Chapter 2:
Right of Access to Records

A. Right to Inspect Records

GP § 4-103(a) provides that "[a]ll persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees." The right is made clear in GP § 4-201(a)(1), which states that, "[e]xcept as otherwise provided by law, a custodian shall permit a person or governmental unit to inspect any public record at any reasonable time." Inspection or copying of a public record may be denied only to the extent permitted under the PIA. GP § 4-201(a)(2).

The PIA grants a broad right of inspection to "any person." The term "person," defined in GP § 1-114, extends to entities as well as individuals. A person need not show that he or she is "aggrieved" or a "person in interest." *Superintendent v. Henschen*, 279 Md. 468 (1977). Nor is access restricted to citizens or residents of Maryland. *Cf. McBurney v. Young*, 133 S. Ct. 1709 (2013) (holding that provision of Virginia FOIA law limiting access to Virginia citizens did not violate federal Constitution). In most cases, a person need not justify or otherwise explain a request to inspect records, and a custodian of records may not require a person to say who they are or why they want the records as a prerequisite to responding to a request. GP § 4-204. Nor may a custodian ignore a request on the grounds that it was made for the purpose of harassment. GP § 4-203(c)(2).

In some instances, the PIA provides a "person in interest" with a greater right of access to a particular type of record than that available to other requesters. In these instances, the custodian must determine whether the requester is a "person in interest." Such special rights of access apply to the following types of records or information: examination records (GP § 4-345(b)), information about a person's finances (GP § 4-336(c)), higher education investment contracts (GP § 4-314(b)), information relating to notaries (GP § 4-332(d)), licensing information (GP §§ 4-333(d) and 4-334(b)), medical or psychological information (GP § 3-229(c)), personnel records (GP § 4-311(b)), records pertaining to investigations (GP § 4-351(b)), retirement records (GP § 4-

312(b)), student records (GP § 4-313(b)) records concerning persons with alarm or security systems (GP § 4-339(b)), and records with identifying information concerning enrollees at senior centers (GP § 4-340(c)).

The term "person in interest" is defined generally by GP § 4-101(g) as the subject of the record or, in some cases, that person's representative. Cases construing the term "person in interest" within the investigatory records context have limited it to the person that is being investigated and have not extended it to either the complainant or the person performing the investigation. *See Maryland Dep't of State Police v. Dashiell*, 443 Md. 435 (2015) (person making the complaint that triggered internal investigation is not a "person in interest"); *Mayor and City Council of Baltimore v. Maryland Committee Against the Gun Ban*, 329 Md. 78 (1993) (political committee that was served with a subpoena was not a "person in interest" in connection with records relating to a Baltimore City Police Department Internal Affairs investigation; the officers who served the subpoena were the subject of the investigation and were thus the "persons in interest"); *see also* 71 *Opinions of the Attorney General* 297 (1986) (with respect to a tape recording of a hearing involving involuntary admission of a patient to State mental health facility, "the person in interest" is the patient or the patient's representative, not the staff who participated in the hearing).

The term "person in interest" includes the "designee" of the person who is the subject of the record. GP § 4-101(g). While the statute does not state how an individual is identified as a "designee," agencies may find it useful to require affirmation from the person who is the subject of the record when access to the record is otherwise limited. Letter of Assistant Attorney General Bonnie A. Kirkland to Delegate Kevin Kelly (April 14, 2004). If a "person in interest" has a legal disability, then that individual's parent or legal representative may act on the individual's behalf as a "person in interest." GP § 4-101(g)(2). However, a parent whose parental rights have been terminated with respect to a child may not act as a "person in interest" on the child's behalf. 90 *Opinions of the Attorney General* 45, 58-59 (2005).

While a custodian cannot require a requester to explain the purpose for which the requester wants the records as a prerequisite to responding to a PIA request, the requester's intended use may be an appropriate subject of discussion in certain circumstances. For example, a requester who wishes to convince a custodian that it is "in the public interest" for the requester to waive a fee under GP § 4-206(e) or to release records covered by one of the discretionary exceptions in Part IV may choose to explain

the purpose underlying the request. *See* pp. 3-28 and 7-3 below. The use to which the requester intends to put the requested information may also be relevant in an action for a protective order brought under GP § 4-358. *See Howard v. Alexanderson*, Nos. C-13-063914, C-13-063484 (Cir. Ct. Carroll Cty. Jan. 16, 2014); p. 3-43 below.

An agency has no obligation to *create* records to satisfy a PIA request. For example, if a request is made for the report of a consultant and the consultant did not issue a written report, the PIA does not require that a written report be created in order to satisfy the request.

Whether or not an agency response would involve the creation of a "new record" has sometimes arisen in the context of electronic records. For example, if an agency maintains certain records in an electronic database and a PIA request seeks a subset of that database or the generation of a report from the database, is the request seeking access to existing records – required by the PIA – or seeking the creation of a "new record" – not required by the PIA?

In the past, agencies sometimes declined to fulfill such requests on the basis of authority from other jurisdictions that public records acts do not require an agency to "reprogram" its computers to respond to a request. *See Yeager v. DEA*, 678 F.2d 315, 324 (D.C. Cir. 1982). In 2011, the General Assembly addressed this question in legislation concerning access to electronic records under the PIA. 2011 Md. Laws, ch. 536; *see* pp. 6-2 through 6-4 below. In a provision obligating a custodian of records to provide a copy of an electronic record in a "searchable and analyzable electronic format," the General Assembly indicated that the custodian was not required to "create, compile, or program a new public record." GP § 4-205(c)(4)(i). The 2011 law also provided that, "if a public record exists in a searchable and analyzable electronic format, the act of a custodian providing a portion of the public record in a searchable and analyzable electronic format does not constitute creating a new public record." GP § 4-205(c)(5).

Application of this provision will depend on the nature and characteristics of particular databases, but generally speaking, an agency is obligated to extract data from an existing database if it has the capacity to do so "within [its] existing functionality and in the normal course." *Comptroller of the Treasury v. Immanuel*, 216 Md. App. 259, 271 (2014). So, an agency should comply with a request if it has staff available who routinely perform the type of data extraction requested, but need not do so if it

would call for expertise outside the agency's existing capabilities. Nor must the agency comply with requests that call for it to generate new data or analyze or summarize data. 216 Md. App. at 271-72 (requiring Comptroller to extract data from database of unclaimed property).

Sometimes a person will present an agency with a "standing request" which seeks production of a category of public records at regular intervals in the future as those records are created. Although an agency may honor such a request, the agency is not required to commit itself to provide records that have not yet been created. *See* Letter of Assistant Attorney General Jack Schwartz to Mark M. Viani, Associate County Attorney, Calvert County (May 22, 1998).

Of course, records no longer retained by an agency cannot be examined. *Prince George's County v. The Washington Post Co.*, 149 Md. App. 289, 323 (2003). However, a custodian should not destroy records to avoid compliance with a pending request or in a manner contrary to the agency's record retention schedule.

B. Government Agency's Access to Records

The PIA generally regulates the access of one government agency to the records of another. A governmental unit is specifically given the right to inspect public records in GP §§ 4-103(b), 4-201(a), and 4-202(a) and is given the right to appeal a denial of inspection by GP §§ 4-361 and 4-362. Thus, when a request for inspection of records is made to a State agency by another State agency, a federal agency, or a local government entity, the custodian should consider the effect of the PIA. *See Prince George's County v. Maryland Comm'n on Human Relations*, 40 Md. App. 473, 485 (1978), *vacated on other grounds*, 285 Md. 205 (1979); 81 *Opinions of the Attorney General* 164 (1996); *see also* 86 *Opinions of the Attorney General* 94, 108-09 (2001). In addition, the agencies involved should consider whether another law governs the matter of interagency access. For example, requests for access to records by the Legislative Auditor in connection with an audit are *not* governed by the PIA. 76 *Opinions of the Attorney General* 287 (1991). If the other law limits access to records, the requesting agency has no greater access under the PIA, as the PIA always defers to other law. 92 *Opinions of the Attorney General* 137, 145-47 (2007).

C. Scope of Search

The PIA does not address the issue of the adequacy of the agency's search for records. Guidance may be found, however, in the case law under FOIA. In judging the adequacy of an agency's search for documents in response to a FOIA request, the court asks whether the agency has conducted a search reasonably calculated to uncover all relevant documents, not whether it has unearthed every single potentially responsive document. *Ethyl Corp. v. EPA*, 25 F.3d 1241 (4th Cir. 1994); *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 719-20 (2011) (applying FOIA standard in absence of analogous provision of state law). Under this standard, agencies may be required to conduct relatively broad and time-consuming searches. *See*, *e.g.*, *Ruotolo v. Dept. of Justice*, 53 F.3d 4 (2d Cir. 1995) (onus is on the agency to demonstrate that a search would be unduly burdensome, and this obligation is met only in cases involving truly massive volumes of records). However, an agency would normally not be required to enlist specialized assistance to reconstitute discarded or deleted records. *Care To Live v. Food and Drug Administration*, 631 F.3d 336, 343-44 (6th Cir. 2011) (agency need not obtain assistance of information technology expert to recover deleted e-mails and electronic documents in order to conduct a reasonable search).