

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*

**Admitted In New York only*

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

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', with a stylized flourish at the end.

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:

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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