Chapter 5:
Administrative and Judicial Review

A. Judicial Enforcement

The PIA provides for judicial enforcement of the rights provided under the Act. GP § 4-362. It authorizes a suit in the circuit court to "enjoin" an entity, official, or employee from withholding records and order the production of records improperly withheld. Under a 2014 amendment to this provision, the right to judicial review now expressly includes the right to challenge an agency's refusal to provide copies of responsive records. *See* 2014 Md. Laws, ch. 584.

1. Limitations

The Court of Special Appeals has held that actions for judicial review under GP § 4-362 of the PIA are controlled by § 5-110 of the Courts and Judicial Proceedings Article, which has a two-year limitations period, rather than by what is now Rule 7-203, which would require the action to be brought within 30 days. The Court did not decide whether proceedings under what is now GP § 4-362 are subject to any other rules governing administrative appeals. *Kline v. Fuller*, 56 Md. App. 294 (1983). Given that a requester may make a new PIA request after a period of limitations has expired concerning the denial of a prior request, the Court of Special Appeals has characterized the two-year limitations period as of "minuscule significance." *Blythe v. State*, 161 Md. App. 492, 512 (2005).

2. Procedural Issues

- **Venue.** Venue is proper where the complainant resides or has a principal place of business or where the records are located. GP § 4-362(a); s*ee Attorney Grievance Commission v. A.S. Abell*, 294 Md. 680 (1982).

- **Answer.** The defendant must answer or otherwise plead within 30 days after service, unless the time period is expanded for good cause shown. GP § 4-362(b)(1).

- **Expedited hearing.** GP § 4-362(c) provides for expedited court proceedings in PIA cases. The agency and counsel should cooperate if the plaintiff seeks a quick judicial determination.

- **Intervention.** In some cases, it may be appropriate for a third party to intervene in an action for disclosure. For example, if the issue is the release of investigatory, financial, or similar records, the person who is the subject of the records may wish to intervene under Maryland Rule 2-214. In an appropriate case, particularly one involving confidential business records, the agency should consider inviting affected persons to intervene. In that event, an affected person's failure to seek intervention may itself be an indication that the records are not truly confidential.

3. Agency Burden

The burden is on the entity or official withholding a record to sustain its action. GP § 4-362(b)(2). If the custodian invokes the agency memoranda exception, however, and the trial court determines that one of the privileges embraced within that exemption applies, the custodian will have met the burden of showing that disclosure would be contrary to the public interest. *Cranford v. Montgomery County*, 300 Md. 759, 776 (1984). The PIA specifically provides that the defendant custodian may submit a memorandum to the court justifying the denial. GP § 4-362(b)(2)(ii). *Cranford* discusses the level of detail necessary to support a denial of access.

To satisfy the statutory burden, an entity or official withholding a record must put forth evidence sufficient to justify the decision. In some circumstances, a court may require the agency to file a *Vaughn* index (named after *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973)) detailing each record withheld or redacted by author, date, and recipient, stating the particular exemption claimed, and providing enough information about the subject matter to permit the requester and court to test the justification of the withholding. *See Blythe v. State*, 161 Md. App. 492, 521 (2005).

A regulatory agency that denies a person in interest access to an investigatory file under GP § 4-351 must establish first, that the file was compiled for a law enforcement purpose and, second, that disclosure would have one of the effects under GP § 4-351(b). *Fioretti v. State Board of Dental Examiners*, 351 Md. 66 (1998) (holding

in plaintiff's favor because the agency failed to support its motion to dismiss with affidavits, a summary of the file, or other relevant evidence).

In contrast, a law enforcement agency enumerated under GP § 4-351(a)(1) is presumed to have compiled an investigatory file for law enforcement purposes. *Blythe v. State*, 161 Md. App. 492, 525-26 n.6 (2005). Because a generic determination of interference with a pending investigation can be made, a "*Vaughn* index" listing each document, its author, date, and general subject matter, and the basis for withholding the document, is not required. *See Office of the State Prosecutor v. Judicial Watch, Inc.*, 356 Md. 118 (1999). However, the custodian nevertheless bears the burden of "demonstrating, with particularity and not in purely conclusory terms, precisely why the disclosure [of an investigatory record] 'would be contrary to the public interest'" and exploring the feasibility of severing a record "into disclosable and non-disclosable parts." *Blythe v. State*, 161 Md. App. 492, 527 (2005).

The court may examine the questioned records *in camera* to determine whether an exception applies. GP § 4-362(c)(2); *see Equitable Trust Co. v. State Comm'n on Human Relations*, 42 Md. App. 53 (1979), *rev'd on other grounds*, 287 Md. 80 (1980). GP § 4-362(c)(2) is discretionary, not mandatory. Whether an *in camera* inspection will be made ultimately depends on whether the trial judge believes that it is needed for a responsible determination on claims of exemption. *Cranford v. Montgomery County*, 300 Md. 759, 779 (1984); *see also Zaal v. State*, 326 Md. 54 (1992) (discussing alternative approaches to protecting sensitive records).

B. Administrative Review

In addition to judicial review, a PIA applicant has two options for less formal, administrative review of agency decisions: the Public Access Ombudsman and the State Public Information Act Compliance Board. Both were added to the statute during the 2015 session to give applicants a means of obtaining review of agency decisions without the delay and expense associated with formal administrative or judicial litigation.

1. Public Access Ombudsman

The Ombudsman is a State official charged with making reasonable attempts to resolve disputes between custodians and applicants. Although the Ombudsman's role

is not limited to particular types of disputes, the statute lists some disputes that the Ombudsman is specifically charged with hearing:

- the application of an exemption;
- redactions;
- the failure to respond in a timely manner or to provide all responsive records;
- overly broad requests;
- the amount of time a custodian needs, given available staff and resources, to produce public records;
- requests for or denials of fee waivers; and
- repetitive or redundant requests.

GP § 4-1B-04(a). The Ombudsman plays the role of mediator only. The Ombudsman does not have the power to compel the custodian to disclose records or information, or even to provide materials for *in camera* review. GP § 4-1B-04(b)(1). Nor does the Ombudsman have the power to conclusively resolve a dispute for purposes of judicial review. Instead, the Ombudsman is charged with trying to resolve disputes in a manner that is acceptable to both the conclusion and the applicant. The ultimate decision whether to accept the Ombudsman's resolution lies with the parties.

The Act does not expressly require an applicant or custodian to bring a dispute before the Ombudsman before seeking judicial review under GP § 4-362. Given that the Ombudsman's resolution of a dispute is non-binding, the intent of the Legislature appears to have been to provide a separate, entirely voluntary means of resolving disputes. Although Ombudsman review is voluntary and non-binding, the burden is on the custodian to demonstrate that a denial is "clearly applicable to the requested public record." GP § 4-301(b)(1). And if the denial is based on one of the discretionary exemptions in Part IV, the custodian must demonstrate that "the harm from disclosure . . . is greater than the public interest in access to the information in the public record." GP § 4-301(b)(2).

2. State Public Information Act Compliance Board

The State Public Information Act Compliance Board is charged with resolving complaints that a custodian has charged an unreasonable fee of more than $350. For the Board to have jurisdiction, the fee charged must exceed $350; a smaller fee cannot form the basis of a complaint before the Board. GP §§ 4-1A-04(a)(1), 4-1A-05(a). In this respect, then, the Board's role is more limited than the Ombudsman's.

The Board, however, has greater powers than the Ombudsman. Where the Ombudsman plays the role of informal mediator, the Board is authorized to issue written decisions with binding effect. Specifically, the Board, if it determines that the custodian has charged an unreasonable fee of more than $350, has the power to order the custodian to reduce the fee to a reasonable amount determined by the Board and refund the difference. GP § 4-1A-04(a)(2), (3).

Proceedings before the Board are initiated by the filing of a complaint signed by the applicant or the applicant's designated representative. GP § 4-1A-05. The complaint, among other things, must identify the custodian and describe the fee that the custodian charged, the date it was charged, and the circumstances surrounding the imposition of the fee. GP § 4-1A-05(b). The complaint must be filed within 90 days after the date of the challenged action. *Id.*

After a complaint is filed, the Board must refer it to the custodian identified in the complaint. The custodian then has 15 days, from receipt of the complaint, in which to file a written response. If requested by the Board, the custodian must include in the response the basis for the fee that was charged. GP § 4-1A-06(b). If the custodian does not file a response within 45 days of the Board's notice, the Board must decide the case on the facts before it. GP § 1-4A-06(c). If the custodian files a response and the information in the complaint and response is sufficient for the Board to resolve the complaint, the Board may do so without further inquiry and issue a written opinion determining whether the fee violated the "reasonable fee" provisions of GP § 4-206. GP § 4-1A-07(a)(2).

If the Board is not able to resolve the complaint on the basis of the complaint and response, it may hold an informal conference to "hear from the complainant, the custodian, or any other person with relevant information about the subject of the complaint." GP § 4-1A-07(b). The Board may allow the parties to present testimony

in person, via teleconference, or in writing. If the parties elect to participate in person, the Board must hold the conference at a location "as convenient as practicable" to the parties. *Id.* Although the conference apparently allows for the Board to hear testimony and admit evidence, it is not a contested case hearing within the meaning of the APA. GP § 4-1A-07(b)(3).

The Board must issue a written opinion within 30 days of receiving the custodian's response or, if it elects to hold an informal conference, within 30 days after the conference. If the Board is unable to render a decision within that time period, it must state the reasons for its inability and issue an opinion as soon as possible thereafter, but not later than 90 days after the filing of the complaint. GP § 4-1A-07(c)(1). The Board may, however, state that it is unable to resolve the complaint. GP § 4-1A-07(c)(2). The Board's opinions are posted on the Attorney General's website.

The applicant need not pursue a complaint before the Board, but may instead elect to proceed straight to judicial review without having to exhaust the administrative remedy. GP § 4-1A-10(a). But if an applicant elects to file a complaint with the Board, the Board's resolution of that complaint may be appealed—by either party, depending on the outcome—to the circuit court for the county where the complainant resides or has a principal place of business or where the public record is located. GP §§ 4-1A-10(b)(1); 4-362(a)(2), (3). The filing of an appeal automatically stays the effect of the Board's decision for 30 days from the date on which the defendant serves an answer or otherwise pleads to the complaint, whichever is sooner. GP § 4-1A-10(b)(2). This limited stay appears to have been designed to allow the custodian a period of time in which to seek from the circuit court, under the provisions of Title 7 of the Maryland Rules, a more extended stay pending appeal.