Maryland Public Information Act

An Overview

Maryland Municipal League
2020 Virtual Fall Conference

October 9, 2020
Maryland Public Information Act
An Overview – A Presentation by:

Judge David Carey

Associate Judge David Carey has presided over the District Court of Maryland, District 9, in Harford County, since November 22, 2013.

Lisa Kershner, Public Access Ombudsman

Appointed by the MD Attorney General to a 4-year term, Lisa is Maryland’s first Public Access Ombudsman. She opened the office on March 30, 2016 and was reappointed to a second term in March 2020.
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
Public Information Act - §4-103

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

- Branches:
  - Executive Branch
  - Legislature

- Quasi-public entities that qualify as “instrumentalities” of government

- Judicial Records not subject to the PIA
Poll Question

Who can ask for a public record under the PIA?
Poll Question

Who can ask for a public record under the PIA?

Yes

No

Maybe

Prisoner
Poll Question

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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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Which of the following is a “public record”? 
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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

§ 4-205(c)

Must provide electronic records in “searchable and analyzable” format if available, the requestor 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, nor does running query on existing database.
Electronic Databases
§ 4-205(c)

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 ...”
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)

BUT, no generic “privacy” protection—an exemption must apply in order to withhold
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
Part II: Mandatory, Specific Records
Part III: Mandatory, Specific information
Part IV: Discretion of Custodian
Part V: Withhold under Special Court Order
Part I: Mandatory Exemptions

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
Mandatory Exemptions
Exemptions – Other Law § 4-301(a)(2) – State Statutes

Example: Police Juvenile Records

- Applies to police records concerning juveniles subject to the jurisdiction of the juvenile court.
  - Various exceptions allow for disclosure
- Generally does not apply to other kinds of police reports where juvenile is listed as victim or witness, e.g., motor vehicle accident reports. See 85 Md. Op. Atty. Gen. 249 (2000)
Part II: Mandatory Exemptions

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
Distribution Lists § 4-341
Mandatory Exemptions
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 Exemptions

Distribution Lists § 4-341

PIA Required Denials for Specific Information

§ 4-341 – Distribution Lists

• Requires a PIA custodian to deny inspection of a distribution list that identifies an address, e-mail, or telephone number
Part III: Mandatory Exemptions

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
Mandatory Exemptions
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
TIME FOR A BREAK
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Part IV: Discretionary Exemptions

Only 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
Part IV: Discretionary Exemptions
Investigative Records § 4-351 (a)

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

- Status of investigation (ongoing or closed?) may be relevant

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

  Again, “person in interest” has greater right of access unless...
Part IV: Discretionary Exemptions

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.
Part IV: Discretionary Exemptions
911 Communication Record § 4-356 Effective 10/1/2019

◦ Custodian of a requested 911 record depicting a victim of domestic violence, sexual abuse, or child abuse must notify victim or representative (if possible) and consider victim’s objection to release.

◦ Custodian has ultimate discretion whether to grant or deny.
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
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<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Start date</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employment contract</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Home address</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>References</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Complaint about performance</td>
<td>%</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Poll Question #3

What information must you provide about a county/municipal employee?

<table>
<thead>
<tr>
<th>Information</th>
<th>Yes</th>
<th>No</th>
<th>Maybe</th>
</tr>
</thead>
<tbody>
<tr>
<td>Salary</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Benefits selection</td>
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<td>X</td>
<td></td>
</tr>
<tr>
<td>Start date</td>
<td>X</td>
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</tr>
<tr>
<td>Employment contract</td>
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<td>Home address</td>
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<td>X</td>
<td></td>
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<tr>
<td>References</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Complaint about performance</td>
<td></td>
<td>X</td>
<td></td>
</tr>
</tbody>
</table>
Exemptions Recap

➢ Mandatory exemption
  *Withhold*

➢ Discretionary exemption
  *Only withhold if public interest in withholding outweighs public interest in disclosure*

➢ 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 requestor
___ all of the above
___ none of the above
Agency’s Response

Timing

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___ promptly
___ no later than 30 days
___ 60 days, with consent of requestor
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”
If a request comes to you, but you are not the custodian:

- Notify the requestor of that fact within 10 working days;
- Refer the requestor 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;
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

- Allowed by statute, subject to 2 free hours of labor
- May be perceived as a means to block or discourage access
- In case of disagreement, consider Ombudsman mediation
Agency’s Response

Fees § 4-206

What can an agency charge for?

The custodian may charge a “reasonable fee,” i.e., the fee must bear a 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

Request for waiver may be based on

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

Indigence Waiver:

▪ Requestor is an “individual”
▪ Requestor is indigent*
▪ Requestor 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 for 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.

*Action Committee for Transit, Inc. v. Town of Chevy Chase, 229 Md. App. 540 (2016)*
Agency’s Response

Broad Requests & High Fees

- **Talk** to the requestor
- **Explain** why the request is broad and the fee high
- **Help** the requestor 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*
  - Exemptions, redactions, untimely/impartial responses, fees, repetitive/redundant requests, etc.

- *Requestor or custodian can initiate mediation*
Public Access Ombudsman
http://piaombuds.maryland.gov

Lisa Kershner
pia.ombuds@oag.state.md.us
(410) 576-6560
Quick Links

- Request Mediation
- Make a PIA Request to the Ombudsman
- List of Readily Available Documents – Under the PIA

External Links

- Maryland Public Information Act
- PIA Manual
- PIA Compliance Board

Coronavirus Notice

The Public Access Ombudsman’s Office is open but staff currently are working entirely remotely.

Maryland State Government is operating under policies intended to minimize the spread of COVID-19 while maintaining operations to the fullest extent possible. While we are attempting to conduct business as usual, working remotely means that our attempts to resolve PIA disputes with a variety of state and local government programs may be slower/less efficient than normal. Additionally, at the present time and for the foreseeable future, we are not receiving regular mail sent to us at 200 St. Paul Pl. in Baltimore.

Electronic communication is currently the most direct way to reach the Ombudsman’s Office. You can email us at pia.ombuds@oag.state.md.us, or at ikershner@oag.state.md.us or jclark@oag.state.md.us.

You can also call us at 410-576-6050 and leave a voicemail message to which we will respond as soon as possible. Please be sure to leave a contact email, if possible, so that we may write back to you.

We will make every effort to respond as quickly as possible, and thank you for your patience.
PIA Compliance Board

Limited Jurisdiction

- Fees Only
- Amount must > $350
- Requestor 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 . . .

- Actual damages
- Disciplinary action
- Criminal fine for willful violations
Resources - OAG Publications

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