

SIXTH ANNUAL REPORT
OF THE
STATE PUBLIC INFORMATION ACT COMPLIANCE BOARD



BOARD MEMBERS

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

SEPTEMBER 2021

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

The General Assembly created the State Public Information Act Compliance Board (“Board”) in 2015 to review the reasonableness of fees greater than \$350 charged under the Public Information Act (“PIA”). Pursuant to § 4-1A-04(c) of the General Provisions Article of the Maryland Code, the Board submits this annual report for the period July 1, 2020, through June 30, 2021 (FY2021).

This report contains a description of the Board’s activities during FY2021, including summaries of the Board’s opinions, the number and nature of complaints filed with the Board, and a brief discussion of the anticipated impact of House Bill 183 from the FY 2021 legislative session on Board operations going forward. In addition, although the law does not provide an opportunity for the Public Access Ombudsman to submit a similar annual report, the Board believes such a report is useful to understand the current state of extra-judicial dispute resolution under the PIA. For this reason, the Board has included a report from the Ombudsman as Appendix C to this report.

**I.
ACTIVITIES OF THE BOARD**

A. Responsibilities of the Board

The current duties of the Board include:

- Receiving, reviewing, and resolving complaints that a custodian of public records charged an unreasonable fee that exceeds \$350;
- Issuing a written opinion regarding whether a custodian has charged an unreasonable fee and, if so, ordering that the custodian reduce the fee to an amount the Board determines reasonable and refund the difference;
- Studying ongoing compliance with the PIA by custodians of public records; and
- Making recommendations to the General Assembly for improvements to the PIA.

There are currently five members of the Board:

- John H. West, III, Esquire – Chair; citizen member – Expires 06/30/2022 (reappointed on 07/01/19 for a second term)

- Deborah F. Moore-Carter – PIA knowledge/Maryland Association of Counties/Maryland Municipal League nominee – Expired 06/30/2018 (holding over until successor is named)
- Michele L. Cohen, Esquire – attorney member – Expires 06/30/2024 (appointed on 07/01/21)
- Darren S. Wigfield – citizen member – Expires 06/30/2022 (reappointed on 07/01/19 for a second term)
- Christopher A. Eddings – non-profit/open government/news media nominee – Expires on 6/30/23 (appointed to fill vacancy on 8/14/20)

On May 3, 2021, René C. Swafford, Esquire resigned just prior to the expiration of her term on June 30, 2021. The Board thanks Ms. Swafford for her dedication and service and wishes her well.

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

The Board also extends its thanks to the Public Access Ombudsman, Lisa Kershner, who is always willing to offer her assistance in matters over which the Board has no jurisdiction and has also been effective in mediating fee disputes when jurisdiction overlaps.

B. Processes and procedures

The Board adheres to the statutory process for receiving and handling complaints. The Board's procedures appear on the Board's website, along with a description of the type of information the Board finds useful for making its decision. The website also contains tips for complainants and custodians to attempt to resolve an issue before submitting a complaint to the Board.

Generally, complaints are received by Board staff at the Office of the Attorney General and numbered based on the date received. Board counsel makes an initial determination as to whether the complaint falls within the Board's jurisdiction. If the complaint involves an assertion of an unreasonable fee that exceeds \$350, Board staff

forwards the materials to the relevant custodian of records for a response. Once all materials are compiled, the Board reviews them and determines whether to schedule a conference with the parties or to decide the matter based on the materials provided. The Board typically makes its decision within thirty days after the conference, if there is one, or within 30 days after receiving all submitted materials, if relying solely on the submissions.

When a complaint addresses only issues that are not within the jurisdiction of the Board, the matter will be dismissed. For example, if a complainant challenges a custodian's denial of a fee waiver request, but does not assert that the fee itself is unreasonable, the Board does not have the authority to consider the issue. On occasion, the Board will also dismiss as premature those complaints that allege that a fee *estimate* is unreasonable. Typically this occurs when the estimate is a broad range, rather than a precise figure based on a breakdown of anticipated costs, and when the custodian has not demanded prepayment. These kinds of complaints, and those that include multiple issues in addition to the unreasonableness of a fee, often fall within the Public Access Ombudsman's authority to address. If the Board believes it does not have jurisdiction, and/or that the complaint might benefit from mediation, it refers the complainant to the Ombudsman.

C. Complaint and Opinion Activities for FY2021

1. Statistics

- New complaints submitted to the Board: 21
- Complaints dismissed without opinion: 13
 - Not within Board's limited jurisdiction: 9
 - Withdrawn by complainant: 4
- Opinions issued during FY2021: 5
 - Carryover from FY2020 complaints: 0
 - Opinions requiring conference with the parties: 0
- Complaints submitted in FY2021 and still pending on 7/1/21: 3

2. Complaints Dismissed without an Opinion

As with FY2020, more than half the complaints received by the Board in FY2021 included issues other than the reasonableness of a fee greater than \$350, which is the sole issue within the Board's jurisdiction. Some of these complaints were from complainants who claimed that their request for a fee waiver should have been granted, rather than that

the fee was unreasonable. Other complaints concerned untimely responses or allegations that records were wrongly withheld, neither of which is within the Board's jurisdiction. Some of these complaints also included allegations that were both within and without the Board's jurisdiction—e.g., an allegation that a custodian both charged an unreasonable fee higher than \$350 and withheld records in error.

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

- **PIACB 21-02:** Complaint concerned a fee estimate of \$300-600; custodian's response indicated actual costs were less than \$350.
- **PIACB 21-04:** Complaint did not contain the complainant's signature and was therefore incomplete; complainant did not respond to request for signature.
- **PIACB 21-09:** Complaint alleged that custodian's response was incomplete; complainant referred to Ombudsman.
- **PIACB 21-11:** Complaint concerned a fee less than \$350 and denial of a fee waiver request; complainant referred to Ombudsman.
- **PIACB 21-17:** Complaint concerned a fee less than \$350; complainant referred to Ombudsman.
- **PIACB 21-18:** Complaint concerned denial of inspection; complainant referred to Ombudsman.
- **PIACB 21-19:** Complaint concerned custodian's failure to respond to PIA request; complainant referred to Ombudsman.
- **PIACB 21-20:** Complaint alleged that custodian failed to provide all responsive records; complainant referred to Ombudsman.
- **PIACB 21-21:** Complaint concerned multiple agencies, some of which denied inspection of records and some of which failed to respond to PIA request; complainant referred to Ombudsman.

The following matters did not result in a formal opinion of the Board because they were withdrawn by the complainant:

- **PIACB 21-03:** Complaint concerned fee higher than \$350 and other issues outside of the Board’s jurisdiction; resolved in mediation with Ombudsman.
- **PIACB 21-06:** Complaint concerned fee higher than \$350 and also involved question of fee waiver; resolved in mediation with Ombudsman.
- **PIACB 21-07:** Complaint concerned fee higher than \$350 and was submitted to both the Board and Ombudsman; resolved in mediation with Ombudsman.
- **PIACB 21-10:** Complaint concerned a fee higher than \$350 and denial of fee waiver request; resolved in mediation with Ombudsman.

3. Complaints in which Board Issued an Opinion

When a complaint is clearly within the jurisdiction of the Board and ripe for review, the Board will issue a written opinion. During FY2021, the Board issued five opinions, all of which were decided on the basis of the parties’ written submissions.

The Board’s opinions for FY2021 appear on the Office of the Attorney General’s website at: <http://www.marylandattorneygeneral.gov/Pages/OpenGov/piaindex.aspx>. Summaries of the opinions appear in this report for ease of reference.

- **PIACB 21-01 (October 5, 2020)**

Agency: Maryland Department of Transportation (State Highway Administration) (“SHA”)

Issue: Complainant alleged that \$836.59 fee estimate provided in a written letter was unreasonable. SHA asked him to prepay the estimate for all email communications between SHA employees and three specific email addresses over a period of three years in some cases and four years in another.

Decision: Because the estimate was a precise figure based on a breakdown of anticipated actual costs and SHA asked for prepayment, the Board could review the estimate. The matter presented a new question of whether a discrepancy between an oral estimate and a custodian’s written estimate is alone proof that a fee is unreasonable. Though the Board found that early communications with a custodian might be probative of reasonableness, here the final estimate was found to be reasonable.

- **PIACB 21-05 (December 1, 2020)**

Agency: Montgomery County Council (“County”)

Issue: Complainant requested review of \$4,808.08 cost estimated by the County to respond to his request for all emails that were sent or received by any email account established or maintained by a specific council member. The County requested prepayment.

Decision: The fee estimate was precise and based on a detailed calculation of anticipated costs. Because the County asked for prepayment, the Board reviewed the fee estimate. Upon review, the Board did not find the fee unreasonable.

- **PIACB 21-08 (December 1, 2020)**

Agency: Washington County (“County”)

Issue: Complainant challenged a fee estimate of \$1,000 to \$1,500 to respond to PIA request for a wide variety of records—e.g., pictures, photos, deeds, surveys, drawings—that indicated that a particular road was either owned by the County or not abandoned.

Decision: Because the fee estimate was a precise amount based on a detailed breakdown of anticipated actual costs, the Board could review for reasonableness. The Board did not find the fee estimate to be unreasonable given the nature and breadth of the request.

- **PIACB 21-12 (May 27, 2021)**

Agency: City of Brunswick (“City”)

Issue: Complainant challenged a fee of \$950 assessed to respond to his PIA request for certain communications between employees of the Brunswick Police Department and specific individuals over a number of discrete time periods.

Decision: The Board found the fee unreasonable because it reflected duplication of effort in that the city attorney, who is compensated at a rate 13 times that of staff, was asked to review material that was duplicative and clearly non-responsive. Board ordered fee reduction of \$195.

- **PIACB 21-13 (June 3, 2021)**

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

Issue: Complainant alleged that the HOC’s \$496 estimated fee for responding to a request for correspondence and other documents related to a particular HOC commissioner candidate was unreasonable. HOC requested prepayment of estimate that resulted from a detailed calculation of anticipated costs.

Decision: Although the Board found the estimated time expenditure generally reasonable, it ultimately concluded that the portion of the estimate attributed to a secondary review by another attorney was unreasonable and ordered a \$62 reduction in fee estimate.

All three of the FY2021 complaints that were still pending on July 1, 2021, were resolved with opinions issued by July 30, 2021. The Board will include summaries of those matters in its next annual report.

II.

2021 LEGISLATIVE SESSION AND IMPACT OF HOUSE BILL 183

A. 2021 Legislative session

House Bill 183 and Senate Bill 449 were introduced early in the 2021 legislative session. These bills were substantially the same as House Bill 502/Senate Bill 590, both of which failed to pass out of committee after the 2020 session was cut short by the Covid-19 pandemic. All of these bills were based largely on recommendations contained in the [Final Report on the Public Information Act](#) (Dec. 27, 2019), which was published jointly with the Public Access Ombudsman. Broadly speaking, the bills provide for a more integrated extra-judicial dispute resolution process and expand the jurisdiction of the Board to resolve a wider variety of disputes.

The Board submitted written testimony, signed by all of its members, in support of both of the bills. Appendix A contains the Board’s written testimony and Chairman West’s opinion editorial, co-authored with the Public Access Ombudsman, that urged passage of HB 183/SB 449. In early February, Board member Darren Wigfield—along with the Public Access Ombudsman—testified before the House Government Operations (“HGO”) Committee in favor of HB 183. Shortly thereafter, Mr. Wigfield and the Public Access Ombudsman also testified before the Senate Education, Health, and Environmental Affairs (“EHE”) Committee regarding SB 449. In March, both committees issued reports of “favorable with amendments.”

Both bills passed their respective chambers with unanimous support. EHE issued a favorable report on the amended version of HB 183 at the end of March, and the Senate passed the bill unanimously on March 30, 2021. The bill was enacted pursuant to Md.

Const., art. II, § 17(c) on May 30, 2021, thus becoming law. It takes effect on July 1, 2022. *See* 2021 Md. Laws, ch. 658. The new law, and its impact on the operations of the Board and the Public Access Ombudsman, is described in more detail below.

Several other PIA-related bills were also introduced during the session, but only one passed and became law. *See* 2021 Md. Laws, ch. 62. Senate Bill 178, which will take effect on October 1, 2021, removes records related to administrative and criminal investigations of alleged police misconduct from the ambit of GP § 4-311's mandatory exemption for personnel records. With the exception of records related to "technical infractions," such records are now classified as investigatory records subject to the discretionary exemption found in GP § 4-351, meaning that inspection may be denied if a custodian determines that inspection would be contrary to the public interest. A technical infraction is defined as "a minor rule violation by an individual solely related to the enforcement of administrative rules that: (1) does not involve an interaction between a member of the public and the individual; (2) does not relate to the individual's investigative, enforcement, training, supervision, or reporting responsibilities; and (3) is not otherwise a matter of public concern." Records related to technical infractions remain personnel records and therefore must be withheld. The new law also places certain redaction and notice duties upon a custodian of records. Neither the Board nor the Public Access Ombudsman took a position on SB 178. The Governor vetoed the bill, but the General Assembly overrode his veto prior to the session's adjournment.

B. Anticipated Impact of House Bill 183

When the new law goes into effect in July 2022, there will be several changes to the way both the Board and the Public Access Ombudsman operate. Appendix B contains a copy of HB 183 as enacted in Chapter 658 of the 2021 Maryland Laws. Some of the more significant changes are as follows:

- Requesters and custodians seeking to resolve PIA-related disputes will first be required to attempt mediation with the Public Access Ombudsman before proceeding to Board review.
- Generally, the Public Access Ombudsman will have 90 days in which to mediate a dispute before issuing a "final determination" that a dispute has either been resolved or not resolved; this deadline can be extended upon mutual consent of the parties.
- In addition to reviewing complaints that allege that a custodian has charged an unreasonable fee of more than \$350, the Board will be empowered to review and resolve complaints that allege that a custodian wrongfully denied inspection

- of a public record or failed to respond to a PIA request within applicable time limits.
- The Board will also be charged with reviewing complaints from custodians that allege that a “request or pattern of requests is frivolous, vexatious, or in bad faith.”
 - The Board will *not* have authority to review allegations involving denials of requests for fee waivers, although the Public Access Ombudsman will continue to have the power to mediate these disputes.
 - A complaint to the Board will need to be filed within 30 days of receipt of the Public Access Ombudsman’s final determination.
 - If a complaint alleges erroneous denial of inspection of a public record, the Board, in its discretion, will be able to ask the custodian to provide certain information, including “a copy of the public record,¹ descriptive index of the public record, or written reason why the record cannot be disclosed,” as well as “the provision of law on which the custodian relied in denying inspection[.]”
 - The Board must maintain the confidentiality of records or information provided pursuant to its request, and the new law provides certain protections against liability and waiver of any privileges that might apply.
 - Along with its expanded jurisdiction, the Board will also have new powers regarding remedies. Depending on the nature of the complaint and the Board’s decision, the Board will have the ability to order that a record be produced, that a custodian promptly respond to a PIA request and, in certain circumstances, that a custodian who has not timely responded waive part or all of a fee. And, if the Board finds that a request is frivolous, vexatious, or made in bad faith, its order may state that a custodian may ignore the request or respond to a less burdensome version.

The new law requires the Board to adopt regulations to carry out its powers and duties under the PIA. The Board will work together with counsel to do so during the next year.

¹ If the complaint alleges that the custodian denied inspection under GP § 4-301(a)(2)(ii), which precludes inspection where it would be “contrary to . . . a federal statute or a regulation that is issued under the statute and has the force of law,” the custodian may not be required to produce the record for Board review.

C. Board recommendations for the 2022 Legislative Session

Given that substantial changes were made to the PIA during the 2021 legislative session, the Board does not have any recommendations at this time for legislation that would enact further changes during the 2022 legislative session.

LAWRENCE J. HOGAN, JR.
GOVERNOR

BOYD K. RUTHERFORD
LT. GOVERNOR



Appendix A
JOHN H. WEST, III, ESQ.
Chair

CHRISTOPHER EDDINGS
DEBORAH MOORE-CARTER
RENÉ C. SWAFFORD, ESQ.
DARREN S. WIGFIELD

STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

TESTIMONY IN SUPPORT OF HB 183
February 11, 2021
Health and Government Operations Committee

Dear Chair Pendergrass, Vice Chair Pena-Melnyk, and Members of the Committee:

On behalf of the Public Information Act Compliance Board (“Board”), we ask for a favorable report on HB 183, which would provide the Board with comprehensive jurisdiction to review and decide disputes about access to public records that cannot be resolved through mediation with the Public Access Ombudsman (“Ombudsman”). We continue to believe that this is a needed and necessary improvement to the current dispute resolution scheme provided by the Public Information Act (“PIA”).

Established by legislation passed in 2015, the Board is an independent body comprising five members who represent diverse interests and knowledge areas, including the media, government, the bar, and the private citizenry. Though the first draft of the 2015 bill provided the Board with the comprehensive PIA jurisdiction that HB 183 provides, its final form drastically limited the Board’s authority by permitting it to review and decide only complaints about unreasonable fees over \$350 charged under the PIA. Since October of 2015, the Board has received just 41 complaints that meet this narrow jurisdictional threshold.

By contrast, the Ombudsman’s program, which was created at the same time as the Board and which involves purely voluntary, non-binding mediation, has received more than 1,153 mediation requests for all types of PIA disputes during the same time period. The vast majority of these do not involve fees over \$350, but instead cover allegations ranging from unlawful withholding of records and untimely responses to overly broad or burdensome requests.

The Ombudsman makes every effort to resolve the disputes that come to her, but many are not resolved through mediation, leaving frustrated requesters or custodians no alternative but going to court. Because court is costly, time-consuming, and complicated, it is not an accessible remedy for many PIA requesters—which means that those without the time and money litigation requires have no real dispute resolution options available. These disputes simply go unresolved.

HB 183 addresses these unresolved disputes and enables the Board to fill the gap in a way that enhances and compliments the important work of the Ombudsman. Notably, in those comparatively rare instances where the Board’s jurisdiction does overlap with that of the Ombudsman—i.e., where a requester complains that he or she has been assessed an unreasonable fee over \$350 for production of public records—mediation is often successful. Such anecdotal

evidence suggests that expanded Board jurisdiction will enhance the effectiveness of the Ombudsman program by providing the parties an incentive to work out their disputes in a more informal, confidential setting. And, for those disputes that cannot be resolved through mediation, the Board can provide an accessible and meaningful remedy.

We emphasize the practicality of the proposed changes. The pandemic has brought into stark relief to extent to which disputes continue, despite significant changes to the way government (and courts) go about conducting their business. When disputes about access to public records arise, the Board has the ability to review and decide cases based on submissions and argument. For those relatively few, more complex cases where a hearing or review of records might be necessary, the Board is capable of holding video videoconferences with the parties or conducting confidential records reviews akin to the *in camera* reviews done in court. Put simply, expanded Board jurisdiction will provide timely, accessible, cost-effective, and meaningful resolution of PIA disputes—during both pandemic and non-pandemic times.

Finally, the Board is equipped to take on an expanded caseload without any major changes to its structure or operation. As described in the *Final Report on the PIA*,¹ which was published in 2019, we believe the Board's increased caseload under HB 183 could be handled by two additional full-time staff. This is a modest expenditure in exchange for a crucial addition to the PIA dispute resolution process and, ultimately, for improving transparency at all levels of State and local government.

For all of these reasons, we urge a favorable report on HB 183.

Public Information Act Compliance Board

John H. West, III, Esq., Chair
Christopher A. Eddings
Deborah Moore-Carter
René C. Swafford, Esq.
Darren S. Wigfield

¹ The report is available here: <https://news.maryland.gov/mpiaombuds/wp-content/uploads/sites/20/2019/12/Final-Report-on-the-PIA-12.27.19.pdf>.



STATE OF MARYLAND
OFFICE OF THE
PUBLIC ACCESS OMBUDSMAN



STATE OF MARYLAND
PUBLIC INFORMATION ACT
COMPLIANCE BOARD

Appendix A-3

February 18, 2021

Right now, transparency in government is critically important. In some areas, peoples' trust and faith in the ability of government to act in their best interests and to protect their health and welfare has diminished. If properly functioning and fairly enforced, Maryland's Public Information Act can do much to restore that trust and faith.

In Maryland, the "PIA" promotes government transparency by affording citizens' a broad right of access to records of State and local government agencies "with the least cost and delay." Though the right to access records is subject to certain exceptions for confidentiality, privacy, and privilege, the core of the PIA is a belief in the right of citizens to know what their government is up to.

In 2015, the General Assembly made efforts to ensure that the PIA is functioning properly and living up to its central promise of timely and cost-effective governmental transparency. At the time, when disputes about access to public records arose, an aggrieved party could go to court or, in some circumstances involving select State agencies, had the option of pursuing administrative review through the Office of Administrative Hearings. Neither option was particularly accessible or practical for parties without the time and money that litigation requires. So, the General Assembly created two independent, extra-judicial options for resolving PIA disputes. The first is the Office of the Public Access Ombudsman. The Ombudsman makes efforts to resolve all sorts of PIA disputes, but can do so only on a voluntary and non-binding basis. The second option is the PIA Compliance Board, an all-volunteer board of five members representing a diversity of interests and knowledge areas. While the 2015 legislation originally envisioned that the Compliance Board would have broad authority to consider the same variety of PIA disputes that the Ombudsman does, it ultimately limited that authority to reviewing and deciding only disputes over fees greater than \$350 charged under the PIA. At the same time the Legislature eliminated the authority of "OAH" to decide certain PIA disputes. Thus, although it almost certainly did not intend to, the General Assembly actually cut back options for enforceable review of PIA disputes.

Now, after nearly five years of operation, it is clear that neither the Ombudsman program nor the PIA Compliance Board is working as efficiently or effectively as it could. While the Ombudsman has broad jurisdiction to mediate all kinds of PIA disputes—from total failures to respond to requests and denials of access to records, to unreasonably broad and repetitive requests—the Ombudsman also lacks any enforcement authority and many cases exit the mediation process unresolved and without any other practical, accessible avenues to pursue relief. At the same time, the PIA Compliance Board does have enforcement authority, but only within its extremely narrow fee-related jurisdiction. The net result of these extra-judicial dispute options working in concert as currently structured is that there are many PIA disputes that never get

resolved, unless the parties have the time and financial resources necessary to file a lawsuit in court.

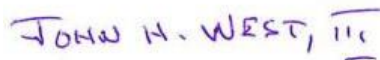
The 2015 legislation required, among other things, that the Compliance Board issue an annual report that includes any recommendations for legislative changes. In 2019, the Chairmen of the Senate Budget and Taxation and House Appropriations Committees requested that Compliance Board and Ombudsman collect certain PIA-related data from 23 State cabinet-level agencies, and to make recommendations related to PIA compliance and enforcement. The result was a joint report, published in December 2019, that carefully examined the PIA landscape and revealed the problems detailed above. The report concluded that the best solution would be to expand the jurisdiction of the Compliance Board so that it could review and decide the variety of PIA disputes that cannot be resolved through mediation with the Ombudsman. An analysis of the Ombudsman's caseload suggests that the Compliance Board could expect to receive approximately 50 to 60 additional matters each year. About half of these matters would involve an agency's denial or partial denial of a PIA request. The 2019 report also revealed that agencies at times need relief when confronted with unduly burdensome or repetitive requests, and mediation is not fruitful. Thus the Board should be authorized to review and provide relief for these sorts of disputes as well. Regardless of the dispute, the Board's decision would always be subject to judicial review, just as it is now.

House Bill 183, cross-filed as Senate Bill 449, implements these recommendations. The Bill builds on the two existing extra-judicial PIA dispute resolution programs to provide an efficient and user-friendly enforcement mechanism. It enhances the Ombudsman's program by giving parties an incentive—avoiding Compliance Board review—to meaningfully engage with the mediation process, while also enabling review for those disputes that, after an earnest attempt at mediation, are in real need of a binding decision. Put simply, the Bill creates more equitable access and serves the PIA's overarching goals of transparency and good government. The Ombudsman and members of the PIA Compliance Board unanimously support H.B. 183 / S.B. 449, and thank all of the Bills' sponsors and stakeholders who are working together to help Maryland fulfill the promise of the PIA.

Sincerely,



Lisa Kershner
Public Access Ombudsman



John "Butch" West
Chair,
Public Information Act Compliance Board

HOUSE BILL 183

P3

(PRE-FILED)

11r0475
CF SB 449

By: **Delegate Lierman**

Requested: September 8, 2020

Introduced and read first time: January 13, 2021

Assigned to: Health and Government Operations

Committee Report: Favorable with amendments

House action: Adopted

Read second time: March 6, 2021

CHAPTER _____

1 AN ACT concerning

2 **Public Information Act – Revisions**
3 **(Equitable Access to Records Act)**

4 FOR the purpose of requiring each official custodian to adopt a certain policy of proactive
5 disclosure; providing that the policy may vary in a certain manner and include the
6 publication of certain records, to the extent practicable, or certain information;
7 ~~requiring each official custodian to publish a certain annual report on a certain~~
8 ~~website, to the extent practicable or, under certain circumstances, store the report~~
9 ~~in a certain manner; requiring the report of an official custodian to include certain~~
10 ~~information;~~ requiring a certain member of the Public Information Act Compliance
11 Board to have served as a custodian, rather than an official custodian, in the State;
12 requiring that two members of the Board, rather than one member, be attorneys;
13 requiring that one member of the Board be knowledgeable about electronic records;
14 requiring the Office of the Attorney General to provide at least a certain number of
15 staff members to assist the Board and requiring the Office of the Public Access
16 Ombudsman to carry out certain duties; requiring the Board to receive, review, and
17 resolve certain complaints from applicants and applicants’ designated
18 representatives and certain complaints from a custodian; altering the minimum fee
19 charged under which the Board is required to take certain actions with regard to a
20 complaint; requiring the Board to order a custodian to take certain actions under
21 certain circumstances; requiring the Board to issue an order authorizing a custodian
22 to take certain actions under certain circumstances; requiring the Board to adopt
23 certain regulations; altering the circumstances under which an applicant or an
24 applicant’s designated representative is authorized to file a certain written

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.

Underlining indicates amendments to bill.

~~Strike out~~ indicates matter stricken from the bill by amendment or deleted from the law by amendment.



2

HOUSE BILL 183

1 complaint; authorizing a custodian to file a certain complaint under certain
2 circumstances; altering the time period within which a certain complaint must be
3 filed; altering the time period within which a certain response must be filed;
4 requiring a custodian to provide certain information to the Board on request;
5 providing that a custodian may not be required to produce a certain record for Board
6 review under certain circumstances; authorizing the Board to request certain
7 information from the custodian; requiring a custodian or an applicant, on request of
8 the Board, to provide a certain affidavit or statement; requiring the Board to
9 maintain the confidentiality of certain records and information; prohibiting a
10 custodian from being civilly or criminally liable for taking certain actions; providing
11 for the construction of certain actions taken under this Act; altering certain time
12 periods within which the Board must issue certain decisions under certain
13 circumstances; prohibiting a person from appealing a certain decision under certain
14 provisions of law; repealing the limitation on the time period for which a certain
15 appeal stays a certain decision; altering the list of disputes that the Ombudsman is
16 required to make reasonable attempts to resolve; requiring the Ombudsman to issue
17 a certain final determination within a certain period of time except under certain
18 circumstances; requiring the Ombudsman to inform the applicant and the custodian
19 of the availability of certain review by the Board under certain circumstances;
20 authorizing the Ombudsman to disclose certain information to certain persons;
21 prohibiting a certain individual from disclosing certain information under certain
22 circumstances; authorizing the Ombudsman to transfer certain information to the
23 Board under certain circumstances; ~~requiring the Ombudsman to submit a certain~~
24 ~~annual report to the Governor and the General Assembly; requiring the~~
25 ~~Ombudsman's report to include certain information;~~ prohibiting a custodian from
26 failing to respond to an application for the inspection of a public record within certain
27 time limits except under certain circumstances; altering the circumstances under
28 which certain time limits are required to be extended pending the resolution of a
29 dispute; altering a certain definition; altering certain terminology; providing for the
30 application of this Act; making stylistic and conforming changes; requiring the Office
31 of the Attorney General to allocate certain staff members on or before a certain date;
32 providing for a delayed effective date; and generally relating to the Public
33 Information Act.

34 BY repealing and reenacting, without amendments,

35 Article – General Provisions

36 Section 4–101(a) and (c), 4–1B–01, and 4–203(a)

37 Annotated Code of Maryland

38 (2019 Replacement Volume and 2020 Supplement)

39 BY repealing and reenacting, with amendments,

40 Article – General Provisions

41 Section 4–101(j), 4–1A–02(a), 4–1A–03(d), 4–1A–04 through 4–1A–08, 4–1A–10,
42 4–1B–02(b), 4–1B–04, 4–203(d), and 4–362(a)

43 Annotated Code of Maryland

44 (2019 Replacement Volume and 2020 Supplement)

HOUSE BILL 183

1 BY adding to
2 Article – General Provisions
3 Section 4–104 ~~and 4–105~~
4 Annotated Code of Maryland
5 (2019 Replacement Volume and 2020 Supplement)

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

8 **Article – General Provisions**

9 4–101.

10 (a) In this title the following words have the meanings indicated.

11 (c) “Board” means the State Public Information Act Compliance Board.

12 (j) (1) “Public record” means the original or any copy of any documentary
13 material that:

14 (i) is made by a unit or an instrumentality of the State or of a
15 political subdivision or received by the unit or instrumentality in connection with the
16 transaction of public business; and

17 (ii) is in any form, including:

18 1. a card;

19 2. a computerized record;

20 3. correspondence;

21 4. a drawing;

22 5. film or microfilm;

23 6. a form;

24 7. a map;

25 8. a photograph or photostat;

26 9. a recording; or

27 10. a tape.

4

HOUSE BILL 183

1 (2) "Public record" includes a document that lists the salary of an employee
2 of a unit or an instrumentality of the State or of a political subdivision.

3 (3) "Public record" does not include:

4 (I) a digital photographic image or signature of an individual, or the
5 actual stored data of the image or signature, recorded by the Motor Vehicle Administration;
6 OR

7 (II) A RECORD OR ANY INFORMATION SUBMITTED TO THE
8 PUBLIC ACCESS OMBUDSMAN OR THE BOARD UNDER SUBTITLE 1A OF THIS TITLE.

9 4-104.

10 (A) EACH OFFICIAL CUSTODIAN SHALL ADOPT A POLICY OF PROACTIVE
11 DISCLOSURE OF PUBLIC RECORDS THAT ARE AVAILABLE FOR INSPECTION UNDER
12 THIS TITLE.

13 (B) THE POLICY ADOPTED UNDER SUBSECTION (A) OF THIS SECTION MAY:

14 (1) VARY AS APPROPRIATE TO THE TYPE OF PUBLIC RECORD AND TO
15 REFLECT THE STAFF AND BUDGETARY RESOURCES OF THE GOVERNMENTAL UNIT;
16 AND

17 (2) INCLUDE PUBLICATION OF PUBLIC RECORDS ON THE WEBSITE OF
18 THE GOVERNMENTAL UNIT, TO THE EXTENT PRACTICABLE, OR PUBLICATION OF
19 PRIOR RESPONSES TO REQUESTS FOR INSPECTION MADE UNDER THIS TITLE.

20 ~~4-105.~~

21 ~~(A) (1) SUBJECT TO PARAGRAPH (2) OF THIS SUBSECTION, ON OR~~
22 ~~BEFORE JULY 1 EACH YEAR, EACH OFFICIAL CUSTODIAN SHALL PUBLISH ON THE~~
23 ~~WEBSITE OF THE GOVERNMENTAL UNIT, TO THE EXTENT PRACTICABLE, A REPORT~~
24 ~~ON THE REQUESTS RECEIVED DURING THE IMMEDIATELY PRECEDING CALENDAR~~
25 ~~YEAR UNDER THIS TITLE FOR INSPECTION OF PUBLIC RECORDS OF THE~~
26 ~~GOVERNMENTAL UNIT.~~

27 ~~(2) IF THE GOVERNMENTAL UNIT DOES NOT HAVE A WEBSITE, THE~~
28 ~~CUSTODIAN SHALL STORE THE REPORT IN A PLACE THAT IS EASILY ACCESSIBLE TO~~
29 ~~THE PUBLIC.~~

30 ~~(B) THE REPORT SHALL INCLUDE:~~

HOUSE BILL 183

5

1 ~~(1) THE NUMBER OF REQUESTS RECEIVED UNDER THIS TITLE,~~
2 ~~INCLUDING:~~

3 ~~(I) THE NUMBER OF REQUESTS GRANTED OR DENIED WITHIN~~
4 ~~10 BUSINESS DAYS;~~

5 ~~(II) THE NUMBER OF REQUESTS GRANTED OR DENIED WITHIN~~
6 ~~30 DAYS; AND~~

7 ~~(III) THE NUMBER OF REQUESTS GRANTED OR DENIED IN MORE~~
8 ~~THAN 30 DAYS AND THE REASONS FOR THE DELAYS, INCLUDING THE NUMBER OF~~
9 ~~EXTENSIONS REQUESTED AND THE NUMBER OF REQUESTS THAT WERE THE~~
10 ~~SUBJECT OF DISPUTE RESOLUTION UNDER § 4 1B 04 OF THIS TITLE;~~

11 ~~(2) THE OUTCOMES OF THE REQUESTS, INCLUDING:~~

12 ~~(I) THE TOTAL NUMBER OF REQUESTS GRANTED IN FULL;~~

13 ~~(II) THE TOTAL NUMBER OF REQUESTS GRANTED IN PART;~~

14 ~~(III) THE TOTAL NUMBER OF REQUESTS DENIED IN FULL; AND~~

15 ~~(IV) THE TOTAL NUMBER OF REQUESTS FOR WHICH REDACTED~~
16 ~~PUBLIC RECORDS WERE PROVIDED;~~

17 ~~(3) THE AMOUNT OF FEES CHARGED UNDER § 4 206 OF THIS TITLE;~~

18 ~~(4) THE NUMBER OF FEE WAIVERS GRANTED UNDER § 4 206(E) OF~~
19 ~~THIS TITLE; AND~~

20 ~~(5) A DESCRIPTION OF EFFORTS BY THE GOVERNMENTAL UNIT TO~~
21 ~~PROACTIVELY DISCLOSE INFORMATION IN ACCORDANCE WITH THE POLICY~~
22 ~~ADOPTED UNDER § 4 104 OF THIS SUBTITLE.~~

23 4-1A-02.

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

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

26 1. from a nongovernmental nonprofit group that is organized
27 in the State;

28 2. who works on issues related to transparency or open
29 government; and

1 3. who is nominated by representatives of the open
2 government and news media communities.

3 (ii) One member of the Board shall:

4 1. have knowledge of the provisions of this title;

5 2. have served as [an official] A custodian in the State as
6 defined in § 4–101(d) of this title; and

7 3. be nominated by the Maryland Association of Counties
8 and the Maryland Municipal League.

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

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

12 A. a custodian of a public record;

13 B. a member of the news media; or

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

16 (3) At least [one member] **TWO MEMBERS** of the Board shall be [an
17 attorney] **ATTORNEYS** admitted to the Maryland Bar.

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

21 [(4)] **(5)** (i) The Governor shall publish, on the website of the Office of
22 the Governor, notice of the Governor’s intent to consider applicants for positions on the
23 Board.

24 (ii) The notice shall include:

25 1. application procedures;

26 2. criteria for evaluating an applicant’s qualifications; and

27 3. procedures for resolving any conflicts of interest.

HOUSE BILL 183

1 (iii) The Governor shall solicit recommendations for positions on the
2 Board from representatives of the custodian, news media, and nonprofit communities.

3 (iv) 1. An individual may submit to the Governor an application
4 for membership on the Board as provided under subparagraph (ii) of this paragraph.

5 2. The names and qualifications of applicants shall be posted
6 on the website of the Office of the Governor.

7 (v) When evaluating an applicant, the Governor shall:

8 1. consider the need for geographic, political, racial, ethnic,
9 cultural, and gender diversity on the Board; and

10 2. ensure the neutrality of the Board.

11 ~~[(5)]~~ **(6)** Subject to paragraphs (2) [and (3)] **THROUGH (4)** of this
12 subsection and with the advice and consent of the Senate, the Governor shall appoint the
13 members of the Board from the pool of applicants under paragraph ~~[(4)]~~ **(5)** of this
14 subsection.

15 4-1A-03.

16 (d) **(1)** [The] **SUBJECT TO PARAGRAPH (2) OF THIS SUBSECTION, THE**
17 Office of the Attorney General shall provide staff and office space for the Board.

18 **(2) THE OFFICE OF THE ATTORNEY GENERAL SHALL PROVIDE AT**
19 **LEAST ~~FOUR~~ TWO STAFF MEMBERS TO ASSIST THE BOARD AND THE OFFICE OF THE**
20 **PUBLIC ACCESS OMBUDSMAN TO CARRY OUT THE DUTIES OF THE BOARD UNDER**
21 **THIS SUBTITLE AND THE OFFICE UNDER SUBTITLE 1B OF THIS TITLE.**

22 4-1A-04.

23 (a) The Board shall:

24 (1) receive, review, and, subject to § 4-1A-07 of this subtitle, resolve
25 complaints filed under § 4-1A-05 of this subtitle from any applicant or the applicant's
26 designated representative alleging that a custodian:

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

29 **(II) charged an unreasonable fee under § 4-206 of this title OF MORE**
30 **THAN ~~\$200~~, \$350; OR**

8

HOUSE BILL 183

1 (III) ~~UNREASONABLY FAILED TO WAIVE A FEE UNDER § 4-206(E)~~
2 ~~OF THIS TITLE; OR~~

3 ~~(IV)~~ FAILED TO RESPOND TO A REQUEST FOR A PUBLIC RECORD
4 WITHIN THE TIME LIMITS ESTABLISHED UNDER § 4-203(A) OR (D) OF THIS TITLE;

5 (2) issue a written [opinion] DECISION as to whether a violation has
6 occurred; and

7 (3) ORDER THE CUSTODIAN TO:

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

11 (II) if the Board finds that the custodian charged an unreasonable
12 fee under § 4-206 of this title, [order the custodian to] reduce the fee to an amount
13 determined by the Board to be reasonable and refund the difference; OR

14 ~~(III) IF THE BOARD FINDS THAT THE CUSTODIAN~~
15 ~~UNREASONABLY FAILED TO WAIVE A FEE UNDER § 4-206(E) OF THIS TITLE, WAIVE~~
16 ~~ALL OR PART OF THE FEE OR RECONSIDER THE FEE WAIVER REQUEST; OR~~

17 ~~(IV)~~ IF THE BOARD FINDS THAT THE CUSTODIAN FAILED TO
18 RESPOND TO A REQUEST FOR A PUBLIC RECORD WITHIN THE TIME LIMITS
19 ESTABLISHED UNDER § 4-203(A) OR (D) OF THIS TITLE:

20 1. PROMPTLY RESPOND; AND

21 2. AT THE BOARD'S DISCRETION AND ONLY IF THE
22 WRITTEN DECISION INCLUDES THE BOARD'S REASONS FOR ORDERING THE WAIVER,
23 WAIVE ALL OR PART OF THE FEE THE CUSTODIAN IS OTHERWISE ENTITLED TO
24 CHARGE UNDER § 4-206 OF THIS TITLE.

25 (B) THE BOARD SHALL:

26 (1) RECEIVE, REVIEW, AND, SUBJECT TO § 4-1A-07 OF THIS
27 SUBTITLE, RESOLVE COMPLAINTS FILED UNDER § 4-1A-05 OF THIS SUBTITLE FROM
28 ANY CUSTODIAN ALLEGING THAT AN APPLICANT'S REQUEST OR PATTERN OF
29 REQUESTS IS FRIVOLOUS, VEXATIOUS, OR IN BAD FAITH;

30 (2) ISSUE A WRITTEN DECISION AS TO WHETHER THE APPLICANT'S
31 REQUEST OR PATTERN OF REQUESTS IS FRIVOLOUS, VEXATIOUS, OR IN BAD FAITH;
32 AND

HOUSE BILL 183

9

1 **(3) IF THE BOARD FINDS THAT THE APPLICANT'S REQUEST IS**
2 **FRIVOLOUS, VEXATIOUS, OR IN BAD FAITH, BASED ON THE TOTALITY OF THE**
3 **CIRCUMSTANCES INCLUDING THE NUMBER AND SCOPE OF THE APPLICANT'S PAST**
4 **REQUESTS AND THE CUSTODIAN'S RESPONSES TO PAST REQUESTS AND EFFORTS TO**
5 **COOPERATE WITH THE APPLICANT, ISSUE AN ORDER AUTHORIZING THE CUSTODIAN**
6 **TO:**

7 **(I) IGNORE THE REQUEST THAT IS THE SUBJECT OF THE**
8 **CUSTODIAN'S COMPLAINT; OR**

9 **(II) RESPOND TO A LESS BURDENSOME VERSION OF THE**
10 **REQUEST WITHIN A REASONABLE TIME FRAME, AS DETERMINED BY THE BOARD.**

11 **[(b)] (C)** The Board shall:

12 **(1) ADOPT REGULATIONS TO CARRY OUT THIS SUBTITLE;**

13 **[(1)] (2)** study ongoing compliance with this title by custodians; and

14 **[(2)] (3)** make recommendations to the General Assembly for
15 improvements to this title.

16 **[(c)] (D)** (1) On or before October 1 of each year, the Board shall submit a
17 report to the Governor and, subject to § 2-1257 of the State Government Article, the
18 General Assembly.

19 (2) The report shall:

20 (i) describe the activities of the Board;

21 (ii) describe the **[opinions] DECISIONS** of the Board;

22 (iii) state the number and nature of complaints filed with the Board;

23 and

24 (iv) recommend any improvements to this title.

25 4-1A-05.

26 (a) Any applicant **[or]**, the applicant's designated representative, **OR A**
27 **CUSTODIAN** may file a written complaint with the Board seeking a written **[opinion]**
28 **DECISION** and order from the Board **UNDER § 4-1A-04 OF THIS SUBTITLE** if:

1 (1) [a custodian charged a fee under § 4-206 of this title of more than \$350]
2 **THE COMPLAINANT HAS ATTEMPTED TO RESOLVE THE DISPUTE THROUGH THE**
3 **OFFICE OF THE PUBLIC ACCESS OMBUDSMAN UNDER § 4-1B-04 OF THIS TITLE;** and

4 (2) [the complainant alleges in the complaint that the fee is unreasonable]
5 **THE PUBLIC ACCESS OMBUDSMAN HAS ISSUED A FINAL DETERMINATION STATING**
6 **THAT THE DISPUTE WAS NOT RESOLVED.**

7 (b) The complaint shall:

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

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

12 (3) be signed by the complainant;

13 (4) if available, include a copy of the original request for public records **AND**
14 **THE CUSTODIAN'S RESPONSE, IF ANY;** and

15 (5) be filed within [90] ~~45~~ **30 CALENDAR** days after the [action that is the
16 subject of the complaint occurred] **COMPLAINANT RECEIVES THE FINAL**
17 **DETERMINATION OF THE PUBLIC ACCESS OMBUDSMAN UNDER § 4-1B-04 OF THIS**
18 **TITLE.**

19 4-1A-06.

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

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

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

25 (b) (1) The custodian **OR APPLICANT** shall file a written response to the
26 complaint within [15] **30 CALENDAR** days after [the custodian receives] **RECEIVING** the
27 complaint.

28 (2) On request of the Board, the custodian shall [include with its written
29 response to the complaint] **PROVIDE:**

30 **(I) IF THE COMPLAINT ALLEGES THAT THE CUSTODIAN FAILED**
31 **TO RESPOND TO A REQUEST FOR A PUBLIC RECORD WITHIN THE TIME LIMITS**

HOUSE BILL 183

1 ESTABLISHED UNDER § 4-203 OF THIS TITLE, A RESPONSE TO THE REQUEST FOR
2 THE PUBLIC RECORD;

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

5 1. A COPY OF THE PUBLIC RECORD, DESCRIPTIVE INDEX
6 OF THE PUBLIC RECORD, OR WRITTEN REASON WHY THE RECORD CANNOT BE
7 DISCLOSED, AS APPROPRIATE; AND

8 2. THE PROVISION OF LAW ON WHICH THE CUSTODIAN
9 RELIED IN DENYING INSPECTION OF THE PUBLIC RECORD; OR

10 (III) IF THE COMPLAINT ALLEGES THAT THE CUSTODIAN
11 CHARGED AN UNREASONABLE FEE UNDER § 4-206 OF THIS TITLE, the basis for the fee
12 that was charged; ~~OR~~

13 ~~(IV) IF THE COMPLAINT ALLEGES THAT THE CUSTODIAN~~
14 ~~UNREASONABLY FAILED TO WAIVE A FEE UNDER § 4-206 OF THIS TITLE, THE BASIS~~
15 ~~ON WHICH THE CUSTODIAN DENIED THE WAIVER REQUEST.~~

16 (3) (I) IF THE COMPLAINT ALLEGES THAT THE CUSTODIAN DENIED
17 INSPECTION OF A PUBLIC RECORD UNDER § 4-301(A)(2)(II) OF THIS TITLE, THE
18 CUSTODIAN MAY NOT BE REQUIRED TO PRODUCE THE PUBLIC RECORD FOR BOARD
19 REVIEW.

20 (II) THE BOARD MAY REQUEST INFORMATION ABOUT THE
21 PUBLIC RECORD FROM THE CUSTODIAN.

22 ~~(3) (4)~~ (4) ON REQUEST OF THE BOARD, A CUSTODIAN OR AN
23 APPLICANT SHALL PROVIDE AN AFFIDAVIT OR A STATEMENT CONTAINING THE
24 FACTS THAT ARE AT ISSUE IN THE COMPLAINT.

25 ~~(4) (5)~~ (5) THE BOARD SHALL MAINTAIN THE CONFIDENTIALITY OF
26 ANY RECORD OR INFORMATION SUBMITTED BY A CUSTODIAN OR AN APPLICANT
27 UNDER THIS SUBSECTION.

28 ~~(5) (6)~~ (6) A CUSTODIAN MAY NOT BE CIVILLY OR CRIMINALLY LIABLE
29 UNDER MARYLAND LAW FOR PROVIDING OR DESCRIBING A PUBLIC RECORD TO THE
30 BOARD UNDER THIS SUBSECTION.

31 ~~(6) (7)~~ (7) THE PROVISION OF A RECORD OR A DESCRIPTION OF A
32 RECORD TO THE BOARD UNDER THIS SUBSECTION MAY NOT BE CONSTRUED AS A
33 WAIVER OF ANY APPLICABLE PRIVILEGE.

1 (c) If a written response **OR INFORMATION REQUESTED UNDER SUBSECTION**
2 **(B) OF THIS SECTION** is not received within [45] **30 CALENDAR** days after the [notice]
3 **REQUEST** is sent, the Board shall decide the case on the facts before the Board.

4 4-1A-07.

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

6 (2) [If the information in the complaint and response is sufficient for
7 making a determination based on the Board's own interpretation of the evidence,] **THE**
8 **BOARD SHALL ISSUE A WRITTEN DECISION** within 30 **CALENDAR** days after receiving
9 [the response, the Board shall issue a written opinion as to whether a violation of this title
10 has occurred or will occur] **THE WRITTEN RESPONSE AND ALL INFORMATION**
11 **REQUESTED UNDER § 4-1A-06(B) OF THIS SUBTITLE.**

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

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

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

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

25 (4) The Board shall issue a written [opinion] **DECISION** within 30
26 **CALENDAR** days after the informal conference.

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

29 (i) state in writing the reason for its inability to issue [an opinion]
30 **A DECISION**; and

31 (ii) issue [an opinion] **A DECISION** as soon as possible but not later
32 than [90] **120** days after the filing of the complaint.

HOUSE BILL 183

1 (2) (I) [An opinion] A DECISION of the Board may state that the Board
2 is unable to resolve the complaint.

3 (II) A PERSON MAY NOT APPEAL UNDER § 4-1A-10 OF THIS
4 SUBTITLE OR § 4-362(A)(2) OF THIS TITLE A DECISION OF THE BOARD STATING
5 THAT THE BOARD IS UNABLE TO RESOLVE THE COMPLAINT.

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

8 4-1A-08.

9 (a) The Board may send to any custodian in the State any written [opinion]
10 DECISION that will provide the custodian with guidance on compliance with this title.

11 (b) The Attorney General shall post on the website of the Office of the Attorney
12 General all of the Board’s written [opinions] DECISIONS under this subtitle.

13 4-1A-10.

14 (a) A person or governmental unit need not exhaust the administrative remedy
15 under this subtitle before filing suit.

16 (b) (1) [A] EXCEPT AS OTHERWISE PROVIDED IN THIS SUBTITLE, A
17 complainant or custodian may appeal the decision issued by the Board under this subtitle
18 in accordance with § 4-362 of this title.

19 (2) An appeal under this subsection automatically stays the decision of the
20 Board pending the circuit court’s decision [or no more than 30 days after the date on which
21 the defendant serves an answer or otherwise pleads to the complaint, whichever is sooner].

22 4-1B-01.

23 In this subtitle, “Ombudsman” means the Public Access Ombudsman.

24 4-1B-02.

25 (b) [The] SUBJECT TO § 4-1A-03(D)(2) OF THIS TITLE, THE Office of the
26 Attorney General shall provide office space and staff for the Ombudsman, with appropriate
27 steps taken to protect the autonomy and independence of the Ombudsman.

28 4-1B-04.

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

14

HOUSE BILL 183

- 1 (1) the custodian’s application of an exemption;
- 2 (2) redactions of information in the public record;
- 3 (3) the failure of the custodian to produce a public record in a timely
- 4 manner or to disclose all records relevant to the request;
- 5 (4) overly broad requests for public records;
- 6 (5) the amount of time a custodian needs, given available staff and
- 7 resources, to produce public records;
- 8 (6) a request for or denial of a fee waiver under § 4–206(e) of this title; [and]
- 9 (7) repetitive or redundant requests from an applicant;
- 10 (8) FEES IMPOSED UNDER § 4–206 OF THIS TITLE; AND
- 11 (9) A REQUEST OR PATTERN OF REQUESTS FROM AN APPLICANT THAT
- 12 IS ALLEGED TO BE FRIVOLOUS, VEXATIOUS, OR MADE IN BAD FAITH.

13 (B) WITHIN 90 CALENDAR DAYS AFTER RECEIVING A REQUEST FOR
 14 DISPUTE RESOLUTION, UNLESS THE PARTIES MUTUALLY AGREE TO EXTEND THE
 15 DEADLINE, THE OMBUDSMAN SHALL ISSUE A FINAL DETERMINATION STATING:

- 16 (1) THAT THE DISPUTE HAS BEEN RESOLVED; OR
- 17 (2) THAT THE DISPUTE HAS NOT BEEN RESOLVED.

18 (C) IF THE OMBUDSMAN ISSUES A FINAL DETERMINATION STATING THAT
 19 THE DISPUTE HAS NOT BEEN RESOLVED, THE OMBUDSMAN SHALL INFORM THE
 20 APPLICANT AND THE CUSTODIAN OF THE AVAILABILITY OF REVIEW BY THE BOARD
 21 UNDER § 4–1A–04 OF THIS TITLE.

22 [(b)] (D) (1) When resolving disputes under this section, the Ombudsman
 23 may not:

- 24 (i) compel a custodian to disclose public records or redacted
- 25 information in the custodian’s physical custody to the Ombudsman or an applicant; or
- 26 (ii) except as provided in [paragraph] PARAGRAPHS (2) AND (3) of
- 27 this subsection, disclose information received from an applicant or custodian without
- 28 written consent from the applicant and custodian.

HOUSE BILL 183

15

1 (2) (I) The Ombudsman may disclose information received from an
2 applicant or custodian to the assistant Attorney General assigned to the Office of the
3 **PUBLIC ACCESS Ombudsman OR TO ANY OTHER PERSON WORKING UNDER THE**
4 **DIRECTION OF THE OMBUDSMAN.**

5 (II) AN INDIVIDUAL TO WHOM THE OMBUDSMAN DISCLOSES
6 INFORMATION UNDER THIS PARAGRAPH MAY NOT DISCLOSE THE INFORMATION
7 WITHOUT WRITTEN CONSENT FROM THE APPLICANT AND CUSTODIAN.

8 (3) THE OMBUDSMAN MAY TRANSFER BASIC INFORMATION ABOUT A
9 DISPUTE, INCLUDING THE IDENTITY OF THE APPLICANT AND CUSTODIAN AND THE
10 NATURE OF THE DISPUTE, TO THE BOARD IF APPROPRIATE STEPS HAVE BEEN
11 TAKEN TO PROTECT THE CONFIDENTIALITY OF COMMUNICATIONS MADE OR
12 RECEIVED IN THE COURSE OF ATTEMPTING TO RESOLVE THE DISPUTE.

13 ~~(E) (1) ON OR BEFORE OCTOBER 1 EACH YEAR, IN CONJUNCTION WITH~~
14 ~~THE REPORT OF THE BOARD REQUIRED UNDER § 4-1A-04 OF THIS TITLE, THE~~
15 ~~OMBUDSMAN SHALL SUBMIT A REPORT TO THE GOVERNOR AND, SUBJECT TO §~~
16 ~~2-1257 OF THE STATE GOVERNMENT ARTICLE, THE GENERAL ASSEMBLY.~~

17 ~~(2) THE REPORT SHALL:~~

18 ~~(I) DESCRIBE THE ACTIVITIES OF THE OMBUDSMAN;~~

19 ~~(II) STATE THE NUMBER AND NATURE OF REQUESTS FOR~~
20 ~~DISPUTE RESOLUTION MADE TO THE OMBUDSMAN;~~

21 ~~(III) DESCRIBE THE AGGREGATE OUTCOMES OF DISPUTE~~
22 ~~RESOLUTIONS CONDUCTED BY THE OMBUDSMAN;~~

23 ~~(IV) HIGHLIGHT ANY AREAS OF CONCERN AND RECOMMEND~~
24 ~~BEST PRACTICES FOR GOVERNMENTAL UNITS IN RESPONDING TO REQUESTS FOR~~
25 ~~PUBLIC RECORDS UNDER THIS TITLE; AND~~

26 ~~(V) RECOMMEND ANY IMPROVEMENTS TO THIS TITLE.~~

27 4-203.

28 (a) (1) Except as provided in paragraph (2) of this subsection, the custodian
29 shall grant or deny the application promptly, but not more than 30 days after receiving the
30 application.

31 (2) The custodian shall grant or deny an application that is the subject of §
32 4-356 of this title not more than 50 days after receiving the application.

1 (d) Any time limit imposed under this section:

2 (1) with the consent of the applicant, may be extended for not more than
3 30 days; and

4 (2) if the applicant **OR CUSTODIAN** seeks resolution of a dispute under [§
5 4-1B-04] **SUBTITLE 1A OR 1B** of this title, shall be extended pending resolution of that
6 dispute.

7 4-362.

8 (a) (1) Subject to paragraph (3) of this subsection, whenever a person or
9 governmental unit is denied inspection of a public record or is not provided with a copy,
10 printout, or photograph of a public record as requested, the person or governmental unit
11 may file a complaint with the circuit court.

12 (2) [Subject] **EXCEPT AS OTHERWISE PROVIDED IN SUBTITLE 1A OF**
13 **THIS TITLE AND SUBJECT** to paragraph (3) of this subsection, a complainant or custodian
14 may appeal to the circuit court a decision issued by the State Public Information Act
15 Compliance Board as provided under § 4-1A-10 of this title.

16 (3) A complaint or an appeal under this subsection shall be filed with the
17 circuit court for the county where:

18 (i) the complainant resides or has a principal place of business; or

19 (ii) the public record is located.

20 SECTION 2. AND BE IT FURTHER ENACTED, That, on or before July 1, 2022, the
21 Office of the Attorney General shall allocate any additional staff members required to be
22 assigned under § 4-1A-03(d)(2) of the General Provisions Article, as enacted by Section 1
23 of this Act.

24 SECTION 3. AND BE IT FURTHER ENACTED, That this Act may not be applied
25 or interpreted to have any effect on or application to any exceptions to disclosure
26 requirements in Title 4 of the General Provisions Article.

27 SECTION ~~3~~ 4. AND BE IT FURTHER ENACTED, That this Act shall take effect
28 ~~October 1, 2021~~ July 1, 2022.

APPENDIX C
REPORT OF THE PUBLIC ACCESS OMBUDSMAN
FY 2021

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

The Ombudsman’s primary duties involve making reasonable attempts to resolve disputes between records custodians and applicants seeking public records under the Maryland Public Information Act (“PIA” or “Act”). The Ombudsman’s process is voluntary, non-binding and confidential. The Ombudsman has jurisdiction to mediate any dispute under the PIA, such as those involving exemptions, the failure of a custodian to respond timely, fee waivers, and repetitive or overly broad requests. *See* § 4-1B-04 of the General Provisions Article of the Maryland Annotated Code and Title 14, Subtitle 37 of the Code of Maryland Regulations.

In addition to mediating PIA disputes, the Ombudsman also regularly provides informal assistance, resource material, and PIA trainings on request. These and other activities are published in summary reports posted to the Ombudsman’s website, <http://piaombuds.maryland.gov>, on a semi-annual, annual, and “since inception” basis.

This report describes the Ombudsman’s activities from July 1, 2020 through June 30, 2021 (“FY 2021”). For additional context, comparative data concerning prior periods is provided in the tables below. Additional information about Ombudsman program activities during FY 2021, is included in the summary statistical report for FY 2021 at App. C-10 - C-11.

ACTIVITIES OF THE OMBUDSMAN

The Attorney General appointed Lisa Kershner as the first Public Access Ombudsman in March 2016 and reappointed her to a second four-year term effective March 30, 2020. The Ombudsman is housed within the Office of the Attorney General (“OAG”) and is supported by the same staff that support the PIACB. Janice Clark serves as program Administrator, and Assistant Attorney General Sara Klemm, serves as program counsel. The Ombudsman thanks the OAG and staff for their exceptional support, skill and professionalism; the Ombudsman could not operate effectively without their support.

Impact of Covid-19 and Mediation Metrics: In March 2020, the Governor declared a state of emergency in Maryland due to the Covid pandemic, and it remained in effect throughout FY 2021. During this time, the Ombudsman program has operated almost entirely remotely, as have many of the state and local government offices with which the Ombudsman works to resolve PIA problems and disputes. The Ombudsman’s data demonstrates that while there have been a number of shifts in the mediation caseload and length of time required to conclude mediations, the overall need for access to public records during the pandemic did not diminish.

Figure 1 below shows that the overall volume of the Ombudsman’s caseload, consisting of requests for mediation and informal requests for assistance (referred to as “Help Desk” or “HD” matters), remained substantially the same in FY 2021 as compared to earlier periods.

Time Period	Carry over from prior year	New Mediation Matters	New HD Matters	Total New Matters	Mediations Closed*
FY 2021	46 carried over from 2020	280	212	492	272 or 83%
FY 2020	19 carried over from 2019	262	235	495	235 or 84%
CY 2019	19 carried over from 2018	279	226	505	252 or 85%
CY 2018	25 carried over from 2017	210	171	406	215 or 91%
CY 2017	63 carried over from 2016	242	68	310	274 or 90%
2016 (9 mos)	N/A	178	32	210	115 or 65%
Since Inception	N/A	1308	839	2147	1254 or 96%

**Closure rate reflected in the “Mediations Closed” column is obtained by dividing the number of mediation matters closed by the total number of open mediations during the period, which includes both “New Mediations” and those carried over from the prior year.*

While the overall volume of incoming requests for mediation is largely unchanged from prior periods, the Ombudsman’s caseload reflects other shifts that are believed to be related to the pandemic. **Figure 2** below reflects a substantial increase in requests for mediation from professional and occupational users of the PIA, a group which includes press and media outlets, non-profit organizations, private attorneys and businesses, among others. As shown below, occupational program users comprised the majority (51%) of all incoming requests for PIA mediation during FY 2021 for the first time in the program’s history. By contrast, individuals using the PIA for purposes unrelated to their business or occupation comprised a substantial majority of the requests for mediation in all prior years.

Time Period	Individual	Professional Occupational User
FY 2021	49%	51%
FY 2020	72%	28%
CY 2019	69%	31%
CY 2018	66%	34%
CY 2017	64%	36%
CY 2016 (9 months)	55%	45%
Since Inception	60%	40%

¹ The Ombudsman does not track the length of time required to close “help desk” matters, which are requests for informal assistance or guidance that do not involve the actual mediation of a dispute. Most often, these requests are made in an effort to prevent a problem from arising and are typically addressed by the Ombudsman and staff very quickly.

Figure 3 reflects that there was also a shift in FY 2021 in the types of agencies participating in mediations. In prior years, both state and local agencies have tended to be more or less equally well-represented in the Ombudsman’s caseload; in FY 2021, however, there was a greater percentage of mediation requests involving state agencies (45%), and a corresponding reduction in matters involving local government (17%). The Ombudsman believes this shift may reflect a greater need for records from the state agencies leading the state’s response to the pandemic. Mediations involving PIA requests to other types of government bodies such as school districts, state’s attorneys’ offices, and other law enforcement agencies, which are captured as “Other” in **Figure 3**, remained substantial (37%), but largely comparable to the volume received in prior years.

Time Period	State	Local	Other*
FY 2021	45%	17%	37%
FY 2020	32%	31%	37%
CY 2019	35%	30%	35%
CY 2018	43%	31%	27%
CY 2017	31%	36%	33%
CY 2016 (9 months)	29%	28%	42%
Since Inception	38%	23%	29%

*Other = public school districts & law enforcement agencies

Figures 4 and 5 below document a shift in the type of issues submitted to the Ombudsman during FY 2021 and the substantial increase in the length of time required to conclude mediations.

Time Period	No/Incomplete Response	Other
FY 2021	65%	35%
FY 2020	54%	46%
CY 2019	51%	49%
CY 2018	35%	65%
CY 2017	37%	63%
CY 2016 (9 months)	53%	47%
Since Inception	50%	50%

Time Period	3 Weeks	6 Weeks	9 Weeks	12 Weeks	12+ Weeks
FY 2021	19%	13%	11%	9%	48%
FY 2020	29%	22%	18%	11%	20%
CY 2019	44%	29%	16%	7%	4%
CY 2018	35%	25%	19%	8%	13%
CY 2017	31%	15%	12%	9%	33%
CY 2016 (9 months)	40%	23%	14%	9%	14%
Since Inception	33%	20%	14%	9%	24%

The Ombudsman’s data suggests that while most agencies attempted to respond to PIA requests during the state of emergency, many were unable to do so within the deadlines provided by the PIA, and they often required significant extensions of time to provide a complete or final substantive response. This is reflected in the substantial increase in the overall percentage of matters in which the presenting issue was the lack of any response to a PIA request and/or the failure of an agency to issue a complete or final substantive response that included, where applicable, the actual production of disclosable public records.

Unlike prior periods, during FY 2021, the problem of a missing or incomplete PIA response was the presenting issue in a substantial majority - nearly two thirds - of all matters submitted to the Ombudsman for mediation. In prior years, these types of problems have tended to be readily resolved once brought to the attention of a person with authority to address the matter; this often was not the case in FY 2021. Rather, during the state of emergency, these types of presenting

problems tended to drag on, sometimes over very protracted periods, thereby contributing to an even greater backlog for responding agencies and for the Ombudsman.

The reasons for these problems appear to vary. Many IT departments have been heavily taxed by the necessity of supporting a remote workforce and the need to provide new services related to the pandemic or to retool existing services so that they could be safely provided. Agencies with limited electronic record management and retrieval capacities at the outset of the pandemic were at a particular disadvantage since, during the state of emergency, they had greater difficulty searching and accessing many of their hard-copy records. Some agencies had to re-deploy personnel to meet shifting needs or lost staff during the pandemic. It also appears likely that some agencies, particularly those at the heart of the state's response to the pandemic, may also have received a heavy volume of requests that exceeded their capacity to respond.²

Other Takeaways from the Pandemic: Some other trends drawn from the Ombudsman's caseload and experience over FY 2021 include:

- Those agencies with efficient electronic records management systems, trained staff, and established procedures for handling PIA requests fared better than those that did not have these resources or processes in place at the start of the pandemic. The Ombudsman's data suggests that many agencies were ill-equipped to respond to PIA requests during the pandemic.
- Expanded "proactive disclosure" practices, together with the maintenance of accurate and up-to-date lists of readily available records that can be produced immediately and without the necessity of a written PIA request or response would have mitigated some of the problems experienced by agencies and requestors alike.³
- While many requestors with whom the Ombudsman worked during the pandemic appreciated the difficulties facing agencies and patiently awaited a response for periods well beyond regular PIA deadlines, requestors who experienced very lengthy delays or who received no response at all eventually grew disheartened and less sympathetic to

² An emergency Order issued by the Governor on March 12, 2020, entitled *Extending Certain Licenses, Permits, Registrations, and Other Governmental Authorizations*, allowed agencies to reset deadlines the agency administered provided the agency followed certain procedures, including submitting the proposed extension to the Governor's office, which then had 24 hours to object to the proposed extension. Absent objection from the Governor's Office, the agency was then required to publish a notice of the extended deadline. This emergency measure was construed by the Governor's Office of Legal Counsel to be applicable to PIA deadlines, among others. The Order is no longer in effect. The Ombudsman is aware of a number of instances in which a state agency or political subdivision followed the requisite process in order to extend otherwise applicable PIA deadlines.

³ Section 4-202(b) of the Public Information Act provides that an applicant need not submit a written application to the records custodian to inspect public records that are listed by the custodian as available immediately on request. Section 4-201(c) requires official custodians to "designate types of public records . . . that are to be made available to any applicant upon request," and to "maintain a current list of the types of public records that have been designated as available to any applicant immediately upon request." Additionally, H.B. 183 includes a provision that directs agencies to develop policies of "proactive disclosure" regarding the types of records that can be made available "proactively," that is, in advance of the receipt of any written request for a public record. H.B. 183 goes into effect on July 1, 2022.

the reasons cited for protracted delay. In short, requestors expected adaptation and improvement, particularly as it became apparent that the pandemic was not going to “go away” quickly.

- During the pandemic, the Ombudsman began to use remote meeting platforms such as “Teams” and “Zoom” in conducting mediations. The ability to bring parties together “face-to-face,” albeit remotely, was particularly useful for matters involving numerous or complex issues, a difficult history between the parties, and/or multiple PIA requests and responses between the same parties. In some instances, the ability to bring parties together in this fashion aided the process and facilitated a mutually satisfactory resolution. Even when the use of remote meeting(s) that included both parties did not lead to a mutually satisfactory resolution, it enabled the Ombudsman to bring these matters to closure more efficiently. For these reasons, the Ombudsman plans to continue to use remote meeting tools together with individual consultations by phone, email and regular mail, as needed.

Outreach and Training: The Ombudsman has seen a steady increase in requests for trainings and “help-desk” assistance since the inception of the program in 2016. Until the onset of the Covid crisis in March 2020, the Ombudsman regularly conducted one to two in-person trainings per month. Since March 2020, however, in-person trainings have been deferred indefinitely. The Office has published guidance on the handling of PIA requests during the pandemic through its blog (“Open Matters”), Twitter account (@MPIA_Ombuds), and website (<http://piaombuds.maryland.gov>) and has conducted PIA trainings remotely on request. The Ombudsman expects that trainings will continue to be conducted on a remote basis for the foreseeable future.

2021 Legislative Session - Impact of House Bill 183: The Ombudsman worked extensively with the PIACB toward passage of H.B. 183 during the 2021 session. As detailed in the Board’s Sixth Annual Report, (see discussion at pgs. 7-9), the bill’s passage this year was the culmination of joint efforts by the Board and Ombudsman beginning in 2019 with the study and publication of their joint report on the PIA, as requested by the Chairmen of the Senate Budget and Taxation and House Appropriations Committees.⁴

H.B. 183 is based on the recommendations in this joint report, and most importantly, provides a mechanism by which requestors and custodians can bring a greater range of issues to the Board for decision if their PIA dispute is not first resolved by mediation with the Ombudsman. The bill, which becomes effective July 1, 2022, thus provides an accessible extra-judicial decisional remedy for most types of PIA disputes where none currently exists.

The bill also for the first time directs agencies to develop policies of “proactive disclosure” of their public records. The policy may take into account the types of records maintained by the agency as well as the staff and budgetary resources of the unit and may include, for example, posting certain records on an agency website. The more fully these policies are embraced and implemented by agencies, the greater their impact will be in reducing staff time and the burden

⁴ *The Final Report on the Public Information Act*, published jointly by the PIACB and the Ombudsman on December 27, 2019, can be found here: <https://news.maryland.gov/mpiaombuds/wp-content/uploads/sites/20/2019/12/Final-Report-on-the-PIA-12.27.19.pdf>.

experienced by agencies in responding to PIA requests, and the delays and frustrations experienced by requestors seeking access to public records.

In February 2021, the Ombudsman testified together with Board member, Darren Wigfield, before the House Government Operations (“HGO”) and Senate Education, Health, and Environmental Affairs (“EHEA”) Committees in support of this important legislation. A copy of the Ombudsman’s written testimony before the HGO committee, which includes projected caseloads for the Board under H.B. 183, is included at App. C-7.⁵

The primary impact of H.B. 183 on the Ombudsman program will include the following.

- For the first time in the program’s history, and effective July 1, 2022, mediation matters will have to be brought to closure within 90 days unless the parties agree to an extension.
- The Ombudsman will be required to issue a “final determination” at the conclusion of each mediation stating the outcome of the mediation, identifying any PIA issues that were not resolved in the mediation, and advising the parties whether further review by the Board is available (applicable to most PIA issues other than a dispute over the denial of a fee waiver).
- Mediations through the Ombudsman program are expected to be more efficient and effective as a result of these changes.

The Ombudsman expects to produce educational materials that can be used by requestors and agencies that will assist in the orderly implementation of H.B. 183. The Ombudsman looks forward to continuing her work with the Board and all stakeholders in order to implement H.B. 183.

CONCLUSION

The Ombudsman wishes to thank the Attorney General for appointing her to this important position. In addition, the Ombudsman extends her thanks to the Board for providing this forum for sharing information about the Ombudsman program. Finally, the Ombudsman wishes to again thank the dedicated staff of the Office of the Attorney General - Janice Clark and Sara Klemm – who tirelessly support the Office of the Public Access Ombudsman, as well as OAG intern, Dennis Blumenfeld, who contributed to this report.

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

Respectfully submitted,
Lisa Kershner
Public Access Ombudsman
September 2021

⁵ The Ombudsman submitted the same written testimony to the Senate EHEA Committee concerning the cross-filed S.B. 449.

LAWRENCE J. HOGAN, JR.
Governor



BOYD K. RUTHERFORD
Lt. Governor

LISA A. KERSHNER
Public Access Ombudsman

STATE OF MARYLAND
OFFICE OF THE
PUBLIC ACCESS OMBUDSMAN

Testimony of Lisa Kershner, Public Access Ombudsman, in support of H.B. 183
Submitted to
Health and Government Operations Committee
February 9, 2021

Dear Chair Pendergrass, Vice Chair Pena-Melnyk, and Members of the Committee:

I serve as Maryland's Public Access Ombudsman, a position I have held since the program began in 2016. I submit this testimony in support of H.B. 183, which strengthens the Maryland Public Information Act ("PIA") and enhances transparency and good government by providing:

1. an accessible administrative remedy, where none currently exists, that will be available to both requestors and agencies to decide PIA disputes that cannot be resolved through mediation alone;
2. for the development by agencies of policies of proactive disclosure of their public records, a measure that will greatly increase public access and at the same time reduce agency workload in responding separately to routine PIA requests; and
3. for the annual reporting by an agency subject to the Act of certain data regarding the PIA requests it receives and the disposition of those requests, thereby increasing transparency regarding actual PIA performance and providing reliable data that can inform future resource allocations and other improvements to the law.

A. *Need for Administrative Remedy for Disputes that Cannot be Resolved by Mediation Alone*

The purpose of the PIA is to make public records broadly available upon request with the least cost and delay possible unless an exemption from disclosure provided by the Act applies. The animating premise of the Act is that transparency is essential to build trust in government and to the functioning of a healthy democratic system of governance—principles which have never been more important—or more in jeopardy—than they are today. The legislature recognized in 2015, when it created the Office of the Public Access Ombudsman and the PIA Compliance Board, that in order to fulfill the purpose of the PIA, it was necessary to establish readily accessible dispute resolution mechanisms that would be broadly available to and accessible by the many diverse requestors who seek access to public records as well as to state and local agencies that are subject to the Act.

To achieve these goals, the Office of the Public Access Ombudsman was created and given a broad mandate to try to resolve a wide range of disputes regarding access to public records under the PIA, but only on a purely voluntary basis. At the same time, the legislature also created a separate program to provide an administrative remedy for PIA disputes via the PIA Compliance Board ("Board"), a five-member volunteer Board whose members are nominated by stakeholder organizations, such as the press, open government advocacy communities, MACO and MML.

Unlike the Ombudsman program, the Board was given decisional authority, but ultimately under 2015's H.B. 755/S.B. 695 as enacted, its jurisdiction was limited to a tiny fraction of actual PIA disputes, namely, PIA fee disputes over \$350.¹ This configuration of the two existing extra-judicial PIA dispute resolution programs has resulted in a Board that is severely under-utilized and of no value in resolving more difficult and protracted disputes such as those involving denials of access to public records, denials of fee waiver requests, and other disputes that are central to the proper implementation of the PIA. While the Ombudsman has broad authority to try to mediate all of these types of disputes, she has no ability to decide or compel any action, and in too many cases, simply is unable to even induce parties to engage with the mediation process in a meaningful way.

H.B. 183 addresses these defects by restoring to the Board the full plenary jurisdiction that was envisioned when it was originally proposed in 2015. One difference is that, under H.B. 183, in order to proceed to Board review, the complaining party must first attempt to mediate the dispute through the Ombudsman, who must then certify that following good faith efforts to mediate, specific issues remain unresolved.

In 2019 and again in 2020, the Office of the Ombudsman performed a detailed review of the Ombudsman's caseload in order to determine the number of disputes, and their level of complexity, that are likely to be in need of a Board remedy.² The data is highly consistent: whether examined on an annual or "since inception" basis, approximately a quarter of the Ombudsman's caseload—or some 50 new matters—are likely to go to the Board for review and decision each year. Additionally, based on our knowledge of the issues present in these matters, we believe that about half of the new matters going to the Board will be subject to summary disposition, with the other half likely to involve some additional work such as research and/or review of additional documentation, for example, record indices or descriptions of privileged records. Based on this evaluation, we believe that the full Board remedy provided by H.B. 183 can be implemented with the addition of two new staff, one of whom would be an attorney and the other, an administrator or paralegal.³

¹ Prior to the changes enacted in 2015, requestors denied access to records by certain State agencies had the ability to challenge those denials administratively through the Office of Administrative Hearings ("OAH"). While H.B. 755 / S.B. 695 originally provided the Board with plenary jurisdiction to decide PIA disputes, the bill was amended to limit the Board's jurisdiction to fee disputes over \$350. Consistent with the original proposed full Board jurisdiction, the bill also eliminated the jurisdiction of OAH to decide PIA disputes. When the bill was amended to provide for the Board's current very limited jurisdiction, the authority of OAH was not reinstated. This history and its impact on dispute resolution under the PIA is described in a 2019 report jointly authored by the Board and Ombudsman. See *Final Report on the Public Information Act* at 9-17 (Dec. 27, 2019), <https://news.maryland.gov/mpiaombuds/wp-content/uploads/sites/20/2019/12/Final-Report-on-the-PIA-12.27.19.pdf>.

² For more details about the case review conducted for all matters handled by the Ombudsman from the start of the program in March 2016 through September 30, 2019 (42 months), please see *Final Report on the Public Information Act* at 13-17. In preparation for submitting this testimony concerning H.B. 183, a similar case review was performed for all matters handled by the Ombudsman from September 30, 2019 through December 31, 2020 (15 months). Thus, our caseload projections and staffing needs assessment are based on a detailed review of specific matters handled by the Ombudsman over 57 months. As further background for the Committee, the Ombudsman's statistical report for 2020, as well as since the start of the program in 2016 are attached to this testimony.

³ The Board and Ombudsman currently are supported by two staff of the Office of Attorney General ("OAG"), an Administrator and Assistant Attorney General. Thus, the provision in H.B. 183—§ 4-1A-03(d)(2)—that calls

If H.B. 183 is enacted, the full Board remedy it provides will maximize the efficiency and effectiveness of the current Ombudsman program and significantly reduce the number of unresolved public record disputes and the resulting frustrations, suspicions and other negative fallout of unresolved, protracted and proliferating disputes with agencies that erode trust in government and sap the productivity and morale of agency staff.

B. Need for Proactive Disclosure of Public Records

H.B. 183 directs agencies to develop practical policies that they can implement to proactively disclose—for example, via a website or other media—their public records in advance of receiving an actual PIA request. Many agencies do this to some degree already. The bill directs that policies be developed at the agency level to implement proactive disclosure to the extent practicable, taking into account the type of records maintained by the agency. Doing so will reduce agency workload by relieving staff of the need to separately answer many routine record requests and will afford requestors greater ease of access to many important agency records.

C. Need for Agency Tracking and Self-Reporting of PIA Data

H.B. 183 also calls for agencies to track and report annually certain basic data about PIA requests and the dispositions of those requests. This tracking and reporting can be done via something as simple as an Excel spreadsheet and/or by maintaining the data and report in any manner that is convenient to the agency and also ensures that the tracking data is either proactively disclosed or readily available on request. Most agencies with any sizeable caseload already do some PIA tracking, and those with a *de minimis* caseload can readily implement such tracking on a going forward basis.⁴ Tracking and annual reporting of PIA data will have several important benefits that cannot be reliably achieved by any other means: 1) it will provide data on agency PIA performance and compliance on a regular and systematic basis; 2) it will assist agencies in spotting areas for improvement and staff training; and 3) it will allow agencies to make a data-based case for the provision of more resources that might be needed to adequately and timely respond to PIA requests.

Conclusion

Right now, there is a pressing need to restore peoples’ trust and faith in their government. Allowing people to see and better understand what their government is doing will go a long way toward restoration of trust and faith. The provisions of H.B. 183 will play a critical and much needed role in insuring that the promise of the PIA is actually fulfilled and functions properly. I thank the Committee for its consideration of this testimony in support of H.B. 183 and look forward to addressing any questions Committee members may have. For all of the reasons discussed above, I ask that the Committee issue a favorable report on H.B. 183.

Respectfully Submitted,



Public Access Ombudsman

footnote continued. for the Board and Ombudsman to be supported by a total of four staff of the OAG, actually provides for the hiring of only two new additional staff.

⁴ *Final Report on the Public Information Act* at 32-33.



Mediation Metric Report of the Public Access Ombudsman

FY 2021 - Annual Report
July 1, 2020 to June 30, 2021

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

492 FY 2021

- ◆ 280 -Mediation requests
- ◆ 212 -Other/"help-desk" inquiries

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

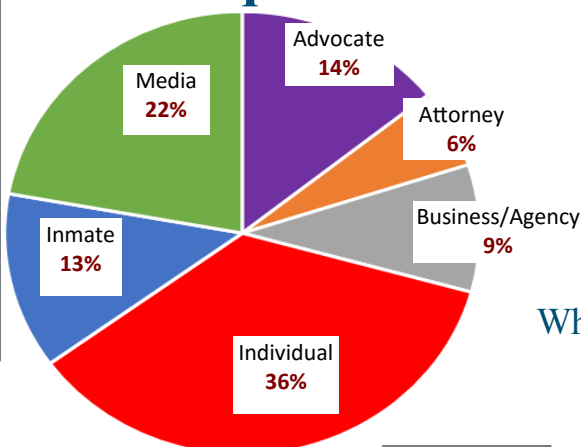
Total Mediation Cases, as of June 30, 2021	
Carry over from FY 2020	46
New/Incoming cases in FY2021	280
Total Number of Mediation cases	326
Total Mediation cases Closed FY 2021	272
Mediation cases carried over to FY 2022	54

The Agencies

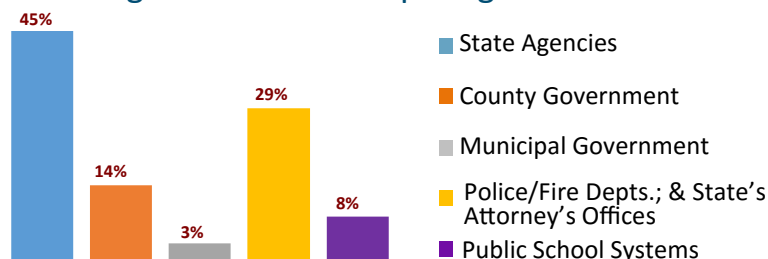
120 unique agencies participated in mediation matters with the PIA Ombudsman in Fiscal Year 2021, including agencies at the state, county, and municipal levels.

The Requestors

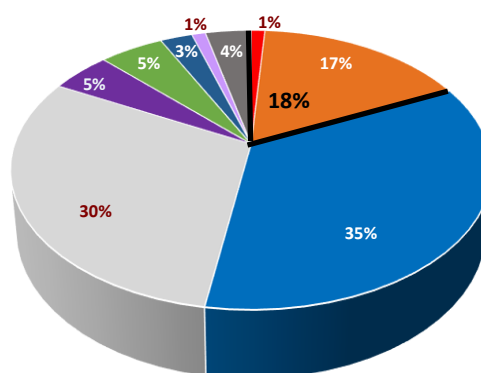
Requestors:
Professional/Occupational requestors make up **51%** of requests for assistance, and all individuals make up **49%**.



What Agencies are Participating in Mediation?



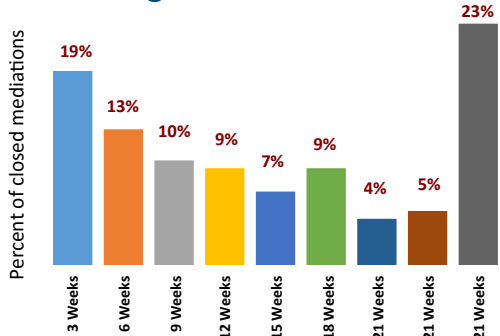
What are the PIA disputes?



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

Range:
1 – 508 days.
19% of the cases are closed within 3 weeks and **43%** by 90 days.

How Long does Mediation Take?



**MPIA Ombudsman
on Twitter
@MPIA_Ombuds**

2021 Legislative Session

House Bill 183 and Senate Bill 449 were introduced early in the 2021 legislative session. These bills were based on recommendations contained in the *Final Report on the Public Information Act* (Dec. 27, 2019), which was published jointly with the PIA Compliance Board. Broadly speaking, the bills provide for a more integrated extra-judicial dispute resolution process and expand the jurisdiction of the Board to resolve a wider variety of disputes. Both bills passed their respective chambers with unanimous support and HB 183 was enacted on May 30, thus becoming law. It takes effect on July 1, 2022.

Several other PIA-related bills were also introduced during the 2021 session, but only one passed and became law. **Senate Bill 178**, which will take effect on October 1, 2021, removes records related to administrative and criminal investigations of alleged police misconduct from the ambit of GP § 4-311's mandatory exemption for personnel records.

Additional analysis of 2021 Legislative Changes to the PIA can be found on the Ombudsman's Blog, *Open Matters* at news.maryland.gov/mpiaombuds/blog.

FY 2021 Open Matters: Blog of the Public Access Ombudsman

- **2021 Legislative Changes to the PIA (Pt. 2)– H.B. 183.** Open Matters Blog, posted 06/21/21
- **2021 Legislative Changes to the PIA – Two Part Series.** Open Matters Blog, posted 06/07/21
- **Ombudsman and members of the PIA Compliance Board unanimously support HB 183.** Open Matters Blog, posted 02/12/21
- **Discretionary Exemptions Series: Investigative Records.** Open Matters Blog, posted 12/28/20
- **New Court Rules Govern Access to Judicial Records .** Open Matters Blog, posted 7/30/20
- **What Criminal Records Can I Get Under the PIA?** Open Matters Blog, posted 07/09/20

RESOURCES/LINKS

- ◆ **MD Office of the Attorney General—PIA Manual 15th Edition:** http://www.marylandattorneygeneral.gov/OpenGov%20Documents/PIA_manual_printable.pdf. The PIA Manual includes Appendix J a List of Public Record Custodians.
- ◆ **MD State Archives:** <http://msa.maryland.gov> is a resource for custodians' record management and retention practices.
- ◆ **Office of Government Information Services (OGIS – FOIA)** <https://www.archives.gov/ogis>
- ◆ **Federal FOIA (Freedom of Information Act) :** <https://www.foia.gov/>
- ◆ **PUBLIC ACCESS OMBUDSMAN**
 - * **Request for Mediation Form:** <https://news.maryland.gov/mpiaombuds/request-mediation>
 - * **Interpretive Regulations:** <https://tinyurl.com/y2cuqp55>
- ◆ **Virginia Freedom of Information Advisory Council:** <http://foiacouncil.dls.virginia.gov/foiacouncil.htm>

Outreach FY 2021

July 1, 2020 – June 30, 2021

Presentations, Workshops, Trainings, and Other Outreach

Due to the COVID-19 state of emergency, in effect throughout the entire FY21, the Public Access Ombudsman's Office conducted all trainings and presentations by remote means.

- Maryland Municipal Attorneys Association, *Legislative changes to the MPIA*, virtual briefing, May 6, 2021
- Senate Education, Health, and Environmental Affairs (EHEA) Committee, Testimony SB 449. February 23, 2021.
- House Health and Government Operations (HGO) Committee , Testimony HB183. February, 11, 2021
- Equitable Access to Government Information Panel, MDCC Press Association Podcast. February 3, 2021
- Maryland Association of Counties, Winter Conference, December 16, 2020.
- Carroll County Sheriff's Office, PIA 101 for Law Enforcement, November 17, 2020.
- Gov't Ops and Health Facilities Subcommittee of the House HGO Committee, Open Government Briefing, October 28, 2020.
- Maryland Municipal League, Academy for Excellence in Local Government, October 9, 2020.
- PIACB Annual Meeting Presentation, Ombudsman's Report, July 29, 2020.

Select Publications

Publications can be found on the Ombudsman's Website at <https://news.maryland.gov/mpiaombuds/paoresources/>.

- **Ombudsman comments**, included as an Appendix to the 2020 Annual Report of the PIA Compliance Board. September 2020
- **Testimony of the Ombudsman** submitted to the House HGO and Senate EHEA Committees concerning HB 183/SB 449. February 2021
- **Final Report on the Public Information Act.** *Submitted by the PIA Compliance Board and the Public Access Ombudsman and pursuant to Committee Narrative in the Report on the Fiscal 2020 State Operating Budget and the State Capital Budget.* December 27, 2019
- **Public Access Ombudsman's Interpretive Regulations:** <https://tinyurl.com/y2cuqp55>, June 2019
- **HB 1105 Report:** *Ombudsman's Report Concerning the Howard County Public School System's Handling of Requests Under the Public Information Act.* December 30, 2016

