

## **PRELIMINARY FINDINGS FOR HOUSE BILL 1105**

### **Submit Your Comments!**

During the 2016 legislative session, the **Maryland General Assembly** passed House Bill (“H.B. 1105”). This bill tasked the **Maryland Office of the Public Access Ombudsman** to investigate and issue a public report by **January 1, 2017** concerning the Howard County Public School System’s handling of public records and **Public Information Act** requests during the period from **July 1, 2012** through **December 31, 2015**.

The Ombudsman is currently seeking comments on **PRELIMINARY FINDINGS** relating to the following areas/topics:

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

The Ombudsman invites all persons who have knowledge, information, documentation, or comments concerning the **Preliminary Findings** to submit same (including any supporting documentation you wish to submit) as promptly as possible but no later than by Close of Business **December 5** to:

Email: [HB1105Comment@oag.state.md.us](mailto:HB1105Comment@oag.state.md.us).

Use the subject “Re: HB 1105”

**- OR -**

Office of the Public Access Ombudsman  
200 Saint Paul Place  
Baltimore, MD 21202-2021

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

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

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

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

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

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

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

**A. BACKGROUND**

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

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

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

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

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

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

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

During the reporting period, HCPSS generally managed its handling and response to PIA requests electronically, frequently by email. From and during approximately late 2012 through 2013, HCPSS transitioned from use of the email platform known as “First Class” to its current Microsoft platform known as “Exchange”. Both HCPSS’ earlier and current email platforms are handled by HCPSS’ servers.<sup>1</sup>

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

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

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

Work performed by these consultants from mid-2012 through spring 2013 resulted in the development, presentation, and Board approval on May 9, 2013, of certain amendments to HCPSS’ Policy 3050:

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<sup>1</sup> The email servers used in conjunction with the earlier “First Class” email platform, as well as backup tapes, are maintained in storage by HCPSS.

Records Management Policy, and the development of recommended records retention schedules necessary to implement the policy.<sup>2</sup>

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

## **B. INFORMATION SOURCES**

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

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

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

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

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

## **C. PRELIMINARY FINDINGS**

### **Statistical Information**

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

- approximately **34 files** for fiscal year 2013 (July 1, 2012 – June 30, 2013);
- approximately **40 files** for fiscal year 2014 (July 1, 2013 – June 30, 2014);
- approximately **75 files** for fiscal year 2015 (July 1, 2014 – June 30, 2015);
- approximately **75 files** for fiscal year 2016 (July 1 - Dec. 31, 2015).

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<sup>2</sup> Policy 3050 was first approved by the HCPSS Board in **April 2011** without accompanying records retention schedules. It was later approved by the Board as amended in **May 2013** pursuant to the recommendations of its consultants. The records retention schedules developed and recommended by the consultants in 2013 have not been submitted by HCPSS to State Archives for approval nor have they been implemented by HCPSS to date.

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

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

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

Several additional PIA matters for which HCPSS produced no records were identified based solely on the requestor's records. Two such requests were made by counsel for the requestor in calendar years 2012 and 2014 and are discussed on pages 7 herein.<sup>4</sup>

### **Reporting Categories**

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

Generally, HCPSS' files that presented H.B. 1105 issues include files 1) in which the response was inconsistent with other HCPSS documentation, including responses to other similar types of PIA requests, 2) did not contain documentation of the basis for the response, and/or 3) was the subject of a requestor complaint or dispute that often prompted the requestor to make additional related requests in follow-up of the original request.

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<sup>3</sup> Approximately 16 of these matters are fiscal year 2016 files in which records were produced within 10 days without claim of exemption or assessment of fees. Many of these files relate to the same request submitted by different requestors to which HCPSS responded by producing records in compact disk format.

<sup>4</sup> The Ombudsman has no way of determining whether there are additional missing PIA requests/matters during the reporting period; apart from secondary documentation produced by HCPSS, the only source of information available to the Ombudsman about missing PIA matters is requestor records.

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

**PIA Requests for Names of HCPSS Employees & HCPSS Email Addresses**

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

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

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

**PIA Requests for Other Types of Data**

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

In these and other cases, HCPSS routinely answered the request by stating, for example, that, “[t]he information you are requesting does not exist” (media request for records reflecting number and status of lawsuits and related expenses)<sup>5</sup> or “no such report exists” (number of computers per school<sup>6</sup>; June

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<sup>5</sup> The response at best seems doubtful given the number and variety of contexts in which this type of data typically would be required in carrying out ordinary functions and operations (*e.g.*, audit, insurance, budget/fiscal and Board oversight). In response to the Ombudsman’s inquiry regarding this response, HCPSS advised “[n]o current staff members worked on this records request. We are checking with our attorneys to find out who may have helped with this request.”

<sup>6</sup> An internal HCPSS email in this file states, “there is no report that says how many computers are in each school but one can be created in about 2 hours.” This information (*i.e.*, that a report could be created in about 2 hours) was not provided to the requestor, nor was any fee estimate provided to the requestor.

2015 request for documents reflecting number of special education-eligible students receiving high school diplomas or Certificates of Completion<sup>7</sup>).

### **PIA Requests Re: DMC Special Education Consulting Engagement**

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

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

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

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

During this court case, HCPSS also produced previously requested comments that were obtained in response to an online parent survey conducted as part of the DMC Special Education Opportunities Review Engagement.<sup>8</sup>

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<sup>7</sup> After receiving this response, the file reflects that the requestor attempted to follow-up staff. The HCPSS file does not reflect the outcome of these efforts. Upon inquiry by the Ombudsman, HCPSS reported that a current staff believes that the requestor was told by a former staff “*that the MPIA does not require HCPSS to create any reports that don’t already exist.*” This was a verbal conversation. No documentation was saved to the file.

<sup>8</sup> These parent survey comments were first sought by this requestor in February, 2015. HCPSS denied this request stating, “the online survey ... was conducted and hosted by the independent contractor and is in the possession of the contractor who has ownership. The Board does not have any information that is responsive to this request.” Notwithstanding this response, HCPSS demonstrated its access to these survey comments by its production of them (in redacted form) in this PIA-related litigation.

## **H.B. 1105 (iii): The Reasonableness of Requestor Complaints**

### **No Response, Incomplete Response & Non-Compliant PIA Responses**

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

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

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

In April 2014, different counsel for the parents made a follow-up PIA request to HCPSS seeking “all of the student records” pertaining to her clients’ deceased daughter. This request, which was addressed to the principal of the high school the student had attended, itemized the records produced in 2012 as well as specific records encompassed by the 2012 request that had not been produced by HCPSS. No written response to this 2014 PIA request and no additional records were received by counsel or her clients in response to this request. Likewise, HCPSS has not produced any documentation of a PIA response to this 2014 request to the Ombudsman.<sup>9</sup>

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

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<sup>9</sup> In February 2016, the Deputy Superintendent wrote to the parent of this deceased student in response to the parent’s continuing efforts to obtain all requested student records. This response enclosed approximately 130+ pages of HCPSS records pertaining to the requestor’s daughter and represented that all of these records had been previously produced to the requestor. There is no documentation, however, that the bulk of these documents were ever produced to the requestor prior to 2016.



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

### **Assessment of Fees**

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

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

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

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

The handling of media requests for records related to mold and indoor air quality conditions in HCPSS schools is also illustrative. Of approximately 17 media requests during fiscal year 2016 concerning mold and air quality conditions in HCPSS schools, fees were assessed in all but one instance even though requestors asked that fees be waived and narrowed their requests in an effort to minimize the time and labor required to fulfill them.<sup>10</sup>

In an earlier (fiscal year 2013) case, HCPSS denied a fee waiver request by a different media requestor (and instead assessed fees of \$405) without informing the requestor that all but one of the 10 years of requested data could be provided in 10 to 15 minutes, and therefore without charge, per information provided by the HCPSS IT department.<sup>11</sup>

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<sup>10</sup> The reasons for denying fee waivers for media requestors are unclear. The Ombudsman is aware that some agencies often waive fees for media requestors in light of the recognized public interest, favoring the broad dissemination of information of importance to the public.

<sup>11</sup> In contrast, retrieval of data for the earliest year, which accounted for the entire fee, was expected to require nearly a full day due to the need to query archived data on the mainframe.

## Timeliness of Response

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

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

Although there are instances in which HCPSS’ response exceeded the maximum 30-day and/or 10-day letter deadlines, missed deadlines do not appear to be a significant cause or driver of most disputes that occurred between HCPSS and requestors during the reporting period.<sup>12</sup> Rather, the issues and concerns that most often led to complaints or disputes resulted from the withholding of records, failure to respond to PIA requests and the assessment of fees.

## **C. CONCLUSION – REQUEST FOR COMMENT**

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

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

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

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<sup>12</sup> For example, during fiscal year 2016, **21 of 35 PIA files** reflect that HCPSS did not comply with the then new 10-day letter requirement, and in another six PIA matters, HCPSS’ response was not within the outside 30-day statutory deadline. Nonetheless, to the best of the Ombudsman’s knowledge, these missed deadlines were not the subject or focal point of any requestor complaint, *per se*.