STATE OF MARYLAND
OFFICE OF THE
PUBLIC ACCESS OMBUDSMAN

STATE OF MARYLAND
PUBLIC INFORMATION ACT
COMPLIANCE BOARD

Final Report on the Public Information Act

Submitted by the Public Information Act Compliance Board and Public Access Ombudsman pursuant to Committee Narrative in the Report on the Fiscal 2020 State Operating Budget and the State Capital Budget

December 27, 2019

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This report concerning the Maryland Public Information Act ("PIA") was requested by the Chairmen of the Senate Budget and Taxation Committee and House Appropriations Committee in April 2019. The Chairmen jointly asked the PIA Compliance Board and Office of the Public Access Ombudsman to collect data from 23 State cabinet-level agencies concerning their PIA caseloads, dispositions, and practices over a 15-month period from July 1, 2018 to September 30, 2019, and to make recommendations relating to PIA enforcement and compliance monitoring.

We wish to thank Delegate Brooke Lierman, from Maryland's 46th Legislative District, and Senator Nancy King and Delegate Maggie McIntosh, the Chairs of the Senate Budget and Taxation Committee and House Appropriations Committee, respectively, for requesting this project and for their dedication to transparency in Maryland government.

This project could not have been completed without the cooperation of the State agencies who responded to our quantitative and qualitative surveys,[1] as well as the many other stakeholders and programs that gave generously of their time and offered valuable comment at various stages of our work.

In no particular order, we would like to thank the staff of the Office of Government Information Services ("OGIS") within the National Archives, who met with the Ombudsman and PIA Compliance Board counsel to share their extensive experience working with the federal Freedom of Information Act Ombudsman and Compliance programs. In particular, we wish to thank: Alina M. Semo, OGIS Director; Martha W. Murphy, OGIS Deputy Director; Kirsten Mitchell, OGIS-Compliance Team Lead; and Carrie McGuire, OGIS-Mediation Team Lead.

We would also like to thank the representatives of open records dispute resolution programs in other states with whom we spoke at length. Each of these representatives generously gave of their time to share valuable insights about the mediation and enforcement components of their respective programs and to answer our many questions.

We particularly wish to thank: Colleen Murphy, Executive Director and General Counsel, Connecticut Freedom of Information Commission; Cheryl Kakazu Park, Director, and Jennifer Brooks, Staff Attorney, Hawaii Office of Information Practices; Margaret Johnson, Executive Director, and Keith Luchtel, former Executive Director and current Board Member, Iowa Public Information Board; Frank Caruso, Executive Director, and John Stewart, Mediator, New Jersey Government Records Council; Erik Arneson, Executive Director, and Nathan Byerly, Deputy Director, Pennsylvania Office of Open Records; Tom Hood, Executive Director, Mississippi Ethics Commission; and Ginger McCall, Oregon's first Public Records Advocate.

[1] The reporting agencies do not include all State agencies, but, instead, those that comprise the Governor's Executive Council, as follows: Department of the Environment (**MDE**); State Police (**MSP**); Department of Transportation (**MDOT**); Department of Health (**MDH**); Department of Education (**MSDE**); Department of Labor (**DLLR**); Department of Public Safety and Correctional Services (**DPSCS**); Secretary of State (**SOS**); Department of Natural Resources (**DNR**); Department of General Services (**DGS)**; Department of Agriculture (**MDA**); Department of Housing and Community Development (**DHCD**); Department of Human Services (**DHS**); Department of Planning (**Planning**); Department of Commerce (**Commerce**); Department of Juvenile Services (**DJS**); Department of Information Technology (**DOIT**); Military Department (**Military**); Department of Aging (**Aging**); Department of Veterans Affairs (**Veterans**); Higher Education Commission (**MHEC**); Department of Disabilities (**MDOD**); and Department of Budget and Management (**DBM**).

Many thanks also to the staff of the Maryland State Archives and Department of General Services, who assisted us in developing the records management and retention sections of our agency survey, and who provided comment on these topics throughout the process. In particular, we thank: Tim Baker, State Archivist; Kathryn Baringer, Director of Appraisal and Description, State Archives; and Michael B. Swygert, Director of the Records Management Division of DGS.

We also extend our thanks to Judge Thomas E. Dewberry, Chief Administrative Law Judge, Judge John Leidig, Executive Administrative Law Judge, and Denise Shaffer, Executive Administrative Law Judge, as well as other staff of the Maryland Office of Administrative Hearings, who provided data regarding that Office's historical experience handling State agency PIA appeals prior to 2016, and other information related to our consideration of extrajudicial PIA dispute resolution options.

Although the cooperation of all the State reporting agencies was essential to this project, we wish to particularly acknowledge and thank the staff of the Maryland State Police, who showed exemplary leadership in thoroughly responding to our follow-up questions concerning MSP's initial survey data. In particular, we thank: Captain Ronald Fisher; Lt. Robert Iman; Lt. Eliot Cohen; Ida Williams, Director of Central Records; Mark Urbanik, Strategic Planning; and Rhea Harris, PIA Coordinator and Special Advisor to the Colonel of MSP.

Finally, we thank the Maryland Office of the Attorney General for its continuing support. In particular, we are indebted to Assistant Attorney General Jeffrey Hochstetler, counsel to the Ombudsman and Board, and Janice Clark, Program Administrator for both programs—without their assistance, this project could not have been completed.

Executive Summary

This report has been prepared jointly by the Public Information Act Compliance Board ("Board" or "PIACB"), an independent, five-member body tasked with deciding certain fee disputes under the Public Information Act ("PIA"), and the Office of the Public Access Ombudsman ("Ombudsman"), an independent Office that seeks to resolve PIA disputes on a purely voluntary basis.

As constituted, both the Ombudsman and Board are administratively and operationally supported by the Office of the Attorney General ("OAG"), but are independent from it. Specifically, whereas the Board and Ombudsman are required to function as neutral, independent entities, the OAG is the State's law firm, providing representation to State agencies, programs, and officials, among other duties.

The PIACB and Ombudsman program were created by the Legislature in 2015 to provide PIA dispute resolution options outside of the court process. As provided in the original bill,[2] the Board was authorized to review and issue binding decisions on most types of PIA disputes. The bill was amended during the 2015 session, however, to limit the Board's authority to its current narrow role of reviewing PIA complaints involving fees of more than $350.[3]

The Office of the Public Access Ombudsman, by contrast, was given the mandate to make "reasonable attempts" to resolve a broad range of PIA disputes, but only on a purely voluntary and non-binding basis.[4]

These two programs together operate with three full-time staff consisting of the Ombudsman, who is required to be a Maryland attorney, another attorney, who is an Assistant Attorney General and serves as counsel to both the Ombudsman and Board, and an administrator, who also supports both programs.

The 2015 legislation required the OAG in 2017 to report on the implementation of these two new programs, and to recommend any changes that should be made to either of them. That 2017 report concluded, in pertinent part, that it was premature at that time to recommend any changes to either the PIACB's limited jurisdiction or to the Ombudsman program, opining that "[t]he enforcement provisions of the statute should not otherwise be altered until the Board and the Ombudsman have been in place longer and have developed a longer track record of performance." 2017 OAG Report at 1 (December 2017).

Now, two years later and after nearly four years of operation, several points are clear from the Ombudsman and Board's combined experience:

1) a significant and consistent number of PIA disputes across State and local agencies cannot be resolved by the Ombudsman's efforts alone;
2) the current Board and staff are severely underutilized due to the Board's very limited jurisdiction;

[2] *See* First Reading of House Bill 755, cross-filed with Senate Bill 695, 2015 Regular Legislative Session.

[3] *See* Maryland Code Ann., General Provisions Article ("GP"), § 4-1A-05.

[4] *See* GP § 4-1B-04.

3) a great deal of the natural synergy that should exist between the Ombudsman and Board due to their complimentary processes and aims is almost completely lacking; the Board lacks jurisdiction to decide the vast majority of PIA disputes, and thus does not provide an incentive for parties to engage meaningfully with the Ombudsman or to comply with the law; and

4) the Ombudsman program and Board as currently configured are falling far short of their real potential to provide meaningful and accessible remedies for PIA disputes in a cost-effective manner.

PIA Enforcement Recommendations

In light of the above, we recommend that the Board's jurisdiction be expanded to allow it to review and decide all PIA disputes, as proposed in the original 2015 bill that created it.[5] However, we recommend that all parties seeking Board review must first go to the Ombudsman in order to allow for the best chance of informal resolution on a purely voluntary and confidential basis. A final decision of the Board would be appealable to the circuit court, but parties need to exhaust this dispute resolution process before going to court.

For reasons we discuss in Section II ("PIA Enforcement Recommendations") and Section IV ("Public Comments"), we believe this recommendation can be implemented with the addition of two new full-time staff—one of whom should be an attorney, and the other, either an attorney, paralegal, or administrator—thereby bringing the total number of staff supporting both the Ombudsman and Board to five, including the Ombudsman.

If implemented, the comprehensive Board remedy we propose will benefit all stakeholders by:

- preserving and enhancing the benefits of the current Ombudsman program without altering its character as a purely voluntary, informal, confidential, and non-binding process of facilitated dispute resolution;
- providing a comprehensive and accessible dispute resolution remedy to both requestors and agencies where none presently exists;
- facilitating the development and further articulation of the PIA without altering existing judicial remedies; and
- maximizing public resources by enabling the Board and Ombudsman to interact in a fully complimentary and synergistic fashion, while at the same time utilizing both programs and staff to their fullest capacity.

We believe this change in the Board's authority is warranted because the average person—as well as many organizations—simply cannot afford to hire a lawyer to handle their PIA disputes in court. Without a comprehensive extrajudicial remedy, parties whose disputes are unresolved

[5] Our recommendation requires amendments to the current dispute resolution sections of the PIA. We have included proposed amendments in **Appendix E** ("Proposed Amendments Reflecting Recommendation for Comprehensive Board Jurisdiction") that delineate the precise respects in which the Board's authority would be expanded under our proposal.

after the Ombudsman's efforts and who wish to obtain a decision on the matter will be left without recourse.

Further, it should be recognized that without an accessible review and decisional remedy, compliance with the PIA as a practical matter is largely optional, not mandatory as the Legislature intended. While we do not suggest that agencies or requestors regularly or intentionally violate or abuse the PIA, experience teaches that all too often, extraneous considerations such as political sensitivity, controversy, fear of public criticism, expedience, unreasonable expectations, or entrenchment for other reasons will dictate many PIA outcomes, making problems such as unlawful delay, wrongful denials, and refusal to compromise or consider alternatives the path of least resistance.

Moreover, an accessible review and decisional backstop would permit the Ombudsman to offer a more meaningful mediation process. As with mediations in the judicial context, we believe that parties will be more willing to cooperate when they know that the alternative is a binding decision that may or may not be favorable to their position.

PIA Tracking and Reporting Recommendations

In Section III ("PIA Tracking and Reporting Recommendations"), we discuss the PIA performance data we collected from 23 State cabinet-level agencies (the "reporting agencies") for the 15-month period from July 1, 2018 to September 30, 2019.

Our data collection efforts proceeded in two phases: first, we collected and reported in our Preliminary Findings (Appendix C) the data gathered for the first 12 months of the reporting period—from July 1, 2018 through June 30, 2019 ("FY2019"). Second, after we published our Preliminary Findings, we completed collection of the data for the remaining three month period—from July 1, 2019 to September 30, 2019 ("1st Quarter FY2020").

While the data for FY2019 is discussed in detail in Section III, comparable tables and data for the 1st Quarter FY2020 is provided in Appendix D (Agency Quantitative Survey Data – 1st Quarter FY2020**)**. The reporting agencies' raw responses to our quantitative survey for both reporting periods are available on the Ombudsman's website at the following links: FY2019; FY2020.

The quantitative data for the entire reporting period is generally consistent in revealing a wide range of PIA caseloads and performance measures across the reporting agencies. Moreover, as we noted in the Preliminary Findings, the data itself varied widely in its reliability and completeness, likely because agencies were not expecting to report the kinds of detail we requested for a largely retrospective period of time.

Our survey of the reporting agencies also included qualitative questions pertaining to their PIA processes and capacities, and in Section III we discuss some of the trends we gleaned from the responses. The reporting agencies' responses to our qualitative survey are available in their entirety on the Ombudsman's website at the following link: Reporting Agencies' Qualitative Responses.

Copies of the survey instruments we used for both the quantitative and qualitative portions of the survey, as well as our initial survey outreach letter to Department Secretaries, Principal

Counsel, and PIA Coordinators, are included in Appendix B **(**Survey Instruments and Cover Letters to Agencies**)**.

In addition to the reporting agencies' PIA caseload and performance data, we also discuss in Section III our findings and recommendations pertaining to PIA performance tracking and reporting. We conclude that internal tracking of PIA requests—from initial receipt through final disposition—is essential for any agency that receives more than a truly *de minimis* number of requests, and that, beyond these essential internal functions, tracking and reporting can serve many important external uses, such as providing a sound basis for agency budget requests and requests for additional resources. Thus, we recommend that the Legislature specify the PIA data agencies must track in order to ensure the availability of uniform and reliable PIA data, and require agencies to publish this data periodically on their websites, to the extent feasible.

Outreach and Comment Process

In developing our recommendations, we engaged a host of PIA stakeholders and solicited their comments, both before and after we published our detailed Preliminary Findings and Recommendations on November 6, 2019.

Our direct outreach, which began in August 2019, included representatives from several governmental[6] and private advocacy organizations,[7] representatives from State and local governmental agencies,[8] attorneys for requestors and agencies, members of the media, and all other requestors and agency contacts with whom we have worked since the Ombudsman and Board began operations.

Copies of our outreach materials, including letters and notices we sent to these contacts and constituencies soliciting their comments, are included in Appendix H (Outreach Instruments).

The Board also held three public meetings between August and December 2019. During its Annual Meeting on August 19, the Board and the Ombudsman discussed this reporting project, outlined a proposal for comprehensive Board jurisdiction, and approved a work plan for completing this project. The Board met again via conference call on November 5, during which it approved the distribution of the Preliminary Findings and Recommendations in order to solicit additional comment, and again on December 17, during which it approved the substance and recommendations of this Final Report. Minutes of the August and November meetings are available in Appendix G (Minutes of Board Meetings), and an audio recording of the December meeting is available on the Board's website at the following link: December 17, 2019 Meeting of the PIACB – Audio.[9]

[6] Maryland Association of Counties ("MACO"), Maryland Municipal League ("MML"), Maryland Association of Boards of Education ("MABE"), and Public School Superintendents Association of Maryland ("PSSAM").

[7] ACLU of Maryland, Blue Water Baltimore, Center for Public Integrity, Common Cause of Maryland, Disability Rights of Maryland, MDDC Press Association, Public Justice Center, and Waterkeepers of the Chesapeake.

[8] County attorneys, municipal attorneys, principal counsel and assistant attorneys general for State agencies, and PIA coordinators and records custodians for State and local agencies.

[9] The written minutes of the December 17 Board meeting have not been prepared as of December 27, 2019.

We address substantive comments we received related to our recommendations in Section IV of this Report, and have included these and other comments in Appendix F (Public Comments).

I. The Maryland Public Information Act: Purpose and Remedies

The PIA is Maryland's chief open records law.[10] It was enacted by the General Assembly in 1970 to establish a broad right of public access to records created or maintained by State and local government agencies in the course of carrying out their official duties. To that end, such records must be made available when requested with the least cost and delay unless the PIA or other law "exempts" the record from disclosure.

The PIA sets time limits in which an agency must issue its initial and final written response—10 business and 30 calendar days, respectively, as a general rule.[11] The 30-day deadline may be extended with the consent of the requestor, but only for an additional 30 days.[12]

The PIA permits an agency to charge a "reasonable fee" to recoup its actual costs in responding to a record request, including time and labor on a prorated basis, after the first two hours, which are free.[13] The PIA directs agencies to give consideration to any fee waiver request based either on indigence, or on any other factors that may indicate that waiver is in the public interest.[14]

Currently, PIA disputes may be resolved in circuit court by way of a civil action filed by an agency or requestor,[15] or through limited extrajudicial dispute resolution options created by the Legislature in 2015.

These extrajudicial options consist of: 1) mediation through the Office of the Public Access Ombudsman, in which the Ombudsman seeks to help parties reach a voluntary resolution by agreement;[16] and 2) with respect to fee disputes greater than $350, review and decision by the PIACB as to whether the fee is reasonable. The decisions of the PIACB are published, binding on the parties, and subject to judicial review by the circuit court.[17]

The PIACB currently has no jurisdiction to decide any disputes other than those involving fees greater than $350, such as the denial of fee waiver requests, the application of exemptions, or whether requests are overly repetitive or unduly burdensome.

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[10] The PIA is codified in §§ 4-101 to 4-601 of the General Provisions Article ("GP") of the Maryland Code Annotated.

[11] GP § 4-203.

[12] *Id.*

[13] GP § 4-206.

[14] *Id.*

[15] GP § 4-362. Requestors may bring a judicial action challenging an agency's full or partial denial of a PIA request, as well as for fee issues or any other aspect of an agency's handling of the PIA request. Agencies are authorized under the PIA to issue a "temporary denial" of a PIA request in cases in which there is doubt concerning whether a record should be disclosed, but must file a judicial action within 10 days thereafter seeking a court order authorizing the continued denial.

[16] GP §§ 4-1B-01 through 4-1B-04.

[17] GP §§ 4-1A-01 through 4-1A-10.

The PIACB consists of five members, all of whom are appointed by the Governor. The membership must be drawn from various PIA stakeholder interest groups, as follows: one member from a nongovernmental nonprofit group that works on issues related to transparency or open government; one member with knowledge of the PIA who has served as an official governmental custodian;[18] and three "private citizen" members who are not custodians or members of the media.[19] One member must be an attorney barred in Maryland.[20]

The Ombudsman is appointed by the Attorney General for a four-year term, but is independent from the Office of the Attorney General. The Ombudsman, like the Board, is supported by the Office of the Attorney General, but is independent from that Office. The Ombudsman and Board currently share a staff, consisting of one Assistant Attorney General and one administrator.

Prior to the creation of the Ombudsman program and the PIACB in 2015, requestors who had been denied records by certain State agencies had the option to challenge those denials administratively, usually through the Office of Administrative Hearings. This option was eliminated in 2015 by House Bill 755—the same bill that created the Ombudsman and PIACB—apparently because the first version of the bill authorized the PIACB to review and decide most PIA disputes involving both State and local agencies, which would have rendered the State administrative review process redundant.

The administrative remedy was not restored, however, when the bill was amended to limit the PIACB's jurisdiction to its present narrow scope. Consequently, current extrajudicial PIA dispute resolution options are more limited than in previous years.

[18] The current language requires the custodian member to have served as "an *official* custodian in the State as defined in § 4-101(d)" of the PIA. GP § 4-1A-02(a)(2)(ii) (emphasis added). The PIA defines "official custodian" as "an officer or employee of the State or of a political subdivision who is responsible for keeping a public record, whether or not the officer or employee has physical custody and control of the public record." GP § 4-101(f). It has come to our attention that this definition may overly limit the choice of potential custodian members, so we have included language in our draft amendments reflecting that this member need only have been a "custodian," which can mean an "official custodian" or "any other authorized individual who has physical custody and control of a public record." GP § 4-101(d)(2).

[19] GP § 4-1A-02.

[20] *Id.* There currently are two attorney members on the PIACB, and we recommend that the Board should have at least two attorneys if its jurisdiction is expanded as we propose. Our draft amendments reflect this recommendation.

II. PIA Enforcement Recommendations

A. Outreach and Information Sources

On the PIA enforcement front, we were specifically asked to analyze the desirability and feasibility of enhanced extrajudicial PIA dispute resolution processes, such as those used by other states, and/or federal analogues under the Freedom of Information Act ("FOIA"). To collect and analyze relevant data, we gathered information from a number of sources, including:

- The Ombudsman's mediation caseload and case outcomes from the beginning of the program in April 2016 through September 2019;
- The Board's caseload and outcomes since it began operations in March 2016 through August 2019;
- Responses and data collected from the 23 State agencies we surveyed;
- The Ombudsman's 2019 stakeholder survey;
- Data for 2013-2015 from the Office of Administrative Hearings, which, prior to 2016, heard PIA appeals for certain State agencies;
- Interviews and other information from the FOIA Ombudsman and from relevant open records dispute resolution programs in seven other states;[21]
- The Final Report on the Implementation of the Public Information Act, published by the Office of the Maryland Attorney General (Dec. 2017); and
- Comments received on this reporting project since August 2019.

The purpose of our information-gathering and broad outreach was to test our recommended dispute resolution model and caseload projections, and to gain additional information concerning the strengths and weaknesses of other program models.

B. Need for and Feasibility of Comprehensive Board Jurisdiction

1. The Problem with the Status Quo

The current judicial remedies for PIA disputes appear to be infrequently used by either requestors or agencies. This likely is due to a variety of reasons, including the cost of and time required to pursue a lawsuit, and the fact that many requestors cannot afford a lawyer. In addition, the formalities of the judicial process are not well-suited to many routine PIA disputes, which usually involve simple fact patterns and the application of a limited body of law. Ultimately, the judicial process is not equipped to fulfill the PIA's central mandate that public records be disclosed with the least cost and delay.[22]

[21] Specifically, we examined the Connecticut Freedom of Information Commission, the Hawaii Office of Information Practices, the Iowa Public Information Board, the New Jersey Government Records Council, the Pennsylvania Office of Open Records, the Utah State Records Committee, and the Mississippi Ethics Commission, which recently expanded its programs to include extrajudicial review and enforcement of its state public records law.

[22] *See* GP § 4-103(b).

That reality, in effect, leaves the Ombudsman and the PIACB as the only accessible PIA dispute resolution options for most parties. However, aside from disputes involving fees over $350, there is no possibility of obtaining a binding final decision on any PIA dispute outside of court. While the Ombudsman has closed 800 cases from early 2016 through September 2019, the PIACB has issued only 22 opinions during that time, suggesting that fee matters eligible for Board review are a tiny fraction of all PIA disputes. That means there is no avenue for meaningful review of the vast majority of PIA disputes in need of a decision.

Although there is no doubt that the informal and voluntary process of the Ombudsman program has been beneficial, for many disputes, mediation alone is either not successful at all or is not as effective as it could be if there was an accessible and comprehensive review and decisional remedy available.

Our detailed review of the Ombudsman's caseload leads us to believe that in about 25% of disputes, there are unresolved issues for which one or both parties would request review by a Board with comprehensive jurisdiction. Moreover, in many other Ombudsman matters, the outcomes likely would be more timely and effective if there was an enforcement backstop that incentivized both parties to engage in mediation in a meaningful way.

As things stand, however, in matters that come before the Ombudsman, parties all too often have no real incentive to seek common ground. For example, an agency that has been inattentive or grown complacent in its PIA response process because it rarely faces the possibility of external review or accountability has no incentive to participate meaningfully in the Ombudsman's process. We suspect that this is the case, for instance, in many of the nearly 20% of all Ombudsman disputes that allege an agency's failure to send any kind of response to a requestor within 30 days,[23] and the many matters in which an agency asserts discretionary exemptions with no real analysis and balancing of the public interest factors they are required by law to consider.

Requestors, also, may have no reason to depart from an entrenched position with regard to their PIA request, such as unreasonably refusing to grant an extension of time or reframe an overly broad request, or failing to accept an agency's application of a legitimate exemption.[24] In each of these scenarios, the possibility that another body could review the matter and render a decision that is not favorable would incentivize the parties to compromise and cooperate to the fullest extent possible.

Of course, in cases where a party refuses to budge, and/or has good reason to believe that it is legally justified in its position, the review and enforcement body would provide the necessary

[23] Most of these allegations (between 10-15% of the Ombudsman's total caseload) turn out to be well-founded, and, when the agency does respond, other compliance issues often emerge.

[24] Agencies currently do not have any options for extrajudicial review of overly repetitive or unduly burdensome requests. We note that while these kinds of problems arise in a comparatively small number of cases, they often are time-consuming and stressful for agency staff, sapping morale and draining resources that could be devoted to other requests. Currently, the only available remedy for such problems is a judicial action seeking injunctive relief.

Requestors and agencies also experience problems involving the PIA's deadlines, for which there currently are no effective remedies. For requestors, the issue typically revolves around late or "missing" responses, and for agencies, a recurrent issue is the inability to obtain an extension of the deadlines absent requestor agreement, even when the request is burdensome. Any extrajudicial dispute resolution body should be authorized to grant appropriate relief in such scenarios, on a case-by-case basis, and our recommended amendments reflect these suggestions. *See* Appendix E.

finality—subject only to judicial review[25]—in a way mediation alone never can. This finality serves the interests of both parties. For instance, an entrenched requestor might have to accept—albeit grudgingly—that the agency is legally permitted to withhold requested information, reducing the likelihood of repetitive requests that burden the agency. Or, an agency that has simply failed to make any response to a requestor—or to the Ombudsman—would be motivated to respond by the prospect of an enforceable and published decision that orders it to respond.

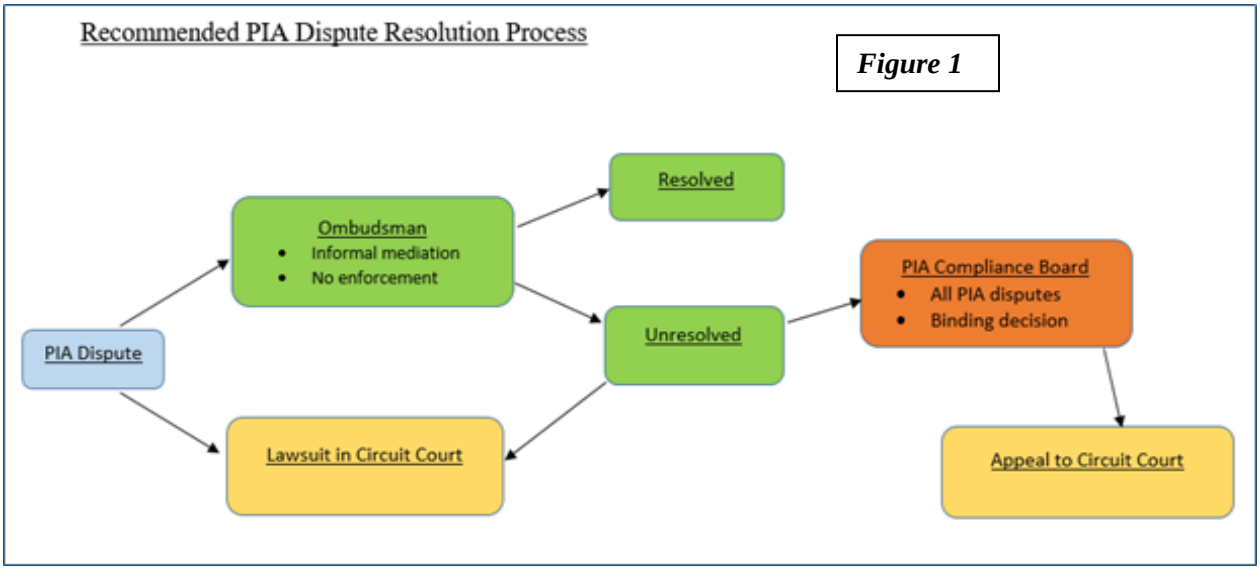
2. The Recommended Solution

The problems and limitations highlighted above frequently undermine requestors'—and by extension, the public's—confidence in the transparency, integrity, fairness, and efficiency of State and local governments, and in the effectiveness of the Ombudsman's process. At the same time, agencies' unresolved PIA problems can undermine staff morale and disrupt their ability to handle other requests in a fair and orderly fashion. Thus, we believe it is in the best interest of all PIA stakeholders that the Legislature take steps to improve the PIA dispute resolution process by enabling the Board to provide a comprehensive and accessible review and decision remedy.

Figure 1, below, reflects our recommendation for an integrated PIA dispute resolution process that begins with Ombudsman mediation, and allows for Board review of disputes that cannot be resolved through the Ombudsman's efforts alone.

Recommended PIA Dispute Resolution Process

Figure 1



We believe our recommended framework meets four key criteria:

- **Builds on and enhances current programs.** Our recommendation preserves the Ombudsman program, which has been successful in resolving many, but not all, PIA disputes, while expanding the role and impact of the existing Board, which is currently underutilized due to its limited jurisdiction. Based on our program experience and conversations with staff of open records dispute resolution programs in several other states

[25] *See* GP § 4-1B-04 and § 4-362 (permitting a decision of the PIACB to be appealed to circuit court).

and at the federal level, we believe expansion of the Board's role is likely to enhance the effectiveness of mediations. Additionally, over time, the Board's opinions will lead to the development of a body of published PIA decisions which will be a resource to requestors and agencies alike.

- **Provides a comprehensive remedy.** Our recommendation provides an extrajudicial dispute resolution remedy for all types of PIA disputes, for all requestors, and for all State and local agencies subject to the PIA. The Board can apply the law to the facts on a case-by-case basis in a way that one-size-fits-all legislation cannot.[26]

- **Provides an accessible, user-friendly dispute resolution option without altering existing judicial remedies.** Most PIA disputes do not require a complex process or in-person hearing, because they are simpler than many other kinds of civil disputes in complexity, evidentiary requirements, and the need for formal process. The Board's process will reflect this simplicity, with most issues likely capable of being decided on the basis of a complaint, a response, and, as needed, on affidavit and/or following *in camera* review of the records at issue or of a privilege log. The Board would be able to call for a conference or hearing whenever needed.

- **Provides the most cost-effective and efficient dispute resolution process.** Expanding the Board's jurisdiction to provide a comprehensive extrajudicial dispute resolution option does not require the creation of any new office or program. Rather, our proposal allows for an efficient and complimentary division of labor between the existing Board and Ombudsman program. As explained above, the mere existence of a Board with comprehensive jurisdiction over PIA disputes is likely to enhance the effectiveness of mediation.

  Moreover, even where the Ombudsman cannot resolve all issues, the Board's efficiency will be enhanced by the Ombudsman's intake and administrative processes. That is, when unresolved disputes are submitted to the Board following mediation, they will contain the basic information and records relevant to the dispute—such as identification of the parties, a description of the unresolved issues, and the PIA request or response at issue—thereby reducing the administrative burden on the Board and insuring that efforts to gather this information are not duplicated between programs.

3. Quantification of the Need and Projected Caseload

In order to assess the need for and feasibility of a comprehensive and generally-accessible dispute resolution remedy, the Ombudsman conducted a detailed review of all mediation matters handled and closed by her Office from the beginning of the program in April 2016 through September 30, 2019. The total caseload for this 42-month period is 800 separate disputes, involving more than 520 unique requestors and 220 unique agencies at the State and local levels.

[26] For example, the Board should be able to examine all the facets of a matter and, in appropriate circumstances, authorize an extension beyond 30 days, authorize an agency to ignore repetitive requests to which it has already sufficiently responded, or preclude an extremely tardy agency from charging fees for the request. The precise relief the Board would be authorized to issue under this proposal is set forth in our proposed amendments to GP § 4-1A-04 ("Powers and duties of Board"), included in Appendix E.

This review was carried out in order to determine the estimated number, type, and complexity of disputes that would be likely candidates for review by a Board with comprehensive jurisdiction.

This review was not an assessment of "customer satisfaction," nor even an evaluation of the effectiveness of the Ombudsman program overall. Rather, the review was carried out solely for the purpose of answering three questions: 1) whether there was a PIA issue that was unresolved from the perspective of either party at the conclusion of the mediation; 2) if so, whether the aggrieved party would likely take the further step of submitting the issue to a Board with comprehensive jurisdiction; and 3) if submitted, the level of complexity presented by the unresolved issue(s) and the time/staff resources the Board would need to resolve them.

Based on this case review, we estimated the number and percentage of disputes that are expected to be presented to a Board with comprehensive jurisdiction following efforts to resolve them by the Ombudsman. As we reported in our Preliminary Findings, and as reflected in the figures below, 25-26% of matters submitted to the Ombudsman have outstanding issues at the conclusion of mediation that we believe one or both parties would likely submit to the Board.[27]

Overall, of the 235 total Ombudsman matters during FY 2019, 61—or 26%—were strong candidates for review and decision by a Board with comprehensive jurisdiction. *See Figure 2*, below.

Board's Projected Caseload Based on Ombudsman Caseload (FY2019)

Figure 2

Agency Category	Number of Disputes	Number Deemed Likely to go to Board with Comprehensive Jurisdiction	Percentage Deemed Likely to go to Board with Comprehensive Jurisdiction
State Reporting Agencies	46	12	26%
Other State Agencies	46	12	26%
Local School Systems	24	6	25%
Local Law Enforcement (Police and State's Attorneys)	65	21	32%
Other Local (County & Municipality)	54	10	19%
Total	**235**	**61**	**26%**

[27] In our experience, there are numerous factors beyond mere "dissatisfaction" with a mediation that will determine whether a party is likely to actually submit the matter for review and decision by the Board. These include factors such as the party's training, temperament, and comfort level with the process. For example, the Ombudsman has handled fee disputes over the past nearly four years that were within the Board's jurisdiction, but which were not submitted to the Board even though mediation failed to resolve the fee issue to the requestor's satisfaction. The reasons these matters did not go to the Board had more to do with the individuals involved than with the mere existence of the Board remedy.

The data for all matters closed by the Ombudsman over 42 months of program operation is strikingly consistent with the data for FY 2019. *See Figure 3*, below. For example, during the 42-month period, the State reporting agencies were involved in 174 mediations, 46 of which—or 26%—were judged likely to have gone to a Board with comprehensive jurisdiction. Similarly, of the 800 total mediations across all agency categories, 204—or about 26%—were judged likely candidates for review by a Board with comprehensive jurisdiction.

Board's Projected Caseload Based on Ombudsman Caseload (42 Months)

Figure 3

Agency Category	**Number of Disputes**	**Number Deemed Likely to go to Board with Comprehensive Jurisdiction**	**Percentage Deemed Likely to go to Board with Comprehensive Jurisdiction**
State Reporting Agencies	174	46	26%
Other State Agencies	140	50	36%
Local School Systems	87	19	22%
Local Law Enforcement (Police and State's Attorneys)	213	60	28%
Other Local (County & Municipality)	186	29	16%
Total	**800**	**204**	**26%**

With regard to those disputes judged likely candidates for decision by the Board, we then went on to examine the complexity level of the issues presented in order to estimate the additional staff required to handle them. In order to assess this variable, we rated each of the disputes that were deemed likely to go to the Board as "simple" or "complex." We rated a dispute as "simple" if a summary disposition was likely, such as if the matter involved a well-settled legal question, presented a minor procedural issue, or required *in camera* review of a small number of documents. Alternately, we rated a matter as "complex" if the issues would require more time and effort to resolve, such as legal research, follow-up on factual questions, examination of privilege logs, or *in camera* review of documents comprising more than a few pages.

We found that the number of disputes expected to go to a Board with comprehensive jurisdiction was roughly evenly split between "simple" and "complex" matters. This held true both for the 12-month period of FY 2019, as shown in *Figure 4*, below, as well as for the 42-month period encompassing all matters closed by the Ombudsman through September 30, 2019, *see Figure 5*, below.

Board's Projected Caseload: Issues and Complexity Based on Ombudsman's Caseload (FY2019) *Figure 4*							
Issue Category	**Total Number of Disputes**	**Deemed Likely to go to Board with Comprehensive Jurisdiction**		**Deemed likely to go to Board:** Disputes presenting "simple" issue		**Deemed likely to go to Board:** Disputes presenting "complex" issue	
		#	**%**	**#**	**%**	**#**	**%**
Exemptions/Redactions	63	33	52%	6	18%	27	82%
Partial/Nonresponsive/ Incomplete Response	45	13	29%	10	77%	3	23%
Timeliness	44	*	*	*	*	*	*
Fees/Fee Waivers	33	1	3%	1	100%	0	0%
Other	50	15	30%	12	80%	3	20%
Total	**235**	**62**	**26%**	**29**	**47%**	**33**	**53%**

Board's Projected Caseload: Issues and Complexity Based on Ombudsman's Caseload (42 Months) *Figure 5*							
Issue Category	**Total Number of Matters**	**Deemed Likely to go to Board with Comprehensive Jurisdiction**		**Deemed likely to go to Board:** Matters presenting "simple" issue		**Deemed likely to go to Board:** Matters presenting "complex" issue	
		#	**%**	**#**	**%**	**#**	**%**
Exemptions/Redactions	196	92	47%	27	29%	65	71%
Partial/Nonresponsive/ Incomplete Response	168	49	29%	36	73%	13	27%
Timeliness	172	*	*	*	*	*	*
Fees/Fee Waivers	126	17	13%	5	29%	12	71%
Other	138	46	33%	32	70%	14	30%
Total	**800**	**204**	**26%**	**100**	**49%**	**104**	**51%**

***We did not initially estimate that any matters solely involving missing or very late responses would go to the Board because the Ombudsman—through persistent and often protracted effort—eventually achieves a resolution. However, because this is an extremely inefficient use of public resources that impedes the Ombudsman's ability to assist other parties, these kinds of disputes may be more appropriate for summary disposition by the Board.*

Our review also revealed—as shown in *Figures 4* and *5*, above—that the largest single category of disputes deemed likely to be submitted to the Board involve exemptions and redactions. We note, however, that many disputes present multiple intertwined issues in a single case. For example, fee issues often are intertwined with issues about the timeliness of a response, as well as whether the request is overly-broad. Exemption and redaction issues can also arise in tandem with fee issues, at least to the extent a fee is assessed for time required to review and redact requested records. There are many other ways in which various PIA issues are intertwined in a single matter.

This reality suggests that the only way for the Board to serve as a meaningful decision-making body is for it to have comprehensive jurisdiction over all PIA disputes. Without such

comprehensive jurisdiction, the Board's ability to operate effectively and efficiently, and to play a substantive role in PIA dispute resolution, will remain negligible. Furthermore, we are unaware of any state that provides for fragmented jurisdiction of public records disputes.

Likewise, without comprehensive jurisdiction, the Board will not function as an effective backstop likely to enhance the effectiveness of mediation, and, to this extent, neither the Board nor the Ombudsman program will fulfill its real potential. Accordingly, for the reasons discussed, we believe there should be a practical, generally-accessible, and comprehensive PIA dispute resolution remedy, and piecemeal expansion of the Board's jurisdiction should be avoided.

In sum, we reach the following conclusions:

1) The Ombudsman's caseload demonstrates a generally consistent unmet need for an accessible and comprehensive extrajudicial dispute resolution option for PIA disputes that are not resolved at the mediation stage.

2) The number of unresolved disputes likely to go to the Board are relatively consistent throughout time and across agencies; approximately 25% of the Ombudsman's disputes—between 50 and 60 per year, or five per month—are not resolved through mediation and were judged likely to go to the Board;

3) The unresolved disputes likely to go the Board will be roughly evenly split between "simple" matters—those that can be resolved in a summary fashion—and "complex" matters—those that will require additional work;

4) Taking the above considerations into account, we estimate that the increased Board caseload can be handled by the addition of two full-time staff—one of which should be an attorney, and the other, an administrator, paralegal, or attorney—bringing the total number of staff to five, including the Ombudsman.

5) Although we cannot be sure that the projected caseload would remain at the same level we estimated based on 2016-2019 data, we believe an exponential increase or decrease is unlikely given the consistency in the Ombudsman's caseload over the past nearly four years. In fact, we anticipate that the availability of an accessible review and decisional remedy will enhance the effectiveness of mediations and bring about changes in agency and requestor behavior and expectations, thereby reducing the incidence of disputes over time.[28]

6) On a periodic basis after implementing this new system, the Board should report on caseloads, staffing, and dispositions, as well as other matters pertaining to overall PIA performance, so that any necessary adjustments to these programs can be made.

[28] We believe the factors most directly related to the number of matters submitted to the Ombudsman are the number of PIA requests submitted agencies overall, the frequency and effectiveness of the Ombudsman's direct outreach to requestors and agencies, as well as whether agencies consistently and timely notify requestors of the availability of the Ombudsman's services. We have no reason to believe any of these factors will be impacted by the mere availability of a comprehensive Board remedy, if one is provided.

4. Other Information Considered

In addition to a detailed review of the Ombudsman and PIACB programs to date, we also considered the responses of the reporting agencies, conversations with representatives from other state programs and the federal FOIA Ombudsman and Compliance programs, and comments from stakeholders.

a. Anecdotal Information from Agencies and Requestors

Our assessment of the need for a comprehensive extrajudicial dispute resolution remedy is consistent with anecdotal information from requestors and agencies. For example, in early 2019, the Ombudsman conducted a program satisfaction survey directed to all requestors and agencies with whom she has worked since inception of the program. Of the more than 100 requestors who responded, more than 30—or roughly 30%—expressed deep frustration with the Ombudsman's inability to decide issues or to enforce the Act with respect to matters that were not resolved by mediation. The following are just a sampling of comments submitted by requestors:

- '[The Ombudsman program is a] waste of taxpayer resources; no real power';
- '[G]overnment agencies don't fully comply due to [Ombudsman's] office being neutral and having no power or authority to sanction';
- '[I]ncrease[] the power of the Ombudsman to at least put pressure on the agency to want to negotiate';
- 'I'm not sure if the Ombudsman's Office can be effective where the custodian of public records knows the office has no legal authority to compel them to comply';
- 'That [Ombudsman's] office is a waste of taxpayer money . . . [i]f they cannot force [an] agency to do what they should';
- 'The Public Access Ombudsman has accomplished absolutely nothing as far as transparency in government and the reason for this is because the PIA Ombudsman has been given zero authority to do anything when government agency's or individual government employees don't respond to the public';
- 'Until there is teeth in the PIA there will be no meaningful resolutions';
- 'Personal experience has shown that the Ombudsman strives for transparency, but lacks enforcement power when they get stonewalled.'[29]

In addition, the qualitative surveys we sent to the reporting agencies asked for their views on the need for and desirability of expanded dispute resolution. Although many agencies

[29] We have omitted the commenters' names here because each was involved in mediation with the Ombudsman and the Ombudsman is required to maintain such information in confidence. *See* GP § 4-1B-04(b)(1).

expressed no general opinion on the matter,[30] or stated that the status quo is adequate,[31] others expressed support for any remedy that would keep PIA disputes out of court, that offered agencies a practical remedy for certain types of recurrent problems—such as repetitive, burdensome, or abusive requests—or that would enhance transparency and compliance.[32]

Other comments we received from stakeholders about expanded dispute resolution are discussed in Section IV and Appendix F ("Public Comments").

b. Other States' Programs

We compared our recommended dispute resolution model with other state models that have similar components, although none were configured as we propose and many have other duties beyond the resolution of open records disputes. Specifically, we examined models from seven states that vest extrajudicial dispute resolution of their open records law in a body other than their Attorney General's Office or traditional State agency administrative review processes. *See Figure 6*, below.[33]

The examination included a review of the relevant statutes, regulations, caseload statistics, where available, and, with all but the Utah program, extensive discussions with relevant program directors and staff. These comparisons allowed us to vet our assumptions against the actual practice of programs with constituent ingredients similar to the model we propose.

As a threshold matter, we note that none of these other state models meet all of the four key criteria we outlined in the discussion of our recommended option, above. Likewise, we believe that many of these models would be more costly and cumbersome to implement, and/or less effective than our recommended framework.

As a general matter, as reflected in *Figure 6*, below, each of the programs we explored have both a mediation and binding review and decisional component, though unlike our proposal, none require a complainant to seek mediation before requesting review from the decisional body.

[30] **Aging** (answered N/A; Low Volume); **DBM** (no opinion); **Disabilities** (no opinion); **MDE** (no opinion, rarely any matters before Board, Ombudsman, or courts); **DJS** (no position); **DLLR** ("takes guidance from the Administration and General Assembly"); **Military** (no opinion); **Planning** (no opinion); **SOS** (did not respond); and **MSP** (no opinion).

[31] **MSDE** (current system adequate); **DGS** (current system adequate); **DHCD** (thinks Ombudsman is sufficient); **DHS** (current system adequate); **DOIT** (satisfied with existing system); **DNR** (no need for expanded enforcement); and **MDOT** (current system adequate, but would like to comment on any specific proposal).

[32] **MDA** (sees need for agency relief on certain problems; not opposed to extrajudicial remedy, but would like to comment on any specific proposal); **Commerce** (welcomes any additional review options that would prevent PIA cases from going to court); **DOH** (no objection to expanded enforcement and committed to PIA compliance); **DPSCS** (welcomes any process that increases transparency; sees need for funding of internal PIA compliance unit); and **Veterans** (welcomes the suggestion).

[33] For a relatively current compilation of open records laws from the 50 states, including a description of comparative enforcement mechanisms, visit the Reporters Committee for Freedom of the Press, Open Government Guide, available at: https://www.rcfp.org/open-government-guide/.

Figure 6. COMPARISON OF OTHER STATE MODELS	Jurisdiction	Structure	Mediation*	Complaints in 2018**	Staff Size	State Population (*millions*)
Connecticut Freedom of Information Commission	Open Records and Open Meetings	Commission: 9 members	Optional	757	14 (including 9 staff attorneys)	3.57
Hawaii Office of Information Practices	Open Records and Open Meetings	Office: Executive Director	None historically; current pilot program	182	8.5 (including 5 staff attorneys)	1.42
Iowa Public Information Board	Open Records and Open Meetings	Board: 9 members	Optional	126	3 (including 1 staff attorney)	3.16
New Jersey Government Records Council	Open Records	Council: 5 members	Optional	227 (FY18)	4 (including 1 staff attorney)	8.9
Pennsylvania Office of Open Records	Open Records	Office: Executive Director	Optional	2,229	20 (including 3 staff attorneys)	12.81
Utah State Records Committee	Open Records, Record Retention	Committee: 7 members	Optional	121 (FY18)	3-4 (including 1 Ombudsman and 1 AAG)	3.16
Mississippi Ethics Commission	Open Records, Open Meetings, Ethics, Campaign Finance	Commission: 8 members	Optional	Unknown	6 (including 1 part-time staff attorney)	2.99

** As a general matter, mediation is offered as an option within the open records complaint process.*

***As we understand it, the total number of complaints reflect all complaints received across the particular program's jurisdictions, not necessarily just those complaints pertaining to open records.*

Without exception, the program representatives with whom we spoke all agree with our assessment that mediation is an invaluable component of the open records dispute resolution process, and that the availability of an accessible review and decisional remedy has a positive impact on mediation outcomes.[34] This confirmed our view that there are significant benefits to requiring mediation as part of the dispute resolution process, both to reserve the Board's remedy for situations that are most appropriate for it, and to give parties an opportunity for confidential and voluntary resolution through the Ombudsman's highly informal process. Requiring mediation as a first step in the process thus preserves and maximizes the benefits of the Ombudsman program

[34] For example, the Director of the Mississippi Ethics Commission explained that the Commission for some years played only an advisory/mediation role in open records disputes, and that once the Commission was vested with review and enforcement authority, mediation became much more effective.

to the degree we believe is desirable, and also likely will result in fewer matters going to the Board than if mediation was not a required first step.

The comparisons with other state models also provided us with a good indication of whether our envisioned programmatic structure and additional resource recommendations are realistic. Programmatically, most of the other state models we examined share staff between the mediation component and the review/decisional component of the programs, with appropriate internal steps taken to protect the neutrality of mediations and eliminate the appearance of conflicts. For example, a staff attorney who handles or assists with a particular mediation would not also be the attorney assigned to that matter if it is unresolved and goes before the review body.

Our recommendation for two additional staff, at least one of whom should be a full time attorney, and the other either an administrator, paralegal, or attorney—resulting in a total of five staff dedicated to PIA dispute resolution, including the Ombudsman—would allow for a similar division of labor and avoidance of conflicts. It would also ensure the continued independent functioning of the Ombudsman and the Board.

At the same time, the comparison suggests that our staffing proposal is sufficient to meet the projected workload of a Board with comprehensive PIA jurisdiction. First, no other program requires mediation as a first step in the dispute resolution process, and we expect that this requirement will result in relatively fewer matters needing adjudication by the Board.

Second, although four of the seven state models have more than five staff, each of those programs is distinguishable from our recommendation. For example, four programs—in Connecticut, Hawaii, Utah, and Mississippi—have jurisdiction over a wide range of other matters in addition to open records disputes. Specifically, Connecticut, Hawaii, and Mississippi each also handle open meetings complaints in addition to open records matters; Utah's State Records Committee also has duties relating to implementing record retention laws; and Mississippi's program handles ethics and campaign finance complaints as well.

Third, the only state program with more than five staff that handles only open records matters—the Pennsylvania Office of Open Records—serves a state with a population more than double that of Maryland. Moreover, that program is operationally and structurally different from the framework we recommend—for instance, by employing several "appeals officers." Our recommendation, by contrast, builds on two existing programs—the PIACB and Office of the Ombudsman—and does not propose formalized contested case procedures.

Finally, our closest program comparison—in terms of function and jurisdiction—is the New Jersey Open Records Council, and that program has four dedicated staff.[35] We note that the New Jersey program's caseload in FY 2018—227 complaints—is comparable to the Ombudsman's 178 matters during the same period, suggesting that the demand for extrajudicial open records dispute resolution is similar in both states. Accordingly, we believe our proposal for five staff dedicated to PIA dispute resolution is adequate.

[35] And, New Jersey's population is approximately two million greater than Maryland's.

5. Alternatives Considered

a. Potential Restoration of Former State Administrative Remedy

We also considered the potential restoration of the State administrative review remedy that existed in the PIA before the 2015 legislation. We are not recommending that this remedy be reinstated as it previously existed for several reasons. First, the administrative appeal remedy was not comprehensive in that it applied only to certain State agencies subject to the contested case provisions of the Administrative Procedure Act.[36] The Ombudsman's caseload suggests, however, that more than half—about 60%—of all PIA disputes arise from requests made to local agencies.

Second, the administrative appeal remedy also appears to have been used rarely. Data provided to us by the Office of Administrative Hearings for the years 2013 to 2015—the last three years the remedy was available—shows that that Office handled 37 PIA appeals, involving only twelve State agencies. By contrast, during its nearly four years of operation, the Ombudsman's Office received more than 800 PIA disputes—174 of which involved the State reporting agencies. Of the total disputes, more than 200, including 46 from the reporting agencies, were not resolved by mediation and also were judged likely candidates for extrajudicial review and decision. This suggests to us that the State administrative appeals option—at least as it pertains to PIA matters—was relatively inaccessible to and/or rarely used by many requestors.

Lastly, the administrative appeals model also did not afford any remedy to agencies, including relief from overly repetitive or unduly burdensome requests, or relief from deadlines for good cause in instances when compromise or agreement cannot be reached with the requestor. Our recommendation, in contrast, offers a comprehensive remedy for both agencies and requestors.

b. Piecemeal Expansion of the Board's Jurisdiction

During the course of our outreach, we received comments from the Office of the Attorney General ("OAG"), one of which suggested that the Board's jurisdiction might be expanded in only a piecemeal fashion, for example, by lowering the fee threshold for Board review, or permitting the Board to review the denial of fee waivers.

We do not believe, however, that piecemeal jurisdiction for PIA dispute resolution makes sense, or accomplishes much. Most PIA disputes involve issues other than fees or involve multiple issues within a single matter. Without plenary jurisdiction over PIA disputes, the Board will not serve as an effective enhancement for mediation. Moreover, we are not aware of any other open records dispute resolution program that provides for such fragmented jurisdiction.

c. Potential Consolidation of PIA and Open Meetings Compliance Boards

Another of the OAG's comments suggested that a Board with expanded PIA jurisdiction could be consolidated or combined with the Open Meetings Compliance Board ("OMCB"). Currently, the OMCB is an independent, three-member body that issues advisory opinions on

[36] Apparently, the Office of Administrative Hearings has the ability to handle certain appeals from particular local agencies, but only by special arrangement. It is our understanding that this kind of arrangement was not typically used for local agency PIA appeals.

whether public bodies have violated the Open Meetings Act.[37] The OMCB has no role in PIA matters, just as the Ombudsman and PIACB have no role in any open meetings matters.

We believe that the current separation between the PIACB and the OMCB is appropriate, and that there would be little utility and potentially greater expense in combining them. First, we are unaware that there is any real support for combining the two entities. Second, in our view, there is not a high degree of overlap between the OMCB and our recommended PIACB to warrant combining the two. Although both the PIA and the Open Meetings Act broadly serve the objectives of transparent government, the compliance and enforcement landscapes under the two laws are vastly different, as are the remedies for violations. Finally, the OMCB is authorized only to issue advisory opinions—likely because open meetings violations usually involve events that have already occurred—while we are recommending the PIACB have authority to review and issue binding opinions on live PIA disputes. Thus, we do not recommend consolidating the two boards.

[37] GP §§ 3-101 through 3-501.

III. PIA Tracking and Reporting Recommendations

A. Survey of Reporting Agencies

We were asked to collect the following information from the 23 State reporting agencies for the 15-month period from July 1, 2018 through September 30, 2019:

- The number of PIA requests received;
- The disposition of those requests;
- The average response time;
- The number of fee waivers requested and granted;
- The number of Ombudsman mediation requests and the number conducted;[38]
- Information on PIA response processes and procedures, including training; and
- Information on records management processes and procedures, including training.

To collect the quantitative data, we sent the reporting agencies a survey instrument in the form of a spreadsheet. Due to our year-end reporting deadline, and because a portion of the reporting period was prospective, we split the process of collecting the data into two phases: first, we requested data for the first 12-month period—July 1, 2018 to June 30, 2019—be sent to us by July 31, 2019; and second, we requested data for the remaining three months—July 1, 2019 to September 30, 2019—be submitted by October 31.

To collect the necessary qualitative data, we asked the agencies to complete a questionnaire. Both the quantitative and qualitative survey instruments, together with our explanatory cover letter to the reporting agencies, are included in Appendix B.

Our Preliminary Findings and Recommendations, which we issued on November 6, 2019, discussed the survey data for the first 12 months of the reporting period—that is, from July 1, 2018 through June 30, 2019 ("FY2019")—in detail. This data and our findings are unchanged except that three reporting agencies—MSDE, DBM, and MHEC—supplemented or corrected their data. Due to the timing of these corrections, we were not able to include them in the Preliminary Findings, but have done so here, both in the data tables and, where necessary, in the text.[39]

Since we issued the Preliminary Findings, we also received from the reporting agencies data for the final three months of the reporting period, that is, from July 1, 2019 through September 30, 2019 ("1st Quarter FY2020"). We have included that data—along with a brief analysis and comparative data tables that match the FY2019 tables—in Appendix D. We do not otherwise refer

[38] Aggregate statistical data on the number of mediations conducted involving the State reporting agencies during FY 2019, and since the inception of the Ombudsman program through September 30, 2019, is discussed in Section II, above. We cannot report an agency-by-agency breakdown of mediation participation given the Ombudsman's confidentiality requirements. *See* GP § 4-1B-04(b).

[39] Specifically, MSDE corrected its data to reflect that it received 184 rather than 300 PIA requests during FY2019, a correction which rendered more of its data internally consistent. Likewise, MHEC, which received two PIA requests during FY2019, corrected certain other data which made its data internally consistent. Lastly, DBM, which initially reported no quantitative data, reported that it received 30 PIA requests in FY2019, but did not track and was unable to report other data fields. DBM reported that it has since begun tracking this other data.

to the 1st Quarter FY2020 data in this Final Report, other than to note here that it is largely consistent with our discussion of the FY2019 data.

The 1st Quarter FY2020 data does differ from the FY2019 data in one respect: most agencies were able to provide consistent data in more reporting categories than they had done with their FY2019 data, albeit in some cases, after additional follow-up from us. We suspect this is because the agencies were "on notice" as of May 2019 that they were expected to report detailed PIA caseload data for this prospective time period, and so likely began tracking the information we requested, if they were not already doing so. Nonetheless, we note that two of the agencies with the largest PIA caseloads—MDE and MDOT—still did not track any additional fields.

1. Quality of Survey Data

The survey of the 23 State reporting agencies, standing alone, is of limited use within the scope of our report. First, the reporting agencies comprise only about half of all State agencies, and no local agencies were included. Thus, the majority of all agencies subject to the PIA were not included in the survey. Nonetheless, based on other information sources, including the Ombudsman caseload from April 2016 through September 2019, we believe many of our observations likely apply across all State agencies, and at the local agency level.

Second, much of the reporting agencies' quantitative data is incomplete. For example, MDOT and MDE reported that they did not did not track and could not provide data for more than half of the questions. Specifically, MDE reported not tracking eight of the quantitative questions—including all of the questions in the section on PIA dispositions—while MDOT did not track data for nine of the questions, including all of the questions in the section on fees. In addition, DHS provided data for only half of FY2019, *i.e.*, the final 6 months, from January 1 to June 30, 2019.

Third, many agency responses were internally inconsistent to a degree that we could not rely on them for certain comparisons and evaluations. Specifically, we could not rely on responses for a particular topic where the sum of the data for that topic was not close to the total number of PIA requests received. For example, one topic is the number of initial PIA responses within and outside the statutory "10-day" deadline; where those responses added together are not equal to or within 5% of the total number of requests, we did not rely on that data when analyzing this topic.[40] In most instances where the data was deemed inconsistent, the deviation was far more than 5% from the total number of requests.[41]

We recognize that some of this internal inconsistency may have been due to misinterpretations of the survey instrument. However, we followed up with every agency that provided us with inconsistent data to explain what we were looking for, and many were able to

[40] By way of further illustration, if an agency reported having received 100 PIA requests during the period, but reported only 33 total responses either within or outside the 10 business day deadline, we could not confidently rely on that agency's numbers for purposes of assessing or comparing agency compliance with the 10 business day initial response deadline.

[41] The survey instrument provided the reporting agencies with the opportunity to explain inconsistencies in each category of data with boxes marked "other"; *e.g.*, an agency could report the number of PIA requests still pending and within the 10-day initial response deadline as of the date they submitted the survey. The survey instrument also invited narrative comment so that an agency could elaborate or further explain its data if it wished to do so. We have taken into account any such relevant explanations that were provided in making our determination as to internal inconsistencies. The survey instruments are provided in Appendix B.

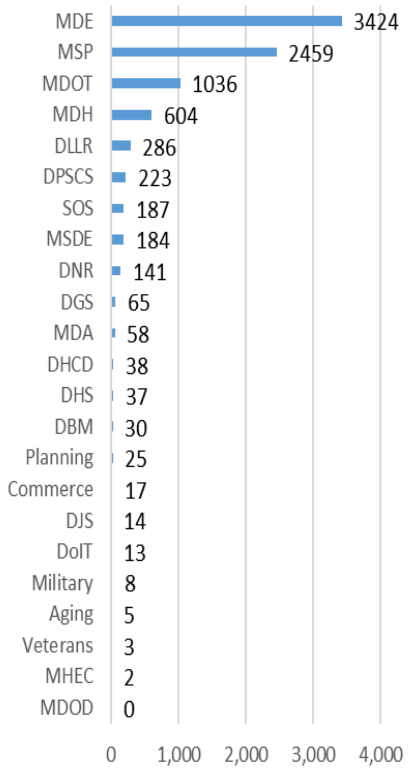
make changes accordingly. For example, MSP had at first reported highly inconsistent numbers but, after discussing their data with us, provided consistent and reliable data for all fields. Other agencies were not responsive to our attempts at clarification, or only provided corrected data too late to be incorporated into our Preliminary Findings.

We also recognize that because agencies were not expecting to report this level of PIA caseload detail until notified of this project in May 2019, they may not have been tracking the requested fields. Nonetheless, to the extent that most of what we asked for could be considered basic metrics of PIA performance, —*e.g.*, timeliness of responses and imposition of fees—we think the lack of tracking is itself an informative finding.

2. Reporting Agencies' PIA Caseloads

The survey data reflects that the PIA caseloads among the reporting agencies during FY2019 varied considerably. For example, the number of requests per agency ranges from 0 (MDOD) to 3,424 (MDE),[42] with three agencies—MDE, MSP and MDOT—receiving 6,919, or 77%, of the 8,859 total PIA requests received by all reporting agencies. See *Figure 7*.

PIA Requests Received by Agency (FY2019) *Figure 7*



This data also reflects that most of the reporting agencies have a light to moderate caseload, with some agencies reporting what might be described as a *de minimis* number of requests. Specifically, twelve agencies reported having fewer than 40 PIA requests during FY2019, and five reported having fewer than ten. An additional seven agencies reported receiving between 50 and 300 requests.[43]

We note, anecdotally, that many agencies at both the State and local levels report a significant increase in PIA requests in recent years. Our survey did not request comparative data from past years, but this trend seems likely due to the increasing prevalence of electronic records and the relative ease of making record requests via email and/or website.

Still, it is worth noting that many reporting agencies do not have a voluminous PIA caseload, and this variation likely holds across other State and local agencies. Moreover, based on all data available to us, there does not appear to be a significant relationship between caseload volume and performance deficiencies, such as timeliness of response.

[42] MDE explains that its total number may even be understated, given that its tracking software aggregates multiple requests from the same requestor.

[43] We are including DHS's total, even though that agency provided data only for the final six months of FY2019.

The disparity between agency caseloads suggests that improvements in performance will come from measures targeted to agency-specific problem areas, units, or processes, rather than from any "one size fits all" approach with respect to staffing, processes, or infrastructure. Rather, agencies with light to moderate caseloads can look to systems used by those with heavier caseloads, build on what works well, and learn from agencies with expertise in handling certain types of data and records, such as large data sets. We discuss some generally-beneficial practices in our recommendations section below.

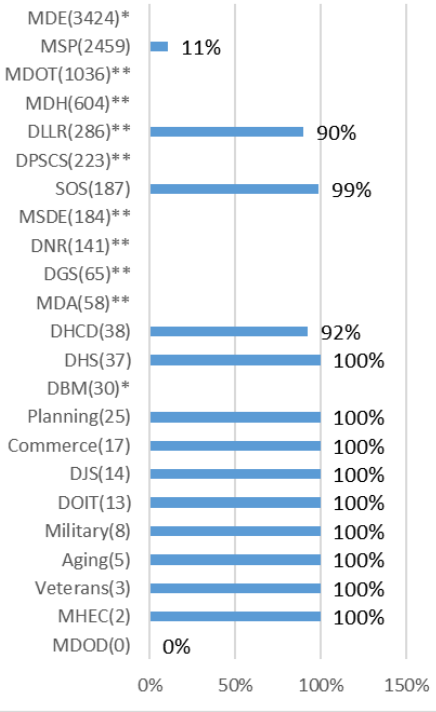
3. Timeliness of PIA Responses

Under the PIA, an agency has 10 business days in which to send an initial response to a request. If the response is not finalized at that time, the "10-day" response must provide the requestor with certain information, such as the reason for the delay and an estimate of fees, if any. An agency has 30 calendar days in which to send the final response, which can be extended by consent of the requestor.

We asked agencies to report the number of initial responses sent within 10 days, *see Figure 8*, and the number of final responses issued within and outside 30 days, *see Figures 9* and *10*, below. Five of the six highest volume agencies—those with more than 200 requests in FY 2019—either did not track one or both of these metrics, or were unable to provide consistent data for one or both metrics.

In fact, only nine agencies tracked and provided consistent data regarding their compliance with both the 10-day and 30-day deadlines, and seven of those were agencies with the smallest caseloads, *i.e.*, fewer than 40 requests during FY2019. *See Figures 8, 9,* and *10.* That said, four of the agencies with caseloads higher than 200 in FY 2019 reported sending more than 80% of final responses within 30 days. *See Figure 9,* below.

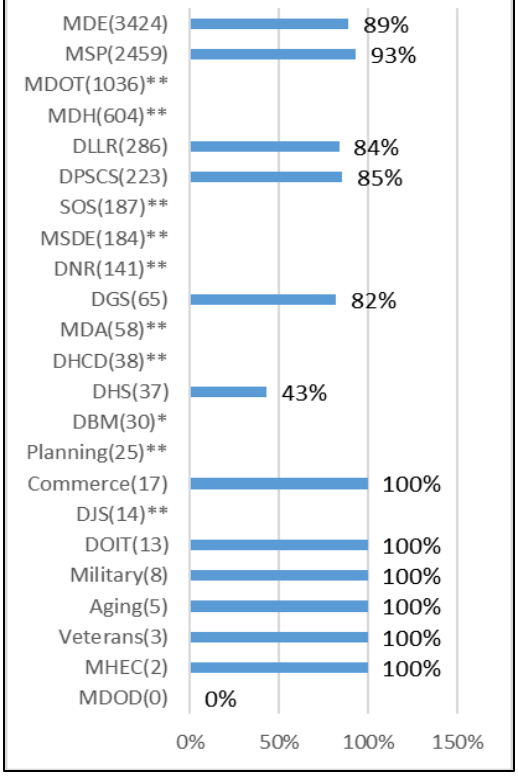
Response Time: Initial Response within 10 Business Days of Receipt *Figure 8*



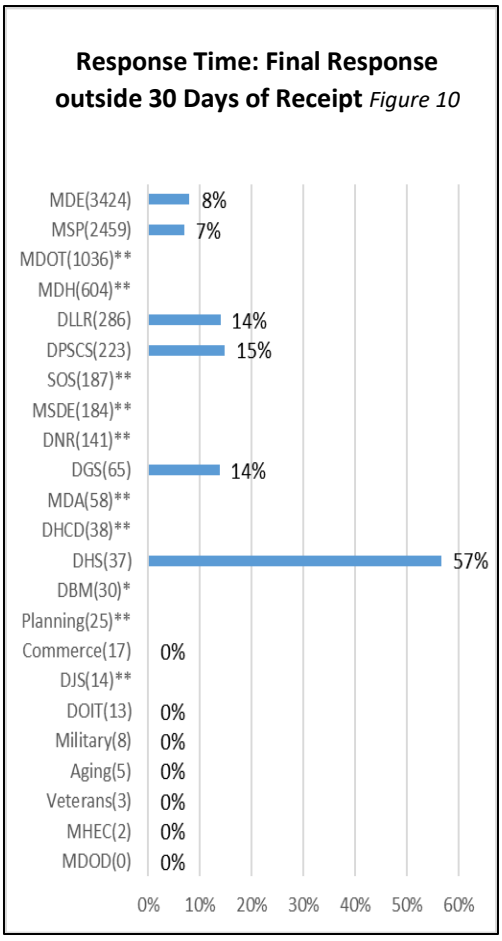
** Did not track this metric | ** Data was internally inconsistent.*

The Ombudsman regularly receives complaints about long overdue and missing responses, in which the agency has not sent even an initial response within 30 days. When an agency's response is missing or long overdue, it frequently indicates other compliance issues. In fact, the internal inconsistencies present in the reporting agencies' survey data, together with the Ombudsman's experience, suggest that many agencies are not adequately tracking PIA requests, leading to tardy responses and other compliance issues. Thus, in order for agencies to fully comply with the PIA—including its deadlines—it is essential to accurately track all PIA requests from the time they are received though the time a final response is sent.

Response Time: Final Response within 30 Days of Receipt *Figure 9*



Response Time: Final Response outside 30 Days of Receipt *Figure 10*



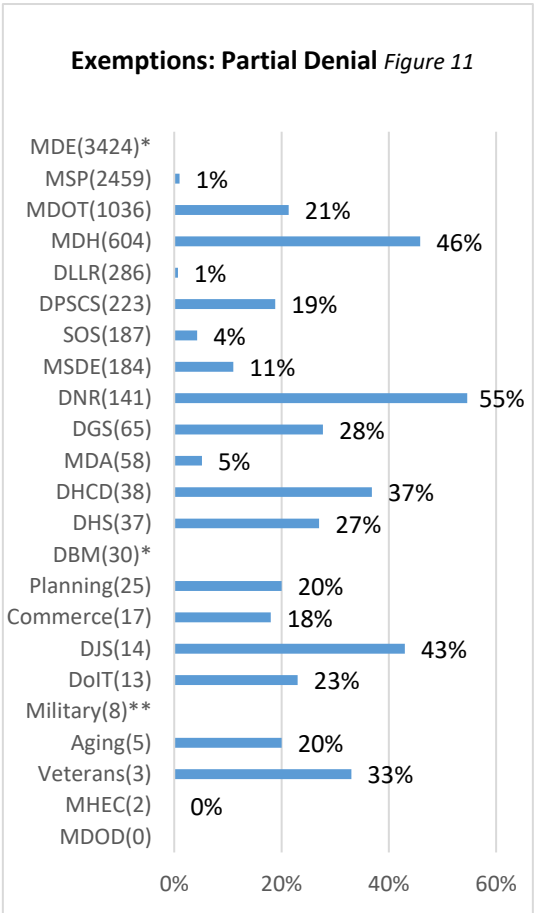
** Did not track this metric. | **Data was internally inconsistent.*

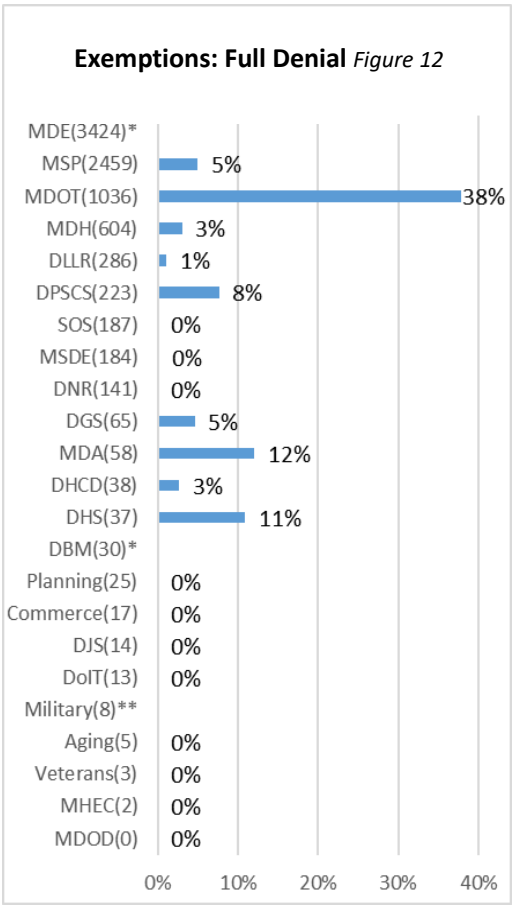
4. Disposition of PIA Requests

We asked the reporting agencies a number of questions pertaining to the dispositions of the PIA requests they received. The data suggests that agencies often receive requests for records of which they are not the custodian, or for which they do not have any responsive materials. Agencies also frequently respond to requests by disclosing all responsive records. Overall, the reporting agencies responded to more than 36% of their cumulative PIA requests with full disclosure of the requested record.

At the same time, many agencies report withholding some or all of the requested record in a significant number of cases. This occurs when an agency applies one or more of the PIA's exemptions. Depending on the material requested, the PIA may *require* an agency to withhold all or part of the record, or it may *permit*, on a discretionary basis, an agency to withhold all or part

of a record. *Figures 11* and *12*, below, indicate that most agencies relatively rarely withhold the entire requested record; MDOT is an outlier here, reporting that it denied the entire record in 38% of its responses. Many more agencies withhold a part of the requested record in a significant percentage of their responses. For example, DNR partially withheld the requested record in more than half of its responses, and twelve agencies provided partial denials in 18% to 46% of their responses.





** Did not track this metric. | **Data was internally inconsistent.*

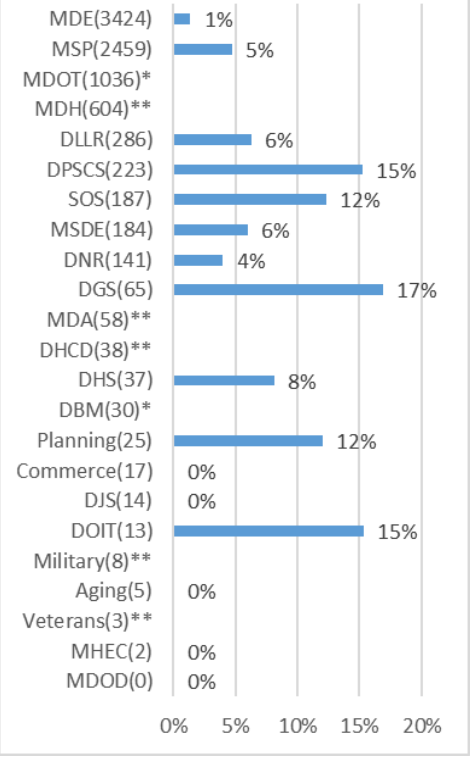
An agency's application of exemptions to either fully or partially deny the requested record is a constant source of disputes. Since the Ombudsman's program began in 2016, more than 20% of all mediations have involved these kinds of issues. The resolution of many exemption-based disputes turns on a legal question and/or a review of the record at issue to assess the applicability of the claimed exemption or exemptions. Although the Ombudsman is often successful on this front, many of these disputes—about half—remain unresolved after mediation and would benefit from our recommendation for a Board with comprehensive jurisdiction to review and issue a binding decision on the matter.

5. PIA Fees

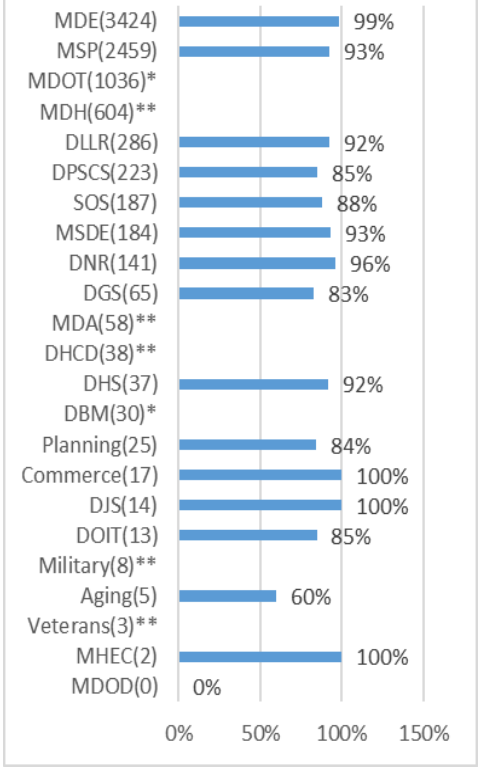
We asked the reporting agencies to provide the number of PIA requests for which a fee was charged, *see Figures 13* and *14*, below, the number of requests for which a fee waiver was requested, *see Figure 15*, below, and the number for which a fee waiver was granted, *see Figure 16*, below.

The data suggests that most PIA requests are handled by agencies without fees. We interpret this category to include requests that were denied, *e.g.*, because one or more exemptions applied, those where no responsive records existed, and those which were handled in two hours or less. This category also may include some matters that were technically eligible for a fee, but in which no fee was charged for some reason, *e.g.*, because the charges were *de minimis*, were not accurately documented, or were otherwise waived.

Requests for which Fee was Charged *Figure 13*



Requests for which No Fee was Charged *Figure 14*

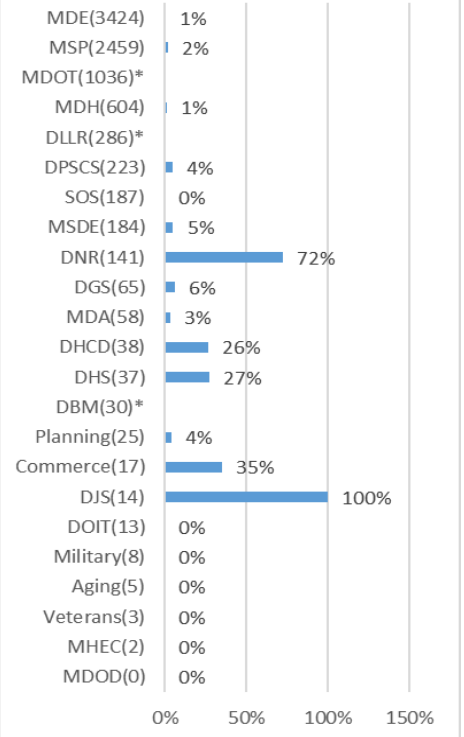


* *Did not track this metric.* | ** *Data was internally inconsistent.*

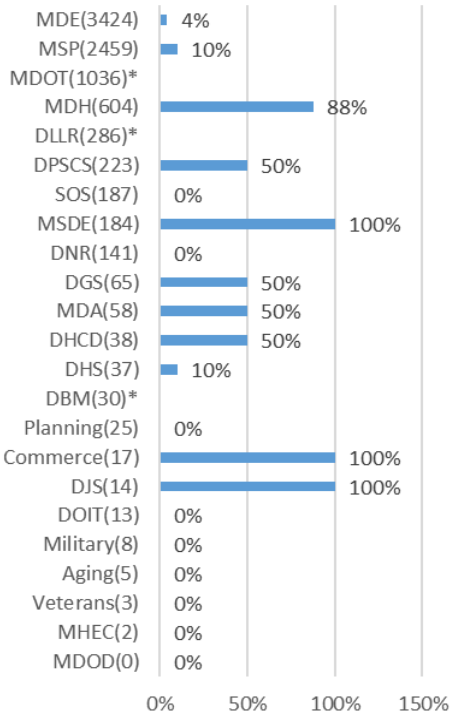
With regard to fee waivers, as reflected in *Tables 15* and *16*, below, it appears waivers are requested in a relatively small percentage of the reporting agencies' total caseloads, subject to a few exceptions. The outliers are DNR and DJS, in which a waiver was requested in 72% and 100% of their requests, respectively. DNR did not grant any of those waiver requests, while DJS granted all of them. Overall, eight of the thirteen agencies that received waiver requests granted at least half of them. The notable exceptions are the two agencies with the largest caseloads—

MDE and MSP—which granted a relatively small percentage of their waiver requests—4% and 10%, respectively. The only other agency reporting more than 1,000 PIA requests—MDOT—did not track or report any fee data.

Fee Waivers Requested as % of Total PIA Requests *Figure 15*



Fee Waivers Granted as % of Waivers Requested *Figure 16*



* *Did not track this metric.* | ** *Data was internally inconsistent.*

Fee disputes are present in a consistent percentage of the Ombudsman's mediations. The Ombudsman has concluded a total of 800 mediations involving State and local agencies as of September 30, 2019. Approximately 6% of these mediations—about 50—have involved the denial of a fee waiver request, and another 9%—or about 74—have involved disputes over the amount of a fee. In other words, the Ombudsman has received more than 120 fee-related disputes in the 42 months of operation through September 30, 2019.

During a roughly comparable period, the Board—which has jurisdiction only over fees greater than $350, but not over lesser fees or fee waivers—has received relatively few complaints that fall within its jurisdiction, issuing only 22 opinions. During the same time, it has received more than 15 complaints about an agency's denial of a fee waiver request, in addition to other complaints about PIA disputes that are not within its jurisdiction. The disparity between the Ombudsman's fee-related caseload and the Board's suggests that the majority of PIA fee-related disputes involve fees less than $350 and/or the denial of fee waiver requests, neither of which are within the Board's jurisdiction.

Based on this data, we believe that any enhanced PIA dispute resolution mechanism must have the authority to address more fee disputes in a meaningful way. With regard to the fee

threshold that is eligible for Board review, we believe the Legislature should reduce it to $200, and our proposed amendments reflect this recommendation. *See* Appendix E. With regard to fee waivers, our recommendation for vesting the Board with comprehensive jurisdiction includes jurisdiction to review an agency's denial of a waiver.[44] *See* Appendix E**.**

B. Compliance Monitoring: Feasibility of Agency Self-Reporting

In addition to analyzing the reporting agencies' PIA caseload data, we asked the agencies to give us their views on the feasibility of caseload tracking and periodic self-reporting of that data. Most agencies reported that it is feasible to periodically report data on their PIA caseload, and many—particularly those receiving a sizeable volume of requests—report that they already track some or all of the data requested in the survey.[45] Agencies receiving a relatively small volume of requests also generally reported either a current ability to track and self–report, or expressed a willingness to consider doing so.[46] Only two agencies expressed the view that self-reporting is not

[44] In our combined experience, we believe that agencies' misunderstanding of the PIA's fee waiver provisions and/or default unwillingness to grant fee waivers leads to the routine—rather than discretionary—denial of many waiver requests. For example, in instances where a requestor provides an affidavit of indigency—which is the most specific statutory criteria for granting a waiver, *see* GP § 4-206(e)(2)—many agencies nonetheless routinely deny the request. In some of these cases, it is clear the agency misunderstands the affidavit provision. *See, e.g.*, PIACB Opinion 19-08 (explaining that the wording of the PIA's fee waiver provision authorizes a custodian to grant a fee waiver "on the basis of an affidavit of indigency alone," without considering other public interest factors, and encouraging the agency to reconsider the waiver request to the extent that it misconstrued the waiver provision).

[45] Agencies reporting an ability to track and report PIA data, including those that already do so internally, include **MDE** (using tracking database and software; currently reports annual statistics to DBM through "Managing MD for Results" process); **MSP** (currently maintains PIA log; periodic self-evaluations conducted by personnel in Central Records); **MDOT** (reports and verifies open requests daily; runs reports for senior leadership, official custodians, and PIA staff as needed); **MDH** (PIA coordinator provides quarterly reports to Secretary and senior staff and meets weekly to review MDH tracking log and discuss any overdue requests; with future use of "smart sheets", will be able to generate reports that identify different categories of cases—*e.g.*, overdue, pending, or completed—and statistics that will be viewed on internal dashboard by senior leadership and all PIA officers); **MSDE** (maintains database of all outstanding and completed requests which is regularly reviewed for accuracy and completion); **DLLR** (performs self-evaluation of caseload based upon spreadsheets maintained by agency counsel); **DPSCS** (has tracking system); **DNR** (self-report feasible on annual basis); **DGS** (self-report feasible); **MDA** (report on annual basis feasible; would develop its own internal survey and have each unit report responses and discuss results at staff meeting); **DHCD** (agency counsel maintains excel spreadsheet/log of PIA requests and their dispositions; tracks deadlines and whether estimated fees are paid); and **DHS** (self-report feasible for 2019 going forward using PIA web portal which tracks requests submitted via the portal).

[46] Agencies receiving comparatively few PIA requests that expressed one of these views include **DJS** (did not previously maintain log or database, but, as of December 1, 2019, is implementing a data-collection system that will track future PIA requests and responses); **Veterans** (does not maintain electronic log or database; receives very few requests); **MHEC** (maintains electronic log of PIA requests, and in process of creating comprehensive internal PIA policy/procedures document for staff to ensure process carried out efficiently); **DBM** (receives moderate number of requests, and should be able to conduct internal self-evaluation using new "Google Sheets" tracking database); **Planning** (self-reporting feasible; has no database, but maintains searchable electronic records on all PIA requests and dispositions); **Commerce** (feasible to periodically perform self-evaluations)**; Military** (probably can perform self-evaluation, but needs more guidance from OAG as to how/what to evaluate)**;** and **Aging** (yes; low volume).

feasible, or otherwise objected to the idea.[47] And one agency—MDOD—which reported receiving no PIA requests at all during the reporting period, responded to the question with "N/A."

We believe that a similar pattern likely exists among State and local agencies not included in our survey. That is, agencies with a significant volume of PIA requests are likely already tracking and logging at least some data, while those with a modest or *de minimis* volume of requests should be able to implement a basic tracking and reporting system without any investment in new software, infrastructure, or staff. We assume that agencies with heavy PIA caseloads already track their PIA data to some degree as necessary to manage their caseload.

We recommend that in order to obtain uniform, consistent, and reliable information on PIA caseloads and dispositions, the Legislature should specify the data agencies must track and report, and require agencies to publish this data periodically on their websites to the extent feasible. Some of the benefits of uniform, consistent tracking and reporting include:

- Likely reduction in "MIA" matters, *i.e.*, matters in which the first response to a PIA request is issued after the 30 day deadline has expired; currently, this category of disputes comprises about 20% of the Ombudsman's caseload.
- Informed assessments of the need for additional PIA-related resources, including personnel, funding, and software systems; not all agencies have this need, and only systematic data will facilitate informed decisions about those that do.
- Identification of "peer" agencies in terms of PIA caseload, allowing agencies to exchange meaningful information and tips about procedures, software, and other technologies that improve PIA performance.
- Enhanced transparency with respect to PIA caseloads, dispositions, fees, and need for future changes to existing law.

C. Other Recommendations and Agency Needs

1. PIA Performance

In addition to asking the reporting agencies about PIA caseloads and procedures, we asked about practices and needs that are closely connected to their capacity to regularly comply with the PIA. For example, we asked questions about records retention and management, proactive records disclosure practices, participation in PIA and records management training, use of PIA tracking systems, software to retrieve and redact electronic records, and policies and procedures related to maintenance and retrieval of public records that may reside on remote or mobile devices, or on social media platforms.

The agency responses are available on the Ombudsman's website at the following link: Reporting Agencies' Qualitative Responses. Many agencies report that they need additional resources, such as more staff, funding, training, and/or technologies—including software and additional software licenses—to move forward in some or all of these areas. And while there is a

[47] These agencies are **DOIT** (would take extra time and resources that are not necessary for the Department to follow PIA requirements); and **SOS (**not feasible; there is only one employee who discharges agency's PIA responsibilities, and she has other duties, too).

great deal of variability in agency caseloads and response capacities, we believe the following general practices would enhance agency efficiency and performance.

- **Maximizing proactive disclosure tools and methods**. These methods include measures as simple as maintaining a current list of readily available documents, publishing such a list on the agency's website, or publishing frequently requested records to the agency's website or other central repository.[48]

  For example, Howard County Public School System ("HCPSS") recently instituted an online initiative of tracking and monitoring PIA requests and proactively disclosing public records.[49] The online system was created in-house from scratch at a low development cost by the HCPSS Communications Division, in consultation with its PIA Representative, following study of similar systems. The HCPSS system allows the public to submit PIA requests through an online form, and to follow the status of their requests as HCPSS works to respond. The system also makes summary information regarding each submitted PIA request available for public inspection, along with responsive documents previously provided to requestors.[50]

- **Training and professionalizing the PIA front-line**. Many agencies are meeting PIA obligations with staff who are not solely dedicated to the PIA. Although this practice is undoubtedly adequate for agencies with a low or *de minimis* volume of requests, agencies with consistently large—or steadily increasing—volumes of PIA requests need trained staff that are either solely or primarily dedicated to handling PIA matters.

  One reporting agency with a high volume of requests indicated that the reclassification of PIA-related positions, together with increased salaries, is needed to maintain and improve the handling of its PIA caseload. This observation is consistent with the approach and recommendations of the FOIA Advisory Committee for recruiting talent and developing career models for information management professionals. *See* FOIA Advisory Committee 2016-2018 Final Report at 14 –15 (discussing bringing in talent and building a career path).

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[48] *See, e.g.,* Open Matters: The Ombudsman's Blog, "Proactive Disclosure Saves Time and Money, and It's the Law"(January 28, 2019); *see also* Report to the Archivist of the United States: Freedom of Information Act Federal Advisory Committee, Final Report and Recommendations, 2016-2018 Committee Term at 18-24 (April 17, 2018) ("FOIA Advisory Committee 2016-2018 Final Report") (discussing recommended practices regarding proactive disclosure).

[49] *See* Open Matters: The Ombudsman's Blog, "PIA Technology Solutions: HCPSS – Transparency in Public Schools" (September 26, 2018).

[50] The HCPSS' PIA Representative explains that,

> [a] key benefit is that we are able to make more public records readily available online. Many times, the same information is sought by different requestors, which they can find through the built-in search feature. In this way, we are using technology to help meet the intent of the PIA to provide records with the least cost and delay. It's an invaluable tool- both for ease of public access and for use internally to track custodians of records, identify keywords to find trends in requests, and monitor timeliness of responses.

- **Changing agency culture and messaging from the top.** Several of the reporting agencies explained the ways in which the Secretary and senior staff collaborate with front-line PIA coordinators in the process of handling PIA requests and problems. *See* footnote 45, herein. In our experience, when Secretaries and senior management are involved in the PIA process, and emphasize the importance of PIA duties—*e.g.*, that compliance is not optional but mandatory, and that PIA compliance is an integral part of the agency's larger public mission—staff at all levels take notice and comply. We know of instances in which these types of efforts and initiatives have turned difficult situations into occasions for meaningful improvement.

- **Tracking and managing PIA requests internally.** We believe internal PIA tracking is critically important to an agency's overall PIA compliance and improved performance in the long run. Many of the reporting agencies have described in detail the steps they are taking to more effectively track, monitor, and trouble-shoot the agency's response process from start to finish. *See* footnotes 45 and 46, herein.[51]

- **Leveraging technology:** With the accelerating pace of e-government initiatives and the proliferation of electronic records and communications at all governmental levels and across all platforms, finding and utilizing technologies that assist in the retention, maintenance, and retrieval of electronic records continues to be critically important for efficiency and transparency. In general, the reporting agencies indicate that there is a great deal of need in this arena; some agencies have little experience with specialized software or other technologies in this context, and others have more substantial experience. Large volume email retrieval, in particular, is consistently identified as problematic, and many agencies seek additional relevant training or technology.

  The above general practices highlight the ways in which some State and local agencies are using technology to improve their PIA process. For additional perspectives on this topic, *see* FOIA Advisory Committee 2016-2018 Final Report at 16-18, and Office of Government Information Services (OGIS) Assessment: Leveraging Technology to Improve Freedom of Information Act (FOIA) Searches (July 31, 2019).

2. Records Management Practices

In addition to questions about the reporting agencies' core PIA caseload, we asked qualitative questions about the agencies' other PIA and records management practices, including staffing, training, proactive disclosure, and use of technology. These areas bear directly on an agency's efficiency and its ability to fully and regularly comply with the PIA.

[51] For additional examples of tracking and monitoring initiatives undertaken by other State and local agencies, *see* Open Matters: The Ombudsman's Blog, "PIA Technology Solutions: Maryland Insurance Administration's PIA Web-Portal" (November 20, 2018); "Innovative Approach to Case Management Aids Anne Arundel's Compliance with the PIA" (March 29, 2018); and "PIA Technology Solutions: HCPSS – Transparency in Public Schools." *See also* FOIA Advisory Committee 2016-2018 Final Report at 17, 20-21 (containing detailed recommendations regarding tracking systems and FOIA Log recommendations).

For example, because the PIA is essentially concerned with access to public records with the least cost and delay, effective records management practices—including maintenance, retention, retrieval, and destruction—are essential to a reliable and efficient PIA process.

Confidence in these records management practices, or the lack thereof, inform all aspects of the PIA, from the search and retrieval process, to fees and disputes. Although our mandate in this report does not include a deep analysis of records management processes, or the need for related enforcement and compliance mechanisms, we do note the crucial connection between records management and the PIA. Some of the findings that emerged from this portion of our survey include:

- There is wide diversity in the reporting agencies' compliance with and competence in records management practices—some agencies reported not knowing whether they had retention schedules on file at all, while others reported up-to-date schedules for all units within the department.
- As a general matter, the agencies with the most voluminous PIA caseload seem to have the best handle on records management practices and the most robust records management programs.
- However, even agencies with large PIA caseloads and robust records management programs do not appear to have comprehensive or integrated records management plans across all mediums, platforms, or devices, such as phones, email, and social media. Proper implementation of the PIA requires this kind of integration for purposes of effective search, retrieval, and production of records.
- Agencies underutilize tools of proactive records disclosure, such as maintaining lists of readily available documents that are able to be provided immediately without review, publishing such documents or links to them on the agency's website, or publishing records that have already been disclosed under the PIA, especially where there is widespread public interest and/or the agency is likely to receive multiple requests for the same documents.
- Many agencies reported they would benefit from additional PIA and/or records management trainings and other resources. Maryland State Archives and the Department of General Services jointly conducted four "Record Management 101" trainings across Maryland during 2019, which were attended by representatives of many of the reporting agencies and others. If there is sufficient interest, we would like to explore the possibility of conducting joint PIA and records management trainings in the future.
- As most agencies transition to primarily electronic records and communications, their records management practices and retrieval and disclosure methods have not kept up with these technologies, which has complicated PIA processes and disputes.
- There is a need for agencies to develop and/or integrate their policies on the use of remote and mobile devices as well as social media with records retention and PIA requirements. In general, public records, including those on remote or mobile devices and, potentially, on social media platforms, must be retained in accordance with records retention requirements and must be accessible in accordance with PIA requirements.
- Although we did not collect similar data at the local government level, we suspect the trends are similar.

IV. Public Comments

We conducted extensive outreach for comments during the course of our work on this project. In this section, we discuss the comments we received that are specifically directed to or have a bearing on our recommendations in this report. The full text of these and other comments we received are included in Appendix F.

A. *Comments from the Office of the Attorney General,* Patrick Hughes, Chief Counsel, Opinions and Advice (December 6, 2019).

Comment. "*In general . . . our Office agrees that some sort of expanded jurisdiction for the PIACB is an avenue that is at least worth exploring, particularly if the proposal would retain the incentive for parties to participate in informal mediation with the Ombudsman before seeking review from the PIACB.*"

Response We are unsure what is meant by "retain[ing] the incentive for parties to participate in informal mediation with the Ombudsman." As outlined above, there is currently little or no incentive for both parties to meaningfully participate because there are few consequences for not participating and cooperating with the Ombudsman. On the contrary, we believe that the only way to truly incentivize parties to participate in informal mediation with the Ombudsman is to have a review and decisional mechanism built in to the process. Only when parties know that they may face a binding resolution in the event that mediation with the Ombudsman does not resolve the matter will they approach the mediation process in a way that maximizes its benefits.

Comment. "*We continue to have concerns . . . about the potential workload of a PIACB with expanded jurisdiction and about whether an all-volunteer board could handle a caseload that would increase significantly in both volume and in legal complexity.*"

Response. This comment appears to stem from the mistaken assumption that other states' open government boards and commissions—or many other kinds of appointed boards, for that matter—are other than volunteer. Five of the seven state models we examined—Connecticut, Iowa, Mississippi, New Jersey, and Utah—utilize appointed boards, commissions, or councils, and, as far as we can tell, none of those members are paid a salary for their services. At most, a member may be reimbursed for expenses—as is the case with the PIACB—and receive a per diem payment for the time they attend meetings of the body, which is usually only once per month. *See, e.g.*, New Jersey Statutes Annotated, 47:1A-7(a).

In all cases—including the PIACB—most of the day-to-day work of the body, including complaint intake, mediation functions, legal research, and opinion drafting is handled by professional paid staff. We acknowledge that the workload of Board staff will increase if its jurisdiction is expanded as we recommend, and that is why we are also recommending an addition of two full time staff, including at least one additional attorney.

Comment. "*Although the preliminary findings estimate that the PIACB would be asked to handle approximately 61 matters per year, that figure appears to assume that the number of requests for mediation will remain the same, even though the Ombudsman would be the first step in a process by which the requester could get a binding resolution from the PIACB. In*

our view, it is highly likely that more requesters would seek to take advantage of the Ombudsman's services once that route becomes the gateway to a binding administrative proceeding."

Response. This comment implicitly assumes one of two things with regard to the total number of PIA disputes in Maryland: either 1) the total number of PIA disputes will somehow increase once the Board has comprehensive jurisdiction, or 2) there are currently many PIA disputes that are not going to the Ombudsman, but that will go to the Ombudsman if the Board is vested with comprehensive jurisdiction. The OAG has not offered any support for either assumption, beyond speculation.

Our caseload projections for a hypothetical Board with comprehensive jurisdiction are based on real data from the Ombudsman's more than 42 months of operation. The number of disputes received by the Ombudsman are remarkably consistent each year—around 200 on average. It is unclear to us why this consistent number would suddenly and dramatically increase just because the Ombudsman becomes the "gateway to a binding administrative proceeding."

The Ombudsman is currently the only extrajudicial dispute-resolution option for most types of PIA disputes, and we believe most parties with substantive disputes who are not willing or are unable to pursue judicial remedies would at least attempt mediation with the Ombudsman's Office. In the alternative, if it is true that parties with substantive disputes are not currently coming to the Ombudsman, but would do so if the Board receives expanded jurisdiction, then that supports our conclusion that there is real need for an expanded dispute-resolution process with a binding review and decisional option. *See also* our discussion of factors influencing the Board's projected caseload and the Ombudsman's caseload in footnotes 27 and 28, herein.

At the very least, even if we are underestimating the need for an expanded Board option, that is not a reason to deny a clearly needed remedy. The Board's actual caseload and processes can be examined and reported in the future as the reality becomes clear, and any additional resources, if necessary, can then be based on concrete operations, not speculation.[52]

Comment. "[*M]ost agencies in other states that resolve public records disputes have large caseloads. That is true both for states with populations larger than Maryland's and those with populations much smaller than Maryland's. . . . Although these statistics do not enable us to predict caseloads in Maryland with any certainty or precision, they do show that large numbers of requesters in other states are using their states' extra-judicial enforcement options, and there is no reason to think that large numbers of requesters in Maryland would not do the same*."

Response. It is impossible to pinpoint the various contingencies, contexts, histories, and structures that result in the wide caseload range of the other open records review/decisional bodies we examined. State population is clearly not the only factor—Connecticut, for instance,

[52] It is our recommendation that the Board continue to report annually on its caseload, disposition, and need for any additional resources. If future caseloads warrant it, we believe it might be worth exploring the possibility of amending the PIA to allow the Board to refer some disputes to the Office of Administrative Hearings, particularly those that are factually complex or might benefit from that Office's procedures. The OAH has advised us that it has the capacity to handle adjudicatory cases referred by the Board, and that such could be accomplished with appropriate amendments to the PIA.

received over 750 complaints in 2018, while Iowa, which has a similar-sized population, received just over 120. Moreover, the New Jersey Government Records Council, which is the model closest to the one we recommend—in terms of single open records jurisdiction, board structure, and staff size—had a similar caseload to the Ombudsman's in 2018.

What we can say is that the best data we have available to project the caseload in Maryland is the Ombudsman's own caseload data for the past 42 months of operations. As we explained in our response above, the Ombudsman's caseload during that time has been quite consistent, averaging around 200 matters per year, and we have no reason to believe that expanding the Board's jurisdiction would result in a dramatic and sudden increase. The OAG's speculation on this point must stem either from the assumption that PIA disputes themselves will increase, or that the Ombudsman has not been receiving numerous disputes solely because there is not currently an enforcement option on the back end. We know of no support for either of these assumptions. *See also* footnotes 27 and 28, herein.

Comment. "*Even if the PIACB's caseload does not increase as much as we expect in raw numbers, the caseload would undoubtedly increase in legal complexity. . . . As a result, on those matters, the PIACB would have to issue thorough, detailed, legally complicated opinions, requiring far more time per case than the fee disputes that it currently adjudicates.*"

Response. We agree that expanding the Board's jurisdiction as we recommend would result in more complex issues coming before the Board than the ones it currently handles—indeed, the need for such review is the basis for our recommendation. That is one of the reasons we are recommending at least one additional attorney for the Board. The OAG is responsible for hiring the Ombudsman and the lawyers and other staff for the programs, all of whom to date have been extremely experienced and capable professionals. There is no reason to believe that the OAG would not be able to hire similarly well-qualified and competent attorneys to meet any additional staffing that may be required.

Moreover, the Ombudsman already deals with complex legal issues, in which she is capably assisted by the assistant attorney general who she shares with the Board. There is no reason to believe that one to two additional full time attorneys dedicated to the PIA dispute-resolution process would not be able to handle the Board's increased caseload and complexity. Moreover, as discussed above, we anticipate the complex Board matters to be balanced by a similar number of more simple matters.

Ultimately, the prospect of complex matters coming before the Board is to be welcomed—it will provide the Board with an opportunity to issue opinions on little-explored exemptions and other issues that will serve as guidance for subsequent matters on the same or similar topics. Such guidance is needed on many PIA exemptions that have not yet been thoroughly examined in case law, and it will serve both to make subsequent matters easier to resolve, and to guide PIA practitioners.

Comment. "*[I]f the intent is to grant the PIACB power to review disputed records in camera to determine whether a particular exemption applies, the members might also have to sort through piles of documents in rendering an opinion. All of that is asking a lot of an all-volunteer board, particularly when only one member of the board is required to be a lawyer. See GP § 4-lA-02(a)(3).*"

Response. As a threshold matter, and to reiterate, the professional, paid staff members of the Board will typically be the ones doing the "heavy lifting" when it comes to initial legal research, document review, and drafting in order to present the Board with a distilled and concise version of the dispute and the issues that require a final decision. This is the division of labor in every other open records board/commission model we examined. Moreover, although other board/commission models we have examined do not require any members to be an attorney, *see, e.g.*, New Jersey Statutes Annotated 47:1A-7, we believe that requiring at least two of the five PIACB members to be Maryland attorneys would be helpful, and have included language to that effect in our draft amendments, *see* Appendix E.

That said, we do expect that some PIA disputes coming before the Board will require a review of the documents at issue in order to determine the application of claimed exemptions, and have drafted a provision in the recommended legislation to that effect. *See* Appendix E. Indeed, the Ombudsman and her staff currently conduct such reviews when it is relevant and when the parties consent to the process. For the most part, these reviews have not been onerous and have proven extremely fruitful.

Even when the documents at issue are voluminous, a thorough review need not always entail examining every page in order to determine the appropriateness of an exemption. For example, depending on the circumstances, it may suffice for the Board to review a representative sampling of documents, and/or a descriptive index of the documents and the exemptions claimed. Courts often use those methods of review in order to conserve judicial resources, and we anticipate that in many such scenarios, the Board could as well. We have included language to that effect in our draft legislation. *See* Appendix E.

Comment. "[*O*]*ne possibility would be to grant the PIACB expanded jurisdiction over some - but not all - PIA disputes that the Ombudsman is unable to resolve,* [*such as disputes over lower fee amounts or fee waivers*]*."*

Response. We see little utility in expanding the Board's jurisdiction in a piecemeal fashion. For example, lowering the fee threshold for Board review might result in a few more fee matters coming to the Board, but would do nothing for the many kinds of other PIA disputes that are in need of resolution. Even the OAG's 2017 Report recognized the limited utility of such a proposal. *See* 2017 OAG Report at 12 (opining that solely expanding the Board's jurisdiction by lowering the fee threshold "will increase the number of cases the Board hears, but not meaningfully so" and "would not enhance the range of issues the Board has the opportunity to reach"). Similarly, expanding the Board's jurisdiction only to fee waivers would play a marginal role in PIA compliance and dispute-resolution broadly.

As discussed in our report, the vast majority of PIA disputes are not fee-related, and many disputes contain multiple issues that are intertwined. Only a comprehensive and accessible PIA review and dispute resolution mechanism such as we recommend will be able to meaningfully address the PIA disputes that cannot be resolved through mediation.

Comment. "*[A]nother option would be to place the PIACB and the Open Meetings Compliance Board ("OMCB") together under the umbrella of a single independent agency that could provide joint staff and attorney support or even to merge the PIACB and OMCB into a*

single independent commission on open government (much like the Ethics Commission), with designated staff and a general counsel's office."

Response. Most of the OAG's comments about our proposal point out how expanding the Board's jurisdiction will result in an increased workload for the Board, which might strain current resources. It is therefore somewhat surprising that the OAG suggests creating an entirely new entity with staff and attorneys, which would undoubtedly require more resources and institutional reorganization than we are recommending. Currently, the OAG provides staff to the Ombudsman, the PIACB, and the Open Meetings Compliance Board ("OMCB"). It certainly has the discretion to organize the staff that serve those entities into a single administrative unit, if it wishes.

We do not, however, see the need to create any new office, agency, or other new entity. The Ombudsman, PIACB, and OMCB already exist as independent units—from one another and from the OAG—and current internal measures are adequate to avoid conflicts of interest. Moreover, we do not believe there is a high degree of potential synergy between the OMCB and our recommended PIACB to warrant combining the two. Although both the PIA and the Open Meetings Act broadly serve the objectives of transparent government, the compliance and enforcement landscapes under the two laws are vastly different. Moreover, the OMCB is authorized only to issue advisory opinions—likely because open meetings violations usually involve events that have already happened—while we are recommending the PIACB have authority to review and issue binding opinions on live PIA disputes.

Comment. "[*W*]*e think that at least two additional attorneys would be necessary to meet the increased needs of the Ombudsman and PIACB under the proposal outlined in the preliminary findings.*"

Response. We do propose two additional staff, at least one of which should be an attorney. The Board will be reporting annually and can make requests for additional staffing as appropriate.

Comment. "[*W*]*e do not yet have a position about whether agencies should be affirmatively required to track and report information about their caseloads. As your preliminary findings point out, tracking may have many benefits in terms of evaluating PIA compliance and in gauging the need of agencies for additional resources. For informational purposes, however, we note that, in at least some cases, a requirement to track and report PIA requests may slow down an agency's response to requests. For example, agencies that frequently respond to oral requests from members of the press or others may have to ask those requesters to put their requests in writing so that they can be more easily tracked.*"

Response. To the extent that agencies regularly respond to oral requests for information, they need not require the request reduced to writing in order to make a simple notation that a request was received and a response provided. For agencies that have rapid and efficient information sharing practices, simple tracking still offers efficiency benefits, such as providing useful data about the frequency and types of requests received so as to better inform proactive disclosure practices, and ensuring institutional knowledge when staff turnover occurs. And for agencies that do not have such informal response practices, simple tracking can be expected to lead to more efficient handling of PIA requests and reduced response times. Moreover, tracking

would allow all agencies to present an accurate picture of PIA caseloads and demands—a crucial component of demonstrating responsive government and pinpointing need for additional resources.

Comment. "*We agree wholeheartedly . . . that agencies need adequate funding to hire personnel devoted, at least primarily if not solely, to the handling of PIA requests. The broader point is that responding to PIA requests and doing so accurately and on time has costs, both direct and indirect. . . . In considering possible amendments to the PIA, we thus urge that the benefits of any proposed changes be balanced with the costs (including the hidden costs) of compliance with those changes.*"

Response. Considering costs is important. However, the Legislature, by enacting the PIA, has already mandated that agencies comply fully. It is up to agencies to make informed and well-justified budget requests for additional resources if needed to ensure their ability to comply with their legal obligations. It may well be the case that agencies have felt little need to pursue additional resources for PIA compliance because there is currently no real consequence for failure to comply.

B. *Comments from the Maryland, Delaware, and District of Columbia Press Association* ("MDDC"), Rebecca Snyder, Executive Director (December 6, 2019).

Comment. "*We agree with many of the recommendations outlined in the report. However . . . [i]t is important that disputes will not require mediation, although we agree that mediation should always been offered as a first option. Our concern is that requiring a mediation may slow down the process when it is obvious that a clear opinion by the PIACB is needed.*" (emphasis in original).

Response. Our proposal requires a dispute to go to the Office of the Ombudsman as a first step in a comprehensive extrajudicial PIA dispute-resolution process for a number of reasons. It allows the Ombudsman an opportunity to assess the issues presented, gather follow-up information if needed, and make a determination whether mediation will be appropriate. Our experience suggests that for the majority of disputes, the Ombudsman's informal process will end up serving some useful end, be it in resolving some or all issues, or in distilling the central unresolved issue or issues into a form most readily and efficiently able to be resolved by the Board. Accordingly, we believe it is essential to the efficiency and effectiveness of the program to require the Ombudsman's Office as a first step.

Your concern about delay is well taken, and we believe our proposed process will avoid unnecessary delays to the extent possible. For example, if, after an initial consultation with the parties, the Ombudsman concludes she is unable to resolve the dispute, she will inform the parties of that fact and provide them with information for filing a complaint with the Board. In all cases, the Ombudsman must make a determination within 90 days of receiving the dispute—absent consent to an extension from the parties—as to whether the dispute has or has not been resolved. The Ombudsman's determination will trigger the possibility of Board review, and the parties will be provided with information about filing a complaint. Our proposed amendments include provisions to this effect. *See Appendix E.*

Comment. "*The* [*Preliminary Findings*] *report clearly lays out that the overall data provided by the surveyed agencies was lacking, partly because the agencies were not expected to track this data, and partly because PIA requests often take a back seat to other work in the agency's purview. Reporting by the agencies would almost certainly result in more focus to the disposition of requests, and, as the report notes, a "likely reduction in "MIA" requests," which is of particular concern for our members. We urge the Ombudsman to make agency reporting a formal recommendation.*"

Response. We are recommending that, in order to obtain uniform, consistent, and reliable information on PIA caseloads and dispositions, the Legislature should specify the data agencies must track and report, and require them to publish this data periodically on their websites to the extent feasible. *See* Section III.B, above.

Comment. "*The Ombudsman is a neutral party who can mediate disputes . . . and this role has been effective. We believe that the report recommendations will provide the office with more tools to encourage resolution of mediated cases by providing a fuller body of precedent from the PIACB. We believe a modest annual report to the legislature from the Ombudsman, identifying caseload and trends, would be helpful. On an informal basis, this already occurs.*"

Response. Annually since the Ombudsman program was created, the Ombudsman has included an appendix to the Board's Annual Report that includes program-level statistics about her caseload and practices, including types of disputes, category of parties, and the extent of outreach and training. The Ombudsman expects to continue this practice, but is not opposed to formalizing it in statute.

Comment. "*The Ombudsman could be more effective if custodians were more strongly encouraged, or even required, to share the potentially responsive records with the Ombudsman in the course of the mediation. Such records could be reviewed by the Ombudsman without being disclosed to the requester until/unless they are deemed public. This practice would help provide context for the mediation discussion, and improve the quality of advice. If the public body refused to provide information to the Ombudsman, she could send the case to the PIA Compliance Board, who could then make a ruling and potentially compel the agency to release the record.*"

Response. The Ombudsman from time to time has secured the parties' consent to review disputed records and provide her opinion as to the applicability of claimed exemptions; generally, this process has been fruitful. However, under our recommendation for expanded Board jurisdiction, the voluntary and informal nature of the Ombudsman's process will not change, and we believe it is important to preserve these aspects of the program.

The Board, instead, will have the authority to obtain contested documents for review, or, in appropriate cases, a descriptive index of those documents; this authority is more appropriate in the quasi-judicial setting in which the Board operates than in the informal mediation process. Of course, it may be that parties are more willing to voluntarily allow the Ombudsman to review and provide her opinion on contested documents when they are aware that such review might be required by the Board, to the extent the dispute is not resolved in mediation.

Comment. "*We also believe that the Ombudsman would be able to pinpoint problems within agencies more quickly if whistleblower protections were added to the PIA. Many times, rank and file staffers may have information about recordkeeping and maintenance of public records that would be useful to dispute resolution. Absent whistleblower protections, these staffers may not come forward due to fear of retaliation, and the whole community suffers.*"

Response. Whistleblower protections could be useful in the PIA context, to the extent that such protections do not already apply. However, we have not reviewed the law in this area or examined how such protections would be integrated and administered, and thus are not making any recommendation on this subject.

Comment. "*Maryland's deadline of 30 days to fulfill a request is one of the longest in the country. At the federal level, the deadline is 20 days, and in Virginia, the deadline is five business days. We recommend that Maryland's fulfillment period be brought to 10 days.*"

Response. Although considering changes to the statutory response deadlines within the PIA is outside the scope of our report as such, it suffices to say that, in the Ombudsman's experience, the statutory deadlines for responding to PIA requests seem to have little connection with an agency's ability, willingness, and/or motivation to comply with those deadlines. Thus we believe that shortening the deadlines alone will have little impact on an agency that has been inattentive to its internal processes or has under-prioritized PIA compliance.

Likewise, shortening the deadlines does nothing to help an agency that is working in good faith to respond to a very large request, but which is unable to secure an extension from the requestor. What is needed in both of these scenarios is not a truncated one-size-fits-all response deadline, but resolution by a decisional body that can apply the facts to a particular case and order appropriate relief. Our recommendation for a Board with comprehensive PIA jurisdiction provides this option, and we believe such a remedy will go much farther in resolving overall timeliness problems than changing the statutory deadlines.

Comment. "*The use of fee waivers is unclear based on the data provided by the interim report's survey. In our practical experience, public bodies across the state have widely varying, and sometimes conflicting, approaches to determining whether a fee waiver is justified based on the public interest.*

This inconsistency in the application of fee waivers across the state creates confusion and mistrust among requestors. We believe that clarification of the standards for fee waivers is important, and the federal government's FOIA standards requiring at least partial fee waivers if disclosure is in the public interest should be applied. Fees and costs should not be a prohibitive bar to the public's ability to monitor the activities of its state and local governments in Maryland."

Response. Considering changes to the fee waiver provisions of the PIA, as such, is outside the scope of our report. Nonetheless, we point out that—even under the current statute—agencies must give consideration to a requestor's affidavit of indigence or to other public interest factors, and must not deny a fee waiver request in an arbitrary or capricious manner. Although federal FOIA-related case law provides guidance on the types of public interest

factors that should be considered and how they should be weighed, similar guidance is lacking in Maryland.

Our recommendation would vest the PIACB with authority to review an agency's decision to deny a fee waiver request, thus providing it with the opportunity to develop and provide guidance on the relevant factors, and to ensure that custodians are making the determination on an individualized, case-by-case basis.

Comment. *"There are elements of the PIA that often require a balancing of privacy rights against the public's legitimate interest in the records. In our experience, disciplinary records of public employees where those records intersect with the public interest, confidential financial information / trade secrets, provisions of the Agriculture Article, active investigation exemptions, and discretionary deliberative exemptions are often used too broadly as a deterrent to public access. We recommend amending the PIA and the Agriculture Article to make it clearer that privacy, in all these contexts, is not an absolute consideration, and that the impact of disclosure must be balanced against the potential harm of withholding records whose disclosure may be in the public interest. . . . We believe the PIA should be amended to require custodians to consider those factors as part of their deliberation and articulate a specific harm that would result from disclosure, in addition to simply qualifying for these specific exemptions.*"

Response. As we discuss in Section II.B.1, above ("The Problem with the Status Quo"), in the Ombudsman's experience, agencies all too often assert discretionary exemptions with no real analysis and balancing of the public interest factors they are required by law to consider. We point out that GP § 4-343 permits a custodian to apply one of the PIA's enumerated discretionary exemptions *only* if they believe disclosure "would be contrary to the public interest." If the custodian's application of the exemption is challenged—either in court or through our recommended Board process—the custodian is required to articulate the reasons for determining that the public interest in withholding the public record outweighs the presumed public interest in disclosure. A Board with comprehensive jurisdiction as we recommend would be in a position, through its decisions on such matters, to develop a body of guidance that is currently lacking for many of the PIA's exemptions, both discretionary and mandatory.

C. *Joint Comments from the ACLU Maryland and the Public Justice Center*, Joseph Spielberger, Public Policy Counsel, ACLU of Maryland, and Debra Gardner, Legal Director, Public Justice Center (December 6, 2019).

Comment. "*We advocate to change 'may' to 'shall' in GP § 4-206(e), to compel agencies to comply with [the provision that permits custodians to waive fees based upon an affidavit of indigence]. Allowing agencies to routinely deny legitimate fee waiver requests sends the message that poor Marylanders are entitled to only a limited measure of transparency, whereas their wealthy counterparts can buy access to more public information.*

We also request more guidance for agencies administering public interest waivers. In our experience requesting public interest waivers, there remains a great deal of confusion among custodians regarding what is considered to be in the public interest."

Response. As we noted in a response to one of MDDC's comments, above, considering changes to the fee waiver provisions of the PIA is outside the scope of our report as such. Nonetheless, we point out that our recommendation would vest the PIACB with authority to review an agency's decision to deny a fee waiver request in any context, thus providing the Board with the opportunity to develop and provide guidance both on the statute's standalone indigence factor, and on the other public interest factors for granting a fee waiver.

Comment. "*We agree that the $350 threshold to fall within the PIA Compliance Board's jurisdiction for a dispute is too high and should be lowered. . . . Lowering the threshold will bring more fee-related disputes under the Board's jurisdiction, and ensure more equitable treatment and transparency for requestors with limited means.*"

Response. Our proposed amendments that implement our recommendation for comprehensive Board jurisdiction reduce the fee threshold to $200. *See* Appendix E.

Comments. "*We . . . urge that the Board be granted the authority to standardize duplication costs for all government entities based on actual costs of photocopy reproduction.*"

Response. This suggestion is not within the scope of our report as such. We note, however, that we have received other comments likewise questioning the wide disparity in agencies' fee practices and charges. The PIA requires all fees to be reasonable, and a "reasonable fee" is defined as "a fee bearing a reasonable relationship to the recovery of actual costs incurred by a governmental unit." GP § 4-206(a)(3). Presumably, any fee charged for photocopy reproduction must be based on the actual costs of that reproduction, and a custodian should be prepared to support the photocopying charge. In our proposal, the Board could review all such charges when a fee is more than $200. *See* Appendix E.

Comment. "*We call for shortening the* [*PIA's*] *initial response time to 5 business days, and the final written response to 15 calendar days.*"

Response: See our response to MDDC's similar comment, above.

D. *Joint Comments from the Maryland Association of Counties ("MACo") and the Maryland Municipal League ("MML")* (December 16, 2019).

Comment. **"***MACo and MML are concerned that while the scope of the survey only included 23 state agencies and no local agencies, the Report's recommendations apply to both to the State and local jurisdictions. . . . MACo and MML do not believe that the survey data is suitable for creating recommendations regarding local government Public Information Act (PIA) issues.*"

Response. MACo and MML misunderstand the basis for our recommendation for a comprehensive PIA dispute resolution process. The recommendation to expand the Board's jurisdiction is not primarily based on the PIA caseload data we received from State reporting agencies; in fact, we recognize and explain the many limitations of this data. While we considered the reporting agencies' data as one of many sources of information, the principal basis for our recommendation to expand the Board's jurisdiction is based on the Board's minimal caseload and the Ombudsman's caseload over nearly four years of operation. That

data reveals a significant number of unresolved disputes which are nearly evenly split between State and local agencies. Any expanded dispute resolution remedy should be comprehensive, *i.e.*, include all agencies subject to the PIA so as to have the fullest impact.

Comment. **"***MACo and MML are concerned about the recommendations regarding expansion of the Board's authority. The original legislation creating the Board set a $350 threshold regarding fee disputes only after much debate and consideration by stakeholders. The threshold was set at that level to reflect cases of significant fiscal impact to records requestors.*

People who wish to contest other aspects of a records request may either use the voluntary mediation provided through the Ombudsman or raise the issue in Maryland court. We do not believe creating a secondary and redundant enforcement step through the Board will reduce costs and staff time for local governments, but rather increase them. MACo and MML do not believe the Board's enforcement authority should be expanded."

Response. The first draft of the legislation creating the Board actually gave it broad authority to resolve all PIA disputes, but that authority was drastically narrowed to the $350+ fee jurisdiction, which has resulted in few complaints over nearly four years of operation, and general underutilization of the Board. At the same time, the Ombudsman regularly receives disputes involving fees less than $350, which pose a financial hardship to many PIA requestors. Our recommendation for comprehensive Board jurisdiction includes reducing the fee review threshold to $200. *See* Appendix E.

A Board vested with comprehensive PIA jurisdiction will not be a "redundant enforcement step," because it would provide a relatively simple and comprehensive remedy for requestors and agencies who would not or could not otherwise seek judicial review, and whose disputes cannot be resolved through voluntary Ombudsman mediation. For reasons outlined in our report, the judicial review option is largely inaccessible for many PIA requestors due to factors such as cost, complexity, necessity of an attorney, and time requirements. This leaves the Ombudsman as the only alternative dispute resolution option for most PIA disputes, but the Ombudsman's process is completely voluntary, offers no decision-making or enforcement remedy, and results in many PIA disputes going unresolved.

Comment. **"***MACo and MML believe that local governments should retain their existing discretion regarding the issuance of fee waivers but could consider enhancing education regarding fee waivers*."

Response. It is true that the decision to grant a fee waiver, under current law, is left to the discretion of the agency.[53] However, the agency may not exercise that discretion in an arbitrary or capricious manner. In the Ombudsman's experience, many agencies refuse to grant fee waivers in a blanket fashion, instead of carefully weighing indigence and other public interest factors on a case-by-case basis. Moreover, for the reasons given in our report and in the response above, judicial review of an agency's fee waiver decision is largely inaccessible for many requestors, especially where many fee waiver requests come from indigent individuals.

[53] *See* GP § 4-206(e).

A Board with comprehensive PIA jurisdiction—including over fee waivers—would ensure that agencies are making this individualized analysis, and would be in a position to expand upon the necessary public interest factors that should be considered; currently, there is little State law regarding the matter.

Comment. "*MACo and MML strongly oppose any recommendation allowing the Board to review documents subject to a discretionary or mandatory denial. Currently, contested documents can be reviewed in camera by a judge as part of a formal judicial proceeding. . . . This provides privacy protections for the subject of the document as well as critical liability protections for record custodians. . . .*

However, the Report's recommendation would allow appointed individuals, who are not part of the judicial system, to compel document production from local governments outside of a judicial proceeding. This could expose local governments to significant liability risks if a custodian releases a document based on the Board's order and a court subsequently holds that the document release should have been denied. There is no exemption in many state and federal laws that would allow disclosure outside of the court system to an appointed official."

Response. First, any meaningful PIA dispute-resolution remedy must include the ability to review an agency's application of exemptions to withhold public records; as explained in the previous two responses, the judicial review remedy is not practically accessible to many PIA requestors. Accordingly, any comprehensive expansion of the Board's jurisdiction should include this authority. Such review would require Board staff to examine the documents at issue or, in appropriate cases—such as where a custodian believes federal law prevents disclosure of the document even to Board staff—to review a descriptive index of the documents being withheld. Our proposed amendments permit an agency to provide only a descriptive index of withheld documents in appropriate cases, and require that the Board protect as confidential all information submitted to it for review. *See* Appendix E.

The Board functions as an administrative, quasi-judicial body. And, as with many such bodies, it is authorized to make findings of fact and conclusions of law, with the assistance of competent professional legal staff. Moreover, any Board decision is appealable to the circuit court. Therefore, if an agency truly disagrees with a Board order that requires it to disclose certain records, and is concerned about the liability risks of doing so, it can seek judicial review of that decision before actually disclosing those records.

Comment. "*MACo and MML have concerns over making Ombudsman mediation a mandatory part of the PIA process. Currently, using the Ombudsman is voluntary for both parties and not directly connected to Board or judicial review. We believe that part of the Ombudsman's success is because of that disconnect and because parties who voluntarily agree to mediation are generally acting in good faith. However, if the mediation is mandatory, it becomes just another link in the chain in the review process and would likely lose its effectiveness. Parties will start treating it more as part of the adversarial proceeding process and less like a valuable form of alternative dispute resolution. It would also significantly delay a final decision on a request to view a document—the opposite of the PIA's stated intent. MACo and MML support keeping the Ombudsman mediation process voluntary.*"

Response. Our proposal does not make Ombudsman mediation a mandatory part of the PIA process. No requestor or agency need ever avail themselves of the Ombudsman process if they do not wish to do so. This is the case under the current law, and would remain unchanged under our proposal. Moreover, under our proposal, the Ombudsman's process does not lose its voluntary and informal character. Rather, it is only when a dispute cannot be resolved by that process—or when a party refuses to meaningfully participate in that process—that the Board remedy becomes available.

However, for the reasons explained in our report, we believe that mediation will become more effective because the parties will be all the more likely to cooperate in the Ombudsman's process, since they will want to avoid the possibility of a Board decision that may not be favorable to them. In this way, parties will have incentives to seek common ground in mediation that they do not have now.

Comment. "*MACo and MML believe that the current voluntary Ombudsman mediation process has been extremely successful. As the Report notes, for FY 2019 the Ombudsman enjoyed an overall success rate of 74%. This is a testament to both the current Ombudsman and the structure of the mediation process.*"

Response. As explained in our report, the 74% "success" rate of the Ombudsman's program does not consist solely or even principally of matters in which parties were satisfied with the outcome of mediation, nor does it in any sense reflect a "success rate" in resolving disputes. *See* Section II.B.3 at 14, and footnote 27, above. In fact, this figure includes unresolved matters that could have gone to the current Board but did not, many other matters that were not resolved to the parties' satisfaction, but which, for unrelated reasons, were judged unlikely to be submitted to the Board, as well as those that were resolved—all of these scenarios are included in the 74% figure.

In short, the only significance to the 74% figure is that it reflects the Ombudsman's assessment of the percentage of mediation matters over the past nearly four years in which she judged the parties unlikely to have availed themselves of a comprehensive Board remedy. The other side of this coin is that 26% of disputes coming to the Ombudsman were judged in need of a comprehensive review/enforcement remedy, and were judged likely to be submitted to the Board by one or both parties.

Our recommendation that the Board's jurisdiction be expanded does not discount the benefits offered by the Ombudsman. Rather, we believe that the recommendation will actually enhance the effectiveness of the Ombudsman's process, as explained in the previous response, while providing an accessible, cost-effective, and comprehensive remedy for the persistent number of PIA disputes that cannot be resolved through voluntary mediation alone and for which a decision is desired.

E. *Miscellaneous Comments.*

Comment. "*I would be interested in more detail on how it was determined that* [*certain unresolved cases in the Ombudsman's case history*] *would likely go to the Board instead of straight to Circuit Court. I can think of scenarios where a requestor would skip the iterative*

Board step and go straight to court." Michael B. Swygert, Director of the Records Management Division of DGS (Dec. 4, 2019).

Response: Under current law, aggrieved requestors can go straight to court without accessing the Ombudsman or Board, but very few do so. As discussed above, the judicial process is largely inaccessible to the vast majority of requestors due to the expense and time required. This is the primary reason why an extrajudicial PIA review and decisional mechanism is needed. We do not, in any event, believe that providing an accessible extrajudicial review remedy will result in parties seeking out the less accessible and more costly judicial option.

Comment. "[*W*]*e would be interested in learning about any software solutions* [*for internal PIA processes*] *that are being discussed and opportunities for piggyback purchasing. Alternately, if the State decides to develop its own software tool, we would like to ask that consideration be given to making it available to local governments as well.*" Sara B. Visintainer, Chief of Staff, Caroline County Commissioners Office (Nov. 18, 2019).

Response. We agree. Information-sharing among custodians is important and will enhance agencies' ability to improve their processes. For examples of the ways in which some State and local agencies are improving their processes through the use of technology, see our discussion in Section III above.

Comments. "*1. On page 7 of the PIA report, the graphs representing partial and full denials state that DJS has inconsistent data. Our data was accurate, but did not match the criteria that was provided in the survey. 2. On page 17 of the PIA report, the footnote states that DJS "does not currently maintain log or database, but would consider doing so." Beginning on December 1, 2019, DJS plans to implement a data collection system that will track future PIA requests and responses.*" Eric Solomon, Director of Communications, DJS (Nov. 8, 2019).

Response. We appreciate the update on your plans, which we incorporated in our discussion in Section III. *See* footnote 46, herein.

Comment. "*After reading the PIA* [*Preliminary Findings*] *Report, I was frustrated because the report is not consistent with the information MHEC submitted. MHEC had NO late response times, for 10 or 30 day responses (see attachment). Yet, the report says our data was internally inconsistent for the 30 day response. We also reported NO fees reported on the survey we submitted, and yet the report stated our data was internally inconsistent.*" Rhonda Wardlaw, Director of Communications, MHEC (Nov. 7, 2019).

Response: We note that you made a supplemental submission that rendered your data internally consistent. Your submission was sent too late to be included in the Preliminary Findings, but we have noted the correction in this Final Report. *See* footnote 39.

Comment. "*I'm confused as to whether the proposal involves either 1) 'binding arbitration' by the PIACB or 2) another level of review by the PIACB that could be appealed to the Circuit Court. If 1), I would not be in favor of it, especially if damages could be awarded. If 2), then would the Circuit Court review be an administrative agency review on the record?*" Kemp W. Hammond, Assistant County Attorney, Anne Arundel County Office of Law (November 1, 2018).

Response. We note that this comment was received before we published our Preliminary Findings and Recommendations on November 6, 2019, and hope that our proposal is now clear. Our recommendation is not to require "binding arbitration" by the Board, but rather to vest the Board with comprehensive jurisdiction to review and issue binding administrative decisions on PIA disputes that cannot be resolved through the Ombudsman's informal mediation program. The Board's decision will be appealable to the circuit court for review of an administrative agency's decision, and that review will be on the record. *See* Md. Rule 7-201 (permitting judicial review of an order of an administrative agency); *Priester v. Bd. of Appeals of Baltimore Cty.*, 233 Md. App. 514, 533 (2017) (explaining that judicial review of an administrative agency's decision is "narrow," and will be affirmed "if there is substantial evidence in the record as a whole to support the agency's findings and conclusions" and if the decision is based on a correct conclusion of law).

Comment. *"[T]here are some effective alternatives to the dispute resolution process as set up by the attorney general's office. Here is an example: the venue. The parties involved in a mediation should be able to jointly choose the venue. . . . The parties involved should also have the option to select a mediator or additional co-mediators and not have only one choice: Lisa Kershner. I think a mediator outside the attorney general's office might be better for me . . . .*" Kyle Ross (Oct. 30, 2019).

Response. The Ombudsman is appointed by the Attorney General, but is independent from that Office. Currently, the Legislature has provided for only one Ombudsman position, and only one position has been funded. That said, parties who choose to mediate with the Ombudsman can always agree on a venue of their choice for any in person meetings. Apart from the Ombudsman, there are many other mediation programs operating privately, and, for those who have filed suit, through the judicial process.

Comment. "*The Office of the Public Access Ombudsman ("Ombudsman") is totally ineffective and a waste of taxpayer resources. The Ombudsman rarely facilitates any resolution and only serves to delay or distract good faith PIA requestors from pursuing effective means of resolution through the court system. The result of having only one acting Ombudsman leads to cozy relationships between agencies that most frequently offend against the PIA and leave requestors feeling that the mediation is rigged.*" Theresa Johnson (Oct. 23, 2019).

Response. See our response immediately above. In addition, we believe that our recommendation for vesting the Board with comprehensive jurisdiction to decide disputes that cannot be resolved by the Ombudsman will ensure accountability, independence, and compliance with the PIA. Moreover, requestors may always seek relief through the judicial process without first attempting mediation through the Ombudsman; this is the case under current law, and would remain so under our proposal.

Comment. "*My problem . . . lay in the quicksand between recordkeeping and disclosure laws, and you reportedly had no jurisdiction over the former, without which you had no reach into the latter . . . [A]nything the State can or will do to facilitate enforcement of PIA laws, including by providing the Ombuds with jurisdiction over the underlying recordkeeping laws, without which the PIA is toothless . . . would be an improvement.*" Andrew Strongin (Sept. 10, 2019).

Response. We recognize the close connection between records management/retention and agencies' PIA response processes. *See* discussion in Section III.C, above. It is true that the Ombudsman plays no role in the State's records retention laws, and has no enforcement authority over any laws, including the PIA. Examining records retention enforcement options is beyond the scope of this report. We note, however, that State Archives and the Department of General Services offered four trainings in 2019 across the State on records retention requirements and practices. We are interested in the possibility of conducting joint trainings with DGS and Archives in the future that cover both records retention and PIA requirements and practices.

V. Conclusion

The Budget Committees commissioned this report because they are "interested in ensuring that the [PIA] increases government transparency through a robust review and disclosure process," and also in ensuring that agencies "have sufficient resources and sufficient procedures to respond to reasonable and legal information requests." To that end, they requested concrete information on topics that heretofore have been discussed largely anecdotally or in the abstract—specifically, information about the reporting agencies' PIA caseloads and related procedures, and on the need for and feasibility of PIA compliance monitoring and expanded extrajudicial dispute resolution.

This report has allowed the PIACB and Ombudsman to bring their nearly four years of operational PIA dispute resolution experience to bear on these questions. While the data we received from the State reporting agencies provides a clearer picture of the diversity in overall PIA caseloads and procedures—a diversity we believe likely exists at the local and municipal levels as well—it is limited with respect to providing a full understanding of their PIA performance because much of the data is either unavailable or inconsistent.

Data from the Ombudsman's caseload provides some of this missing detail, not only for the reporting agencies, but for agencies across State and local government. What emerges on the compliance monitoring front is that many agencies likely are not tracking their PIA caseloads in any detailed or uniform way, but are not opposed to doing so. Because this kind of tracking can benefit agency PIA compliance internally, and lead to more informed decisions about resource allocation externally, we recommend that the Legislature specify the data agencies must track and report, and require agencies to publish this data periodically on their websites to the extent feasible.

On the enforcement front, it is clear there is no generally-accessible remedy for PIA disputes in need of a decision. This void not only leaves many individual citizens and organizations without any practical remedy for their unresolved PIA disputes, but also undermines the effectiveness of the Ombudsman program.

Thus, our recommendation is to expand the Board's jurisdiction to review and decide PIA disputes that are unresolved after reasonable efforts have been made by the Ombudsman. By providing the Board with the authority originally envisioned for it, with the crucial addition that the Ombudsman's process will be a required first step, the Legislature will create a generally-accessible and comprehensive PIA remedy that:

1) preserves and maximizes the genuine, potential benefit of the Ombudsman program and the Board;

2) provides a meaningful remedy where none presently exists; and

3) establishes an integrated dispute resolution system that is likely to lead to long term benefits for Maryland citizens and their State and local governments.

Ultimately, the Legislature needs to determine if it wishes to provide for independent, meaningful oversight of PIA compliance and implementation. If it does, we believe our recommendations are by far the most cost-effective way to do so.

Respectfully submitted,

John H. West, Chair
Public Information Act Compliance Board

Lisa Kershner, Public Access Ombudsman
Office of the Public Access Ombudsman

Appendices
Table of Contents

Appendix A.
Committee Narrative
2019 Session

Cover Page extracted

Report on the Fiscal 2020 State Operating Budget (HB 100) And the State Capital Budget (HB 101) And Related Recommendations

By the Chairmen of the Senate Budget and Taxation Committee and House Appropriations Committee

Joint Chairmen's Report
Annapolis, Maryland
2019 Session

Page 97
extracted

C81C
Office of the Attorney General

Committee Narrative

OFFICE OF THE ATTORNEY GENERAL

C81C00.01 Legal Counsel and Advice

Public Information Act Transparency and Reporting: The committees are interested in ensuring that the State's Public Information Act (PIA) increases government transparency through a robust review and disclosure process. The committees also understand that agencies must have sufficient resources and sufficient procedures to respond to reasonable and legal information requests from the public and press. To that end, the committees would like additional information on the volume of requests being made under PIA. The committees request that the PIA ombudsman and the PIA compliance board in the Office of the Attorney General (OAG) work with the Executive Branch cabinet-level agencies to prepare a report that provides the following data by agency for the period from July 1, 2018, to September 30, 2019:

- the number of PIA requests;
- the disposition of requests;
- the average response time;
- the number of fee waivers requested and the number granted; and
- the number of mediation requests and the number of mediations conducted.

In addition, the PIA ombudsman and PIA compliance board should include in the report an analysis of the utility and feasibility of State cabinet-level Executive Branch agencies publishing periodic self-evaluations of their PIA performance as well as the utility and feasibility of other PIA compliance/monitoring and extrajudicial enforcement processes, such as those employed by federal agencies pursuant to the Freedom of Information Act. This report should also include discussion of the current training, processes, and procedures, including, but not limited to, record retention and record management practices and technologies used by cabinet-level Executive Branch agencies to handle the PIA requests. The final report of the PIA ombudsman and the PIA compliance board shall be published and submitted to the committees by December 31, 2019. The PIA ombudsman and PIA compliance board shall set such interim deadlines as may be necessary to publish their final report.

Information Request	Author	Due Date
PIA transparency and reporting	OAG	December 31, 2019

Appendix B.
Survey Instruments and Cover Letter to Agencies

STATE OF MARYLAND
OFFICE OF THE
PUBLIC ACCESS OMBUDSMAN

STATE OF MARYLAND
PUBLIC INFORMATION ACT
COMPLIANCE BOARD

May 13, 2019

Via email: «Secretary_Email»

The Honorable «Name»
Secretary «Agency»

Dear Secretary «Secretary»,

Greetings from the Office of the Public Access Ombudsman ("Ombudsman") and the Public Information Act Compliance Board ("PIACB"). In an effort to better understand the practices and needs of your Department in performing its Public Information Act ("PIA") duties, we have been asked to collect certain information by the Chairmen of the Senate Budget and Taxation Committee and House Appropriations Committee. *See* Committee Narrative C81C in the Report on the Fiscal 2020 State Operating Budget and the State Capital Budget and Related Recommendations ("Joint Chairmen's Report"), attached. Accordingly, we are attaching two questionnaires for your Department to complete and return to us.

Quantitative Questionnaire. First, the Quantitative Questionnaire requests basic information about the PIA requests your Department processes. Note that the Joint Chairmen's Report requests data for the time period July 1, 2018 to September 30, 2019. However, in light of our December 31, 2019 final report deadline, we are breaking that time period into two reporting periods as follows:

- By July 31, 2019, please send us your July 1, 2018 – June 30, 2019 data;
- By October 31, 2019, please send us your July 1, 2019 – September 30, 2019 data.

Please note that the data you report should encompass all agencies, offices, and divisions operating within or under your Department's auspices. We understand that gathering this data for a largely retrospective time period may present certain difficulties, depending on the extent to which your Department currently documents its PIA processes. We nonetheless encourage you to compile and report past data as completely as possible, while implementing practices that accurately capture the requested prospective data.

Qualitative Questionnaire. Second, the Qualitative Questionnaire requests your responses to questions about your Department's PIA and records-retention and management practices. Please send us your responses to the Qualitative Questionnaire by July 31, 2019. If possible, please complete both questionnaires in the format we have provided. You may send completed questionnaires to Janice Clark, Administrative Officer for the Ombudsman and the PIACB, by email: jclark@oag.state.md.us.

200 Saint Paul Place ❖ Baltimore, Maryland 21202-2021
Telephone Number 410-576-6560 ❖ Main Office Toll Free (888) 743-0023
Telephone for Deaf (410) 576-6372

We intend to check in with you throughout the process and to provide you with an opportunity to review and comment on our draft report to the joint committees by the end of 2019. Thank you in advance for your cooperation, and do not hesitate to contact us with questions along the way.

Sincerely,

Lisa Kershner
Public Access Ombudsman

John "Butch" West
Chair, PIACB

cc: «Principal_CounselAAG», «Counsel_Title», via email: «Counsel_Email»
«PIA_Contact», PIA Contact, via email: «PIA_Email»
«Addl_Contact», «Contact_Title», via email: «Contact_Email»

Encl: Committee Narrative
Quantitative and Qualitative Surveys

Department Qualitative Survey

*****If appropriate, please detail the relevant practices of your Department's agencies, offices, or divisions*****

Department Name: _____

PIA Response Process

1. Has the Department designated a PIA contact? If so, has the contact information been provided to the Office of the Attorney General and is it up-to-date? How does the Department make this contact information available to the public? (*See* Md. Code Ann., General Provisions Art. ("GP"), § 4-503).
2. Does the Department have "back-up" PIA coordinators who can fill this role in the event the primary contact/coordinator is out or unavailable?
3. How does the Department receive incoming PIA requests? Does the Department publish information as to how to submit PIA requests? If so, how?
4. Does the Department provide or participate in PIA trainings? If so, how often, in what format, conducted by whom, and attended by whom?
5. Does the Department maintain a list of records that are immediately or readily available on request? If so, is the list made available to the public? How? Is the list up-to-date? (*See* GP § 4-201(c)).
6. Does the Department's search for records potentially responsive to a PIA request extend to work-related records on private or remote devices, such as text messages? If so, please describe the Department's policy and/or practice in retrieving records from private or remote devices.
7. Does the Department have any written policies or regulations that deal with PIA fees? If so, please provide a citation to any applicable regulations, or a copy of any written policy.
8. Does the Department have any policy or practice with regard to requests for PIA fee waivers on the basis of indigency and/or on the basis of public interest? If so, please provide a copy of any written policy or description of applicable practice.
9. Does the Department regularly inform PIA requestors—either in the 10-day letter or in the final response—about remedies and resources available under the PIA? (*See* GP § 4-203(c)(1)). If so, please describe or attach a copy of the information you regularly provide.
10. Does the Department regularly use any specialized software, equipment, or other technology in its PIA response process? E.g., does the Department use software in gathering, reviewing, and/or redacting requested records? Does it use software in calculating or tracking fees? Does it maintain an electronic log or database of PIA requests it receives and the disposition of these requests? If so, please describe.
11. Does the Department need any additional resources—including training—in order to efficiently meet its obligations under the PIA? If so, please describe your current or anticipated needs in this regard.

12. Is it feasible for the Department to perform periodic self-evaluations of its PIA caseload and performance? Please explain.
13. What is the Department's perspective on expanding PIA compliance-monitoring and extra-judicial review options in the State? Please explain.

Records Management/Retention

1. Does the Department have a designated records officer? (*See* Md. Code Ann., State Government Art., § 10-610, and COMAR 14.18.02). If so, does the Department's records officer work in conjunction with its PIA coordinator or otherwise play any role in the PIA response process? If so, please describe.
2. Are your Department's records described on one or more approved record retention schedules filed with State Archives? If so, when were those schedules last reviewed and/or updated? Please attach a copy.
3. How many divisions, agencies, or offices in your Department do not have an approved record retention schedule filed with State Archives? Please list.
4. Does the Department conduct or participate in any training regarding record retention requirements, record maintenance, or related topics? If so, please describe the frequency and scope of such trainings.
5. Does the Department have any written policy or practice regarding the retention and maintenance of work-related records that may be created, received, or maintained on private or remote devices used by its employees or officials? If so, please attach a copy of such policies or describe the Department's practice.
6. Does the Department have any written policy or practice relating to the retention or management of work-related emails and/or text messages? If so, please attach a copy of any applicable written policy or describe the Department's practice.
7. Does the Department have any written policy or practice relating to the retention or retrieval of work-related social media posts/content? If so, please attach a copy of such policy or describe your current practice.
8. Does your Department need any additional resources—including trainings—in order to efficiently manage its records retention, maintenance, and retrieval practices? If so, please describe your current or anticipated needs in this regard.

Department Quantitative Survey

Department Name:	**Reporting Period: July 1, 2018 - June 30, 2019**
Data category	**Number**
PIA requests received	numerical response
Disposition: not the custodian of requested records	numerical response
Disposition: no responsive records exist	numerical response
Disposition: partial denial (includes redactions)	numerical response
Disposition: full denial (no responsive records disclosed)	numerical response
Disposition: full disclosure (all responsive records disclosed)	numerical response
Disposition: other (decribe in comments section below)	numerical response
Fees: requests for which fee was charged	numerical response
Fees: requests for which no fee was charged	numerical response
Fees: fee waivers requested	numerical response
Fees: fee waivers granted	numerical response
Fees: other (decribe in comments section below)	numerical response
Response time: initial response within 10 business days of receipt	numerical response
Response time: initial response outside 10 business days of receipt	numerical response
Response time: final response within 30 days of receipt	numerical response
Response time: final response outside 30 days of receipt	numerical response
Response time: final response for which extension was requested	numerical response
Response time: other (describe in comments section below)	numerical response

Comments category	**Comments**
Disposition	
Fees	
Response time	

Department Quantitative Survey

Department Name:	**Reporting Period: July 1, 2019 - Sep. 30, 2019**
Data category	**Number**
PIA requests received	
Disposition: not the custodian of requested records	
Disposition: no responsive records exist	
Disposition: partial denial (includes redactions)	
Disposition: full denial (no responsive records disclosed)	
Disposition: full disclosure (all responsive records	
Disposition: other (decribe in comments section below)	
Fees: requests for which fee was charged	
Fees: requests for which no fee was charged	
Fees: fee waivers requested	
Fees: fee waivers granted	
Fees: other (decribe in comments section below)	
Response time: initial response within 10 business days of receipt	
Response time: initial response outside 10 business days of receipt	
Response time: final response within 30 days of receipt	
Response time: final response outside 30 days of receipt	
Response time: final response for which extension was requested	
Response time: other (describe in comments section	

Comments category	**Comments**
Disposition	
Fees	
Response time	

Appendix C.
Preliminary Findings

Published November 6, 2019

STATE OF MARYLAND
OFFICE OF THE
PUBLIC ACCESS OMBUDSMAN

STATE OF MARYLAND
PUBLIC INFORMATION ACT
COMPLIANCE BOARD

Report on the Public Information Act: Preliminary Findings and Recommendations

Submitted by the Public Access Ombudsman and
Public Information Act Compliance Board pursuant to
Committee Narrative in the Report on the Fiscal 2020
State Operating Budget and the State Capital Budget

November 6, 2019

I. Introduction

The Report on the Fiscal 2020 State Operating Budget (HB 100) and the State Capital Budget (HB 101), published by the Chairmen of the Senate Budget and Taxation Committee and House Appropriations Committee in April 2019, asked the Office of the Public Access Ombudsman ("Ombudsman") and the Public Information Act Compliance Board ("Board" or "PIACB") to collect and report data on Public Information Act ("PIA") caseload and compliance from 23 State cabinet-level agencies (the "reporting agencies"),[1] and to make recommendations on ways to improve statewide PIA monitoring, compliance, and enforcement.

With regard to the reporting agencies, the Ombudsman and the Board (collectively "we") were asked to collect the following information for the 15-month period from July 1, 2018 through September 30, 2019:

- The number of PIA requests received;
- The disposition of those requests;
- The average response time;
- The number of fee waivers requested and granted;
- The number of Ombudsman mediation requests and the number conducted;
- Information on PIA response processes and procedures, including training;
- Information on records management processes and procedures, including training.

Due to the imminent reporting deadline, and because a portion of the reporting period was prospective, we split the process of collecting the data into two phases: 1) we requested data for the first 12-month period—July 1, 2018 to June 30, 2019—to be sent to us by July 31, 2019; and 2) we requested data for the remaining 3 months—July 1, 2019 to September 30, 2019—to be submitted by October 31. The survey data discussed in these preliminary findings are for the first 12 months of the reporting period only—that is, for the period from July 1, 2018 through June 30, 2019 ("FY 2019"). We are still receiving data for the last 3 months of the period.

On the PIA monitoring, compliance, and enforcement front, we were specifically asked to analyze the desirability and feasibility of:

- Requiring the reporting agencies to periodically self-report information related to their PIA caseload and performance; and
- Enhanced extrajudicial PIA enforcement processes, such as those used by other states, and by federal agencies under the Freedom of Information Act ("FOIA").

Our final report is due by December 31, 2019, and these preliminary findings and recommendations are published for the purpose of providing interested parties an opportunity to

[1] The reporting agencies do not include all State agencies, but, instead, those that comprise the Governor's Executive Council, as follow: Department of the Environment (**MDE**); State Police (**MSP**); Department of Transportation (**MDOT**); Department of Health (**MDH**); Department of Education (**MSDE**); Department of Labor (**DLLR**); Department of Public Safety and Correctional Services (**DPSCS**); Secretary of State (**SOS**); Department of Natural Resources (**DNR**); Department of General Services (**DGS**); Department of Agriculture (**MDA**); Department of Housing and Community Development (**DHCD**); Department of Human Services (**DHS**); Department of Planning (**Planning**); Department of Commerce (**Commerce**); Department of Juvenile Services (**DJS**); Department of Information Technology (**DOIT**); Military Department (**Military**); Department of Aging (**Aging**); Department of Veterans Affairs (**Veterans**); Higher Education Commission (**MHEC**); Department of Disabilities (**MDOD**); and Department of Budget and Management (**DBM**).

submit comments on a more informed basis in advance of our final report. Please send all comments by December 6, 2019, by email to: PIA.Ombuds@oag.state.md.us, referencing "Comments" in the subject line, or by regular mail to:

Office of the Attorney General
Attn: Public Access Unit
200 St. Paul Place
Baltimore, MD 21202

A. Methodology and Information Sources

To collect the requested quantitative data from the reporting agencies, we sent each agency a survey instrument in the form of a spreadsheet. To collect and analyze qualitative data related to enhanced PIA monitoring and extrajudicial enforcement processes, we gathered information from a number of sources, including:

- The Ombudsman's caseload and case outcomes from the beginning of the program in April 2016 through September 2019;
- The Board's caseload and outcomes since it began operations in March 2016 through August 2019;
- The Ombudsman's 2019 stakeholder survey;
- Data from the Office of Administrative Hearings ("OAH") for 2013-2015;
- Discussions with State Archives and the Department of General Services-Records Management Division ("DGS");
- Interviews and other information from the FOIA Ombudsman and from relevant open records dispute resolution programs in six other states;[2]
- The Final Report on the Implementation of the Public Information Act, Office of the Maryland Attorney General (Dec. 2017); and
- Comments received on this Committee Narrative project since August 2019.

We also rely on the combined institutional experience of the Ombudsman and the Board, both of which have been in operation for more than three years. The Ombudsman, in particular, is in a unique position to draw upon observations and insights gained from three years of deep and varied interactions with a host of requestors and agencies around the state. This provides us an institutional appreciation of and perspectives on the challenges faced by both the requestor and agency communities.

B. The Maryland Public Information Act ("PIA") Overview

The PIA is Maryland's chief open records law. Its central purpose is to provide members of the public with a broad right of access to government records with the least cost and delay, unless a specific exemption requires or allows some or all of a record to be withheld. To this end, the PIA sets time limits in which an agency must issue its initial and final written response—10 business and 30 calendar days, respectively, as a general rule.

[2] Specifically, we researched the Connecticut Freedom of Information Commission, the Hawaii Office of Information Practices, the Iowa Public Information Board, the New Jersey Government Records Council, the Pennsylvania Office of Open Records, and the Utah State Records Committee.

The PIA permits an agency to charge a reasonable fee to recoup its actual costs in responding to a record request, including time and labor on a prorated basis after the first 2 hours spent gathering or preparing records for production. Importantly, the PIA directs agencies to give consideration to any fee waiver request based on indigence, or any other factors that may indicate that waiver is in the public interest.

Currently, PIA disputes may be resolved in circuit court by way of a civil action filed by an agency or requestor,[3] or through limited alternative dispute resolution ("ADR") options created by the Legislature in 2015. These ADR options consist of: 1) mediation through the Office of the Public Access Ombudsman, in which the Ombudsman seeks to help parties reach a voluntary resolution by agreement; and 2) with respect to fee disputes greater than $350, review and decision by the PIACB as to whether the fee is reasonable—the decisions of the PIACB are published, binding on the parties, and subject to judicial review by the circuit court. The PIACB currently has no jurisdiction to decide any other disputes under the PIA, such as the denial of fee waiver requests, the application of exemptions, or whether requests are repetitive or vexatious.

Prior to the creation of the Ombudsman program and the PIACB in 2015, requestors who had been denied records by certain State agencies had the option to challenge those denials administratively, usually through the Office of Administrative Hearings ("OAH"). This option was eliminated in 2015 by House Bill 755—the same bill that created the Ombudsman and PIACB—apparently because the first version of the bill authorized the PIACB to review and decide most PIA disputes involving both State and local agencies. The administrative remedy was not restored, however, when the bill was amended to limit the PIACB's jurisdiction to its present scope. Consequently, current extrajudicial PIA enforcement options are more limited than in years prior to 2015, at least for disputes involving many State agencies.

II. Preliminary Findings

These findings are informed by multiple sources and types of data**,** as no single source allowed us to evaluate PIA performance, tracking, and compliance and enforcement matters. Taken together, these sources form the basis for these preliminary findings and the recommendations that follow.

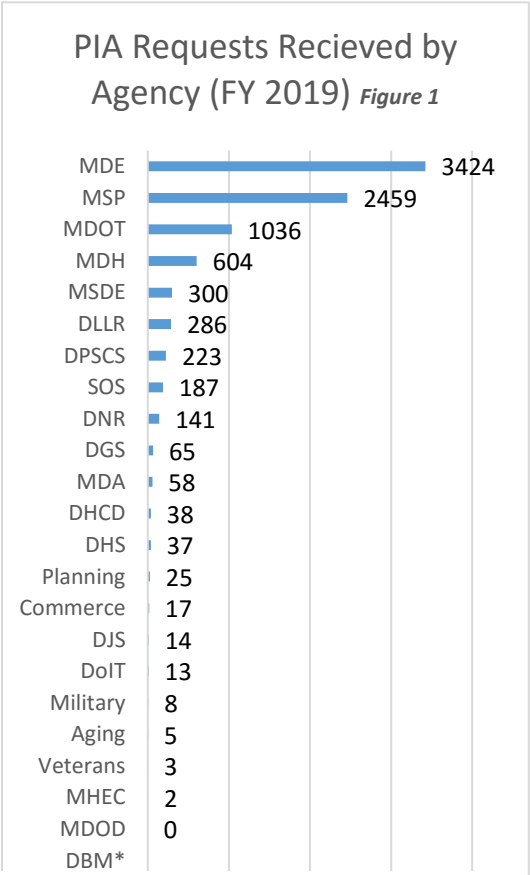
A. Quality of Survey Data

The survey of the 23 State reporting agencies, standing alone, is of limited use within the scope of our report. First, the reporting agencies comprise only about half of all State agencies, and no local agencies were included. Thus, the majority of all agencies subject to the PIA were not included in the survey. Nonetheless, based on other information sources, including the Ombudsman caseload from April 2016 through September 2019, we believe many of our observations likely apply across all State agencies, and at the local agency level.

[3] Requestors may bring a judicial action challenging an agency's full or partial denial of a PIA request, as well as for fee issues or any other aspect of an agency's handling of the PIA request. Agencies are authorized under the PIA to issue a "temporary denial" of a PIA request in cases in which there is doubt concerning whether a record should be disclosed, but must file a judicial action within 10 days thereafter seeking a court order authorizing the continued denial.

Second, much of the reporting agencies' quantitative data is incomplete. For example, DBM reported that it did not track and could not provide any data at all for the reporting period. MDOT and MDE reported that they did not did not track and could not provide data for more than half of the questions. Specifically, MDE reported not tracking 8 of the quantitative questions—including all of the questions in the section on PIA dispositions—while MDOT did not track data for 9 of the questions, including all of the questions in the section on fees. DHS provided data for only half of FY 2019, *i.e.*, the final 6 months, from January 1 to June 30, 2019.

Third, many agency responses were internally inconsistent to a degree that we could not rely on them for certain comparisons and evaluations. Specifically, we could not rely on responses for a particular topic where the sum of the data for that topic was not close to the total number of PIA requests received. For example, one topic is the number of initial PIA responses within and outside the statutory "10-day" deadline; where those responses added together are not equal to or within 5% of the total number of requests, we did not rely on that data when analyzing this topic.[4] In most instances where the data was deemed inconsistent, the deviation was far more than 5% from the total number of requests.[5] We recognize that some of this internal inconsistency may have been due to misinterpretations of the survey instrument, but think that it more often reflects the fact that many agencies are not currently tracking much of the detail we were asked to collect and report—itself an informative finding.



**Did not report any data for the reporting period.*

B. Reporting Agencies' PIA Caseloads

The survey data reflects that the PIA caseloads among the reporting agencies during FY 2019 vary considerably. For example, the number of requests per agency ranges from 0 (MDOD) to 3,424 (MDE),[6] with 3 agencies—MDE, MSP and MDOT—receiving 6,919, or

[4] By way of further illustration, if an agency reported having received 100 PIA requests during the period, but reported only 33 total responses either within or outside the 10 business day deadline, we could not confidently rely on that agency's numbers for purposes of assessing or comparing agency compliance with the 10 business day initial response deadline.

[5] The survey provided the reporting agencies with the opportunity to explain inconsistencies in each category of data with boxes marked "other"; *e.g.*, an agency could report the number of PIA requests still pending and within the 10-day initial response deadline as of the date they submitted the survey. We have taken into account any such relevant explanations in making our determination as to internal inconsistencies.

[6] MDE explains that its total number may even be understated, given that its tracking software aggregates multiple requests from the same requestor.

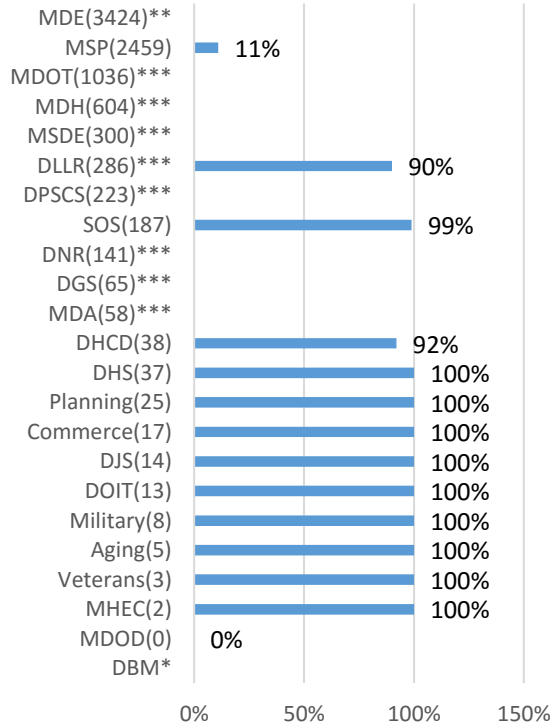
77%, of the 8,945 total PIA requests received by all reporting agencies (***Figure 1***).

This data also reflects that most of the reporting agencies have a light to moderate caseload, with some agencies reporting what might be described as a *de minimis* number of requests. Specifically, 11 agencies reported having fewer than 40 PIA requests during FY 2019, and 5 reported having fewer than 10. An additional 6 agencies reported receiving between 50 and 300 requests.[7]

We note, anecdotally, that many agencies at both the State and local levels report a significant increase in PIA requests in recent years. Our survey did not request comparative data from past years, but this trend seems likely due to the increasing prevalence of electronic records and the relative ease of making record requests via email and/or website. Still, it is worth noting that many reporting agencies do not have a voluminous PIA caseload, and this variation likely holds across other State and local agencies. Moreover, based on all data available to us, there does not appear to be a significant relationship between caseload volume and performance deficiencies, such as timeliness of response.

The disparity between agency caseloads suggests that improvements in performance will come from measures targeted to agency-specific problem areas, units, or processes, rather than from any "one size fits all" approach with respect to staffing, processes, or infrastructure. Rather, agencies with light to moderate caseloads can look to systems used by those with heavier caseloads, build on what works well, and learn from agencies with expertise in handling certain types of data and records, such as large data sets. We discuss some generally beneficial practices in our recommendations section below.

Response Time: Initial Response within 10 Business Days of Receipt ***Figure 2***



* *Did not report any data for the reporting period.*
** *Did not track this metric.*
*** *Data was internally inconsistent.*

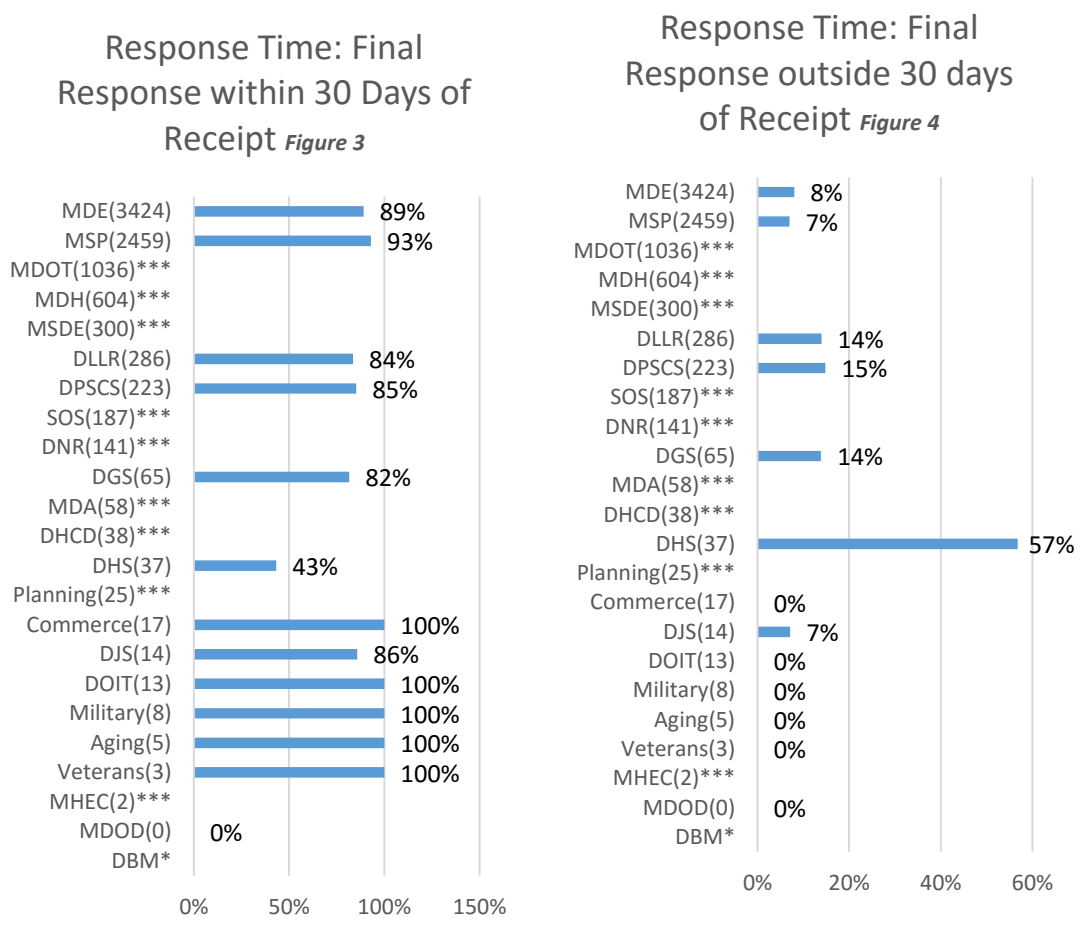
C. Timeliness of PIA Responses

Under the PIA, an agency has 10 business days in which to send an initial response to a request. If the response is not finalized at that time, the "10-day" response must provide the requestor with certain information, such as the reason for the delay and an estimate of fees, if any. An agency has 30 calendar days in which to send the final response, which can be extended by consent of the requestor.

[7] We are including DHS's total, even though that agency provided data only for the final six months of FY 2019. We are also including MSDE's reported figure of 300 total PIA requests, but note that when we followed up with that agency to inquire about certain inconsistencies in its data, it indicated the number may have been in error. However, the agency did not provide any amendment when invited to do so, so we have included the original reported number.

We asked agencies to report the number of initial responses sent within 10 days (***Figure 2***) and the number of final responses issued within 30 days (***Figures 3 & 4***). Five of the 7 highest volume agencies—those with more than 200 requests in FY 2019—either did not track one or both of these metrics, or were unable to provide consistent data for one or both metrics. In fact, only 9 agencies tracked and provided consistent data regarding their compliance with both the 10-day and 30-day deadlines, and 7 of those were agencies with the smallest caseloads, *i.e.*, fewer than 40 requests during FY 2019 (***Figures 2, 3, and 4***). That said, 4 of the agencies with caseloads higher than 200 in FY 2019 reported sending more than 80% of final responses within 30 days (***Figure 3***).

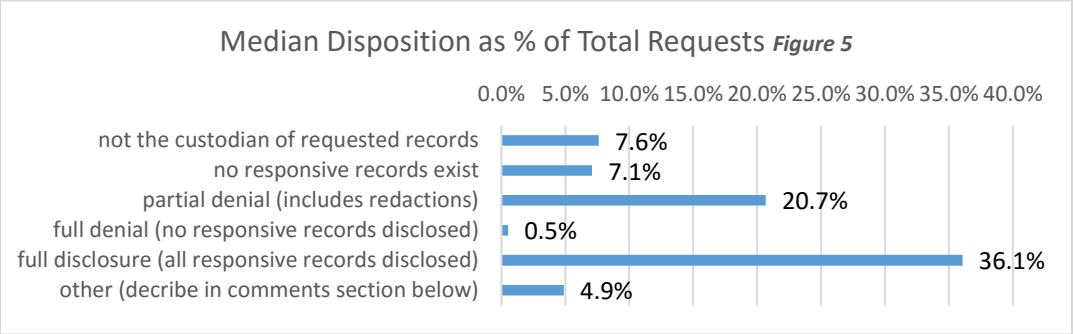
In the Ombudsman's experience, long overdue and missing responses regularly comprise around 20% of the mediation caseload. When an agency's response is missing or long overdue, it frequently indicates other compliance issues. In fact, the internal inconsistencies present in the



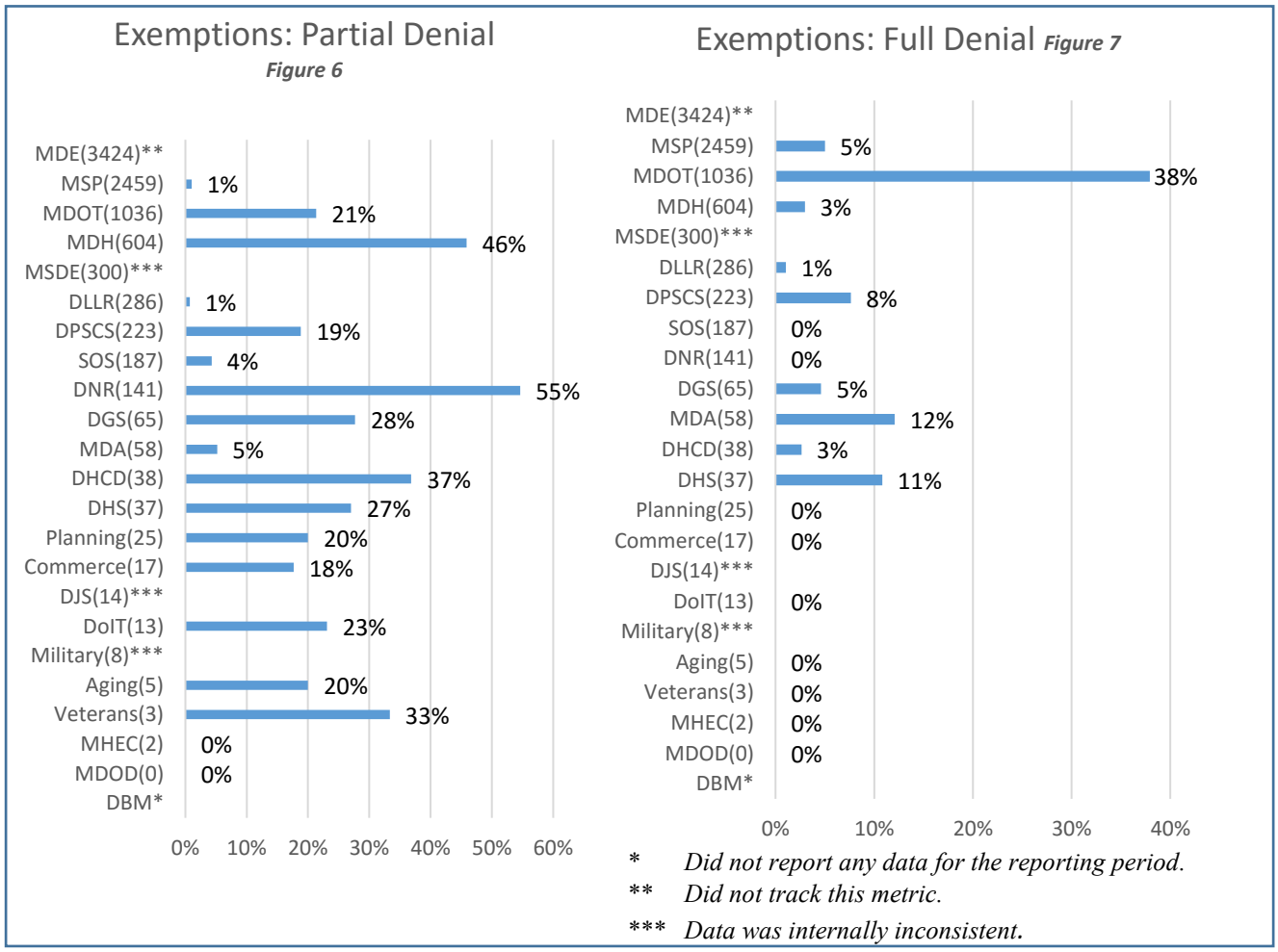
reporting agencies' survey data, together with the Ombudsman's experience, suggest that many agencies are not adequately tracking PIA requests, leading to tardy responses and other compliance issues. Thus, in order for agencies to fully comply with the PIA—including its deadlines—it is essential to accurately track all PIA requests from the time they are received though the time a final response is sent.

D. Disposition of PIA Requests

We asked the reporting agencies a number of questions pertaining to the dispositions of the PIA requests they received, as detailed in the table below (***Figure 5***).



The data suggests that agencies often receive requests for records of which they are not the custodian, or for which they do not have any responsive materials. Agencies also frequently respond to requests by disclosing all responsive records; overall, the reporting agencies responded to more than 36% of their total PIA requests with full disclosure of the requested record.

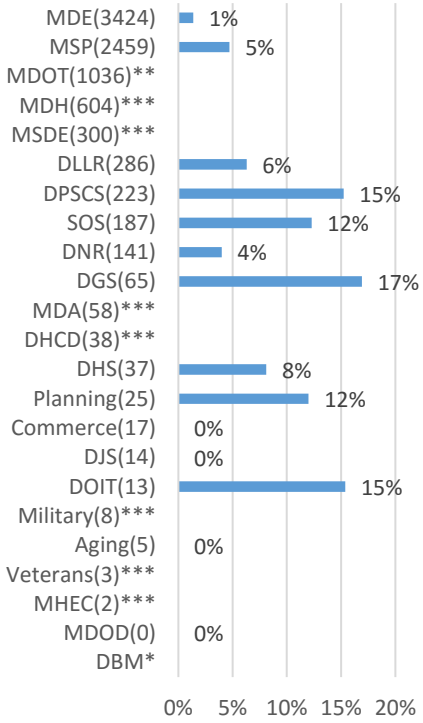


At the same time, many agencies report withholding some or all of the requested record in a significant number of cases. This occurs when an agency applies one or more of the PIA's exemptions. Depending on the material requested, the PIA may *require* an agency to withhold all or part of the record, or it may *permit*, on a discretionary basis, an agency to withhold all or part of a record. The tables above ***(Figures 6 & 7)*** indicate that most agencies relatively rarely withhold the entire requested record; MDOT is an outlier here, reporting that it denied the entire record in 38% of its responses. Many more agencies withhold a part of the requested record in a significant percentage of their responses. For example, DNR partially withheld the requested record in more than half of its responses, and 11 agencies provided partial denials in 18% to 46% of their responses.

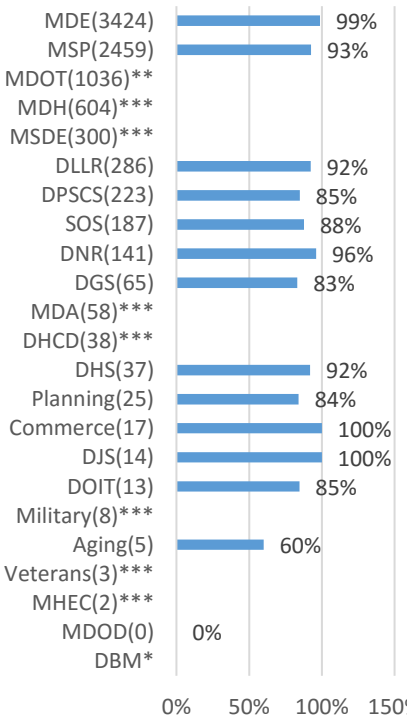
An agency's application of exemptions to either fully or partially deny the requested record presents a constant source of disputes. Since the Ombudsman's program began in 2016, more than 20% of all mediations have involved these kinds of issues. The resolution of many exemption-based disputes turns on a legal question and/or a review of the record at issue to assess the applicability of the claimed exemption or exemptions. Although the Ombudsman is often successful on this front, many of these disputes—about half—remain unresolved after mediation and could benefit from an extrajudicial forum with authority to review and issue a binding decision on the matter.

E. PIA Fees

Requests for which Fee was Charged ***Figure 8***

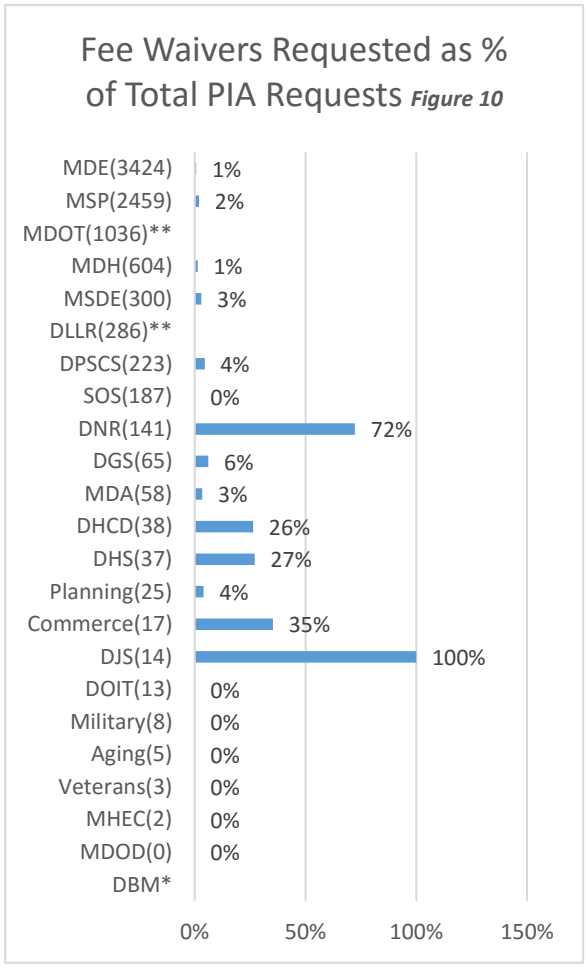


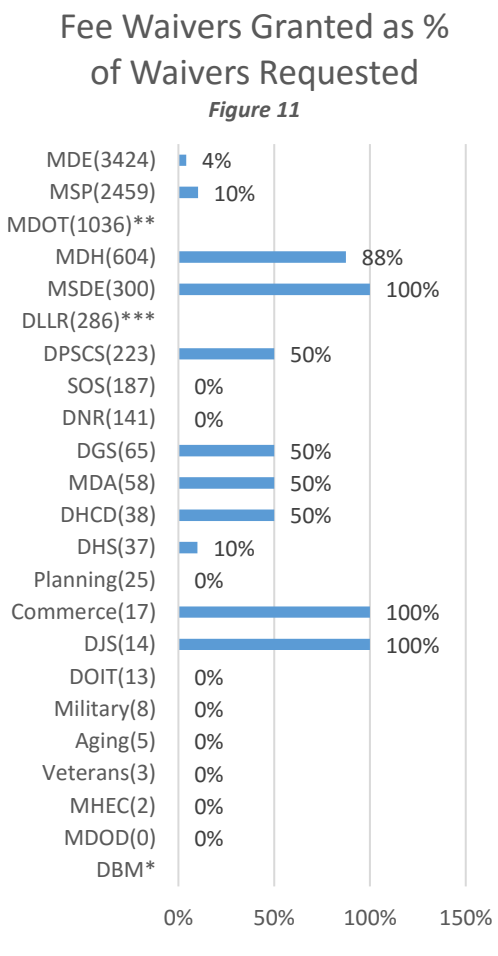
Requests for which No Fee was Charged ***Figure 9***



* *Did not report any data for the reporting period.*
** *Did not track this metric.*
*** *Data was internally inconsistent.*

We asked the reporting agencies to provide the number of PIA requests for which a fee was charged (***Figures 8 & 9***), the number of requests for which a fee waiver was requested (***Figure 10***), and the number for which a fee waiver was granted (***Figure 11***).





* *Did not report any data for the reporting period.*
** *Did not track this metric.*
*** *Data was internally inconsistent.*

The data suggests that most PIA requests are handled by agencies without fees. We interpret this category to include requests that were denied—*e.g.*, because one or more exemptions applied—those where no responsive records existed, and those which were handled in 2 hours or less. This category also may include some matters that were technically eligible for a fee, but in which no fee was charged for some reason, *e.g.*, because the charges were *de minimis*, were not accurately documented, or were otherwise waived.

With regard to fee waivers, as reflected in the tables above, it appears waivers are requested in a relatively small percentage of the reporting agencies' total caseload, subject to a few exceptions. The outliers are DNR and DJS, in which a waiver was requested in 72% and 100% of their requests, respectively. DNR did not grant any of those waiver requests, while DJS granted all of them. Overall, 8 of the 13 agencies that received waiver requests granted at least half of them. The notable exceptions are the two agencies with the largest caseloads—MDE and MSP—which

granted a relatively small percentage of their waiver requests—4% and 10%, respectively. The only other agency reporting more than 1,000 PIA requests—MDOT—did not track or report any fee data.

Fee disputes are present in a persistent number of the Ombudsman's mediations. The Ombudsman has concluded a total of 821 mediations involving State and local agencies since the program began. Approximately 6% of these mediations, about 50, have involved the denial of a fee waiver request, and another 9%, or about 74, have involved disputes over the amount of a fee. In other words, the Ombudsman has received more than 120 fee-related disputes in a little over 3 years.

During a roughly comparable 3-year period, the Board—which has jurisdiction only over fees greater than $350, but not over lesser fees or fee waivers—has received relatively few complaints that fall within its jurisdiction, issuing only 22 opinions. During the same time, it has received more than 15 complaints about an agency's denial of a fee waiver request, in addition to other complaints about PIA disputes that are not within its jurisdiction. The disparity between the Ombudsman's fee-related caseload and the Board's suggests that the majority of PIA fee-related disputes involve fees less than $350 and/or the denial of fee waiver requests, neither of which are within the Board's jurisdiction.

Based on this reality, we believe that any enhanced PIA dispute resolution or enforcement mechanism must have the authority to address more fee disputes in a meaningful way, especially with regard to fee waiver denials. In our combined experience, we believe that agencies' misunderstanding of the PIA's fee waiver provisions and/or default unwillingness leads to the routine denial of many waiver requests. Even in instances where a requestor provides an affidavit of indigency—which is the most specific statutory criteria for granting a waiver—many agencies nonetheless routinely deny the request. In some of these cases, it is clear the agency misunderstands the affidavit provision. *See, e.g.*, PIACB Opinion 19-08 (explaining that the wording of the PIA's fee waiver provision authorizes a custodian to grant a fee waiver "on the basis of an affidavit of indigency alone," without considering other public interest factors, and encouraging the agency to reconsider the waiver request to the extent that it misconstrued the waiver provision). Additionally, consistent with these findings, we believe the Legislature should consider reducing the fee threshold for review by the Board.

F. Records Management and Other Agency Practices & Needs

In addition to questions about the reporting agencies' core PIA caseload, we asked qualitative questions about the agecnies' other PIA and records management practices, including staffing, training, proactive disclosure, and use of technology. These areas bear directly on an agency's efficiency and its ability to fully and regularly comply with the PIA.

For example, because the PIA is essentially concerned with access to public records with the least cost and delay, effective records management practices—including maintenance, retention, retrieval, and destruction—are essential to a reliable and efficient PIA process. Confidence in these records management practices, or the lack thereof, inform all aspects of the PIA, from the search and retrieval process, to fees and disputes. Although our mandate in this report does not include a deep analysis of records management processes, or the need for related enforcement and compliance mechanisms, we do note the crucial connection between records

management and the PIA. Some of the findings that emerged from this portion of our survey include:

- There is wide diversity in the reporting agencies' compliance with and competence in records management practices—some agencies reported not knowing whether they had retention schedules on file at all, while others reported up-to-date schedules for all units within the department.
- As a general matter, the agencies with the most voluminous PIA caseload seem to have the best handle on records management practices and the most robust records management programs.
- But, even agencies with large PIA caseloads and robust records management programs do not appear to have comprehensive or integrated records management plans across all mediums, platforms, or devices, such as phones, email, and social media. Proper implementation of the PIA requires this kind of integration for purposes of effective search, retrieval, and production of records.
- Agencies underutilize tools of proactive records disclosure, such as maintaining lists of readily available documents that are able to be provided immediately without review; publishing such documents or links to them on the agency's website; publishing records that have already been disclosed under the PIA, especially where there is widespread public interest and/or the agency is likely to receive multiple requests for the same documents.
- Many agencies reported they would benefit from additional PIA and/or records management trainings and other resources.
- As most agencies transition to primarily electronic records and communications, their records management practices and retrieval and disclosure methods have not kept up with these technologies, which has complicated PIA processes and disputes.
- Although we did not collect similar data at the local government level, we suspect the trends are similar.

G. Need for Accessible PIA Enforcement Remedy

The Committee Narrative directed us to evaluate the need for and feasibility of expanding extrajudicial enforcement of the PIA, which currently is limited to Board review of fee disputes over $350. In order to assess the need for an expanded enforcement option, we reviewed all mediation matters handled by the Ombudsman both during FY 2019 and from the beginning of the program in April 2016.

The data involves an array of requestors and state and local agencies, and a wide variety of disputes—including disputes about timeliness, fees, exemptions and redactions, the completeness and accuracy of responses, and, on occasion, about repetitive, unduly burdensome, overly broad, or otherwise vexatious requests. This caseload review allowed us to determine both the number and type of disputes that could not be resolved by mediation and which seemed to be likely candidates for submission to a PIA Compliance Board—or other extrajudicial forum—with comprehensive enforcement authority.

The chart below (***Figure 12***) reflects our findings for all agencies—at both the State and local level—that have been involved in mediations with the Ombudsman during FY 2019. The reporting agencies alone—which reported receiving a combined total of 8,998 PIA requests during FY

2019—were involved in 46 mediations. Of those, 12 mediations—or approximately 26%—had unresolved issues at the conclusion of the mediation that we judged would likely have been submitted to the Board if it had jurisdiction to decide the issues.

A similar trend holds across the other agency categories. That is, for agencies other than the State reporting agencies, we found that a relatively similar portion of mediation matters contained unresolved issues at the end of mediation that we judged would likely have gone to a Board with expanded jurisdiction; that portion ranges from 19% of mediation matters with "other local" agencies, to 32% of mediations with "local law enforcement" agencies, including police departments and State's Attorney's Offices. Overall, of the 235 total Ombudsman mediations during FY 2019, 61—or 26%—were strong candidates for review and decision by an enforcement Board with expanded jurisdiction, if that option were available.[8]

Ombudsman Mediations: FY 2019 ***Figure 12***

Agency Category	Number of Mediations	Number Unresolved and Likely to go to Board with Expanded Jurisdiction	Percentage Unresolved and Likely to go to Board with Expanded Jurisdiction
State Reporting Agencies	46	12	26%
Other State Agencies	46	12	26%
Local School Systems	24	6	25%
Local Law Enforcement (Police and State's Attorneys)	65	21	32%
Other Local (County & Municipality)	54	10	19%
Total	**235**	**61**	**26%**

We also conducted the same review for *all* mediations handled by the Ombudsman since the program began. This data from 42 months of operation involves more than 520 unique requestors and more than 220 unique agencies at the State and local levels. The results are strikingly consistent with those captured for the FY 2019 reporting period. For example, during the 42-month period, the State reporting agencies were involved in 189 mediations, 49 of which—or 26%—were judged likely to have gone to a Board with expanded jurisdiction for review and a decision, if that option had been available. Similarly, of the 821 total mediations across all agency categories, 197—or about 24%—were judged likely in need of such a Board remedy.

In sum, we believe this retrospective analysis of the Ombudsman's caseload demonstrates a generally consistent unmet need for a practical and accessible extrajudicial enforcement option for PIA disputes that are not resolved at the mediation stage.[9] The analysis demonstrates that the

[8] In fact, the data shows that both the mean and median percentage of matters that were deemed to be likely candidates for decision by a PIACB with expanded jurisdiction was between 25% and 26%.

[9] Agencies currently do not have any extrajudicial remedies for overly repetitive or otherwise vexatious requests. We note that while these kinds of problems arise in a comparatively small number of cases, they often are time-consuming

number of unresolved disputes likely to go to the Board are relatively consistent throughout time and across agencies. Although we cannot be sure that the projected case volume would remain at the same level we estimated based on 2016-2019 data, we believe an exponential increase or decrease is unlikely in the near term. In fact, we would anticipate that the availability of an accessible enforcement option, together with a larger body of published substantive decisions, will enhance the effectiveness of mediations and bring about changes in agency and requestor behavior and expectations, all of which may lead to a long term decrease in disputes that need enforcement.

Our assessment of the need for an extrajudicial enforcement remedy is consistent with anecdotal information from requestors and agencies. For example, in early 2019, the Ombudsman conducted a program satisfaction survey directed to all requestors and agencies with whom the Ombudsman has worked since inception of the program. Of the more than 100 requestors who responded, more than 30—or roughly 30%—expressed frustration with the Ombudsman's inability to decide issues or to enforce the Act with respect to matters that were not resolved by mediation.

In addition, our qualitative surveys for this report asked for the reporting agencies' views concerning the need for and desirability of extrajudicial enforcement. Although many agencies expressed no general opinion on the matter,[10] or stated that the status quo is adequate,[11] others expressed support for any remedy that would keep PIA disputes out of court, that offered agencies a practical remedy for certain types of recurrent problems—such as repetitive, vexatious, or abusive requests—or that would enhance transparency and compliance.[12]

The current judicial remedies for PIA disputes appear to be infrequently used by either requestors or agencies. This likely is due to a variety of reasons, including the cost of a lawsuit and the fact that most requestors are *pro se*. Moreover, the formalities of the judicial process are

Footnote Cont'd

and stressful for agency staff, sapping morale and draining resources that could be devoted to other requests. Currently, the only available remedy for such problems is a judicial action seeking injunctive relief.

Requestors and agencies also experience problems involving the PIA's deadlines, for which there currently are no effective remedies. For requestors, the issue typically revolves around late or "missing" responses, and for agencies, a recurrent issue is the inability to obtain an extension of the deadlines absent requestor agreement, even when the request is burdensome. Any extrajudicial enforcement body should be authorized to grant appropriate relief in such scenarios, on a case-by-case basis.

[10] **Aging** (answered N/A; Low Volume); **DBM** (no opinion); **Disabilities** (no opinion); **MDE** (no opinion, rarely any matters before Board, Ombudsman, or courts); **DJS** (no position); **DLLR** ("takes guidance from the Administration and General Assembly"); **Military** (no opinion); **Planning** (no opinion); **SOS** (did not respond); and **MSP** (no opinion).

[11] **MSDE** (current system adequate); **DGS** (current system adequate); **DHCD** (thinks Ombudsman is sufficient); **DHS** (current system adequate); **DOIT** (satisfied with existing system); **DNR** (no need for expanded enforcement); and **MDOT** (current system adequate, but would like to comment on any specific proposal).

[12] **MDA** (sees need for agency relief on certain problems; not opposed to extrajudicial remedy, but would like to comment on any specific proposal); **Commerce** (welcomes any additional review options that would prevent PIA cases from going to court); **DOH** (no objection to expanded enforcement and committed to PIA compliance); **DPSCS** (welcomes any process that increases transparency; sees need for funding of internal PIA compliance unit); and **Veterans** (welcomes the suggestion).

often inappropriate for many of the more routine PIA disputes, which usually involve simple fact patterns and the application of a limited body of law.

Accordingly, for all of these reasons, we believe that requestors and agencies would benefit from a practical, accessible, and inexpensive extrajudicial enforcement forum that could review and decide PIA disputes that cannot be resolved by the Ombudsman's voluntary mediation program.

III. Recommendations

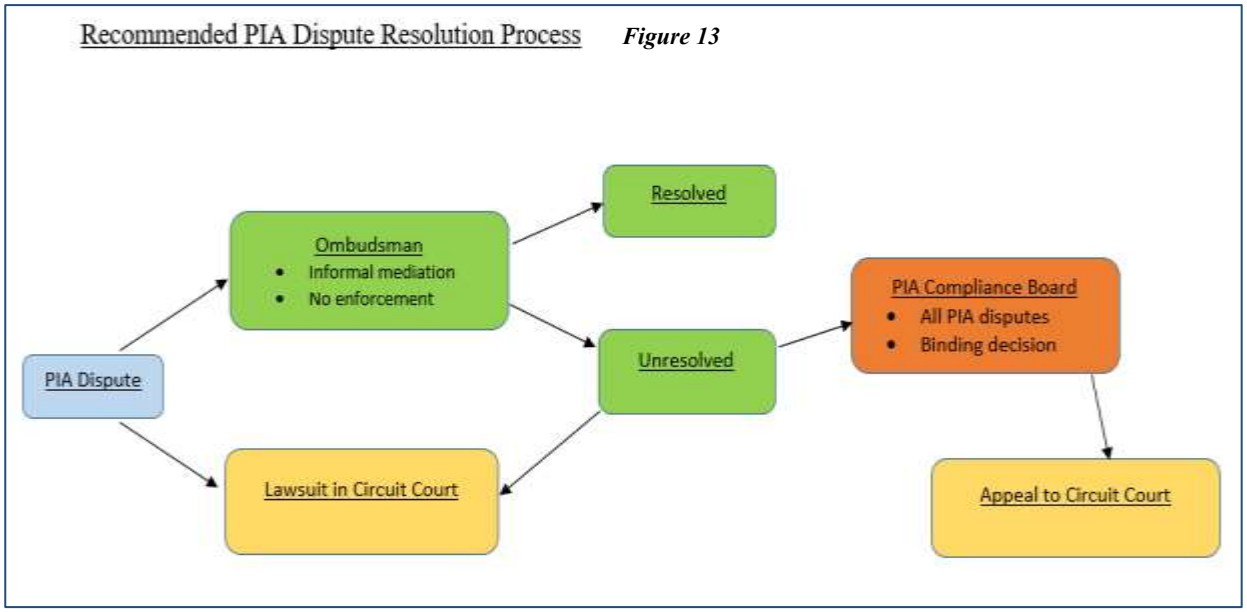
The problems and deficiencies highlighted above frequently undermine requestors'—and by extension, the public's—confidence in the transparency, integrity, fairness, and efficiency of State and local governments. At the same time, agencies' unresolved problems can undermine staff morale and disrupt their ability to handle other requests in a fair and orderly fashion. Thus, we believe it is in the best interest of all PIA stakeholders that informed and meaningful steps are taken to improve PIA performance and enforcement deficiencies.

Our preliminary findings suggest the recommendations outlined below, which cover PIA tracking and monitoring, the expansion of the current extrajudicial enforcement option, and practices that agencies can implement without new legislation that may lead to improvements in handling their PIA caseloads.

A. Expanding the Board's Jurisdiction

We recommend that the current extrajudicial PIA dispute resolution options be expanded by authorizing the Board to review and issue binding decisions on most PIA disputes that have not been resolved following mediation—or attempted mediation—with the Ombudsman. The Board's final decision in all cases would be appealable to circuit court and subject to on-the-record review, as is currently the case with the Board's decisions on fee disputes greater than $350. This recommendation for a streamlined PIA dispute resolution process is diagramed below ***(Figure 13)***.

Recommended PIA Dispute Resolution Process ***Figure 13***



We believe this framework meets four key criteria, as follows:

1. **Builds on and enhances programs that work well under current law.** Our recommendation preserves the Ombudsman program, which has been successful in resolving many, but not all, PIA disputes, while expanding the role and impact of the existing Board, which is currently underutilized due to its limited jurisdiction. Based on our program experience and conversations with staff of open records dispute resolution programs in several other states and at the federal level, we believe expansion of the Board's role is likely to enhance the effectiveness of mediations. Additionally, over time, the Board's opinions will lead to the development of a body of published PIA decisions, which will be a resource to requestors and agencies alike.

2. **Provides a comprehensive remedy.** Our recommendation provides an extrajudicial enforcement remedy for all types of PIA disputes, for all requestors, and for all State and local agencies subject to the PIA.

3. **Provides an accessible, user-friendly enforcement option without altering existing judicial remedies.** Most PIA disputes do not require a complex process or in-person hearing. Rather, most PIA disputes are simpler than other kinds of civil disputes in complexity, evidentiary requirements, and the need for formal process. The Board's process will reflect this simplicity, with most issues likely capable of being decided on the basis of a complaint, a response, and, as needed, on affidavit and/or following *in camera* review of the records at issue or of a privilege log. The Board would be able to call for a conference or hearing whenever needed.

4. **Provides a cost-effective and efficient extrajudicial enforcement process.** Expanding the Board's jurisdiction to provide a comprehensive extrajudicial enforcement option does not require the creation of any new office or program; rather, this proposal allows for an efficient and complimentary division of labor between the existing Board and Ombudsman program.

    - Even where the Ombudsman cannot resolve all issues, the Board's efficiency will be enhanced by the Ombudsman's intake and administrative processes. That is, when unresolved disputes are submitted to the Board following mediation, they will contain the basic information and records relevant to the dispute—such as identification of the parties, a description of the unresolved issues, and the PIA request or response at issue—thereby reducing the administrative burden on the Board and insuring that efforts to gather this information are not duplicated between programs.

    - Based on a detailed review of the Ombudsman's caseload and outcomes in mediations over the past several years, the Board's caseload is projected to increase by about 5 new Board complaints per month in addition to its current fee-based complaints, which have averaged far less than 1 per month.

        - Analysis of the Ombudsman's caseload included an estimate of the number and complexity of new matters that would likely be presented for Board review and decision if that option was available.

- In general, we concluded that approximately 25% of the disputes presented to the Ombudsman—between 50 and 60 per year, or 5 per month—are not resolved through mediation and could be expected to go to the Board.

- These matters range in complexity from relatively simple legal issues and easy procedural questions, to more involved matters that will likely require some legal research and analysis, resolution of more complex factual issues, and/or review of a potentially large number of records. We project that new Board matters will be roughly evenly split between the simpler issues and those that are more complex.

- Taking all these considerations into account, we estimate that the increased Board caseload can be handled by the addition of two full-time staff—an administrator and attorney. Currently, the Ombudsman and Board share two staff—an administrator and attorney—both of whom are provided by and housed within the Office of the Attorney General ("OAG"). The addition of 2 staff would bring the total number of staff to 5, including the Ombudsman.

  - On a periodic basis after implementing this new system, both the Board and Ombudsman should report on caseloads, staffing, and dispositions, as well as other matters pertaining to overall PIA performance, so that any necessary adjustments in these programs can be made.[13]

B. Other Enforcement Options We Considered

In addition to our recommended framework, we considered other expanded extrajudicial enforcement options, including reinstating the administrative appeals remedy that was removed in 2015, and frameworks that do not require mediation before seeking binding resolution from an enforcement body. We have concluded that none of these other models meet all of the four key criteria we outlined in the discussion of our recommended option, above. In addition, based on our research—including interviews with relevant program representatives in other states—we believe that many other models would be more costly and cumbersome to implement, and/or less effective than our recommended framework.

For example, the administrative appeal remedy that existed in Maryland prior to 2015 was not comprehensive in that it applied only to certain State agencies subject to the contested case provisions of the Administrative Procedure Act.[14] The Ombudsman's caseload suggests, however, that more than half—about 60%—of all PIA disputes arise from requests made to local agencies.

The administrative appeal remedy also appears to have been used rarely. Data provided to us by OAH for the years 2013 to 2015—the last three years the remedy was available—shows that

[13] Currently, the Board conducts an Annual Meeting to consider and approve, among other matters, its Annual Report which is issued each year by October 1. As a matter of practice, the Board has included a report and comments by the Ombudsman as an Appendix to its Annual Report. These reports are published on the websites of the OAG www.marylandattorneygeneral.gov/Pages/OpenGov/piacb.asp and Ombudsman news.maryland.gov/mpiaombuds/.

[14] Apparently, OAH has the ability to handle certain appeals from particular local agencies, but only by special arrangement. It is our understanding that this kind of arrangement was not typically used for local agency PIA appeals.

OAH handled 37 PIA appeals, involving only 12 State agencies. By contrast, during its first 3.5 years of operation, the Ombudsman's Office received more than 820 PIA disputes—189 of which involved the State reporting agencies. Of the total disputes, more than 190, including 49 from the reporting agencies, were not resolved by mediation and were judged likely candidates for extrajudicial review and decision. This suggests to us that the State administrative appeals option—at least as it pertains to PIA matters—was relatively inaccessible to and/or rarely used by many requestors.[15]

Extrajudicial enforcement models from other states also did not meet all of our four key criteria, for various reasons. For example, none of the six state models we examined *require* mediation before resort to a forum with binding resolution authority, though most have a mediation option. These models, thus, would not preserve the current benefits of the Ombudsman mediation program to the degree we believe is desirable; at the very least, we expect that requiring mediation first will result in fewer matters going to the Board than if mediation was not required. Moreover, some of these other state models include within their jurisdiction matters that are not related to records disputes, and/or contain procedures that we believe would not be as efficient as those in our recommendation. We will discuss the other models we explored in more depth in the final report.

C. Compliance Monitoring - Feasibility of Agency Self-Reporting

In addition to analyzing the reporting agencies' PIA caseload data, we asked the agencies to give us their views on the feasibility of caseload tracking and periodic self-reporting and evaluation. Most agencies reported that it is feasible to periodically report data on their PIA caseload, and many—particularly those receiving a sizeable volume of requests—report that they already track some or all of the data requested in the survey.[16] Agencies receiving a relatively small volume of requests also generally reported either a current ability to track and self–report, or expressed a willingness to consider doing so.[17] Only two agencies expressed the view that self-

[15] The administrative appeals model also did not afford any remedy to agencies, including relief from persistently vexatious or repetitive requests, or relief from deadlines for good cause in instances when compromise or agreement cannot be reached with the requestor.

[16] Agencies reporting an ability to track and report PIA data, including those that already do so internally, include **MDE** (using tracking database and software; currently reports annual statistics to DBM through "Managing MD for Results" process); **MSP** (currently maintains PIA log; periodic self-evaluations conducted by personnel in Central Records); **MDOT** (reports and verifies open requests daily; runs reports for senior leadership, official custodians, and PIA staff as needed); **MDH** (PIA coordinator provides quarterly reports to Secretary and senior staff and meets weekly to review MDH tracking log and discuss any overdue requests; with future use of "smart sheets", will be able to generate reports that identify different categories of cases—*e.g.*, overdue, pending, or completed—and statistics that will be viewed on internal dashboard by senior leadership and all PIA officers); **MSDE** (maintains database of all outstanding and completed requests which is regularly reviewed for accuracy and completion); **DLLR** (performs self-evaluation of caseload based upon spreadsheets maintained by agency counsel); **DPSCS** (has tracking system); **DNR** (self-report feasible on annual basis); **DGS** (self-report feasible); **MDA** (report on annual basis feasible; would develop its own internal survey and have each unit report responses and discuss results at staff meeting); **DHCD** (agency counsel maintains excel spreadsheet/log of PIA requests and their dispositions; tracks deadlines and whether estimated fees are paid); and **DHS** (self-report feasible for 2019 going forward using PIA web portal which tracks requests submitted via the portal).

[17] Agencies receiving comparatively few PIA requests that expressed one of these views include **DJS** (does not currently maintain log or database, but would consider doing so, though concerned about time requirements);

reporting is not feasible, or otherwise objected to the idea.[18] And one agency—MDOD—which reported receiving no PIA requests at all during the reporting period, responded to the question with "N/A".

We believe that a similar pattern likely exists among State and local agencies not included in our survey. That is, agencies with a significant volume of PIA requests are likely already tracking and logging at least some data, while those with a modest or *de minimus* volume of requests should be able to implement a basic tracking and reporting system without any investment in new software, infrastructure, or staff. We assume that agencies with heavy PIA caseloads already track their PIA data to some degree as necessary to manage their caseload.

As far as the quality of data is concerned, we recognize that the inability or failure by some of the reporting agencies to report some or all of the requested data in any reliable manner may be due to the fact that agencies were not expecting to have to report this data. After all, they are not currently required to track and report it, and each agency has more or less developed its own system and criteria for tracking and handling its PIA requests. Thus, to the extent the Legislature and other PIA stakeholders are interested in high quality data—*i.e.*, uniform, consistent, and reliable data—on PIA caseloads and dispositions, it will likely be necessary to mandate which data agencies must track and report. Some of the benefits of uniform, consistent tracking and reporting include:

- Likely reduction in "MIA" requests—*i.e.,* matters in which the first response to a PIA request is issued after the 30 day deadline has expired; currently, this category of disputes comprises about 20% of the Ombudsman's caseload.
- Informed assessments of the need for additional PIA-related resources, including personnel, funding, software systems, etc.; not all agencies have this need, and only systematic data will facilitate informed decisions about those that do.
- Identification of "peer" agencies in terms of PIA caseload, allowing agencies to exchange meaningful information and tips about procedures, software, and other technologies that improve PIA performance.
- Enhanced transparency with respect to PIA caseloads, dispositions, fees, and needs for future changes to existing law.

D. Other Recommendations – Best Practices and Agency Needs

In addition to asking the reporting agencies about PIA caseloads and procedures, we asked about practices and needs that are closely connected to their capacity to regularly comply with the

Footnote Cont'd

Veterans (does not maintain electronic log or database; receives very few requests); **MHEC** (maintains electronic log of PIA requests, and in process of creating comprehensive internal PIA policy/procedures document for staff to ensure process carried out efficiently); **DBM** (receives moderate number of requests, and should be able to conduct internal self-evaluation using new "Google Sheets" tracking database); **Planning** (self-reporting feasible; has no database, but maintains searchable electronic records on all PIA requests and dispositions); **Commerce** (feasible to periodically perform self-evaluations)**; Military** (probably can perform self-evaluation, but needs more guidance from OAG as to how/what to evaluate)**;** and **Aging** (yes; low volume).

[18] These agencies include **DOIT** (would take extra time and resources that are not necessary for the Department to follow PIA requirements); and **SOS (**not feasible; there is only one employee who discharges agency's PIA responsibilities, and she has other duties, too).

PIA. For example, we asked questions about records retention and management, proactive records disclosure practices, participation in PIA and records management training, use of PIA tracking systems and software to retrieve and redact electronic records, and policies and procedures related to maintenance and retrieval, when applicable, of public records that may reside on remote or mobile devices, or on social media platforms.

Many agencies responded that they need additional resources, such as more staff, funding, training, and/or technologies to move forward in some or all of these areas. Although our final report will contain a more detailed analysis of agency responses, our preliminary recommendations in these areas include the following:

- **Proactive disclosure tools and methods should be maximized**: These methods include measures as simple as maintaining a current list of readily available documents, publishing such a list on the agency's website, or publishing frequently requested records to the agency's website or other central repository.

- **PIA training and professionalizing the front-line**: Many agencies are meeting PIA obligations with staff who are not solely dedicated to the PIA; while this practice is undoubtedly adequate for agencies with a low or *de minimus* volume of requests, agencies with consistently large—or steadily increasing—volumes of PIA requests need trained staff that are either solely or primarily dedicated to handling PIA matters. One reporting agency with a high volume of requests indicated that the reclassification of PIA-related positions, together with increased salaries, is needed to maintain and improve the handling of its PIA caseload.

- **The importance of agency culture and messaging from the top:** Several of the reporting agencies explained the ways in which the Secretary and senior staff collaborate with front-line PIA coordinators in the process of handling PIA requests and problems. In our experience, when Secretaries and senior management are involved in the PIA process, and emphasize the importance of PIA duties—*e.g.,* that compliance is not optional but mandatory, and that PIA compliance is an integral part of the agency's larger public mission—staff at all levels take notice and comply. We know of instances in which these types of efforts and initiatives have turned difficult situations into occasions for meaningful improvement.

- **Internal tracking and management of PIA requests:** Whether or not uniform tracking and self-reporting is mandated, we believe internal PIA tracking is critically important to an agency's overall PIA compliance and improved performance in the long run.

- **Leveraging technology:** With the accelerating pace of e-government initiatives and the proliferation of electronic records and communications at all governmental levels and across all platforms, finding and utilizing technologies that assist in the retention, maintenance, and retrieval of electronic records continues to be critically important for efficiency and transparency. In general, the reporting agencies indicate that there is a great deal of need in this arena; some agencies have little experience with specialized software or other technologies in this context, and others have more substantial experience. Large volume email retrieval, in particular, is consistently identified as problematic, and many agencies seek additional relevant training or technology.

IV. Conclusion

The Budget Committees commissioned this report because they are "interested in ensuring that the [PIA] increases government transparency through a robust review and disclosure process," and also in ensuring that agencies "have sufficient resources and sufficient procedures to respond to reasonable and legal information requests." To that end, they requested concrete information on topics that heretofore have been discussed largely anecdotally or in the abstract—specifically, information about the reporting agencies' PIA caseloads and related procedures, and on the need for and feasibility of PIA compliance monitoring and extrajudicial enforcement options.

The data we received from the reporting agencies provides a clearer picture of their overall PIA caseloads and procedures, but is limited with respect to providing a full understanding of their PIA performance because much of the data is either unavailable or inconsistent. Data from the Ombudsman's caseload provides some of this missing detail, not only for the reporting agencies, but for agencies across State and local government. What emerges on the compliance monitoring front is that many agencies likely are not tracking their PIA caseloads in any detailed or uniform way, but are not opposed to doing so. Because this kind of tracking can benefit agency PIA compliance internally, and lead to more informed decisions about resource allocation externally, the Legislature may wish to consider implementing a uniform self-tracking and reporting requirement.

On the extrajudicial enforcement front, the Ombudsman and Board's more than three years of caseload data and institutional experience make two things clear: 1) a consistent number of PIA disputes across State and local agencies cannot be resolved by mediation alone, and 2) the current Board is underutilized due to its limited jurisdiction. Our recommendation is to expand the Board's jurisdiction to review and decide most PIA disputes that are unresolved after mediation or attempted mediation with the Ombudsman. This recommendation provides the Board with the authority originally envisioned for it in the first version of the 2015 bill that created it, with the crucial addition that Ombudsman mediation will be a required first step in the alternative dispute resolution process.

We look forward to receiving comments on these preliminary findings and recommendations from all stakeholders in advance of the final report.

Appendix D. Agency Quantitative Survey Data

1st Quarter FY 2020

Agency Quantitative Survey Data
1st Quarter FY 2020

The Chairs of the Senate Budget and Taxation Committee and House Appropriations Committees requested the PIA Ombudsman and the PIA Compliance Board to collect and report PIA caseloads and performance data for 23 State cabinet-level agencies[1] for the period from July 1, 2018 to September 30, 2019.

The data collected for FY 2019—that is, from July 1, 2018 through June 30, 2019—was published in our Preliminary Findings on November 6, 2019, and is discussed in Section III of the Final Report. The FY2019 data as reported to us is available on the Ombudsman's website at the following link: FY2019 data.

This Appendix summarizes the data gathered from the reporting agencies for the last three months of the reporting period—from July 1, 2019 to September 30, 2019 ("1st Quarter FY2020"), including the following quantitative data:

- the number of PIA requests each agency received;
- the disposition of requests by each agency;
- response times for each agency; and
- the percentage of fee waivers requested and the percentage granted by each agency.

The full data set for 1st Quarter FY2020 is available on the Ombudsman's website at the following link: 1st Quarter FY2020 data.

1. **Survey**
   - ***a.*** **Number of Respondents**:
     All 23 State reporting agencies provided data for the 1st Quarter FY2020.
   - ***b.*** **Agencies Receiving No PIA Requests**:
     Four agencies reported having received no PIA requests during the 1st Quarter FY2020; these are MDOD, MHEC, Military, and Veterans.
   - ***c.*** **Quality of Data**:
     After follow-up, as necessary, all agencies reported quantitative data for the 1st Quarter FY2020 that was internally consistent.
   - ***d.*** **Data Fields Not Tracked**:
     Although all agencies responded to all the survey questions, some did not track particular fields. As was the case with the FY2019 data, two of the three highest volume agencies, MDE and MDOT, did not track data for over half the questions. Specifically, MDE reported not tracking seven of the fourteen questions including all the questions in the section on dispositions, while

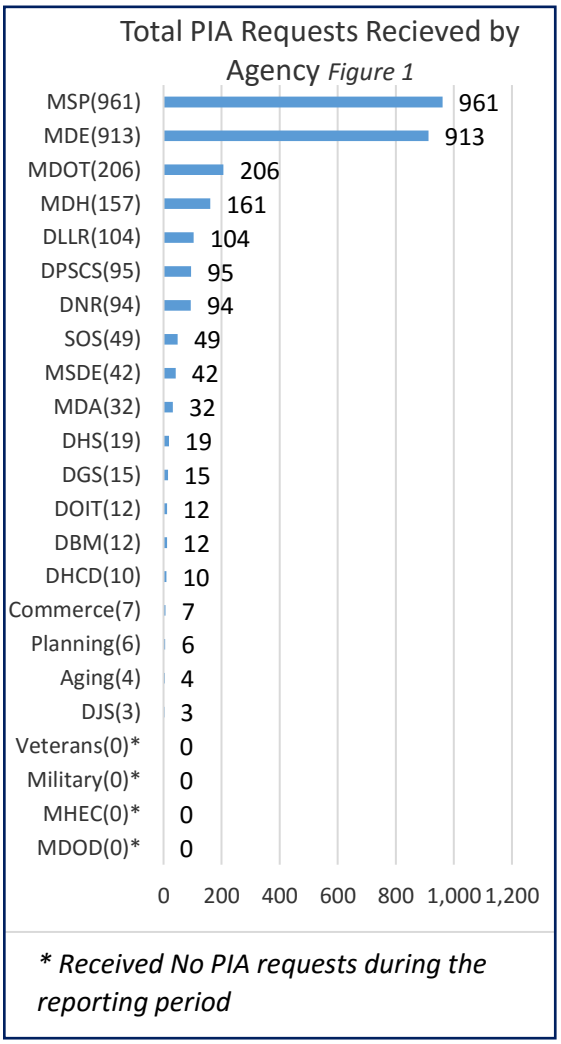
[1] The reporting agencies are as follow: Department of the Environment (**MDE**); State Police (**MSP**); Department of Transportation (**MDOT**); Department of Health (**MDH**); Department of Education (**MSDE**); Department of Labor (**DLLR**); Department of Public Safety and Correctional Services (**DPSCS**); Secretary of State (**SOS**); Department of Natural Resources (**DNR**); Department of General Services (**DGS**); Department of Agriculture (**MDA**); Department of Housing and Community Development (**DHCD**); Department of Human Services (**DHS**); Department of Planning (**Planning**); Department of Commerce (**Commerce**); Department of Juvenile Services (**DJS**); Department of Information Technology (**DOIT**); Military Department (**Military**); Department of Aging (**Aging**); Department of Veterans Affairs (**Veterans**); Higher Education Commission (**MHEC**); Department of Disabilities (**MDOD**); and Department of Budget and Management (**DBM**).

MDOT reported that it did not track data for ten of the fourteen questions, including all the questions in the fees section of the survey.

2. Reporting Agencies' PIA Caseloads (Figure 1)

Number of PIA requests

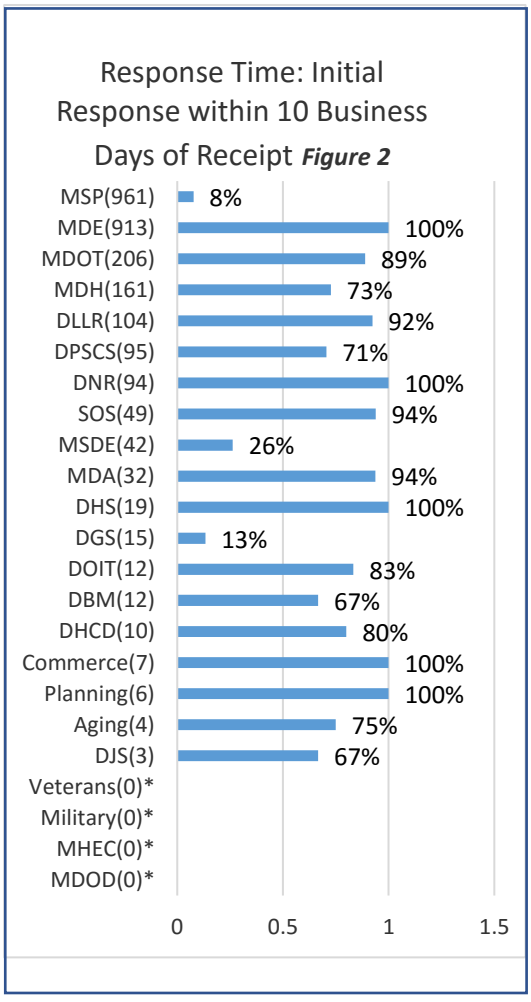
Figure 1, to the right, reflects the total number of PIA requests received by the reporting agencies. The reporting agencies received a total of 2,745 PIA requests during the 1st Quarter FY2020. The number per agency ranged from 0 to 961. Two agencies received 68.4% of all requests: MSP (35.1%) and MDE (33.3%). Over half the agencies reported receiving 20 or fewer requests, including the four agencies that reported receiving no requests during the 1st Quarter FY2020.



** Received No PIA requests during the reporting period*

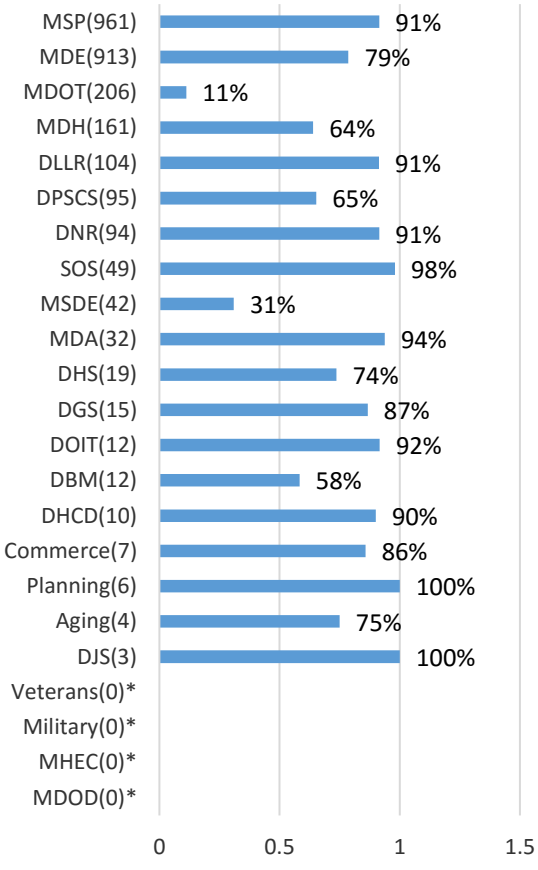
3. Timeliness of PIA Responses (Figures 2, 3, and 4)

Figures 2 through 4, below, reflect agency response time, including compliance with the 10-day initial deadline and the 30-day final deadline. Data on the number of requests for which extensions were granted, or that were open and pending at the conclusion of the reporting period, if/as reported, are reflected in the full data set.

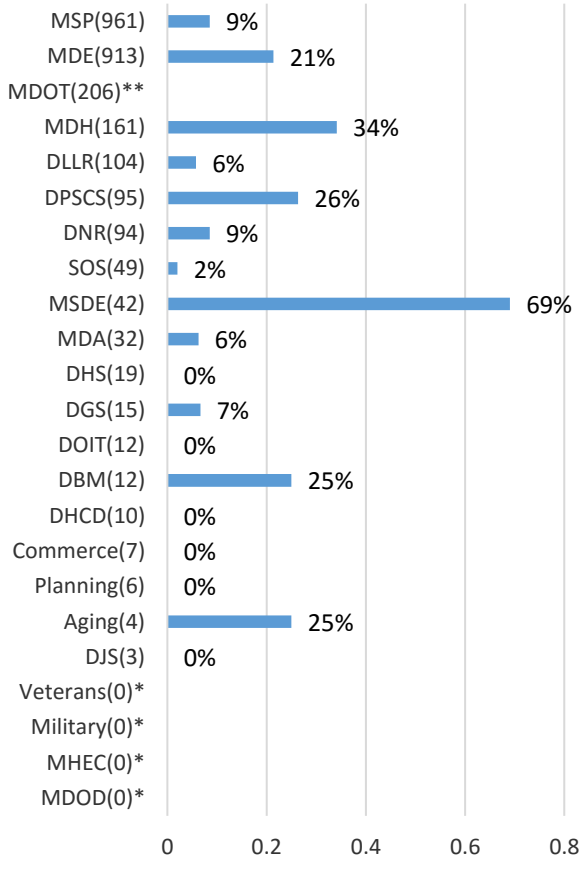


** Received No PIA requests during the reporting period*

Response Time: Final Response within 30 Days Of Receipt ***Figure 3***



Response Time: Final Response outside 30 Days Of Receipt ***Figure 4***

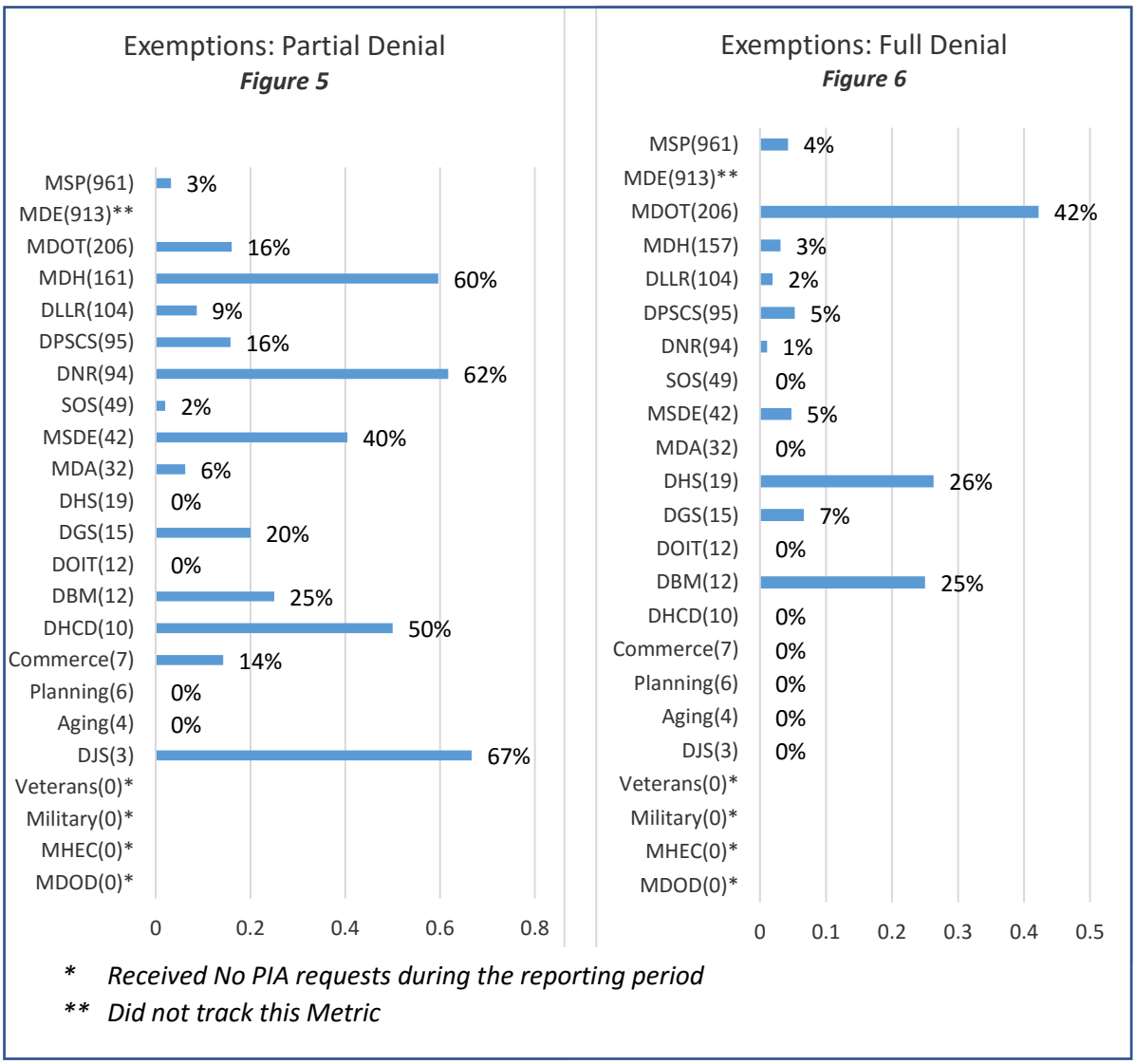


* *Received No PIA requests during the reporting period*

** *Did not track this Metric*

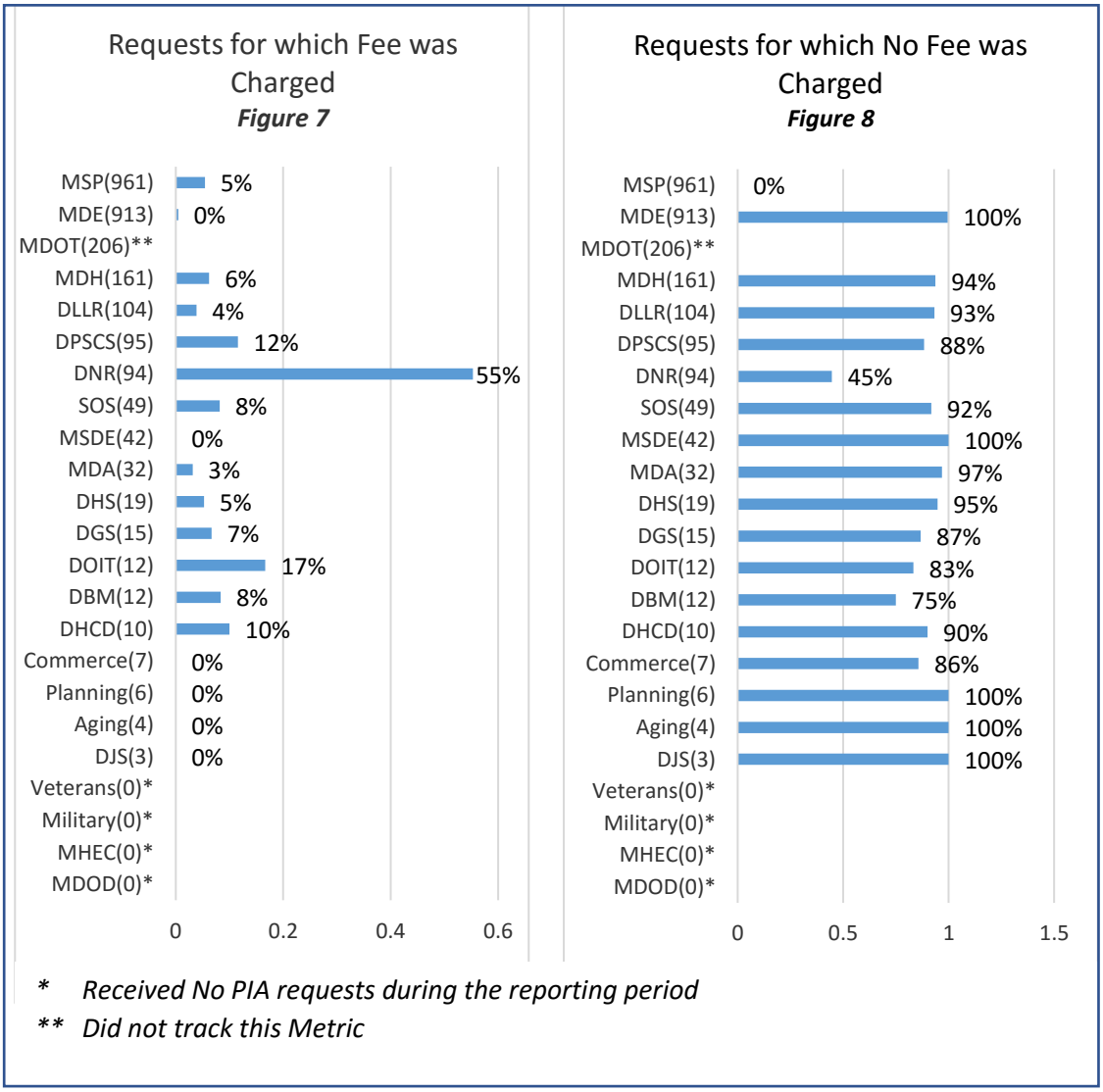
3. Disposition of PIA Requests (Figures 5 and 6)

Figures 5 and 6, below, reflect the percentage of requests that were denied, in whole or in part. Other types of dispositions, such as requests granted in full, those in which no responsive records exist, or those in which the agency was not the custodian of the records, if/as reported, are reflected in the full data set.



4. PIA Fees (Figures 7, 8, 9, and 10)

Figures 7 through 10, below, reflect the percentage of requests for which fees were charged, percentage of requests for which no fee was charged, fee waivers requested as percentage of total PIA requests, and waivers granted as percentage of waivers requested.

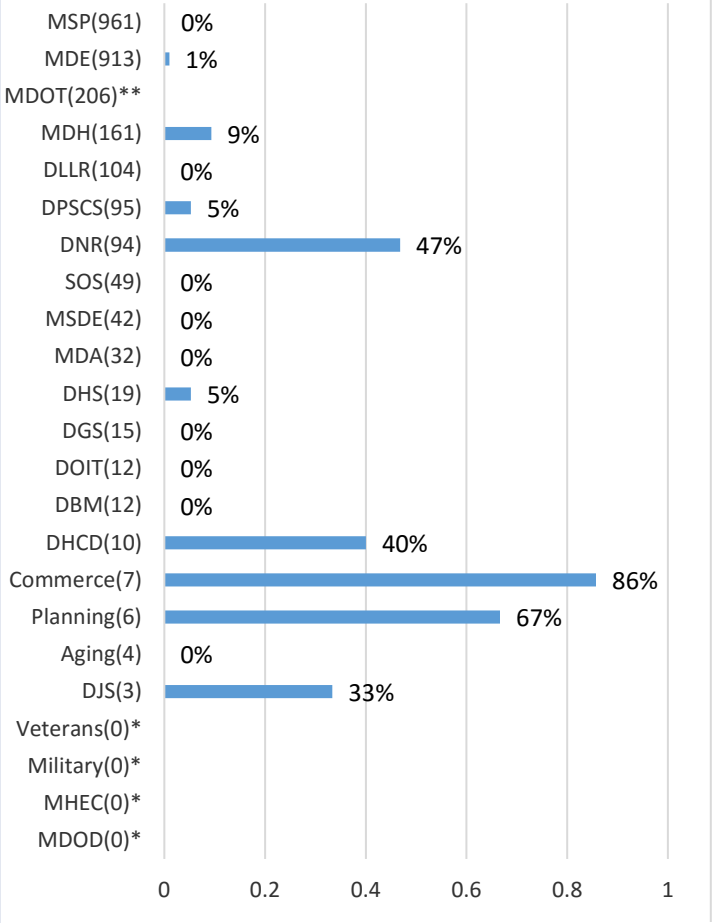


* *Received No PIA requests during the reporting period*

** *Did not track this Metric*

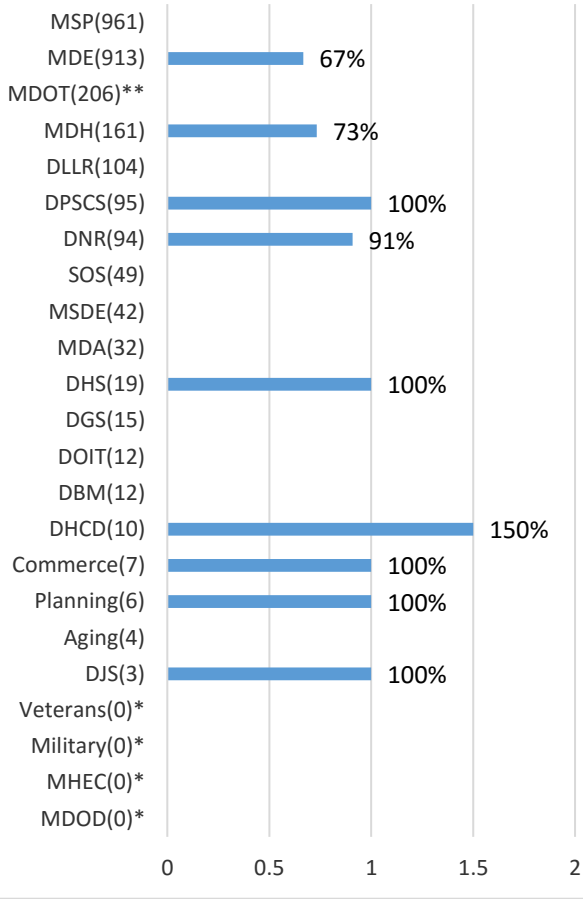
Fee Waivers Requested as % of Total PIA Requests

Figure 9



Fee Waivers Granted as % of Waivers Requested

Figure 10



* *Received No PIA requests during the reporting period*

** *Did not track this Metric*

Appendix E.
Proposed Amendments Reflecting Recommendation for Comprehensive Board Jurisdiction

PROPOSED AMENDMENTS TO IMPLEMENT THE OMBUDSMAN AND PIA COMPLIANCE BOARD'S PRELIMINARY RECOMMENDATIONS FOR ENHANCED PIA DISPUTE RESOLUTION

NOVEMBER 14, 2019

Public Information Act Compliance Board

§ 4-1A-01. [UNCHANGED]

§ 4-1A-02. Board Members

(a)(1) The Board consists of five members.

(2)(i) One member of the Board shall be a representative:

1. from a nongovernmental nonprofit group that is organized in the State;
2. who works on issues related to transparency or open government; and
3. who is nominated by representatives of the open government and news media communities.

(ii) One member of the Board shall:

1. have knowledge of the provisions of this title;
2. have served as ~~an official~~ A custodian in the State as defined in § 4-101(d) of this title; and
3. be nominated by the Maryland Association of Counties and the Maryland Municipal League.

(iii) 1. Three members of the Board shall be private citizens of the State.

2. A private citizen member of the Board may not be:

A. a custodian of a public record;

B. a member of the news media; or

C. a staff member or spokesperson for an organization that represents the interests of custodians or applicants for public records.

(3) At least TWO ~~one~~ memberS of the Board shall be ~~an~~ attorneyS admitted to the Maryland Bar.

(4) AT LEAST ONE MEMBER OF THE BOARD SHALL BE KNOWLEDGABLE ABOUT ELECTRONIC RECORDS, INCLUDING ELECTRONIC STORAGE, RETRIEVAL, REVIEW, AND REPRODUCTION TECHNOLOGIES.

§ 4-1A-03. [UNCHANGED]

§ 4-1A-04. Powers and duties of Board

(a) The Board shall:

(1) receive, review, and, subject to § 4-1A-07 of this subtitle, resolve complaints filed under § 4-1A-05 of this subtitle from any applicant or the applicant's designated representative alleging that a custodian: ~~charged an unreasonable fee under~~ § 4-206 ~~of this title;~~

(I) DENIED INSPECTION OF A PUBLIC RECORD IN VIOLATION OF THIS TITLE;

(II) CHARGED AN UNREASONABLE FEE OF MORE THAN $200 UNDER § 4-206 OF THIS TITLE;

(III) IMPROPERLY DENIED A FEE WAIVER REQUEST UNDER § 4-206(E) OF THIS TITLE; OR

(IV) DID NOT TIMELY RESPOND TO A REQUEST FOR A PUBLIC RECORD UNDER § 4-203 OF THIS TITLE;

(2) issue a written opinion as to whether a violation has occurred; and

(3) ORDER THE CUSTODIAN TO:

(I) IF THE BOARD FINDS THAT THE CUSTODIAN DENIED INSPECTION OF A PUBLIC RECORD IN VIOLATION OF THIS TITLE, PRODUCE THE PUBLIC RECORD FOR INSPECTION;

(II) ~~(3)~~ if the Board finds that the custodian charged an unreasonable fee under § 4-206 of this title, order the custodian to reduce the fee to an amount determined by the Board to be reasonable and refund the difference~~.~~;

(III) IF THE BOARD FINDS THAT THE CUSTODIAN IMPROPERLY DENIED A FEE WAIVER REQUEST UNDER § 4-206(E) OF THIS TITLE, WAIVE THE FEE OR RECONSIDER THE FEE WAIVER REQUEST; OR

(IV) IF THE BOARD FINDS THAT THE CUSTODIAN DID NOT TIMELY RESPOND TO A REQUEST FOR A PUBLIC RECORD UNDER § 4-203 OF THIS

TITLE, ORDER THE CUSTODIAN TO PROMPTLY RESPOND AND, IN THE BOARD'S DISCRETION, TO WAIVE ANY FEE THE CUSTODIAN MAY OTHERWISE BE ENTITLED TO CHARGE UNDER § 4-206 OF THIS TITLE.

(B) THE BOARD SHALL:

(1) RECEIVE, REVIEW, AND, SUBJECT TO § 4-1A-07 OF THIS SUBTITLE, RESOLVE COMPLAINTS FILED UNDER § 4-1A-05 OF THIS SUBTITLE FROM ANY CUSTODIAN ALLEGING THAT AN APPLICANT'S REQUEST IS OVERLY REPETITIVE OR UNDULY BURDENSOME;

(2) ISSUE A WRITTEN OPINION AS TO WHETHER THE APPLICANT'S REQUEST IS OVERLY REPETITIVE OR UNDULY BURDENSOME; AND

(3) ISSUE AN ORDER AUTHORIZING THE CUSTODIAN TO:

(I) IF THE BOARD FINDS THAT THE APPLICANT'S REQUEST IS OVERLY REPETITIVE, BASED ON THE TOTALITY OF THE CIRCUMSTANCES, INCLUDING THE NUMBER AND SCOPE OF THE APPLICANT'S PAST REQUESTS AND THE CUSTODIAN'S RESPONSES THERETO, IGNORE THE APPLICANT'S REQUEST ON THAT TOPIC; OR

(II) IF THE BOARD FINDS THAT THE APPLICANT'S REQUEST IS UNDULY BURDENSOME, BASED ON THE TOTALITY OF THE CIRCUMSNTANCES, INCLUDING THE SCOPE OF THE REQUEST AND THE CUSTODIAN'S EFFORTS TO COOPERATE WITH THE APPLICANT, RESPOND TO A LESS BURDENSOME VERSION OF THE REQUEST WITHIN A REASONABLE TIMEFRAME, AS DETERMINED BY THE BOARD.

~~(b)~~ (C) The Board shall:

(1) ADOPT REGULATIONS TO CARRY OUT THIS TITLE;

(2) study ongoing compliance with this title by custodians; and

(3) make recommendations to the General Assembly for improvements to this title.

~~(c)~~(D)(1) On or before October 1 of each year, the Board shall submit a report to the Governor and, subject to § 2-1246 of the State Government Article, the General Assembly.

(2) The report shall:

(i) describe the activities of the Board;
(ii) describe the opinions of the Board;
(iii) state the number and nature of complaints filed with the Board; and
(iv) recommend any improvements to this title.

§ 4-1A-05. Complaints to Board

In general

(a) Any applicant or CUSTODIAN ~~the applicant's designated representative~~ may file a written complaint with the Board UNDER § 4-1A-04 OF THIS SUBTITLE IF:~~seeking a written opinion and order from the Board if~~:

~~(1) a custodian charged a fee under § 4-206 of this title of more than $350; and~~

(1) THE COMPLAINANT ATTEMPTED TO RESOLVE THE DISPUTE THROUGH THE OFFICE OF THE OMBUDSMAN; AND

(2) THE OFFICE OF THE OMBUDSMAN ISSUED A FINAL DETERMINATION THAT THE DISPUTE WAS NOT RESOLVED UNDER § 4-1B-04(B)(2) OF THIS TITLE.

~~(1) a custodian charged a fee under § 4-206 of this title of more than $350; and~~
~~(2) the complainant alleges in the complaint that the fee is unreasonable.~~

~~(b)~~(B) The complaint shall:

(1) identify the custodian OR APPLICANT that is the subject of the complaint;

(2) describe the action of the custodian OR APPLICANT, the date of the action, and the circumstances of the action;

~~(3) be signed by the complainant;~~

(3) if available, include a copy of the original request for public records AND THE CUSTODIAN'S RESPONSE; and

(4) be filed within ~~90~~ 15 days after the COMPLAINANT RECEIVES THE OMBUDSMAN'S FINAL DETERMINATION UNDER § 4-1B-04(B)(2) OF THIS TITLE.~~action that is the subject of the complaint occurred.~~

§ 4-1A-06. Receipt of complaint; response

(a) Except as provided in subsection (c) of this section, on receipt of a written complaint, the Board promptly shall:

(1) send the complaint to the custodian OR APPLICANT identified in the complaint; and

(2) request that a response to the complaint be sent to the Board.

(b) (1) The custodian OR APPLICANT shall file a written response to the complaint within 15 days after ~~the custodian~~ receive~~s~~ING the complaint.

(2) On request of the Board, the custodian shall PROVIDE: ~~include with its written response to the complaint the basis for the fee that was charged~~:

(I) A RESPONSE, IF ONE WAS NOT TIMELY FILED;

(II) IF THE COMPLAINT ALLEGES THAT THE CUSTODIAN DENIED INSPECTION OF A PUBLIC RECORD IN VIOLATION OF THIS TITLE:

1. A COPY OF THE PUBLIC RECORD OR DESCRIPTIVE INDEX OF THE PUBLIC RECORD, AS APPROPRIATE; AND

2. THE PROVISION OF LAW THAT THE CUSTODIAN ALLEGES ALLOWS THE CUSTODIAN TO DENY INSPECTION OF THE PUBLIC RECORD;

(III) IF THE COMPLAINT ALLEGES THAT THE CUSTODIAN CHARGED AN UNREASONABLE FEE UNDER § 4-206 OF THIS TITLE, THE BASIS FOR THE FEE THAT WAS CHARGED; OR

(IV) IF THE COMPLAINT ALLEGES THAT THE CUSTODIAN IMPROPERLY DENIED A FEE WAIVER UNDER § 4-206 OF THIS TITLE, THE BASIS FOR THE DENIAL.

(4) ON REQUEST OF THE BOARD, A CUSTODIAN OR APPLICANT SHALL PROVIDE AN AFFIDAVIT CONCERNING FACTS AT ISSUE IN THE COMPLAINT.

(5) THE BOARD SHALL MAINTAIN THE CONFIDENTIALITY OF ANY PRIVILEGED OR CONFIDENTIAL INFORMATION PROVIDED BY A CUSTODIAN OR APPLIACANT UNDER THIS SUBSECTION.

(c) If ANY REQUESTED SUBMISSION~~a written response~~ is not received within ~~45~~ 30 days after the ~~notice~~ REQUEST is sent, the Board shall decide the case on the facts before the Board.

§ 4-1A-07. Review and written opinion by Board

(a) (1) The Board shall review the complaint and any response.

(2) SUBJECT TO § 4-1A-06, THE BOARD ~~If the information in the complaint and response is sufficient for making a determination based on the Board's own interpretation of the evidence, within 30 days after receiving the response, the Board~~ shall issue a written opinion WITHIN 30 DAYS AFTER RECEIVING ALL REQUESTED SUBMISSIONS. ~~as to whether a violation of this title has occurred or will occur~~.

(b) (1)(i) Subject to subparagraph (ii) of this paragraph, if the Board is unable to reach a determination based on the written submissions before it, the Board may schedule an informal conference to hear from the complainant~~, the custodian,~~ or any other person with relevant information about the subject of the complaint.

(ii) The Board shall hold the informal conference under subparagraph (i) of this paragraph in a location that is as convenient as practicable to the ~~complainant~~ APPLICANT and the custodian.

(2) When conducting a conference that is scheduled under paragraph (1) of this subsection, the Board may allow the parties to testify by teleconference or submit written testimony by electronic mail.

(3) An informal conference scheduled by the Board is not a contested case within the meaning of § 10-202(d) of the State Government Article.

(4) The Board shall issue a written opinion within 30 days after the informal conference.

(c) (1) If the Board is unable to issue an opinion on a complaint within the time periods specified in subsection (a) or (b) of this section, the Board shall:

(i) state in writing the reason for its inability to issue an opinion; and

(ii) issue an opinion as soon as possible but not later than ~~90~~ 120 days after the filing of the complaint.

(2) An opinion of the Board may state that the Board is unable to resolve the complaint.

(d) The Board shall send a copy of the written opinion to the complainant and the affected custodian OR APPLICANT.

§ 4-1A-08. [UNCHANGED]

§ 4-1A-09. [UNCHANGED]

§ 4-1A-10. [UNCHANGED]

Office of the Public Access Ombudsman

§ 4-1B-01. [UNCHANGED]

§ 4-1B-02. [UNCHANGED]

§ 4-1B-03. [UNCHANGED]

§ 4-1B-04. Powers and duties of Ombudsman

(a) Subject to subsection ~~(b)~~ (D) of this section, the Ombudsman shall make reasonable attempts to resolve disputes between applicants and custodians relating to requests for public records under this title, including disputes over:

(1) the custodian's application of an exemption;
(2) redactions of information in the public record;
(3) the failure of the custodian to produce a public record in a timely manner or to disclose all records relevant to the request;
(4) overly broad requests for public records;
(5) the amount of time a custodian needs, given available staff and resources, to produce public records;
(6) a request for or denial of a fee waiver under § 4-206(e) of this title; and
(7) repetitive or redundant requests from an applicant.

(B) WITHIN 90 DAYS OF RECEIVING A REQUEST FOR DISPUTE RESOLUTION, UNLESS THE PARTIES AGREE TO EXTEND THE DEADLINE, THE OFFICE OF THE OMBUDSMAN SHALL ISSUE A FINAL DETERMINATION STATING:

(1) THAT THE PUBLIC RECORDS DISPUTE HAS BEEN RESOLVED; OR

(2) THAT THE PUBLIC RECORDS DISPUTE HAS NOT BEEN RESOLVED.

(C) IF THE OMBUDSMAN ISSUES A FINAL DETERMINATION STATING THAT THE PUBLIC RECORDS DISPUTE HAS NOT BEEN RESOLVED, THE DETERMINATION MUST INFORM THE PARTIES OF THE AVAILABILITY OF REVIEW BY THE PUBLIC INFORMATION ACT COMPLIANCE BOARD UNDER § 4-1A-04 OF THIS TITLE.

~~(b)~~(D)(1) When resolving disputes under this section, the Ombudsman may not:

(i) compel a custodian to disclose public records or redacted information in the custodian's physical custody to the Ombudsman or an applicant; or

(ii) except as provided in paragraphS (2) AND (3) of this subsection, disclose information received from an applicant or custodian without written consent from the applicant and custodian.

(2) The Ombudsman may disclose information received from an applicant or custodian to the assistant Attorney General assigned to the Office of the Ombudsman, OR TO ANY OTHER PERSON WORKING UNDER THE DIRECTION OF THE OFFICE OF THE OMBUDSMAN.

(3) THE OMBUDSMAN MAY TRANSFER BASIC INFORMATION ABOUT A DISPUTE, INCLUDING THE IDENTITY OF THE PARTIES AND THE NATURE OF THE DISPUTE, TO THE PUBLIC INFORMATION ACT COMPLIANCE BOARD, WITH APPROPRIATE STEPS TAKEN TO PROTECT THE CONFIDENTIALITY OF COMMUNICATIONS MADE OR RECEIVED IN THE OMBUDSMAN'S DISPUTE RESOLUTION ATTEMPTS.

Appendix F.
Public Comments*

*We have redacted the contact information of private individuals, as well as material pertaining to particular Ombudsman mediations, which the Ombudsman is required by law to maintain in confidence.

MARYLAND Association of COUNTIES

MML

DATE: December 15, 2019

TO: Jeffery Hochstetler, Assistant Attorney General and Counsel for the Public Information Act Compliance Board

FROM: Maryland Association of Counties and Maryland Municipal League

RE: Comments on *Report on the Public Information Act: Preliminary Findings and Recommendations*

The Maryland Association of Counties (MACo) and the Maryland Municipal League (MML) offer the following joint comments in response to the recommendations of the Public Information Act Compliance Board (Board) and the Public Access Ombudsman (Ombudsman) found in the *Report on the Public Information Act: Preliminary Findings and Recommendations* (Report). We appreciate the opportunity to provide feedback on the recommendations. We also wish to acknowledge the hard work of both the Board and Ombudsman in preparing the Report.

1. Scope of Survey

MACo and MML are concerned that while the scope of the survey only included 23 state agencies and no local agencies, the Report's recommendations apply to both to the State and local jurisdictions. The Report acknowledges that "much of the reporting agencies' quantitative data is incomplete" and "many agency responses were internally inconsistent to a degree that we could not rely on them for certain comparisons and evaluations." (Report, page 4). Yet the Report ultimately uses this incomplete and inconsistent state data to make significant policy recommendations for local governments. **MACo and MML do not believe that the survey data is suitable for creating recommendations regarding local government Public Information Act (PIA) issues.**

2. Expansion of the Board's Enforcement Authority – In General

MACo and MML are concerned about the recommendations regarding expansion of the Board's authority. The original legislation creating the Board set a $350 threshold regarding fee disputes only after much debate and consideration by stakeholders. The threshold was set at that level to reflect cases of significant fiscal impact to records requestors.

People who wish to contest other aspects of a records request may either use the voluntary mediation provided through the Ombudsman or raise the issue in Maryland court. We do not

believe creating a secondary and redundant enforcement step through the Board will reduce costs and staff time for local governments, but rather increase them. **MACo and MML do not believe the Board's enforcement authority should be expanded.**

3. Expansion of the Board's Enforcement Authority – Fee Waivers

Counties and municipalities will grant fee waivers as appropriate, subject to the parameters established in existing law, and dependent on the nature of the requestor and the scope of the records request. Neither MACo nor MML have received reports of significant problems regarding the use of fee waivers at a local level. Denial of a fee waiver can already be challenged by going to court and there is no reason to create an additional enforcement mechanism. **MACo and MML believe that local governments should retain their existing discretion regarding the issuance of fee waivers but could consider enhancing education regarding fee waivers.**

4. Expansion of the Board's Enforcement Authority – Document Review

MACo and MML strongly oppose any recommendation allowing the Board to review documents subject to a discretionary or mandatory denial. Currently, contested documents can be reviewed *in camera* by a judge as part of a formal judicial proceeding. This has been the method referenced by prior Attorney General Opinions on the applicability of exemptions. This provides privacy protections for the subject of the document as well as critical liability protections for record custodians.

Moreover, the expertise of the judicial system is required to determine the applicability of exemptions in record disclosure laws because it requires the application of case law to the particular facts at issue. This is an increasingly complex area of the law as evidenced by the recent inclusion in the Public Information Act of references to other state and federal laws. 2019 Laws Md. ch. 297.

However, the Report's recommendation would allow appointed individuals, who are not part of the judicial system, to compel document production from local governments outside of a judicial proceeding. This could expose local governments to significant liability risks if a custodian releases a document based on the Board's order and a court subsequently holds that the document release should have been denied. There is no exemption in many state and federal laws that would allow disclosure outside of the court system to an appointed official. **MACo and MML believe that the authority of the Board should not be expanded to include document review.**

5. Mandatory Ombudsman Mediation

MACo and MML have concerns over making Ombudsman mediation a mandatory part of the PIA process. Currently, using the Ombudsman is voluntary for both parties and not directly connected to Board or judicial review. We believe that part of the Ombudsman's success is

because of that disconnect and because parties who voluntarily agree to mediation are generally acting in good faith. However, if the mediation is mandatory, it becomes just another link in the chain in the review process and would likely lose its effectiveness. Parties will start treating it more as part of the adversarial proceeding process and less like a valuable form of alternative dispute resolution. It would also significantly delay a final decision on a request to view a document—the opposite of the PIA's stated intent. **MACo and MML support keeping the Ombudsman mediation process voluntary.**

6. Expansion of Voluntary Ombudsman Mediation

MACo and MML believe that the current voluntary Ombudsman mediation process has been extremely successful. As the Report notes, for FY 2019 the Ombudsman enjoyed an overall success rate of 74%. This is a testament to both the current Ombudsman and the structure of the mediation process. **MACo and MML would be open to working with the Board to potentially: (1) increase the role of the Board in the mediation process by letting them mediate cases where there is no conflict of interest (*i.e.*, cases that are not within their scope of authority to hear); (2) improve education and outreach efforts to encourage use of the Ombudsman and mediation; and (3) determine how to increase resources dedicated to the Ombudsman and mediation.**

Conclusion

In conclusion, MACo and MML support the work of the Board and the Ombudsman. However, for the reasons cited above, we have significant concerns about the usefulness and practicality of expanding the scope of the Board. We would be willing to work with the Board and the Ombudsman to expand the use of voluntary mediation, including whether there could be an expanded role for Board in this area. If you have any questions on these comments, please contact Leslie Knapp, Jr. (lknapp@mdcounties.com) or Justin Fiore (justinf@mdmunicipal.org).

From: Al Carr <alfred.carr@gmail.com>
Sent: Wenesday, December 11, 2019 9:46 AM

Hi Lisa,

Here are my thoughts about changes to the MPIA that are needed:

1) Close the Sociological Information Loophole
The term "sociological information" which has a medical/social services origin should be defined in the statute rather than left to individual agencies/custodians to define by rule or regulation. At least one agency has abused this loophole and so could others in the future. The current definitions by various agencies in regulations should be reviewed and incorporated as appropriate into a statutory definition.

2) Narrow the Scope of Section 4-341
The legislative intent of this 2018 emergency legislation was to protect citizens from spamming by harvesting email addresses from government newsletter sign ups. At least one state agency is using this section to deny legitimate MPIA requests in a way that is inconsistent with the intent of the law.

Thank you,

Al

Delegate Al Carr
301 858-3638 office

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December 6, 2019

Lisa Kershner
PIA Ombudsman
200 St. Paul Street
Baltimore, MD 21201

RE: COMMENTS FOR REPORT on the PUBLIC INFORMATION ACT: Preliminary Findings and Recommendations

Dear Ms. Kershner:

Thank you for the opportunity to provide comments on the above-referenced report, dated November 6, 2019. From our perspective, the findings detailed in the report are consistent with our members' experience with various agencies. Many of the surveyed agencies are not tracking or monitoring the number of requests received and the disposition of those requests, or have reported data so internally inconsistent that it calls into question the validity of their data. This is not a surprise to journalists who hear routinely from agencies that records are unavailable, if they get a response at all. As the report points out, "[w]hen an agency's response is missing or long overdue, it frequently indicates other compliance issues." The work of the Ombudsman and the PIA Compliance Board has been exemplary in helping to clarify issues and resolve disputes. We agree with many of the recommendations outlined in the report. However, there are several areas in which we believe the Act would benefit from even further reform.

Expanding the Board's jurisdiction. In the past three years the PIA Compliance Board has been in operation, it has been vastly underutilized, issuing only 22 opinions in comparison to the 821 mediations in the Ombudsman's caseload. This points to an overly narrow jurisdiction, namely fee disputes at $350 or over. Maryland's requestors do not often utilize judicial remedies for a variety of reasons, thus leaving custodians and requestors in limbo in terms of precedent-setting opinions on records disputes. Under the Ombudsman's recommendation, the PIACB would be able to issue opinions and enforce these opinions on a much wider range of disputes. We agree with the report's anticipation that published decisions will provide much-needed clarity and enforcement for requestors and custodians alike. It is important that disputes will not require mediation, although we agree that mediation should always been offered as a first option. Our concern is that requiring a mediation may slow down the process when it is obvious that a clear opinion by the PIACB is needed. For our members, timely responses to PIA requests are critical. We believe that the process outlined in the report is the most

efficient use of resources and will allow the PIACB to quickly come up to speed on a dispute and render a decision. We wholeheartedly support this recommendation.

Compliance monitoring – feasibility of agency self-reporting. The report clearly lays out that the overall data provided by the surveyed agencies was lacking, partly because the agencies were not expected to track this data, and partly because PIA requests often take a back seat to other work in the agency's purview. Reporting by the agencies would almost certainly result in more focus to the disposition of requests, and, as the report notes, a "likely reduction in "MIA" requests," which is of particular concern for our members. We urge the Ombudsman to make agency reporting a formal recommendation.

Best practices and agency needs. The report shares best practices and guidelines based on feedback from agencies. We agree that custodians, requestors and the overall transparency of records in Maryland would benefit from the implementation of the five recommendations. Proactive disclosure of records, training and professionalizing the front line staffers responsible for handling PIA requests, leveraging technology, and internal tracking and management of PIA requests are all common-sense ways to get to the goal. Open public records is critical to transparency in Maryland and this often requires a shift in agency culture and messaging. Fulfilling public records requests is not optional and compliance is an "integral part of the agency's larger public mission." We support this recommendation.

We believe that the recommendations in the report will be effective; however there are areas in which we feel that further reforms to the PIA are needed.

Further reforms needed.

Ombudsman's role. The Ombudsman is a neutral party who can mediate disputes (confidentially, when necessary), and this role has been effective. We believe that the report recommendations will provide the office with more tools to encourage resolution of mediated cases by providing a fuller body of precedent from the PIACB. We believe a modest annual report to the legislature from the Ombudsman, identifying caseload and trends, would be helpful. On an informal basis, this already occurs.

The Ombudsman could be more effective if custodians were more strongly encouraged, or even required, to share the potentially responsive records with the Ombudsman in the course of the mediation. Such records could be reviewed by the Ombudsman without being disclosed to the requester until/unless they are deemed public. This practice would help provide context for the mediation discussion, and improve the quality of advice. If the public body refused to provide information to the Ombudsman, she could send the case to the PIA Compliance Board, who could then make a ruling and potentially compel the agency to release the record.

We also believe that the Ombudsman would be able to pinpoint problems within agencies more quickly if whistleblower protections were added to the PIA. Many times, rank and file staffers may have information about recordkeeping and maintenance of public records that would be useful to dispute resolution. Absent whistleblower protections, these staffers may not come forward due to fear of retaliation, and the whole community suffers.

Timeliness of requests. Maryland's deadline of 30 days to fulfill a request is one of the longest in the country. At the federal level, the deadline is 20 days, and in Virginia, the deadline is five business days. We recommend that Maryland's fulfillment period be brought to 10 days.

Fee waivers. The use of fee waivers is unclear based on the data provided by the interim report's survey. In our practical experience, public bodies across the state have widely varying, and sometimes conflicting, approaches to determining whether a fee waiver is justified based on the public interest. This inconsistency in the application of fee waivers across the state creates confusion and mistrust among requestors. We believe that clarification of the standards for fee waivers is important, and the federal government's FOIA standards requiring at least partial fee waivers if disclosure is in the public interest should be applied. Fees and costs should not be a prohibitive bar to the public's ability to monitor the activities of its state and local governments in Maryland.

The cost of requested information becomes higher as more attorney review time is used to screen records. We agree with the Compliance Board's recommendation that public bodies may not charge fees for duplicate reviews of information. We would bolster this principle further with a clear directive that agencies cannot charge for time spent on lawyers to review requested documents. This would incentivize agencies to streamline the review process, and prevent the abusive citation of legal fees to discourage requests.

Further, we believe that basic records should be presumed to be open and not require attorney review time to release those records to the public.

Some of the consistent fees stem from poor record-keeping practices of custodians. Creating and funding requirements for efficient records maintenance and retention policies will aid in accessing information more quickly. Should require reporting of the number of requests received and how tracked -expand. Increasing electronic records such as body camera footage, email, text and phone records mean more resources needed.

Enforcement of the PIA statute. For the most part, custodians work to provide public information in a timely and complete fashion. However, there are some public bodies that consistently undermine the values stated in the PIA by delaying release of information or intentionally withholding information that is acknowledged to be a public record. Stronger enforcement is needed for these cases. A straightforward solution could be that public bodies be prohibited for charging for a PIA request if the delivery of the request takes longer than the 30-day period, or misses significant milestones, such as the 10-day letter. This would be waived if the requestor agrees to the delay or if the Ombudsman or Compliance Board is reviewing the case.

Records subject to the PIA. Public records held by third parties are subject to the PIA, though the status of records made by a private contractor in the course of transacting business on behalf of government is unclear. Procurement contracts should be amended to clarify and provide guidance for the information that goes into the public record. We are sensitive to the business needs of contractors to protect trade secrets and to preserve privacy of individuals; however, these must be balanced against the public interest. It may be helpful to specify that records created in carrying out the contract are public records

subject to FOIA, or that copies of a database, say on DVD, be supplied quarterly to the public agency which is a party to the contract as a "work for hire."

Exemptions. There are elements of the PIA that often require a balancing of privacy rights against the public's legitimate interest in the records. In our experience, disciplinary records of public employees where those records intersect with the public interest, confidential financial information / trade secrets, provisions of the Agriculture Article, active investigation exemptions, and discretionary deliberative exemptions are often used too broadly as a deterrent to public access. We recommend amending the PIA and the Agriculture Article to make it clearer that privacy, in all these contexts, is not an absolute consideration, and that the impact of disclosure must be balanced against the potential harm of withholding records whose disclosure may be in the public interest. For instance, the U.S. Circuit Court of Appeals for the District of Columbia uses factors found in Critical Mass Energy Project v. Nuclear Regulatory Commission to assess whether confidential information given to public bodies is disclosable under the PIA. Other courts may have specific factors that judges use to consider whether exemptions on those grounds are justified. We believe the PIA should be amended to require custodians to consider those factors as part of their deliberation and articulate a specific harm that would result from disclosure, in addition to simply qualifying for these specific exemptions. An amendment to the PIA passed in 2017 requires custodians to disclose why redaction is not appropriate for a specific record, and this proposal follows similar reasoning.

Public bodies sometimes also claim private non-profit status to shield their documents and decisions from public information act disclosure. We believe the law should clarify that information from "quasi-public" groups is accessible under the PIA.

Thank you for the opportunity to comment on these aspects of the report. We look forward with interest to the final report. Should you have any questions in the meantime, please do not hesitate to contact me. I can be reached at rsnyder@mddcpress.com or 443-768-3281.

Sincerely,

Rebecca Snyder
Executive Director

ACLU Maryland

PUBLIC JUSTICE CENTER

December 6, 2019

Janice Clark
Office of the Attorney General
Attn: Public Access Unit
200 St. Paul Place
Baltimore, MD 21202

RE: Report on the Public Information Act: Preliminary Findings and Recommendations

Dear Ms. Clark:

The ACLU of Maryland and Public Justice Center respectfully submit the following comments regarding the Public Access Ombudsman and Public Information Act Compliance Board's Report on the Public Information Act: Preliminary Findings and Recommendations (hereafter "report").

I. Fee waivers based on indigency and public interest

a. Indigency waivers

On page 10 of the report, the authors propose that any PIA dispute resolution or enforcement mechanism must address fee disputes in a meaningful way, especially regarding fee waiver denials. Currently an official custodian "may waive a fee" if a requestor is indigent and requests a fee waiver.[1] The report cites "agencies' misunderstanding of the PIA's fee waiver provisions and/or default unwillingness" as reasons for denying many waiver requests, even when the requestor submits an affidavit of indigency. We advocate to change "may" to "shall" in GP § 4-206(e), to compel agencies to comply with this critical provision.

Allowing agencies to routinely deny legitimate fee waiver requests sends the message that poor Marylanders are entitled to only a limited measure of transparency, whereas their wealthy counterparts can buy access to more public information.

[1] GP § 4-206(e)

The proposed change from "may" to "shall" would clarify any agency misunderstanding, and underscore that the Public Information Act is grounded in the principle that "Government of the people, by the people, and for the people must be open to the people."[2] It would also solve a significant compliance problem with the current statute and facilitate efficient and effective enforcement of the fee waiver requirement.

b. Public interest waivers

We also request more guidance for agencies administering public interest waivers. In our experience requesting public interest waivers, there remains a great deal of confusion among custodians regarding what is considered to be in the public interest.

Additionally, we agree with the report's preliminary recommendations for proactive steps that agencies can take to reduce the burden related to records disclosure. These steps, listed on page 19 of the report, include (1) maintaining lists of readily available documents to be provided immediately without review; (2) publishing documents or links to them on agency websites; and (3) publishing records that have already been disclosed under the PIA, especially where there is widespread public interest. In doing so, it will be much easier for agencies to comply timely with the PIA requirements, while upholding the spirit of the law.

c. Threshold for the Board's jurisdiction

We agree that the $350 threshold to fall within the PIA Compliance Board's jurisdiction for a dispute is too high and should be lowered. On page 10, the report shows that most fee-related disputes involve either fees less than $350 or a denial of a fee waiver request. Lowering the threshold will bring more fee-related disputes under the Board's jurisdiction, and ensure more equitable treatment and transparency for requestors with limited means.

d. Standardized duplication costs

We also urge that the Board be granted the authority to standardize duplication costs for all government entities based on actual costs of photocopy reproduction. As in New Jersey, that cost should be fixed at $0.05 per page. There is no reason for one government entity to charge $0.10 per page and others to charge $0.50 per page. Such charges far exceed the actual costs of reproduction.

II. Response time

Under the PIA, an agency generally must issue its initial response within 10 business days, and a final written response within 30 calendar days. We call for shortening the initial response time to 5 business days, and the final written response to 15 calendar days. We also support the report's recommendations for each agency to (1) accurately track all PIA requests from the time it receives the request through the time it issues a final response, and (2) fully integrate records

[2] Office of the Attorney General, Maryland Public Information Act Manual, 14th Ed. (2015).

management practices and disclosure methods into specialized software and other electronic records and communications technologies.

Thank you for your time and attention to this important issue.

Sincerely,

Joseph Spielberger
Public Policy Counsel
ACLU of Maryland

Debra Gardner
Legal Director
Public Justice Center

BRIAN E. FROSH
Attorney General

ELIZABETH HARRIS
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December 6, 2019

Lisa Kershner
Public Access Ombudsman
200 Saint Paul Place
Baltimore, MD 21202

John H. West III
Chair, Public Information Act Compliance Board
200 Saint Paul Place
Baltimore, MD 21202

Dear Ms. Kershner and Members of the Public Information Act Compliance Board:

Thank you for the opportunity to comment on the Preliminary Findings and Recommendations that you issued on November 6, 2019, in advance of your upcoming Report on the Public Information Act. As you know, on October 30, 2019, the Office of the Attorney General submitted preliminary comments to the Ombudsman in response to her request for feedback about her tentative proposal to expand the jurisdiction of the Public Information Act Compliance Board ("PIACB"). In light of your later-issued preliminary findings, we have a few additional thoughts and suggestions that we hope you might find useful as you finalize your report.

First, as to the tracking and reporting of PIA caseloads, we do not yet have a position about whether agencies should be affirmatively required to track and report information about their caseloads. As your preliminary findings point out, tracking may have many benefits in terms of evaluating PIA compliance and in gauging the need of agencies for additional resources. For informational purposes, however, we note that, in at least some cases, a requirement to track and report PIA requests may slow down an agency's response to requests. For example, agencies that frequently respond to oral requests from members of the press or others may have to ask those requesters to put their requests in writing so

that they can be more easily tracked. Thus, although we understand the potential benefits of requiring tracking, we suggest that any final analysis about whether to mandate tracking and reporting consider the potential disadvantages of such a mandate, both for custodians and for requesters, in terms of more formal procedures and the possibility of slower response times.

Second, as to the proposal for expanding the jurisdiction of the PIACB, we will not be able to form a definitive position until there is draft language to review, because the details of how such a proposal would be implemented are important. In general, as we have said before, our Office agrees that some sort of expanded jurisdiction for the PIACB is an avenue that is at least worth exploring, particularly if the proposal would retain the incentive for parties to participate in informal mediation with the Ombudsman before seeking review from the PIACB. We continue to have concerns, however, about the potential workload of a PIACB with expanded jurisdiction and about whether an all-volunteer board could handle a caseload that would increase significantly in both volume and in legal complexity. *See* Maryland Office of the Attorney General, Final Report on the Implementation of the Public Information Act at 15 (Dec. 2017) ("2017 OAG Report") (explaining that assigning to the PIACB the power to adjudicate all PIA disputes may "place unreasonable expectations on the Board and its staff," at least as the Board and its staff are currently constituted). Although the preliminary findings estimate that the PIACB would be asked to handle approximately 61 matters per year, that figure appears to assume that the number of requests for mediation will remain the same, even though the Ombudsman would be the first step in a process by which the requester could get a binding resolution from the PIACB. In our view, it is highly likely that more requesters would seek to take advantage of the Ombudsman's services once that route becomes the gateway to a binding administrative proceeding. There is, of course, no way to tell for sure how many mediation requests the Ombudsman would receive or how many of those requests would be resolved in mediation and never make it to the PIACB. But we are concerned that the preliminary report may be underestimating the burden on the PIACB under the proposed expansion of its jurisdiction.

In fact, as noted in our earlier comments, most agencies in other states that resolve public records disputes have large caseloads. That is true both for states with populations larger than Maryland's and those with populations much smaller than Maryland's. For example, it is our understanding that Pennsylvania's public records agency receives

between 2,000 and 2,500 appeals every year,[1] New Jersey's agency received 355 complaints in the last fiscal year for which we could find data,[2] Connecticut's agency hears hundreds of complaints per year under its public records and open meetings laws,[3] Utah's agency decided more than 60 cases involving public records denials in 2018, despite the relatively small size of that state,[4] and Hawaii's agency received 182 formal requests for assistance under its public records and open meetings laws in fiscal year 2018 alone.[5]

Although these statistics do not enable us to predict caseloads in Maryland with any certainty or precision, they do show that large numbers of requesters in other states are using their states' extra-judicial enforcement options, and there is no reason to think that large numbers of requesters in Maryland would not do the same. Even if the PIACB's caseload does not increase as much as we expect in raw numbers, the caseload would undoubtedly increase in legal complexity. Right now, the PIACB only handles questions about the reasonableness of agency fees—a relatively simple category of disputes. If the PIACB were instead to handle all types of PIA disputes, it would have to interpret exemptions from disclosure under the PIA and other State and federal confidentiality provisions that exist outside of the PIA but require the withholding of documents under the PIA. From our own experience in representing State agencies and in responding to PIA requests, these exemptions are often difficult to apply and can involve nuanced and complex questions of statutory interpretation or common-law privileges. As a result, on those matters, the PIACB would have to issue thorough, detailed, legally complicated opinions, requiring far more time per case than the fee disputes that it currently adjudicates.[6] What is more, if the intent is to grant the PIACB power to review disputed records in camera to determine whether a particular exemption applies, the members might

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[1] *See* https://www.openrecords.pa.gov/Documents/AnnualReport 2018.pdf.

[2] *See* https://www.state.nj.us/grc/about/performance/Fiscal%20Year%202012%20Annual%20Report.pdf.

[3] *See* https://portal.ct.gov/FOI/Common-Elements/Top-Menu/About-Us.

[4] *See* https://archives.utah.gov/src/srcappeals-2016-2018.html.

[5] *See* https://oip.hawaii.gov/wp-content/uploads/2018/12/ANNUAL-REPORT-2018-OIP.pdf.

[6] On top of that, the law (at least as currently written) requires the PIACB to issue opinions within 30 days (or 90 days if the Board explains the need for an extension), *see* Md. Code Ann., Gen. Prov. ("GP") § 4-1A-07, further increasing the burden on the all-volunteer board members if its caseload were to increase.

also have to sort through piles of documents in rendering an opinion. All of that is asking a lot of an all-volunteer board, particularly when only one member of the board is required to be a lawyer. *See* GP § 4-1A-02(a)(3).

Therefore, to the extent that our predictions about the PIACB's increased caseload are right, we think that the increased caseload under this proposal may be too much for the PIACB to handle, at least as the PIACB is currently constituted. At this point, we have at least three suggestions for your consideration as to how the proposal might be amended in light of that concern.

First, as mentioned briefly in our earlier comments, one possibility would be to grant the PIACB expanded jurisdiction over *some*—but not all—PIA disputes that the Ombudsman is unable to resolve. That would reduce the administrative burden on the PIACB to a manageable level, while at the same time providing an opportunity to gauge how the PIACB handles an increased caseload. For example, two obvious first steps that could be taken to expand the PIACB's jurisdiction would be to lower the threshold for fee disputes that the PIACB can resolve from $350 to some lesser amount and to permit the PIACB to resolve disputes about fee waivers for fees over a certain amount as well. *See* 2017 OAG Report at 13 (suggesting that, before giving the PIACB jurisdiction over all PIA disputes, the General Assembly might first wish to consider granting the PIACB jurisdiction to hear fee waiver disputes). Although there may also be other types of disputes that the PIACB could handle, if there is a desire to expand the PIACB's jurisdiction only in part, fee disputes might be the best place to start because the PIACB already has expertise in that area. This approach would also provide more information about how expanded jurisdiction would work that could inform any future discussions about further expanding the PIACB's jurisdiction. To be clear, if you decide to go that route, we would urge that you keep the requirement that the parties first attempt to mediate the dispute with the Ombudsman, because we agree that any proposal for expanded jurisdiction should preserve the incentive to utilize the Ombudsman's procedures, which have proven to be a great success.

Second, as our Office has previously explained, another option would be to place the PIACB and the Open Meetings Compliance Board ("OMCB") together under the umbrella of a single independent agency that could provide joint staff and attorney support or even to merge the PIACB and OMCB into a single independent commission on open government (much like the Ethics Commission), with designated staff and a general

counsel's office. *See* 2017 OAG Report at 19. That approach might prove more costly than your proposed approach, but it would also have added benefits. *See id.* First, it would "allow for the development of open government expertise that cuts across statutory lines." *Id.* Second, it would eliminate any possible public concern stemming from the fact that our Office represents the compliance boards and State agencies that appear before those compliance boards (and from the fact that our Office responds to PIA requests that might end up before the PIACB). *Id.*[7]

Third, at the very least, the Ombudsman and PIACB would need significant additional staff support. *See* 2017 OAG Report at 16. Although the preliminary findings recommend that the PIACB could handle the proposed expanded jurisdiction with one additional administrative staff person and one additional attorney, the preliminary findings arrive at that recommendation by—in our view—underestimating the number of matters that the PIACB will be asked to resolve. Instead, as we said in our earlier comments, we think that at least *two* additional attorneys would be necessary to meet the increased needs of the Ombudsman and PIACB under the proposal outlined in the preliminary findings. That additional attorney support is necessary not only because of the increased number of cases but also the increased legal complexity that those new cases would involve. In fact, even having two additional attorneys might not be sufficient, depending on how much the PIACB's caseload ultimately increases and whether the PIACB will still be expected to resolve matters on a short deadline. But we think that two additional attorneys is the absolute bare minimum to adequately staff a PIACB with expanded jurisdiction to hear all PIA disputes.

Finally, we wanted to highlight one preliminary finding that we feel is worthy of elaboration in the final report, that is, your finding that "agencies with consistently large—or steadily increasing—volumes of PIA requests need trained staff that are either solely or primarily dedicated to handling PIA matters." Preliminary Findings at 19. We agree wholeheartedly with that sentiment. As our Office has previously said, when government employees who were not hired to respond to PIA requests are asked to undertake the often time-consuming task of searching for and reviewing documents under the PIA, they may

[7] Although "our Office manages actual conflicts through the erection of conflicts walls and appointment of substitute counsel," we have noted that merging these "entities into a separate, independent, paid commission would accomplish the[] same objectives,' while also "promot[ing] the public's faith in the process." *Id.*

view the task as a "distraction from the important public services they were hired to provide." Maryland Office of the Attorney General, Interim Report on the Implementation of the Public Information Act at 34 (Dec. 2016) ("2016 OAG Interim Report"). When that happens, there are at least three negative consequences: the employee might not respond to requests until they absolutely have to do so, the employee might not have an incentive to "improve [his or her] records-retrieval practices," and agencies lose the opportunity to centralize expertise about the PIA. 2016 OAG Interim Report. Moreover, if employees who were not hired to respond to PIA requests are asked to respond to such requests frequently, the diversion of those employees from their other duties and their fields of expertise can easily lead to employee dissatisfaction and employee turnover. Thus, we agree that agencies need adequate funding to hire personnel devoted, at least primarily if not solely, to the handling of PIA requests.

The broader point is that responding to PIA requests and doing so accurately and on time has costs, both direct and indirect. Sometimes, those costs take the form of the salaries of employees hired to work on PIA-related matters. But when custodians are asked to respond to more and more PIA requests or to take on additional duties under the PIA and are not provided with any additional funding or other resources to perform those tasks, there is still a cost. The cost merely takes the form of a delay in the provision of other government services, of reduced efficiency in government operations, or of lower morale among the agency's employees, rather than being directly reflected in a line on the agency's budget. "[T]his is not to say that" time spent on PIA compliance "is not time well-spent; providing citizen insight into government operations is every bit as important as the other governmental tasks that agencies perform." 2016 OAG Interim Report at 34. But it is important that any policy debate about the PIA, including any debate about imposing new reporting requirements or expanding the jurisdiction of the PIACB, not lose sight of these costs. In the considering possible amendments to the PIA, we thus urge that the benefits of any proposed changes be balanced with the costs (including the hidden costs) of compliance with those changes.

I hope that these additional comments are helpful. Please do not hesitate to reach out to me if you would like to discuss any of them in more detail.

Sincerely,

Patrick B. Hughes
Chief Counsel, Opinions & Advice

From: Cindy Eckard [redacted]
Sent: Thursday, December 5, 2019 11:09 AM

Dear Ms. Kershner and Ms. Clark,

Thank you for sharing your preliminary study findings regarding the Maryland PIA Ombudsman and Compliance Board structures, functions and performance. It is refreshing to read such a precise, informative and important document. I will attempt to keep my response likewise economic.

My experience with the PIA process reflects your findings: various agencies at both the local and state levels respond to PIA requests with widely disparate attitudes and abilities. The posture of their attorneys varies widely as well, as does the agencies' and the attorneys' knowledge of the Maryland Public Information Act itself. Some agencies are not only non-compliant, their attitude can be described as belligerent. It's sometimes difficult to distinguish between an agency's failure to understand the law, and their outright antagonism toward fulfilling the PIA request.

As you note on page 8: "Depending on the material requested, the PIA may require an agency to withhold all or part of the record, or it may permit, on a discretionary basis, an agency to withhold all or part of a record." On several occasions in the past few years, agencies I've contacted have used this as an opportunity to withhold whatever they choose: many have initially deemed responsive documents "protected."

It has only been through the efforts of the Ombudsman's office that multiple responsive documents were ultimately provided. Indeed, in the case of several [redacted] inquiries, a complete reversal of definitions was achieved and I was provided stacks of documents that had previously been withheld. This illustrates the capriciousness of the current PIA process within these large, powerful agencies, and speaks to the concerns you raise on page 19 regarding the agencies' culture and leadership participation.

Your report also notes how varied the responses between agencies are, pointing out, for instance, the vast differences in fee waivers between "DNR and DJS, in which a waiver was requested in 72% and 100% of their requests, respectively. DNR did not grant any of those waiver requests, while DJS granted all of them."

Similarly, I've found vast differences in the request requirements among agencies, both local and state. Some require a printed, written request with payment in advance for not very much work, while others ask for no fee, and send voluminous documents by email, and still others send responsive documentation by mail without anything but an email request.

The result is a very tippy lifeboat for citizens who have legal rights for timely access to public information, but rarely know what to expect, or what's legally owed by any given agency. Format requirements for requests, the timing of the agencies' responses, the scope of the responsive documents are basically on a "Mother, may I?" basis. The requestor also faces usually indifferent or impatient attitudes from staff, while having no empowerment in this process. Most people are uncomfortable challenging government agencies in the first place, especially local agencies, where the requestor lives, works, or has kids in school. Nearly any resistance or withholding from the agency is sufficient to deter further inquiries for most people.

But even for the determined citizen, currently, agencies have little or no oversight when they withhold public documents. The Ombudsman's office is the sole point of leverage. But it's a good bet that citizens are either unwilling to seek help (it might seem intimidating), or unaware of the Ombudsman's office. Because the cover letters for responsive documents likewise lack uniformity, some agencies fail to even mention the Ombudsman's office as a source of mediation should the citizen be unsatisfied with the agency's response.

So I would propose both a significant public awareness campaign as well as the development of uniform communication tools. Standard response letters, for instance, that could be tailored by individual agencies, would

ensure that requestors are given full explanations and notations - particularly in the form of hyperlinks - so that they can verify or challenge the agency's positions. I submit that proper and uniform response/communications tools that educate and empower a requestor to take next steps is imperative. This extends your excellent points made on page 19 regarding the need to upgrade retrieval tools as well:

"Even agencies with large PIA caseloads and robust records management programs do not appear to have comprehensive or integrated records management plans across all mediums, platforms, or devices, such as phones, email, and social media. Proper implementation of the PIA requires this kind of integration for purposes of effective search, retrieval, and production of records."

The same holds true for the need to inform citizens of their options when dissatisfied with an agency's response, and to equip citizens digitally with the statutory references cited by the agency. We have the technology. Of course, to the extent that procedures could likewise be uniformly embraced, the public information act would be truly implemented and its goals, fully realized.

Lastly, your footnote (7) on page 5 is illustrative of the overall climate in which public information is sought from government agencies - withheld information, inconsistent information, erroneous information and seeming contempt for the process, leaving those who seek legally owed documents, simply denied. This attitude contributes to procedural inefficiencies, delays, and ultimately, the denial of citizens' rights, because most people just get fed up, and give up.

"We are also including MSDE's reported figure of 300 total PIA requests, but note that when we followed up with that agency to inquire about certain inconsistencies in its data, it indicated the number may have been in error. However, the agency did not provide any amendment when invited to do so, so we have included the original reported number."

I heartily support the suggestions to expand the role of the Compliance Board to consider cases where lesser fees are debated, and hope that the General Assembly can also create real sanctions for those departments and agencies who fail to comply quickly and completely with lawful inquiries from the public. I can't stress enough the critical role played by the Ombudsman's office in upholding this pivotal law and protecting this fundamental American right: to know what the government is doing. Nothing more eloquently enables that right than the Public Information Act. But it needs both a concerted rallying call and enforcement teeth.

I'll close here with an offer to discuss more details of the brilliant report you've shared if that would be helpful to you.

Many thanks,
Cindy Eckard
[redacted]

From: Kyle Ross <[redacted]>
Sent: Friday, December 6, 2019 1:57 PM

I read the preliminary report and know the final report is due in Annapolis by December 31st, 2019.

I found the report very interesting although several of the acronyms were not spelled out in the beginning so when I got to the charts I had no idea what the letters stood for.

I think overall it's a great report. I would make two suggestions.

1.) there needs to be an outside auditor hired every five years or so to do this report

2.) there needs to be a "three strikes and you are out--- of the picture" rule. By this I mean that if the ombudsman tries three times to reach a Maryland Government Institution to resolve a public records dispute and there is no response then the case should be closed. I think it' a waste of tax payer dollars for an ombudsman to have to keep trying to work with an uncooperative agency or requestor. These staff members should be allowed to move on to the next case and use their time in furtherance of more cooperative situations. A three strikes rule gives a clear ending to a case so the requestor can move on to other options.

We all have to be realistic about how to spend the limited resources of all governmental agencies and select priorities.

From: Michael Swygert -DGS- <michael.swygert@maryland.gov>
Sent: Wednesday, December 4, 2019 10:16 AM

Please see my comments regarding the PIA JCR report. Thanks, Michael.

Significant Comments from Michael Swygert, Director, Records Management, Department of General Services.

Received via email on December 4, 2019

Excerpted from Page 4 of Report on the Public Information Act: Preliminary Findings and Recommendations

> We recognize that some of this internal inconsistency may have been due to misinterpretations of the survey instrument, but think that it more often reflects the fact that many agencies are not currently tracking much of the detail we were asked to collect and report—itself an informative finding

MS Comment. Date: 2019-11-25 13:26:28

It was not always clear what the questions within the quantitative survey were asking. For example, it was unclear what was meant by an initial response within 10 business days: 10-dayletters informing requestors that responses will take longer than 10 business days to fulfill or final responses within 10 business days. Because the question included the word "initial", DGS provided the number of 10-day letters sent to requestors. My guess is that this is why this question is internally inconsistent for DGS. In the future, it may be helpful to include instructions for the quantitative portion of this report.

Excerpted from Page 5 of Report on the Public Information Act: Preliminary Findings and Recommendations.

> This data also reflects that most of the reporting agencies have a light to moderate caseload, with some agencies reporting what might be described as a *de minimis* number of requests. Specifically, 11 agencies reported having fewer than 40 PIA requests during FY 2019, and 5 reported having fewer than 10. An additional 6 agencies reported receiving between 50 and 300 requests.

MS Comment. Date: 2019-12-04 10:05:57

Agencies may receive few requests in comparison to, say, MDE but the requests may be broad in scope and require considerable resources to fulfill. This is more of less the case with DGS. I would be interested in more detail on not just the number but kind and complexity of requests received by agencies.

Excerpted from Page 5 of Report on the Public Information Act: Preliminary Findings and Recommendations.

> The disparity between agency caseloads suggests that improvements in performance will come from measures targeted to agency-specific problem areas, units, or processes, rather than from any “one size

fits all" approach with respect to staffing, processes, or infrastructure. Rather, agencies with light to moderate caseloads can look to systems used by those with heavier caseloads, build on what works well, and learn from agencies with expertise in handling certain types of data and records, such as large data sets. We discuss some generally beneficial practices in our recommendations section below.

MS Comment. Date: 2019-12-04 10:06:34

It may be helpful to provide guidance for requestors on how to appropriately request records, particularly for requests covering multiple sets of records and/or long time frames. The goal would not be to limit responsive records but rather avoid vague and/or overly broad requests and limit search and review time.

Excerpted from Page 5 of Report on the Public Information Act: Preliminary Findings and Recommendations.

Under the PIA, an agency has 10 business days in which to send an initial response to a request. If the response is not finalized at that time, the "10-day" response must provide the requestor with certain information, such as the reason for the delay and an estimate of fees, if any. An agency has 30 calendar days in which to send the final response, which can be extended by consent of the requestor

MS Comment. Date: 2019-11-25 13:31:39

Just as in my note above, it was not clear what this question was asking

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Excerpted from Page 6 of Report on the Public Information Act: Preliminary Findings and Recommendations.

In the Ombudsman's experience, long overdue and missing responses regularly comprise around 20% of the mediation caseload.

MS Comment. Date: 2019-11-25 13:32:33

It is unclear what is meant by "long overdue requests". Occasionally, pursuant to GP § 4-203(d)(1), DGS will negotiate additionally time to fulfill requests; generally in the case of voluminous requests. On rare occasions, we provide records beyond 60 days on a rolling basis upon agreement with the requestor. Anecdotally, requestors seem to understand that some requests will take longer than 60 days to fulfill.

Excerpted from Page 8 of Report on the Public Information Act: Preliminary Findings and Recommendations.

At the same time, many agencies report withholding some or all of the requested record in a significant number of cases. This occurs when an agency applies one or more of the PIA's exemptions. Depending on the material requested, the PIA may require an agency to withhold all or part of the record, or it may permit, on a discretionary basis, an agency to withhold all or part of a record.

MS Comment. Date: 2019-11-25 13:34:00

This is often the case for DGS, particularly with records related to procurement, real estate and construction. Records responsive to these requests often contain confidential commercial or financial information that vendors would not customarily disclose and are therefore withheld under GP § 4-335.

Excerpted from Page 9 of Report on the Public Information Act: Preliminary Findings and Recommendations.

Overall, 8 of the 13 agencies that received waiver requests granted at least half of them

MS Comment. Date: 2019-11-25 13:41:44

Occasionally, we will deny a fee waiver request but provide records free of charge. For instance, requests that are commercial in nature and that are determined to have limited value to the general public, but are for commonly requested and easily accessible records, have been provided free of charge. In these instances, waiver denials are issued to address the appropriateness of the waiver request.

Excerpted from Page 11 of Report on the Public Information Act: Preliminary Findings and Recommendations.

> some agencies reported not knowing whether they had retention schedules on file at all, while others reported up-to-date schedules for all units within the department.

MS Comment. Date: 2019-11-25 13:46:41
Experience tell us that this may be because the person completing the PIA survey may not be the same person responsible for managing an agency's day-to-day records management functions.

Excerpted from Page 11 of Report on the Public Information Act: Preliminary Findings and Recommendations.

> As most agencies transition to primarily electronic records and communications, their records management practices and retrieval and disclosure methods have not kept up with these technologies, which has complicated PIA processes and disputes.

MS Comment. Date: 2019-11-25 13:47:16
I would be interested in knowing if the current PIA laws and regulations adequately address this, particularly retrieval and review of electronic records. Simple key word searches often return large amounts of records that must be reviewed for required exemptions. This is often a very time consuming process.

Excerpted from Page 12 of Report on the Public Information Act: Preliminary Findings and Recommendations.

> Of those, 12 mediations—or approximately 26%—had unresolved issues at the conclusion of the mediation that we judged would likely have been submitted to the Board if it had jurisdiction to decide the issues.

MS Comment. Date: 2019-11-25 13:56:32

I would be interested in more detail on how it was determined that these cases would likely go to the Board instead of straight to Circuit Court. I can think of scenarios where a requestor would skip the iterative Board step and go straight to court.

Excerpted from footnote on Page 13 of Report on the Public Information Act: Preliminary Findings and Recommendations.

> Requestors and agencies also experience problems involving the PIA's deadlines, for which there currently are no effective remedies. For requestors, the issue typically revolves around late or "missing" responses, and for agencies, a recurrent issue is the inability to obtain an extension of the deadlines absent requestor agreement, even when the request is burdensome.

MS Comment. Date: 2019-11-25 14:01:05

I would be interested in more detail on the difficulty agencies face in responding to requests. Perhaps this can be its own section.

From: Sara B. Visintainer <svisintainer@carolinemd.org>
Sent: Friday, November 22, 2019 11:53 AM

Hi Lisa,

Thanks so much for your presentation at the MACo training this week. It was very helpful.

You had offered to share your tracking system and I wanted to follow up. Right now, we are just using a spreadsheet with fairly limited information on each request. We would like to see how you are organizing your information and what kind of information you are recording about each request to determine if we should make changes to the data we keep.

Additionally, as you work with the State to improve its PIA processes, we would be interested in learning about any software solutions that are being discussed and opportunities for piggyback purchasing. Alternately, if the State decides to develop its own software tool, we like to ask that consideration be given to making it available to local governments as well.

All the best,

Sara

Sara B. Visintainer
Chief of Staff
Caroline County Commissioners Office

From: Dashaun Lanham <Dashaun.Lanham@seatpleasantmd.gov>
Sent: Monday, November 18, 2019 12:01 PM

Good Morning,

Please find below the response from the City of Seat Pleasant regarding the above subject matter.

With regard to the reporting agencies, the Ombudsman and the Board (collectively "we") were asked to collect the following information for the 15-month period from July 1, 2018 through September 30, 2019:

1 The number of PIA requests received;
The City of Seat Pleasant received 22 PIA request during the 15-month period of July 1, 2018 through September 30, 2019

2 The disposition of those requests;
The City of Seat Pleasant has responded and closed each of the PIA request.

3. The average response time;
The City of Seat Pleasant typically respond to each request in 10-30 days of receipt

4. The number of fee waivers requested and granted;
The City of Seat Pleasant had received three fee waivers out of the 22 PIA request.

5. The number of Ombudsman mediation requests and the number conducted;
The City of Seat Pleasant has not requested the Ombudsman to mediate any of the request

6. Information on PIA response processes and procedures, including training;
The City of Seat Pleasant follows the OAG PIA manual process and procedures. The City Clerk attends training offered through the Maryland Municipal Clerk's Association and Maryland Municipal League, LGIT, etc.

7. Information on records management processes and procedures, including training.
The City Clerk continues to stay abreast on Records management processes and procedures.

We have been inundated with PIA request within the last year that consumes the time of the staff. We have made and continue to be a transparent government by ensuring our documents and posted on the city's website.

Dashaun N. Lanham, CMC
City Clerk
City of Seat Pleasant

From: Craig O'Donnell <[redacted]>
Sent: Tuesday, November 19, 2019 10:07 AM

Craig O'Donnell
Maryland Transparency & Accountability
PDF Comments

Page:11. Author: Craig Subject: Highlight

Agencies underutilize tools of proactive records disclosure, such as maintaining lists of readily available documents that are able to be provided immediately without review; publishing such documents or links to them on the agency's website; publishing records that have already been disclosed under the PIA,…

Number: 1 Author: Craig Subject: Sticky Note Date: 2019-11-06 11:43:32
As has been mandated by statute for -- what -- 5 years now?

Number: 2 Author: Craig Subject: Highlight Date: 2019-11-21 09:43:48
Both of these are technically simple and, while they may appear burdensome in the short run because IT staff likes to complain about extra work, there are ways to allow the PIA contact to copy materials onto a website into a "Document Releases" bucket that is then searchable.* *We have noticed that some state sites have "Do Not Index" flags which means Google, Duck Duck Go and such cannot index them. These should be removed. While technically not directly a PIA matter, making it easier to find information that is already there can only help.

Page:14. Author: Craig Subject: Highlight

Although many agencies expressed no general opinion on the matter,10 or stated that the status quo is adequate,11 others expressed support for any remedy that would keep PIA disputes out of court, that offered agencies a practical remedy for certain types of recurrent problems—such as repetitive, vexatious, or abusive requests—or that would enhance transparency and compliance.12

Number: 1 Author: Craig Subject: Highlight Date: 2019-11-21 09:42:31
Where are the statistics on "vexation" by requesters? This, like the Md Assoc of Counties' claim that a stronger Open Meetings Act would financially paralyze small jurisdictions, is obviously in the mind of the beholder.

Uncooperative agencies often wind up getting many requests because they play parsimonious with documents and with information. When they are uncommunicative, it is often the case that a PIA req is filed, and that raises more questions about the matter, resulting in another; facts found there result in another.

In other words, we feel agencies are usually far more to blame that requesters

Page:15. Author: Craig Subject: Highlight

Moreover, the formalities of the judicial process are often inappropriate for many of the more routine PIA disputes, which usually involve simple fact patterns and the application of a limited body of law.

Number: 1 Author: Craig Subject: Sticky Note Date: 2019-11-06 11:49:26

And is there any information on what the cost of these court cases is? Cost is a brick wall barrier to most requesters, including news organizations that 20 years ago would have had the resources to sue for records. Suits for records at the federal level are relatively routine, but there appear to be no agencies willing to take on a pro bono role consistently to challenge denials in Maryland (or for that matter, Delaware, another state where this commenter is familiar with FOIA.)

From: Parker, Ned (Reuters) <ned.parker@thomsonreuters.com>
Sent: Tuesday, November 12, 2019 1:18 PM

I would just want to affirm how helpful the PIA Ombudsperson was in resolving my records requests issues with two counties for information to be used in Reuters news stories. The Ombudsperson negotiated with two counties for the release of information in a way that protected confidentiality but also provided me what I needed. This was invaluable and a true public service to be commended in the name of providing information to the public.

Best wishes,
Ned Parker
Journalist
Reuters News Agency

From: Eric Solomon -DJS- <eric.solomon@maryland.gov>
Sent: Friday, November 8, 2019 3:36 PM

Janice,

It was nice speaking with you today. Here are the two comments I wanted to pass along regarding the PIA report.

1. On page 7 of the PIA report, the graphs representing partial and full denials state that DJS has inconsistent data. Our data was accurate, but did not match the criteria that was provided in the survey.

2. On page 17 of the PIA report, the footnote states that DJS "does not currently maintain log or database, but would consider doing so." Beginning on December 1, 2019, DJS plans to implement a data collection system that will track future PIA requests and responses.

I wasn't sure if we were able to delete or replace the current language on page 17 that states we were concerned about time requirements. As long as our comments are added, I think we are fine.

Thanks again for your help!

Eric
Eric Solomon
Director of Communications

From: Rhonda Wardlaw -MHEC- <rhonda.wardlaw@maryland.gov>
Sent: Thursday, November 7, 2019 11:29 AM

Ms. Clark

After reading the PIA Report, I was frustrated because the report is not consistent with the information MHEC submitted.

MHEC had NO late response times, for 10 or 30 day responses (see attachment)

Yet, the report says our data was internally inconsistent for the 30 day response.

We also reported NO fees reported on the survey we submitted, and yet the report stated our data was internally inconsistent

Thank you for letting me submit my findings on the inconsistencies in the report.

Many thanks!
R

Rhonda Wardlaw
Director of Communications
Maryland Higher Education Commission

From: Junkmaneast <[redacted]
Sent: Wednesday, November 6, 2019 1:28 PM

I had to use them a few years ago. It was about [redacted] and [redacted]. The attorney for [redacted] was not responding to my requests but did with the Ombuds unit. Even said, they were not able to get what I asked for and I was forced to pay more than I should have had to. They said they had no power to make them do anything even if it is what they are supposed to do, so if that is the case, I see they have no purpose and are paid for no reason.

glen

From: Andrew Strongin [redacted]
Sent: Wednesday, November 6, 2019 12:30 PM
Dear Ms. Clark,

Your request for feedback on the preliminary findings and recommendations is propitious; I write in support of the proposed expansion of the Board's jurisdiction, which would provide extrajudicial PIA dispute resolution.

As you may recall, I earlier provided input regarding the inadequacy of current extrajudicial relief in relation to my experience with [redacted], whose PIA practices proved deficient. Specifically, [redacted] used its violation of records retention laws as a basis for non-disclosure of otherwise disclosable public records. The Ombuds had no jurisdiction, and the OAG refused to pursue the matter. Thus, I was left without practicable remedy to address the very evil the PIA is meant to address: hidden governmental action, which foments

government distrust. For lack of resources to sue [redacted] to force it to meet State requirements, [redacted] was practically untouchable.

Just this past week, yet another issue has arisen in [redacted] that should have been resolved expeditiously, but mystifyingly has turned into a matter for the [redacted]. Greatly distilled, the [redacted] represents that there are no documents to disclose, even as [redacted] continue to state, publicly, that they have seen the very documents I have requested. There should be some procedure available short of a private lawsuit and/or referral of the [redacted] to the Attorney Grievance Commission to shake loose documents the [redacted] would hide.

I am left to wonder at the remedies available to Maryland residents, when even those of us who have the benefit of legal training and self-employment effectively are unable to require even the vaunted [redacted] to meet the ideals of the PIA. As stated in the Preface to the OAG's Manual (14th Ed. 2015), "The Maryland Public Information Act is based on the enduring principle that public knowledge of government activities is critical to the functioning of a democratic society; that a Government of the people, by the people, and for the people must be open to the people. Members of the public need and deserve complete information as they make the decisions and form the opinions that determine our future path, and the Act ensures that those needs are met fairly and expeditiously while protecting important privacy rights and other public policy goals." Just so.

I have spent the last 25 years practicing as an arbitrator and mediator across the country and internationally, resolving all manner of labor disputes in the private, public, and federal arenas. I have spent much of that time, as my clients would tell you, encouraging them to avoid needless expenditures of time, money, and other resources. I know waste, obfuscation, and procedural abuse when I see it; PIA requests in local jurisdictions should not require private lawsuits, which are expensive and time-consuming and beyond the reach of most State residents, who want nothing more than to be able to verify governmental action they otherwise distrust.

If there is any assistance I can provide to ease the path towards governmental accountability, I would be pleased to be of service.

Best regards,
Andrew M. Strongin
Arbitrator & Mediator
[redacted]

From: R Coleman <[redacted]>
Sent: Wednesday, November 6, 2019 11:52 AM

Dear Ms. Clark:

I wanted to provide my comments on the report. I agree with the report. In my experience departments/ agencies intentionally charge a fee or use an exemption incorrectly. The requestor does not have enough options to remedy the situation. I would suggest the following:

1. The ombudsman office can handle any fee waivers over 50 dollars or any waiver of fees were the requestor provides an affidavit.

2. Any mediation requests that have a primary facie case should be allowed to proceed to OAH free of charge for the requestor.

3. That any partial denial or denial to a requestor is given his/her appeal rights.

If you need anything else from me please let me know.

Ryan Coleman

From: Jim Doyle <[redacted]>
Sent: Wednesday, November 6, 2019 11:12 AM

I made seventeen PIA requests to [redacted] during the previous administration [redacted] and did not receive a single acknowledgement or response. I refiled most of these PIA requests during the present administration and received a few acknowledgements and a small sliver of the responsive documents. With [redacted] I had to threaten litigation to get them to be responsive. On one of the issues, they told me that it would take time to get the documents as they were in archive, then more time was sought, then a determination that the documents were lost. A similar "run around" with a request to [redacted] where I was invited to come and review the file folder to find that there was nothing in the folder to then be told that the folder was lost.

When a PIA request is made using the [redacted] Portal there is no mechanism for recording or memorializing that the request was made so there is immediately plausible deniability that the request was made.

Sincerely,
James G Doyle | Principal
[redacted]

From: Chuck Carter <[redacted]>
Sent: Sunday, November 3, 2019 5:00 AM

My comments are as follows:

1. The PIA board should penalize agencies that do not provide timely responses. A censure published as appropriate perhaps would work.
2. Currently agencies can provide any response and declare it to be responsive regardless of whether it is or not, and they are not be compelled to comply with the law. Mediation does not allow for an independent assessment and compliance directive.
3. Agencies are allowed to bury the requester in voluminous pages of nonresponsive documents without an executive summary.
4. Agencies can overload the requester with legal language and documents. A synopsis should be done for general public consumption.
5. I have a specific case where the fact that a voluminous was nonresponsive was admitted by the agency in a separate rebuttal to a [redacted] agency but was never done in the PIA Ombudsman related response of over 300 pages. They tried to paper over the issue with legalistic nonresponsive documents.
6. I contended that they were nonresponsive but that just increased the level of confrontation by the agency in the form of personal attacks on the requester regarding my character and integrity. And there was no Cabinet-level agencies with jurisdiction to handle appeals.
7. Is the Governor's Commission on Children and Youth covered by the PIA? Why are only 23 Cabinet-level agencies covered? What agencies are not covered? What about bi-county agencies?
8. I have found other agencies to be responsive and non-confrontational.
9. Concerns sent to legislators are not effective as oversight issues to be addressed.
10. An annual report by agency should be published regarding PIA responses.

Please let me know if more information or clarification is needed.

From: Lattner, Edward <Edward.Lattner@montgomerycountymd.gov>
Sent: Friday, November 1, 2019 3:51 PM

Issues for consideration:

1. The MPIA should be amended to include a locally created Inspector General as a law enforcement agency under the investigatory records exemption in GP 4-351(a)(1). We have had several requests for our IG's investigatory files and are hard pressed to find a basis to withhold records, even when the request includes open ongoing IG investigations.
2. The recent "indigency" amendment in GP 4-206(e)(2)(i) could be read as mandating that the custodian waive all fees if the applicant is indigent, without regard to whether the factors governing all other fee waiver requests are met (e.g., public interest v. commercial interest identified in FOIA cases).
3. It would be helpful if the MPIA addressed an applicant's use of the MPIA while the applicant is engaged in litigation with the County.
4. Does GP 4-203(b)(3) serve any purpose? When that section was first proposed it's reference to a "bona fide dispute" between the applicant and the government dovetailed language that was proposed for GP 4-362(d)(1). That latter proposed amendment made the government's payment of damages for wrongfully withholding a requested record contingent upon a finding that there was not a "bona fide dispute" between the applicant and the government. Although the "bona fide dispute" language was ultimately stricken from GP 4-362(d)(1), it remained in GP 4-203(b)(3). 2015 Md. Laws chs. 135/136.

Edward B. Lattner | Chief
Division of Government Operations
Montgomery County Attorney's Office

From: Kemp Hammond <lwhamm50@aacounty.org>
Sent: Friday, November 1, 2019 2:19 PM

Good afternoon,

I'm confused as to whether the proposal involves either 1) "binding arbitration" by the PIACB or 2) another level of review by the PIACB that could be appealed to the Circuit Court. If 1), I would not be in favor of it, especially if damages could be awarded. If 2), then would the Circuit Court review be an administrative agency review on the record (7-201, et seq.)?

Thank you.

Kemp W. Hammond
Assistant County Attorney
Anne Arundel County Office of Law

From: Kyle Ross <[redacted]>
Sent: Wednesday, October 30, 2019 2:43 PM

Dear Staff at the Office of the Attorney General,

I am a stakeholder in 2019 (a person who has engaged the services of the Office of the Attorney General to get help with Public Information Act Compliance and mediation services via the ombudsman) and I would like to make some comments on my experience.

First and foremost I shall say the information and guidance I have received from the office administrator named Janice Clark and the ombudsman named Lisa Kershner has been timely, helpful and very professional. At all times when I had interactions with them, I felt I was in good hands. They were knowledgeable, honest, direct and hard working in trying to help me.

However, the overall outcome, the idea of knowing and seeing what my government was doing by making a legal request as a full citizen of Maryland to see a government document... has been dismal. It has not been due to the staff or lack of services offered but it has shown me that transparency in government is still hard to achieve even with laws and this extrajudicial opportunity for dispute resolution.

The laws and procedures haven't worked for me so far and it has been about eleven months of me trying to get one document from one government institution of Maryland. My story dates back to early December 2018 when I discovered I had questions about a murder which had taken place in Baltimore forty three years earlier, in 1976. I wanted to see [redacted] in order to know more about what had happened forty three years earlier--- near the corners of Lombard and Carey Streets. At this early point in time I didn't know anything about a MPIA. I have learned a lot over the course of eleven months. The office of the attorney general, through Janice and Lisa, taught me about the MPIA and guided me so I would know what I needed to know. And before I knew about Lisa and Janice, some angel who had heard my story, sent me to the website of the office of the attorney general so I would know more about the PIA but the website was not enough. Luckily, I got to talk to Janice and Lisa and they did everything they could do to show me how to navigate the process: helping me know to whom I should address my request, for example. I didn't know the name of the Public information office for the government institution which had control over the document I wanted to see. They told me.

Okay but still I have not had any outcome. First I tried to get my document, [redacted], from [redacted]. That took many months with phone calls, visits and letters. I was so upset with this situation, I even a letter to the Governor, Mr. Hogan. Finally I got a response from [redacted] and in my letter, he made a reference to the [redacted] still investigating the case. The [redacted] gave me the [redacted] phone number in his letter. So here's what happened with that. After a phone call and letters through snail mail and email and even dropping a few requests off in person to the [redacted], I am still NOT in possession of the document I want to see: [redacted] in Baltimore in 1976. I sent all my legal requests (snail mail, email and courier) to the Public information Officer for the [redacted] and have not yet gotten a copy of the [redacted] nor a rejection letter stating the reason why I cannot have this document.

I thought an extra-judicial process would be easy and I would get a timely response. I was wrong. It has been very hard and time consuming and I am losing trust in the whole effort.

I think what I find the most ironic of all is that the [redacted] is charging people every day with crimes but I wonder whether they are following laws. I thought the Maryland Public Information Act Manual (Fourteenth edition, 2015) said they had 30 days to respond. I know the [redacted] is overburdened and under staffed but are they giving the same leniency to all the people they are charging with crimes? Are they as forgiving as we have to be when it comes to their actions or lack, thereof? I am struggling with the issue of fairness in their lack of a response. I try to understand their staffing issues but it's hard.

I need the new edition of the MPIA manual if one is coming out in 2019. Maybe there are new rules in there which I don't know about and which would absolve [redacted] in these delays. If a man is sitting in prison

for 43 years for a crime he didn't commit (and there's no telling how long this man will live since prison inmates age faster than those of us not in prison) and IF that [redacted] would prove he is innocent then I feel a gut wrenching pain every day the [redacted] denies to even answer my request. I have no other choice but to start thinking about other options. Right now I am praying every day for a mediation date.

Can anyone help me? Anyone? The Attorney General's Office can only do so much even though I thought they could do miracles.

Beyond this specific experience of mine, as far as the overall process of dispute resolution--- there are some effective alternatives to the dispute resolution process as set up by the attorney general's office. Here is an example: the venue. The parties involved in a mediation should be able to jointly choose the venue. Some people feel better in a more neutral venue than the downtown [redacted] or the attorney general's office. The parties involved should also have the option to select a mediator or additional co-mediators and not have only one choice: Lisa Kershner. I think a mediator outside the attorney general's office might be better for me because the attorney general and [redacted] work together on issues and I want to avoid all appearances of 'conflict of interest.' My preference would be a mediator not paid by the government of Maryland. I think venue and choice of mediator(s) should be a negotiable opportunity between the parties. The goal is to increase transparency and I think it is important to have all sides comfortable with the whole process. It also might be nice to put ads up buses or around the state so people like me know they can do this legal request. I found out about MPIA by sheer luck, in many ways. A marketing campaign might be helpful. That's my two cents.

If you have any questions and need additional information. Please feel free to contact me.

Sincerely,
Kyle Ann Ross

From: Theresa Johnson <[redacted]>
Sent: Wednesday, October 23, 2019 1:02 PM

Please include the following comment in your report:

The Office of the Public Access Ombudsman ("Ombudsman") is totally ineffective and a waste of taxpayer resources. The Ombudsman rarely facilitates any resolution and only serves to delay or distract good faith PIA requestors from pursuing effective means of resolution through the court system. The result of having only one acting Ombudsman leads to cozy relationships between agencies that most frequently offend against the PIA and leave requestors feeling that the mediation is rigged. The ombudsman should be abolished.

From: Gregory A. Slate <[redacted]>
Sent: Thursday, October 17, 2019 6:58 AM

I write to offer my comment on way to improve Public Information Act (PIA) monitoring and enforcement. The Office of the Public Access Ombudsman ("Ombudsman") does a tremendous job of attempting to mediate disputes but ultimately are ineffective in the face of public agencies and official that realize the Ombudsman has no enforcement authority or "teeth" with respect to flagrant violations of the PIA. The Ombudsman should offer a binding resolution process and/or a procedural for formal referral of agencies willfully violating the PIA for criminal investigation through a dedicated PIA violation prosecution office.

Thank you.

From: Gerald Widdoes <Gerald.Widdoes@ccdps.org>
Sent: Wednesday, October 16, 2019 2:26 PM

For statistical purposes for the period of July 1, 2018 to September 30, 2019 (the period the Public Access Ombudsman requested for state agencies) the Cecil County Sheriff's Office handled:

MPIA requests – 634 – includes incidents, crash report, etc.

Denied: –14

Fee Waivers requested – 4

Fee waivers granted – 2

Average response time – not officially tracked but I believe all were answered within 30 days at the latest.

Request for mediation - 0

I would like to comment that additional training be provided. When I joined the current sheriff's administration in 2016 I basically had to read the MPIA manual prepared by your office in order to get a grasp of the process. I still struggle with some decisions. I can only imagine what smaller sheriff's office's go through when there are administration/election changes. A class specific to police would be of great benefit. Our biggest headache is when inmates convicted of crimes such as murder request our files. I understand they are looking for information that may not have been provided during the normal discovery process. Their attorneys have received copies. Those inmates also want fee waivers because they are indigent once sentenced to long periods of incarceration. We recently had a request that ended up being well over 1000 pages, just under 100 dvd's, and the inmate wanted video's formatted to play on an X-Box 360. It was certainly a hardship on our mid-sized agency.

Respectfully,

Gerald K. Widdoes, J.D.
Cecil County Sheriff's Office
410-392-2101

From: [redacted] <[redacted]>
Sent: Saturday, October 12, 2019 9:27 PM

Dear PIA Office,

I believe entities are often over-whelmed on the PIA requests today because more and more decisions lack transparency.

Thus we need your office to be supported and we welcome an ADR process. In addition, we have found that a mere call from your office to 'push' along the PIA request has helped, quite a bit.

Thank you for exploring this needed service.

Ellen M. Zavian, Esq.

From: Spicer, Patrick <Patrick.Spicer@hcps.org>
Sent: Thursday, October 10, 2019 4:05 PM
Cc: Bulson, Sean <Sean.Bulson@hcps.org>

Please be advised that I am the public information act designated officer for Harford County public schools. In that capacity I have responded to hundreds of public information act requests the last several years.

My comment and suggestions are as follows. Harford County Public schools continues to receive numerous and routine requests from persons or entities which seek records containing commercial information. The persons or entities who forward such requests are engaged in a business which financially benefits for potentially financially benefits from obtaining the information contained in the records. For example we receive quarterly requests from an entity called Smart Procure seeking the same information but on an updated basis as it sought in prior requests; we receive quarterly/regular requests from attorneys seeking information regarding escheat funds; we receive regular requests from entities, some on a regular basis, seeking information relating to all of our employees including place of work, salary, telephone number, email address. We also receive public information act requests from law firms/attorneys for purposes related to litigation between the clients of such law firms/attorneys and the school system.

While I have not done a full quantitative analysis I can say with confidence that the number of Public Information act requests we receive has increased each year. Harford County Public schools does not have a separate budgetary account for the work which is required respond to the requests we receive.

In light of the above Harford County Public schools suggests that the Public Information act be amended so as to prohibit 1) requests for records that are sent from persons or corporations which are commercial in nature; 2) requests from attorneys or persons which relate to current or threatened litigation relating to the school system. It is my understanding that other states have provisions such as those requested above. Such an amendment would do much to relieve the school system of responding to public information act requests which are essentially based solely on commercial or litigation self-interest (and paid for by the taxpayer) while at the same time preserving the rights of citizens who have a legitimate interest in requesting documents relating to the school system.

Please advise me should you have any questions regarding the above. Thank you for consideration of our comments.

Patrick P. Spicer, Esquire
General Counsel
Board of Education of Harford County
Phone: 410-638-4005 Fax: 410-638-4022

From: Sally Dworak-Fisher (dworak-fishers@publicjustice.org) <dworak-fishers@publicjustice.org
Sent: Wednesday, October 9, 2019 5:35 PM

Greetings,

First of all, I want to commend the Ombudsperson for her work to ensure that the purposes of the MPIA are fulfilled. We have used her services several times, and she has been helpful in cajoling compliance and also clarifying the scope and requirements of agencies responding to requests.

One area where I think the MPIA is undermined involves the agencies' refusal or reluctance to grant fee waivers in many cases, which too often means we don't get the documents we seek. We at the Public Justice Center routinely request a fee waiver, explain the public interest basis for our request, and ask for a detailed basis for any decision to deny the waiver as well as an estimate of the predicted cost of production, citing Action Comm. For Transit, Inc. v. Town of Chevy Chase, 229 Md. App. 540, 561-3 (2016); City of Baltimore v. Burke, 67 Md. App. 147 (1986). We also review the attached AG Opinion.

Routinely we are told that the agency is simply too short-staffed to grant waivers; it sounds as if they have an unwritten policy of denying them. I recommend asking each agency how many and what waivers they have granted. I understand that some agencies may still use hard files and pulling those files and redacting information can take some time, so there are overlapping budget issues. However, the problem is that the failure to grant waivers due to agency staffing constraints limits the effectiveness of the PIA. We often settle for receiving only some of the documents requested, when we would really have a fuller picture and a better understanding if we could see the full information we requested.

Thank you again for working to make the MPIA a vehicle for transparency.

Best,

Sally Dworak-Fisher
Public Justice Center
410-625-9409 ext. 273

From: Rector, Kevin <krector@baltsun.com>
Sent: Tuesday, October 1, 2019 12:01 PM

Hi Janice,

I have been looking through the documents that you sent along, and have some questions.

It seems the answers to your questions vary widely among agencies, such that there is a clear lack of consistency across the state in terms of how PIA requests are handled and responded to, and in how and whether agencies ensure that documentation is preserved. Is that a problem? Why or why not? Do you intend to comment on this issue in your final report to the committees? How so?

The committee wanted you to collect this information so as to ascertain whether the PIA is ensuring a "robust review and disclosure process." However, as you know, the agencies that are responsive to your request for data – that is, state cabinet-level executive branch agencies – make up only a fraction of government bodies across the state that fall under the PIA law. Some of the agencies not included in your review, such as the Baltimore Police Department, likely receive far more PIA requests than some of the cabinet-level agencies. Do you acknowledge this as a shortcoming of the review? Will you be outlining this in your final report? In what way?

Are there any other early conclusions you have come to, based on the initial filings from the various agencies, that you'd like to share with me?

Thank you very much.

Kevin Rector
The Baltimore Sun
Desk: 410-332-6968
[redacted]

From: Nancy Lynn <[redacted]>
Sent: Tuesday, September 17, 2019 6:49 PM

Dear Janice Clark,

This PIA Act sounds wonderful in theory. However when one attempts to apply the law it is sadly discovered that it is a "looks good" but has no power for the average citizen. My request still has not been honored to this day. Anything that would require people to comply or jail time might help for the law to be enforced.

Sincerely,
Nancy Lynn

From: Mitchell Berger <[redacted]>
Sent: Sunday, September 15, 2019 3:42 PM

Mitchell Berger
[redacted]
[redacted]
September 15, 2019

Janice Clark, Administrative Officer
Lisa Kershner, Public Access Ombudsman
c/o Office of the Attorney General Public Access Unit
200 St. Paul Place, Baltimore, MD 21202

Dear Ms. Clark and Ms. Kershner:

As someone who has used of the Maryland Public Information Act in furtherance of efforts to ensure local police accountability, I write in response to your office's request for comment regarding input into ways the Act could be strengthened to fulfill MPIA's intended purpose: to ensure that "[a]ll persons […] have access to information about the affairs of government and the official acts of public officials and employees" (Maryland Code, § 4-103 - General right to information). Most especially, I am concerned that MPIA, among the more "anemic" state public information laws in general, especially is so with respect to promoting police accountability.[1]

As you know, from our discussions I have been especially interested in police misconduct within [redacted] because of the harassment to which I have been subject by certain officers. I have consistently found [redacted] to be unforthcoming and evasive in its responses to my requests both as to my situation and broader accountability issues. Nor am I alone. For instance, when the Salt Lake Tribune reported on former Gaithersburg Police Chief John King's alleged sexual misconduct, the paper requested records under MPIA from the City of Gaithersburg and the City of Baltimore where King also appears to have engaged in misconduct. The authors of one Tribune article write: "The Tribune requested records detailing King's departure from the two police departments, but was denied, as Maryland's public records law protects the public release of personnel or employment records."[2]

However, at issue here does not appear to be any specific, broadly applicable sections of MPIA but rather provisions of the Law Enforcement Officer's Bill of Rights that provide significantly greater protection to law enforcement officers than to other public employees. The mother of a son killed by police officers urged what would seem a reasonable step – to permit complainants to internal affairs departments to track the progress of investigations into their complaints.[3] Another reasonable step would be to make explicit that MPIA, as stated in dicta by a dissenting judge in the Glass case, that "where an investigation against a law enforcement officer is completed and results in a sustained complaint, the record of the discipline imposed is not exempt from disclosure under the Maryland Public Information Act under its personnel records exemption."[4] David Plymer, a former Anne Arundel County and State's attorney, has urged other changes in MPIA that would make it easier to obtain police

disciplinary records.[5] Lastly, I recommend MPIA make it easier for prevailing complainants to recover attorney fees even absent broader public interest in the records that may be at issue.[6]

The reality MPIA users and transparency advocates face, as one attorney involved in a noted police-related MPIA case advised me, is that local jurisdictions are skilled in dragging these cases out and using every nuance of MPIA to defeat its actual intended purpose of promoting transparency and accountability. Short of going to court, an expensive and time-consuming proposition even for skilled attorneys, few practical remedies exist for complainants faced with purposeful MPIA noncompliance regarding alleged or established police misconduct; once in court the odds are against them no matter the merit of their case. In day-to-day practice, Maryland's police and the elected officials who purportedly govern their conduct are functionally exempt from our state's public information laws.

I urge you to take a hard look at this issue in your office's research and recommendations to the Legislature. Thank you in advance for your consideration. If necessary, please feel free to contact me, by email only, at [redacted]. A copy of this letter to your attention will follow by FedEx or certified mail.

Sincerely,

Mitchell Berger

_____

[1]https://www.nfoic.org/states-failing-foi-responsiveness

[2]https://www.sltrib.com/news/crime/2017/06/03/investigative-records-ex-provo-police-chief-admitted-to-sexual-relationship-but-she-says-it-wasnt-consensual/; see also, https://www.baltimoresun.com/news/crime/bs-md-police-records-bill-20190212-story.html; https://www.billtrack50.com/BillDetail/1044863

[3]https://www.baltimoresun.com/news/opinion/oped/bs-ed-police-accountability-20170329-story.html

[4]Glass v. Anne Arundel County, 160 A.3d 658 (2017), 453 Md. 201. Available at Scholar.google.com.

[5]https://davidplymyer.com/2018/12/09/to-dream-the-impossible-dream-about-an-amendment-to-the-md-public-information-act/

[6]Stromberg Metal Works, Inc. v. Univ. of Maryland, 166 Md. App. 190 (2005) affirmed, 395 Md. 120 (2006), https://caselaw.findlaw.com/md-court-of-special-appeals/1335093.html; MPIA Manual, Chapter 7.

From: Joanne C. Simpson <[redacted]>
Sent: Friday, September 13, 2019 6:02 AM

Dear MPIA officials and elected Maryland representatives,

I urge you to create clear guidelines, and requirements for responses, regarding requests for public information under the Maryland Public Information Act. Government entities should not be able to ignore, deflect, delay, or charge exorbitant fees for access to public information. I've had various conflicts with issue [redacted] and their attorney, [redacted]. There should be ramifications for a publicly funded entity's noncompliance with the spirit or letter of the MPIA, and a state oversight board must have the ability to enforce and to take action and/or levy penalties.

Thank you for your time and attention.

Best,

Joanne C. Simpson
[redacted]

From: R Coleman [redacted]>
Sent: Thursday, September 12, 2019 9:33 AM

Hello:

I am hopeful that something can be done around the Respondent's ability to charge fees. I have noticed that the [redacted] uses this as a way to deter the public to get documents that the greater community should know this information.

Ryan Coleman

From: Quentin Banks -DMIL- <quentin.banks@maryland.gov>
Sent: Thursday, September 12, 2019 8:46 AM

Ms. Clark:

Most of my comments were included with the submission of part 1 of the survey submitted by the Maryland Military Department, however I will resubmit my thoughts on the matter:

TRAINING: The Office of the Attorney General should offer training classes to persons designated as PIA Coordinators. Hard copies of the Attorney General's Public Information Act Manual should be provided without charge. That manual should include the latest changes to the law.

FEES: The Attorney General should determine a flat fee for providing copies instead of trying to calculate a fee based upon time spent researching the request beyond the first two hours of the employee's time based on his or her hourly salary. Give guidance on to whom the payments should be remitted. What bank accounts have to be established when payments are received. The Maryland Military Department is not a regulatory agency/department and this becomes a problem.

I hope this helps....

V/R
Quentin

Quentin W. Banks, Jr.
Lieutenant Colonel, US Army (Retired)
Public Affairs Officer
Military Department

From: Cathy McCollum <[redacted]>
Sent: Tuesday, September 10, 2019 8:04 PM

Since I feel that the process failed both myself and my neighbors, where we did not receive what we were entitled, we were also curtailed from inspecting documentation ourselves. There needs to be greater compliance in making state officials adhere to the very same rules citizens are tasked with. In our case, state officials elected to

circumvent the law and enter into contracts with other parties who were not bodies of the state government, resulting in the destruction of several homeowner properties, because each homeowner was not only blocked by the aggrieving state body, but by each body that was put in place to prevent illegal activity within its' own body. Us homeowners were and have been tasked with seeking outside assistance, because the entities in which our tax dollars pay for failed us at each and every stage.

The state government should not be the parties that overlook their own entities when they are faced with enforcing code, because more times than not, the state agencies protect their bodies, and forget that it is "ALL" taxpayers that keep the state running, and they are employees of all the state residents. There should be a committee overlooking and voting on issues involving other state agencies, for several homeowners from different counties, as to present fairness and results that are indicative of all.

From: hagerstown <[redacted]>
Sent: Tuesday, September 10, 2019 5:13 PM

Dear Ms. Clark-

I have some suggestions to enable a more responsive PIA process (ideally, leading to greater transparency and public trust in the government) for your consideration:

1. Shorten the initial response time to a PIA request from 10 working days to 5 working days. Efficient organizations should be able to have a response to an initial PIA request within one working week (with an allowance made for holidays, snow days, etc.). Within that one working week (i.e., 5 working days), organizations should be able to determine: a) does the document being requested, fit into one of the categories of documents covered by a Maryland Records Retention Schedule; b) if the document is covered, then where is the document; if not, then the initial response would be that more time is needed to locate the document; c) within those first 5 days, any exception/exemptions/etc. applicable to the document would be addressed and would also be a reason to extend the period of the response due to analysis of applicable rules, regulations, and statutes; d) a 5 day response time encourages organizations to be thoughtful when creating documents and creates an opportunity for these organizations to properly classify and store the documents, resulting in a daily awareness of the importance of 'transparency' in government (as well as, ideally, creating an atmosphere where efficiency and forethought are desired and rewarded); and, e) as referred to in item d)- indicators reflecting the percentage of "on-time" PIA responses could be worked into yearly performance reports and effective organizations can be rewarded with pay raises, bonuses, etc.

2. any extension of time past the 5 day initial response period must be properly explained by specifically detailing the reason why an extension is being applied (and, no response that includes "the records may or may not exist" is allowed as that is a disrespectful answer- usually- by an organization that already has the power over people); while there is not much a requester can do to complain about an extension, whenever an extension of time is being applied by the organization, this action would be tracked and held against the organization when completing the yearly performance review; and, yearly performance reviews for PIA actions would be reported to the public either via the organizations public facing web pages, and/or, on the Maryland PIA Ombudsman public facing web page.

3. strengthen the office of the PIA Ombudsman by enabling the organization to perform as any other State administrative agency - i.e., allow the office to make rules and regulations; and, create a small, independent PIA Commission to adjudicate PIA disputes (an example is the U.S. Dept. of Labor and the OSHA enforcement division- the Dept. of Labor suggests and creates labor safety rules and regulations and has a compliance/enforcement division- any disputes concerning a safety violation can be addressed by the Occupational Safety and Health

Commission and these decisions can be appealed to a U.S. Circuit Court of Appeals; the PIA Ombudsman would act as the Secretary of the agency and a small PIA Commission (maybe two or three administrative law judges?) would be created to adjudicate disputes.

4. post a list, ideally on the PIA Ombudsman public facing web page, of every Maryland PIA request made and the response from the involved agency. Within the list, a link can be provided to enable the public to access any records the agency provided the requester. Privacy protections could be applied to allow people who are making PIA requests for personal/private information (e.g., investigatory records, etc.) to 'exempt' these requests and responses from posting on the public facing web page. In theory, this list could help to lighten the load on agencies by making documents already requested, freely and quickly available to other people.

5. ensure that the Maryland PIA is applied to ALL governmental organizations, including executive/legislative/judicial organizations. Allowing any of these branches of government to exclude themselves from the coverage of the Maryland PIA defeats the purpose of the Maryland PIA, as well as creates mistrust between citizens and their government because the government is involved in 'doublespeak' by proclaiming "open government" --- except for this branch/organization. Certain aspects of government can remain 'exempt' from the Maryland PIA (e.g., sensitive policy discussions, public security discussions- as appropriate, and so on)- but, policies/procedures/practices/contracts/etc.... that impact interactions between the public and government should always be 'open' so people can review these actions and then become involved if there are obvious omissions/neglect/denial of equal treatment/arbitrary decisions/waste or fraud/etc. being completed by government officials.

Thank you for the opportunity to provide my thoughts.

M. Panowicz

From: Kim Gordon <kgordon@nmwda.org>
Sent: Tuesday, September 10, 2019 3:39 PM

Enhanced dispute resolution affording the opportunity to seek binding resolution from the PIACB in the event that required Ombudsman mediation is unsuccessful is a great idea. The process proposed keeps judicial appeal as an option while still giving requestors and agencies access to meaningful resolution. Seems like a win-win. Also, there is a narrow window for jurisdiction of the PIACB in that it reviews complaints where the fee claimed exceeds $350. There could be a situation where the fee is lower (perhaps a waiver is appropriate) but the ability to seek resolution from the PIACB regarding a dispute could be helpful. Perhaps the jurisdiction for the PIACB could be broader, especially if required mediation with the Ombudsman is unsuccessful.

Kim Gordon

From: derek jarvis [redacted]>
Sent: Tuesday, September 10, 2019 12:09 PM

I see the agency as a waste of resources because they appear to protect other agencies and is of no benefit to the public at large. I had an experience with the agency and they did not help me with records at all stating there was nothing they could do to obtain records from [redacted] which is a very corrupt [redacted], which was outrageous to me.

D Jarvis

From: Christine Ryder <p98930@aacounty.org>
Sent: Tuesday, September 10, 2019 10:43 AM

Ms. Clark,

I have looked at the Joint Chairmen's Report extract that was attached and am very concerned about this Agency's ability to comply with providing the information outlined, especially for a period of July 1, 2018 to date. The Anne Arundel County Police Department receives requests for records by mail, in person, online, by email, as well as through the PIO's office. All requests for records are considered in accordance to MPIA standards if not received by subpoena or court order. We do not log or centralize those requests in any way. Therefore, it would be very time and labor intensive to go back and quantify and document the details. It likewise would be burdensome to begin logging such information as we're already often overwhelmed with such work. If it is to become mandated that we do so, my general feedback would be that we need lead time to procure software or establish some other means for tracking what will be required to report.

Thank you for the opportunity to provide comments. Please let me know if you need anything further.

Christine Ryder
Anne Arundel County Police Department
Custodian of Records

From: Andrew Strongin [redacted]
Sent: Tuesday, September 10, 2019 10:10 AM
Dear Ms. Clark,

Thank you for the opportunity to submit these comments regarding potential improvements to PIA monitoring and enforcement in Maryland. I happen to be a member of the Maryland bar, but I am writing as a private citizen.

As you may recall, I contacted you earlier this year regarding a PIA dispute between me and [redacted]. Greatly distilled, the dispute reduced to the [redacted] position that it had no obligation to provide public records that it did not possess, where it's non-possession was an apparent violation of the underlying Maryland recordkeeping laws. My problem thus lay in the quicksand between recordkeeping and disclosure laws, and you reportedly had no jurisdiction over the former, without which you had no reach into the latter.

I do not recall if you and I ever closed the loop on this, but I subsequently spoke at length with multiple offices within the OAG's office, and ultimately was told that the OAG refused to take any enforcement action against the [redacted] with regards to recordkeeping laws. Needless to say, if a [redacted] can avoid sunshine laws merely by neglecting its recordkeeping obligations, the government's lights are out and we're all left in the dark. Yes, I suppose the "private attorney general" route remained open to me, but realistically and practically, the time and cost associated with such actions made them unavailable. The OAG could have - and should have - resolved the problem with a phone call to remind the [redacted] of its recordkeeping obligation, but the OAG simply was disinterested. I remember when the rule of law meant something in this country, and I miss those days.

So, long story short, anything the State can or will do to facilitate enforcement of PIA laws, including by providing the Ombuds with jurisdiction over the underlying recordkeeping laws, without which the PIA is toothless and citizens are left to the vagaries of municipal employees more interested in consolidating and protecting their own power than serving the citizens they are supposed to represent, would be an improvement.

If you would like to discuss this further, I can make myself available by phone or otherwise.

Thank you for your consideration,

Andrew M. Strongin
Arbitrator & Mediator
[redacted]

Appendix G. Minutes of Board Meetings

Public Information Act Compliance Board

Minutes of Annual Meeting
August 19, 2019
Office of the Attorney General
200 St. Paul Place, Baltimore, Maryland

In attendance:

Board and Board staff:

John H. West, III, Chair
Deborah Moore-Carter
René C. Swafford
Darren S. Wigfield
Jeffrey Hochstetler, Board Counsel
Janice Clark, Board Administrator

Members of the public: 31 Members of the public attended, including: Lisa Kershner, Public Access Ombudsman; Brooke Lierman, State Delegate; individuals from advocacy organizations and the media; and employees of governmental organizations across Maryland. (See attached attendance sheet)

Call to order and welcoming remarks

The Board Chair called the meeting to order at 1:00 p.m. The Board Chair introduced the Board members, welcomed members of the public, and provided an overview of the agenda. The meeting agenda would include discussion of the Board's 4th Annual Report, which will be submitted to the Legislature. The goal of the report is to identify and discuss issues to study or recommend for legislative action under the Public Information Act.

Update on Board Activities and Composition

The Chair provided a description of the Board's jurisdiction and responsibilities, and noted a change in the PIA law that had been approved in the 2019 legislative session. SB 5 (2019) requires notification to the "person-in-interest" when certain 911 records are requested--this change does not directly affect the PIACB's jurisdiction.

The Chair recognized the Public Access Ombudsman, Lisa Kershner. He noted the importance of the Public Access Ombudsman program in responding to numerous Public Information Act (PIA) issues outside of the Board's jurisdiction. He also noted that the Board and Public Access Ombudsman have been tasked by the legislature to produce a PIA research report with recommendations on the jurisdiction of the Board.

Update by the Public Access Ombudsman on Ombudsman Program and PIA Research Report

The Chair asked the Ombudsman, Lisa Kershner, to report on the status of this research report and her program. Ms. Kershner began her report by acknowledging Mr. Hochstetler and Ms.

Clark from the Office of the Attorney General's (OAG) Public Access Unit, who staff both the Board and the Ombudsman's office. She explained the role of mediation in the PIA process. She reported on themes she has noted from her experience in the office and the mediation metrics data that the Ombudsman's office has gathered since the inception of the program in 2016. This data is available on the Ombudsman's website at http://piaombuds.maryland.gov.

Ms. Kershner highlighted the point that Maryland has no means for extrajudicial enforcement of the PIA other than the very narrow fee jurisdiction of the Board. The only other option for enforcement is the courts, which is unattainable or undesirable for many. Additionally, Ms. Kershner noted that agencies across the state have a vast array of experiences in terms of PIA caseload.

This year the Ombudsman's office has taken on two separate initiatives to assess the PIA experiences of requestors and agencies. A stakeholder survey was disseminated in the beginning of the year to all agencies and requestors that have interacted with the Ombudsman program to hear about their PIA experiences and caseload. We have a very positive response rate.

More recently, at the direction of the Maryland Senate and House Budget Committees, the Ombudsman's Office has undertaken research to collect PIA caseload and compliance data across 23 State cabinet-level agencies through both quantitative and qualitative survey instruments. Ms. Kershner described some of the questions that these agencies are responding to. The Ombudsman noted that the responses to these questions are quite diverse in terms of PIA caseload volume and quality of responses.

Pulling from these surveys and the programmatic experience of the Ombudsman's office and the Board, additional research and recommendations will be undertaken regarding enhanced PIA dispute resolution and compliance monitoring models. Part of this research will involve examining the models of other states and the federal government.

One of the recommendations in the final report will likely be to expand the jurisdiction of the PIACB to include all PIA disputes, while preserving the Ombudsman's program and requiring parties to go through mediation before going to the Board. The final report will be made available at the end of the year.

Ms. Kershner noted that her recommendation builds on what is working well, and fills gaps where there is need, with minimal added infrastructure. She expects that expanded Board jurisdiction will result in 4-7 new matters per month to the Board. Board members discussed the implications of Ms. Kershner's recommendation. They emphasized the value of Ombudsman mediation and noted that the capacity of a truly voluntary board is limited. The Board asked the Ombudsman to review her past matters and come up with a researched estimate for the number of new matters the Board could see with expanded jurisdiction.

Public Discussion

The public was invited to ask questions. Laura Anderson Wright asked Ms. Kershner about the role of the Ombudsman within this proposed structure: Would Ombudsman mediation still be voluntary or would it be required before the Board would hear a complaint? The Ombudsman explained that the nature of the Ombudsman program would still be voluntary and that access to the Board would not be thwarted if a body refused mediation. The Board would have enforcement authority.

Eliyah Parker, Montgomery County Police, asked if the new jurisdiction would affect the way agencies assess fees or the Board reviews excessive fees. Ms. Kershner said that she did not expect the recommendations to make any changes to the ways fees are assessed by agencies.

Ms. Kershner emphasized that she is seeking comments from the public and agencies regarding this report and recommendations. Submit comments to pia.ombuds@oag.state.md.us.

Chairman West thanked Ms. Kershner for her report.

Overview of FY 2019 PIACB Cases

Chairman West provided an overview of the draft annual report of the Board and noted that there continues to be a misunderstanding of the Board's jurisdiction. Of 14 total complaints received in FY 2019, 7 were dismissed as outside of the Board's jurisdiction, 4 opinions were issued, and 3 were still pending as of July 1, 2019, (the end of the fiscal year). Half of the complaints were not about the reasonableness of a fee—the only issue within the Board's jurisdiction--but instead concerned issues such as affordability of a fee and/or a fee waiver denial. Like the previous year, this remains the most significant trend that the Board has seen.

Mr. Wigfield noted that the annual report makes note of the research project described by the Ombudsman and defers recommendations until the end of the year when the report is produced. He asked the Board to consider making recommendations sooner so that the legislature will have time to consider them in the 2020 session. Board members and Ms. Kershner discussed opportunities to make preliminary findings and recommendations in the fall before the end of the year.

Vote to Approve Research Plan and Recommendations

Discussion. Chairman West stated that there was consensus among the Board to approve the research plan and recommendations as presented and to propose that preliminary and final recommendations be made to the Legislature.

Mr. Wigfield added that the research plan should include contacting the Office of Administrative Hearings ("OAH") to find out what their PIA appeal experiences have been, and to examine the number and process of OAH PIA appeals before the Board was created and compare that to the process now and as recommended.

Motion by Mr. West to approve the plan as presented and amended by Mr. Wigfield. Seconded by Mr. Wigfield. **Motion unanimously approved.**

Vote to Approve the 4th Annual Report of the PIA Compliance Board

Motion by Ms. Moore-Carter to approve draft of the 4th Annual Report of the PIA Compliance Board as written, second by Rene Swafford. **Motion unanimously passed.**

Public Discussion

The chairman opened the meeting up to questions and suggestions from members of the pubic. The Ombudsman's office addressed questions regarding research report data sources, types of recommendations, and advice on tracking software for PIA requests. The Ombudsman also offered to directly respond to specific matters outside of the meeting.

Closing remarks and adjournment

The Board Chair thanked everyone for attending and thanked staff and the Office of the Attorney General for its great support. The Chair adjourned the meeting at 2:20 p.m.

Public Attendees - August 19 Board meeting

Name	Affiliation	Category
Lisa Kershner	PIA Ombudsman	PIA Ombudsman
Brooke Lierman	State Delegate	State Delegate
Janice Clark	Staff	Staff
Jeff Hochstetler	Staff	Staff
Adina Crawford	Montgomery County Government	agency
Alpa Vaghani	Montgomery County Government	agency
Barb Krupiarz	Governor's Office for Children	agency
Becky Freeberger	Environmental Control Board	agency
Bill Jorch	Maryland Municipal League	advocate
Cathy Coble	Northeast Maryland Waste Disposal Authority	agency
Chichi Nyagah-Nash	Baltimore City Department of General Services	agency
Christine Ryder	Anne Arundel County Government	agency
Eliyah Parker	Montgomery County Police	agency
Irma Robins	University of Maryland	agency
Janice Sartucci		public
Joanne Antoine	Common Cause	advocate
Joe Sviatko	Maryland Insurance Administration	agency
John Norris	Calvert County Attorney	agency
Kim Gordon	Northeast Maryland Waste Disposal Authority	agency
Laura Anderson Wright	University of Maryland College Park	agency
Laura Hurley	Wicomico County Council	agency
Margaret-Ann F. Howie	Baltimore County Public Schools	agency
Mary Davison	Montgomery County Police	agency
Michael Leedy	Baltimore State's Attorney's Office	agency
Myriem Seabron	Department of Housing and Community Development	agency
R Danielle Brown	University of Maryland	agency
Rebecca Snyder	MDDC Press Association	media
Rhea Harris	Maryland State Police	agency
Rig Baldwin		public
Solomon Abimaje	Montgomery County Police	agency
Tami Cathell	Department of State	agency
Tanya Brooks	Register of Wills, Baltimore County	agency

Public Information Act Compliance Board
Conference Call Meeting Minutes
November 5, 2019

On November 5, 2019 Board members held a conference call to discuss the draft ***Report on the Public Information Act: Preliminary Findings and Recommendations*** **("Preliminary Report" or "Report"), a final version of which** is to be submitted by the end of the year to the Legislature by the Public Access Ombudsman and Public Information Act Compliance Board, pursuant to a Committee Narrative request in the Report on the Fiscal 2020 State Operating Budget and the State Capital Budget.

In Attendance:

Board and Board Staff:

John (Butch) West III, Board member and Chair
Larry E. Effingham, Board member
Deborah F. Moore-Carter, Board member
René C. Swafford, Board member
Jeffrey P. Hochstetler, Board Counsel
Lisa Kershner, Public Access Ombudsman
Janice Clark, Board Administrator

Nearly 20 members of the public observed the call.

Call to order and welcoming remarks.

Board chair, Mr. West, called the meeting to order at 1:06 pm. He noted that the Board was meeting to discuss the Preliminary Report. He provided a brief summary of the Report, noting it provides history of the Board's function and identifies PIA issues on which the Board and Public Access Ombudsman are making recommendations to the Legislature.

He also thanked Lisa Kershner, Public Access Ombudsman, for taking the lead to put together a comprehensive document. He then opened the discussion for Board members to ask questions or provide suggestions on the Report.

Discussion of Preliminary Report

Board members agreed that the Report is extremely well done. They noted a key point in the Report was the disparity of record keeping by State agencies regarding their PIA practices. They surmised that the disparity could be explained in that this kind of data had not been required in the past.

Board members also discussed the recommendations and the resources required to implement them. They agreed that agencies will need more resources, including training, technology, and, potentially, additional dedicated staff to the PIA. Additionally, the Board itself will need additional staff to implement the enhanced Board jurisdiction recommended in the Preliminary Report.

Board members heard from the Ombudsman on the methodology and data collection used in the Preliminary Report. They discussed the data reported and made recommendations for stylistic changes to the draft before disseminating to the public for comment.

Board members also discussed next steps in the production of the Report. They were asked to vote to approve the Preliminary Report in order to disseminate to the public for comment.

MOTION by Deborah Moore-Carter to accept the draft Preliminary Report and begin next steps in the process. Seconded by René Swafford. Motion unanimously passed.

The Board instructed Mr. Hochstetler to finalize the Preliminary Report based on the discussions earlier in the call and to publish it to the public for comments. The Board also discussed next steps for a Final Report and noted the importance of comments from all Board members individually as progress continues. It was emphasized that all Board members are welcome to contact staff directly with comments before the Board next meets to discuss the Final Report, which will need to be scheduled for December.

Chairman West thanked the Public Access Ombudsman and Board staff for work on this report.

Meeting was adjourned at 1:26.

Appendix H.
Outreach Instruments

STATE OF MARYLAND
OFFICE OF THE
PUBLIC ACCESS OMBUDSMAN

STATE OF MARYLAND
PUBLIC INFORMATION ACT
COMPLIANCE BOARD

August 28, 2019

Subject. Update on Public Information Act Study and Request for Comments

The Maryland Public information Act Compliance Board ("PIACB") and Public Access Ombudsman ("Ombudsman") were requested this year by the Chairmen of the Senate Budget and Taxation Committee and House Appropriations Committee to collect and report data on Public Information Act ("PIA") caseload and compliance from 23 State cabinet-level agencies, and to makes recommendations on ways to improve PIA monitoring and enforcement. The Joint Chairmen's request—or "Committee Narrative" request—is available here. The report is due by December 31, 2019.

The PIACB and Ombudsman are in the process of collecting and analyzing the requested data, and are considering frameworks that may enhance the extra-judicial PIA dispute-resolution process. The two entities are in a unique position to make recommendations by drawing on their programmatic experience to date and, in the case of the Ombudsman, by pulling from her extensive interactions with requestors and agencies across the State.

Although still in its conceptual stage, the PIACB and Ombudsman believe that a promising avenue for enhanced PIA dispute resolution lies in permitting parties who are unable to resolve their dispute through Ombudsman mediation to seek a binding resolution from the PIACB, whose jurisdiction could be expanded to include all PIA disputes. By requiring parties to participate in Ombudsman mediation before they could petition the PIACB, this framework would preserve the benefits of the current informal PIA dispute-resolution process. Simultaneously, this framework would enable a currently-underutilized PIACB to address a very real need of requestors and agencies—the need for an accessible enforcement remedy as an alternative to going to court. This framework would not preclude the judicial remedy for those who want it, and any final decision of the PIACB could be appealed for judicial review.

The PIACB and Ombudsman expect to provide more detail on their findings and recommendations before they submit the final report at the end of the year, and, in the meantime, welcome comments from interested stakeholders by email: **pia.ombuds@oag.state.md.us**.

If you have any questions, please contact Janice Clark, 410-576-7033, Administrative Officer for the Public Information Act Compliance Board, and Public Access Ombudsman.

200 Saint Paul Place ❖ Baltimore, Maryland 21202-2021
Telephone Number 410-576-6560 ❖ Email: pia.ombuds@oag.state.md.us ❖ Web: https://news.maryland.gov/mpiaombuds/
Telephone for Deaf (410) 576-6372

STATE OF MARYLAND
OFFICE OF THE
PUBLIC ACCESS OMBUDSMAN

STATE OF MARYLAND
PUBLIC INFORMATION ACT
COMPLIANCE BOARD

PIA Resources

Maryland Office of the Attorney General
www.marylandattorneygeneral.gov/Pages/OpenGov/pia.aspx

- **Public Information Act Manual**

Office of the Public Access Ombudsman
www.piaombuds.maryland.gov

- **Request mediation of a PIA dispute—for both agencies and requestors**
- **Request PIA training**
- **Resources and guidance for responding to and making PIA requests**

Public Information Act Compliance Board (PIACB)
http://www.marylandattorneygeneral.gov/Pages/OpenGov/piacb.aspx

- **Request review of PIA fees greater than $350**
- **Procedure for responding to PIACB complaints**
- **Opinions on reasonableness of PIA fees**

PIA Improvements – We Want Your Comments!

The Legislature recently asked the PIACB and Ombudsman to report on the PIA workload and processes of Cabinet-level State agencies, and to report by December 31, 2019 on recommendations for improvements in PIA monitoring and enforcement. Possible recommendations include:

- **Permitting agencies and requestors who cannot solve PIA disputes with the Ombudsman to seek an opinion from the PIACB;**

- **Asking agencies to periodically report on the number, type, and outcome of PIA requests they receive.**

Please let us know if you have any comments about these suggestions—or any other aspect of the report—by email: pia.ombuds@oag.state.md.us

PIA Compliance Board and Public Access Ombudsman
c/o Office of the Attorney General – Public Access Unit
200 St. Paul Place, Baltimore, MD, 21202; (410) 576-6560; pia.ombuds@oag.state.md.us

From: **PIA.Ombuds** <PIA.Ombuds@oag.state.md.us>
Date: Wed, Nov 6, 2019 at 10:39 AM
Subject: Public Information Act Study and Request for Comments
To: Clark, Janice <jclark@oag.state.md.us>

Dear PIA Stakeholder:

Attached are the preliminary findings and recommendations of the Public Access Ombudsman and PIA Compliance Board pursuant to the Legislature's request for a report on the PIA. We look forward to your comments in advance of the Final Report. Please send comments no later than December 6, 2019 by email to pia.ombuds@oag.state.md.us.

If you have any questions, please contact Janice Clark, 410-576-7033, Administrative Officer for the Public Information Act Compliance Board, and Public Access Ombudsman.

On Tue, Sep 10, 2019 at 9:48 AM PIA.Ombuds <PIA.Ombuds@oag.state.md.us> wrote:

Dear PIA Stakeholder:

The Office of the Public Access Ombudsman ("Ombudsman") and the Maryland PIA Compliance Board (PIACB) are seeking your comments on ways to improve Public Information Act (PIA) monitoring and enforcement, as detailed below. Please submit comments by November 1.

The PIACB and Ombudsman were requested this year by the Chairmen of the Senate Budget and Taxation Committee and House Appropriations Committee to collect and report data on PIA caseload and compliance from 23 State cabinet-level agencies, and to make recommendations on ways to improve PIA monitoring and enforcement. The Joint Chairmen's request—or "Committee Narrative" request—is available here. The report is due by December 31, 2019.

The PIACB and Ombudsman are in the process of collecting and analyzing the requested data, and are considering frameworks that may enhance the extra-judicial PIA dispute-resolution process. The two entities are in a unique position to make recommendations by drawing on their programmatic experience to date and, in the case of the Ombudsman, by pulling from her extensive interactions with requestors and agencies across the State.

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The PIACB and Ombudsman expect to provide more detail on their findings and recommendations before they submit the final report at the end of the year, and, in the meantime, welcome comments from interested stakeholders by email to **pia.ombuds@oag.state.md.us**.

If you have any questions, please contact Janice Clark, 410-576-7033, Administrative Officer for the Public Information Act Compliance Board, and Public Access Ombudsman.

Janice Clark
Administrative Officer
Public Access Ombudsman
PIA Compliance Board