

**REPORT CONCERNING THE
HOWARD COUNTY PUBLIC SCHOOL SYSTEM'S
HANDLING OF REQUESTS UNDER THE
PUBLIC INFORMATION ACT**



**SUBMITTED BY
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ACKNOWLEDGEMENTS

The Office of the Public Access Ombudsman (Ombudsman) was created during the 2015 legislative session to facilitate the resolution of disputes arising under the Maryland Public Information Act (PIA) through voluntary mediation between requestors and responding agencies. This new dispute resolution program opened its doors on March 30, 2016, when the first Ombudsman took office. Within two weeks, the Ombudsman was tasked by the enactment of H.B.1105 to investigate the Howard County Public School System's (HCPSS') compliance with the PIA over a three-and-one-half year period and to publish a report by January 1, 2017. Thus, the Ombudsman carried out the investigation and other tasks necessary to prepare this report during the past nine months, concurrently with all of the start-up tasks and operations of the new Ombudsman program.

This would not have been possible without the cooperation and assistance of many individual requestors, staff of the Maryland Office of the Attorney General, HCPSS and the Howard County Board of Education (Board of Education), and many others who gave generously of their time and expertise.

The Ombudsman particularly wishes to thank the current HCPSS Director of Communications, John White, who joined HCPSS on December 1, 2015, at the very end of the reporting period, and served as the designated contact during the investigation on behalf of the Superintendent, HCPSS, and the Board of Education. In this role, Mr. White consistently responded to innumerable requests from the Ombudsman for records and information with courtesy and professionalism, notwithstanding the many other demands on his time.

The Ombudsman also extends her thanks and acknowledges the contributions of the many interested members of the HCPSS community, including requestors, who provided critically important records and information not otherwise available to the Ombudsman. HCPSS is fortunate to have a very dedicated, diverse, and engaged community of parents, employees, and long-term former employees.

During the course of the investigation, the Ombudsman consulted several State and local agencies, as well as private consultants who performed professional services for HCPSS regarding records management and retention. The Ombudsman especially thanks the State Archivist, Tim Baker, and his staff; the Director of the Records Management Division of the General Services Administration, Michael B. Swygert; the Howard County Records Manager, Regina Martin; and the private consultants, Fred Diers, Karen Payne, and Joanna DeVito DePalma, whose expertise in the areas of records management and retention systems and requirements was invaluable in carrying out this investigation.

In addition, the Ombudsman thanks the many journalists, media representatives, and open government advocates who helped with outreach to obtain public comment and input during earlier phases of the Ombudsman's work, including Rebecca Snyder of the Maryland, Delaware, and D.C. Press Association; *The Baltimore*

Sun; The Daily Record; The Howard County Times; Dan Furmansky, consultant to Common Cause Maryland and Waterkeepers Chesapeake; and others.

In all phases of this investigation, the Ombudsman received invaluable assistance in planning, research, document review and analysis, the conduct of interviews, public outreach, and preparation of the Preliminary Findings and this Final Report from student interns: Jimmy Nghieu (J.D. candidate, University of Maryland Francis King Carey School of Law, class of 2018) and Sarah Wicks (J.D. candidate, University of Maryland Francis King Carey School of Law, class of 2019, and MPH candidate, Johns Hopkins University School of Public Health, class of 2019). The Ombudsman is immensely grateful for their dedication, professionalism, and many contributions to the Ombudsman's work.

Last, but certainly not least, the Ombudsman wishes to thank Assistant Attorney General, Karen Federman Henry, and Administrative Officer, Janice Clark, both of whom have supported the Ombudsman since they joined the Office of the Attorney General in August 2016. Timely completion of the many tasks entailed by the Ombudsman's duties under H.B. 1105 would not have been possible without their very able support and dedication.

EXECUTIVE SUMMARY

The Ombudsman approached the investigatory and reporting duties assigned by H.B. 1105 in light of the purposes underlying the Maryland Public Information Act (PIA) and H.B. 1105. Since its enactment in 1970, the central purpose of the PIA has been to foster the transparency and accountability that is essential to public trust, confidence, and informed participation in government, which it seeks to achieve by providing a practical means of access to public records by any person. The evident purpose of H.B. 1105 complements the PIA by seeking to enable all participants in HCPSS' PIA process to take informed action in order to correct problems or deficiencies concerning:

- 1) the integrity and propriety of any refusal by a custodian to disclose a public record;
- 2) the validity of any declaration by a custodian that a public record does not exist and cannot be produced; and
- 3) the reasonableness of requestor complaints concerning delay in disclosing a public record or other matter involving compliance by the PIA.

The directive of H.B. 1105 does not specify the means by which the investigation should proceed, nor does it provide the Ombudsman with the type of investigatory tools or resources that would be available in judicial or law-enforcement settings. Even with the obligations placed on HCPSS to cooperate with the investigation, the Ombudsman has had to rely on the voluntary cooperation of all participants at every stage.

Key findings and considerations have emerged from the Ombudsman's investigation and study:

- Records retention policies are essential to the ability of a governmental unit to maintain its records and respond properly to PIA requests.
- The public confidence in its governmental agencies can be diminished by only a handful or relatively small number of mishandled PIA requests.
- A mishandled request often will prompt a requestor to submit additional requests in an effort to obtain the requested or related records.
- A governmental unit must not treat (or be perceived as treating) controversial or uncomfortable public records requests differently than it handles "garden-variety" requests.
- PIA requests must be handled without regard to the identity of the requestor or the subject of the records requested, unless the identity of the requestor is relevant to a right of access not available to

members of the public at large or other permissible consideration, such as the waiver of fees.

- The records custodian should work closely with legal counsel to insure the integrity, validity, and propriety of PIA responses.
- Although fees may be charged by a custodian, waiver requests should not be denied without consideration of the public interest, because doing so can undermine the purpose of the PIA by deterring requestors from pursuing their record requests.

The existence of and adherence to a system-wide document retention policy is a key factor in the integrity of the PIA response process, and promotes continuity of institutional knowledge and ordinary operations in the face of staff changes, particularly changes in key staff. An effective records retention policy includes procedures that are approved by the requisite state and local authorities, which for HCPSS includes the State Archives and the Board of Education. These policies and practices specify regular record destruction protocols and periods, thereby ensuring that public records are disposed of only in accordance with objectively verifiable and approved retention and destruction schedules. Importantly, records retention and destruction schedules focus on the content of the records, not just the format in which the records are maintained. The failure of a public body such as HCPSS to adhere to any approved, system-wide, content-based record retention and destruction schedules on a consistent basis undermined public confidence in the integrity and validity of PIA responses, and greatly complicated the investigation and independent fact-finding that was required by H.B. 1105.

The majority of PIA requests that were handled by HCPSS during the reporting period proceeded without incident or dispute, and many involved the types of errors or delays that can occur in any governmental system from time to time. These types of matters frequently were resolved by the parties through modest follow-up that often involved no external intervention or court action. A much different pattern was present, however, in a smaller number of cases that were problematic under the H.B. 1105 reporting categories. These cases, unlike the many “garden-variety” requests that generally proceeded without significant issues or disputes, tended to involve the submission of multiple related requests by the requestor in an effort to obtain records in instances where a PIA response was not provided at all; the response only partially addressed the request; or in which disclosure was denied in whole or in part on various grounds, including on grounds that HCPSS did not have the requested records or that the records did not exist.

In the latter types of cases, HCPSS’ interaction with the requestors over an extended period of time often resulted in a proliferation of issues concerning the validity and integrity of HCPSS’ initial and succeeding responses, without moving the matter to a definitive resolution. This pattern is evidenced in the Findings and Analysis section of this report. In one of those matters, the requestor was required to bring suit against HCPSS in order to obtain records she had requested over an approximate 6-month period. Another requestor had to submit multiple requests over a 4-year period, before obtaining many of the requested records. For reasons discussed in this report,

these requestors continue to question whether all records that respond to their PIA requests have been fully and properly disclosed. These questions could not be definitively resolved through the H.B. 1105 investigation and evaluation.

The focus of this report, including the analysis of findings under the H.B. 1105 reporting categories, is on several categories of requests that appear “problematic,” rather than on the more “garden-variety” requests that posed no factual or legal issues under H.B. 1105. The General Assembly did not direct the Ombudsman to make any recommendations, but only to perform a retrospective review and evaluation of HCPSS’ PIA practices during the specified reporting period. It is hoped, however, that the investigation and this report may serve a constructive purpose by enabling all participants to make appropriate changes or adjustments on an informed basis.

I. INTRODUCTION

A. Investigation Directed by H.B. 1105

During the 2016 legislative session, the General Assembly enacted H.B. 1105, which included an uncodified section that directed the Public Access Ombudsman to investigate, evaluate, and issue a report to the public concerning the Howard County Public School System (HCPSS) for the period from July 1, 2012, through December 31, 2015. 2016 Md. Laws ch. 132.¹ The bill did not provide the background leading to its enactment, but simply identified the following areas for the investigation:

- (i) the integrity and propriety of any refusal by the custodian of a public record for the Howard County Public School System, on the request of an applicant, to disclose the public record;
- (ii) the validity of any declaration by the custodian of a public record for the [HCPSS] that a public record requested by an applicant does not exist and cannot be produced; and
- (iii) the reasonableness of any complaint by an applicant for a public record from the [HCPSS] as to:
 - 1. any delay by a custodian in furnishing the public record that was requested; and
 - 2. any other matter involving compliance by a custodian with the requirements of Title 4 of the General Provisions Article of the Code (the Public Information Act).²

Notably, the legislation did not ask for recommendations from the Ombudsman, nor did the bill direct the manner in which the Ombudsman must conduct the investigation and evaluation. To facilitate the Ombudsman's task, however, the bill described the cooperation expected from the representatives of the HCPSS and the protections to be given to certain information:

[O]n the request of the Ombudsman, the Howard County Board of Education, Howard County Superintendent of Schools, or Howard County Public School System, as applicable, shall provide the Ombudsman with any public record that the Ombudsman deems necessary to conduct the review, evaluation, and publication of the report required under [this bill]; and

[T]he Ombudsman shall maintain and preserve as confidential any public record that the Ombudsman obtains from the Howard County

¹ The codified section of H.B. 1105 mandates that, when HCPSS' records custodians charge a fee to an applicant, the custodians must provide written notice that the applicant may file a complaint with the Public Information Act Compliance Board to contest the fee. (A-3) The provision did not take effect until July 1, 2016, so it does not impact the contents of this report. (A-4)

² The full text of H.B. 1105 is attached to this report for ease of reference. (A-1 through A-4)

Board of Education, Howard County Superintendent of Schools, or the [HCPSS] for the purposes of this section that the board, county superintendent, or public school system has determined to be confidential.

B. Overview of the PIA

Maryland's Public Information Act (PIA) gives the public the right to access government records without unnecessary cost and delay and applies to all three branches of Maryland state government, local governments, governmental units and instrumentalities. The PIA was enacted in 1970, and currently appears in §§ 4-101 through 4-601 of the General Provisions Article (GP) of the Annotated Code of Maryland. The essence of the PIA derives from its emphasis on disclosure:

- (a) All persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees.
- (b) To carry out the right set forth in subsection (a) of this section, unless an unwarranted invasion of the privacy of a person in interest would result, *this title shall be construed in favor of allowing inspection of a public record*, with the least cost and least delay to the person or governmental unit that requests the inspection.

GP § 4-103 (emphasis added).

The PIA applies to any materials that relate to the conduct of public business and the operation of the government. GP § 4-103. By definition, a public record includes documents, electronic mail, scanned materials, and records that are made or received by a government unit in connection with the transaction of public business. GP § 4-101(h). School districts are included within the agencies that must comply with the law. GP § 4-101(g)(4). Because the PIA favors public access to government records, the statute must be interpreted to permit inspection of a record. *See* GP § 4-103(a) and (b).

Records custodians are those individuals who have custody or control of public records, which does not always require physical custody of the records. GP § 4-101(c) and § 4-101(d). In fact, the statute defines an official custodian as the individual who has the overall responsibility for the records, while anyone authorized to have physical custody or control of records can be a custodian. *See* GP § 4-101(d) and (f). Based on the definitions contained in the law, there is an underlying assumption that all agencies subject to the PIA will maintain records in an organized manner and have policies in place for retention and destruction of those records. GP § 4-101.

A request for access to public records usually is made in writing, but need not expressly mention the words "Public Information Act" to fall within the scope of the law. GP § 4-202. The reason for the request, and even the identity of the requestor, are

usually unnecessary. *See Moberly v. Herboldsheimer*, 276 Md. 211, 227 (1975); 61 Op. Att’y Gen. 702, 709 (1976). For example, if the request seeks information that only a person of interest can obtain, or if an agency needs to evaluate a fee waiver request, then the individual identity becomes relevant. *See, e.g.*, GP § 4-311 (personnel records); GP § 4-206(e)(2) (fee waiver based on indigence of requestor).

The maximum response time generally is 30 days, but up to 30 days more may be allowed if the applicant consents to the extension. GP § 4-203. A custodian need not create a record, but if information can be extracted from a database in a routine manner that does not require skills outside the agency’s expertise, the information may fall within the electronic records designation of the PIA. GP § 4-205(c)(5). Generally, this means that an agency has an obligation to extract data from an existing database if it can do so within the normal course. *See Comptroller of the Treasury v. Immanuel*, 216 Md. App. 259, 271 (2014), *aff’d*, 449 Md. 76 (2016).

The law includes a list of items that must be denied—often described as exceptions or exemptions—most of which relate to confidentiality and privacy (required denials). GP §4-301 through § 4-340. Several types of records also may be denied, depending on the circumstances (permitted denials). GP § 4-343 through § 4-355. The permitted denials fall within the discretion of the agency and require an evaluation of whether the public interest is better served by disclosing the records or by withholding them.

When a custodian of records denies a request, the response must be provided within 10 working days of the request and must explain the reason for the denial, the legal basis for the denial, and the remedies to challenge the denial. GP § 4-203. When an exemption is claimed, it will protect only the records within the scope of the exemption. This means that a custodian may need to provide those portions of the records that do not fall within the scope of the exemption by redacting the protected information from the records. *See* GP § 4-301. At a minimum, a custodian of records would need to review the materials to make this determination. The exceptions to disclosure should be construed narrowly, with recognition of the legislative effort to balance individual privacy interests against the public’s right of access. *See Office of the Governor v. Washington Post Co.*, 360 Md. 520 (2000), and *University System of Maryland v. Baltimore Sun Co.*, 381 Md. 79 (2004), respectively.

When a public employee who receives a request is not the custodian of the public record sought, the employee must give the requestor notice of that fact. If the employee knows who the custodian is or where the material may be located, that information must be given to the requestor as well. GP § 4-202(c). A caveat exists when the public employee receiving the request is the official custodian or holds a supervisory position in relation to the custodian of the record. In those instances, the recipient must direct the request to the subordinate custodian and cannot require a requestor to submit a separate request. *See Ireland v. Shearin*, 417 Md. 401 (2010). Similarly, if the requested record does not exist, the custodian must inform the requestor of that fact based on the custodian’s knowledge of the existing records or promptly after a search for potentially responsive records. GP § 4-202(d).

C. Records Retention Requirements

A key component of an agency's ability to respond to PIA requests often derives from its records management and retention practices. The absence of an identifiable system-wide records retention program followed by HCPSS during the reporting period was a critical factor in the methodology employed for the investigation and evaluation of the main H.B. 1105 reporting categories (*i.e.*, the validity, integrity, or propriety of responses to PIA requests that the requested records "did not exist" or "could not be produced").

In general, Maryland law requires State agencies and political subdivisions to establish and adhere to a records management and retention system. *See* Md. Ann. Code, State Gov't § 10-610. The procedures implemented for records management ensure the security of the materials and provide an efficient mechanism to manage the information. The Code of Maryland Regulations (COMAR) includes extensive details describing the types of records governed by the law and regulations. *See* COMAR Title 14.18.02. By establishing a records management system, an agency has ready access to its records and also has schedules approved by the State Archives.

The independently approved and verifiable schedules govern the orderly destruction of records that no longer serve the agency's operations. Adherence to approved records retention and destruction schedules also facilitates the response to PIA requests by giving agencies a structure for maintaining records and by enabling any custodian to readily determine whether the requested materials exist. The records within the scope of the law and regulations specifically include written materials, email, books, photographs, computerized records, and data that is generated, stored, received, or communicated by electronic means. *See* COMAR § 14.18.02.02.B(9)(b). The schedules describe these records by their content, which facilitates analysis under the PIA by identifying records that may fall within an exemption (*e.g.*, personnel records; student records).

Apart from PIA considerations, the implementation of agency-wide approved retention schedules ensures continuity of knowledge and information even when staff or administrations change. The regulations identify a custodian as having responsibility not only for controlling the materials, but also, for delivering the records to a successor upon departure of the custodian from the agency. COMAR § 14.18.02.05, § 14.08.02.09, § 14.08.02.11, and § 14.18.02.12. At a minimum, the "delivery" would mean that a successor custodian must be identified when the person serving as the custodian leaves that role, leaving no gaps in the agency's ability to retrieve records upon request.

D. Description of HCPSS

HCPSS is a medium-size public school system located in Howard County, Maryland. Comprised of 76 schools, HCPSS had more than 50,000 students enrolled during the reporting period. As an employer of more than 8,000 staff, HCPSS is the single largest employer in Howard County and a significant economic force within the

county. A 7-member elected Board of Education governs HCPSS and appoints the Superintendent.

For purposes of the PIA, the Superintendent serves as the official custodian of records and has the legal responsibility for responding to PIA requests received by HCPSS. In fact, the PIA responses issued throughout the reporting period by HCPSS expressly state that the response is issued on behalf of the Superintendent, who is the official custodian of records under Maryland law for PIA purposes. The current Superintendent has held this office continuously since July 1, 2012, and is now serving her second term.

During the reporting period, and for some time before it, HCPSS' process for handling and responding to PIA requests was managed by its central office. From February 1998 until October 2012, HCPSS included in-house general counsel as part of the central office staff, with two attorneys and one paralegal serving the daily legal needs of HCPSS, including assistance with PIA responses. The administrator who handled PIA requests and regularly consulted with the legal department for HCPSS retired in June 2012. Three months later, the Superintendent eliminated the internal legal department.³ Thereafter, HCPSS relied on outside law firms for legal advice and representation concerning PIA and other matters.⁴

Throughout the reporting period, the Director of Communications coordinated PIA handling for HCPSS, although the individuals holding the position changed a few times. A new Director of Communications was appointed by the Superintendent on July 19, 2012, and served until September 28, 2015. For a brief period in October and November 2015, the Deputy Superintendent supervised the handling of and responses to PIA requests, until the incumbent Director of Communications assumed these duties on December 1, 2015. In December 2015, HCPSS also added to its central office an in-house "Knowledge and Records Manager", who reports to HCPSS' Chief Accountability Officer. The Director of Communications, Deputy Superintendent, Chief Accountability Officer, and Knowledge and Records Manager are located in the central office of HCPSS, serve on the Superintendent's designated Cabinet, and report directly to the Superintendent.

During the reporting period, HCPSS generally managed its handling and response to PIA requests electronically, frequently by email. From approximately late 2012 through 2013, HCPSS transitioned from one email platform to another. Both the previous and current email platforms utilize HCPSS servers. The email servers used in conjunction with HCPSS' earlier email platform, as well as back-up tapes, are maintained by HCPSS in storage. In addition to updating its email platform and servers,

³ This stands as a correction to the Preliminary Findings, which incorrectly indicated that the general counsel had resigned from this position. Information received after the Preliminary Findings were posted show that the HCPSS in-house legal department was eliminated. HCPSS and the Superintendent confirmed this information in December 2016.

⁴ The distinction between in-house and outside counsel is not a matter of the quality of services, but instead, serves as an opportunity to emphasize that agencies should seek legal advice whenever a request involves an exemption or an aspect of the PIA that is new to the custodian.

HCPSS contracted for the purchase, installation, and implementation of a system-wide electronic Data Warehouse System that is intended to enhance its efficiency and capacity to manage and use electronic data across the HCPSS system.

From July 1, 2012, through November 2014, HCPSS' central office staff also worked with independent records management consultants to develop system-wide records retention and destruction schedules for both print and electronic records. These engagements were an outgrowth of initiatives by HCPSS and the Board of Education that predate the reporting period, and grew out of issues concerning HCPSS' records retention practices, particularly regarding email. Specifically, in April 2011, the Board of Education approved a system-wide records retention and management policy known as Policy 3050. The Policy could not be implemented without accompanying records retention schedules. Following board member consultation with State Archives, HCPSS issued an RFP during the spring of 2012 for the purpose of engaging professional records management consultants to assist it in developing comprehensive and up-to-date records retention and disposal schedules.⁵ The consultants performed their analysis from mid-2012 through spring 2013 and developed proposed system-wide records retention schedules as well as certain proposed amendments to HCPSS' Policy 3050.

Although the Board of Education approved the amendments to Policy 3050 in May 2013, HCPSS has never submitted the schedules proposed by its consultants to State Archives, nor has it attempted to implement these schedules on a system-wide basis. During the course of the H.B. 1105 investigation, the Ombudsman discussed records retention issues and practices with HCPSS' Director of Communications and provided him with copies of the 1961 retention schedules, which remain the only schedules that have been approved by State Archives.⁶ A detailed timeline summarizing the history of HCPSS' efforts to develop and implement new records retention schedules and obtain approval from State Archives appears in the Appendix to this report. (C-1 through C-3)

E. Types of Requestors

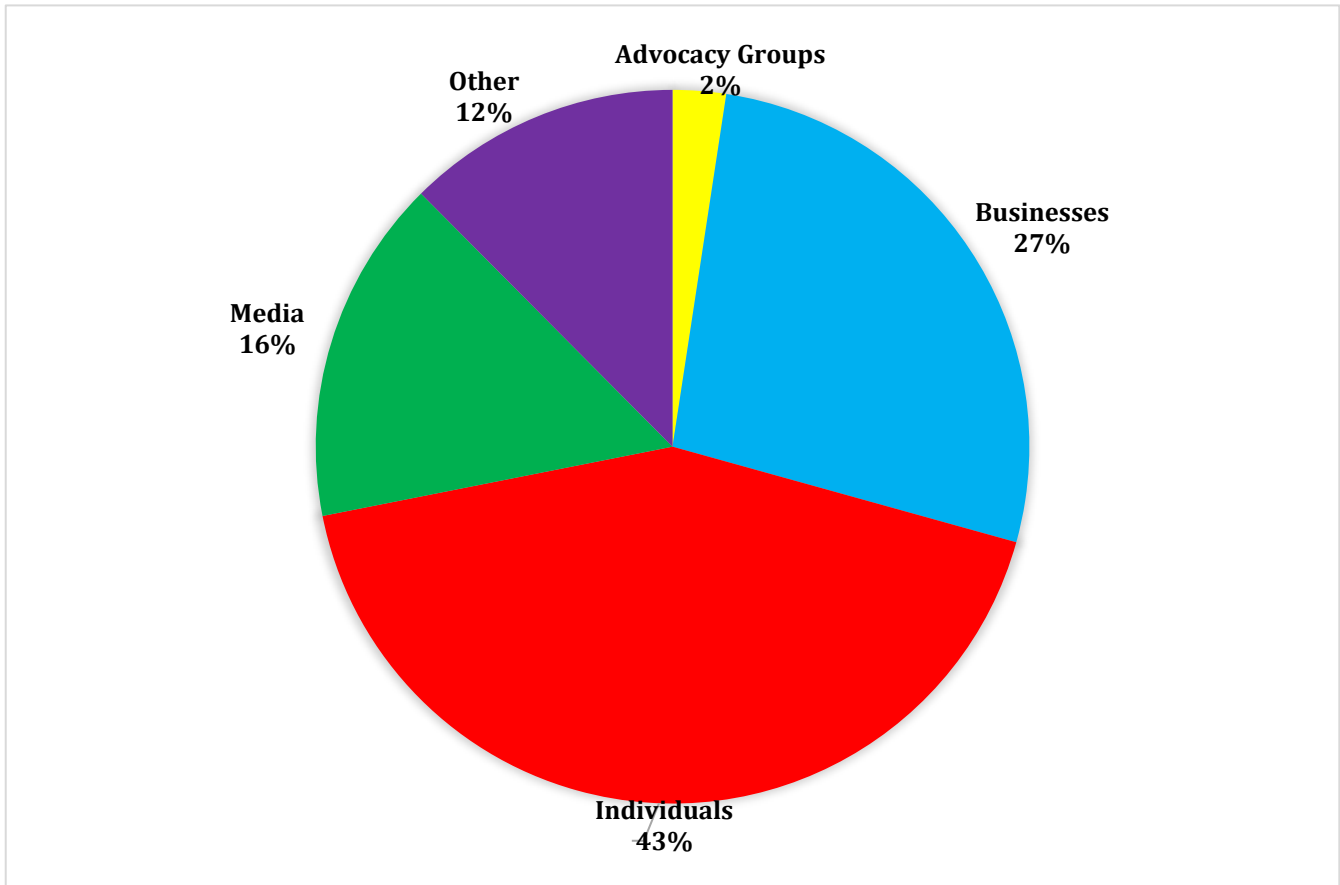
HCPSS is fortunate to have many diverse and engaged constituencies. Not surprisingly, HCPSS received PIA requests from a diverse group of requestors concerning a wide variety of topics during the reporting period. Requestors include individuals, media representatives, businesses, non-profit and advocacy groups, and other professionals or occupational users of the PIA, such as attorneys and researchers.

⁵ During the Board of Education's consultation with State Archives in 2011, HCPSS obtained copies of the records retention schedules approved by State Archives for HCPSS in 1961. Because the schedules had never been updated or revised, the Board of Education determined that it was necessary to engage consultants to assist it in developing and implementing updated retention schedules.

⁶ The Ombudsman informed HCPSS that State Archives had indicated that it had no "Certificates of Destruction" that had been filed by HCPSS. The Certificates are required when records are destroyed pursuant to approved retention schedules.

The types of requestors submitting requests to HCPSS are illustrated in the chart shown after this paragraph.⁷ The vast majority of requestors during the reporting period (roughly 43%) were individuals, most of whom had some form of direct involvement or relationship with HCPSS as: parents of HCPSS students; current or former HCPSS employees; Board of Education members; or other members of the Howard County community. Most of these individuals were non-lawyers and most submitted their PIA requests without the assistance of legal counsel.

Figure A. Types of Requestors During Reporting Period



⁷ The figures shown are estimates only. Precise figures cannot be provided, because it is unknown whether all requestors during the reporting period have been identified.

II. METHODOLOGY

Throughout the investigation, every effort was made to obtain the records and information necessary to evaluate HCPSS' responses to PIA requests during the reporting period. In doing so, all available means were employed to obtain contemporaneous and reliable documentation to substantiate the claims or assertions made by HCPSS, requestors, and other interested persons.

These efforts were necessary, but only partially successful, due to the convergence of several circumstances:

- As noted in the Preliminary Findings, a number of HCPSS' PIA files were missing or so incomplete that they could not be evaluated under the H.B. 1105 categories.
- Certain key HCPSS staff that worked at HCPSS during the reporting period no longer were employed by HCPSS during the investigation; current HCPSS staff occupying the same positions had no personal knowledge (and often no information) concerning the matters in question.
- Not all PIA requests were captured in a file, email, or log.
- HCPSS did not follow approved document retention and destruction practices concerning many types of records that were the subject of PIA requests during the reporting period.

In the end, the investigation required a combination of reviewing HCPSS' and requestors' records, and conducting interviews of current and former HCPSS employees, individual requestors, third-party consultants of HCPSS, and State records management personnel. To verify the completeness of the records provided by HCPSS, and to ensure an understanding of the records and practices of HCPSS, former and current HCPSS employees were contacted. Members of the public who had submitted requests under the PIA were contacted, which led to additional information and perspectives regarding HCPSS' handling of PIA requests.

Both HCPSS and the general public were invited to comment twice during the process—once in September approximately mid-way through the investigation, and again in November when the Preliminary Findings were posted.⁸ The Preliminary Findings included an overview of the investigation and evaluation at that juncture and did not purport to represent a draft report. Instead, the purpose of the Preliminary Findings was to ensure that no additional issues required evaluation.

⁸ The Preliminary Findings were posted on November 23, 2016, with a request for any additional comments by December 5, 2016. HCPSS submitted comments on December 5, and the Superintendent provided additional comments on December 13, 2016. HCPSS' and the Superintendent's additional comments are attached to this report. See Appendix D and E, respectively.

All records and information collected during the investigation were considered and evaluated with respect to their bearing on the topics identified in H.B. 1105. Section III of this report reflects the findings and analysis of this information, along with any open questions that remain, despite the extensive records and information obtained during the investigation. Throughout the investigation and during the preparation of this report, the Ombudsman has elected not to rely on any oral information that could not be independently verified through contemporaneous or other reliable documentary evidence for any finding.

A. HCPSS Records and Interviews

Beginning in late May 2016, before the effective date of H.B. 1105, HCPSS was asked for its PIA records and files. The expectation was that the investigation would involve a review of HCPSS' records to discern the information requested by the General Assembly. On June 23, 2016, HCPSS produced all of its extant files pertaining to PIA matters that were initiated or pending during the reporting period. The materials were produced from central office records in digital or print form, or both. In addition, HCPSS produced secondary documentation, which included an excel spreadsheet of summary data pertaining to PIA requests and responses, along with summary reports prepared for the Board of Education beginning in April 2015.

Upon reviewing the records and files, various follow-up requests were made throughout the investigation to obtain relevant documentation and information from HCPSS. Because a number of HCPSS' PIA files were incomplete, and some files were missing in their entirety, HCPSS was specifically asked to search for additional PIA records at the school level and through its several outside counsel. Although some additional documentation pertaining to approximately 9 previously produced PIA files was obtained, no new or additional PIA files were retrieved through these efforts.

At many stages of the process, and particularly during the early phase of the investigation, when asked about HCPSS' document retention practices, HCPSS repeatedly stated that it followed FERPA⁹ and other HCPSS policies pertaining to PIA requests that involved student records, medical information, security, and other records that must not be disclosed. For the most part, these policies do not describe any records retention and destruction practices for the types of documents that are the subject of PIA requests, but instead, address when HCPSS will withhold records and information under recognized law or other defined circumstances. They do not address what records exist or are supposed to exist in HCPSS' custody, nor do these policies identify the redactable information that might enable disclosure of portions of the records in these categories. Although adherence to these policies is necessary and appropriate to HCPSS' overall operations, they do not shed any light on the H.B. 1105 reporting categories that call for the evaluation of the veracity and integrity of HCPSS' PIA responses that requested documents do not exist or the merits of disputes concerning PIA requests generally.

⁹ FERPA refers to the Family Educational Rights and Privacy Act of 1974.

Following the initial review of the PIA files and related documentation produced by HCPSS, a number of current HCPSS employees were interviewed on October 10, 2016, at HCPSS' central office. These employees were believed to potentially have personal knowledge of HCPSS' PIA handling and response system, its document retention policies and practices, or other matters relevant to the H.B. 1105 investigation. All interviews were conducted in the presence of the HCPSS Director of Communications, after each person requested his attendance. HCPSS also facilitated telephone interviews of certain former employees by providing contact information and introductions to the former HCPSS' Director of Communications, her former assistant, and a former finance department staff member.¹⁰

Throughout the investigation, several in-person meetings, emails, and telephone conversations were conducted with the Superintendent and the current Director of Communications.

B. Requestor Records and Interviews

Following an initial review of HCPSS' PIA files, direct feedback was sought from approximately 10 requestors, who had submitted multiple requests during the reporting period or whose files reflected a dispute involving the H.B. 1105 reporting categories. Approximately 81 of HCPSS' files were sent to these individuals, and they were asked to review their files, compare the HCPSS materials with their own records, and provide feedback regarding the accuracy, completeness, or other relevant aspects of the records.

One requestor confirmed that the HCPSS records appeared to be complete, while others provided supplemental information regarding their experience. In many of these cases, multiple requests were made by the same requestor due to some dissatisfaction with the initial response or in light of additional questions prompted by the response. During the investigation, several requestors contacted the Ombudsman and were interviewed to obtain their perspectives. These requestor interviews yielded additional relevant records and information that HCPSS had not provided for review.

C. State Agencies and Private Consultants

To clarify and understand the interplay between the responsibilities of HCPSS under the PIA and the records retention requirements of State law, additional assistance was sought and obtained from the State Archivist and his staff; the Director of the Maryland Department of General Services, Records Management Division; HCPSS' Record Manager; and the records management consultants who led or participated in the records management consulting engagements with HCPSS during the reporting period. This information became important as a means of addressing the denial of PIA requests based on the asserted non-existence of requested records—an

¹⁰ Despite being provided contact information, the Ombudsman, was unable to reach or interview the former finance department employee.

issue that often raised related questions of whether the record should have existed or been retained at the time of the request.

D. Outreach for public comment

Both HCPSS and the general public were invited to provide additional documentation and comment twice during the investigative process—during the month of September 2016, following the Ombudsman’s initial review of HCPSS’ PIA files, and immediately following the publication of the Preliminary Findings, on November 23, 2016. The latter posting included a request for any additional comments, information, or documentation to be submitted to the Ombudsman by December 5, 2016.

The notices seeking additional documentation and public comment were disseminated through publication on the OAG, HCPSS, and other key websites,¹¹ as well as to members of the media (*e.g.*, *The Baltimore Sun*, *Howard County Times*, *The Daily Record*, MDDC Press Association, and others), open government advocates, and state and local government representatives¹². This outreach campaign for public comment also yielded articles in *The Baltimore Sun* and *The Daily Record*.

¹¹ Online publication websites included the “Patch” Community bulletin board websites in Ellicott City, Elkridge, Columbia, and Laurel.

¹² Three county council members (Dr. Calvin Ball, Jon Weinstein, and Mary Kay Sigaty) shared the announcement on their social media pages and newsletters, as did the Howard County Board of Education. Additionally, the announcement was emailed to the 12,000 members of the Howard County Education Association, and the Howard County Public Education group on Yahoo also shared the announcement with its members.

III. FINDINGS AND ANALYSIS

A. Overview of files, PIA requests, and exclusions from evaluation

For the required evaluation, HCPSS produced approximately 224¹³ PIA files, organized by fiscal year:

- FY 2013 (July 1, 2012 – June 30, 2013) - approximately 34 files
- FY 2014 (July 1, 2013 – June 30, 2014) - approximately 40 files
- FY 2015 (July 1, 2014 – June 30, 2015) - approximately 75 files
- FY 2016 (July 1, 2015 - December 31, 2015) - approximately 75 files¹⁴

Based on the review of HCPSS files and records, certain files were determined to be inadequate for review under the H.B. 1105 categories. The consistent reason for excluding a file from review was that it did not include or reflect the request that was submitted, the date when the request was made, and/or a PIA response that identified the records produced or other final disposition of the request. Additional files were excluded from review because they did not raise an issue or question under the H.B. 1105 reporting categories and from which there did not appear to be any dispute between the requestor and HCPSS. These exclusions did not necessarily mean that the file documented HCPSS' compliance with the PIA, but only that no issue was identified from them that was relevant to H.B. 1105.

Using these criteria, a number of files were excluded from evaluation and analysis in this report, leaving approximately 99 HCPSS PIA files for discussion under H.B. 1105. The approximately 125 HCPSS PIA files excluded from this report include:

- approximately 16 files relating to requests made in fiscal years 2013, 2014 and 2015 that contained inadequate documentation for review under the H.B. 1105 reporting categories;¹⁵ and
- 109 files relating to requests made across the reporting period that did not evidence a dispute or issue under the H.B. 1105 reporting categories.¹⁶

¹³ A comparison of these figures with those presented in HCPSS' comments on the Preliminary Findings appears in Section IV.A. of this report.

¹⁴ These figures do not capture or relate to the approximately 20 missing files that consist of PIA matters for which HCPSS produced no underlying records in either print or digital form. As mentioned in the Preliminary Findings, those matters were identified from an excel spreadsheet of summary data produced by HCPSS. Absent any underlying records (*i.e.*, the PIA request and HCPSS' response), these matters could not be evaluated under H.B. 1105. The Ombudsman does not have any means of ascertaining whether all of the "missing" PIA files or records have been identified.

¹⁵ The Preliminary Findings identified 12 PIA files that had been excluded at that stage from further review due to inadequate documentation. Following that posting, 4 additional files were determined to contain insufficient documentation for purposes of H.B. 1105 review.

¹⁶ The Preliminary Findings identified 70 HCPSS PIA files that had been excluded from further analysis at that stage, because the files did not present an issue that implicated any H.B. 1105

B. H.B. 1105 Reporting Categories

The reporting categories delineated in H.B. 1105 are not mutually exclusive, but frequently overlap. In fact, some of the categories were implicated at different times during the course of the handling of a PIA request or with regard to a series of related requests. For example, the records obtained during the investigation evidence occasions on which HCPSS initially responded that the requested records “do not exist.” In some instances, after repeated challenges and questions raised by requestors, HCPSS ultimately acknowledged the existence of the requested documents, but then asserted that the documents could not be produced (in whole or part) due to the application of an exemption. In some of these cases, there remain open questions as to whether HCPSS has disclosed all responsive documents or, alternatively, has properly disclosed the nature and basis for continuing to withhold the responsive records or portions of these records. This type of response (or failure to respond) resulted in significant disputes between the requestor and HCPSS, some of which originated during the reporting period and continued throughout the course of the investigation without resolution.

For these reasons, while aggregate data concerning HCPSS’ PIA files may provide useful background or contextual information, the most serious issues and disputes involving the H.B. 1105 categories merit greater examination. Doing so allows analysis of the origin of the dispute in relation to the H.B. 1105 categories and the development of these disputes over a period of time. This section describes the response patterns as they emerged from a review of HCPSS’ PIA files, as well as a more detailed examination of several cases that involved protracted disputes and in which there remain open issues.

1. Email addresses and other electronic data—responsibility to extract information compared to creation of a record.

In several types of cases, HCPSS routinely answered the request for records by stating that the requested record did not exist. Although the particular list or report may not have been previously prepared, the requests related to electronic records that could be extracted from databases. The requests included:

- Numerous requests for names and email addresses of various HCPSS staff by individual and organizational requestors, including non-profit, union, and business requestors.
 - Requests were routinely answered by stating that a report containing the requested data “does not exist.”
 - Responses often referred the requestor to the individual school websites (76 locations) for some or all of the requested information.

Footnote contd. - reporting category. During the review since November 23, 2016, this category has been updated to include 109 PIA files produced by HCPSS that span the entire reporting period.

- Alternate responses acknowledged that responsive records existed, but that HCPSS declined to provide the records, viewing the extraction of the data as creating a record.
- In one instance, HCPSS produced the requested list as an excel file after counsel for the requestor (a candidate for president of HCPSS' certified employees' union) wrote two follow-up letters concerning HCPSS' denial.
- A media request for records reflecting the number and status of lawsuits and related expenses.
 - HCPSS responded that “[t]he information you are requesting does not exist.”
 - The Ombudsman raised a question about this response, to which HCPSS advised “[n]o current staff members worked on this records request. We are checking with our attorneys to find out who may have helped with this request.” No additional information was provided by HCPSS previously that responded to the request.
- Other requestors asked for the number of computers per school and for documents reflecting the number of special education-eligible students who received high school diplomas or Certificates of Completion in June 2015. Additional requests that met with similar responses involved requests for aggregate (or anonymized) data concerning final grades, college entrance or matriculation data for students following graduation from high school, and a wide range of other topics.
 - Requestors were told “no such report exists.”
 - An internal HCPSS email in the file related to the computers states “there is no report that says how many computers are in each school *but one can be created in about 2 hours.*” (Emphasis added.)
 - The fact that a report could be created in about 2 hours was not provided to the requestor.
 - The file regarding the Certificates of Completion reflects that, after receiving the response from HCPSS that the report did not exist, the requestor attempted to follow up by arranging a conference call with HCPSS staff. The file does not reflect the outcome of these efforts.
 - Upon inquiry during the investigation, HCPSS reported that a current staff member believes that the requestor was told by a former staff “*that the MPIA does not require HCPSS to create any reports that don’t already exist. This was a verbal conversation. No documentation was saved to the file.*” (Emphasis added.)

A pattern appeared in this category of data requests, some of which were made on a recurrent or periodic basis across the reporting period by individual and organizational requestors. In each instance, the request involved information that HCPSS should have captured on a regular basis or that required extraction from an

existing database to compile. As a result, the response should not have been that it did not exist, but, as appropriate, should have involved an estimate of the time needed to produce the information and an estimated fee, if and when appropriate.

When the PIA was enacted in 1970, the law contemplated primarily paper records. The increasing capabilities of technology have impacted what retrieval activities rise to the level of creating a record as well as the types of information that fall within the definition of a public record. The PIA does not require an agency to create a new record in response to a request for public information. GP § 4-205. The simplest example of this principle is one in which the request is for a report of a consultant when no written report was prepared. The agency does not need to obtain a written report to satisfy the request—that would amount to creating a new public record. When the records are electronic documents, the same principles that apply to paper would resolve the request. But when a request seeks a subset of a database or a report generated from the database, it can be unclear whether doing so involves creating a new record.

The General Assembly addressed this issue in 2011 by obligating a records custodian to provide an electronic record in a “searchable and analyzable electronic format” while reiterating that the custodian need not create, compile, or program a new record. GP § 4-205(c)(4). The statute clarified that “the act of a custodian providing a portion of the public record in a searchable and analyzable electronic format does not constitute creating a new public record.” GP § 4-205(c)(5). Although an agency need not create a database to respond to a request, the agency has an obligation to extract data from an existing database in response to a request if it can do so “within [its] existing functionality and in the normal course.” *Comptroller of the Treasury v. Immanuel*, 216 Md. App. 259, 271 (2014), *aff’d*, 449 Md. 76 (2016). The time needed to do so would fall within the agency’s ability to charge a fee for the employee’s time, with the first two hours free of charge.

Referring requestors to the website may be permissible in some instances, especially when it reduces the cost to the requestor and the agency. The comment that the record did not exist, however, did not address the custodian’s obligation to extract electronic records from a database. In fact, the “standard” denial response to requests for lists of staff names and email addresses¹⁷ reflects a refusal to provide the records. HCPSS did not offer or explain the availability of other types of responsive records in its responses, nor did the response address whether HCPSS could extract the requested data using the ordinary functionality of its database and other electronic record systems or software. The time and resources needed to accomplish the extraction might make a custodian reluctant to produce the information, but the obligation to do so does not disappear based on that reluctance. Instead, the law allows an agency to charge a fee for the time needed when it exceeds 2 hours.

¹⁷ This category included requests for the email addresses of all HCPSS employees, all student/certified personnel, all K-12 teachers, all first year teachers, reading and math coaches, reading specialists, and elementary and middle school assistant principals.

An additional issue relates to the role of the official custodian in the process. As the official custodian for HCPSS, the Superintendent had a responsibility to forward the request to the 76 schools and to instruct them to respond to the PIA request as appropriate. The official custodian often does not have physical custody of relevant records, but has the ability and the obligation to direct the appropriate subordinate(s) to produce the records that respond to the PIA request. In no event is the requestor required to submit separate requests to the subordinates—in this case, the 76 schools that had relevant information.

In sum, although a PIA request may be submitted to any custodian of public records, the official custodian is in a unique position to direct the other custodians to respond to the PIA request. The PIA instructs an official custodian (the Superintendent or her designee) to refer a request to the proper custodian, rather than send the requestor away with only the advice to make other PIA requests of those individuals, or to search 76 websites for the requested data or information.

2. Records relating to the Special Education Study

In an effort to evaluate and improve its special education program, the Board of Education approved a \$300,000 consultant contract in June 2014 with District Management Council (DMC). The contract required DMC to perform a review and assessment of HCPSS' special education services and programs. The scope of services identified a variety of tasks, including production of a tangible work product:

[a] final report . . . [that] includes recommendations of successful practices, a short list of the highest impact changes on student achievement and the school budget, extensive back up data, and detailed estimates of potential savings or cost avoidance.

The HCPSS community knew of the project, and the parents of children affected by the special education program were especially interested in the evaluation and report. Two aspects of the special education report were the subjects of PIA requests—the DMC report and the parent comment survey results gathered by DMC as part of its contract with HCPSS.

The DMC report—At least two requestors submitted PIA requests to HCPSS seeking to obtain DMC's work product including, but not limited to, its preliminary and final reports. Under its contract, DMC was required to share its initial findings with HCPSS, and the scope of services to the contract repeatedly refers to the provision of a comprehensive final report. The responses to the requests for DMC reports varied at different times:

- January 28, 2015—request for DMC reports “preliminary or otherwise”.
 - No written response was provided to this request, nor was any DMC report provided to the requestor.
- March 13, 2015—request from a different requestor for the DMC preliminary report

- HCPSS responded by letter dated March 23, 2015, that “(n)o such preliminary report exists.”
- April 1, 2015—a follow-up request was submitted to HCPSS requesting DMC’s preliminary report, as discussed in an internal HCPSS email dated February 10, 2015, and DMC’s final report, as outlined in the contract.
 - HCPSS responded by letter dated April 27, 2015, and stated that “[t]he Board report was the final of the DMC findings. What [name omitted] referred to as a preliminary report was the first of many iterations of the eventual Board report.”
 - No preliminary report was provided by HCPSS in response to this third request for DMC’s preliminary report.

None of this information was provided to the requestors in response to their separate PIA requests in January, March, and April 2015. In fact, HCPSS’ PIA responses and other information in its internal records show that HCPSS consistently responded to requestors by stating that the Preliminary Report does not exist—not that it was protected by the cited exemption (or any other exemption). Moreover, documents obtained during the investigation reflect the following key events:¹⁸

- October 29, 2014—DMC produced “Preliminary Highlights for Sharing;” as contemplated by the DMC contract; this preliminary report included budget analysis and detailed cost savings.
- January 8, 2015—DMC met with the Superintendent to discuss the Preliminary Highlights.
- January 28, 2015—a PIA request was submitted to HCPSS by an interested parent of a special needs child seeking the preliminary report; no written PIA response was issued, though handwritten notes in the file reflect that the requestor was told that HCPSS staff and DMC would be presenting the DMC report to the Board of Education the next day, on January 29, 2016. Notes in the file further reflect that the requestor agreed to await the Board of Education presentation the next day to determine if anything else was required.
- January 29, 2015—DMC and central office HCPSS staff present the “Board report” concerning the DMC Special Education Opportunities Review engagement; these documents included a report in a form very much like the October 29, 2014, preliminary report and a power point presentation. The Board report omits the cost savings data/information contained in the Preliminary Highlights.
- February 10, 2015—internal HCPSS email shows HCPSS staff worked on DMC’s preliminary report in order to prepare the Board report that was presented on January 29, 2015.

¹⁸ A timeline depicting the events related to these requests is attached to this report. (Appendix C-4).

- March 12, 2015—another PIA request asks for the email between HCPSS staff.
- March 13, 2015—another PIA request is submitted to HCPSS by another requestor seeking a copy of the DMC preliminary report.
- March 16, 2015—a PIA request is submitted asking for a copy of the DMC contract.
- March 20, 2015—HCPSS responds to the March 16th request with copy of the DMC contract.
- March 23, 2015—HCPSS responds to the March 13th PIA request for the DMC preliminary report stating “no such preliminary report exists.”
- April 1, 2015—PIA request is submitted for DMC’s preliminary report and final report.
- April 27, 2015—HCPSS responds saying the preliminary report was one of several iterations; no response is given regarding the request for the final DMC report.
- May 6, 2015—DMC produced, the “Spring 2015” “Highlights for Sharing” report, sometimes referred to as DMC’s final report; the cover shows only “Spring 2015,” rather than a precise date. This report, like the Board Report, also omitted the budget analysis and detailed cost savings that appeared in DMC’s October 29, 2014, “Preliminary Highlights for Sharing.”
- August 7, 2015—HCPSS finally produces a redacted version of DMC’s Preliminary Highlights for Sharing during litigation filed by the requestor parent who submitted the initial request in January 28, 2015.
 - This redacted document omitted all of the budget analysis and detailed cost savings from the October 2014 report, and provided only the background description of HCPSS.

The foregoing history reveals that HCPSS failed to respond at all to the first request in January 2015. Later, in March and April 2015, HCPSS told two PIA requestors who asked for the DMC preliminary report that it did not exist, yet HCPSS’ own records reflected that at least 4 members of the central office staff knew of its existence—the Superintendent, the Deputy Superintendent, the former Executive Director of Special Education, and an assistant. Moreover, despite numerous inquiries, the preliminary report was not produced by HCPSS until one of the involved requestors filed a lawsuit against HCPSS to obtain it, along with other documentation produced or obtained by HCPSS during the DMC Special Education engagement. HCPSS’ internal emails suggest that, early in 2015, there was a decision by HCPSS to withhold the DMC preliminary report, and instead, to rework it for presentation to the Board of Education—the document that later became known as the “Board report.”

A comparison of the January 2015 “Board report” and a document later produced by HCPSS, namely, the “Spring 2015” DMC report titled “Highlights for Sharing”, reveals that these two documents are virtually identical to each other in

substance, differing only in their respective cover pages, dates, and other minor variations not material to their content. No explanation or contemporaneous documentation has been produced or provided that explains why DMC issued the “Spring 2015” “Highlights for Sharing” document several months after the very same content had been presented to the Board of Education and simultaneously released to the public. Moreover, no explanation or contemporaneous documentation has been produced that shows why the budget analysis and detailed cost savings data required by the contract between DMC and HCPSS was omitted from the “Board report” and the “Spring 2015” “Highlights for Sharing” report. The sequence and content of these various documents leave unanswered whether other DMC special education reports or “iterations” were provided to HCPSS that have not been identified or disclosed, although the Superintendent and President of DMC have unequivocally denied the existence of any such additional reports. (C-4)

Based on the available records, several conclusions are apparent. First, HCPSS’ initial statement that the DMC preliminary report did not exist was invalid—the report was received by HCPSS on or about October 29, 2014, several months before the first PIA request seeking it was made. Only during litigation, some 8 months after the first PIA request was made, was the report disclosed to the requestor. Second, no final DMC report matching the description of the “final bound report” that DMC was obligated to provide under its contract with HCPSS has ever been produced.¹⁹ Based on the terms of the contract, DMC was obligated to provide HCPSS with a comprehensive analysis, including “extensive back up data, and detailed estimates of potential savings or cost avoidance.” The only substantive difference between the “Preliminary Highlights for Sharing” produced by DMC (dated October 29, 2014), the January 2015 “Board report,” and the DMC “Highlights for Sharing” (dated “Spring 2015”) is that the latter two documents contain no financial data concerning cost-savings opportunities, while the DMC “Preliminary Highlights for Sharing” does. No documentation of any amendment to the DMC contract that modified the scope of work to remove the obligation to provide HCPSS with the final bound report or to address detailed cost-savings has been produced during this investigation.²⁰

Finally, there is no apparent reason for the issuance of the “Highlights for Sharing” with a DMC cover sheet in May 2015. Doing so makes it appear that DMC had submitted this document as the final report in satisfaction of its contract. This conclusion becomes untenable when one realizes that the May 2015 report is virtually identical to the January 2015 Board report, which was worked on by central office staff. Apart from the omission of certain cost savings data and analysis, the May 2015 document closely tracks DMC’s “Preliminary Highlights” issued in October 2014.

¹⁹ Both DMC and the Superintendent agreed on this point. See Superintendent’s December 13, 2016, email and attachment. (E-1 through E-5)

²⁰ Indeed, the only amendment to the DMC Special Education Opportunities Review Contract that was provided during this investigation granted DMC an additional \$100,000 to conduct a facilities and maintenance program review. As with the original contract, this was achieved through a sole source method.

At a minimum, the responses to the PIA requests relating to the preliminary report provided by DMC reflect an invalid response that a public record did not exist, when it did. While the DMC preliminary report (or some portion of it) may have met the criteria for an intra-agency memorandum, as a pre-decisional evaluation of the data collected, that is a far different ground for denial than stating that the report did not exist. By responding that the DMC preliminary report did not exist, the trust of the public was diminished in contravention of the purpose of the PIA.

This report cannot definitively conclude whether the intra-agency exemption applied to the draft report—that determination belongs to a different forum. But the issue merits some comment. The exemption usually applies to internal communications of an agency to encourage staff to provide meaningful information and comments to the decision-maker. An agency must consider more than just whether the communications were internal to the agency, but instead, must evaluate whether disclosure of the records would compromise or inhibit candor in internal decision-making. *See Office of the Governor v. Washington Post Co.*, 360 Md. 520 (2000). As a result, several caveats accompany use of the intra-agency memorandum exemption:

- The exemption cannot be too general or conclusory;
- Disclosure must actually inhibit candor in decision-making—when claiming the exemption, specific reasons must be demonstrated that disclosing the record may compromise decision-making;
- Usually, the exemption applies only to pre-decisional disclosure—once the decision is made, the effect on internal discussions would have ceased; and
- Only deliberations are protected—not underlying facts or purely objective information.

In all instances, a records custodian must show a reasonable basis for concluding that disclosure would inhibit creative debate and discussion within or among agencies or would impair the integrity of the agency’s decision-making process. *See NLRB v. Sears*, 421 U.S. 132, 151 (1975). By reviewing the report and redacting only the deliberative portions of it, if any, HCPSS could have (and should have) allowed the preliminary report to be shared when it was requested in January 2015 and thereafter.

The survey data—Many parents knew of the ongoing study of the special education program and participated in a survey. In addition to wanting to see the DMC report, a requestor also asked for the comments provided by the parents in response to an online survey that DMC conducted for HCPSS:

- February 2015—in response to the first request for certain parent survey comments, HCPSS denied the request stating that the online survey “was conducted and hosted by the independent contractor and is in the possession of the contractor who has ownership. The Board does not have any information that is responsive to this request.”

- August 2015—during the lawsuit brought by a parent-requestor, HCPSS produced the previously requested comments that were obtained in response to the online parent survey conducted by DMC as part of its Special Education Opportunities Review engagement; producing the survey comments in redacted form demonstrated HCPSS' access to these comments at that time.

The physical location of the records with a contractor does not govern the entire analysis of whether records are subject to the PIA. Instead, the focus is on whether the records fall within the control of the official custodian and relate to the transaction of government business. Although the records of an independent contractor often do not fall within the scope of the PIA, because by definition, a public record includes only items made or received by the governmental unit or instrumentality, the records could remain public records when the agency outsources the task of maintaining them to a private contractor. See GP § 4-101(b); Public Information Act Manual, p. 1-6 and 1-7. In addition, a contractor charged with evaluating information received from the governmental unit and producing a report that would be transmitted to the governmental unit would result in the report being a public record, along with the information the agency provided to the contractor. Similarly, a contract may require that the contractor provide the underlying data gathered by the contractor to the governmental unit. In both instances, the governmental unit receives a record that would be analyzed for inspection under the PIA.

These provisions are consistent with the definition of “official custodian” in the PIA, which contemplates that physical possession of the materials may exist somewhere other than with the official custodian, but that the ability to obtain the materials falls within the control element of the custodian’s responsibilities. GP § 4-101(d). In each instance, the records custodian has an obligation to evaluate the nature of the records and whether they fall within the purpose of the PIA relating to disclosure of records that relate to the operations of government.

HCPSS had a responsibility to evaluate its right of access to the survey data and then to review it to determine whether any information required redaction. Simply stating that the data was “owned” or held by a contractor did not address the inquiry or reflect the appropriate level of review. No information has shown that the survey data (*i.e.*, parent comments) was proprietary or subject to a particular exemption. Likewise, HCPSS’ production of the requested comments after it was sued, without use of any compulsory process to obtain the comments from the contractor, suggests that HCPSS had the ability to obtain the data when the PIA request was submitted. By responding to requestors openly and honestly, the purpose of the PIA would have been fulfilled.

3. Requests for student records and records related to presence of mold and indoor air quality conditions—examples of no response, incomplete responses, & non-compliant PIA responses.

Multiple compliance issues arose during the H.B. 1105 reporting period regarding the failure of HCPSS to respond to PIA requests or to provide a complete response as required by the PIA. A tragic example of such ignored requests, followed by a series of incomplete and non-compliant responses, involves the parents of a deceased HCPSS student. For more than 4 years, PIA requests were submitted by and on behalf of the parents, beginning in September 2012 and continuing through the date of this report. The timeline of events²¹ shows the difficulty faced by these requestors:

- September 13, 2012—counsel for the parents of a recently deceased HCPSS high school student requested “all school records, files, notes or documents that pertain in any way to [name omitted]”.
 - This PIA request was submitted to the Registrar of the high school the student had attended.
 - No PIA response to this record request was provided by HCPSS, nor was one received by counsel or the parents.
- October 9, 2012—counsel for the parents received approximately 32 pages of student records from HCPSS, which did not include many of the requested records concerning the events and actions taken during the student’s last year of life.
 - The 32 pages of HCPSS records were sent to counsel in an envelope marked “Confidential” and without any accompanying PIA response letter or explanatory information.
- April 29, 2014—different counsel for the parents made a follow-up PIA request to HCPSS seeking “all of the student records” pertaining to her clients’ deceased daughter.
 - This request was addressed to the principal of the high school the student had attended and itemized the records produced in 2012, as well as specific records encompassed by the 2012 request that had not been produced by HCPSS.
 - No written response was given and no additional records were received by counsel or her clients in response to this request.
 - HCPSS has not produced any documentation of a PIA response to this 2014 request.
- February 4, 2016²²—Parent appeared at a public meeting of the Board of Education and explained her efforts to seek justice for her

²¹ A timeline depicting the events related to these request is attached to this report. (C-5).

²² Even though part of this timeline extends beyond the H.B. 1105 reporting period, this information is instructive for purposes of this report.

daughter, and described the unanswered requests for her daughter's student records.

- February 12, 2016—the HCPSS Deputy Superintendent wrote to the parent of the deceased student and enclosed approximately 130+ pages (146 documents) of HCPSS records pertaining to the requestor's daughter.
 - The Deputy Superintendent's letter expressly represents that all of the enclosed records had been previously produced to the requestor in 2014 or earlier.
 - There is no documentation that supports the representation made in the Deputy Superintendent's letter that the bulk of the enclosed records were ever produced to the requestor or her counsel at any time prior to February 12, 2016.
 - Notwithstanding this production, the requestor persists in efforts to obtain documents relating to her daughter that have not been produced.
- April 11, 2016—parents request all student records.
- April 25, 2016—Director of Communications responds that all records were provided previously.
 - The letter noted that, following his thorough review of the matter and all records related thereto, HCPSS has no additional records, not previously produced, to produce to requestor concerning her daughter.
 - This letter refers to no documentation to substantiate the statement, and none has been provided to the Ombudsman, that most of the records produced by the Deputy Superintendent in February 2016, had ever been produced before.
- October 17, 2016—PIA request submitted for Bullying and Harassment Intimidation Reporting form and findings.
- October 31, 2016—HCPSS sends letter that a response will take more than 10 days.
- November 16, 2016—response from HCPSS counsel stating that documents either have been produced or do not exist.
- November 28, 2016—letter from HCPSS' attorney producing, for the first time, a 2-page, signed bullying incident report (dated February 17, 2012) relating to the requestor's daughter.
 - This document had been requested by the parents and counsel since September 2012.
 - The response by outside counsel on behalf of HCPSS explained that the document had not been produced with the November 16, 2016, letter due to the need to analyze the applicable exemption and redact protected material from the 2-page document.

- The disclosure, by way of counsel's November 28, 2016 letter, does not explain why the document was not reviewed and redacted in September-October 2012, in April 2014, or even in February 2016 when the Deputy Superintendent wrote to the requestor.

The foregoing history demonstrates multiple PIA compliance problems and incorrect or unsubstantiated responses by HCPSS. Among the areas of concern are: HCPSS' failure to respond in writing to the September 2012 and April 2014 PIA requests for student records; HCPSS' unsubstantiated assertion that the vast majority of records it produced to the requestor for the first time in February 2016 had been produced in 2014 and earlier; and the repetition of this unsubstantiated statement and concomitant representation later in 2016 by the Director of Communications that all disclosable records had been produced to the requestor. In fact, HCPSS' own counsel demonstrated that the latter comment was not the case when an additional record was provided for the first time on November 28, 2016.

In addition, no documentation was produced during this investigation to explain HCPSS' failure to respond in writing to the requests made in 2012 and 2014, nor to substantiate HCPSS' claim that it produced most of the requested records prior to 2016. Instead, the disclosure of records in February and November 2016 support the requestor's pursuit of the records, despite HCPSS' repeated assertions that all documents already had been provided. The requestor continues to believe that additional responsive records exist that have not been provided. Although it is possible that some of the records may have been withheld from the requestor under claim of exemption, HCPSS has never explained whether or why such documents, if any, cannot be produced in redacted form.

HCPSS' multiple failures in responding fully and accurately to this requestor have severely undermined the ability of this requestor to have any trust or confidence in the integrity and validity of HCPSS' responses to her PIA requests. Likewise, failures of this magnitude, persisting for more than 4 years, have an obvious impact on the level of trust and confidence that HCPSS can expect in the wider community. Perhaps most troubling of all is that, even at this late date, HCPSS seems unwilling to give a candid accounting for these failures. Apart from the persistence of certain unanswered questions concerning the withholding of other records not yet produced, but which may be subject to disclosure in redacted form, HCPSS has taken no steps to acknowledge and take responsibility for the very real injury to this requestor and her family in the form of lost opportunities to investigate all relevant circumstances leading to her daughter's death in 2012, and to assess and pursue any appropriate avenues for redress or relief on a timely basis.

Not every instance of this type of response was as tragic. Toward the end of the reporting period, in late 2015, other missing, incomplete, or non-compliant responses were made to PIA requests regarding the presence of mold and indoor air quality conditions in HCPSS schools. Some examples include:

- October 2015—PIA request for records relating to mold test results and for an email identified by date and sender was answered by referring the requestor to HCPSS' website; the requested email was not addressed at all.
- November 2015—PIA request by a media requestor asked for “documentation on the number of public records requests the district has received in the last 12 months and the number of instances in which you have charged a fee and the amount of fees collected.”
 - This request was prompted by HCPSS' prior fee estimate of more than \$5,400 to this requestor in connection with its PIA requests for documentation of indoor air quality issues at HCPSS schools.
 - The requestor explained during the H.B. 1105 investigation that, as of September 2016, the November 2015 request had not been answered, nor had the previously requested underlying air quality records been produced.

The PIA is construed to provide access to public records and requires a specific reason for denial. The failure to respond to all aspects of a request leads to diminished trust from the public. A requestor should not have to submit multiple PIA requests for the same information, but should receive a response that enables the requestor to understand whether the information is available, if there is a cost, and any exemption that applies to withheld records. While the issues posed by the examples described in this section could be viewed as more controversial than many other PIA requests, that aspect of a request does not alter the responsibility of HCPSS in evaluating a PIA request and responding to it.

4. Timeliness of Response

Consistent with the PIA, HCPSS appears to have handled PIA requests throughout the reporting period using an internal 10-day target deadline for response. Notwithstanding this practice, in most cases HCPSS responded to PIA requests at or about the outside 30-day statutory deadline. Although there are instances in which HCPSS' response exceeded the maximum 30-day or the 10-day letter deadlines, missed deadlines do not appear to be a significant cause or driver of most disputes that occurred between HCPSS and requestors during the H.B. 1105 reporting period.

Based on the files reviewed during the investigation, the missed deadlines do not appear to have been the subject or focal point of any requestor complaint. Instead, the issues and concerns that most often led to complaints or disputes resulted from the withholding of records, the failure to respond to PIA requests, and the assessment of fees. These aspects are addressed elsewhere in this report.

During FY 2016, 21 of 35 PIA files reflect that HCPSS did not comply with the then new 10-day letter requirement that became effective in October 2015. In another 6 PIA matters, HCPSS' response was not given within the outside 30-day statutory deadline. HCPSS provided comments after the Preliminary Findings were posted in November 2016 that show improvement in its timeliness and that HCPSS regularly

responds within the statutory time periods. No independent analysis of HCPSS' statistics was performed, because these responses occurred after the reporting period.

5. Assessment of Fees

The PIA allows a responding agency to assess fees in order to recover its actual costs in fulfilling PIA requests, subject to certain limitations and restrictions. The requestor may not be charged for the first 2 hours of a search for records. And a requestor may ask for a waiver of the fees based on the requestor's ability to pay and other relevant factors that suggest the waiver would serve the public interest. GP § 4-206. Responding agencies have significant discretion regarding the assessment of fees for a PIA request, as well as whether to grant a waiver of those fees.

The H.B. 1105 investigation did not reveal any instance during the reporting period in which a fee waiver request was granted by HCPSS. Although waiver requests appear to be relatively infrequent, at least in comparison to the number of matters in which fees were assessed, even when a waiver request was made, it was not addressed in the response letter, nor does it appear to have been considered. Rather, the denial of waiver requests appears to have been HCPSS' standard practice, and often had a deterrent effect on the requestor pursuing the requested records. Specifically, during fiscal years 2015 and 2016:

- 15 requests for waivers were ignored.
- In 18 PIA matters, a number of PIA requestors were told that they must pay a fee to receive the records, the requestor did not pay the fee or pursue the request:
 - 3 of these matters involved business requestors;
 - 5 of these requests were made by individuals;
 - 10 of these matters involved media requestors.
- In 10 of the PIA matters in which HCPSS ignored a waiver request it appears that the requestor abandoned or did not pursue the matter further.
- Overall, in approximately 56% of the cases in which fee waiver requests were denied or ignored, the requestor went away without the records.

Some requestors complained that the fees assessed as a pre-condition to processing a PIA request were excessive and unjustified. For example, in response to a follow-up email by an individual requestor asking for a waiver of the assessed \$1,292.75 fee, HCPSS responded that “[u]nfortunately, we cannot waive fees.” Noticeably absent from HCPSS' response letter and its subsequent email response to the waiver request were any explanatory details, such as, the basis for the assessed fees, how the fees were calculated, or why the fees were required to fulfill the request for an investigative file pertaining to the requestor's child. Nor did the response suggest any alternative means of reducing or minimizing the fees related to the request. HCPSS only stated that the required two free hours were excluded from the fee.

The handling of media requests for records related to mold and indoor air quality conditions in HCPSS schools experienced a similar result. Of approximately 17 media requests during FY 2016 concerning mold and air quality conditions in HCPSS schools, fees were assessed in all but one instance. In those matters, the requestors asked that fees be waived and even narrowed their requests in an effort to minimize the time and labor required to fulfill them to no avail.

In a different matter during FY 2013, HCPSS denied a fee waiver request by a media requestor and failed to explain that all but one of the 10 years of requested data could be provided in 10 to 15 minutes (and, therefore, without charge) based on information provided by the HCPSS IT department. Instead, HCPSS assessed fees of \$405 for all 10 years of information, even though the retrieval of data for the earliest year accounted for the entire fee—only that information was expected to require nearly a full day to query archived data on the mainframe.

The complaints about fees reflect a need for more communication between the custodian of HCPSS records and a requestor. The reasons for HCPSS denying fee waivers for media requestors are unclear. Some agencies often waive fees for media requestors in light of the recognized public interest, favoring the broad dissemination of information of importance to the public. When a custodian of records explains the calculation of the fee charged and engages in a discussion with a requestor to find a way to reduce the fee (*e.g.* narrow the request or focus on fewer aspects of the request), the purpose of the PIA is achieved. Many of the complaints likely would have been avoided if HCPSS had communicated with the requestors in greater detail about the cost involved and other options for handling the requests.

IV. HCPSS AND SUPERINTENDENT RESPONSES

A. HCPSS' comments regarding the Preliminary Findings

The Preliminary Findings for the H.B. 1105 report were posted for public comment on November 23, 2016. HCPSS submitted several points of clarification in response to those findings. The comments appear in the Appendix in their original form (D-1 through D-6) and are addressed here in summary form to compare HCPSS' position with the data collected and evaluated during the investigation.

- Definition of official custodian**—HCPSS explained that, historically, the Superintendent has fulfilled that role, but as a practical matter, the Superintendent plays no day-to-day role in handling requests under the MPIA. Instead, the Director of Communications has that responsibility.

Ombudsman comment—many official custodians do not have physical custody of public records and do not participate in PIA responses on a regular basis; this does not absolve the official custodian of the responsibilities assigned by the PIA.
- Procedures for PIA requests**—under the leadership of the current Superintendent, HCPSS administration has systemically addressed problems it inherited in providing timely responses to PIA requests by putting procedures in place that ensure prompt forwarding of requests to its Public Information Office and immediate follow up to locate requested documents.

Ombudsman comment—the investigation did not show what problems were inherited; 1998 through 2012 did not come up as posing issues with PIA responses; the reporting period of July 1, 2012 through December 31, 2015 revealed multiple disputes and issues. Ongoing improvement is always useful.
- Progress in timeliness of the HCPSS response to MPIA requests**—as illustrated in the table below, HCPSS improved from a 57% on-time completion rate in FY13 (July 1, 2012-June 30, 2013) to the current 100% on-time completion rate, even as the number of annual requests has more than tripled over that same time period.

Figure B. Timeliness of HCPSS response to MPIA requests

Fiscal Year	Dates	Number of Requests	Met 10-Day Deadline (beginning 10/1/15)	10-Day On-Time Completion Rate	Completed Within 30-Day Deadline	30-Day On-Time Completion Rate
Reporting Period						
FY13	7/1/12-6/30/13	47	n/a	n/a	27	57%
FY14	7/1/13-6/30/14	44	n/a	n/a	36	82%
FY15	7/1/14-6/30/15	79	n/a	n/a	63	80%
FY16 - prior to new 10-day provision	7/1/15-9/30/15	39	n/a	n/a	37	94%
FY16 - after new 10-day provision	10/1/15-12/31/15	36	19	53%	29	81%
Outside of Reporting Period						
FY16 - beginning after 1/1/16	1/1/16-6/30/16	84	80	95%	84	100%
FY17 - through 11/30/16	7/1/16-11/30/16	105	105	100%	105	100%

Ombudsman comment—the claimed current 100% timely responses occur after the reporting period (all during 2016); the other figures do not match the number of files actually provided by HCPSS to the Ombudsman, but may be a function of the items that were captured in the HCPSS spreadsheet or log for which no PIA file was produced to the Ombudsman. The increased number of requests could reflect better recordkeeping by HCPSS as it sets up better processes. Timeliness was not an issue that generated significant disputes during the reporting period.

- ***Lack of current document retention schedule***—HCPSS acknowledged that Board of Education Policy 3050, Records Management, was developed by HCPSS in 2011 and amended by the Board of Education in 2013, and that HCPSS is currently controlled by the records retention schedules approved by the State Archivist in 1961, along with any applicable local, state, and federal laws and regulations. New schedules from 2013 are under review by HCPSS' Records Officer and are on track to be submitted to the State Archivist and Howard County Department of Records for their approval as part of the policy review and update that is scheduled to be effective July 1, 2017.

Ombudsman comment—the 1961 schedules were provided to HCPSS during the investigation—HCPSS representatives did not evidence any prior knowledge of the schedules; State Archives regulations require review of records retention and disposition schedules at least every two years; the proposed 2013 schedules have been undergoing review for almost 4 years.

- ***Practice of referring requesters to HCPSS website to obtain requested information***—each communication concludes with notice to the requestor to “Please feel free to contact the Public Information Office at 410-313-6682 for further assistance.” HCPSS views the provision of a web link where the requested information is available, in lieu of providing hard copies or electronic copies, as an effective mechanism to decrease the agency’s response time, promote administrative efficiency, avoid the assessment of fees to requestors, and “is environmentally friendly.”

Ombudsman comment—HCPSS correctly notes that providing information on a website is permissible; this differs from situations in which HCPSS declined to extract data from its database for a requestor, as directed by the PIA and the Maryland Court of Appeals (*e.g.*, names and email addresses), but instead referred the requestor to visit the websites of HCPSS' 76 individual schools to obtain some or all of the requested information.

- ***Documents that did not exist and notation that the PIA does not require HCPSS to create a report to respond to a specific request***—HCPSS had not created a list of the information requested and did not want to affect pending litigation. HCPSS was justified in issuing its original response that the data was not available, as it required the preparation of a special report containing all of the items requested.

Ombudsman comment—the request called for a response regarding the time it would take to extract the data from the system and an estimated fee, if appropriate—not a statement that the records did not exist. Extracting data

from a database in the ordinary course does not amount to creating a record under the PIA.

- ***Air quality reports and mold reports***—beginning in July 2015, HCPSS received an unprecedented number of requests for copies of seven air quality reports regarding Glenwood Middle School. Those reports amounted to more than 200 pages and exceeded the HCPSS email attachment size capacity by more than seven times. Given this limitation, HCPSS initially produced the records in compact disc format and mailed them to the requestors' home addresses. HCPSS waived all fees for creating the compact discs and mailing them to the requestors, despite the fact that no fee waivers had been requested. As demand for the records increased, HCPSS responded by making all records of past and present air quality reports publicly available on the Glenwood Middle School website. Any further PIA requests for these reports were responded to with the transmission of a direct link to the document(s) posted on the school website. Through the work of a community advisory committee, HCPSS developed, piloted and instituted a new procedure in which all Indoor Environmental Quality reports are posted on the affected school's website (in a consistently identified location) and an email is sent to all parents and guardians at the school notifying them of the availability of each new report and including a link to the entire document.

Ombudsman comment—this was an appropriate referral of requestors to the website.

- ***Request from parents of deceased student***—the September 2012 request by counsel for the parents of a recently deceased HCPSS high school student was correctly processed by the building principal as a request for student records, as provided for in COMAR § 13A.08.02, the MSDE Maryland Student Records Manual. The Family Educational Rights and Privacy Act of 1974 (FERPA) restricts access to student records, which also are protected under PIA § 4-313. Any requests by a parent for student records for a child not their own are confidential and protected. All information available and releasable in accordance with state and federal requirements was provided to the parent in 2012. In accordance with the MSDE Maryland Student Records Manual, the request was processed at the school level, where it was handled without involving HCPSS central office staff. HCPSS has since put into place procedures that centralize all requests for information with its Public Information Office.

Ombudsman comment—the summary of the law is accurate, but the nature of the request does not fit within it; the parents of the student requested the records relating to their child—this did not present a situation of a parent seeking student records for a child who was not their own. To the extent that some of the relevant records identified another student, the custodian needed to review the materials for the possibility of redacting the identifying information, releasing the non-exempt portions, and explaining the grounds for its determinations to the requestor in writing. No files or documentation provided during the H.B. 1105 investigation indicates that HCPSS fulfilled these requirements. Likewise, HCPSS' claim that it provided 130+ pages of records to

the parents at any time prior to February 2016 is without support in its records, and is contradicted by the requestor and her counsel.

- **Increased volume in PIA requests**—HCPSS faced unprecedented increases in demand for information, from 47 PIA requests in FY13 to 159 requests in FY16. That trend continues as HCPSS has already received more than 105 requests in the first five months of FY17. It also should be noted that nearly half of those requests come from a single individual. As of October 1, 2015, a new PIA provision requires agencies to comply with a 10-day notification requirement. The adjustment to the new requirements and protocols came at a time when the HCPSS Director of Communications position was vacant. Since January 1, 2016, all required response deadlines have been met in a timely manner. In the face of both a dramatic increase in public record requests and the implementation of significant changes to the PIA requirements, response rates have improved to 100% for the past year.

Ombudsman comment—the law does not modify its requirements based on the volume of the requests. Many agencies are experiencing similar increases. This emphasizes the need for understanding and organization of the requests and having an efficient means of handling them. When a custodian knows that the volume is heavy and delays are likely to occur, communication with the requestors becomes even more important. The claimed improvement occurs in 2016, after the H.B. 1105 reporting period.

B. Superintendent's Comments regarding the Preliminary Findings

1. December 13, 2016

After initial comments were provided by HCPSS, the Superintendent was invited to confirm that no additional points needed mention. On December 13, 2016, the Superintendent submitted several additional comments by email. Each are summarized and discussed in this section, and the full submission appears in the Appendix to this report. (E-1 and E-2)

- **Communication with members of the Board of Education**—some of my new Board members with whom you have been in contact have indicated that your final report is poised to suggest a lack of cooperation on the part of HCPSS staff. I understand that there was an issue with regard to the blanket waiver that you requested, but my understanding is that has been resolved directly between you and the new Board members.

Ombudsman's comment—only the Chair of the Board of Education was contacted to obtain potentially necessary authorization for third parties to speak with and provide records to the Ombudsman relevant to the H.B. 1105 investigation. This request was submitted to the Board Chair for the Board's consideration with limited time remaining to complete the investigation. This action was taken after the Preliminary Findings were posted in light of the fact that several previous requests to the Superintendent's designee did not produce the requested authorization. The Board of Education responded by authorizing

third parties to speak with and provide records to the Ombudsman, subject to the attorney-client privilege, which was not waived.

- ***Investigative report with regard to the deceased student***—both the September 2012 and April 2014 document requests by the parents of a deceased student, or their attorney, were directed to and handled at the school level by the building principal. This was consistent with the practice in existence at the time that I took office. A subsequent circular, effective August 3, 2016, centralizes all PIA response operations with the Director of Communications. In February 2016, the Deputy Superintendent released to the parents over 130 pages responsive to their request. This was done at the advice of counsel. The matter was seen as important enough for the Deputy Superintendent, the Executive Director of School Administration, and the Director of Communications to engage counsel and to work collaboratively in responding to the request. It bears note that at no time did I become personally involved in the details of which documents to release (in redacted form or otherwise) or not to release, as this was a matter properly handled at the administrative staff level. It was not until November 22, 2016, that I became aware of the parents' specific request for an investigative form with regard to the bullying and harassment complaint that they had filed in 2012. Upon learning for the first time of the existence of an investigative report form, dated February 17, 2012 (which was four and half months prior to my taking office), and the fact that a decision had been made by staff, on the advice of counsel, to withhold the form, I immediately instructed both staff and the attorney handling the matter that the investigative form was to be properly redacted to protect any information personally identifiable to the student alleged to have committed the bullying/harassment and to release the investigative form immediately. Counsel provided a draft of the cover letter to be sent to the parents with the properly redacted investigative form, which I did not see until late on the afternoon of November 23, the day before the recent Thanksgiving break. I instructed the attorney to send the letter out first thing Monday morning, which he did.

Ombudsman's comment—the description of events provided by the Superintendent overlooks the role of the official custodian in the PIA response process. The issue is not whether the Superintendent knew of the prior requests or acted promptly once she learned of them. Rather, the concern is that HCPSS did not respond at all to the requests made in in September 2012 and April 2014. Later, upon receipt of additional records requests in 2016, HCPSS complained that it had already provided all disclosable records to the requestor, even though subsequent events demonstrate that it had not done so. And after admonishing the requestor during the summer of 2016 that all records had already been provided, HCPSS found one more responsive document in November 2016. This two-page document could have and should have been redacted and produced in response to the 2012 or 2014 requests, as is the case with the 100+ pages of records HCPSS produced in February 2016. The responsibility for this delay and "oversight" in responding to and providing requested records falls on the official custodian as the individual with the

authority and legal responsibility for ensuring that records are properly maintained, searched, and fully disclosed, as appropriate, in response to PIA requests. This situation also highlights the need for regular consultation with legal counsel, as many issues concerning the disclosure and redaction required by the PIA call for the expertise of a legal adviser.²³ HCPSS did not provide any information during the H.B. 1105 investigation as to what legal advice, if any, HCPSS received when the first PIA request for these records was made in September 2012, nor when the second request was made in April 2014, nor at any time thereafter.

- **DMC final report**—in response to the recent allegation that there exists somewhere a bound volume of the consultant's findings and recommendations, a letter was provided from Nathan Levenson, President of DMC. The letter dispels once and for all the notion that there is some report that HCPSS has failed to release. It also shows the timeline of what documents HCPSS received and when.

Ombudsman's comment—although the letter from DMC states that no final bound report was provided to HCPSS by DMC, it does not address the contract requirement that DMC provide a final bound report, nor HCPSS' apparent failure to amend the contract to relieve DMC of this obligation. (E-3 through E-5) DMC's letter also does not address other unanswered questions raised in this report concerning the timing, substance, and sequence in which various DMC-related documents were released by HCPSS on and after October 29, 2014, all of which contributed to ongoing requestor doubt as to the validity of HCPSS' various PIA responses on this subject.

2. December 14, 2016

A meeting was attended by the Superintendent, her personal attorney, the Ombudsman, and the legal adviser to the Ombudsman on December 14, 2016, to discuss any additional comments or records that HCPSS wanted to provide to facilitate the analysis of HCPSS' PIA response practices during the reporting period, identified by H.B. 1105. During the meeting, the Superintendent explained that many of HCPSS' more controversial responses derived from advice received from HCPSS' counsel. Because the documentation supporting this position had not been approved for release, no documents were shared on that day. The Superintendent confirmed the elimination of the in-house legal department in 2012. In addition, the Superintendent reiterated her view concerning the status of the DMC report and the chronology of the PIA requests regarding the parents of the deceased child.

3. December 20, 2016

Almost one week after the meeting, the Superintendent provided 77 pages of materials through her personal attorney. The materials included a lengthy narrative of

²³ Based on data provided by HCPSS, it consulted with counsel regarding 34 of the 224 files produced. This means that HCPSS sought legal advice in approximately 15% of the PIA matters it handled during the reporting period.

issues extraneous to the H.B. 1105 report, along with a list of dates that responded to one of the Ombudsman's questions about HCPSS seeking and obtaining legal advice regarding how to respond to a particular PIA request. The only information that relates to this report was the confirmation that the Superintendent abolished the in-house legal department that existed in HCPSS prior to her appointment as superintendent.

The remaining discussion and documents continue the Superintendent's theme that she did not have personal knowledge of certain events. In addition, the materials describe specific individuals in a negative light, rather than addressing the purpose of the H.B. 1105 investigation, evaluation, and report. As with the other submissions, this focus misses the point of the investigation—rather than focusing on any particular individual, the directive of H.B. 1105 required review of HCPSS' PIA practices overall. As a result, the Ombudsman has chosen not to discuss the most recent submission from the Superintendent, because the materials do not aid in substantiating HCPSS' handling of PIA requests during the reporting period.

V. Conclusion

In an era of fast-paced change in the technology-driven and social-media environments in which public and private business regularly takes place, it is still the case that open and forthright communication is essential to a relationship of trust and confidence between the government and the community it serves.

This reports presents issues and problems under H.B. 1105 that were determined to be either systemic in nature or that involved serious disputes between HCPSS and requestors. The report does not seek to catalogue or recite each and every instance in which a PIA request may have been handled erroneously or in violation of some aspect of the PIA.

When responses to PIA requests are ignored, or otherwise improperly handled, public trust and confidence in government necessarily is diminished. The investigation identified at least two protracted disputes related to PIA requests concerning subjects that could be viewed as “controversial” or that could be perceived as exposing HCPSS, its management, or the Board of Education, to public criticism, potential liability, or otherwise cast HCPSS, its officials, or the Board of Education, in a poor light. This aspect of the investigation is of particular concern, because the central policy purpose of the PIA is to foster open government in a non-partisan and requestor-neutral way.

The foregoing findings are presented in the hope that they will aid all participants in pursuing a constructive course of improvement going forward, including any necessary corrections. By recognizing past errors and mishandling of PIA requests, HCPSS can restore public confidence in the integrity, validity, and effectiveness of the PIA as an instrument that serves the interests of both HCPSS and the wider community.

APPENDIX A

H.B. 1105

Full Text

Appendix A

LAWRENCE J. HOGAN, JR., Governor

Ch. 132

Chapter 132

(House Bill 1105)

AN ACT concerning

Howard County Public School System – Access to Public Information

Ho. Co. 9-16

FOR the purpose of requiring the custodian of a public record to provide written notice to an applicant regarding the right to file a certain complaint with the State Public Information Act Compliance Board; requiring the Public Access Ombudsman to investigate, evaluate, and issue a report concerning the Howard County Public School System concerning certain matters; requiring the Howard County Board of Education, Howard County Superintendent of Schools, and the Howard County Public School System, as applicable, to provide the Ombudsman with certain records; requiring the Ombudsman to maintain the confidentiality of certain records; and generally relating to the Howard County Public School System and access to public information.

BY repealing and reenacting, without amendments,

Article – General Provisions

Section 4-1A-01, 4-1A-04(a), 4-1A-05(a), 4-1B-01, and 4-1B-04(a)

Annotated Code of Maryland

(2014 Volume and 2015 Supplement)

BY repealing and reenacting, with amendments,

Article – General Provisions

Section 4-206

Annotated Code of Maryland

(2014 Volume and 2015 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article – General Provisions

4-1A-01.

There is a State Public Information Act Compliance Board.

4-1A-04.

(a) The Board shall:

Appendix A

Ch. 132

2016 LAWS OF MARYLAND

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

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

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

4-1A-05.

(a) Any applicant or the applicant's designated representative may file a written complaint with the Board seeking a written opinion and order from the Board if:

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

(2) the complainant alleges in the complaint that the fee is unreasonable.

4-1B-01.

In this subtitle, "Ombudsman" means the Public Access Ombudsman.

4-1B-04.

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

(1) the custodian's application of an exemption;

(2) redactions of information in the public record;

(3) the failure of the custodian to produce a public record in a timely manner or to disclose all records relevant to the request;

(4) overly broad requests for public records;

(5) the amount of time a custodian needs, given available staff and resources, to produce public records;

(6) a request for or denial of a fee waiver under § 4-206(e) of this title; and

(7) repetitive or redundant requests from an applicant.

Appendix A

LAWRENCE J. HOGAN, JR., Governor

Ch. 132

4-206.

(a) (1) In this section the following words have the meanings indicated.

(2) "Indigent" means an individual's family household income is less than 50% of the median family income for the State as reported in the Federal Register.

(3) "Reasonable fee" means a fee bearing a reasonable relationship to the recovery of actual costs incurred by a governmental unit.

(b) (1) Subject to the limitations in this section, the official custodian may charge an applicant a reasonable fee for:

(i) the search for, preparation of, and reproduction of a public record prepared, on request of the applicant, in a customized format; and

(ii) the actual costs of the search for, preparation of, and reproduction of a public record in standard format, including media and mechanical processing costs.

(2) The staff and attorney review costs included in the calculation of actual costs incurred under this section shall be prorated for each individual's salary and actual time attributable to the search for and preparation of a public record under this section.

(c) The official custodian may not charge a fee for the first 2 hours that are needed to search for a public record and prepare it for inspection.

(d) (1) If another law sets a fee for a copy, an electronic copy, a printout, or a photograph of a public record, that law applies.

(2) The official custodian may charge for the cost of providing facilities for the reproduction of the public record if the custodian did not have the facilities.

(e) The official custodian may waive a fee under this section if:

(1) the applicant asks for a waiver; and

(2) (i) the applicant is indigent and files an affidavit of indigency; or

(ii) after consideration of the ability of the applicant to pay the fee and other relevant factors, the official custodian determines that the waiver would be in the public interest.

(F) IN HOWARD COUNTY, IF THE CUSTODIAN OF A PUBLIC RECORD FOR THE HOWARD COUNTY PUBLIC SCHOOL SYSTEM CHARGES AN APPLICANT A FEE UNDER

Appendix A

Ch. 132

2016 LAWS OF MARYLAND

SUBSECTION (B) OF THIS SECTION, THE CUSTODIAN SHALL PROVIDE WRITTEN NOTICE TO THE APPLICANT THAT THE APPLICANT MAY FILE A COMPLAINT WITH THE BOARD TO CONTEST THE FEE.

SECTION 2. AND BE IT FURTHER ENACTED, That:

(1) in addition to the duties prescribed under § 4-1B-04(a) of the General Provisions Article of the Code, on or before January 1, 2017, the Public Access Ombudsman shall investigate, evaluate, and issue a report to the public concerning the Howard County Public School System, to cover the period from July 1, 2012, through December 31, 2015, concerning:

(i) the integrity and propriety of any refusal by the custodian of a public record for the Howard County Public School System, on the request of an applicant, to disclose the public record;

(ii) the validity of any declaration by the custodian of a public record for the Howard County Public School System that a public record requested by an applicant does not exist and cannot be produced; and

(iii) the reasonableness of any complaint by an applicant for a public record from the Howard County Public School System as to:

1. any delay by a custodian in furnishing the public record that was requested; and

2. any other matter involving compliance by a custodian with the requirements of Title 4 of the General Provisions Article of the Code (the Public Information Act); and

(2) (i) on the request of the Ombudsman, the Howard County Board of Education, Howard County Superintendent of Schools, or Howard County Public School System, as applicable, shall provide the Ombudsman with any public record that the Ombudsman deems necessary to conduct the review, evaluation, and publication of the report required under paragraph (1) of this section; and

(ii) the Ombudsman shall maintain and preserve as confidential any public record that the Ombudsman obtains from the Howard County Board of Education, Howard County Superintendent of Schools, or the Howard County Public School System for the purposes of this section that the board, county superintendent, or public school system has determined to be confidential.

SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall take effect July 1, 2016.

Approved by the Governor, April 12, 2016.

APPENDIX B

H.B. 1105

Preliminary Findings

Appendix B

Preliminary Findings Pursuant to HB 1105
(November 23, 2016)

H.B. 1105 directs the Office of the Public Access Ombudsman (“Ombudsman”) to “investigate, evaluate, and issue a report to the public concerning the Howard County Public School System [“HCPSS”], to cover the period from July 1, 2012, through December 31, 2015, concerning:

- (iv) the integrity and propriety of any refusal by the custodian of a public record for the Howard County Public School System [“HCPSS”], on the request of an applicant, to disclose the public record;
- (v) the validity of any declaration by the custodian of a public record for the [HCPSS] that a public record requested by an applicant does not exist and cannot be produced; and
- (vi) the reasonableness of any complaint by an applicant for a public record from the [HCPSS] as to:
 - 3. any delay by a custodian in furnishing the public record that was requested; and
 - 4. any other matter involving compliance by a custodian with the requirements of Title 4 of the General Provisions Article of the Code (the Public Information Act)

These findings are preliminary and are based upon records and information provided to the Ombudsman to date. Except where expressly noted, these findings relate only to the period defined by H.B. 1105, July 1, 2012 to December 31, 2015.

These findings are not exhaustive, are intended to be illustrative and are disseminated following an earlier period of public notice and comment from late August through September 30, 2016.

Comment from any interested person concerning H.B. 1105 topics or these preliminary findings may be submitted at HB1105Comment@oag.state.md.us using the subject, “Re: HB 1105 Preliminary Findings”, or by regular mail to: Office of the Public Access Ombudsman, 200 St. Paul Place, Baltimore, MD. 21202.

Because the Ombudsman’s Report is due by January 1, 2017, **any additional comment or documentation must be submitted by 4:00 p.m. on December 5, 2016.**

A. BACKGROUND

The Maryland Public Information Act (“PIA”) provides access to public records upon a written request by any person submitted to a Maryland state, county, or municipal agency or other governmental body subject to its requirements. In general, requested records must be produced or disclosed to the applicant, also referred to as the “requestor”, unless the record (or information contained in the record) falls within defined exceptions (or “exemptions”) to the general rule of required disclosure. The PIA also requires responding agencies to promptly respond to PIA requests in writing within defined time limits.

HCPSS is a medium-size public school system in Maryland that is subject to the requirements of the PIA. It is comprised of 76 schools with an enrollment during the reporting period of 50,000+ students. As an employer of more than 8,000 staff, it is the single largest employer in Howard County and a significant economic force within the county.

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HCPSS is governed by a 7 member elected Board of Education (“Board”) which appoints the Superintendent. The Superintendent is the Custodian of Records charged with the responsibility of responding to PIA requests to HCPSS. The current Superintendent, now in her second term, has held this office continuously since July 1, 2012.

HCPSS’ process for handling and responding to PIA requests was managed throughout the reporting period by its central office. Specifically, the immediate past “Director of Communications”, who was appointed by the Superintendent to this position on July 19, 2012, served in the role of a PIA coordinator and signatory on behalf of the Superintendent until September 28, 2015.

For a brief period, from approximately October to December, 2015, the Deputy Superintendent supervised the handling/response to PIA requests, until the incumbent Director of Communications took over these same duties beginning on December 1, 2015.

Both the Director of Communications and Deputy Superintendent are located in the HCPSS central office, serve on the Superintendent’s designated “Cabinet”, and report to the Superintendent.

From February, 1998 until October, 2012, HCPSS employed in-house General Counsel. Following the resignation of its General Counsel in October 2012, this central office position was eliminated and HCPSS thereafter relied throughout the reporting period on outside law firms for legal advice and representation concerning PIA and other matters.

During the reporting period, HCPSS generally managed its handling and response to PIA requests electronically, frequently by email. From and during approximately late 2012 through 2013, HCPSS transitioned from use of the email platform known as “First Class” to its current Microsoft platform known as “Exchange”. Both HCPSS’ earlier and current email platforms are handled by HCPSS’ servers.²⁴

During fiscal year 2015, HCPSS, in addition to updating its email platform and servers, also contracted for the purchase, installation, and implementation of a system-wide electronic Data Warehouse System intended to enhance its efficiency and capacity to manage and use electronic data across the HCPSS system.

In December 2015, HCPSS hired an in-house “Knowledge and Records Manager.” The Knowledge and Records Manager reports to HCPSS’ Chief Accountability Officer, who is also a member of the Superintendent’s designated Cabinet.

The addition of a Records Manager to HCPSS’ central office staff followed substantial work performed by independent records management consultants from approximately July, 1, 2012 through November 2014 aimed at developing a system-wide record retention policy and schedules for both print and electronic records.

²⁴ The email servers used in conjunction with the earlier “First Class” email platform, as well as backup tapes, are maintained in storage by HCPSS.

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Work performed by these consultants from mid-2012 through spring 2013 resulted in the development, presentation, and Board approval on May 9, 2013, of certain amendments to HCPSS' Policy 3050: Records Management Policy, and the development of recommended records retention schedules necessary to implement the policy.²⁵

According to information posted to HCPSS' website on September 8, 2016 HCPSS is in the process of developing new proposed records retention schedules, which are projected to take effect on July 1, 2017.

B. INFORMATION SOURCES

HCPSS' search for and production of relevant PIA files and documentation proceeded over the course of several months beginning in June 2016.

At the Ombudsman's request, HCPSS produced all of its extant files pertaining to PIA matters that were initiated or pending during the reporting period. It also produced secondary documentation including an excel spreadsheet containing summary data pertaining to PIA requests/responses and summary reports prepared for the Board beginning in April 2015.

In addition to retrieval of these digital and print materials from its central office records, HCPSS also retrieved and produced to the Ombudsman all PIA documentation available at the school level and from its outside counsel.

Additional information obtained by the Ombudsman includes other background information and records provided by HCPSS as well as records and information provided by past and present HCPSS employees and by requestors. The Ombudsman also obtained comment from interested members of the public in response to an earlier notice concerning the H.B. 1105 investigation.

In addition, the Ombudsman consulted with and received invaluable assistance from the State Archivist and staff, the Director of the MD. Department of General Services/Records Management Division, Howard County's Record Manager, and the records management consultants who led and/or participated in the records management consulting engagements during the reporting period.

C. PRELIMINARY FINDINGS**Statistical Information**

HCPSS produced approximately **224 PIA files** organized by fiscal year consisting of:

- approximately **34 files** for fiscal year 2013 (July 1, 2012 – June 30, 2013);

²⁵ Policy 3050 was first approved by the HCPSS Board in **April, 2011** without accompanying records retention schedules. It was later approved by the Board as amended in **May, 2013** pursuant to the recommendations of its consultants. The records retention schedules developed and recommended by the consultants in 2013 have not been submitted by HCPSS to State Archives for approval nor have they been implemented by HCPSS to date.

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- approximately **40 files** for fiscal year 2014 (July 1, 2013 – June 30, 2014);
- approximately **75 files** for fiscal year 2015 (July 1, 2014 – June 30, 2015);
- approximately **75 files** for fiscal year 2016 (July 1 - Dec. 31, 2015).

Approximately **70 HCPSS files**, or slightly less than a third of the files produced by HCPSS that have been reviewed to date, did not contain any indication of a PIA violation or dispute.²⁶ Generally, files were deemed not to present a reportable issue under H.B. 1105 when 1) the response met the relevant requirements of the PIA, 2) was not disputed, and 3) was consistent with all other records and information available to the Ombudsman. HCPSS' records reflect that in many of these cases, it either produced the requested records/information within 30 days without claim of exemption and without assessment of fees, or it promptly responded that it did not have the requested records.

Approximately **12 PIA files** produced by HCPSS have been identified as containing insufficient documentation to evaluate for PIA compliance. These files relate to PIA requests made primarily during fiscal years 2013 and 2014, and include, for example, files that did not contain or reflect the request as submitted, the date when the request was made, and/or a PIA response reflecting the records produced or the final disposition of the request.

In addition to PIA files produced by HCPSS, there are approximately **20 additional PIA matters/requests** for which HCPSS has produced no underlying print or digital record or file. These matters relate to requests made during fiscal years 2013 and 2014 and were identified from an excel spreadsheet prepared by HCPSS containing certain summary PIA data.

Several additional PIA matters for which HCPSS produced no records were identified based solely on the requestor's records. Two such requests were made by counsel for the requestor in calendar years 2012 and 2014 and are discussed at pages 6-7 herein.²⁷

Reporting Categories

The H.B. 1105 reporting categories are not mutually exclusive and HCPSS files that present issues under one of the H.B. 1105 reporting categories frequently present multiple issues or concerns. For this reason, summary descriptions of PIA request/response patterns, including the subject matter of the PIA requests, are more informative than aggregate statistical data and are presented in summary form here.

Generally, HCPSS' files that present H.B. 1105 issues include files 1) in which the response was inconsistent with other HCPSS documentation, including responses to other similar types of PIA

²⁶ Approximately 16 of these matters are fiscal year 2016 files in which records were produced within 10 days without claim of exemption or assessment of fees. Many of these files relate to the same request submitted by different requestors to which HCPSS responded by producing records in compact disk format.

²⁷ The Ombudsman has no way of determining whether there are additional missing PIA requests/matters during the reporting period; apart from secondary documentation produced by HCPSS, the only source of information available to the Ombudsman about missing PIA matters is requestor records.

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requests, 2) did not contain documentation of the basis for the response, and/or 3) was the subject of a requestor complaint or dispute that often prompted the requestor to make additional related requests in follow-up of the original request.

H.B. 1105 (i) & (ii): The integrity and propriety of any refusal to disclose a requested public record and validity of responses that a requested public record does not exist and cannot be produced**PIA Requests for Names of HCPSS Employees & HCPSS Email Addresses**

Numerous requests for names and email addresses of various HCPSS staff by individual and organizational requestors, including non-profit, union, and business requestors, were made across the reporting period and were routinely answered by stating that a report containing the requested data “does not exist”, often with a referral of the requestor to school websites for some or all of the requested information.

This form of “standard” answer to requests for lists of staff names and email addresses (*e.g.*, all HCPSS employees, all student/certified personnel, all K-12 teachers, all first year teachers, reading and math coaches and reading specialists, and elementary and middle school assistant principals) did not offer or explain the availability of other types of responsive records, nor did the response address whether HCPSS could extract the requested data using ordinary functionality of its database and other electronic record systems or software.

In one such matter, it was only after counsel for the requestor (a candidate for president of HCPSS’ certified employees’ union) wrote two follow-up letters concerning HCPSS’ denial that HCPSS produced the requested list in the form of an excel file. The ready availability of the requested data in electronic form is documented by HCPSS’ production of the excel file on the same day it received counsel’s letter following-up the initial request.

PIA Requests for Other Types of Data

A similar pattern is found regarding many other types of data requests, some of which were made on a recurrent or periodic basis across the reporting period by individual and organizational requestors. These matters include requests for aggregate (or anonymized) data concerning such topics as final grades, number of special education-eligible students receiving high school diplomas or “Certificates of Completion” in lieu of diplomas during specified years, college entrance/matriculation data following graduation from high school, the number and status of lawsuits pending against HCPSS for specified years including documentation of funds used to cover settlement agreements, court costs or other expenses related to lawsuits, and a wide range of other topics.

In these and other cases, HCPSS routinely answered the request by stating, for example, that, “[t]he information you are requesting does not exist” (media request for records reflecting number and status

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of lawsuits and related expenses)²⁸ or “no such report exists” (number of computers per school²⁹; June 2015 request for documents reflecting number of special education-eligible students receiving high school diplomas or Certificates of Completion³⁰).

PIA Requests Re: DMC Special Education Consulting Engagement

The HCPSS Board entered into a \$300,000 consultant contract dated June 12, 2014, with District Management Council (“DMC”), to perform a review and assessment of its Special Education services and programs. The contract called for DMC to provide, among other work product,

[a] final report ... [that] includes recommendations of successful practices, a short list of the highest impact changes on student achievement and the school budget, extensive back up data, and detailed estimates of potential savings or cost avoidance.

At least two requestors made PIA requests to HCPSS beginning in January 2015 and thereafter requesting DMC’s work product, including but not limited to its preliminary and final reports. HCPSS did not produce the requested reports, but instead variously stated, for example, in a March 2015 response to one requestor that the requested preliminary report did not exist. In a later April 2015 response to another requestor, who had obtained certain internal HCPSS email generated in February 2015 during the course of handling a previous related PIA request, that, “[t]he Board report was the final draft of the DMC findings. What [name omitted] referred to as a preliminary report was the first of many iterations of the eventual Board report.”

Notwithstanding the foregoing PIA responses and other information contained in internal HCPSS documents, HCPSS did not produce *any* requested DMC report, “preliminary or otherwise”, until after one of the involved requestors brought suit. In this litigation, HCPSS produced certain previously requested documents, including two DMC reports, one titled “Preliminary Highlights for Sharing” (dated October 29, 2014) and another titled “Highlights for Sharing” (dated Spring 2015).

²⁸ The response at best seems doubtful given the number and variety of contexts in which this type of data typically would be required in carrying out ordinary functions and operations (e.g., audit, insurance, budget/fiscal and Board oversight). In response to the Ombudsman’s inquiry regarding this response, HCPSS advised “[n]o current staff members worked on this records request. We are checking with our attorneys to find out who may have helped with this request.”

²⁹ An internal HCPSS email in this file states, “there is no report that says how many computers are in each school but one can be created in about 2 hours.” This information (i.e., that a report could be created in about 2 hours) was not provided to the requestor, nor was any fee estimate provided to the requestor.

³⁰ The file reflects that after receiving this response, the requestor attempted to follow-up by arranging a conference call with HCPSS staff. The file does not reflect the outcome of these efforts. Upon inquiry by the Ombudsman, HCPSS reported that a current staff believes that the requestor was told by a former staff “that the MPIA does not require HCPSS to create any reports that don’t already exist. This was a verbal conversation. No documentation was saved to the file.”

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During this court case, HCPSS also produced previously requested comments that were obtained in response to an online parent survey conducted as part of the DMC Special Education Opportunities Review Engagement.³¹

H.B. 1105 (iii): The Reasonableness of Requestor Complaints**No Response, Incomplete Response & Non-Compliant PIA Responses**

Multiple complaints regarding the failure of HCPSS to respond to PIA requests or to provide a complete response as required by the PIA were made across the reporting period. Examples include:

- a. In September 2012, counsel to the parents of a recently deceased HCPSS high school student requested “all school records, files, notes or documents that pertain in any way to [name omitted]”. This PIA request was made to the Registrar of the high school the student had attended. No PIA response to this record request was provided by HCPSS or received by counsel or the parents, and HCPSS has produced no record of any PIA response to the Ombudsman.

In October 2012, however, counsel for the parents received approximately 32 pages of student records from HCPSS, which did not include many of the requested records concerning events and actions taken during the student’s last year of life. The 32 pages of HCPSS records were sent to counsel in an envelope marked “Confidential” without any accompanying PIA response letter or explanatory information.

In April 2014, different counsel for the parents made a follow-up PIA request to HCPSS seeking “all of the student records” pertaining to her clients’ deceased daughter. This request, which was addressed to the principal of the high school the student had attended, itemized the records produced in 2012 as well as specific records encompassed by the 2012 request that had not been produced by HCPSS. No written response to this 2014 PIA request and no additional records were received by counsel or her clients in response to this request. Likewise, HCPSS has not produced any documentation of a PIA response to this 2014 request to the Ombudsman.³²

³¹ These parent survey comments were first sought by this requestor in February, 2015. HCPSS denied this request stating, “the online survey ... was conducted and hosted by the independent contractor and is in the possession of the contractor who has ownership. The Board does not have any information that is responsive to this request.” Notwithstanding this response, HCPSS demonstrated its access to these survey comments by its production of them (in redacted form) in this PIA-related litigation.

³² In February 2016, the Deputy Superintendent wrote to the parent of this deceased student in response to the parent’s continuing efforts to obtain all requested student records. This response enclosed approximately 130+ pages of HCPSS records pertaining to the requestor’s daughter and represented that all of these records had been previously produced to the requestor. There is no documentation, however, that the bulk of these documents were ever produced to the requestor prior to 2016.

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- b. Various missing, incomplete or otherwise non-compliant responses were made in response to requests during the second half of 2015 regarding the presence of mold and indoor air quality conditions in HCPSS schools. Some examples follow:
1. An October 2015 request for records relating to mold test results and for an email identified by date and sender was answered by referring the requestor to HCPSS' website; the requested email was not addressed at all.
 2. A November 2015 PIA request asked for "documentation on the number of public records requests the District has received in the last 12 months and the number of instances in which you have charged a fee and the amount of fees collected." This request was prompted by HCPSS' earlier assessment of more than \$5,400 to this media requestor in connection with its PIA requests for documentation of indoor air quality issues at HCPSS schools.

The Ombudsman was advised by the requestor, that as of September 2016, the November 2015 request had not been answered, nor had the previously requested underlying air quality records been produced.

Assessment of Fees

The PIA allows a responding agency to assess fees in order to recover its actual costs in fulfilling PIA requests subject to certain limitations and restrictions. It also allows responding agencies to waive fees upon request based upon a determination that a waiver is in the public interest. Thus, the PIA affords agencies significant discretion regarding the assessment of PIA fees but requires agencies to exercise such discretion when a waiver is requested.

The Ombudsman has not identified any instance during the reporting period in which a fee waiver request was granted by HCPSS. Although such requests appear to be relatively infrequent, at least in comparison to the number of matters in which fees were assessed, when made, waiver requests generally were not addressed in the response letter nor do they appear to have been considered. Rather, the denial of waiver requests appears to have been standard practice.

The Ombudsman is aware of requestor complaints that fees assessed as a condition to processing a PIA request are excessive and unjustified and that such fees appear to have deterred requestors from pursuing their requests and/or from obtaining the requested records.

For example, in response to a follow-up email by an individual requestor asking for waiver of the assessed \$1,292.75 fee, HCPSS responded without explanation that, "[u]nfortunately, we cannot waive fees." Neither HCPSS' response letter, nor its subsequent email response to the waiver request, explains the basis of the assessed fees (i.e., how the fees were calculated, except to state that the required two free hours were excluded), why fees of \$1,292.75 were required to fulfill the request for an investigative file pertaining to the requestor's child, nor did it suggest any alternative means of reducing or minimizing fees related to the request.

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The handling of media requests for records related to mold and indoor air quality conditions in HCPSS schools is also illustrative. Of approximately 17 media requests during fiscal year 2016 concerning mold and air quality conditions in HCPSS schools, fees were assessed in all but one instance even though requestors asked that fees be waived and narrowed their requests in an effort to minimize the time and labor required to fulfill them.³³

In an earlier (fiscal year 2013) case, HCPSS denied a fee waiver request by a different media requestor (and instead assessed fees of \$405) without informing the requestor that all but one of the 10 years of requested data could be provided in 10 to 15 minutes, and therefore without charge, per information provided by the HCPSS IT department.³⁴

Timeliness of Response

Throughout the reporting period, the PIA required HCPSS to respond promptly to PIA requests and provided an outside 30-day deadline for responding to requestors. The current “10-day letter requirement” resulting from 2015 amendments to the PIA did not take effect until October 1, 2015, three months prior to the end of the reporting period.

Consistent with the PIA, HCPSS appears to have handled PIA requests throughout the reporting period using an internal 10-day target deadline for response. Notwithstanding this practice, in most cases HCPSS responded to PIA requests at or about the outside 30-day statutory deadline.

Although there are instances in which HCPSS’ response exceeded the maximum 30-day and/or 10-day letter deadlines, missed deadlines do not appear to be a significant cause or driver of most disputes that occurred between HCPSS and requestors during the reporting period.³⁵ Rather, the issues and concerns that most often led to complaints or disputes resulted from the withholding of records, failure to respond to PIA requests and the assessment of fees.

C. CONCLUSION – REQUEST FOR COMMENT

These preliminary findings are provisional and subject to revision in light of ongoing investigation of the topics on which the Ombudsman is required to report. Likewise, the PIA response data and specific examples discussed herein are not intended to be exhaustive, but rather, illustrative of the information currently available to the Ombudsman and the assessment performed to date.

³³ The reasons for denying fee waivers for media requestors are unclear. The Ombudsman is aware that some agencies often waive fees for media requestors in light of the recognized public interest, favoring the broad dissemination of information of importance to the public.

³⁴ In contrast, retrieval of data for the earliest year, which accounted for the entire fee, was expected to require nearly a full day due to the need to query archived data on the mainframe.

³⁵ For example, during fiscal year 2016, **21 of 35 PIA files** reflect that HCPSS did not comply with the then new 10-day letter requirement, and in another six PIA matters, HCPSS’ response was not within the outside 30-day statutory deadline. Nonetheless, to the best of the Ombudsman’s knowledge, these missed deadlines were not the subject or focal point of any requestor complaint, *per se*.

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The Ombudsman is publishing these preliminary findings in order to obtain additional public comment at this stage of her work, and therefore is seeking to disseminate the preliminary findings broadly to any interested person, agency or organization.

Persons wishing to provide comment or documentation to the Ombudsman **should do so by December 5, 2016** via email at HB1105Comment@oag.state.md.us using the subject, "Re: HB 1105 Preliminary Findings" or by regular mail to: Office of the Public Access Ombudsman, 200 St. Paul Place, Baltimore, MD. 21202.

APPENDIX C

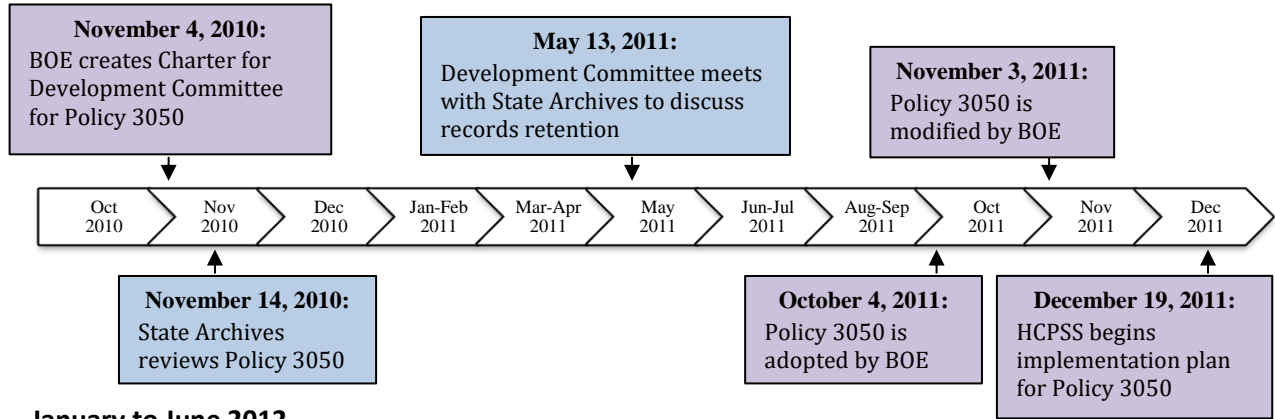
Timelines

HCPSS' Efforts to Develop & Implement Records Retention Policy & Schedule	C-1 – C-3
PIA Request Timeline: DMC Special Education Reports	C-4
PIA Requests for Records of Deceased High School Student.....	C-5

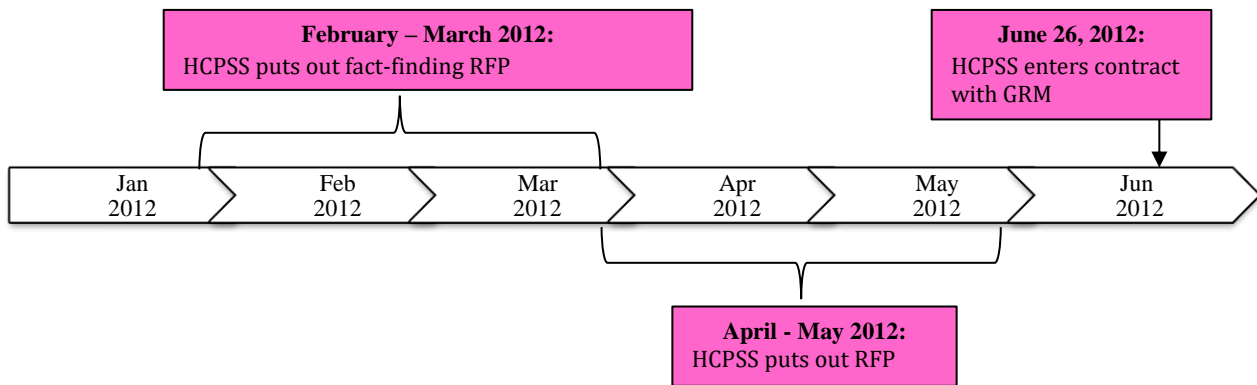
Appendix C

TIMELINE OF HCPSS' EFFORTS TO DEVELOP & IMPLEMENT RECORDS RETENTION POLICY & SCHEDULE

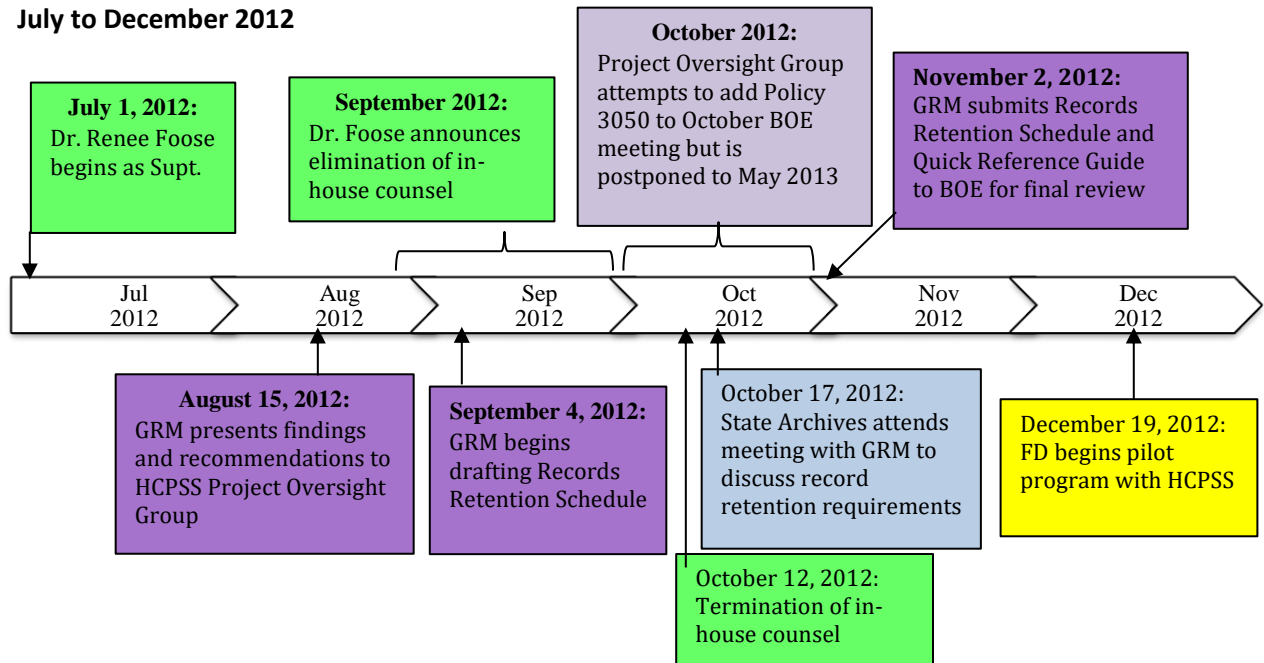
2010 - 2011



January to June 2012

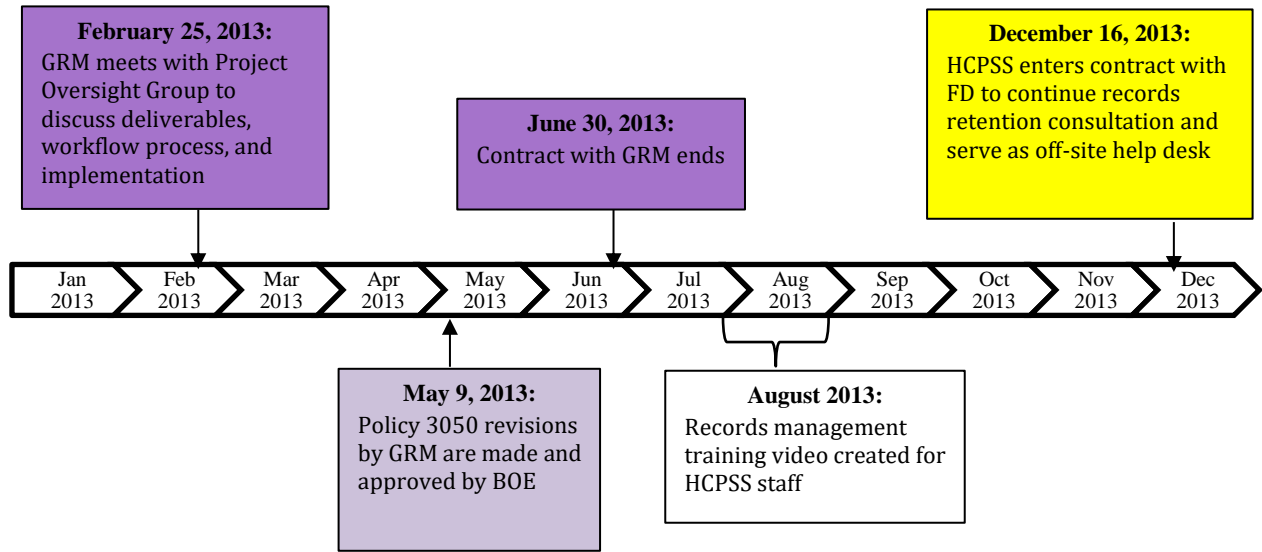


July to December 2012

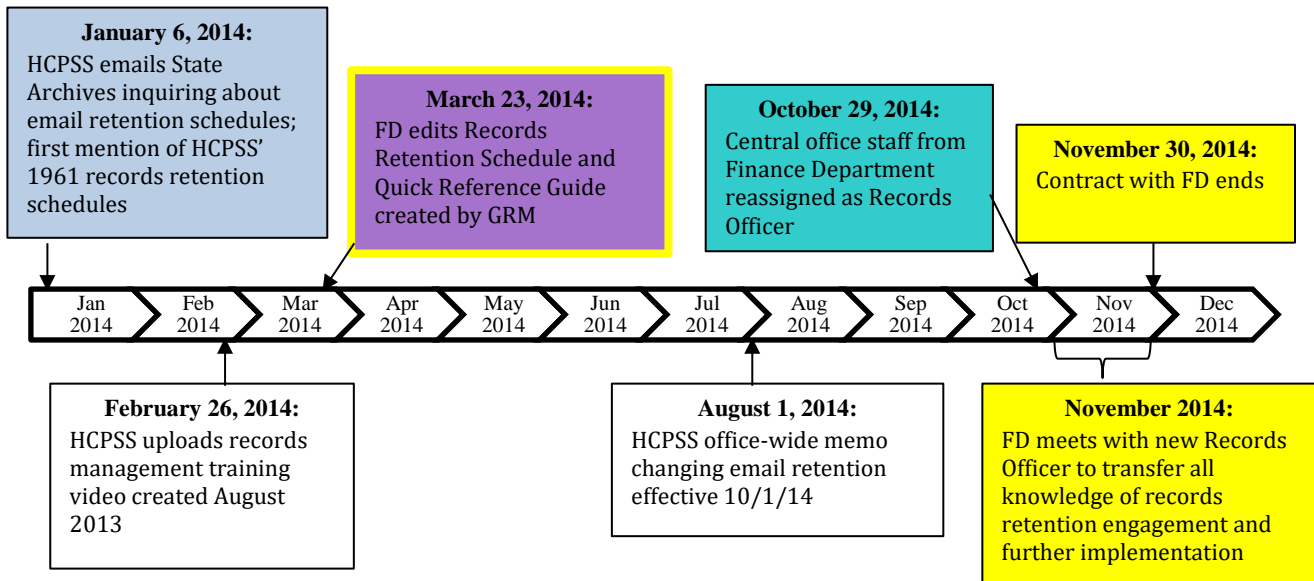


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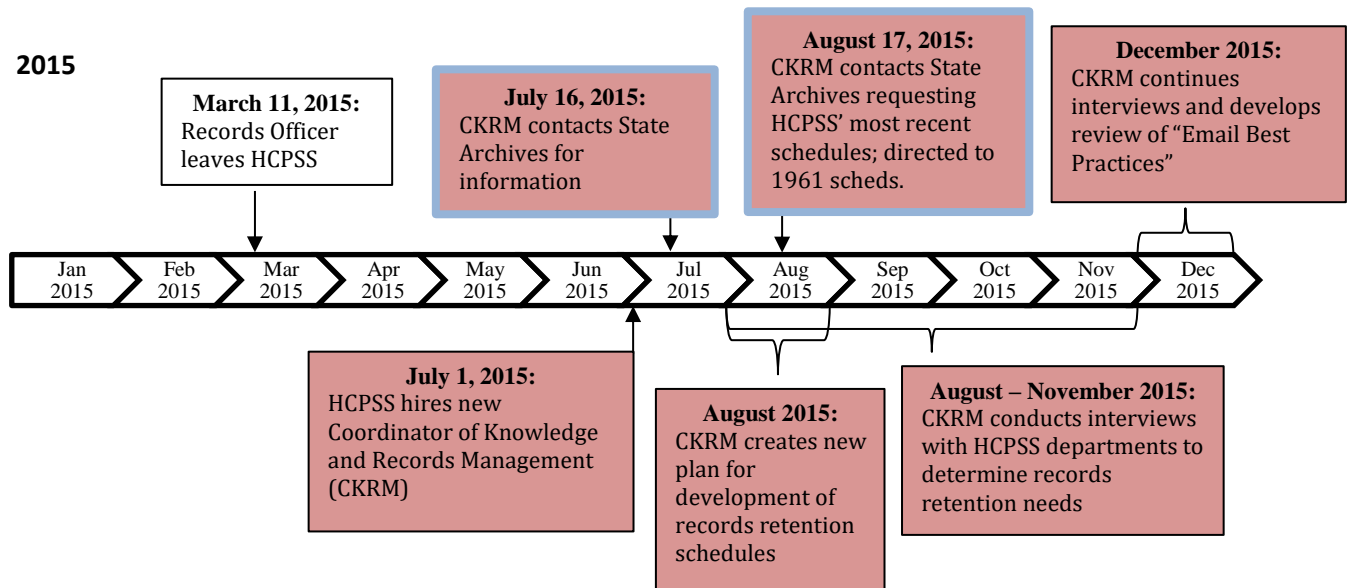
2013



2014

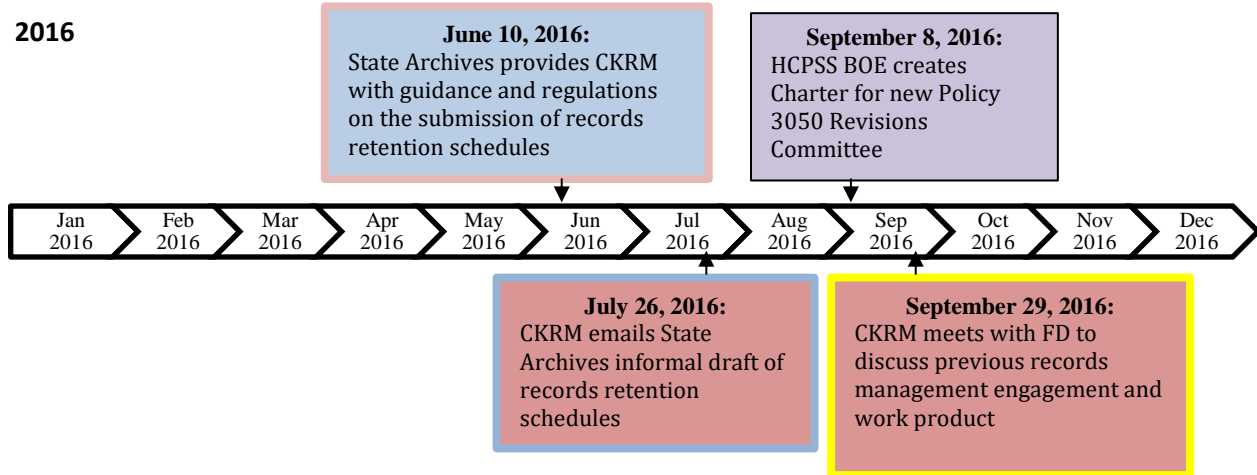


2015

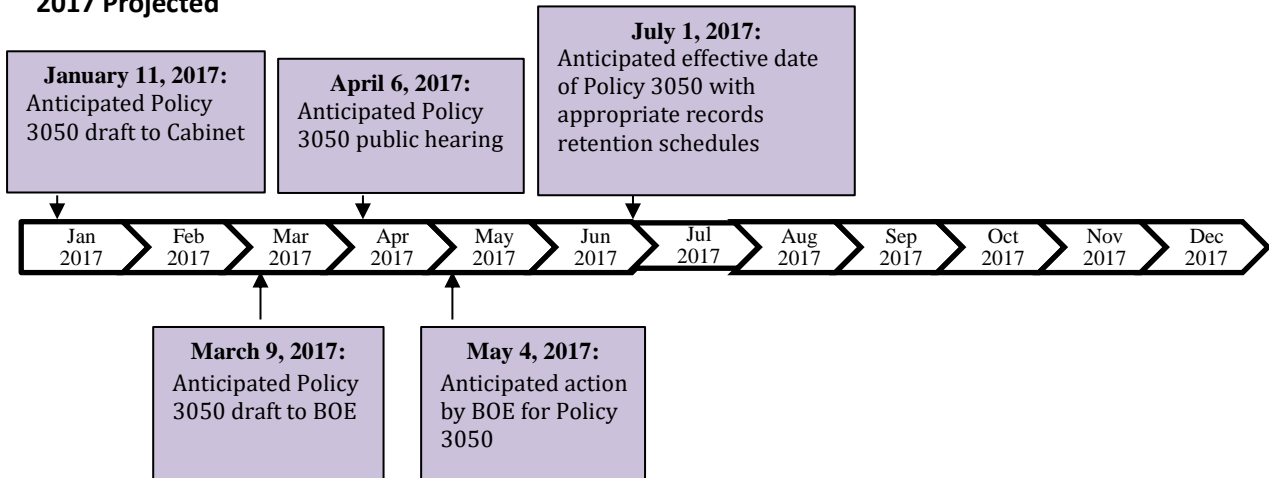


Appendix C

2016



2017 Projected



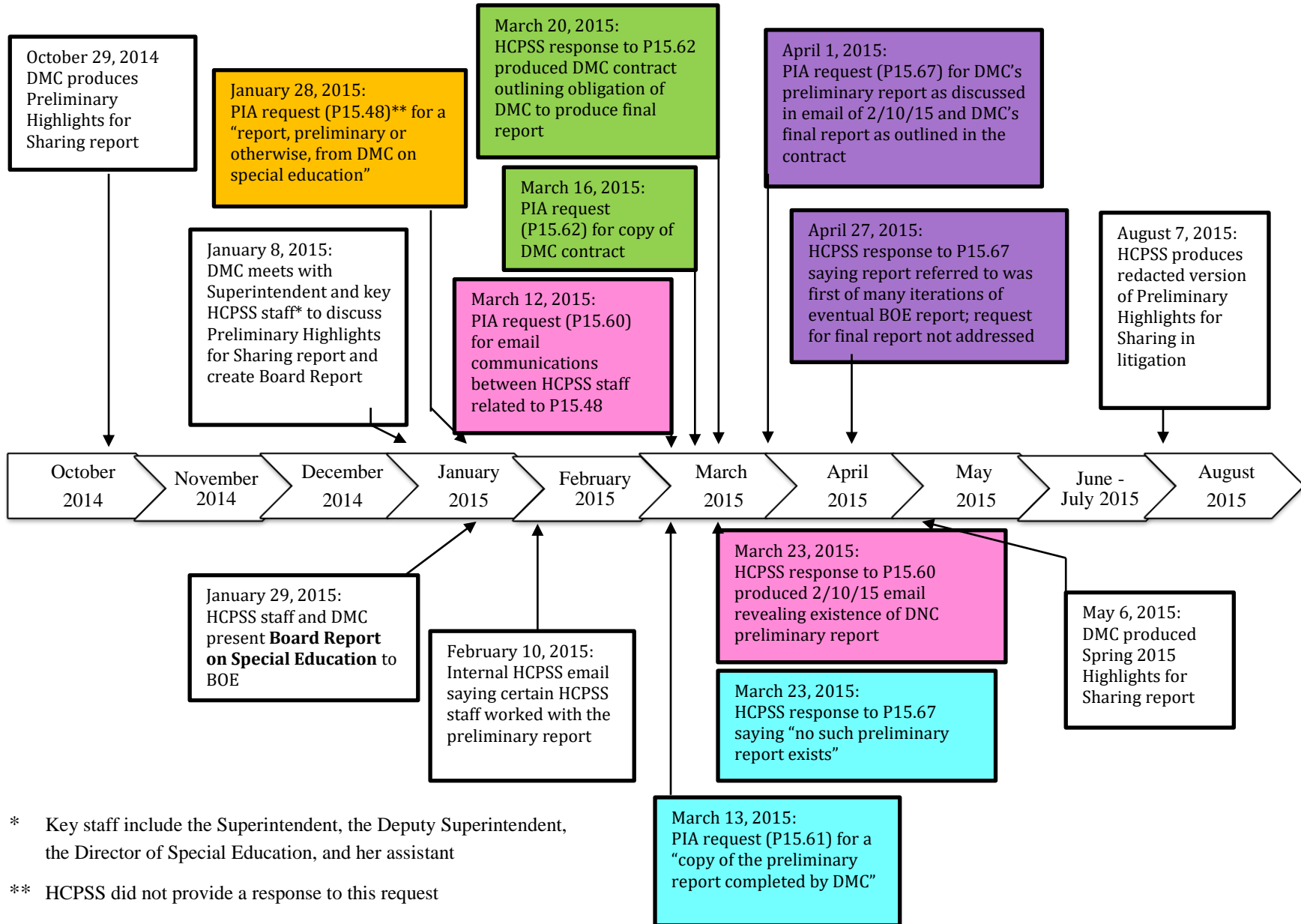
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Timelines

PIA Request Timeline: DMC Special Education Reports

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PIA REQUEST TIMELINE: DMC SPECIAL EDUCATION REPORTS



* Key staff include the Superintendent, the Deputy Superintendent, the Director of Special Education, and her assistant

** HCPSS did not provide a response to this request

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Timelines

PIA Requests for Records of Deceased High School Student

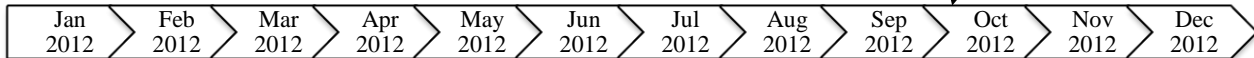
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PIA REQUESTS FOR RECORDS OF DECEASED HIGH SCHOOL STUDENT

2012

September 13, 2012:
Parent's counsel (KM) request for "all school records..." re: [name omitted]

October 9, 2012:
Parent's counsel (KM) receives ~32 pages without cover letter or official PIA response



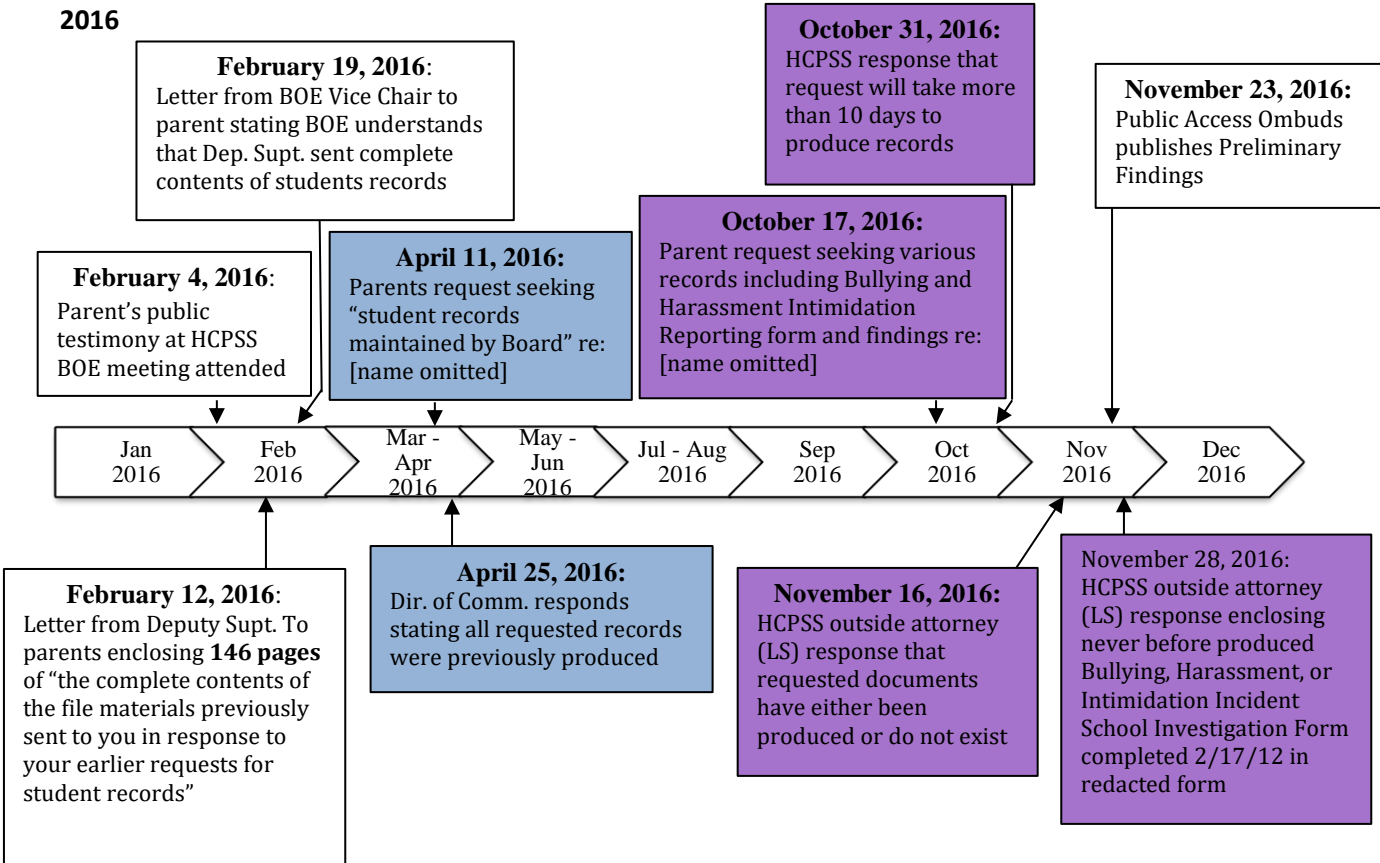
2014

April 29, 2014:
Parent's counsel (SG) request* for "all...student records" re: [name omitted] and itemizing specific records not produced in 2012

*This request had no PIA response by HCPSS



2016



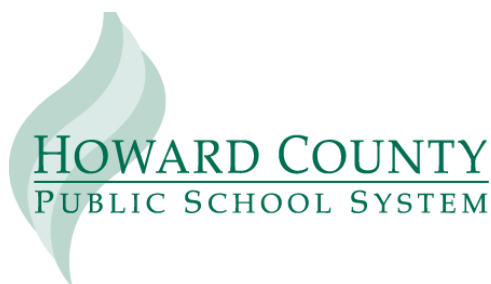
APPENDIX D

HCPSS' Comments

December 5, 2016

with Enclosure

Appendix D



December 5, 2016

Transmitted via email to: HB1105Comment@oag.state.md.us

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

Re: HB 1105

Dear Ms. Kershner:

In response to the request for comments on the HB 1105 Preliminary Findings Report, I wish to take this opportunity to provide the following:

First, in response to your statement on page 2 of the Preliminary Report, the Maryland Public Information Act (MPIA), General Provisions Article, § 4-101(f), defines the “official custodian” as “an officer or employee of the State or of a political subdivision who is responsible for keeping a public record, whether or not the officer or employee has physical custody and control of the public record.” Historically, in the Howard County Public School System (HCPSS), the Superintendent of Schools has fulfilled that role. However, as a practical matter, the Superintendent plays no day-to-day role in handling requests under the MPIA. As the Director of Communications, that responsibility falls directly to me. I assumed that position on December 1, 2015, and am listed as HCPSS’ Public Information Act Representative in the contact information list published by the Attorney General, pursuant to GP § 4-503(b), in the MPIA Manual (15th ed., October 2016) at Appendix J-20. See:

http://www.marylandattorneygeneral.gov/OpenGov%20Documents/Appendix_J.pdf. Similarly, the contact information published in the MPIA Manual (14th ed., October 2015) at Appendix J-11 listed my predecessor, Rebecca Amani-Dove. See: http://www.marylandattorneygeneral.gov/OpenGov%20Documents/PIA_manual_printable.pdf.

Second, under the leadership of Superintendent Renee Foose, HCPSS administration has systemically addressed problems it inherited in providing timely responses to MPIA requests by

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putting procedures in place that ensure prompt forwarding of requests to its Public Information Office and immediate follow up to locate requested documents. Additionally, HCPSS has increased outreach to schools and improved training related to addressing MPIO requests. HCPSS has proactively distributed alerts, progress reports, and regular updates regarding items of interest to the public by posting information on the HCPSS website, individual school sites and the Board of Education BoardDocs site. HCPSS further sends communications directly to the community through a weekly email sent to more than 128,000 subscribers, including all HCPSS parents, and members of the HCPSS staff, community or media who elect to receive these messages.

Since July 1, 2012, there has been clear evidence of progress in the timeliness of the HCPSS response to MPIO requests. As illustrated in the table below, HCPSS improved from a 57 percent on-time completion rate in FY13 (July 1, 2012-June 30, 2013) to the current 100 percent on-time completion rate, even as the number of annual requests has more than tripled over that same time period.

Fiscal Year	Dates	Number of Requests	Met 10-Day Deadline (beginning 10/1/15)	10-Day On-Time Completion Rate	Completed Within 30-Day Deadline	30-Day On-Time Completion Rate
Reporting Period						
FY13	7/1/12-6/30/13	47	n/a	n/a	27	57%
FY14	7/1/13-6/30/14	44	n/a	n/a	36	82%
FY15	7/1/14-6/30/15	79	n/a	n/a	63	80%
FY16 - prior to new 10-day provision	7/1/15-9/30/15	39	n/a	n/a	37	94%
FY16 - after new 10-day provision	10/1/15-12/31/15	36	19	53%	29	81%
Outside of Reporting Period						
FY16 - beginning after 1/1/16	1/1/16-6/30/16	84	80	95%	84	100%
FY17 - through 11/30/16	7/1/16-11/30/16	105	105	100%	105	100%

Third, regarding your observation that HCPSS lacks a current document retention schedule (Preliminary Report, at 3 n.2), Board of Education Policy 3050, Records Management, developed by the HCPSS in 2011 and amended by the Board in 2013, is controlled by current records retention schedules C-184:C-190, approved by the State Archivist, and any applicable local, state, and federal laws and/or regulations. New schedules recommended by consultants in 2013 are under review by HCPSS’s Records Officer, Erika Hawkins, who served as a senior records coordinator at Deloitte and senior records consultant for the Department of Justice prior to joining HCPSS in July 2015. Her assignment is to ensure compliance with new legal requirements and alignment with improvements in technology resources and industry best practices. These new schedules are on track to be submitted to the State Archivist and Howard

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⁴ County Department of Records for their approval as part of the policy review and update currently underway and scheduled to be effective July 1, 2017.

Fourth, the Preliminary Report questions the HCPSS practice of referring requesters to its website to obtain requested information. Preliminary Report, at 5 and 7. HCPSS continues to reply to any requests for documents posted online with a direct link to that record—including those published on the HCPSS website, the Board of Education BoardDocs site and the Maryland State Department of Education (MSDE) website. In addition, each communication concludes with notice to the requestor to “Please feel free to contact the Public Information Office at 410-313-6682 for further assistance.”

GP § 4-101(h) describes a “public record” as existing “in any form, including ... a computerized record.” However, as stated in 56 *Opinions of the Attorney General* 461, 463, “The statute guarantees any person the right to public information and to obtain authentic copies thereof, but it does not guarantee the right to have the information provided in any specific form.” See January 9, 1995 Letter to F. Carvel Payne at 2 (“The Federal Freedom of Information Act has been similarly interpreted to mean that the requester’s right is to particular information, not a particular form.”); see also 56 *Opinions of the Attorney General* 461, 463 (1971) (same language regarding no right to have information provided in any specific form); 63 *Opinions of the Attorney General* 659, 666 (1978) (same with regard to information on computer tapes); *Chapin v. Freedom of Information Commission*, 577 A.2d 300, 321 (1990 App. Ct. of Conn.) (Interpreting similar Connecticut statute and concluding that “[a]s long as the agency makes its information available for inspection, it is not in violation of the Act [regardless of its form].”)

As I suggested in my email of November 28, 2016, we are unable to find any legal authority that would prohibit providing a requester with a web link where the requested information is available, in lieu of providing hard copies or electronic copies. This practice decreases the agency’s response time, promotes administrative efficiency, avoids the assessment of fees to requesters and is environmentally friendly. It also makes records publicly available online without the need for a formal request.

Fifth, the Preliminary Report expresses concerns about those cases where the HCPSS response to certain information requests was that “the document requested does not exist,” along with a notation that the MPIA does not require HCPSS to create a report to respond to a specific request. Preliminary Report at 5, 6 n.7. It is well-established that “[a]n agency has no obligation to *create* records to satisfy a PIA request.” Maryland Public Information Act Manual (14th ed., October 2015) at 2-3 (emphasis in original) and cases cited therein. See e.g. GP § 4-205(c)(4)(iii) (“Subsection may not be construed to ... require a custodian to create, compile, or program a new [electronic] public record”); *Comptroller of the Treasury v. Immanuel*, 216 Md. App. 259,

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⁴ 271-272 (2014), *aff'd.*, *Immanuel v. Comptroller of Maryland*, 449 Md. 76 (2015) (Agency under no requirement to generate new data or analyze or summarize data).

As an example of the practice, the Preliminary Report, at 5, cites a request in which a candidate for president of the Howard County Education Association (HCEA) and her attorney asked for email addresses of all employees who were members of the bargaining unit represented by HCEA. The request came at a time when this candidate had cases pending against HCEA in both the Circuit Court for Howard County (Case No. 13-C-15-102046) and before the Maryland Public School Labor Relations Board (PSLRB) (Case No. PSLRB SV 2015-05). In connection with those cases, HCEA filed complaints against the Howard County Board of Education in both the Circuit Court for Howard County (Case No. 13-C-15-101960) and before the PSLRB (Case No PSLRB SV 2015-04).

HCPSS' original response of January 22, 2015, stated that no such list existed, but that most employee email addresses were available on the individual school websites, which was a true statement. In light of the then-pending litigation, HCPSS was attempting to avoid any action that could be viewed as entanglement in internal union affairs. On January 26, 2015, the candidate's attorney asked for reconsideration. On advice of counsel, staff was authorized to prepare and produce an Excel spreadsheet providing the information requested. State-approved ethics regulations and HCPSS Policy 2070, Ethics, prohibited use of these data to communicate with HCEA members during the conduct of the campaign for HCEA president. HCEA vehemently complained about the release of this information in a proceeding filed under Section 4-205(c) of the Maryland Education Article on April 8, 2015.

HCPSS was justified in issuing its original response that the data was not available, as it required the preparation of a special report containing all the items requested. Your conclusion that the requested data were readily available in electronic format based upon its release the same day as counsel's follow up letter is factually incorrect. Preliminary Report at 5. Preliminary efforts at preparing the requested information had commenced at the time of the first request in order to meet timelines in the event that a decision was ultimately made to prepare a report containing the requested information.

Sixth, addressing the Preliminary Report at 4 n.4, beginning in July 2015, HCPSS received an unprecedented number of requests for copies of seven air quality reports regarding Glenwood Middle School. Those reports amounted to more than 200 pages and exceeded by more than seven times the HCPSS email attachment size capacity. Given this limitation, HCPSS initially produced the records in compact disc format and mailed them the requestors' home addresses. In doing so, HCPSS waived all fees for creating the compact discs and mailing them to the requestors, despite the fact that no fee waivers had been requested. As demand for the records increased, HCPSS responded by making all records of past and present air quality reports

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publicly available on the Glenwood Middle School website. Any further MPIA requests for these reports were responded to with the transmission of a direct link to the document(s) posted on the school website. Through the work of a community advisory committee, HCPSS developed, piloted and instituted a new procedure in which all Indoor Environmental Quality reports are posted on the affected school's website (in a consistently identified location) and an email is sent to all parents/guardians at the school notifying them of the availability of each new report and including a link to the entire document. It is worth noting that U.S. Environmental Protection Agency Regional Administrator Shawn Garvin in October 2016 recognized and commended HCPSS' proactive approach.

Seventh, regarding Preliminary Report at 7 n.9, the September 2012 request by counsel of the parents of a recently deceased HCPSS high school student was correctly processed by the building principal as a Student Records request, as provided for in COMAR 13A.08.02, the MSDE Maryland Student Records Manual. The Family Educational Rights and Privacy Act of 1974 (FERPA) restricts access to student records, which also are protected under MPIA § 4-313. Any requests by a parent for student records for a child not their own are confidential and protected. All information available and releasable in accordance with state and federal requirements were provided to the parent in 2012. In accordance with MSDE Maryland Student Records Manual, the request was processed at the school level, where it was sent without involving HCPSS Central Office staff. HCPSS has since put into place procedures that centralize all requests for information with its Public Information Office. (See Attachment, Circular 11 - Public Information Act Requests)

Eighth, it is important for the public to know that HCPSS faced unprecedented increases in demand for information, from 47 MPIA requests in FY13 to 159 requests in FY16. That trend continues as HCPSS has already received more than 105 requests in the first five months of FY17. It also should be noted that nearly half of those requests come from a single individual.

As of October 1, 2015, a new MPIA provision requires agencies to comply with a 10-day notification requirement. As suggested at Page 2 of your Preliminary Report, the adjustment to new requirements and protocols came at a time when the HCPSS Communications Director position was vacant. Since January 1, 2016, and as reflected in the table on page 2 of this letter, all required response deadlines have been met in a timely manner. In the face of both a dramatic increase in public record requests and the implementation of significant changes to the MPIA requirements, response rates have improved to 100 percent for the past year.

In closing, as you have confirmed to me on several occasions—but did not acknowledge in the Preliminary Report—the data demonstrate that HCPSS has shown continuous improvement in its timely and transparent handling of MPIA requests. It bears noting that the HB1105 reporting

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period coincides with the tenure of Superintendent Foose and that these improvements have been made under her leadership.

HCPSS looks forward to using the results of your final report to build upon the progress made since 2012 in order to further ensure transparency and accountability in the manner in which the school system provides information to the public. The review process you have established provides an instructive model that can be applied to other school systems, as well as local and state governmental units throughout Maryland.

Thank you for your kind consideration.

Sincerely,

A handwritten signature in black ink that reads "John White". The signature is written in a cursive style with a prominent dot over the 'i'.

John White
Director of Communications

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ATTACHMENT: Circular 11 - Public Information Act Requests

THE HOWARD COUNTY PUBLIC SCHOOL SYSTEM
10910 Clarksville Pike
Ellicott City, MD 21042

Circular No. 11
Series 2016-2017

August 3, 2016

Deputy Superintendent

Public Information Act Requests

To: All Staff
From: Linda T. Wise
Deputy Superintendent

The HCPSS Public Information Office is responsible for, and has established procedures for recording and responding to all Maryland Public Information Act (MPIA) requests. Any HCPSS employee who receives an email request marked PIA, MPIA and/or FOIA (Freedom of Information Act) should immediately forward the email to pia_requests@hcpss.org. Any paper copies should be immediately sent to Emily Bahhar in the HCPSS Public Information Office.

The MPIA has strict and short deadlines that must be followed for every request. It is essential that employees coordinate with Public Information promptly to respond to all such requests.

The MPIA grants the public a broad right of access to records that are in the possession of state and local government agencies, including public school systems. The basic mandate of the MPIA is to enable people to have access to public records unless the requested records fall within one of the exceptions in the statute, including but not limited to personnel records, student records and medical records.

The scope of the MPIA is broad, and most records possessed by HCPSS employees fall within the MPIA definition of a "public record." All employees should be aware that email sent to and from an HCPSS email account is subject to be requested under the MPIA. Emails given to a requester as part of a MPIA request will be redacted to remove any exempt information, such as names of students, identifiable information, medical records, etc. Also subject to the MPIA are paper and/or electronic meeting notes, files, and other such documents.

Helpful resources:

- MPIA, https://www.oag.state.md.us/Opengov/PIA_manual_printable.pdf
- HCPSS PIA information, <http://www.hcpss.org/about-us/public-information-requests/>
- HCPSS Policy 3040 Technology Security, <http://www.hcpss.org/f/board/policies/3040.pdf>
- HCPSS Policy 8080 Responsible Use of Technology and Social Media, <http://www.hcpss.org/f/board/policies/8080.pdf>

Any questions should be directed to the Office of Public Information, x6682 or publicinfo@hcpss.org.

LTW/JW/eb

APPENDIX E

HCPSS Superintendent Email Comments December 13, 2016 with Attachment

Email from Superintendent, December 13, 2016	E-1
Attachment: Letter from DMC President to Superintendent, December 12, 2016	E-3

Appendix E

-----Original Message-----

From: Renee Foose [mailto:Renee_Foose@hcpss.org]

Sent: Tuesday, December 13, 2016 4:20 PM

To: Kershner, Lisa <kershner@oag.state.md.us>

Subject: RE: Meeting request

Thank you Lisa. I fully understand that time is limited, which is my reason for reaching out to you this morning and for asking that a face-to-face meeting take place tomorrow at 2:00 p.m. I do not want to stand on ceremony; I only want to make sure that every outstanding request that you have made has been addressed. I forwarded your email to John, and he assures me that there are only a couple outstanding requests, several of which are duplicates, and he assures me they will be prepared and sent to you today or tomorrow.

On the other hand, I have heard that some of my new Board members with whom you have been in contact have indicated that your final report is poised to suggest a lack of cooperation on the part of HCPSS staff. I understand that there was an issue with regard to the blanket waiver that you requested, but my understanding is that has been resolved directly between you and the new Board members. I refuse to allow a situation to persist in which HCPSS is accused of a lack of cooperation without knowing, in advance, prior to the release of your final report, exactly what items (aside from the recent requests to John) are outstanding. This should be a simple matter, and I would ask that it be sent today so that we will have a productive meeting tomorrow in which I can share any additional documentation with you, as requested.

I know that one of your most recent areas of interest is the investigative report with regard to the deceased student. As your Preliminary Report recognizes, at page 7, both the September 2012 and April 2014 document requests by the parents of a deceased student, or their attorney, were directed to and handled at the school level by the building principal. This was consistent with the practice in existence at the time that I took office. As stated in HCPSS's December 5 response, HCPSS Circular No. 11, effective August 3, 2016, centralizes all PIA response operations with the Director of Communications. As you further recognize, at footnote 9 of page 7, in February 2016, the Deputy Superintendent released to the parents over 130 pages responsive to their request. This was done at the advice of counsel. The matter was seen important enough for the Deputy Superintendent, the Executive Director of School Administration and the Director of Communications to engage counsel and to work collaboratively in responding to the request. It bears note that at no time did I become personally involved in the details of which documents to release (in redacted form or otherwise) or not to release, as this was a matter properly handled at the administrative staff level.

It was not until November 22, 2016, that I became aware of the parents' specific request for an investigative form with regard to the bullying and harassment complaint that they had filed in 2012. Upon learning for the first time of the existence of an investigative report form, dated February 17, 2012 (which was four and half months prior to my taking office), and the fact that a decision had been made by staff, on the advice of counsel, to withhold the form, I immediately instructed both staff and the attorney handling the matter that the investigative form was to be properly redacted to protect any information personally identifiable to the student alleged to have committed the bullying/harassment and to release the investigative form immediately. Counsel provided a draft of the cover letter to be sent to the parents with the properly redacted investigative form, which I did not see until late on the afternoon of November 23, the day before the recent Thanksgiving break. I instructed the attorney to send the letter out first thing Monday morning, which he did.

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I imagine that another item of interest will be the DMC report and the recent allegation by Ms. Krupiarz that there exists somewhere a bound volume of the consultant's findings and recommendations. I am attaching a letter that I received yesterday from Nathan Levenson, President of DMC, which I believe dispels once and for all the notion that there is some report that HCPSS has failed to release to Ms. Krupiarz. It also shows the timeline of what documents we received and when. If there are any additional questions you may have in this regard, please let me know in advance of our meeting tomorrow.

Sincerely,
Renee A. Foose

On 12/13/16, 11:39 AM, "Kershner, Lisa" <lkershner@oag.state.md.us> wrote:

>Dear Dr. Foose,
>I look forward to receiving your additional written comments.
>
>Time is very limited now, but I can meet with you tomorrow afternoon at 2:00. Does that work on your end?
>
>As for document/information requests, I've been corresponding with John White regularly on this. I sent a couple follow-up requests yesterday, for example. You may want to check in with him as to anything else outstanding.
>Hope to see you all tomorrow.
>Sincerely,
>Lisa Kershner
>-----Original Message-----
>From: Renee Foose [mailto:Renee_Foose@hcpss.org]
>Sent: Tuesday, December 13, 2016 9:27 AM
>To: Kershner, Lisa <lkershner@oag.state.md.us>
>Subject: Meeting request
>
>Dear Lisa,
>
>I'm hoping there is an opportunity to reschedule our meeting sometime this week. I am very interested in speaking with you.
>
>It has also come to my attention that you may feel my staff has been uncooperative and/or unresponsive to your requests. I'm sorry to hear this. Please let me know what requests are outstanding as of right now and I will personally see that they are attended to immediately.
>
>I have additional comments that I will be providing to you today, or first thing in the morning.
>
>Looking forward to hearing back from you.
>
>Sincerely,
>Renee A. Foose
>>Sent from my iPhone

Appendix E

December 12, 2016

Dr. Renee Foose
Superintendent
Howard County Public School System
10910 Clarksville Pike
Ellicott City, MD 21042



**DISTRICT
MANAGEMENT
COUNCIL**

133 FEDERAL STREET
BOSTON, MA 02110
TEL. 877-DMC-3500
WWW.DMCOUNCIL.ORG

The District Management Council (DMC) has at your request compiled an overview of the documents delivered to the district. We conducted a Special Education Opportunities Review on behalf of the Howard County Public School System. The review focused equally on the academic achievement of students and on the cost effective use of limited financial resources. The study was conducted under the framework of the continuous improvement model. It does not try to determine what is good or bad, but rather creates a road map to help move a district to the next level of performance. This process acknowledges that all systems can improve and that opportunities for improvement are built upon the district's current strengths, history, structure, and resources.

The review compared current practice in the district to best practices drawn from similar systems around the country. It also incorporates a number of well-tested analytical tools and national benchmarking. The review looked equally at general education services for struggling students as well as special education services.

The review respects the reality that school districts are complex organizations tasked with a multitude of expectations, unfunded mandates, priorities, and responsibilities. Although a large variety of thoughtful ideas for improvement are possible, a short, targeted plan is more beneficial than a long laundry list of observations, options, and possible actions. To that end, a small number of high-potential, high-impact opportunities were recommended.

The research for this project included extensive in-person interviews, an online parent survey, a deep look at hard data, classroom visits, benchmarking against best practices and like communities, and other research.

The following roles were interviewed in the fall of 2014, typically with approximately 6-10 representatives in each focus group:

- Elementary special education teachers
- Secondary special education teachers
- Speech and language pathologists
- Occupational therapists
- Physical therapists
- Psychologists and social workers
- Instructional facilitators
- Elementary general education teachers
- Secondary general education teachers
- Special education co-teachers

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- Parents
- Elementary paraprofessionals
- Secondary paraprofessionals
- Reading and math specialists
- Elementary principals
- Elementary assistant principals
- Secondary principals
- Secondary assistant principals

Additionally, the following leadership roles were interviewed during this process:

- High school instructional team leaders
- Middle school instructional team leaders
- Elementary instructional team leaders
- Curriculum directors
- Elementary curriculum coordinators
- Secondary curriculum coordinators
- Chief of Accountability
- Special education and student services leadership
- Administrative directors
- Deputy superintendent
- Superintendent
- Executive director of special education and student services
- Chief finance officer and staff

A unique feature of the review was our scheduling sharing technology. This allowed nearly every special educator, paraprofessional, related service provider and others to share a week's schedule with us via an online tool.

After the initial research, we provided in October 2014 an internal working draft for district leaders to provide feedback, identify any data errors and clarify any outstanding questions and allow district leaders to conduct further internal study. This was approximately 34 pages long.

In January of 2015 we presented our findings to the district leadership and the school board. The district also presented work plans and formed working groups to begin addressing the opportunities.

In the Spring of 2015 the final report was provided. This was a summary of key findings somewhat less than 30 pages long. You have asked about the existence of a more comprehensive bound report, but no such report was ever prepared by DMC or shared with the district. DMC believes shorter more focused reports have more impact.

In October of 2016 DMC presented a list of answers to questions raised by a stakeholder.

Finally, under a separate contract, we conducted a facilities, maintenance and grounds review and provided a report in April 2015.

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As with all of our work with districts across the country, we study a topic very broadly and deeply but then summarize just the key finding and opportunities. We believe this creates focus and enhances implementation. No district has the capacity to implement dozens of recommendations. We do not share the raw data, meeting notes, or background analysis as a standard practice.

I hope this summary is helpful.



Nathan Levenson
President