Maryland Public Information Act
An Overview
GOVERNMENT QUIETLY GOES ABOUT SOLVING PROBLEMS

Roads Remain in Good Condition

Financial Disclosure Forms Reveal Nothing Amiss
Sunshine Laws
DEMOCRACY!
Presentation Overview

• General Rule of Disclosure
• Basic Terms
• Exemption Landscape
• Response Time Frames
• Fees/Fee Waivers
• Remedies and Enforcement
• PIA Resources
Public Information Act

Annotated Code of Maryland
General Provisions Article
Sections 4-101 through 4-601
GENERAL RIGHT TO INFORMATION.

(a) All persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees.

(b) ... unless an unwarranted invasion of the privacy of a person in interest would result, this title shall be construed in favor of allowing inspection of a public record, with the least cost and least delay to the person or governmental unit that requests the inspection.
Accommodates other interests

- Legal privileges
- Personal privacy
- Financial privacy
- Free competition
- Intellectual property
- Integrity of investigations
- Public security
Which Agencies?

- State and Local Governments
- All 3 Branches: Executive Branch, Legislature, Judiciary
- Quasi-public entities that qualify as “instrumentalities” of government
**Who can ask for a public record under the PIA?**

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Who is a Person in Interest?

“Person in interest” § 4-101 (g)

1. a person or governmental unit that is the subject of a public record or a designee of the person or governmental unit;

2. if the person has a legal disability, the parent or legal representative of the person
Who is the Custodian?

Two Kinds § 4-101 (d) :

- “Official custodian” has legal responsibility for keeping records; often top official within agency

- “Custodian” also includes anyone who is authorized to have “physical custody and control” of the record
What Records?

“Public record” § 4-101(j):

- any documentary material . . .
- made or received by the agency . . .
- in connection with the transaction of public business . . .
- in any form

**No requirement to create documents § 4-205(b)(4)(iii)**
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What is a PIA Request?

“Application to Inspect Public Records” § 4-202

PIA provides for access to records, not “information”

Ordinarily, not required to create a record

Complicated for electronic records
Electronic Databases

Must provide electronic records in “searchable and analyzable” format if available, the requester asks for it, and it is feasible to exclude confidential information.

No obligation “to create, compile, or program a new public record”

The act of “providing a portion of the public record” does not constitute creating a new public record.
Electronic Databases

_Comptroller v. Immanuel_

216 Md. App. 259 (2014)

Extracting a list of the top 5,000 account holders from much larger database is _not_ the creation of a new record

Controlling principle:

“…within [the agency’s] existing functionality and in the normal course…”
Sufficiency of Search

Diligent search reasonably calculated to discover responsive documents

- Wherever kept
- Does not require you to turn over every stone
- Keep track of which sources searched, which key words used
Guiding Principles

Broad right of access:

“Except as otherwise provided by law, a custodian shall permit a person or governmental unit to inspect any public records at any reasonable time.”

Purpose of request does not matter

Redact exempt material, provide the rest

Construed “in favor of allowing inspection . . .”
Guiding Principles

Limitations on disclosure:

“. . . unless an unwarranted invasion of the privacy of a person in interest would result”

The PIA is for “revealing matters of governance . . . but it should not reveal information from beyond where State activity ends and private activity begins.”

— Comptroller v. Immanuel, 449 Md. 76 (2016)
Exemptions:
What may/must be withheld

Five categories of exceptions to the general rule of disclosure

Identify them by the part of General Provisions Title 4, Subtitle 3 in which they appear
Exemptions:

What may/must be withheld

Exceptions to the general rule of disclosure

Part I:  Mandatory, Other Law
Exemptions: What may/must be withheld

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Exemptions: What may/must be withheld

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Exceptions to the general rule of disclosure

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Part IV: Discretion of Custodian

Part V: Withhold under Special Court Order
Part I: Mandatory, Other Law
§ 4-301

- Common-law privileges
  - attorney-client privilege
  - executive privilege
  - legislative privilege
  - grand jury privilege
- State statutes
- Federal statutes and regulations

Court rules and orders
- E.g., MD Rules 16-901 – 16-914, not PIA, govern access to judicial records
Part II Exemptions: Mandatory, Records

- Personnel records § 4-311
- Traffic citations/charging documents (when requested by attorneys) § 4-315
- Arrest warrants/criminal charging documents (before service on defendant) § 4-316
- MVA Records with personal information § 4-320
- Red light camera/speed camera § 4-321
- Surveillance images -- dumping § 4-322
- Firearm and handgun records § 4-325
- Captured license plate data § 4-326
Personnel Records § 4-311

Records that directly pertain to employment and an employee’s ability to perform a job

- Application, performance rating, school grades
- Hiring, discipline, promotion, dismissal
- Internal affairs files

Must “relate to an individual” vs. statistical information

*Can disclose to person in interest and their supervisor*

§ 4-311(b)
Mandatory, Records
--New Legislation

• HB677/SB477 - PIA Required Denials

• Requires a PIA custodian to deny inspection of a distribution list that identifies an address, e-mail, or tel.#.

• Approved by the Governor, April 2018. Effective immediately.
Part III Exemptions: Mandatory, Information

- Medical or psychological information § 4-329
  - E.g., medical information in 911 calls
- Home address & telephone number of public employee § 4-331
- Trade secrets, confidential commercial & financial info § 4-335
- Personal financial info § 4-325
- Alarm/Security System info § 4-339
Confidential Commercial Information
§ 4-335

- Trade secrets, business information that the company ordinarily would not make public
- That would cause substantial competitive harm if made public
- Can consider the company’s view, but must make your own decision
Part IV Exemptions: Discretionary
**If custodian believes inspection would be contrary to public interest**

- Records include:
  - Privileged inter/intra-agency memos § 4-344
    - Includes materials protected by attorney work-product privilege and deliberative process privilege
  - Investigations & Security Procedures § 4-351
  - Emergency response plans, building plans, etc., if disclosure would endanger public security
Investigative Records § 4-351 (a)

- Law enforcement agencies’ records
  - Applicable to other agencies too

- Exemption fades once enforcement proceeding is over, but . . .

- Continuing ability to withhold information about confidential sources, investigative techniques

Again, *person in interest* has greater right of access unless...
Investigative Records § 4-351 (b)

1. interfere with a valid and proper law enforcement proceeding;
2. deprive another person of a right to a fair trial or an impartial adjudication;
3. constitute an unwarranted invasion of personal privacy;
4. disclose the identity of a confidential source;
5. disclose an investigative technique or procedure;
6. prejudice an investigation; or
7. endanger the life or physical safety of an individual.
Last Exemption: Special Court Order

• Records are otherwise disclosable
  – *but* disclosure would cause “substantial injury to the public interest”

• Temporarily deny inspection
  – seek court order within 10 days

• Court may authorize continued denial of inspection
Catch-All Exemptions

• Temporary denial & court order
  – traditionally considered only “catch-all” available under the PIA

• “Contrary to the public interest”? 
  – No, not unless a discretionary exemption applies

• “Unwarranted invasion of privacy”? 
  – Only if a specific exemption applies 
  – Not a stand-alone exemption
What information must you provide about a municipal employee?

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Exemptions Recap

• Mandatory exemption
  *Withhold*

• Discretionary exemption
  *Withhold if in the public interest*

• If no exemption applies
  *Withhold only with court order (e.g. per temporary denial)*

• If only part of record is exempt
  *Redact*
Agency’s Response

Timing

What is the time limit for responding to a PIA request?

___ promptly
___ no later than 30 days
___ 60 days, with consent of requester
___ all of the above
___ none of the above
Agency’s Response

Timing

What is the time limit for responding to a PIA request?

___ promptly
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X  all of the above
___ none of the above
Agency’s Response

Timeliness Of Response § 4-203

A. Promptly, but not more than 30 days after receiving the application.

B. If response will take longer than 10 days, must notify.
If it will take more than 10 working days to respond, notify in writing and explain:

(1) how much time is necessary,

(2) the reason for the delay, and

(3) “an estimate of the range of fees that may be charged”
Agency’s Response
Finding the Right Custodian

If a request comes to you, but you are not the custodian:

- Notify the requester of that fact within 10 working days;
- Refer the requester to the correct custodian (if known); and
- Give the location or possible location of the record (if known).
Agency’s Response
Denial Letter § 4-203 (c)(1)

What to include?

- Reasons for the denial
- Legal authority for the denial
- Notice of remedies
Agency’s Response

Denial Letter § 4-203 (c)(1)

Reasons for the denial:

▪ Must provide “a brief description of the undisclosed record that will enable the applicant to assess the applicability of the legal authority for the denial”

▪ For discretionary exemptions, must explain why denial is necessary, and why record could not be produced in redacted form (new as of Oct. 2017);
Agency’s Response
Denial Letter § 4-203 (c)(1)

Notice of Remedies:

Judicial Review

PIA Compliance Board (if fee > $350)

Ombudsman
Agency’s Response
Fees § 4-206

- The Good: Allowed by statute; internalize non-public expenses
- The Bad: Perception that fees are used to discourage access
- The Ugly: Constituent complaints prompt legislative initiatives
Agency’s Response
Fees § 4-206

What can agency charge for?

• Custodian may charge “reasonable fee,” meaning fee must bear reasonable relationship to the recovery of actual costs incurred by the agency, including:
  • Search and review time
    • hourly rate, without benefits, of specific employees involved
    • first two hours free
  • Copies
Agency’s Response
Fee Waivers § 4-206

Now two independent standards:

- Public Interest
- Indigence
Agency’s Response
Fee Waivers § 4-206

Public Interest Waiver:

- The custodian determines that a waiver “would be in the public interest”
- Must consider “the ability of the applicant to pay the fee”
- Media requests vs. inmates
Indigence Waiver:

- Requester is an “individual”
- Requester is indigent
- Requester submits an affidavit of indigence

Definition of “indigent” – family household income is less than 50% of the median family income for the State ($55,000, family of four)
Agency’s Response
Fee Waivers § 4-206

Waiver decision remains discretionary

“The custodian may waive a fee under this section if . . . .”
Agency’s Response

Recurring Fee Issues

• Aggregating requests
• Prepayment of fees
• Are media outlets *entitled* to a fee waiver?
Who qualifies as “media” today?

- “Any printed, photographic, mechanical, or electronic means of disseminating news and information to the public”

- Court of Special Appeals: “local news blogger” qualifies as media
Agency’s Response

Broad Requests & High Fees

- **Talk** to the requester
- **Explain** why the request is broad and the fee high
- **Help** the requester be more specific
- **Suggest** alternative approaches
- **Consider** requesting Ombudsman assistance
Remedies & Enforcement

• Public Access Ombudsman § 4-1B-04
  • Voluntary mediation
• Public Information Act Compliance Board § 4-1A-04
  • Fees too high; threshold for review is $350
• Judicial Review § 4-362
  • Court enforcement with potential for award of costs and fees if successful
Ombudsman

- *Mediates* PIA disputes
- Can consider any dispute “relating to requests for public records” under the Act
- Requester *or* custodian can initiate mediation
Public Access Ombudsman
http://news.maryland.gov/mpiaombuds/

Lisa Kershner
pia.ombuds@oag.state.md.us
(410) 576-6560
PIA Compliance Board

Limited Jurisdiction

Fees Only

Amount must > $350

Requester must allege fee is “unreasonable”
Judicial Remedies

Against Agency . . .

▪ Injunctive relief

▪ Agency liability:
  – Statutory damages up to $1,000
  – Actual damages (hard to prove)

▪ Attorney fees and costs
Judicial Remedies

Against Custodian . . .

- Custodian liability hasn’t changed – actual damages only
- Disciplinary action
- Criminal fine for willful violations
Resources - OAG Publications

http://www.marylandattorneygeneral.gov/Pages/OpenGov/default.aspx

- Legal Analysis and Resources

- For Agency Custodians

- For the Public
  - Access to Government Records Under the Maryland Public Information Act (2015)
Open Government

The public’s right to information about government activities lies at the heart of a democratic government. Maryland’s Public Information Act grants the people of this State a broad right of access to public records while protecting legitimate governmental interests and the privacy rights of individual citizens. Similarly, Maryland’s Open Meetings Act generally requires State and local public bodies to hold their meetings in the open.

- About the Maryland Open Meetings Act
- About the Maryland Public Information Act
Hypothetical No.1
The Fire Chief & the Audit Report
Hypothetical No.1
The Fire Chief & the Audit Report

• Is the audit report a public record?
Hypothetical No.1
The Fire Chief & the Audit Report

• Is the audit report a public record?
• Did the Fire Chief respond correctly to Mr. Williams’ request?
Hypothetical No.1
The Fire Chief & the Audit Report

• Is the audit report a public record?

• Did the Fire Chief respond correctly to Mr. Williams’ request?

• Could the Chief have denied the request because it was made as part of a private dispute and for malicious reasons?
Hypothetical No.2
Making Government More Efficient
Hypothetical No.2
Making Government More Efficient

Was the City Manager’s response timely?
Hypothetical No.2
Making Government More Efficient

Was the City Manager’s response timely?
Does the personnel records exemption apply?
Hypothetical No.2
Making Government More Efficient

Was the City Manager’s response timely?

Does the personnel records exemption apply?

Was it appropriate for the City Manager to provide the list?
Hypothetical No. 2
Making Government More Efficient

Was the City Manager’s response timely?

Does the personnel records exemption apply?

Was it appropriate for the City Manager to provide the list?

What should the City Manager have done?