

SEVENTH ANNUAL REPORT
OF THE
STATE PUBLIC INFORMATION ACT COMPLIANCE BOARD



BOARD MEMBERS

JOHN H. WEST, III, ESQ., CHAIR
DEBORAH F. MOORE-CARTER
MICHELE L. COHEN, ESQ.
CHRISTOPHER A. EDDINGS
DARREN S. WIGFIELD

SEPTEMBER 27, 2022

**SEVENTH ANNUAL REPORT
OF THE STATE
PUBLIC INFORMATION ACT COMPLIANCE BOARD**

The General Assembly created the State Public Information Act Compliance Board (“Board”) in 2015 to review allegations that records custodians had charged an unreasonable fee higher than \$350 under the Public Information Act (“PIA”). In 2021, the General Assembly expanded the jurisdiction of the Board to also include review of denials of inspection, failures to respond to PIA requests, and allegations that a PIA request was “frivolous, vexatious, or in bad faith.” 2021 Md. Laws, ch. 658. The Board’s expanded jurisdiction took effect on July 1, 2022. Pursuant to § 4-1A-04(d) of the General Provisions Article of the Maryland Code (“GP”), the Board submits this annual report for the period July 1, 2021, through June 30, 2022 (“FY2022”).

This report contains a description of the Board’s activities during FY2022, including summaries of the Board’s opinions, the number and nature of complaints filed with the Board, and information about the Board’s adoption of regulations pursuant to GP § 4-1A-04(c). In addition, although the law does not provide an opportunity for the Public Access Ombudsman to submit a similar annual report, the Board believes such a report is useful to understand the current state of extra-judicial dispute resolution under the PIA. For this reason, the Board has included a report from the Ombudsman as Appendix A to this report.

**I.
ACTIVITIES OF THE BOARD**

A. Responsibilities of the Board

In FY2022, the duties of the Board included:

- Receiving, reviewing, and resolving complaints that a custodian of public records charged an unreasonable fee that exceeds \$350;
- Issuing written opinions regarding whether a custodian has charged an unreasonable fee and, if so, ordering that the custodian reduce the fee to an amount the Board determines reasonable and refund the difference, if applicable;
- Studying ongoing compliance with the PIA by custodians of public records;
- Adopting regulations to carry out the Board’s powers and duties under Subtitle 1A of the PIA (as effective on July 1, 2022); and
- Making recommendations to the General Assembly for improvements to the PIA.

There are currently five members of the Board:¹

- John H. West, III, Esquire – Chair; citizen member – **term expired** 06/30/2022 (reappointed on 07/01/19 for a second term; holding over until successor is named)
- Deborah F. Moore-Carter – PIA knowledge/Maryland Association of Counties/Maryland Municipal League nominee – **term expired** 06/30/2018 (holding over until successor is named)
- Michele L. Cohen, Esquire – attorney member – term expires 06/30/2024 (appointed on 07/01/21)
- Darren S. Wigfield – citizen member – **term expired** 06/30/2022 (reappointed on 07/01/19 for a second term; holding over until successor is named)
- Christopher A. Eddings – non-profit/open government/news media nominee – term expires on 6/30/2023 (appointed to fill vacancy on 8/14/20)

The Attorney General’s Office provides the Board with the services of counsel and an administrator, posts the Board’s decisions and other Public Information Act materials on its website, and bears the incidental costs of administering the complaint and review process. The Board appreciates the excellent service it has received from the Attorney General’s Office in the performance of these tasks. Specifically, the Board wishes to thank Assistant Attorney General Sara Klemm, who serves as counsel to the Board, and Spencer Dove, who serves as the Board’s administrative officer.

The Board also extends its thanks to the Public Access Ombudsman, Lisa Kershner, who is always willing to offer her assistance in matters over which the Board previously had no jurisdiction, and who has always been effective in mediating fee disputes when jurisdiction overlaps. The Board anticipates that the Ombudsman, through her mediation services, will continue to resolve many matters that now fall within the Board’s expanded jurisdiction, thus alleviating the need for a Board complaint.

¹ In addition to expanding the Board’s jurisdiction, the law passed in 2021 also made changes to the statutory composition of the Board. The Board’s membership must now include two attorneys (rather than only one) and a member who is “knowledgeable about electronic records, including electronic storage, retrieval, review and reproduction technologies.” GP § 4-1A-02(a)(3) and (4). The Board’s current membership—which, as noted above, includes three members who are holding over after the expiration of their terms—satisfies these requirements. Both the Board Chair and Ms. Cohen are attorneys, and Mr. Wigfield possesses expertise in electronic records.

B. Processes and procedures

1. FY2022 and Before

Prior to the changes that became effective on July 1, 2022, the Board adhered to the statutory process then in effect for receiving and handling complaints.

In brief, complaints were received by Board staff at the Office of the Attorney General and numbered based on the date received. Board counsel then made an initial determination as to whether the complaint fell within the Board's limited jurisdiction over fee disputes. If it did, Board staff forwarded the complaint to the relevant custodian for a response, and, once all materials were compiled, the Board reviewed them and typically issued a written opinion within 30 days. (The Board did not hold any informal conferences in FY2022.) If the Board determined that the custodian charged an unreasonable fee, then it directed the custodian to reduce the fee to a reasonable amount and refund any overage paid.

When a complaint addressed only issues that were not within the jurisdiction of the Board, the matter was dismissed. These kinds of complaints, and those that included multiple issues in addition to the unreasonableness of a fee, often fell within the Public Access Ombudsman's authority to address. Thus, if the Board determined that it did not have jurisdiction, and/or that the complaint might benefit from mediation, it referred the complainant to the Ombudsman.

2. FY2023 and Going Forward

Post-July 1, 2022, the processes and procedures under which the Board operates are similar to those in effect prior to the expansion of the Board's jurisdiction. Now, however, in order for the Board's jurisdiction to attach, a complainant (i.e., a PIA requester or custodian) must have attempted to mediate the dispute through the Public Access Ombudsman and have received a final determination from the Ombudsman that the dispute was not resolved. After receiving the final determination, a complainant has 30 days to file a complaint with the Board. In addition to reviewing complaints about unreasonable fees higher than \$350, the Board now has authority to review complaints that a custodian wrongfully denied inspection of a public record or failed to respond to a request for a public record. The Board also has authority to review complaints from custodians that a PIA request is frivolous, vexatious, or in bad faith.

Once Board staff receive a complaint, the complaint is given a file number. Board counsel then makes an initial determination as to whether the complaint meets the pleading requirements (e.g., that there is a final determination from the Ombudsman stating that the

dispute was not resolved) and whether the nature of the dispute falls within the Board's jurisdiction. If the complaint passes this initial review, Board staff forwards the complaint and any attached material to the relevant custodian (or, in the case of complaints about frivolous, vexatious, or bad faith PIA requests, the PIA requester) for a response. The responding party has 30 days in which to file its response. Typically, once the Board receives the response, it will permit the complainant to file a reply within 15 days.

If the written submissions provide sufficient information for the Board to resolve the matter, then the Board issues a written decision within 30 days after receiving the response. If the Board needs more information, it may elect to hold an informal conference with the parties, *see* COMAR 14.02.04 (regulations governing informal conferences), in which case the Board's written decision is issued within 30 days after the informal conference. The Board may also request additional information if it is needed to resolve the complaint, including a descriptive index of the public records not disclosed or copies of the public records themselves.² *See* COMAR 14.02.05 (regulations governing requests for additional information) and COMAR 14.02.06 (regulations governing the Board's treatment and handling of confidential records or information). If the Board requests additional information, then it will issue its written decision within 30 days after receiving that additional information. If the Board is unable to issue its decision within these time periods, it must state the reasons why in writing and issue a decision as soon as possible, but no later than 120 days after the complaint was filed.

Depending on the issue raised in the complaint, the Board has authority to order certain remedies. As before, if the Board determines that a custodian has charged an unreasonable fee higher than \$350, it may order the custodian to reduce the fee to a reasonable amount and refund the difference, if applicable. If the Board determines that a custodian denied inspection of public records in violation of the PIA, it may order the custodian to produce those records. And, if the Board determines that a custodian failed to respond to a PIA request within applicable time limits, it may order the custodian to promptly respond and, if its decision states the reasons, the Board may also order the custodian to waive all or part of the fee they would otherwise be entitled to charge. If the Board determines that a PIA request is frivolous, vexatious, or in bad faith, it may permit

² If the custodian's response to the PIA request indicated that inspection was denied under GP § 4-301(a)(2)(ii) (denial because inspection would be contrary to a federal statute or regulation issued under the statute that has the force of law), then the custodian may not be required to produce the public records for Board review. GP § 4-1A-06(b)(3); *see also* COMAR 14.02.05.03A(1).

the custodian to ignore that request or any future requests that are substantially the same as that request.

A complainant or custodian may appeal the Board's decision to one of Maryland's circuit courts in accordance with GP § 4-362(a)(2). An appeal automatically stays the Board's decision pending the circuit court's decision.

C. Complaint and Opinion³ Activities for FY2022

1. Statistics

- New complaints submitted to the Board: 19
- Complaints dismissed without opinion: 9
 - Not within Board's limited jurisdiction: 6
 - Dismissed after resolution in mediation: 1
 - Dismissed after complainant failed to provide necessary information to determine jurisdiction: 2
- Opinions issued during FY2022: 13
 - Carryover from FY2021 complaints: 3
 - Opinions requiring conference with the parties: 0
- Complaints submitted in FY2022 and still pending on 7/1/22: 0

2. Complaints Dismissed without an Opinion

Just under a third of the complaints received by the Board in FY2022 either included issues other than an alleged unreasonable fee greater than \$350 (which was the sole issue within the Board's jurisdiction), or were filed more than 90 days after the custodian charged the fee. Some of these complaints were from complainants who claimed that their request for a fee waiver should have been granted, rather than that the fee was unreasonable. Other complaints concerned a custodian's failure to respond to a PIA request or an allegation that records were wrongly withheld, neither of which was within the Board's jurisdiction in FY2022.

³ Under the law passed in 2021, the Board now issues decisions rather than opinions. *See* 2021 Md. Laws, ch. 658; GP § 4-1A-07 (governing the Board's written decisions). However, because the statute effective during FY2022 still referred to the Board's written "opinions," this annual report will use that terminology.

The following matters did not result in a formal opinion of the Board because they were dismissed for lack of jurisdiction:

- **PIACB 22-01:** Complaint alleged that a custodian had improperly denied a request for specific documents from within a criminal file; complainant referred to the Ombudsman.
- **PIACB 22-02:** Complaint concerned denial of inspection and denial of a fee waiver request; complainant referred to the Ombudsman.
- **PIACB 22-12:** Complaint concerned denial of inspection; complainant referred to the Ombudsman.
- **PIACB 22-16:** Complaint was filed more than 90 days after the custodian charged the challenged fee.
- **PIACB 22-18:** Complaint was filed more than 90 days after the custodian charged the challenged fee.
- **PIACB 22-19:** Complaint alleged that a custodian had failed to respond to a PIA request; complainant referred to the Ombudsman.

The following matter did not result in a formal opinion of the Board because the Board dismissed the complaint after it was resolved through mediation with the Ombudsman:

- **PIACB 22-10:** Complaint alleged that a custodian charged an unreasonable fee higher than \$350 and also that the custodian wrongfully denied a fee waiver request.

The following matters did not result in a formal opinion of the Board because the complainant failed to respond to the Board's request for more information:

- **PIACB 22-03:** Complaint concerned a fee higher than \$350 and the complainant's status as indigent but did not indicate when the fee was charged, so the Board was unable to determine whether it had jurisdiction or not.
- **PIACB 22-04:** Complaint concerned a fee higher than \$350 and the complainant's status as indigent but did not indicate when the fee was charged, so the Board was unable to determine whether it had jurisdiction or not.

3. Complaints in which Board Issued an Opinion

When a complaint is within the jurisdiction of the Board and ripe for review, the Board will issue a written opinion. During FY2022, the Board issued thirteen opinions, all of which were decided on the basis of the parties' written submissions.

The Board's opinions appear on the Office of the Attorney General's website: <https://www.marylandattorneygeneral.gov/Pages/OpenGov/piaindex.aspx#InplviewHash9271b794-4b75-4046-be3e-d555c31cbb4e>. Summaries of the ten opinions issued for complaints filed in FY2022 appear in this report for ease of reference. In addition, the Board has provided summaries of the three FY2021 carry-over matters for which opinions were issued in FY2022 (and thus not included in the Board's FY2021 annual report). The summaries are provided in chronological order according to the date the opinion was issued.

- **PIACB 21-15 (July 7, 2021)**

Agency: City of Hyattsville ("City")

Issue: The City estimated that it would cost \$22,890 to respond to the complainant's request for records of certain communications between the Hyattsville Police Department and select City officials but did not require prepayment of the fee. The complainant alleged that the fee estimate was unreasonable.

Decision: Because the City did not demand prepayment of all or a portion of the estimated fee, the Board declined to issue a binding resolution. Instead, the Board provided guidance to the City and the requester. The Board encouraged the parties to work together to narrow the scope of the PIA request (as the complainant had indicated he was willing to do) and also suggested that the City use different search terms and employ a de-duplication function (if available) to reduce the number of duplicative responsive records. The Board also cautioned that the City should not expect its attorney to review *all* of the records that staff have already compiled and reviewed; rather, only those responsive records that present a genuine legal question about whether or not they may be disclosed (or whether redactions are needed) should be provided to the attorney for review.

- **PIACB 21-14 (July 23, 2021)**

Agency: Montgomery County Public Schools ("MCPS")

Issue: The complainant alleged that fee estimates for three different PIA requests were unreasonable: (1) \$1,360.32, for "emails, notes, text, files, phone

calls, notes of phone calls, etc.” between eight individuals over a span of five and a half months; (2) \$16,524.60, for any communications between more than 20 individuals that contained the complainant’s last name over a span of almost two and a half years; and (3) \$725.21, for “telephone logs and ledgers and all related notes, emails, messages, and all attachments” between two individuals on 24 specific dates.

Decision: The fee estimates appeared precise and based on a detailed calculation of anticipated costs. Because the MCPS asked for prepayment, the Board reviewed the fee estimates. The Board asked the MCPS for more information about the tasks associated with responding and the anticipated volume of responsive records, which the MCPS provided in part. The Board found that all three of the estimated fees were unreasonable to some extent and ordered reductions, with the caveats that if final fees were in excess of the estimates, then the MCPS could charge the complainant the difference and, if final fees were below the estimates, then the MCPS must refund the complainant the overage paid.

- **PIACB 21-16 (July 30, 2021)**

Agency: City of Hagerstown (“City”)

Issue: The City initially estimated that it would cost \$10,000 to respond to the complainant’s request for certain records related to the City’s Crime-Free Housing programs. After discussion, the complainant revised the request and the City reduced the estimated fee to between \$1,600 and \$1,800. The complainant challenged both the initial and revised estimates.

Decision: The City asked for a “down payment” of a portion of the fee prior to starting work on a response, and its estimates were based on a sufficiently precise breakdown of time expenditures and prorated salaries. Thus, the Board reviewed the estimates. In its response to the fee complaint, the City also provided a more detailed “near-final” fee of \$843.60, which the Board also reviewed. Ultimately, the Board concluded that both the initial \$1,600-1,800 range and the near-final fee bore a reasonable relationship to the actual or anticipated actual costs of responding to the complainant’s PIA request and therefore ordered no fee reduction.

- **PIACB 22-05 (December 10, 2021)**

Agency: Housing Opportunities Commission of Montgomery County (“HOC”)

Issue: The HOC estimated that it would cost \$1,550 to respond to the complainant’s PIA request for records related to the Montgomery County Attorney’s representation of the HOC. The complainant alleged that the estimated fee was unreasonable. The complainant also alleged that the HOC should have fully waived the fee.

Decision: Because the HOC required full prepayment of the estimated fee, the Board reviewed the fee to determine whether it was reasonable. Given that the complainant sought many types of records created over a span of 35 years, and that those records would likely need close review for privilege, the Board concluded that the estimated fee was reasonable. The Board declined to address the fee waiver issue.

- **PIACB 22-06 (January 18, 2022)**

Agency: Harford County Sheriff’s Office (“HCSO”)

Issue: The complainant alleged that the \$9,205.34 estimated fee that the HCSO sought to charge to respond to the complainant’s request for police internal affairs data previously provided, but without the officers’ names redacted, was unreasonable.

Decision: The HCSO required prepayment of the estimated fee, which was sufficiently precise, so the Board reviewed the matter and concluded that the estimated fee was unreasonable. First, the Board found that the hourly rates charged by the HCSO were unreasonable because they included costs other than salary and because the HCSO charged overtime rates. Second, the Board concluded, based on the type of information the complainant was seeking (and the information that had already been provided), that the HCSO’s estimated time expenditures were excessive. Third, the Board determined that the HCSO could not charge the complainant for duplicative review of records that were already “fully vetted.” The Board ordered a significant reduction of the estimated fee.

- **PIACB 22-07 (February 3, 2022)**

Agency: Department of Budget & Management, Central Collections Unit (“DBM-CCU”)

Issue: The complainant challenged two separate estimated fees: (1) \$221,367.23, for redacted records of certain communications between alleged debtors, DBM-CCU, and other State or federal agencies; and (2) \$97,100.18, for

three specific records from the files of alleged debtors who requested debt investigations between May 2018 and May 2020.

Decision: After discussing its authority to review estimated fees, the Board concluded that it did not have authority to review the estimated fees in this matter because, even though the DBM-CCU provided a detailed breakdown of its estimates, the DBM-CCU did not demand prepayment. Rather, the DBM-CCU denied the complainant’s PIA request in full, and provided the fee estimates only for informational purposes. Thus, the DBM-CCU had not “charged” a fee. The Board dismissed the complaint as not ripe for review.

- **PIACB 22-08 (February 23, 2022)**

Agency: Office of the State’s Attorney for Baltimore County (“BCSAO”)

Issue: The BCSAO charged an estimated fee of \$595 for production of public records from the complainant’s criminal case file. In his complaint, the complainant alleged that he was unable to pay the fee and asked the Board to review it.

Decision: The Board concluded that, even affording the complaint liberal construction, the complainant had not alleged that the estimated fee was unreasonable; rather, his complaint was in the nature of a complaint about a denial of a fee waiver request, which the Board lacks authority to review. Therefore, the Board dismissed the complaint.

- **PIACB 22-09 (March 21, 2022)**

Agency: Ocean City Police Department (“OCPD”)

Issue: The complainant alleged that the \$692.27 fee that the OCPD charged for internal affairs records of one police officer was unreasonable.

Decision: The Board determined that the amount of time attributed to redaction of the records was excessive and ordered a modest reduction in the fee. In light of some recent opinions finding that time attributed to attorney review was unreasonable under certain circumstances, the Board also clarified its view that attorney review of records already prepared may be a legitimate, non-duplicative cost that may be assessed.

- **PIACB 22-11 (April 15, 2022)**

Agency: Prince George’s County Police Department (“PGPD”)

Issue: The PGPD estimated that it would cost \$8,400 to respond to the complainant’s request for records related to databases that contain data about the gang affiliation of individuals. The complainant alleged that the estimated fee was unreasonable and that the PGPD erroneously denied a fee waiver request.

Decision: Despite initially defending its fee estimate, the PGPD later—but while the matter was still pending an opinion—indicated that it would respond to the complainant’s PIA request without charging a fee. Thus, the Board dismissed the complaint at moot.

- **PIACB 22-14 (May 6, 2022)**

Agency: Howard County Police Department (“HCPD”)

Issue: The complainant challenged a \$2,937.43 estimated fee charged by the HCPD for internal affairs records related to eleven different police officers.

Decision: The HCPD’s estimated fee was broken down in a precise manner and the HCPD required that the complainant prepay, so the Board reviewed the matter and concluded that the fee was unreasonable in two ways. First, the HCPD included FICA as well as healthcare and pension benefits in its hourly rate, rather than basing the hourly rate on prorated salary alone. Second, the HCPD could not show that the flat fees assessed for certain types of records (e.g., \$70 for each 911 call recording) per a resolution of the Howard County Council were reasonably related to anticipated actual costs. The Board ordered a discrete reduction based on the reduced hourly rate and directed the HCPD to revisit the flat fees and adjust them to reflect the anticipated actual costs of producing those records.

- **PIACB 22-13 (May 6, 2022)**

Agency: Baltimore County Police Department (“BCPD”)

Issue: The BCPD estimated that it would cost \$988.05 to produce body-worn camera footage that the complainant requested. The complainant alleged that the estimated fee was unreasonable.

Decision: Though the BCPD required prepayment of only a portion of the estimated fee—and that portion was less than \$350—the Board concluded that it had authority to review the matter because the prepaid amount was based on the full fee (i.e., it was 10% of that full fee) and because the prepaid amount was non-refundable. Based on the precise salary information provided, the Board determined that the hourly rate used to calculate the fee estimate was not reasonably related to anticipated actual costs and therefore ordered a small reduction in the estimated fee.

- **PIACB 22-17 (May 18, 2022)**

Agency: Montgomery County Police Department (“MCPD”)

Issue: The complainant challenged estimated fees related to two separate PIA requests: (1) \$325,223 for internal affairs complaints and records related to those complaints for 49 police officers; and (2) \$86,870, for the same types of records, but related to sixteen different police officers.

Decision: The MCPD provided a significant degree of detail about its estimated fees, which it charged in advance. Thus, the Board reviewed the matter. The Board found that the hourly rates used to calculate the estimated fees were reasonable, and that the anticipated time expenditures for production of documents and audio footage were also reasonable. However, the Board concluded that the MCPD’s anticipated time expenditure for production of video footage was excessive, and directed the MCPD to use a reduced amount of time in the calculation of estimated fees for video footage. The reduced figure was based on an average used by another police department and information provided in written testimony to the General Assembly by a representative of the Maryland Municipal League.

- **PIACB 22-15 (June 27, 2022)**

Agency: Takoma Park Police Department (“TPPD”)

Issue: The TPPD estimated that it would cost at least \$5,421.13 to respond to the complainant’s PIA request for internal affairs records related to one police officer. The complainant alleged that the fee was unreasonable.

Decision: Given that the estimated fee was, at least in part, based on a detailed breakdown of recoverable costs, and that the TPPD both indicated an intent to require prepayment of the fee and referred the complainant to the Board in the

event that she believed the fee to be unreasonable, the Board reviewed the matter. The Board concluded that, generally, the hourly rates used to calculate the fees were reasonable. Though the Board was concerned that certain time estimates related to retrieval and review of responsive records in electronic form may be excessive, it did not reduce those estimates but rather directed the TPPD to revisit those estimates. The Board determined that the estimated fee related to responsive records in non-electronic form was unreasonable and directed the TPPD to ascertain a rough approximation of the volume and content of responsive records before calculating an estimated fee.

D. Adoption of Regulations & Policy of Proactive Disclosure

As noted earlier, during the 2021 legislative session, the General Assembly passed House Bill 183, which enacted significant changes to the extra-judicial dispute resolution options provided by the PIA. *See* 2021 Md. Laws, ch. 658. The new law, which went into effect on July 1, 2022, provides that:

- Requesters and custodians seeking to resolve PIA-related disputes must first attempt to resolve those disputes through the Public Access Ombudsman, who continues to have broad authority to mediate a wide variety of issues.
- Generally, Ombudsman has 90 days in which to mediate a dispute before issuing a “final determination” that a dispute has either been resolved or not resolved; this deadline can be extended upon mutual consent of the parties.
- If a dispute is not resolved, and if it is within the expanded jurisdiction of the Board, the aggrieved party may file a complaint with the Board within 30 days after receiving the Ombudsman’s final determination.
- In addition to reviewing complaints that allege that a custodian has charged an unreasonable fee of more than \$350, the Board has authority to review and resolve complaints that allege that a custodian wrongfully denied inspection of a public record or failed to respond to a PIA request.
- The Board is also charged with reviewing complaints from custodians that allege that a “request or pattern of requests is frivolous, vexatious, or in bad faith.”
- Along with its expanded jurisdiction, the Board also has new powers regarding remedies. Depending on the nature of the complaint and the Board’s decision, the Board may order that a record be produced, that a custodian promptly respond to a PIA request and, in certain circumstances, that a custodian who has not timely responded waive part or all of a fee. And, if the Board finds that a

request is frivolous, vexatious, or made in bad faith, its order may state that a custodian may ignore the request or respond to a less burdensome version.

The new law also required the Board to “adopt regulations to carry out” Subtitle 1A of the PIA. *See* GP § 4-1A-04(c)(1). The Board began the process of drafting its regulations in the fall of 2021. Board members Michele Cohen and Darren Wigfield participated in the drafting process.

After the initial draft was complete, the Board met on December 10, 2021, to discuss the draft regulations and the adoption process. The meeting was held virtually via Microsoft Teams and open to the public.⁴ At the meeting, the Board voted to circulate the initial draft to interested stakeholders for informal public comment. (The Board also posted notice on its website that the public could request a copy of the draft regulations, along with instructions on how to submit any informal comment.) About a dozen people requested the draft regulations, and four submitted informal public comments to the Board. Those informal public comments are included as Appendix B to this annual report.

The Board met again on February 4, 2022, in another open virtual meeting. The Board reviewed the informal public comments that it received and discussed certain proposed changes to the draft regulations. The Board ultimately voted to make some changes in light of the informal comments. After receiving an overview of the next steps, the Board voted to begin the formal adoption process and to submit the proposed regulations to the Maryland Register. The proposal, which is attached as Appendix C, was published in the March 25, 2022, issue of the Maryland Register.

As required by law, the Board’s proposal included information about how the public could comment on the proposed regulations. The Board accepted comments through April 25, 2022; the Board did not hold a public hearing to take comments. One person submitted comments, which are attached as Appendix D. The Board held an open virtual meeting on May 10, 2022, to review the public comments. The Board did not make any changes to the proposed regulations and voted to submit notice of final adoption to the Maryland Register. That notice, attached to this annual report as Appendix E, was published on June 3, 2022. The Board’s regulations became effective ten days later, and are available through COMAR Online:

http://www.dsd.state.md.us/COMAR/subtitle_chapters/14_Chapters.aspx#Subtitle02

The new law also requires official custodians to “adopt a policy of proactive disclosure of public records that are available for inspection under [the PIA].” GP § 4-

⁴ The agenda and video minutes for this meeting (and all meetings held thereafter) are available on the Board’s website:

https://www.marylandattorneygeneral.gov/Pages/OpenGov/piacb_meetings.aspx.

104(a). At its May 10, 2022, the Board voted to adopt a policy of proactive disclosure. That policy is attached to this annual report as Appendix F.

II.

RECOMMENDATIONS FOR IMPROVEMENTS TO THE PIA

Given that substantial changes were made to the PIA during the 2021 legislative session, and that those changes have only just taken effect, the Board does not have any specific recommendations at this time for legislation in the 2023 session that would enact further changes.

The Board does note, however, that since Anton’s Law—which changed the status of records related to alleged police misconduct from non-disclosable personnel records, *see* GP § 4-311, to records that may be disclosed as investigative records pursuant to GP § 4-351 (unless they are records of “technical infractions”)—took effect on October 1, 2021, the Board has received a number of complaints related to fees charged by police departments for internal affairs related records. *See* PIACB 22-06 (Jan. 18, 2022); PIACB 22-09 (Mar. 21, 2022); PIACB 22-14 (May 6, 2022); PIACB 22-17 (May 18, 2022); PIACB 22-15 (June 27, 2022). These complaints, and the responses to these complaints, reveal a wide disparity as to what search and review processes are employed and also as to what fees are charged. For instance, while some police departments charge high hourly rates for lengthy legal review, others appear to prepare records without an attorney’s review (or, at least, if an attorney is reviewing the records, the custodian is not passing this cost along to the requester). At the same time, the complaints and responses were fairly uniform in the degree to which they laid bare the labor-intensive nature (and resulting high costs) of preparing video footage (including body-worn camera footage) for production under the PIA.

The Board is aware that, during the 2022 legislative session, the General Assembly enacted a law that creates a task force to study PIA requests made to law enforcement agencies. *See* 2022 Md. Laws, ch. 536. In addition to reviewing the fees that law enforcement agencies charge for records requested under the PIA and the procedures those same agencies employ to respond to PIA requests, the Board understands that the task force is directed to study “the status and operations” of this Board. The Board looks forward to providing whatever information or assistance it can to aid the task force as it studies these important issues in the PIA.

Appendix A.
REPORT FROM THE
PUBLIC ACCESS
OMBUDSMAN

APPENDIX A
REPORT OF THE PUBLIC ACCESS OMBUDSMAN
FY 2022

The General Assembly created the Office of the Public Access Ombudsman (“Office” or “Ombudsman”) in 2015 in the same law that created the Public Information Act Compliance Board (“Board” or “PIACB”). *See* 2015 Md. Laws, ch. 135.

The Ombudsman’s primary duty is to make reasonable attempts to resolve disputes between records custodians and applicants seeking public records under the Maryland Public Information Act (“PIA” or “Act”). Typically, the Ombudsman accomplishes this through voluntary, non-binding and confidential mediation. The Ombudsman has broad authority to try to resolve a wide variety of disputes that arise under the PIA, including: disputes involving exemptions; the failure of a custodian to respond in a timely way; fee waivers; and repetitive, overly broad, and alleged vexatious requests. *See* Md. Code Ann., Gen. Prov. (“GP”) § 4-1B-04; COMAR 14.37.02.

In addition to mediating PIA disputes, the Ombudsman also regularly provides informal assistance, resource material, and PIA trainings on request. These and other activities are published in summary reports that are periodically posted to the Ombudsman’s website, <https://piaombuds.maryland.gov>.

This report describes the Ombudsman’s activities from July 1, 2021, through June 30, 2022 (“FY 2022”). For context, comparative data concerning prior periods is provided in the tables below. Additional information about Ombudsman program activities during FY 2022 and since inception is included at the end of this report.

ACTIVITIES OF THE OMBUDSMAN

The Attorney General appointed Lisa Kershner as the first Public Access Ombudsman in March 2016 and reappointed her to a second four-year term effective March 30, 2020. The Ombudsman is housed within the Office of the Attorney General (“OAG”) and is supported by the same staff that support the PIACB. The program’s first Administrative Officer, Janice Clark, left the program in October 2021. The Ombudsman thanks Ms. Clark for her invaluable service, and is pleased to welcome Spencer Dove, who joined the program in this role starting in late December 2021. Assistant Attorney General Sara Klemm continues to serve as program counsel. The Ombudsman thanks the OAG and staff for their exceptional support, skill, and professionalism throughout the year. The Ombudsman could not operate effectively without their support.

Program Operations & Mediation Metrics: During FY 2022, the Ombudsman program continued to operate largely remotely, as have many of the State and local agencies with which the Ombudsman works. However, the Ombudsman’s current caseload data, discussed below, suggests that certain impacts of the COVID-19 pandemic began to abate during FY 2022.

Figure 1 below shows the overall volume of the Ombudsman’s caseload, consisting of requests for mediation and informal requests for assistance (referred to as “help-desk” or “HD” matters).

Time Period	Carry-Over from Prior Year	New Mediation Matters	New HD Matters	Total New Matters	Mediations Closed ¹
FY 2022	52	215	168	383	239 or 90%
FY 2021	49	235	212	447	232 or 82%
FY 2020	19	262	235	497	232 or 83%
Since Inception	N/A	1481	1004	2485	1453 or 98%

The substantial increase in carry-over matters at the start of FY 2021 and FY 2022 is one of the impacts resulting from the COVID-19 pandemic and accompanying State of Emergency that was in effect throughout Maryland from March 2020 until August 15, 2021. The number of carry-over matters, both month-to-month and year-to-year, is closely tracked because it impacts the length of the queue for the Ombudsman's services and, thus, the length of time required to bring a request for dispute resolution to closure. These factors, in turn, impact the efficiency with which mediations can proceed as well as the likelihood of successful outcomes. Thus, during FY 2022, the Ombudsman prioritized closing those matters that had been pending for a protracted period alongside new matters in an effort to reduce the queue and overall length of time needed to bring mediations to closure. This effort reduced the number of carry-over mediations entering FY 2023 to 28, a number which is much closer to pre-pandemic levels.

Figure 2 below broadly reflects the types of requesters using the Ombudsman program. The substantial majority this year, as in all previous years except for FY 2021, encompassed individual requesters seeking assistance for purposes unrelated to their business or occupation. At the same time, the Ombudsman continued to work with a diverse, albeit smaller, group of professional and occupational users, including press and media outlets, non-profit organizations, private attorneys, businesses, and others. As shown below, while occupational program users comprised the majority (51%) of all incoming requests for PIA mediation during FY 2021, that proportion dropped to 19% in FY 2022, a figure that, while still lower than FY 2020, is more in-line with previous years of reported data.

Time Period	Individual	Professional Occupational User
FY 2022	81%	19%
FY 2021	49%	51%
FY 2020	72%	28%
Since Inception	62%	38%

Figure 3 reflects the type of agencies participating in mediation during FY 2022. In previous years, both State and local agencies have tended to be more-or-less equally represented in the Ombudsman's caseload. In FY 2021, however, there was a greater percentage of mediation requests involving State agencies (45%), and a corresponding reduction in matters involving local government (17%). As we reported last year, this shift may have reflected a greater interest in and

¹ Closure rate reflected in the "Mediations Closed" column is obtained by dividing the number of mediation matters closed by the total number of open mediations during the period, which includes both "New Mediations" and those carried over from the prior year. "Help-desk" matters are not reflected in this statistic because they are generally closed quickly, usually within 24 to 48 hours.

need for records from those State agencies leading Maryland’s response to the pandemic. FY 2022 saw movement toward a relatively equal level of participation by state and local agencies. That said, requests made to public school districts and law enforcement agencies – which are captured in the category “Other” – comprised a substantial and somewhat increased portion of the Ombudsman’s caseload, reflecting continued strong public interest in K-12 public schools and the activities of law enforcement agencies.

Figure 3: Program Use – Agency Make-Up

Time Period	State	Local	Other*
FY 2022	30%	24%	46%
FY 2021	45%	17%	37%
FY 2020	32%	31%	37%
Since Inception	37%	24%	39%

**Other = public school districts & law enforcement agencies*

Figures 4 and 5 below document the types of issues submitted to the Ombudsman during FY 2022 as well as the length of time required to conclude mediations.

Figure 4: Issues Presented for Mediation

Time Period	No/ Incomplete Response	Other
FY 2022	52%	48%
FY 2021	65%	35%
FY 2020	54%	46%
Since Inception	47%	53%

Figure 5: Length of Time to Conclude Mediations

Time Period	3 Weeks	6 Weeks	9 Weeks	12 Weeks	12+ Weeks
FY 2022	18%	16%	17%	11%	38%
FY 2021	19%	13%	11%	9%	48%
FY 2020	29%	22%	18%	11%	20%
Since Inception	30%	18%	15%	9%	28%

The data is consistent with the Ombudsman’s sense that the prevalence of problems, such as missing, long delayed or incomplete PIA responses, which were observed during the State of Emergency are beginning to abate. Figure 4 shows that in FY 2022 there was a reduction in the proportion of mediations involving a missing or incomplete PIA response as compared to FY 2021. Consistent with this trend, Figure 5 illustrates that during FY 2022, a greater percentage of PIA mediations were concluded in 9 weeks or less, while the need for more than 12 weeks to resolve a PIA dispute through mediation declined.

As we reported last year, during FY 2021 the problem of a missing or incomplete PIA response was the presenting issue in a substantial majority – nearly two thirds – of all matters submitted to the Ombudsman for mediation. While these types of problems tended to be readily resolved once brought to the attention of the custodian prior to FY 2021, this often was not the case in FY 2021. Rather, these types of presenting problems tended to drag on, sometimes over very protracted periods, thereby contributing to an even greater backlog for both responding agencies and for the Ombudsman. Taken together, Figures 4 and 5 show that these issues which predominated FY 2021 are slowly abating in FY 2022. Greater detail for these two charts can be found in the Ombudsman’s statistical reports which are included at the end of this report.

Outreach & Training: The Ombudsman regularly receives requests for trainings and other assistance (“help-desk” matters) from both requesters and custodial agencies. The volume of these matters is reflected in the attached statistical reports included at the end of this report. Prior

to the COVID-19 pandemic, the Ombudsman regularly conducted in-person trainings on request. Since March 2020, however, the Ombudsman has conducted group trainings and presentations entirely remotely, a trend the Ombudsman expects to continue so long as the COVID-19 community transmission rate in Maryland remains high. In the meantime, the Office is reviewing strategies to expand the Ombudsman's footprint around the State while building awareness of the Office by harnessing social media and other internet-based tools.

Implementation of H.B. 183: The most exciting changes coming to the Office of the Public Access Ombudsman arise from H.B. 183 going into effect on July 1, 2022. For background, H.B. 183 expanded the jurisdiction of the PIACB while instituting an integrated PIA complaint dispute resolution process that includes the Ombudsman. Before a dispute may be filed as a complaint with the Board (assuming the Board has jurisdiction), a requester or custodian must attempt to first resolve the PIA dispute through the Ombudsman.² The Ombudsman must now bring disputes submitted for resolution to conclusion within 90 days unless the parties mutually agree in writing to an extension. At the conclusion of the process, the Ombudsman is also now required to issue a final determination that identifies the issues presented, and states whether the dispute was resolved, unresolved, or partially resolved.

During FY 2022, the Office made substantial efforts to ensure the smooth and seamless implementation of these changes. These efforts, undertaken by the Ombudsman and staff, include the following:

- Enhancing current case management systems for the Ombudsman to ensure proper tracking and reporting.
- Updating the Ombudsman's records retention schedules to include additional records that H.B. 183 now requires (e.g., final determinations).
- Developing and/or updating communications and publications related to the mediation process.
- Overhauling the Ombudsman's website and publishing the Ombudsman's Policy of Proactive Disclosure.
- Updating office protocols needed to implement H.B. 183.
- Disseminating educational materials and informational one-pagers to stakeholders and program users so that they were prepared for the law to take effect on July 1, 2022. Examples (Mediation Process One-Pager and "What's Changed?" One-Pager) are included at the end of this report.

While the impact of H.B. 183 is only just beginning to be realized in these first few months of FY 2023, the new requirements, including the 90-day timeframe for completing mediations, are expected to make the Ombudsman program more efficient and effective.

Looking Forward to FY 2023, the Ombudsman will continue to engage with stakeholders in order to identify opportunities for growth and improvement, as well as to better carry out the new law. Such engagement includes tracking and evaluating the new law's impact on the Ombudsman program with respect to caseload volumes, the length of time required to bring matters to conclusion, the actual outcomes or dispositions of mediations, and the experience of

² Despite the Board's expanded jurisdiction, the Ombudsman continues to have authority to address a wider variety of PIA-related disputes than the Board.

program users with the process as a whole. The Ombudsman also anticipates revising and adding to the Office's interpretive regulations to reflect changes in protocols needed to implement H.B. 183.

CONCLUSION

The Ombudsman wishes to thank the Attorney General for appointing her to this important position. In addition, the Ombudsman extends her thanks to the Board for providing this forum for sharing information about the Ombudsman program. Finally, the Ombudsman wishes to again thank the dedicated staff of the Office of the Attorney General – Spencer Dove and Sara Klemm – who tirelessly support the Office of the Public Access Ombudsman, as well as OAG law clerk, Andre Beasley, who provided valuable assistance to the Ombudsman during the Summer 2022 term regarding the handling of multiple mediation matters.

Additional program information, including statistical reports, helpful tips, and PIA-related news and developments, are regularly posted throughout the year to the Ombudsman's website <http://piaombuds.maryland.gov>, and on Twitter @MPIA_Ombuds.

Respectfully submitted,
Lisa Kershner
Public Access Ombudsman
September 2022

MARYLAND PUBLIC INFORMATION ACT (PIA)
The public's right to information about government activities lies at the heart of a democratic government.

Mediation Metric Report of the Public Access Ombudsman

FY 2022 - Annual Report
 July 1, 2021 to June 30, 2022



**Annual Report
 FY 2022**

383 FY 2022

- ◆ 215 -Mediation requests
- ◆ 168 -Other/"help-desk" inquiries

The Big Picture: Mediation Matters!
Early resolution of disputes saves time and resources and increases public knowledge and awareness of the PIA process. Mediation is entirely voluntary, confidential, and in many cases doesn't require an attorney.

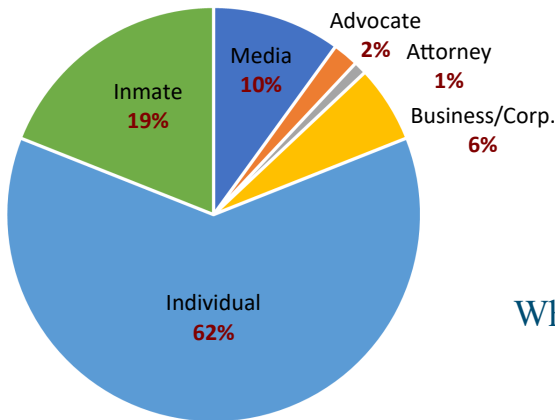
Total Mediation Cases, as of June 30, 2022	
Carry over from FY 2021	52
New/Incoming cases in FY2022	215
Total Number of Mediation cases	267
Total Mediation cases Closed FY 2022	239
Mediation cases carried over to FY 2023	28

The Agencies

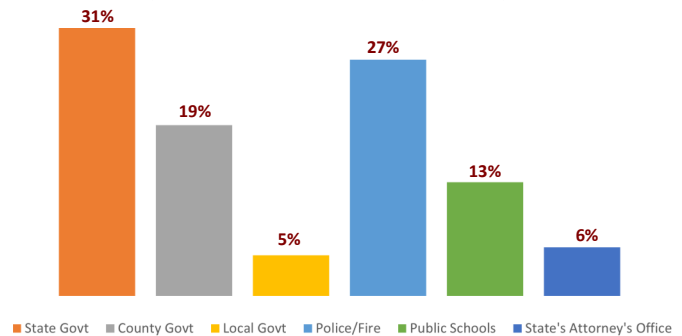
48 unique agencies participated in mediation matters with the PIA Ombudsman in Fiscal Year 2022, including agencies at the state, county, and municipal levels.

The Requesters

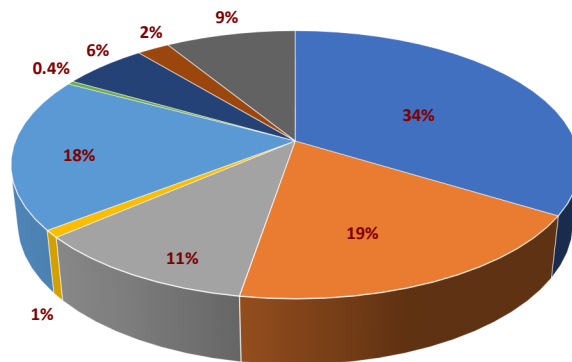
Requesters:
 Professional/Occupational requesters make up **19%** of requests for assistance, and all individuals make up **81%**.



What Agencies are Participating in Mediation?

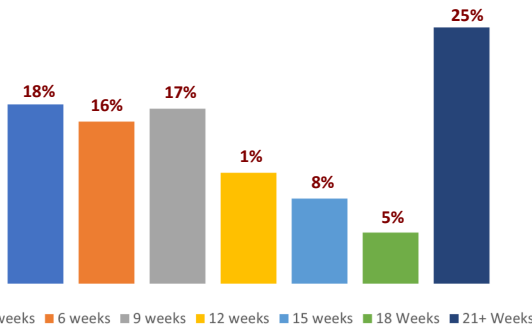


What are the PIA disputes?



Disputes are presented as framed by the requester. Characterizations are based on how the requesters describe the issues. These are not findings.

How Long Does Mediation Take?



Range:
 1 – 455 days.
18% of the cases are closed within 3 weeks and **64%** by 90 days.

- Misapplication of exemption - 29%
- Redaction inappropriate - 18%
- Entire record withheld - 11%
- MIA: No Response - 34%
- Partial, nonresponsive, or incomplete response - 19%

- Fees excessive - 6%
- Fee waiver request denied or ignored - 2%
- Does not believe response - 1%
- Asked for explanation of response - 0.4%
- Other - 9%

Lisa Kershner

200 St. Paul Place,
 19th Floor
 Baltimore, MD 21202

Phone: 410-576-6560
 Email: pia.ombuds@oag.state.md.us
 Twitter: @MPIA_Ombuds

Ombudsman's Website:

<http://piaombuds.maryland.gov>

**MPIA Ombudsman
on Twitter
@MPIA_Ombuds**

2022 Legislative Session

During the 2022 Legislative Session, six bills were introduced that impacted the PIA. Of these six, two bills were of great interest to the Office of the Public Access Ombudsman. The first, **Senate Bill 31**, set forth the circumstances under which a custodian of records, in accordance with the PIA, must deny or allow inspection of recordings from a body-worn camera worn by a law enforcement officer. This bill had been previously introduced. After passing the Senate, the House of Delegates did not take any further action on this bill. The second, **Senate Bill 777**, established the Task Force to Study Public Information Act Requests Made to Law Enforcement. The task force is charged with reviewing and studying (1) the costs charged by law enforcement agencies in relation to the disclosure of records under the PIA; (2) procedures applied by law enforcement agencies in the disclosure of records requested under the PIA, and (3) the status and operation of the PIA Compliance Board. The Office of the Attorney General was tasked with providing staff to the task force. This bill took effect on June 1, 2022. Both of these bills reflect the growing public attention in activities of law enforcement officers and agencies in recent years.

Additional analysis of 2022 Legislative Changes to the PIA can be found on the Ombudsman's Blog, *Open Matters* at news.maryland.gov/mpiaombuds/blog.

FY 2022 Open Matters: Blog of the Public Access Ombudsman

- **PIA Ombudsman program—Impact of Covid-19 and Mediation Metrics. Part 2**. Open Matters Blog, posted October 12, 2021.
- **PIA Ombudsman Program - Impact of Covid-19 and Mediation Metrics. Part 1**. Open Matters Blog, posted September 27, 2021.

RESOURCES/LINKS

- ♦ **MD Office of the Attorney General—PIA Manual 17th Edition:** http://www.marylandattorneygeneral.gov/OpenGov%20Documents/PIA_manual_printable.pdf. The PIA Manual includes Appendix J a List of Public Record Custodians.
- ♦ **Maryland State Archives:** <http://msa.maryland.gov> is a resource for custodians' record management and retention practices.
- ♦ **Office of Government Information Services (OGIS – FOIA)** <https://www.archives.gov/ogis>
- ♦ **Federal FOIA (Freedom of Information Act)** : <https://www.foia.gov/>
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 - * **Interpretive Regulations:** <https://tinyurl.com/y2cuqp55>
- ♦ **Virginia Freedom of Information Advisory Council:** <http://foiacouncil.dls.virginia.gov/foiacouncil.htm>

Outreach FY 2022

July 1, 2021 – June 30, 2022

Presentations, Workshops, Trainings, and Other Outreach

Due to the COVID-19 pandemic, the Public Access Ombudsman's Office conducted all trainings and presentations by remote means.

- Maryland Municipal League 2021 Virtual Summer Conference, *MPIA Overview*, virtual briefing in partnership with Judge David Carey. July 19, 2021.
- PIA Compliance Board, Ombudsman program update/summary. August 26, 2021.
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Select Publications

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- **Mediation Process Flow-Chart**



MARYLAND PUBLIC INFORMATION ACT (PIA)

The public's right to information about government activities lies at the heart of democracy.

Metrics Handout Office of the Public Access Ombudsman

Since Inception Report
March 30, 2016—June 30, 2022



75 Months
Since
Inception

2485 March 30, 2016

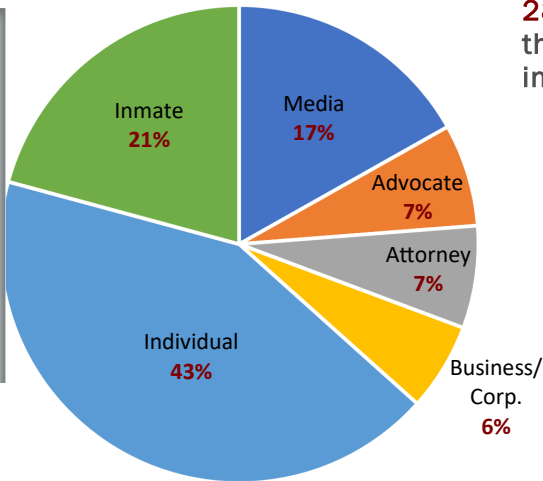
- ◆ 1481 - Mediation requests
- ◆ 1004 - Other / "help-desk" inquiries

The Big Picture: Mediation Matters!

Early resolution of disputes saves time and resources and increases public knowledge and awareness of the PIA process. Mediation is entirely voluntary, confidential, and in many cases doesn't require an attorney.

The Requesters

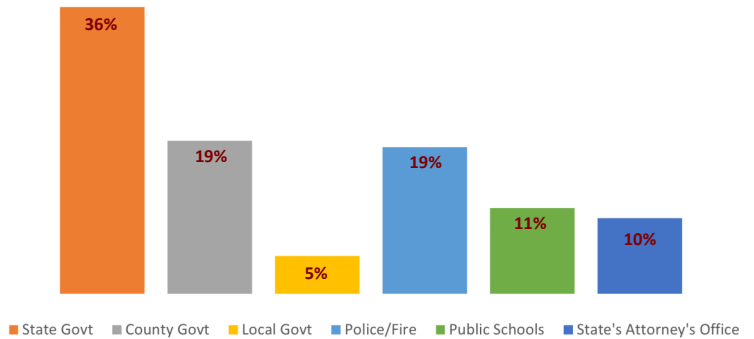
Aggregated Requesters: Professional/Occupational categories make up 36% of requests for assistance and all individuals make up 64%.



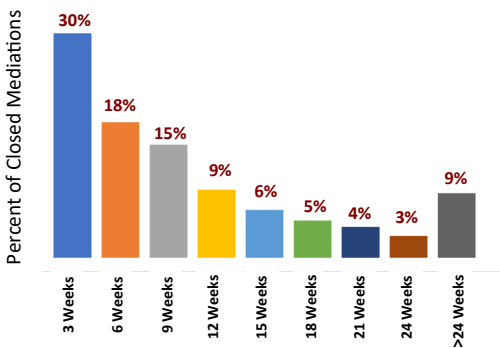
The Agencies

285 unique agencies participated in mediation matters with the PIA Ombudsman since the beginning of the program, including agencies at the state, county and local levels.

What Agencies are Participating in Mediation?

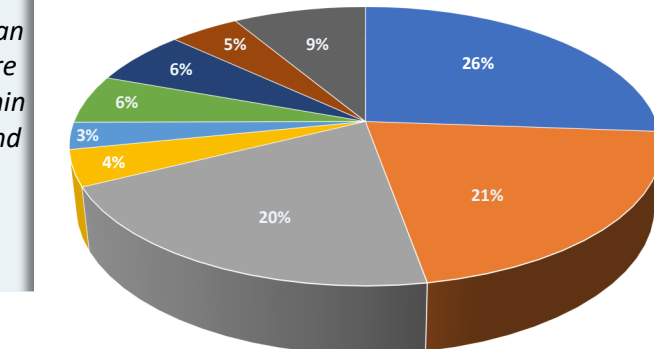


How Long Does Mediation Take?



30% of Ombudsman matters are closed within 3 weeks and 75% by 90 days.

What are the PIA disputes?



Disputes are presented as framed by the requester. Characterizations are based on how the requesters describe the issues. These are not findings.

Mediations March 30, 2016 – June 30, 2022	
New/Incoming Cases between 3/30/16–6/30/22	1481
Closed as of 6/30/22	1453

- Misapplication of exemption 23%
- Redaction inappropriate 3%
- Entire record withheld 20%
- MIA: No Response 26%
- Partial, nonresponsive, or incomplete response 21%
- Fees excessive 6%
- Fee waiver denied or ignored 5%
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Lisa Kershner

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- **Mediation Process Flow-Chart**



PUBLIC ACCESS OMBUDSMAN MEDIATION PROCESS QUICK GUIDE



The processing times outlined here serve as benchmarks for both the Ombudsman and program users to set expectations. The speed with which a mediation can be conducted depends on a number of factors, including the nature/complexity of the PLA dispute, the responsiveness of the parties, and the number of requests pending in the Ombudsman's queue, as examples.

LARRY HOGAN
Governor

BOYD K. RUTHERFORD
Lt. Governor



LISA A. KERSHNER
Public Access Ombudsman

STATE OF MARYLAND
OFFICE OF THE
PUBLIC ACCESS OMBUDSMAN

WHAT'S CHANGED?

[Chapter 658](#) of the 2021 Acts of the Maryland General Assembly takes effect on July 1, 2022. This new law expands the jurisdiction of the PIA Compliance Board while instituting an integrated PIA complaint dispute resolution process that includes the Public Access Ombudsman. While the mediation process with the Ombudsman largely remains the same, there are some differences of which you should take note. Here are some of the key changes taking effect under the new law:

Before	After
Files with the Ombudsman can remain open for an indefinite period of time.	Files with the Ombudsman must be closed and a Final Determination issued within 90 days, unless parties agree to an extension in writing.
Upon conclusion of a mediation, the Ombudsman closes the file.	Upon conclusion of a mediation, the Ombudsman prepares and issues a Final Determination to the parties in order to close the file.
A file can be opened with the Ombudsman and a complaint can be submitted to the PIA Compliance Board at the same time.	Mediation must first be attempted with the Ombudsman for all PIA disputes and a Final Determination issued before the Board can review a complaint.
The PIA Compliance Board can only hear complaints involving unreasonable fees in excess of \$350.	The PIA Compliance Board will have the authority to hear disputes about denial of inspection of a public record; charging unreasonable fees higher than \$350; a failure to respond to a request for a public record within certain statutory time limits; and frivolous, vexatious, or bad faith requests.

Appendix B.
INFORMAL
PUBLIC COMMENTS

January 6, 2022

Via Email at piaopengov@oag.state.md.us

Public Information Act Compliance Board
c/o Office of the Attorney General
200 St. Paul Place
19th Floor
Baltimore, MD 21202

To Whom It May Concern:

My name is Erin Parker, and I represent Anne Arundel Community College. Previously, I represented other USM institutions and worked in the Educational Affairs Division of the Office of the Attorney General, and thus, have experience in representing Maryland public institutions of higher education who are subject to the Public Information Act. I am writing to provide informal feedback regarding the draft regulations regarding the Public Information Act Compliance Board (“Board”).

The Public Information Act, Md. Code, Gen. Prov., § 4-101 *et. seq.* (“PIA”) provides that the Board review and decide whether a public body “charged an unreasonable fee under § 4-206 of this title of more than \$350.” PIA, § 4-1A-04(a)(1)(ii). If the Board finds a fee to be unreasonable, the Board may order the custodian to “reduce the fee to an amount determined by the Board to be reasonable and refund the difference.” PIA, § 4-1A-04(a)(3)(ii). Under PIA, § 4-1B-04, the Ombudsman can resolve disputes regarding “fees imposed.” In each instance in which fees are discussed in the PIA, the legislature used the past tense of the verb to indicate that the fee had actually been assessed. The draft regulations, however, seem to allow for the Board to review “fee estimates,” in addition to fees charged or fees imposed. In this regard, the draft regulations say, “If a complaint alleges that the custodian charged an unreasonable fee **or fee estimate** of more than \$350...”

The term “fee estimates” does not appear in the PIA statute. Rather, the fee must have been “charged” or “imposed.” We believe that by including “fee estimates” within the scope of review by the Board or the Ombudsman, the proposed regulations, as drafted, would impermissibly expand the jurisdiction of the Board and Ombudsman beyond what was contemplated by the law.

A fee estimate is a tentative placeholder mandated by the PIA. Fee estimates are not ripe for review because they are approximations that are developed in anticipation of completing the work that is needed in order to search for, review, and produce the records that have been requested. The fee estimate is not final. Often times, upon receipt of a fee estimate, the requestor will narrow the scope of an overbroad request or limit the records that need to be searched in order to make the search more reasonable in light of the information sought.

The PIA defines a reasonable fee as “a fee bearing a reasonable relationship to the recovery of actual costs incurred by a governmental unit.” PIA, § 4-206(a)(3). When a public body calculates a fee estimate, it must rely on the best information available and rough calculations to arrive at a reasonable estimate, but it does not necessary reflect the actual costs that will be incurred by the public body once the work is performed. While attempting to ascertain the volume of records to be searched and individuals who would be involved in the search, review, and production of documents, the public body does not

necessarily know the precise volume of information that will need to be searched or exact individuals who will be needed to perform the search when it calculates the fee estimate.

Prior Board opinions clearly articulate that the Board does not review fee estimates. For example, in *Sharp v. DLLR*, the Board stated, “Because the calculation may yield a different fee once the records are gathered, prepared, and copied, the Board views the estimate as premature and, therefore, cannot evaluate it further for purposes of ordering a reduction or a refund.” PIACB-17-17; *see also* PIACB-17-15. The Board has further stated that “[A]n estimated fee does not reflect the actual costs incurred by a governmental unit and hinders this Board’s ability to direct a reduction or refund of the portion of a fee that appears to be unreasonable.” PIACB-18-08. Once the work is performed to locate, review, prepare the responsive documents for production, and copy the documents, if requested, the actual fee is, then, assessed. If the Board’s or Ombudsman’s jurisdiction were expanded to include fee estimates that are set forth in a ten-day letter, as a public body, we fear the result would be an onslaught of premature complaints that do not reflect the actual amount charged by the public body.

We believe the Board’s rationale remains true. The statutory language of the PIA has not changed to include fee estimates, and we respectfully request that the Board remove the words “fee estimate” throughout the draft regulations to reflect the legislative intent to afford review of only fees charged or imposed. This revision would further reflect the Board’s prior well-founded opinions that fee estimates are not subject to review.

More recently, the Board has permitted review of fee estimates when a public body has required prepayment of the fee in order to conduct the work required to produce responsive documents, stating:

Fee estimates—as opposed to fees charged for work already performed—can present challenges for review, and we have on occasion dismissed complaints about fee estimates as prematurely made. *See, e.g.,* PIACB 17-04 at 3-4 (Nov. 22, 2016). In other cases, where the custodian has asked for prepayment of a precise figure based on a breakdown of anticipated actual costs—as is the case here—we have been able to evaluate the reasonableness of a fee estimate. *See, e.g.,* PIACB 21-01 (Oct. 5, 2020); PIACB 20-13 (June 22, 2020). In these cases, if the parties’ submissions give us no reason to doubt an estimate, the Board will not disturb it. If, on the other hand, the submissions show that an estimate is not reasonably related to the anticipated actual costs of a response, we will instruct the agency to modify or eliminate that portion of the estimate that does not accurately reflect the agency’s actual costs. *See, e.g.,* PIACB 20-05 at 3-4 (Nov. 7, 2019). Any conclusions about the reasonableness of a fee estimate for tasks not yet performed do not change the fact that the final fee for tasks actually performed must bear a reasonable relationship to the actual costs incurred by the agency. *See* PIACB 21-01 at 3 (Oct. 5, 2020) (“[F]inal assessments of costs must be based on the time actually expended, at the rates of the staff who expended it.”). If that final fee deviates from the estimate paid, then a custodian may assess any additional actual costs incurred or, if the final cost is less than the estimate paid, must refund the requester the difference.

We submit that even when prepayment is required of an estimated fee, that the regulations should be revised to make clear that the Board does not review fee estimates and adopt its former reasoning and dismiss requests to review fee estimates. Nothing in the PIA itself supports the position that a fee estimate, even when prepayment is required, is subject to review by the Board or the Ombudsman.

Prepayment is a mechanism that public bodies use to ensure that they will be paid for the work performed. Without the ability to require prepayment of an estimated fee, too often requestors simply never paid the public body, leaving the public body footing the bill for many hours of work that was needed to fulfill the request. By explicitly including a provision for public bodies to charge a fee to search, review and prepare public records, the legislature made clear that it did not intend for public bodies to bear the costs associated with an individual's request for information. In this regard, the Office of the Attorney General has opined that "[t]his provision reflects a legislative judgment that the taxpayers need not subsidize PIA requestors (except for the first two hours of search and preparation time...)." 81 Opinions of the Attorney General 154, 157 (1996).

Responding to PIA requests often take hundreds of hours of public employees' time to gather, review, and produce information, which takes those employees' time away from the work of the public body. These costs to the business of the public body are real and should not be overlooked. Ultimately, the public body must refund any funds that were paid by the requestor, if the estimate was too high. Therefore, public bodies are motivated to make their best estimate and accurately reflect that they believe will be incurred to produce the requested records. When the actual fee is assessed based on the work that was, in fact, performed, any concerns about the fee estimate would likely be resolved and rendered moot.

Once the actual fees have been assessed to conduct the search, review, and production of records, a dispute regarding the actual amount charged is ripe for resolution. Until such time, the Board should clarify in the regulations that the fee estimate, even when prepayment is required, is not subject to review by the Board or the Ombudsman. We respectfully request that all references to fee estimates in the draft regulations be removed and the following statement be added to the regulations: "The Board and the Ombudsman may not review fee estimates, even if prepayment of the estimate is required by the public body." At a minimum, the regulations should clarify that fee estimate may only be reviewed if prepayment is required by the public body.

If you have any questions regarding these informal comments, please do not hesitate to contact me at eoparker1@aacc.edu or 410-777-1220.

Sincerely,



Erin O. Parker
General Counsel

Submitted by electronic mail to: piaopengov@oag.state.md.us

January 6, 2022

Informal Comments on Draft PIACB regulations dated 12/10/21

Thank you for the opportunity to review and comment informally on these draft regulations. I reserve the right to submit formal comments on the same or any other matters when the regulations are proposed and published for public comment.

01.01.B.

The Board should define “frivolous, vexatious, or in bad faith,” relying on relevant Maryland legal precedent.

01.05.B.(2)

The regulations referenced do not apply to county detention centers and thus this provision provides no protection for detention center detainees and inmates, given the use of “pursuant to.” At a minimum, explicit reference to an analogous or similar date stamp affixed at a county detention center should be included. The Board should also accept as evidence an attestation under oath from an inmate as to the date of deposit or personal delivery referenced in 01.05.B.(1) and provide a form for such attestation. Although not the subject of this section of the draft regulations, I urge that the Board provide by regulation for the creation of a form complaint for use by inmates, ensure that copies of the form are available in the libraries of prisons, county detention centers, and other detention facilities throughout Maryland, and include the form attestation of deposit or delivery for mailing on that form complaint.

02.03.C.(1).(d)

This provision does not fully comply with the statute. The Board should require a brief description of the undisclosed records “that will enable the applicant (and the Board) to assess the applicability of the legal authority for the denial.”

02.04.B.(1) and 03.04.B.(1)

Given that the time for filing a complaint or response is 30 days, the time for filing a reply should be 15 days.

02.08.B. and 03.08.B.

This provision is likely unworkable and will deny applicants and custodians a meaningful opportunity to refile a signed complaint. Given that there are no deadlines in the draft regulations for the transmission of information to the Board by the Ombud or for the dismissal of the complaint by the Board, there is no guarantee that the dismissal will be communicated to the applicant or custodian within 30 days of receipt of the Final Determination of the Ombud, or sufficiently in advance of the 30th day to allow for refileing. I urge the Board to allow for

*John Nethercut
Executive Director*

*Debra Gardner
Legal Director*

ATTORNEYS

*Michael Abrams
Ashley Black
Monisha Cherayil
Sally Dworak-Fisher
Matthew Hill
Charisse Lue
John Pollock
Renuka Rege
Russell R. Reno, Jr.
Tyra Robinson
David Rodwin
Maria Roumiantseva*
Zafar S. Shah
Albert Turner*

*In Memoriam:
Levern Blackmon
1996-2020*

PARALEGALS

*Fredson Desravines
Gabriela Dickson La Rotta
Patrick O’Toole
Carolina Paul
Lena Yeakey*

*Brenda Midkiff
Director of Administration*

*Sabrina Harris
Office Manager*

*Kathleen Gregory, CFRE
Director of Development*

*Erin Brock
Development Manager*

*Rebecca Reynolds
Development Associate*

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refiling within 15 days of receipt of the dismissal of the complaint, with notice of the time for refiling in the notice of dismissal.

06.06.B.(2)

In light of the possibility (and likelihood) of further appellate proceedings, this provision should provide for return or destruction of the records or information only after the entry of a final judgment in the matter.

Thank you again for the opportunity to submit informal comments at this stage. I am happy to discuss these comments if that would be helpful. If you need any further information, do not hesitate to contact me.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Debra Gardner", written in a cursive style.

Debra Gardner
Legal Director



Office of the General Counsel
University of Maryland, Baltimore County
Administration Building, Room 904
1000 Hilltop Circle, Baltimore, MD 21250

Tkacik@umbc.edu // 410-455-2870
410-455-1713 (fax) // 410-455-2337 (TTY)
ogc.umbc.edu

PIA Board or to whom it may concern:

I am writing on behalf of UMBC to provide informal feedback regarding the draft regulations regarding the Public Information Act Compliance Board (“Board”). The Public Information Act, Md. Code, Gen. Prov., § 4-101 et. seq. (“PIA”) provides that the Board review and decide whether a public body “charged an unreasonable fee under § 4–206 of this title of more than \$350.” (PIA, § 4-1A-04(a)(1)(ii)) If the Board finds a fee to be unreasonable, the Board may order the custodian to “reduce the fee to an amount determined by the Board to be reasonable and refund the difference.” (PIA, § 4-1A-04(a)(3)(ii)) Under PIA, § 4-1B-04, the Ombudsman can resolve disputes regarding “fees imposed.” In each instance in which fees are discussed in the PIA, the Legislature used the past tense of the verb to indicate that the fee had actually, already been assessed. The draft regulations, however, seem to allow for the Board to review “fee estimates,” in addition to fees charged or fees imposed. In this regard, the draft regulations say, “If a complaint alleges that the custodian charged an unreasonable fee or fee estimate of more than \$350...”

The term “fee estimate” does not appear in the PIA statute. Rather, the fee must have been “charged” or “imposed.” We believe that by including “fee estimate” within the scope of review by the Board or the Ombudsman, the draft regulations, as drafted, would impermissibly expand the jurisdiction of the Board and Ombudsman beyond what was contemplated by the law and General Assembly.

A fee estimate is a tentative placeholder mandated by the PIA. Fee estimates are not ripe for review because they are approximations that are developed in anticipation of completing the work that is needed in order to search for, review, and produce the records that have been requested. The fee estimate is not final. Oftentimes, upon receipt of a fee estimate, the requestor will reasonably narrow the scope of an overbroad request or limit the records that need to be searched in order to make the search more focused to address the information sought.

The PIA defines a reasonable fee as “a fee bearing a reasonable relationship to the recovery of actual costs incurred by a governmental unit.” (PIA, § 4-206(a)(3)) When UMBC calculates a fee estimate, it must rely on the best information available and rough calculations to arrive at a reasonable estimate, but it does not necessarily reflect the actual costs that will be incurred by UMBC once the work is performed. While attempting to ascertain the volume of records to be searched and individuals who would be involved in the search, review, and production of documents, UMBC does not necessarily know the precise volume of information that will need to be searched or exact individuals who will be needed to perform the search when it calculates the fee estimate.

Prior Board opinions clearly articulate that the Board does not review fee estimates. For example, in *Sharp v. DLLR*, the Board stated, “Because the calculation may yield a different fee once the records are gathered, prepared, and copied, the Board views the estimate as premature and, therefore, cannot evaluate it further for purposes of ordering a reduction or a refund.” (PIACB-17-17; see also PIACB-17-15) The Board has further stated that “[A]n estimated fee does not reflect the actual costs incurred by a governmental unit and hinders this Board’s ability to direct a reduction or refund of the portion of a fee that appears to be unreasonable.” (PIACB-18-08) Once the work is performed to locate, review, prepare the responsive documents for production, and copy the documents, if requested, the actual fee is, then, assessed. If the Board’s or Ombudsman’s jurisdiction were expanded to include fee estimates if set forth in a ten-day letter, as a public body, we fear the result would be an onslaught of premature complaints that do not reflect the actual amount charged by the public body.

We believe the Board’s rationale remains accurate. The statutory language of the PIA has not changed to include fee estimates, and we respectfully request that the Board remove the words “fee estimate” throughout the draft regulations to reflect the legislative intent to afford review of only fees charged or imposed. This revision would further reflect the Board’s prior well-founded opinions that fee estimates are not subject to review.

More recently, the Board has permitted review of fee estimates when a public body has required prepayment of the fee in order to conduct the work required to produce responsive documents, stating:

Fee estimates—as opposed to fees charged for work already performed—can present challenges for review, and we have on occasion dismissed complaints about fee estimates as prematurely made. See, e.g., PIACB 17-04 at 3-4 (Nov. 22, 2016). In other cases, where the custodian has asked for prepayment of a precise figure based on a breakdown of anticipated actual costs—as is the case here—we have been able to evaluate the reasonableness of a fee estimate. See, e.g., PIACB 21-01 (Oct. 5, 2020); PIACB 20-13 (June 22, 2020). In these cases, if the parties’ submissions give us no reason to doubt an estimate, the Board will not disturb it. If, on the other hand, the submissions show that an estimate is not reasonably related to the anticipated actual costs of a response, we will instruct the agency to modify or eliminate that portion of the estimate that does not accurately reflect the agency’s actual costs. See, e.g., PIACB 20-05 at 3-4 (Nov. 7, 2019). Any conclusions about the reasonableness of a fee estimate for tasks not yet performed do not change the fact that the final fee for tasks actually performed must bear a reasonable relationship to the actual costs incurred by the agency. See PIACB 21-01 at 3 (Oct. 5, 2020) (“[F]inal assessments of costs must be based on the time actually expended, at the rates of the staff who expended it.”). If that final fee deviates from the estimate paid, then a custodian may assess any additional actual costs incurred or, if the final cost is less than the estimate paid, must refund the requester the difference.

We submit that even when prepayment is required of an estimated fee, that the regulations should be revised to make clear that the Board does not review fee estimates and adopt its former reasoning and dismiss requests to review fee estimates. Nothing in the PIA itself supports the position that a fee estimate, even when prepayment is required, is subject to review by the Board or the Ombudsman.

Prepayment is a mechanism that UMBC uses to ensure that we will be paid for the work performed. Without the ability to require prepayment of an estimated fee, too often requestors simply never pay UMBC, leaving our institution and taxpayers footing the bill for many hours of work that was needed to fulfill the abandoned request. These requests take our employees' time away from the work of serving our students and community. These real costs to UMBC should not be overlooked. Ultimately, UMBC must refund any funds that were paid by the requestor, if the estimate was too high. Therefore, we are motivated to make our best estimate and accurately reflect what we believe will be incurred to produce the requested records. When the actual fee is assessed based on the work that was, in fact, performed, any concerns about the fee estimate would likely be resolved and rendered moot.

Once the actual fees have been assessed to conduct the search, review, and production of records, a dispute regarding the actual amount charged is ripe for resolution. Until such time, the Board should clarify in the draft regulations that the fee estimate, even when prepayment is required, is not subject to review by the Board or the Ombudsman. We respectfully request that all references to fee estimates in the draft regulations be removed and the following statement be added to the regulations: "The Board and the Ombudsman may not review fee estimates, even if prepayment of the estimate is required by the public body." At a minimum, the regulations should clarify that fee estimate may only be reviewed if prepayment is required by a public body.

Thank you for welcoming informal comments. Respectfully submitted for your consideration,

Sincerely,

A handwritten signature in blue ink, appearing to read "Christopher Tkacik".

Christopher Tkacik
Sr. Associate General Counsel

January 7, 2022

To Whom it may Concern:

I am writing to provide informal feedback regarding the draft regulations prepared by the Public Information Act Compliance Board ("Board"). They appear to be well thought out and a strong effort to remove any doubt and provide clarity to all parties involved. This only helps us all.

However, I have three (3) areas of concern which relate to [a] failure to explicitly state the records retention schedule in the regulations [b] explicitly mentioning records protected by attorney-client privilege and [c] clarification regarding when a complaint related to the assessment of fees is ripe for review by the Board.

Area 1

I believe explicitly stating the records retention schedules for Chapter 04.06 on page 12 and Chapter 06.01.A on page 14 would be helpful. The general public (read: casual reader) does not know what schedule is being referenced or where the schedule may be found.

Area 2

Chapter 05.03.A.1 on page 13 only exempts records protected by federal law. However, I believe records protected by attorney-client privilege should also be specifically included in this section.

Area 3

The Public Information Act, Md. Code, Gen. Prov., § 4-101 *et. seq.* ("PIA") provides that the Board review and decide whether a public body "charged an unreasonable fee under § 4-206 of this title of more than \$350." PIA, § 4-1A-04(a)(1)(ii). If the Board finds a fee to be unreasonable, the Board may order the custodian to "reduce the fee to an amount determined by the Board to be reasonable and refund the difference." PIA, § 4-1A-04(a)(3)(ii). Under PIA, § 4-1B-04, the Ombudsman can resolve disputes regarding "fees imposed." In each instance in which fees are discussed in the PIA, the legislature used the past tense of the verb to indicate that the fee had actually been assessed. The regulations, however, seem to allow for the Board to review "fee estimates," in addition to fees charged or fees imposed. In this regard, the regulations say, "If a complaint alleges that the custodian charged an unreasonable fee **or fee estimate** of more than \$350..."

The term "fee estimates" does not appear in the PIA statute. Rather, the fee must have been "charged" or "imposed." I believe that by including "fee estimates" within the scope of review by the Board or the Ombuds, the regulations, as drafted, causes confusion and would

impermissibly expand the jurisdiction of the Board and Ombuds beyond what was contemplated – or is permitted -- by the law.

A fee estimate is a tentative placeholder mandated by the PIA, and appears in the 10-day letter. It is not a binding figure. Fee estimates are not ripe for review because they are merely approximations which are developed in anticipation of completing the work that is needed in order to search for, review, and produce the records that have been requested. The fee estimate is not final. Often times, upon receipt of a fee estimate in the 10-day letter, the requestor will narrow the scope of an overbroad request or limit the records that need to be searched in order to make the search more reasonable in light of the information sought.

The PIA defines a reasonable fee as “a fee bearing a reasonable relationship to the recovery of actual costs incurred by a governmental unit.” PIA, § 4-206(a)(3). When a public body calculates a fee estimate, it must rely on the best information available and rough calculations to arrive at a reasonable estimate, but it does not necessarily reflect the actual costs that will be incurred by the public body once the work is performed. While attempting to ascertain the volume of records to be searched and individuals who would be involved in the search, review, and production of documents, the public body does not necessarily know the precise volume of information that will need to be searched or exact individuals who will be needed to perform the search when it calculates the fee estimate for the 10-day letter.

Prior Board opinions clearly articulate that the Board does not review fee estimates in the 10-day letter. For example, in *Sharp v. DLLR*, the Board stated, “Because the calculation may yield a different fee once the records are gathered, prepared, and copied, the Board views the estimate as premature and, therefore, cannot evaluate it further for purposes of ordering a reduction or a refund.” PIACB-17-17; *see also* PIACB-17-15. The Board has further stated that “[A]n estimated fee does not reflect the actual costs incurred by a governmental unit and hinders this Board’s ability to direct a reduction or refund of the portion of a fee that appears to be unreasonable.” PIACB-18-08. Once the work is performed to locate, review, prepare the responsive documents for production, and copy the documents, if requested, the actual fee is, then, assessed. If the Board’s or Ombuds’ jurisdiction were expanded to include fee estimates set forth in a ten-day letter, as a public body, I fear the result would be an onslaught of premature complaints that do not reflect the actual amount charged by the public body. This only clogs the pipeline for the Board, Ombuds and public body.

I believe the Board’s rationale remains true. The statutory language of the PIA has not changed to include fee estimates, and I respectfully request that the Board remove the words “fee estimate” throughout the draft regulations to reflect the legislative intent to afford review of only fees charged or imposed. This revision would further reflect the Board’s prior well-founded opinions that fee estimates are not subject to review.

More recently, the Board has permitted review of fee estimates when a public body has required prepayment of the fee in order to conduct the work required to produce responsive documents, stating:

Fee estimates—as opposed to fees charged for work already performed—can present challenges for review, and we have on occasion dismissed complaints about fee estimates as prematurely made. See, e.g., PIACB 17-04 at 3-4 (Nov. 22, 2016). In other cases, where the custodian has asked for prepayment of a precise figure based on a breakdown of anticipated actual costs—as is the case here—we have been able to evaluate the reasonableness of a fee estimate. See, e.g., PIACB 21-01 (Oct. 5, 2020); PIACB 20-13 (June 22, 2020). In these cases, if the parties’ submissions give us no reason to doubt an estimate, the Board will not disturb it. If, on the other hand, the submissions show that an estimate is not reasonably related to the anticipated actual costs of a response, we will instruct the agency to modify or eliminate that portion of the estimate that does not accurately reflect the agency’s actual costs. See, e.g., PIACB 20-05 at 3-4 (Nov. 7, 2019). Any conclusions about the reasonableness of a fee estimate for tasks not yet performed do not change the fact that the final fee for tasks actually performed must bear a reasonable relationship to the actual costs incurred by the agency. See PIACB 21-01 at 3 (Oct. 5, 2020) (“[F]inal assessments of costs must be based on the time actually expended, at the rates of the staff who expended it.”). If that final fee deviates from the estimate paid, then a custodian may assess any additional actual costs incurred or, if the final cost is less than the estimate paid, must refund the requester the difference.

I submit that even when prepayment is required of an estimated fee, that the regulations should be revised to make clear that the Board does not review fee estimates presented in the 10-day letter and adopt its former reasoning and dismiss requests to review such fee estimates. Nothing in the PIA itself supports the position that a fee estimate, even when prepayment is required, is subject to review by the Board or the Ombuds.

Prepayment is a mechanism that public bodies use to ensure that they will be paid for the work performed and to offset taxpayer expense. Without the ability to require prepayment of an estimated fee, too often requestors simply never paid the public body, leaving the public body footing the bill for many hours of work that was needed to fulfill the request. These requests often take hundreds of hours of public employees’ time to gather, review, and produce information, which takes those employees’ time away from the core mission of the public body. These costs to the business of the public body are real and significant; they should not be overlooked. Ultimately, the public body must refund any funds that were paid by the requestor, if the estimate was too high. Therefore, public bodies are motivated to make their best estimate and accurately reflect that they believe will be incurred to produce the requested records. When the actual fee is assessed based on the work that was, in fact, performed, any concerns about the fee estimate in the 10-day letter would be resolved and rendered moot.

Once the actual fees have been assessed to conduct the search, review, and production of records, a dispute regarding the actual amount charged is ripe for resolution. Until such time, the Board should clarify in the regulations that the fee estimate, even when prepayment is required, is not subject to review by the Board or the Ombuds. I respectfully request that all

references to fee estimates in the drafted regulations be removed and the following statement be added to the regulations: "The Board and the Ombuds may not review fee estimates, even if prepayment of the estimate is required by the public body." At a minimum, the regulations should clarify that fee estimate may only be reviewed if prepayment is required by the public body.

Thank you for your consideration,

Sincerely,
Laura Anderson Wright, Esq.
Associate General Counsel

Appendix C.

REGULATORY

PROPOSAL

Title 14
INDEPENDENT AGENCIES
Subtitle 02 STATE PUBLIC INFORMATION ACT COMPLIANCE BOARD

Notice of Proposed Action

[22-071-P]

The State Public Information Act Compliance Board proposes to adopt, under a new subtitle, **Subtitle 02 State Public Information Act Compliance Board**:

- (1) New Regulations **.01—.07** under **COMAR 14.02.01 Definitions; General Provisions**;
- (2) New Regulations **.01—.09** under **COMAR 14.02.02 Complaint Process — Applicants**;
- (3) New Regulations **.01—.09** under **COMAR 14.02.03 Complaint Process — Custodians**;
- (4) New Regulations **.01—.06** under **COMAR 14.02.04 Informal Conference**;
- (5) New Regulations **.01—.07** under **COMAR 14.02.05 Request for Records or Additional Information**;
- (6) New Regulations **.01—.08** under **COMAR 14.02.06 Confidential Records or Information Provided Under COMAR 14.02.05.03**;
- (7) New Regulations **.01—.05** under **COMAR 14.02.07 Decisions of Board**; and
- (8) New Regulations **.01** and **.02** under **COMAR 14.02.08 Meetings of Board**.

This action was considered at a February 4, 2022, public meeting of the State Public Information Act Compliance Board, held virtually.

Statement of Purpose

The purpose of this action is to provide regulations governing the policies and procedures of the State Public Information Act Compliance Board as it will operate after July 1, 2022, with the expanded jurisdiction provided by Ch. 658, Acts of 2021.

Comparison to Federal Standards

There is no corresponding federal standard to this proposed action.

Estimate of Economic Impact

The proposed action has no economic impact.

Economic Impact on Small Businesses

The proposed action has minimal or no economic impact on small businesses.

Impact on Individuals with Disabilities

The proposed action has no impact on individuals with disabilities.

Opportunity for Public Comment

Comments may be sent to Sara Klemm, Assistant Attorney General, Office of the Attorney General, 200 St. Paul Place, Baltimore, MD 21202, or call 410-576-7034, or email to sklemm@oag.state.md.us, or fax to 410-576-7004. Comments will be accepted through April 25, 2022. A public hearing has not been scheduled.

Open Meeting

Final action on the proposal will be considered by the State Public Information Act Compliance Board during a public meeting to be held on early May, at a virtual meeting through Microsoft Teams.

14.02.01 Definitions; General Provisions

General Provisions Article, §4-1A-04, Annotated Code of Maryland

.01 Definitions.

A. In this subtitle, the following terms have the meanings indicated.

B. Terms Defined.

(1) “Act” means the Maryland Public Information Act, General Provisions Article, Title 4, Annotated Code of Maryland.

(2) “Applicant” has the meaning stated in General Provisions Article, §4-101(b), Annotated Code of Maryland.

(3) “Board” means the State Public Information Act Compliance Board, as described in General Provisions Article, §4-1A-02, Annotated Code of Maryland.

(4) “Custodian” has the meaning stated in General Provisions Article, §4-101(d), Annotated Code of Maryland.

(5) “Designated representative” means an attorney, an employee organization representative, or any other individual authorized in writing by a party to represent the party.

(6) “Dispute” has the meaning stated in COMAR 14.37.01.01B.

(7) “Exemption” has the meaning stated in COMAR 14.37.01.01B.

(8) “Final Determination” means the written document issued by the Public Access Ombudsman pursuant to General Provisions Article, §4-1B-04(b), Annotated Code of Maryland, stating that a specific dispute has been resolved or partially resolved or not been resolved.

(9) “Inmate” means an individual who:

(a) Is confined in a correctional or other detention facility pursuant to a court order in a criminal or juvenile delinquency case; and

(b) Has no direct access to the U.S. Postal Service or the ability to submit a complaint or other information electronically.

(10) “Official custodian” has the meaning stated in General Provisions Article, §4-101(f), Annotated Code of Maryland.

(11) “Ombudsman” means the Public Access Ombudsman, as described in General Provisions, §4-1B-03, Annotated Code of Maryland.

(12) “Public record” has the meaning stated in General Provisions Article, §4-101(k), Annotated Code of Maryland.

(13) “Sociological information” means any of the following information concerning a person that may be contained in a record of the Board:

(a) Social security number;

(b) Personal address;

(c) Personal phone number;

(d) Personal email address; and

(e) Date of birth.

(14) “Unreasonable fee” means a fee that does not bear a reasonable relationship to the recovery of actual costs incurred by a governmental unit responding to a request for a public record.

.02 Jurisdiction.

A. Subject to the procedure outlined in COMAR 14.02.02, the Board shall review and resolve complaints from an applicant or the applicant’s designated representative alleging that a custodian:

(1) Denied inspection of a public record in violation of the Act;

- (2) Charged an unreasonable fee or charged an unreasonable estimated fee of more than \$350 under General Provisions Article, §4-206, Annotated Code of Maryland; or
- (3) Failed to respond to a request for a public record within the time limits established under General Provisions Article, §4-203(a) or (d), Annotated Code of Maryland.

B. Subject to the procedure outlined in COMAR 14.02.03, the Board shall review and resolve complaints from a custodian alleging that an applicant's request or pattern of requests is frivolous, vexatious, or in bad faith.

.03 Recusal of Board Members.

A. Standard for Recusal.

(1) A Board member shall recuse himself or herself from Board proceedings that involve circumstances in which the Board member:

- (a) Has a conflict of interest; or
- (b) Cannot participate fairly and impartially.

(2) Personal familiarity with an applicant or custodian does not, of itself, require recusal of a Board member.

B. The Board member who is recused from a matter before the Board may not:

- (1) Participate in the Board's discussion or decision on the matter; or
- (2) Discuss the matter or the Board's review of the matter with members of the Board, the parties, or staff or counsel to the Board.

C. The Board shall document the recusal of the Board member from a matter in its written decision on the matter.

.04 Consolidation of Complaints.

In its discretion, the Board may consolidate complaints filed under COMAR 14.02.02 and COMAR 14.02.03 if both complaints involve the same applicant and same custodian, and if consolidation will promote efficient and fair resolution of the complaints.

.05 Computation of Time.

Computation of a period of time shall be governed by General Provisions Article, §1-302, Annotated Code of Maryland.

.06 Date of Receipt.

A. A complaint, response, or reply to a response is deemed received on the date that it is postmarked or sent by email to the Board.

B. Inmate Applicants.

(1) A complaint, response, or reply to a response is deemed received on the date that the complaint, response, or reply to a response, in mailable form and with proper postage affixed is:

- (a) Deposited by the inmate applicant into a receptacle designated by the facility for outgoing mail; or
- (b) Personally delivered to an employee of the facility authorized by the facility to collect such mail.

(2) A date stamp affixed pursuant to COMAR 12.02.20.04A or COMAR 12.12.20.04A, or a similar date stamp affixed by a county detention center or other detention facility not within the control of the Division of Correction, is evidence of the date on which an inmate applicant sent a complaint, response, or reply to a response under §B(1) of this regulation.

.07 Record.

A. The Board shall maintain a record of each matter, including an index.

B. The Board's internal record of a matter shall consist of the following, if filed in a matter:

- (1) The complaint;
- (2) The response to a complaint;
- (3) The reply to the response;
- (4) Written notices;
- (5) Written requests for information;
- (6) Records or additional information received by the Board pursuant to COMAR 14.02.05.03;
- (7) The recording of an informal conference; and
- (8) The Board's written decision.

C. The public record of a matter shall consist of the records listed in §B of this regulation, if filed, except that records or additional information received by the Board pursuant to COMAR 14.02.05.03 may not be included.

14.02.02 Complaint Process — Applicants

Authority: General Provisions Article, §§4-1A-04(a) and (c), 4-1A-05, and 4-1A-06, Annotated Code of Maryland

.01 Filing a Complaint.

A. An applicant or the applicant's designated representative may file a complaint with the Board within 30 days after receiving a Final Determination from the Ombudsman that a specific dispute has not been resolved.

B. The complaint shall:

- (1) *Pertain only to the dispute described in the Final Determination;*
- (2) *Be submitted in writing; and*
- (3) *Be signed by the applicant.*
- C. *The substance of the complaint shall, at minimum:*
 - (1) *Identify the custodian that is the subject of the complaint; and*
 - (2) *Describe the action of the custodian, the date of the action, and the circumstances of the action.*
- D. *A complaint may be filed by email or regular mail.*

.02 Documents Attached to Complaint.

- A. *If available, an applicant shall attach to the complaint:*
 - (1) *A copy of the original request for a public record;*
 - (2) *A copy of the custodian's response; and*
 - (3) *The Ombudsman's Final Determination.*
- B. *An applicant may attach to the complaint additional documents relevant to the dispute, including correspondence between the applicant and the custodian.*

.03 Response to Complaint.

- A. *Upon receipt of a complaint, the Board shall:*
 - (1) *Promptly send the complaint to the custodian identified in the complaint; and*
 - (2) *Request that the custodian send a response to the Board.*
- B. *A custodian shall file a written response to a complaint within 30 days after receiving the complaint and request for a response from the Board.*
- C. *Complaints Alleging that a Custodian Denied Inspection of a Public Record in Violation of the Act.*
 - (1) *If a complaint alleges that a custodian denied inspection of a public record in violation of the Act, the custodian's response shall, to the extent relevant to the dispute:*
 - (a) *Explain why denial was necessary;*
 - (b) *Explain why redacting information would not address the reasons for denial;*
 - (c) *Provide the legal authority for the denial; and*
 - (d) *Without disclosing protected information or creating a descriptive index, provide a brief description of the undisclosed records that allows the Board to assess the applicability of the legal authority for the denial.*
 - (2) *If the custodian's response to the applicant's request for public records contains all of the information required by §C(1) of this regulation, then it is sufficient for the custodian to attach the response.*
- D. *If a complaint alleges that a custodian charged an unreasonable fee or charged an unreasonable estimated fee of more than \$350 under General Provisions Article, §4-206, Annotated Code of Maryland, the response shall, to the extent relevant to the dispute, include:*
 - (1) *The hourly salary rates for the staff who responded or who are likely to respond to the applicant's request for a public record;*
 - (2) *The number of hours expended by each staff, or the number of hours the custodian anticipates will be expended by each staff, to respond to the applicant's request for a public record;*
 - (3) *A description of the tasks each staff performed or is likely to perform to respond to the applicant's request for public records; and*
 - (4) *An explanation of how fees for reproduction of the records are calculated.*
- E. *If a complaint alleges that a custodian failed to respond to a request for a public record within the time limits established by General Provisions Article, §4-203(a) or (d), Annotated Code of Maryland, the response shall, to the extent relevant to the dispute:*
 - (1) *Provide the date and nature of correspondence with the applicant, if any;*
 - (2) *Describe the circumstances that prevented the custodian from responding in a timely manner; and*
 - (3) *Explain how the custodian intends to respond to the applicant's request for public records.*
- F. *A custodian may not attach to its response records that it claims are confidential, privileged, or otherwise exempt from disclosure.*
- G. *A custodian shall send a copy of the response to the applicant.*

.04 Reply to Response.

- A. *The Board may, in its discretion, permit the applicant to file a reply to the custodian's response.*
- B. *If permitted to file a reply, the applicant shall:*
 - (1) *File the reply within 15 days after receiving the custodian's response; and*
 - (2) *Send a copy of the reply to the custodian.*

.05 Effect of Failure to Respond.

If a written response from a custodian is not received within 30 days after the Board notifies the custodian of the complaint and requests a response and the Board has not requested any additional information, the Board shall decide the case on the facts before it.

.06 Transfer of Information from Ombudsman.

- A. The Ombudsman may transfer basic information about a dispute to the Board, including:
- (1) The identity of the applicant and custodian;
 - (2) A brief summary of the nature of the dispute; and
 - (3) A copy of the Final Determination relevant to the complaint.
- B. Confidential Communications or Information.
- (1) The Ombudsman may not disclose to the Board any confidential mediation communications or mediation information, defined in COMAR 14.37.01.01B(8) and (10), that are made or received in the course of attempting to resolve a dispute.
 - (2) The Ombudsman may disclose confidential communications or information referenced in §B(1) of this regulation if all parties have consented to the disclosure in writing.

.07 Withdrawal of Complaint.

An applicant may withdraw a complaint at any time until the Board's decision is issued.

.08 Dismissal of Complaint.

- A. The Board shall dismiss a complaint if:
- (1) The Board lacks jurisdiction to review the complaint;
 - (2) The complaint is filed more than 30 days after the applicant received the Ombudsman's Final Determination;
- or
- (3) The complaint is not signed by the applicant.
- B. If the Board dismisses a complaint because it is not signed by the applicant, the applicant may refile a signed complaint within the same 30 days of receiving the Final Determination from the Ombudsman.

.09 Effect of Filing.

A complaint, the custodian's response to a complaint, and a reply to the custodian's response are public records of the Board subject to inspection under the Act.

14.02.03 Complaint Process — Custodians

Authority: General Provisions Article, §§4-1A-04(b) and (c), 4-1A-05, and 4-1A-06, Annotated Code of Maryland

.01 Filing a Complaint.

- A. A custodian may file a complaint with the Board within 30 days after receiving a Final Determination from the Ombudsman that a dispute has not been resolved.
- B. The complaint shall:
- (1) Pertain only to the dispute described in the Final Determination;
 - (2) Be submitted in writing; and
 - (3) Be signed by the custodian.
- C. The substance of the complaint shall, at minimum:
- (1) Identify the applicant that is the subject of the complaint;
 - (2) Describe the action of the applicant, the date of the action, and the circumstance of the action, including:
 - (a) The number and scope of the applicant's past requests, if any;
 - (b) The custodian's responses to past requests, if any; and
 - (c) Efforts to cooperate with the applicant; and
 - (3) Explain why, in the custodian's opinion, the applicant's request or pattern of requests is frivolous, vexatious, or in bad faith.
- D. A complaint may be filed by email or regular mail.

.02 Documents Attached to Complaint.

- A. If available, a custodian shall attach to the complaint:
- (1) A copy of the original request for a public record;
 - (2) A copy of the custodian's response; and
 - (3) The Ombudsman's Final Determination.
- B. A custodian may attach to the complaint additional documents relevant to the dispute, including correspondence between the applicant and the custodian.

.03 Response to Complaint.

- A. Upon receipt of a complaint, the Board shall:
- (1) Promptly send the complaint to the applicant identified in the complaint; and
 - (2) Request that the applicant send a response to the Board.
- B. An applicant shall file a written response to a complaint within 30 days after receiving the complaint and request for a response from the Board.
- C. An applicant shall send a copy of the response to the custodian.

.04 Reply to Response.

- A. The Board may, in its discretion, permit the custodian to file a reply to the applicant's response.
- B. If permitted to file a reply, the custodian shall:
 - (1) File the reply within 15 days after receiving the applicant's response; and
 - (2) Send a copy of the reply to the applicant.

.05 Effect of Failure to Respond.

If a written response from an applicant is not received within 30 days after the Board notifies the applicant of the complaint and requests a response and the Board has not requested any additional information, the Board shall decide the case on the facts before it.

.06 Transfer of Information from Ombudsman.

- A. The Ombudsman may transfer basic information about a dispute to the Board, including:
 - (1) The identity of the applicant and custodian;
 - (2) A brief summary of the nature of the dispute; and
 - (3) A copy of the Final Determination relevant to the complaint.
- B. Confidential Communications or Information.
 - (1) The Ombudsman may not disclose to the Board any confidential communications or information, defined in COMAR 14.37.01.01B(8) and (10), that are made or received in the course of attempting to resolve a dispute.
 - (2) The Ombudsman may disclose confidential communications or information referenced in §B(1) of this regulation if all parties have consented to the disclosure in writing.

.07 Withdrawal of Complaint.

A custodian may withdraw a complaint at any time until the Board's decision is issued.

.08 Dismissal of Complaint.

- A. The Board shall dismiss a complaint if:
 - (1) The Board lacks jurisdiction to review the complaint;
 - (2) The complaint is filed more than 30 days after the custodian received the Ombudsman's Final Determination;or
 - (3) The complaint is not signed by the custodian.
- B. If the Board dismisses a complaint because it is not signed by the custodian, the custodian may refile a signed complaint within the same 30 days of receiving the Final Determination from the Ombudsman.

.09 Effect of Filing.

A complaint, the custodian's response to a complaint, and a reply to the custodian's response are public records of the Board subject to inspection under the Act.

14.02.04 Informal Conference

Authority: General Provisions Article, §§4-1A-04(c) and 4-1A-07(b), Annotated Code of Maryland

.01 Board's Discretion.

If the Board is unable to reach a decision based on the written submissions before it, the Board may schedule an informal conference to hear from the complainant and affected custodian or applicant, or any other person with relevant information about the subject of the complaint.

.02 Notice of Informal Conference.

- A. After receipt of a complaint, the response, and a reply to the response, if one is filed, the Board shall notify the parties if it intends to hold an informal conference.
- B. Notice of an informal conference shall state:
 - (1) The names of the complainant and affected custodian or applicant;
 - (2) The matter number;
 - (3) The date and time of the informal conference; and
 - (4) The location of the informal conference.
- C. The Board may coordinate the date, time, and location of the informal conference with the complainant and the affected custodian or applicant prior to issuing the notice under §B of this regulation.
- D. Notice of an informal conference shall be sent by email, if provided, and regular mail to the address provided.

.03 Location of Informal Conference.

- A. An informal conference shall be held in a location that is as convenient as practicable to the complainant and the affected custodian or applicant.
- B. An informal conference may be held by videoconference or teleconference, at the Board's discretion.

.04 Timing of Informal Conference.

An informal conference shall be held as soon as practicably possible after receipt of all written submissions, but no later than 30 days after receipt of all written submissions unless extenuating circumstances require an extension.

.05 Procedure During Informal Conference.

A. Charge of Informal Conference.

(1) *The Chair of the Board shall have charge over the conduct of an informal conference.*

(2) *If the Chair is recused from a matter under COMAR 14.02.01.03, then a Board member designated by the Chair shall have charge over the conduct of an informal conference.*

B. Evidence.

(1) *Testimony.*

(a) *In addition to live testimony, the Board may allow the parties to testify by teleconference or to submit written testimony by email or regular mail, provided that any written testimony is also submitted to the other party.*

(b) *The Board may ask questions of and elicit testimony from the parties during the informal conference.*

(c) *Cross-examination may be conducted as the Chair, or the Board member designated by the Chair to have charge over the informal conference, finds it required for full and true disclosure of the facts.*

(2) *The Board may allow documentary or other nontestimonial evidence to be submitted at an informal conference, provided that it is also sent to the other party.*

(3) *The strict rules of evidence observed by the courts do not apply to an informal conference.*

(4) *In its discretion, the Board may exclude irrelevant or unduly repetitive evidence.*

C. An informal conference is not a contested case within the meaning of State Government Article, §10-202(d), Annotated Code of Maryland.

.06 Record of Informal Conference.

The Board shall record an informal conference.

14.02.05 Request for Records or Additional Information

Authority: General Provisions Article §§4-1A-04(c) and 4-1A-06(b), Annotated Code of Maryland

.01 Form of Request.

A. *The Board may send a request for additional information by email or regular mail.*

B. *The Board shall send a copy of a request for additional information to all parties.*

C. *The Board may direct the party providing the additional information to send a copy of the additional information provided in response to the Board's request to the other party.*

.02 Request for Custodian's Response to Request for Public Record.

If a complaint alleges that a custodian failed to respond to a request for a public record within the time limits established under General Provisions Article, §4-203(a) or (d), Annotated Code of Maryland, the Board may request the response to the request for a public record.

.03 Requests Related to Public Records.

A. *If a complaint alleges that a custodian denied inspection of a public record in violation of the Act, the Board may request that the custodian provide, as appropriate in the Board's discretion:*

(1) *A copy of the public record for in camera inspection, unless the custodian's response to the request for a public record indicated that inspection was denied under General Provisions Article, §4-301(a)(2)(ii), Annotated Code of Maryland;*

(2) *A descriptive index of the public record; or*

(3) *A written reason why the record cannot be disclosed.*

B. *The Board shall maintain the confidentiality of records or information provided under §A of this regulation.*

.04 Request for Basis for Fee Charged.

If a complaint alleges that a custodian charged an unreasonable fee or estimated fee under General Provisions Article, §4-206, Annotated Code of Maryland, the Board may request that the custodian provide more information about the basis for the fee or estimated fee charged.

.05 Frivolous, Vexatious, or Bad Faith Requests.

If necessary to resolve the complaint, the Board may request more information related to an alleged frivolous, vexatious, or bad faith request, including information about the applicant's pattern or history of requests.

.06 Request for Affidavit or Statement.

The Board may request that a custodian or applicant provide an affidavit, in the form provided by Maryland Rule 1-304, or a statement containing the facts that are at issue in the complaint.

.07 Timing.

A. *The Board shall request additional records or information, if needed, as soon as practicably possible.*

B. A custodian or applicant shall send to the Board the additional records or information requested as soon as practicably possible after receipt of the Board's request, but no later than 30 days after receipt of the request.

14.02.06 Confidential Records or Information Provided Under COMAR 14.02.05.03

Authority: General Provisions Article, §§4-101(k), 4-1A-04(c), and 4-1A-06(b), Annotated Code of Maryland

.01 General Confidentiality Provisions.

A. Records or Information Received by the Board.

(1) A record or information received by the Board pursuant to COMAR 14.02.05.03 is not a public record of the Board subject to inspection under the Act.

(2) A complaint, the response, and a reply to the response received by the Board are public records of the Board subject to inspection under the Act.

B. The Board shall maintain the confidentiality of a record or information received by the Board from a custodian pursuant to COMAR 14.02.05.03.

.02 Provision of Confidential Records or Information.

A. Records or information received by the Board pursuant to COMAR 14.02.05.03 may be sent by regular mail, certified mail, email, or hand-delivery.

B. Records or information sent to the Board under this regulation shall contain an inspection index.

C. Each individual record or information sent to the Board under this regulation shall be Bates numbered consecutively and correspond to the numbers as listed in the index.

.03 Storage of Confidential Records or Information.

A. Hardcopy records or information received by the Board pursuant to COMAR 14.02.05.03 shall be stored on behalf of the Board in a locked file of the Public Access Unit of the Office of the Attorney General.

B. Electronic records or information received by the Board pursuant to COMAR 14.02.05.03 shall be stored on behalf of the Board in a secure electronic file.

.04 Access to Confidential Records or Information.

A. Only the Board, an Assistant Attorney General assigned to the Public Access Unit, the administrator to the Board, and individuals working under the supervision and at the direction of the staff of the Public Access Unit may inspect records or information received by the Board pursuant to COMAR 14.02.05.03.

B. The individuals listed in §A of this regulation shall safeguard the confidentiality of records or information received by the Board pursuant to COMAR 14.02.05.03.

.05 Reference to Confidential Records or Information.

References in the Board's decision to specific records or information received by the Board pursuant to COMAR 14.02.05.03 shall be by the Bates numbers or by generic descriptions or characterizations as set forth in the inspection index.

.06 Return or Destruction of Confidential Records or Information.

A. No Appeal of Board Decision Filed.

(1) After 45 days from the issuance of the Board's decision, the Board shall notify the custodian to make appropriate arrangements for the return of all records or information received by the Board pursuant to COMAR 14.02.05.03.

(2) Destruction of Records or Information.

(a) If a custodian fails to make arrangements for the return of records or information received by the Board pursuant to COMAR 14.02.05.03, the Board shall destroy the records or information after 90 days from the issuance of the Board's decision.

(b) Destruction of electronic records or information shall be accomplished by deleting the records or information from email and the internal network drive of the Public Access Unit.

(c) Destruction of hardcopy records or information shall be accomplished by shredding the records.

B. Appeal of Board Decision Filed.

(1) The Board shall continue to store records or information received by the Board pursuant to COMAR 14.02.05.03 according to Regulation .03 of this chapter.

(2) Once the opinion of the circuit court has issued, the Board shall return or destroy the records or information received by the Board pursuant to COMAR 14.02.05.03 according to the time periods provided in §A of this regulation.

.07 Effect of Providing Confidential Records or Information.

A. A custodian may not be civilly or criminally liable under Maryland law for providing or describing a public record to the Board under General Provisions Article, §4-1A-06(b), Annotated Code of Maryland.

B. The provision of a record or a description of a record to the Board under General Provisions Article, §4-1A-06(b), Annotated Code of Maryland, may not be construed as a waiver of any applicable privilege.

.08 Record on Appeal.

- A. The Board shall prepare and transmit the record in accordance with the Maryland Rules.
- B. The Board shall transmit any part of the record that contains records or information received by the Board pursuant to COMAR 14.02.05.03, or that are otherwise not open to public inspection, under seal.

14.02.07 Decisions of Board

Authority: General Provisions Article, §§4-1A-04, 4-1A-07, and 4-362(a)(2), Annotated Code of Maryland

.01 Written Decision.

- A. The Board shall issue a written decision.
- B. In its written decision, the Board shall refer to any confidential records or information in accordance with COMAR 14.02.06.05.
- C. A decision of the Board may state that it is unable to resolve the complaint.
- D. The Board shall send a copy of the written decision to the complainant and the affected custodian or applicant.
- E. The Board may send to any custodian in the State any written decision that will provide the custodian with guidance on compliance with the Act.
- F. As required by statute, the Attorney General shall post on the website of the Office of the Attorney General all of the Board's written decisions.

.02 Timing Generally.

- A. Except as provided in Regulation .03 of this chapter, the Board shall issue a written decision within 30 days after receiving the written response, a reply, if filed, and all records or information requested under COMAR 14.02.05.
- B. Except as provided in Regulation .03 of this chapter, if the Board holds an informal conference under COMAR 14.02.04, the Board shall issue a written decision within 30 days after the informal conference.

.03 Statement of Delay.

- A. If the Board is unable to issue a decision within the time periods specified in Regulation .02 of this chapter, it shall state in writing the reason for its inability to issue a decision.
- B. The Board shall issue a decision as soon as possible, but no later than 120 days after the filing of the complaint.

.04 Remedies.

- A. If the Board finds that a custodian has denied inspection of all or part of a public record in violation of the Act, the Board may order the custodian to produce the public record for inspection.
- B. If the Board finds that a custodian charged an unreasonable fee or charged an unreasonable estimated fee under General Provisions Article, §4-206, Annotated Code of Maryland, the Board may order the custodian to reduce the fee or estimated fee to an amount the Board determines is reasonable and refund the difference, if applicable.
 - C. Remedies for Custodian's Failure to Respond.
 - (1) If the Board finds that a custodian failed to respond to a request for a public record within the time limits established under General Provisions Article, §4-203(a) or (d), Annotated Code of Maryland, the Board may order the custodian to promptly respond.
 - (2) The Board may order a custodian to waive all or part of the fee that the custodian is entitled to charge under General Provisions Article, §4-206, Annotated Code of Maryland, if:
 - (a) The Board finds that a custodian failed to respond to a request for a public record within the time limits established under General Provisions Article, §4-203(a) or (d), Annotated Code of Maryland; and
 - (b) The Board includes its reasons for ordering the waiver in its written decision.
 - D. If the Board finds that an applicant's request is frivolous, vexatious, or in bad faith based on the totality of the circumstances, the Board may issue an order authorizing the custodian to:
 - (1) Ignore the request that is the subject of the custodian's complaint;
 - (2) Ignore any future requests that are substantially the same as the request that is the subject of the custodian's complaint; or
 - (3) Respond to a less burdensome version of the request within a time frame that the Board determines is reasonable.

.05 Appeal Rights.

- A. A complainant or custodian may appeal the Board's decision in accordance with General Provisions, §4-362(a)(2), Annotated Code of Maryland.
- B. An appeal filed pursuant to §A of this regulation automatically stays the Board's decision pending the circuit court's decision.
- C. A party may not appeal a decision of the Board that states that the Board is unable to resolve the complaint.

14.02.08 Meetings of Board

Authority: General Provisions Article, §4-1A-04(c), Annotated Code of Maryland

.01 Deliberations.

- A. To resolve a complaint, the Board may deliberate by email, teleconference, videoconference, or in person.*
- B. Deliberations under this regulation shall pertain only to the resolution of a complaint.*

.02 Meetings.

- A. The Board may elect to convene regular standing meetings to deliberate and resolve complaints, and to address any other business of the Board.*
- B. All meetings shall be held in accordance with General Provisions Article, Title 3, Annotated Code of Maryland, to the extent applicable to the meeting.*
- C. All meetings shall be governed by commonly accepted rules of parliamentary procedure as determined by the Chair of the Board.*

JOHN H. WEST, III
Chair
Public Information Act Compliance Board

Appendix D.

PUBLIC COMMENTS

Klemm, Sara

From: joel hurewitz [REDACTED]
Sent: Monday, April 25, 2022 2:40 PM
To: Klemm, Sara
Subject: Comments to Maryland Public Information Act Compliance Board Proposed Rules

[You don't often get email from [REDACTED] Learn why this is important at <http://aka.ms/LearnAboutSenderIdentification.>]

Ms.Klemm,

Thank you for our discussion Friday on the proposed rules for the Public Information Act Compliance Board.

To reiterate my core issue, I believe that Applicants should have an automatic right to file a reply to the Custodian's response under 14.02.02 Complaint Process - Applicants. This procedure is analogous to judicial review under Maryland Rule 7-207(a), and thus the timeline and procedures should generally be copied.

Usually the Custodian is in a superior position to members of the public who are requesting documents; they have greater staff and funding and most importantly, they have knowledge of the actual contents of the withheld document. The reply to the complaint might be the first time that the Custodian will have to fully justify its position rather than just asserting an exception as they will have done throughout the initial denial and Ombudsman process. If the Applicant does not have a right to file a reply, they will need to prebut what the Custodian might say in its response to the complaint.

This is particularly relevant when the exception is one based on caselaw and interpretation including attorney-client privilege or the inter- or intra-agency exemption, deliberative process privilege.

Furthermore, it is unclear how and when the Applicant would get permission from the Board to file a reply and how the time would run while the Board will be granting permission for the reply.

Thank you for your consideration of these issues in the proposed rules,

Sincerely,

Joel Hurewitz
Columbia, MD

Appendix E.
NOTICE OF
FINAL ADOPTION

Title 14
INDEPENDENT AGENCIES
Subtitle 02 STATE PUBLIC INFORMATION ACT COMPLIANCE BOARD
Notice of Final Action

[22-071-F]

On May 10, 2022, the State Public Information Act Compliance Board adopted:

- (1) New Regulations .01—.07 under COMAR 14.02.01 Definitions; General Provisions;
- (2) New Regulations .01—.09 under COMAR 14.02.02 Complaint Process — Applicants;
- (3) New Regulations .01—.09 under COMAR 14.02.03 Complaint Process — Custodians;
- (4) New Regulations .01—.06 under COMAR 14.02.04 Informal Conference;
- (5) New Regulations .01—.07 under COMAR 14.02.05 Request for Records or Additional Information;
- (6) New Regulations .01—.08 under COMAR 14.02.06 Confidential Records or Information Provided

Under COMAR 14.02.05.03;

- (7) New Regulations .01—.05 under COMAR 14.02.07 Decisions of Board; and
- (8) New Regulations .01 and .02 under COMAR 14.02.08 Meetings of Board.

This action, which was proposed for adoption in 49:7 Md. R. 475—481 (March 25, 2022), has been adopted with the nonsubstantive changes shown below.

Effective Date: June 13, 2022.

Attorney General's Certification

In accordance with State Government Article, §10-113, Annotated Code of Maryland, the Attorney General certifies that the following changes do not differ substantively from the proposed text. The nature of the changes and the basis for this conclusion are as follows:

COMAR 14.02.03.09: The changes correct an obvious drafting mistake. Chapter .03 provides regulations for custodians who file complaints with the State Public Information Act Compliance Board. It is clear from the regulations in that chapter that the custodian is the initial complaint, and that the applicant will file a response to the complaint, see Regulations .01 and .02 of Chapter .03. However, as proposed, the text of Regulation .09 erroneously refers to the “custodian’s response to a complaint” and the “reply to the custodian’s response.” The changes correct the mistake so that the regulation refers to the “applicant’s response to a complaint” and the “reply to the applicant’s response.” These changes are not substantive because they simply correct that obvious drafting error, and because they do not substantially affect the rights, duties, or obligations of a member of the public.

14.02.03 Complaint Process — Custodians

Authority: General Provisions Article, §§4-1A-04(b) and (c), 4-1A-05, and 4-1A-06, Annotated Code of Maryland

.09 Effect of Filing.

A complaint, the [[custodian’s]] applicant’s response to a complaint, and a reply to the [[custodian’s]] applicant’s response are public records of the Board subject to inspection under the Act.

JOHN H. WEST, III
Chair
Public Information Act Compliance Board

Appendix F.
POLICY OF PROACTIVE
DISCLOSURE

LARRY HOGAN
GOVERNOR

BOYD K. RUTHERFORD
LT. GOVERNOR



JOHN H. WEST, III, ESQ.
CHAIR

MICHELE L. COHEN, ESQ.
CHRISTOPHER EDDINGS
DEBORAH MOORE-CARTER
DARREN S. WIGFIELD

STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

Policy of Proactive Disclosure
Adopted: May 10, 2022

The Public Information Act Compliance Board provides the following policy of proactive disclosure pursuant to § 4-104 of the General Provisions Article of Maryland's Annotated Code.

Section 4-1A-08(b) of the Public Information Act ("PIA") requires that the Attorney General post the Board's written decisions on the website of the Office of the Attorney General ("OAG"). In addition to the written decisions, it is the policy of the Board to have posted on its OAG website page the following information about each pending and decided matter:

- The names of the applicant and custodian
- The date the Board received the complaint
- The issue(s) involved (e.g., fee, exemption, vexatious request)
- The date the Board issued its written decision

It is also the policy of the Board to proactively disclose via its OAG website page the following records:

- The Board's annual reports
- Agendas and minutes of Board meetings
- Material related to the promulgation of regulations and revised regulations
- Testimony before the Maryland General Assembly