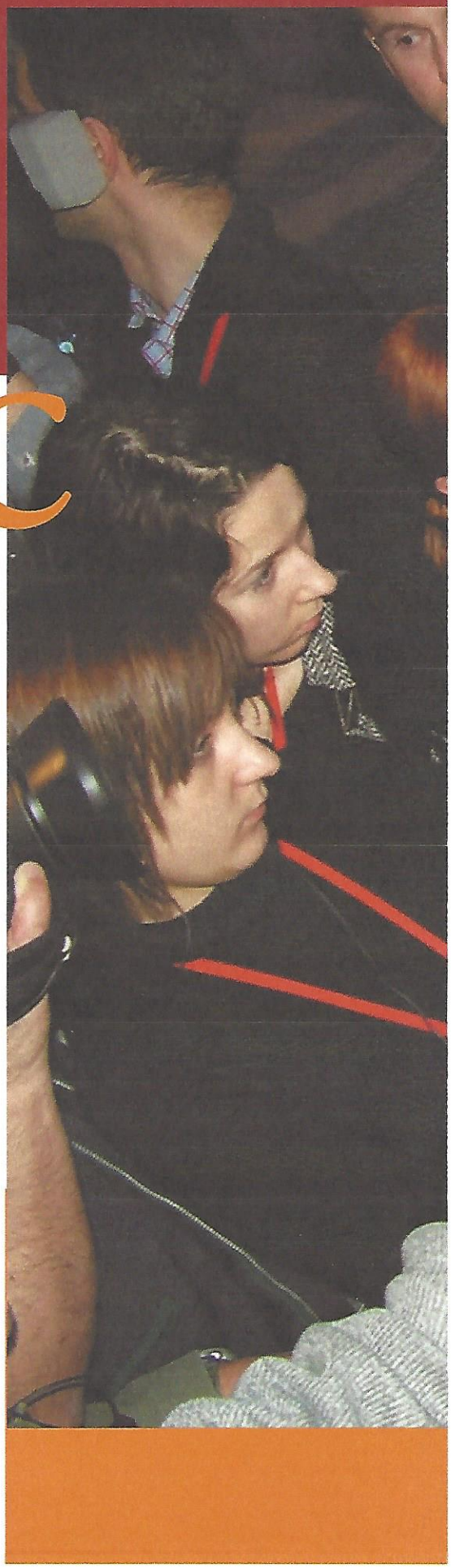
Maryland Public Information Act:

Maxims, Myths and Misunderstandings



By Robert N. McDonald

Those who have seen the movie Erin Brockovich may recall that its plot turns on a public records request. An attorney prosecuting a class action environmental suit against a California utility company is looking for information that will relate the utility's activities to his clients' illnesses. His assistant, Erin Brockovich, played by Julia Roberts, goes to an obscure water agency and requests access to certain public records. An eager young clerk, smitten by the charms of the requester, furnishes the records that turn out to be the key to the law suit's success.

In Maryland, no glamor is necessary to access public records. As any attorney representing a state, county, or municipal agency can attest, the Maryland Public Information Act ("PIA") provides any member of the public with a broad right of access to agency records. The statute, having now attained its 40th birthday, is codified in the Annotated Code of Maryland, State Government Article ("SG"), §10-611 *et seq.* When it was first enacted in 1970, it was drawn partly from the federal Freedom of Information Act ("FOIA") and partly from public records statutes previously enacted in certain western states. Since then, the Legislature has tweaked the PIA from time to time, though the basic structure of the statute has remained constant. Its provisions have been the subject of several dozen appellate court decisions and Attorney General opinions.

This article will state some basic propositions about the PIA and suggest which are true (maxims), which are false (myths), and which are simply misunderstandings of the statute.

Maxims

1. The general rule under the Public Information Act is to disclose.

The PIA's governing principle is 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." SG §10-612(a). More concretely, "[e]xcept as otherwise provided by law, a custodian [of public records] shall permit a person ... to inspect any public record at any reasonable time." SG §10-613(a)(1). These sentiments are based on the same insight that led Justice Brandeis to write in 1915 that "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."

2. As with all general rules, there are exceptions.

There are many exceptions to the general rule of disclosure – 43 specific enumerated exceptions defined in the PIA with varying degrees of specificity and subject to various conditions – and several exceptions that simply incorporate privileges and confidentiality provisions already established in the common law, statute, or court rule. In general, the exceptions appear designed to preserve legal privileges, safeguard personal and financial privacy, promote free competition, protect intellectual property, ensure the integrity of investigations, and protect public security.

Not surprisingly, exceptions protect the confidentiality of medical information, personal financial information, personnel records of government employees, and privileged communications (e.g., executive privilege, attorney-client privilege). Other exceptions are less intuitively obvious or relate to narrower subjects. For example, one exception concerns the location of endangered species (SG §10-617(g)); another protects photographic images taken by traffic control signal monitoring systems (SG §10-616(o)).

If an agency declines to provide access to a record, or to some information in a record, it must identify the exception that allows it to withhold that specific record or information.

3. The PIA always defers to other law.

One of the exceptions to the PIA's general rule of disclosure provides that "a custodian shall deny inspection of a public record ... if by law, [the record] is privileged or confidential" (SG §10-615(1)). This exception encompasses any other statute or common law rule that would preclude public access to a government record. The PIA thus defers to other laws that prohibit disclosure of a particular record or particular information. For example, the Juvenile Causes Act makes confidential many records relating to proceedings involving children (Courts & Judicial Proceedings Article, §3-827, §3-8A-27). The PIA is designed to respect that confidentiality; such records would not be available in response to a PIA request.

Conversely, the sections of the PIA that allow or mandate that an agency withhold records from public access each begin with the proviso "unless otherwise provided by law." Thus, the provisions of the PIA that might prevent access to records bow to other laws that open those records to public inspection. For example, real property assessment records that might otherwise be considered personal financial information are open to public inspection without charge (Tax-Property Article, §2-211); certain police records that might be covered by the investigative records exception of the PIA are available to criminal defendants under the rules governing criminal discovery (Maryland Rules 4-262, 4-263).

4. It does not matter who you are or why you want the records.

For the most part, the identity and motive of the requester do not affect an agency's response under the PIA. And an agency cannot make disclosure of the requester's identity or motive a condition of responding to a PIA request.

There are a couple of minor qualifications to this maxim that can affect the content of the agency's response. The PIA allows a person enhanced access to records about himself or herself – in PIA jargon, the "person in interest." Thus, for certain records (*e.g.*, medical records, student records, personnel and retirement records), the "person in interest"

may have access when a member of the general public would not.

Also, the requester's motive may be relevant when the agency is deciding whether to waive the fee that it would otherwise charge to cover the agency's costs in retrieving and copying records. For example, a member of the news media who is requesting access to records for journalistic purposes may be eligible for a waiver of those charges when a member of the general public who was seeking the records for his or her own personal benefit would not.

Myths

1. A PIA request must cite the PIA, not FOIA.

A healthy percentage of the requests received by state agencies for public records cite FOIA and sometimes other federal laws that have no application to state or local agencies. However, nothing in the PIA requires that the requester cite the statute. A public records request should be processed by an agency if the records sought are described with reasonable specificity, regardless of the accuracy of statutory reference.

2. A PIA request must be in writing.

It is true that the statute appears to prefer written requests, but it specifies no particular format and allows agencies to respond to oral requests (SG §10-614(a)). In practice, PIA requests range from lengthy written lists that rival the most overburdensome civil discovery request to informal oral inquiries. The Attorney General's Office generally advises agencies to obtain a PIA request in writing if the request is unusual or complex, or if there is a potential for controversy over the timing or substance of the response to the request. With the advent of the Internet, agency websites now contain much information previously accessible only through a written request or personal visit. As a result, many routine requests for access to public records are now made and fulfilled instantly online.

3. The PIA requires agencies to maintain records for a certain period of time to satisfy future PIA requests.

The PIA itself does not state how long an agency must retain a record. Other statutes, regulations, and policies establish record retention requirements for government agencies. Of course, an agency should not knowingly destroy a record that is the subject of a pending PIA request.

4. The PIA could not apply to a §501(c)(3) corporation because it would not be a government agency.

The PIA applies to records of "units" and "instrumentalities" of State and local government (SG §10-611(g)). The appellate courts have not hesitated to hold that it applies to government instrumentalities that happen to be §501(c)(3) corporations. For example, in *Baltimore Development Corp. v. Carmel Realty Associates*, 395 Md. 299 (2006), the Court of Appeals held that the PIA applied to a nonprofit corporation formed to plan and implement development strategies in Baltimore City. In *Andy's Ice Cream, Inc. v. City of Salisbury*, 125 Md. App. 125, *cert. denied*, 353 Md. 473 (1999), the Court of Special Appeals held that a corporation formed to oversee a municipal zoo was subject to the PIA. The extent to which the entity is controlled by the government and the extent to which it performs a governmental function are important factors as to application of the Act.

In a few instances, the Legislature has specified that an entity created by statute is either not a unit of government or not subject to the PIA. For example, the Legislature has specified that the Maryland Legal Services Corporation is *not* a unit or instrumentality of the State (Human Services Article, §11-202(c)).

5. An agency may not provide access to records if it would invade someone's privacy.

Unlike FOIA, there is no general privacy exception to the PIA's general rule of disclosure. One of the initial sections of the PIA states that "unless an unwar-

ranted invasion of privacy of a person ... would result, the [PIA] shall be construed in favor of permitting inspection of a public record, with the least cost and least delay..." (SG §10-612(b)). But this is not a specific exception to the PIA's mandate of public access to government records, but rather a rule of construction for interpreting the exceptions that do appear in the statute. Many of the specific exceptions in the PIA are based on notions of privacy (*e.g.*, financial information of an individual, medical information, adoption records) – a value that animates the application of these and other exceptions. But there is no general exception that allows an agency to withhold what it deems to be private information.

Misunderstandings

1. The PIA is the Maryland analog of FOIA, so everything I know about FOIA applies also to the PIA.

Not quite. The two statutes are similar, but not identical or co-extensive. For example, the PIA applies to units of government in all three branches of State and local government – executive, judicial, and legislative – while FOIA applies only to federal executive branch and independent agencies.

Some of the exceptions to disclosure in the PIA parallel similar exceptions in FOIA (*e.g.*, confidential commercial information, investigative records). Maryland courts will rely on federal authority under FOIA in construing those exceptions (*see, e.g., Stromberg Metal Works, Inc. v. University of Maryland*, 382 Md. 151 (2004)). But some of the exceptions in the PIA are peculiar to Maryland law and have no analog in FOIA. In addition, some of the exceptions in the Maryland statute are *mandatory* – *i.e.*, they prohibit an agency from disclosing certain records or information. FOIA does not have mandatory exceptions.

2. One can obtain answers to all sorts of questions about government activities simply by posing a question to a government agency under the PIA.

Although it is called the "Public Information Act," the statute actually concerns access to government records, not to information *per se*. While the statute defines "public record" broadly – "any documentary material ... made ... or received ... in connection with the transaction of public business" (SG §10-611(g)) – an agency's obligation under the statute is to provide access to those records, not to distill or analyze information that may be contained in its records. Nor is an agency obligated to create a new record in order to respond to a PIA request. A request under the PIA should therefore be seeking access to existing records, not answers to informational questions. Nevertheless, an agency may be willing to provide a compilation of information when it simplifies the response for both the agency and the requester.

3. If an agency is going to deny all or part of a PIA request, it must do so within 10 working days after it receives the request; if it does not do so, it cannot deny access to the records.

This statement reflects a common confusion with the PIA's deadlines. There are a number of 10-day deadlines in the statute, but nothing in the PIA requires that an agency issue a denial within 10 days of the request.

Under the PIA, an agency must decide whether or not to grant a request for access to public records "promptly, but not to exceed 30 days after receiving the [request]." SG §10-614(b). Agencies sometimes can decide immediately whether to provide access to the requested records, sometimes take weeks, and sometimes must seek an extension from the requester, as permitted by the PIA (SG §10-614(b)(4)).

Once an agency has determined whether records are disclosable, it is to advise the requester of that decision; if the decision involves a denial of all or part of the request, the agency has another 10 days to provide a written statement of the reasons for the denial (SG §10-614(b)(3)). In practice, agencies provide the reasons for a denial along with notice of the denial without using the additional 10 days.

There are two other 10-day deadlines in the statute: If an agency has records responsive to a PIA request and no exceptions apply to those records, but the agency believes that it would be "substantially against the public interest" to disclose them, the agency can deny access but must file a petition in circuit court within 10 days of the denial asking the court to affirm its decision. (SG §10-619(b)). If the agency is not the custodian of the records sought in a PIA request that it receives, the agency must, within 10 days, advise the requester that it is not the custodian and, if feasible, direct the requester to the right agency (SG §10-614(a)(3)).

4. An agency can withhold records if it finds that disclosure would be against the public interest.

There is no general "public interest" exception to the general rule of disclosure. But for those categories of records for which the PIA grants an agency discretion (*e.g.*, records of investigations by law enforcement agencies), the statute allows records to be withheld if the agency determines that disclosure would be "contrary to the public interest" (SG §10-618). Apart from those specific categories of records, an agency that wishes to resist disclosure on the basis of the public interest must obtain a court order to withhold the records (SG §10-619).

5. If a PIA request encompasses records or information that were provided to the agency by an individual or private entity, it would be a conflict of interest for the agency to contact the individual or entity about the request.

Nothing in the statute forbids such contact. In fact, the Attorney General's Office specifically recommends that agencies obtain the views of the individual or entity that provided the records or information if there is a possibility that they contain confidential commercial information or some other information protected from disclosure by law. Of course, the agency must ultimately make its own decision as to the application of any exception to public access.

For those interested in a detailed understanding of the law, the Attorney General's Office publishes the Public Information Act Manual, a summary of the statute and the case law construing it, which can be accessed online at http://www.oag.state.md.us/Opengov/pia.htm.

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