



STATE OF MARYLAND  
OFFICE OF THE  
PUBLIC ACCESS OMBUDSMAN



STATE OF MARYLAND  
PUBLIC INFORMATION ACT  
COMPLIANCE BOARD

## **Final Report on the Public Information Act**

Submitted by the Public Information Act Compliance Board and Public Access Ombudsman pursuant to Committee Narrative in the Report on the Fiscal 2020 State Operating Budget and the State Capital Budget

December 27, 2019

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## Acknowledgments

This report concerning the Maryland Public Information Act (“PIA”) was requested by the Chairmen of the Senate Budget and Taxation Committee and House Appropriations Committee in April 2019. The Chairmen jointly asked the PIA Compliance Board and Office of the Public Access Ombudsman to collect data from 23 State cabinet-level agencies concerning their PIA caseloads, dispositions, and practices over a 15-month period from July 1, 2018 to September 30, 2019, and to make recommendations relating to PIA enforcement and compliance monitoring.

We wish to thank Delegate Brooke Lierman, from Maryland’s 46<sup>th</sup> Legislative District, and Senator Nancy King and Delegate Maggie McIntosh, the Chairs of the Senate Budget and Taxation Committee and House Appropriations Committee, respectively, for requesting this project and for their dedication to transparency in Maryland government.

This project could not have been completed without the cooperation of the State agencies who responded to our quantitative and qualitative surveys,<sup>1</sup> as well as the many other stakeholders and programs that gave generously of their time and offered valuable comment at various stages of our work.

In no particular order, we would like to thank the staff of the Office of Government Information Services (“OGIS”) within the National Archives, who met with the Ombudsman and PIA Compliance Board counsel to share their extensive experience working with the federal Freedom of Information Act Ombudsman and Compliance programs. In particular, we wish to thank: Alina M. Semo, OGIS Director; Martha W. Murphy, OGIS Deputy Director; Kirsten Mitchell, OGIS-Compliance Team Lead; and Carrie McGuire, OGIS-Mediation Team Lead.

We would also like to thank the representatives of open records dispute resolution programs in other states with whom we spoke at length. Each of these representatives generously gave of their time to share valuable insights about the mediation and enforcement components of their respective programs and to answer our many questions.

We particularly wish to thank: Colleen Murphy, Executive Director and General Counsel, Connecticut Freedom of Information Commission; Cheryl Kakazu Park, Director, and Jennifer Brooks, Staff Attorney, Hawaii Office of Information Practices; Margaret Johnson, Executive Director, and Keith Luchtel, former Executive Director and current Board Member, Iowa Public Information Board; Frank Caruso, Executive Director, and John Stewart, Mediator, New Jersey Government Records Council; Erik Arneson, Executive Director, and Nathan Byerly, Deputy Director, Pennsylvania Office of Open Records; Tom Hood, Executive Director, Mississippi Ethics Commission; and Ginger McCall, Oregon’s first Public Records Advocate.

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<sup>1</sup> The reporting agencies do not include all State agencies, but, instead, those that comprise the Governor’s Executive Council, as follows: Department of the Environment (**MDE**); State Police (**MSP**); Department of Transportation (**MDOT**); Department of Health (**MDH**); Department of Education (**MSDE**); Department of Labor (**DLLR**); Department of Public Safety and Correctional Services (**DPSCS**); Secretary of State (**SOS**); Department of Natural Resources (**DNR**); Department of General Services (**DGS**); Department of Agriculture (**MDA**); Department of Housing and Community Development (**DHCD**); Department of Human Services (**DHS**); Department of Planning (**Planning**); Department of Commerce (**Commerce**); Department of Juvenile Services (**DJS**); Department of Information Technology (**DOIT**); Military Department (**Military**); Department of Aging (**Aging**); Department of Veterans Affairs (**Veterans**); Higher Education Commission (**MHEC**); Department of Disabilities (**MDOD**); and Department of Budget and Management (**DBM**).

Many thanks also to the staff of the Maryland State Archives and Department of General Services, who assisted us in developing the records management and retention sections of our agency survey, and who provided comment on these topics throughout the process. In particular, we thank: Tim Baker, State Archivist; Kathryn Baringer, Director of Appraisal and Description, State Archives; and Michael B. Swygert, Director of the Records Management Division of DGS.

We also extend our thanks to Judge Thomas E. Dewberry, Chief Administrative Law Judge, Judge John Leidig, Executive Administrative Law Judge, and Denise Shaffer, Executive Administrative Law Judge, as well as other staff of the Maryland Office of Administrative Hearings, who provided data regarding that Office's historical experience handling State agency PIA appeals prior to 2016, and other information related to our consideration of extrajudicial PIA dispute resolution options.

Although the cooperation of all the State reporting agencies was essential to this project, we wish to particularly acknowledge and thank the staff of the Maryland State Police, who showed exemplary leadership in thoroughly responding to our follow-up questions concerning MSP's initial survey data. In particular, we thank: Captain Ronald Fisher; Lt. Robert Iman; Lt. Eliot Cohen; Ida Williams, Director of Central Records; Mark Urbanik, Strategic Planning; and Rhea Harris, PIA Coordinator and Special Advisor to the Colonel of MSP.

Finally, we thank the Maryland Office of the Attorney General for its continuing support. In particular, we are indebted to Assistant Attorney General Jeffrey Hochstetler, counsel to the Ombudsman and Board, and Janice Clark, Program Administrator for both programs—without their assistance, this project could not have been completed.

## Executive Summary

This report has been prepared jointly by the Public Information Act Compliance Board (“Board” or “PIACB”), an independent, five-member body tasked with deciding certain fee disputes under the Public Information Act (“PIA”), and the Office of the Public Access Ombudsman (“Ombudsman”), an independent Office that seeks to resolve PIA disputes on a purely voluntary basis.

As constituted, both the Ombudsman and Board are administratively and operationally supported by the Office of the Attorney General (“OAG”), but are independent from it. Specifically, whereas the Board and Ombudsman are required to function as neutral, independent entities, the OAG is the State’s law firm, providing representation to State agencies, programs, and officials, among other duties.

The PIACB and Ombudsman program were created by the Legislature in 2015 to provide PIA dispute resolution options outside of the court process. As provided in the original bill,<sup>2</sup> the Board was authorized to review and issue binding decisions on most types of PIA disputes. The bill was amended during the 2015 session, however, to limit the Board’s authority to its current narrow role of reviewing PIA complaints involving fees of more than \$350.<sup>3</sup>

The Office of the Public Access Ombudsman, by contrast, was given the mandate to make “reasonable attempts” to resolve a broad range of PIA disputes, but only on a purely voluntary and non-binding basis.<sup>4</sup>

These two programs together operate with three full-time staff consisting of the Ombudsman, who is required to be a Maryland attorney, another attorney, who is an Assistant Attorney General and serves as counsel to both the Ombudsman and Board, and an administrator, who also supports both programs.

The 2015 legislation required the OAG in 2017 to report on the implementation of these two new programs, and to recommend any changes that should be made to either of them. That 2017 report concluded, in pertinent part, that it was premature at that time to recommend any changes to either the PIACB’s limited jurisdiction or to the Ombudsman program, opining that “[t]he enforcement provisions of the statute should not otherwise be altered until the Board and the Ombudsman have been in place longer and have developed a longer track record of performance.” 2017 OAG Report at 1 (December 2017).

Now, two years later and after nearly four years of operation, several points are clear from the Ombudsman and Board’s combined experience:

- 1) a significant and consistent number of PIA disputes across State and local agencies cannot be resolved by the Ombudsman’s efforts alone;
- 2) the current Board and staff are severely underutilized due to the Board’s very limited jurisdiction;

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<sup>2</sup> See First Reading of House Bill 755, cross-filed with Senate Bill 695, 2015 Regular Legislative Session.

<sup>3</sup> See Maryland Code Ann., General Provisions Article (“GP”), § 4-1A-05.

<sup>4</sup> See GP § 4-1B-04.

- 3) a great deal of the natural synergy that should exist between the Ombudsman and Board due to their complimentary processes and aims is almost completely lacking; the Board lacks jurisdiction to decide the vast majority of PIA disputes, and thus does not provide an incentive for parties to engage meaningfully with the Ombudsman or to comply with the law; and
- 4) the Ombudsman program and Board as currently configured are falling far short of their real potential to provide meaningful and accessible remedies for PIA disputes in a cost-effective manner.

### PIA Enforcement Recommendations

In light of the above, we recommend that the Board’s jurisdiction be expanded to allow it to review and decide all PIA disputes, as proposed in the original 2015 bill that created it.<sup>5</sup> However, we recommend that all parties seeking Board review must first go to the Ombudsman in order to allow for the best chance of informal resolution on a purely voluntary and confidential basis. A final decision of the Board would be appealable to the circuit court, but parties need to exhaust this dispute resolution process before going to court.

For reasons we discuss in Section II (“PIA Enforcement Recommendations”) and Section IV (“Public Comments”), we believe this recommendation can be implemented with the addition of two new full-time staff—one of whom should be an attorney, and the other, either an attorney, paralegal, or administrator—thereby bringing the total number of staff supporting both the Ombudsman and Board to five, including the Ombudsman.

If implemented, the comprehensive Board remedy we propose will benefit all stakeholders by:

- preserving and enhancing the benefits of the current Ombudsman program without altering its character as a purely voluntary, informal, confidential, and non-binding process of facilitated dispute resolution;
- providing a comprehensive and accessible dispute resolution remedy to both requestors and agencies where none presently exists;
- facilitating the development and further articulation of the PIA without altering existing judicial remedies; and
- maximizing public resources by enabling the Board and Ombudsman to interact in a fully complimentary and synergistic fashion, while at the same time utilizing both programs and staff to their fullest capacity.

We believe this change in the Board’s authority is warranted because the average person— as well as many organizations—simply cannot afford to hire a lawyer to handle their PIA disputes in court. Without a comprehensive extrajudicial remedy, parties whose disputes are unresolved

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<sup>5</sup> Our recommendation requires amendments to the current dispute resolution sections of the PIA. We have included proposed amendments in [Appendix E](#) (“Proposed Amendments Reflecting Recommendation for Comprehensive Board Jurisdiction”) that delineate the precise respects in which the Board’s authority would be expanded under our proposal.

after the Ombudsman’s efforts and who wish to obtain a decision on the matter will be left without recourse.

Further, it should be recognized that without an accessible review and decisional remedy, compliance with the PIA as a practical matter is largely optional, not mandatory as the Legislature intended. While we do not suggest that agencies or requestors regularly or intentionally violate or abuse the PIA, experience teaches that all too often, extraneous considerations such as political sensitivity, controversy, fear of public criticism, expedience, unreasonable expectations, or entrenchment for other reasons will dictate many PIA outcomes, making problems such as unlawful delay, wrongful denials, and refusal to compromise or consider alternatives the path of least resistance.

Moreover, an accessible review and decisional backstop would permit the Ombudsman to offer a more meaningful mediation process. As with mediations in the judicial context, we believe that parties will be more willing to cooperate when they know that the alternative is a binding decision that may or may not be favorable to their position.

### PIA Tracking and Reporting Recommendations

In Section III (“PIA Tracking and Reporting Recommendations”), we discuss the PIA performance data we collected from 23 State cabinet-level agencies (the “reporting agencies”) for the 15-month period from July 1, 2018 to September 30, 2019.

Our data collection efforts proceeded in two phases: first, we collected and reported in our Preliminary Findings ([Appendix C](#)) the data gathered for the first 12 months of the reporting period—from July 1, 2018 through June 30, 2019 (“FY2019”). Second, after we published our Preliminary Findings, we completed collection of the data for the remaining three month period—from July 1, 2019 to September 30, 2019 (“1st Quarter FY2020”).

While the data for FY2019 is discussed in detail in Section III, comparable tables and data for the 1<sup>st</sup> Quarter FY2020 is provided in [Appendix D](#) (Agency Quantitative Survey Data – 1<sup>st</sup> Quarter FY2020). The reporting agencies’ raw responses to our quantitative survey for both reporting periods are available on the Ombudsman’s website at the following links: [FY2019](#); [FY2020](#).

The quantitative data for the entire reporting period is generally consistent in revealing a wide range of PIA caseloads and performance measures across the reporting agencies. Moreover, as we noted in the Preliminary Findings, the data itself varied widely in its reliability and completeness, likely because agencies were not expecting to report the kinds of detail we requested for a largely retrospective period of time.

Our survey of the reporting agencies also included qualitative questions pertaining to their PIA processes and capacities, and in Section III we discuss some of the trends we gleaned from the responses. The reporting agencies’ responses to our qualitative survey are available in their entirety on the Ombudsman’s website at the following link: [Reporting Agencies’ Qualitative Responses](#).

Copies of the survey instruments we used for both the quantitative and qualitative portions of the survey, as well as our initial survey outreach letter to Department Secretaries, Principal

Counsel, and PIA Coordinators, are included in [Appendix B](#) (Survey Instruments and Cover Letters to Agencies).

In addition to the reporting agencies' PIA caseload and performance data, we also discuss in Section III our findings and recommendations pertaining to PIA performance tracking and reporting. We conclude that internal tracking of PIA requests—from initial receipt through final disposition—is essential for any agency that receives more than a truly *de minimis* number of requests, and that, beyond these essential internal functions, tracking and reporting can serve many important external uses, such as providing a sound basis for agency budget requests and requests for additional resources. Thus, we recommend that the Legislature specify the PIA data agencies must track in order to ensure the availability of uniform and reliable PIA data, and require agencies to publish this data periodically on their websites, to the extent feasible.

### Outreach and Comment Process

In developing our recommendations, we engaged a host of PIA stakeholders and solicited their comments, both before and after we published our detailed Preliminary Findings and Recommendations on November 6, 2019.

Our direct outreach, which began in August 2019, included representatives from several governmental<sup>6</sup> and private advocacy organizations,<sup>7</sup> representatives from State and local governmental agencies,<sup>8</sup> attorneys for requestors and agencies, members of the media, and all other requestors and agency contacts with whom we have worked since the Ombudsman and Board began operations.

Copies of our outreach materials, including letters and notices we sent to these contacts and constituencies soliciting their comments, are included in [Appendix H](#) (Outreach Instruments).

The Board also held three public meetings between August and December 2019. During its Annual Meeting on August 19, the Board and the Ombudsman discussed this reporting project, outlined a proposal for comprehensive Board jurisdiction, and approved a work plan for completing this project. The Board met again via conference call on November 5, during which it approved the distribution of the Preliminary Findings and Recommendations in order to solicit additional comment, and again on December 17, during which it approved the substance and recommendations of this Final Report. Minutes of the August and November meetings are available in [Appendix G](#) (Minutes of Board Meetings), and an audio recording of the December meeting is available on the Board's website at the following link: [December 17, 2019 Meeting of the PIACB – Audio](#).<sup>9</sup>

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<sup>6</sup> Maryland Association of Counties (“MACO”), Maryland Municipal League (“MML”), Maryland Association of Boards of Education (“MABE”), and Public School Superintendents Association of Maryland (“PSSAM”).

<sup>7</sup> ACLU of Maryland, Blue Water Baltimore, Center for Public Integrity, Common Cause of Maryland, Disability Rights of Maryland, MDCC Press Association, Public Justice Center, and Waterkeepers of the Chesapeake.

<sup>8</sup> County attorneys, municipal attorneys, principal counsel and assistant attorneys general for State agencies, and PIA coordinators and records custodians for State and local agencies.

<sup>9</sup> The written minutes of the December 17 Board meeting have not been prepared as of December 27, 2019.

We address substantive comments we received related to our recommendations in Section IV of this Report, and have included these and other comments in [Appendix F](#) (Public Comments).

## I. The Maryland Public Information Act: Purpose and Remedies

The PIA is Maryland’s chief open records law.<sup>10</sup> It was enacted by the General Assembly in 1970 to establish a broad right of public access to records created or maintained by State and local government agencies in the course of carrying out their official duties. To that end, such records must be made available when requested with the least cost and delay unless the PIA or other law “exempts” the record from disclosure.

The PIA sets time limits in which an agency must issue its initial and final written response—10 business and 30 calendar days, respectively, as a general rule.<sup>11</sup> The 30-day deadline may be extended with the consent of the requestor, but only for an additional 30 days.<sup>12</sup>

The PIA permits an agency to charge a “reasonable fee” to recoup its actual costs in responding to a record request, including time and labor on a prorated basis, after the first two hours, which are free.<sup>13</sup> The PIA directs agencies to give consideration to any fee waiver request based either on indigence, or on any other factors that may indicate that waiver is in the public interest.<sup>14</sup>

Currently, PIA disputes may be resolved in circuit court by way of a civil action filed by an agency or requestor,<sup>15</sup> or through limited extrajudicial dispute resolution options created by the Legislature in 2015.

These extrajudicial options consist of: 1) mediation through the Office of the Public Access Ombudsman, in which the Ombudsman seeks to help parties reach a voluntary resolution by agreement;<sup>16</sup> and 2) with respect to fee disputes greater than \$350, review and decision by the PIACB as to whether the fee is reasonable. The decisions of the PIACB are published, binding on the parties, and subject to judicial review by the circuit court.<sup>17</sup>

The PIACB currently has no jurisdiction to decide any disputes other than those involving fees greater than \$350, such as the denial of fee waiver requests, the application of exemptions, or whether requests are overly repetitive or unduly burdensome.

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<sup>10</sup> The PIA is codified in §§ 4-101 to 4-601 of the General Provisions Article (“GP”) of the Maryland Code Annotated.

<sup>11</sup> GP § 4-203.

<sup>12</sup> *Id.*

<sup>13</sup> GP § 4-206.

<sup>14</sup> *Id.*

<sup>15</sup> GP § 4-362. Requestors may bring a judicial action challenging an agency’s full or partial denial of a PIA request, as well as for fee issues or any other aspect of an agency’s handling of the PIA request. Agencies are authorized under the PIA to issue a “temporary denial” of a PIA request in cases in which there is doubt concerning whether a record should be disclosed, but must file a judicial action within 10 days thereafter seeking a court order authorizing the continued denial.

<sup>16</sup> GP §§ 4-1B-01 through 4-1B-04.

<sup>17</sup> GP §§ 4-1A-01 through 4-1A-10.

The PIACB consists of five members, all of whom are appointed by the Governor. The membership must be drawn from various PIA stakeholder interest groups, as follows: one member from a nongovernmental nonprofit group that works on issues related to transparency or open government; one member with knowledge of the PIA who has served as an official governmental custodian;<sup>18</sup> and three “private citizen” members who are not custodians or members of the media.<sup>19</sup> One member must be an attorney barred in Maryland.<sup>20</sup>

The Ombudsman is appointed by the Attorney General for a four-year term, but is independent from the Office of the Attorney General. The Ombudsman, like the Board, is supported by the Office of the Attorney General, but is independent from that Office. The Ombudsman and Board currently share a staff, consisting of one Assistant Attorney General and one administrator.

Prior to the creation of the Ombudsman program and the PIACB in 2015, requestors who had been denied records by certain State agencies had the option to challenge those denials administratively, usually through the Office of Administrative Hearings. This option was eliminated in 2015 by House Bill 755—the same bill that created the Ombudsman and PIACB—apparently because the first version of the bill authorized the PIACB to review and decide most PIA disputes involving both State and local agencies, which would have rendered the State administrative review process redundant.

The administrative remedy was not restored, however, when the bill was amended to limit the PIACB’s jurisdiction to its present narrow scope. Consequently, current extrajudicial PIA dispute resolution options are more limited than in previous years.

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<sup>18</sup> The current language requires the custodian member to have served as “an *official* custodian in the State as defined in § 4-101(d)” of the PIA. GP § 4-1A-02(a)(2)(ii) (emphasis added). The PIA defines “official custodian” as “an officer or employee of the State or of a political subdivision who is responsible for keeping a public record, whether or not the officer or employee has physical custody and control of the public record.” GP § 4-101(f). It has come to our attention that this definition may overly limit the choice of potential custodian members, so we have included language in our draft amendments reflecting that this member need only have been a “custodian,” which can mean an “official custodian” or “any other authorized individual who has physical custody and control of a public record.” GP § 4-101(d)(2).

<sup>19</sup> GP § 4-1A-02.

<sup>20</sup> *Id.* There currently are two attorney members on the PIACB, and we recommend that the Board should have at least two attorneys if its jurisdiction is expanded as we propose. Our draft amendments reflect this recommendation.

## II. PIA Enforcement Recommendations

### A. Outreach and Information Sources

On the PIA enforcement front, we were specifically asked to analyze the desirability and feasibility of enhanced extrajudicial PIA dispute resolution processes, such as those used by other states, and/or federal analogues under the Freedom of Information Act (“FOIA”). To collect and analyze relevant data, we gathered information from a number of sources, including:

- The Ombudsman’s mediation caseload and case outcomes from the beginning of the program in April 2016 through September 2019;
- The Board’s caseload and outcomes since it began operations in March 2016 through August 2019;
- Responses and data collected from the 23 State agencies we surveyed;
- The Ombudsman’s 2019 stakeholder survey;
- Data for 2013-2015 from the Office of Administrative Hearings, which, prior to 2016, heard PIA appeals for certain State agencies;
- Interviews and other information from the FOIA Ombudsman and from relevant open records dispute resolution programs in seven other states;<sup>21</sup>
- The Final Report on the Implementation of the Public Information Act, published by the Office of the Maryland Attorney General (Dec. 2017); and
- Comments received on this reporting project since August 2019.

The purpose of our information-gathering and broad outreach was to test our recommended dispute resolution model and caseload projections, and to gain additional information concerning the strengths and weaknesses of other program models.

### B. Need for and Feasibility of Comprehensive Board Jurisdiction

#### 1. The Problem with the Status Quo

The current judicial remedies for PIA disputes appear to be infrequently used by either requestors or agencies. This likely is due to a variety of reasons, including the cost of and time required to pursue a lawsuit, and the fact that many requestors cannot afford a lawyer. In addition, the formalities of the judicial process are not well-suited to many routine PIA disputes, which usually involve simple fact patterns and the application of a limited body of law. Ultimately, the judicial process is not equipped to fulfill the PIA’s central mandate that public records be disclosed with the least cost and delay.<sup>22</sup>

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<sup>21</sup> Specifically, we examined the Connecticut Freedom of Information Commission, the Hawaii Office of Information Practices, the Iowa Public Information Board, the New Jersey Government Records Council, the Pennsylvania Office of Open Records, the Utah State Records Committee, and the Mississippi Ethics Commission, which recently expanded its programs to include extrajudicial review and enforcement of its state public records law.

<sup>22</sup> See GP § 4-103(b).

That reality, in effect, leaves the Ombudsman and the PIACB as the only accessible PIA dispute resolution options for most parties. However, aside from disputes involving fees over \$350, there is no possibility of obtaining a binding final decision on any PIA dispute outside of court. While the Ombudsman has closed 800 cases from early 2016 through September 2019, the PIACB has issued only 22 opinions during that time, suggesting that fee matters eligible for Board review are a tiny fraction of all PIA disputes. That means there is no avenue for meaningful review of the vast majority of PIA disputes in need of a decision.

Although there is no doubt that the informal and voluntary process of the Ombudsman program has been beneficial, for many disputes, mediation alone is either not successful at all or is not as effective as it could be if there was an accessible and comprehensive review and decisional remedy available.

Our detailed review of the Ombudsman's caseload leads us to believe that in about 25% of disputes, there are unresolved issues for which one or both parties would request review by a Board with comprehensive jurisdiction. Moreover, in many other Ombudsman matters, the outcomes likely would be more timely and effective if there was an enforcement backstop that incentivized both parties to engage in mediation in a meaningful way.

As things stand, however, in matters that come before the Ombudsman, parties all too often have no real incentive to seek common ground. For example, an agency that has been inattentive or grown complacent in its PIA response process because it rarely faces the possibility of external review or accountability has no incentive to participate meaningfully in the Ombudsman's process. We suspect that this is the case, for instance, in many of the nearly 20% of all Ombudsman disputes that allege an agency's failure to send any kind of response to a requestor within 30 days,<sup>23</sup> and the many matters in which an agency asserts discretionary exemptions with no real analysis and balancing of the public interest factors they are required by law to consider.

Requestors, also, may have no reason to depart from an entrenched position with regard to their PIA request, such as unreasonably refusing to grant an extension of time or reframe an overly broad request, or failing to accept an agency's application of a legitimate exemption.<sup>24</sup> In each of these scenarios, the possibility that another body could review the matter and render a decision that is not favorable would incentivize the parties to compromise and cooperate to the fullest extent possible.

Of course, in cases where a party refuses to budge, and/or has good reason to believe that it is legally justified in its position, the review and enforcement body would provide the necessary

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<sup>23</sup> Most of these allegations (between 10-15% of the Ombudsman's total caseload) turn out to be well-founded, and, when the agency does respond, other compliance issues often emerge.

<sup>24</sup> Agencies currently do not have any options for extrajudicial review of overly repetitive or unduly burdensome requests. We note that while these kinds of problems arise in a comparatively small number of cases, they often are time-consuming and stressful for agency staff, sapping morale and draining resources that could be devoted to other requests. Currently, the only available remedy for such problems is a judicial action seeking injunctive relief.

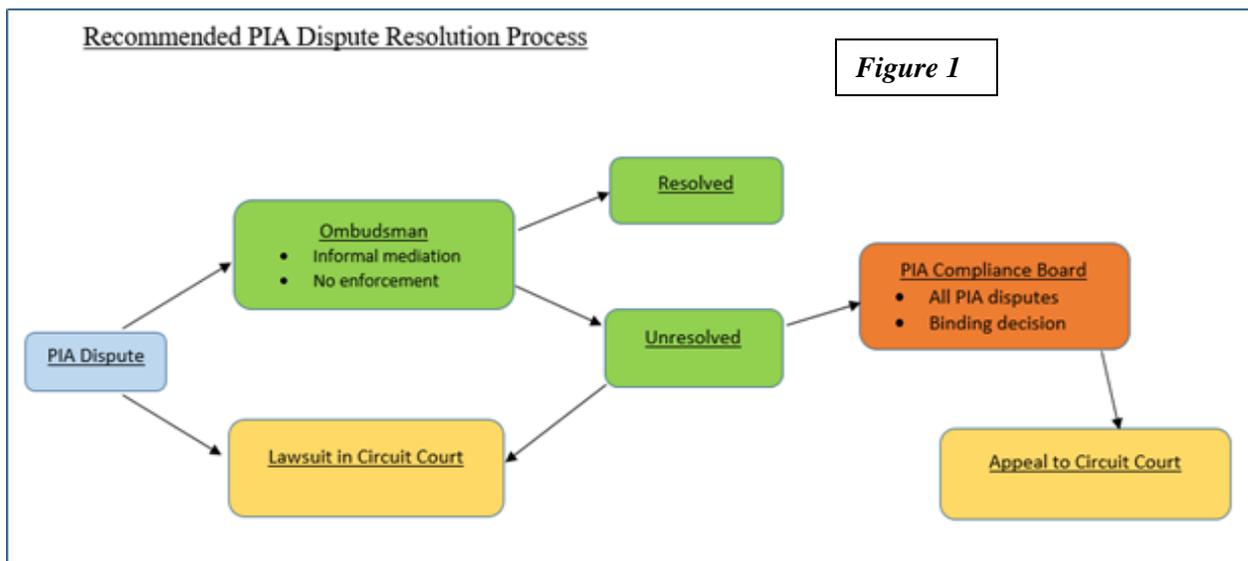
Requestors and agencies also experience problems involving the PIA's deadlines, for which there currently are no effective remedies. For requestors, the issue typically revolves around late or "missing" responses, and for agencies, a recurrent issue is the inability to obtain an extension of the deadlines absent requestor agreement, even when the request is burdensome. Any extrajudicial dispute resolution body should be authorized to grant appropriate relief in such scenarios, on a case-by-case basis, and our recommended amendments reflect these suggestions. See [Appendix E](#).

finality—subject only to judicial review<sup>25</sup>—in a way mediation alone never can. This finality serves the interests of both parties. For instance, an entrenched requestor might have to accept—albeit grudgingly—that the agency is legally permitted to withhold requested information, reducing the likelihood of repetitive requests that burden the agency. Or, an agency that has simply failed to make any response to a requestor—or to the Ombudsman—would be motivated to respond by the prospect of an enforceable and published decision that orders it to respond.

## 2. The Recommended Solution

The problems and limitations highlighted above frequently undermine requestors’—and by extension, the public’s—confidence in the transparency, integrity, fairness, and efficiency of State and local governments, and in the effectiveness of the Ombudsman’s process. At the same time, agencies’ unresolved PIA problems can undermine staff morale and disrupt their ability to handle other requests in a fair and orderly fashion. Thus, we believe it is in the best interest of all PIA stakeholders that the Legislature take steps to improve the PIA dispute resolution process by enabling the Board to provide a comprehensive and accessible review and decision remedy.

*Figure 1*, below, reflects our recommendation for an integrated PIA dispute resolution process that begins with Ombudsman mediation, and allows for Board review of disputes that cannot be resolved through the Ombudsman’s efforts alone.



We believe our recommended framework meets four key criteria:

- **Builds on and enhances current programs.** Our recommendation preserves the Ombudsman program, which has been successful in resolving many, but not all, PIA disputes, while expanding the role and impact of the existing Board, which is currently underutilized due to its limited jurisdiction. Based on our program experience and conversations with staff of open records dispute resolution programs in several other states

<sup>25</sup> See GP § 4-1B-04 and § 4-362 (permitting a decision of the PIACB to be appealed to circuit court).

and at the federal level, we believe expansion of the Board's role is likely to enhance the effectiveness of mediations. Additionally, over time, the Board's opinions will lead to the development of a body of published PIA decisions which will be a resource to requestors and agencies alike.

- **Provides a comprehensive remedy.** Our recommendation provides an extrajudicial dispute resolution remedy for all types of PIA disputes, for all requestors, and for all State and local agencies subject to the PIA. The Board can apply the law to the facts on a case-by-case basis in a way that one-size-fits-all legislation cannot.<sup>26</sup>
- **Provides an accessible, user-friendly dispute resolution option without altering existing judicial remedies.** Most PIA disputes do not require a complex process or in-person hearing, because they are simpler than many other kinds of civil disputes in complexity, evidentiary requirements, and the need for formal process. The Board's process will reflect this simplicity, with most issues likely capable of being decided on the basis of a complaint, a response, and, as needed, on affidavit and/or following *in camera* review of the records at issue or of a privilege log. The Board would be able to call for a conference or hearing whenever needed.
- **Provides the most cost-effective and efficient dispute resolution process.** Expanding the Board's jurisdiction to provide a comprehensive extrajudicial dispute resolution option does not require the creation of any new office or program. Rather, our proposal allows for an efficient and complimentary division of labor between the existing Board and Ombudsman program. As explained above, the mere existence of a Board with comprehensive jurisdiction over PIA disputes is likely to enhance the effectiveness of mediation.

Moreover, even where the Ombudsman cannot resolve all issues, the Board's efficiency will be enhanced by the Ombudsman's intake and administrative processes. That is, when unresolved disputes are submitted to the Board following mediation, they will contain the basic information and records relevant to the dispute—such as identification of the parties, a description of the unresolved issues, and the PIA request or response at issue—thereby reducing the administrative burden on the Board and insuring that efforts to gather this information are not duplicated between programs.

### 3. Quantification of the Need and Projected Caseload

In order to assess the need for and feasibility of a comprehensive and generally-accessible dispute resolution remedy, the Ombudsman conducted a detailed review of all mediation matters handled and closed by her Office from the beginning of the program in April 2016 through September 30, 2019. The total caseload for this 42-month period is 800 separate disputes, involving more than 520 unique requestors and 220 unique agencies at the State and local levels.

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<sup>26</sup> For example, the Board should be able to examine all the facets of a matter and, in appropriate circumstances, authorize an extension beyond 30 days, authorize an agency to ignore repetitive requests to which it has already sufficiently responded, or preclude an extremely tardy agency from charging fees for the request. The precise relief the Board would be authorized to issue under this proposal is set forth in our proposed amendments to GP § 4-1A-04 ("Powers and duties of Board"), included in [Appendix E](#).

This review was carried out in order to determine the estimated number, type, and complexity of disputes that would be likely candidates for review by a Board with comprehensive jurisdiction.

This review was not an assessment of “customer satisfaction,” nor even an evaluation of the effectiveness of the Ombudsman program overall. Rather, the review was carried out solely for the purpose of answering three questions: 1) whether there was a PIA issue that was unresolved from the perspective of either party at the conclusion of the mediation; 2) if so, whether the aggrieved party would likely take the further step of submitting the issue to a Board with comprehensive jurisdiction; and 3) if submitted, the level of complexity presented by the unresolved issue(s) and the time/staff resources the Board would need to resolve them.

Based on this case review, we estimated the number and percentage of disputes that are expected to be presented to a Board with comprehensive jurisdiction following efforts to resolve them by the Ombudsman. As we reported in our Preliminary Findings, and as reflected in the figures below, 25-26% of matters submitted to the Ombudsman have outstanding issues at the conclusion of mediation that we believe one or both parties would likely submit to the Board.<sup>27</sup>

Overall, of the 235 total Ombudsman matters during FY 2019, 61—or 26%—were strong candidates for review and decision by a Board with comprehensive jurisdiction. *See Figure 2*, below.

<b>Board’s Projected Caseload Based on Ombudsman Caseload (FY2019)</b>			
<i>Figure 2</i>			
<b>Agency Category</b>	<b>Number of Disputes</b>	<b>Number Deemed Likely to go to Board with Comprehensive Jurisdiction</b>	<b>Percentage Deemed Likely to go to Board with Comprehensive Jurisdiction</b>
State Reporting Agencies	46	12	26%
Other State Agencies	46	12	26%
Local School Systems	24	6	25%
Local Law Enforcement (Police and State’s Attorneys)	65	21	32%
Other Local (County & Municipality)	54	10	19%
<b>Total</b>	<b>235</b>	<b>61</b>	<b>26%</b>

<sup>27</sup> In our experience, there are numerous factors beyond mere “dissatisfaction” with a mediation that will determine whether a party is likely to actually submit the matter for review and decision by the Board. These include factors such as the party’s training, temperament, and comfort level with the process. For example, the Ombudsman has handled fee disputes over the past nearly four years that were within the Board’s jurisdiction, but which were not submitted to the Board even though mediation failed to resolve the fee issue to the requestor’s satisfaction. The reasons these matters did not go to the Board had more to do with the individuals involved than with the mere existence of the Board remedy.

The data for all matters closed by the Ombudsman over 42 months of program operation is strikingly consistent with the data for FY 2019. *See Figure 3*, below. For example, during the 42-month period, the State reporting agencies were involved in 174 mediations, 46 of which—or 26%—were judged likely to have gone to a Board with comprehensive jurisdiction. Similarly, of the 800 total mediations across all agency categories, 204—or about 26%—were judged likely candidates for review by a Board with comprehensive jurisdiction.

<b>Board’s Projected Caseload Based on Ombudsman Caseload (42 Months)</b>			
<i>Figure 3</i>			
<b>Agency Category</b>	<b>Number of Disputes</b>	<b>Number Deemed Likely to go to Board with Comprehensive Jurisdiction</b>	<b>Percentage Deemed Likely to go to Board with Comprehensive Jurisdiction</b>
State Reporting Agencies	174	46	26%
Other State Agencies	140	50	36%
Local School Systems	87	19	22%
Local Law Enforcement (Police and State’s Attorneys)	213	60	28%
Other Local (County & Municipality)	186	29	16%
<b>Total</b>	<b>800</b>	<b>204</b>	<b>26%</b>

With regard to those disputes judged likely candidates for decision by the Board, we then went on to examine the complexity level of the issues presented in order to estimate the additional staff required to handle them. In order to assess this variable, we rated each of the disputes that were deemed likely to go to the Board as “simple” or “complex.” We rated a dispute as “simple” if a summary disposition was likely, such as if the matter involved a well-settled legal question, presented a minor procedural issue, or required *in camera* review of a small number of documents. Alternately, we rated a matter as “complex” if the issues would require more time and effort to resolve, such as legal research, follow-up on factual questions, examination of privilege logs, or *in camera* review of documents comprising more than a few pages.

We found that the number of disputes expected to go to a Board with comprehensive jurisdiction was roughly evenly split between “simple” and “complex” matters. This held true both for the 12-month period of FY 2019, as shown in *Figure 4*, below, as well as for the 42-month period encompassing all matters closed by the Ombudsman through September 30, 2019, *see Figure 5*, below.

<b>Board’s Projected Caseload: Issues and Complexity Based on Ombudsman’s Caseload (FY2019) <i>Figure 4</i></b>							
Issue Category	Total Number of Disputes	Deemed Likely to go to Board with Comprehensive Jurisdiction		Deemed likely to go to Board: Disputes presenting “simple” issue		Deemed likely to go to Board: Disputes presenting “complex” issue	
		#	%	#	%	#	%
Exemptions/Redactions	63	33	52%	6	18%	27	82%
Partial/Nonresponsive/Incomplete Response	45	13	29%	10	77%	3	23%
Timeliness	44	*	*	*	*	*	*
Fees/Fee Waivers	33	1	3%	1	100%	0	0%
Other	50	15	30%	12	80%	3	20%
<b>Total</b>	<b>235</b>	<b>62</b>	<b>26%</b>	<b>29</b>	<b>47%</b>	<b>33</b>	<b>53%</b>

<b>Board’s Projected Caseload: Issues and Complexity Based on Ombudsman’s Caseload (42 Months) <i>Figure 5</i></b>							
Issue Category	Total Number of Matters	Deemed Likely to go to Board with Comprehensive Jurisdiction		Deemed likely to go to Board: Matters presenting “simple” issue		Deemed likely to go to Board: Matters presenting “complex” issue	
		#	%	#	%	#	%
Exemptions/Redactions	196	92	47%	27	29%	65	71%
Partial/Nonresponsive/Incomplete Response	168	49	29%	36	73%	13	27%
Timeliness	172	*	*	*	*	*	*
Fees/Fee Waivers	126	17	13%	5	29%	12	71%
Other	138	46	33%	32	70%	14	30%
<b>Total</b>	<b>800</b>	<b>204</b>	<b>26%</b>	<b>100</b>	<b>49%</b>	<b>104</b>	<b>51%</b>

*\*We did not initially estimate that any matters solely involving missing or very late responses would go to the Board because the Ombudsman—through persistent and often protracted effort—eventually achieves a resolution. However, because this is an extremely inefficient use of public resources that impedes the Ombudsman’s ability to assist other parties, these kinds of disputes may be more appropriate for summary disposition by the Board.*

Our review also revealed—as shown in *Figures 4 and 5*, above—that the largest single category of disputes deemed likely to be submitted to the Board involve exemptions and redactions. We note, however, that many disputes present multiple intertwined issues in a single case. For example, fee issues often are intertwined with issues about the timeliness of a response, as well as whether the request is overly-broad. Exemption and redaction issues can also arise in tandem with fee issues, at least to the extent a fee is assessed for time required to review and redact requested records. There are many other ways in which various PIA issues are intertwined in a single matter.

This reality suggests that the only way for the Board to serve as a meaningful decision-making body is for it to have comprehensive jurisdiction over all PIA disputes. Without such

comprehensive jurisdiction, the Board’s ability to operate effectively and efficiently, and to play a substantive role in PIA dispute resolution, will remain negligible. Furthermore, we are unaware of any state that provides for fragmented jurisdiction of public records disputes.

Likewise, without comprehensive jurisdiction, the Board will not function as an effective backstop likely to enhance the effectiveness of mediation, and, to this extent, neither the Board nor the Ombudsman program will fulfill its real potential. Accordingly, for the reasons discussed, we believe there should be a practical, generally-accessible, and comprehensive PIA dispute resolution remedy, and piecemeal expansion of the Board’s jurisdiction should be avoided.

In sum, we reach the following conclusions:

- 1) The Ombudsman’s caseload demonstrates a generally consistent unmet need for an accessible and comprehensive extrajudicial dispute resolution option for PIA disputes that are not resolved at the mediation stage.
- 2) The number of unresolved disputes likely to go to the Board are relatively consistent throughout time and across agencies; approximately 25% of the Ombudsman’s disputes—between 50 and 60 per year, or five per month—are not resolved through mediation and were judged likely to go to the Board;
- 3) The unresolved disputes likely to go the Board will be roughly evenly split between “simple” matters—those that can be resolved in a summary fashion—and “complex” matters—those that will require additional work;
- 4) Taking the above considerations into account, we estimate that the increased Board caseload can be handled by the addition of two full-time staff—one of which should be an attorney, and the other, an administrator, paralegal, or attorney—bringing the total number of staff to five, including the Ombudsman.
- 5) Although we cannot be sure that the projected caseload would remain at the same level we estimated based on 2016-2019 data, we believe an exponential increase or decrease is unlikely given the consistency in the Ombudsman’s caseload over the past nearly four years. In fact, we anticipate that the availability of an accessible review and decisional remedy will enhance the effectiveness of mediations and bring about changes in agency and requestor behavior and expectations, thereby reducing the incidence of disputes over time.<sup>28</sup>
- 6) On a periodic basis after implementing this new system, the Board should report on caseloads, staffing, and dispositions, as well as other matters pertaining to overall PIA performance, so that any necessary adjustments to these programs can be made.

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<sup>28</sup> We believe the factors most directly related to the number of matters submitted to the Ombudsman are the number of PIA requests submitted agencies overall, the frequency and effectiveness of the Ombudsman’s direct outreach to requestors and agencies, as well as whether agencies consistently and timely notify requestors of the availability of the Ombudsman’s services. We have no reason to believe any of these factors will be impacted by the mere availability of a comprehensive Board remedy, if one is provided.

#### 4. Other Information Considered

In addition to a detailed review of the Ombudsman and PIACB programs to date, we also considered the responses of the reporting agencies, conversations with representatives from other state programs and the federal FOIA Ombudsman and Compliance programs, and comments from stakeholders.

##### a. Anecdotal Information from Agencies and Requestors

Our assessment of the need for a comprehensive extrajudicial dispute resolution remedy is consistent with anecdotal information from requestors and agencies. For example, in early 2019, the Ombudsman conducted a program satisfaction survey directed to all requestors and agencies with whom she has worked since inception of the program. Of the more than 100 requestors who responded, more than 30—or roughly 30%—expressed deep frustration with the Ombudsman’s inability to decide issues or to enforce the Act with respect to matters that were not resolved by mediation. The following are just a sampling of comments submitted by requestors:

- ‘[The Ombudsman program is a] waste of taxpayer resources; no real power’;
- ‘[G]overnment agencies don’t fully comply due to [Ombudsman’s] office being neutral and having no power or authority to sanction’;
- ‘[I]ncrease[] the power of the Ombudsman to at least put pressure on the agency to want to negotiate’;
- ‘I’m not sure if the Ombudsman’s Office can be effective where the custodian of public records knows the office has no legal authority to compel them to comply’;
- ‘That [Ombudsman’s] office is a waste of taxpayer money . . . [i]f they cannot force [an] agency to do what they should’;
- ‘The Public Access Ombudsman has accomplished absolutely nothing as far as transparency in government and the reason for this is because the PIA Ombudsman has been given zero authority to do anything when government agency's or individual government employees don't respond to the public’;
- ‘Until there is teeth in the PIA there will be no meaningful resolutions’;
- ‘Personal experience has shown that the Ombudsman strives for transparency, but lacks enforcement power when they get stonewalled.’<sup>29</sup>

In addition, the qualitative surveys we sent to the reporting agencies asked for their views on the need for and desirability of expanded dispute resolution. Although many agencies

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<sup>29</sup> We have omitted the commenters’ names here because each was involved in mediation with the Ombudsman and the Ombudsman is required to maintain such information in confidence. *See* GP § 4-1B-04(b)(1).

expressed no general opinion on the matter,<sup>30</sup> or stated that the status quo is adequate,<sup>31</sup> others expressed support for any remedy that would keep PIA disputes out of court, that offered agencies a practical remedy for certain types of recurrent problems—such as repetitive, burdensome, or abusive requests—or that would enhance transparency and compliance.<sup>32</sup>

Other comments we received from stakeholders about expanded dispute resolution are discussed in Section IV and [Appendix F](#) (“Public Comments”).

#### b. Other States’ Programs

We compared our recommended dispute resolution model with other state models that have similar components, although none were configured as we propose and many have other duties beyond the resolution of open records disputes. Specifically, we examined models from seven states that vest extrajudicial dispute resolution of their open records law in a body other than their Attorney General’s Office or traditional State agency administrative review processes. *See Figure 6*, below.<sup>33</sup>

The examination included a review of the relevant statutes, regulations, caseload statistics, where available, and, with all but the Utah program, extensive discussions with relevant program directors and staff. These comparisons allowed us to vet our assumptions against the actual practice of programs with constituent ingredients similar to the model we propose.

As a threshold matter, we note that none of these other state models meet all of the four key criteria we outlined in the discussion of our recommended option, above. Likewise, we believe that many of these models would be more costly and cumbersome to implement, and/or less effective than our recommended framework.

As a general matter, as reflected in *Figure 6*, below, each of the programs we explored have both a mediation and binding review and decisional component, though unlike our proposal, none require a complainant to seek mediation before requesting review from the decisional body.

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<sup>30</sup> **Aging** (answered N/A; Low Volume); **DBM** (no opinion); **Disabilities** (no opinion); **MDE** (no opinion, rarely any matters before Board, Ombudsman, or courts); **DJS** (no position); **DLLR** (“takes guidance from the Administration and General Assembly”); **Military** (no opinion); **Planning** (no opinion); **SOS** (did not respond); and **MSP** (no opinion).

<sup>31</sup> **MSDE** (current system adequate); **DGS** (current system adequate); **DHCD** (thinks Ombudsman is sufficient); **DHS** (current system adequate); **DOIT** (satisfied with existing system); **DNR** (no need for expanded enforcement); and **MDOT** (current system adequate, but would like to comment on any specific proposal).

<sup>32</sup> **MDA** (sees need for agency relief on certain problems; not opposed to extrajudicial remedy, but would like to comment on any specific proposal); **Commerce** (welcomes any additional review options that would prevent PIA cases from going to court); **DOH** (no objection to expanded enforcement and committed to PIA compliance); **DPSCS** (welcomes any process that increases transparency; sees need for funding of internal PIA compliance unit); and **Veterans** (welcomes the suggestion).

<sup>33</sup> For a relatively current compilation of open records laws from the 50 states, including a description of comparative enforcement mechanisms, visit the Reporters Committee for Freedom of the Press, Open Government Guide, available at: <https://www.rcfp.org/open-government-guide/>.

**Figure 6.**  
**COMPARISON**  
**OF OTHER**  
**STATE**  
**MODELS**

	Jurisdiction	Structure	Mediation *	Complaints in 2018**	Staff Size	State Population (millions)
<b>Connecticut Freedom of Information Commission</b>	Open Records and Open Meetings	Commission: 9 members	Optional	757	14 (including 9 staff attorneys)	3.57
<b>Hawaii Office of Information Practices</b>	Open Records and Open Meetings	Office: Executive Director	None historically; current pilot program	182	8.5 (including 5 staff attorneys)	1.42
<b>Iowa Public Information Board</b>	Open Records and Open Meetings	Board: 9 members	Optional	126	3 (including 1 staff attorney)	3.16
<b>New Jersey Government Records Council</b>	Open Records	Council: 5 members	Optional	227 (FY18)	4 (including 1 staff attorney)	8.9
<b>Pennsylvania Office of Open Records</b>	Open Records	Office: Executive Director	Optional	2,229	20 (including 3 staff attorneys)	12.81
<b>Utah State Records Committee</b>	Open Records, Record Retention	Committee: 7 members	Optional	121 (FY18)	3-4 (including 1 Ombudsman and 1 AAG)	3.16
<b>Mississippi Ethics Commission</b>	Open Records, Open Meetings, Ethics, Campaign Finance	Commission: 8 members	Optional	Unknown	6 (including 1 part-time staff attorney)	2.99

\* As a general matter, mediation is offered as an option within the open records complaint process.

\*\*As we understand it, the total number of complaints reflect all complaints received across the particular program's jurisdictions, not necessarily just those complaints pertaining to open records.

Without exception, the program representatives with whom we spoke all agree with our assessment that mediation is an invaluable component of the open records dispute resolution process, and that the availability of an accessible review and decisional remedy has a positive impact on mediation outcomes.<sup>34</sup> This confirmed our view that there are significant benefits to requiring mediation as part of the dispute resolution process, both to reserve the Board's remedy for situations that are most appropriate for it, and to give parties an opportunity for confidential and voluntary resolution through the Ombudsman's highly informal process. Requiring mediation as a first step in the process thus preserves and maximizes the benefits of the Ombudsman program

<sup>34</sup> For example, the Director of the Mississippi Ethics Commission explained that the Commission for some years played only an advisory/mediation role in open records disputes, and that once the Commission was vested with review and enforcement authority, mediation became much more effective.

to the degree we believe is desirable, and also likely will result in fewer matters going to the Board than if mediation was not a required first step.

The comparisons with other state models also provided us with a good indication of whether our envisioned programmatic structure and additional resource recommendations are realistic. Programmatically, most of the other state models we examined share staff between the mediation component and the review/decisional component of the programs, with appropriate internal steps taken to protect the neutrality of mediations and eliminate the appearance of conflicts. For example, a staff attorney who handles or assists with a particular mediation would not also be the attorney assigned to that matter if it is unresolved and goes before the review body.

Our recommendation for two additional staff, at least one of whom should be a full time attorney, and the other either an administrator, paralegal, or attorney—resulting in a total of five staff dedicated to PIA dispute resolution, including the Ombudsman—would allow for a similar division of labor and avoidance of conflicts. It would also ensure the continued independent functioning of the Ombudsman and the Board.

At the same time, the comparison suggests that our staffing proposal is sufficient to meet the projected workload of a Board with comprehensive PIA jurisdiction. First, no other program requires mediation as a first step in the dispute resolution process, and we expect that this requirement will result in relatively fewer matters needing adjudication by the Board.

Second, although four of the seven state models have more than five staff, each of those programs is distinguishable from our recommendation. For example, four programs—in Connecticut, Hawaii, Utah, and Mississippi—have jurisdiction over a wide range of other matters in addition to open records disputes. Specifically, Connecticut, Hawaii, and Mississippi each also handle open meetings complaints in addition to open records matters; Utah’s State Records Committee also has duties relating to implementing record retention laws; and Mississippi’s program handles ethics and campaign finance complaints as well.

Third, the only state program with more than five staff that handles only open records matters—the Pennsylvania Office of Open Records—serves a state with a population more than double that of Maryland. Moreover, that program is operationally and structurally different from the framework we recommend—for instance, by employing several “appeals officers.” Our recommendation, by contrast, builds on two existing programs—the PIACB and Office of the Ombudsman—and does not propose formalized contested case procedures.

Finally, our closest program comparison—in terms of function and jurisdiction—is the New Jersey Open Records Council, and that program has four dedicated staff.<sup>35</sup> We note that the New Jersey program’s caseload in FY 2018—227 complaints—is comparable to the Ombudsman’s 178 matters during the same period, suggesting that the demand for extrajudicial open records dispute resolution is similar in both states. Accordingly, we believe our proposal for five staff dedicated to PIA dispute resolution is adequate.

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<sup>35</sup> And, New Jersey’s population is approximately two million greater than Maryland’s.

## 5. Alternatives Considered

### a. Potential Restoration of Former State Administrative Remedy

We also considered the potential restoration of the State administrative review remedy that existed in the PIA before the 2015 legislation. We are not recommending that this remedy be reinstated as it previously existed for several reasons. First, the administrative appeal remedy was not comprehensive in that it applied only to certain State agencies subject to the contested case provisions of the Administrative Procedure Act.<sup>36</sup> The Ombudsman’s caseload suggests, however, that more than half—about 60%—of all PIA disputes arise from requests made to local agencies.

Second, the administrative appeal remedy also appears to have been used rarely. Data provided to us by the Office of Administrative Hearings for the years 2013 to 2015—the last three years the remedy was available—shows that that Office handled 37 PIA appeals, involving only twelve State agencies. By contrast, during its nearly four years of operation, the Ombudsman’s Office received more than 800 PIA disputes—174 of which involved the State reporting agencies. Of the total disputes, more than 200, including 46 from the reporting agencies, were not resolved by mediation and also were judged likely candidates for extrajudicial review and decision. This suggests to us that the State administrative appeals option—at least as it pertains to PIA matters—was relatively inaccessible to and/or rarely used by many requestors.

Lastly, the administrative appeals model also did not afford any remedy to agencies, including relief from overly repetitive or unduly burdensome requests, or relief from deadlines for good cause in instances when compromise or agreement cannot be reached with the requestor. Our recommendation, in contrast, offers a comprehensive remedy for both agencies and requestors.

### b. Piecemeal Expansion of the Board’s Jurisdiction

During the course of our outreach, we received comments from the Office of the Attorney General (“OAG”), one of which suggested that the Board’s jurisdiction might be expanded in only a piecemeal fashion, for example, by lowering the fee threshold for Board review, or permitting the Board to review the denial of fee waivers.

We do not believe, however, that piecemeal jurisdiction for PIA dispute resolution makes sense, or accomplishes much. Most PIA disputes involve issues other than fees or involve multiple issues within a single matter. Without plenary jurisdiction over PIA disputes, the Board will not serve as an effective enhancement for mediation. Moreover, we are not aware of any other open records dispute resolution program that provides for such fragmented jurisdiction.

### c. Potential Consolidation of PIA and Open Meetings Compliance Boards

Another of the OAG’s comments suggested that a Board with expanded PIA jurisdiction could be consolidated or combined with the Open Meetings Compliance Board (“OMCB”). Currently, the OMCB is an independent, three-member body that issues advisory opinions on

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<sup>36</sup> Apparently, the Office of Administrative Hearings has the ability to handle certain appeals from particular local agencies, but only by special arrangement. It is our understanding that this kind of arrangement was not typically used for local agency PIA appeals.

whether public bodies have violated the Open Meetings Act.<sup>37</sup> The OMCB has no role in PIA matters, just as the Ombudsman and PIACB have no role in any open meetings matters.

We believe that the current separation between the PIACB and the OMCB is appropriate, and that there would be little utility and potentially greater expense in combining them. First, we are unaware that there is any real support for combining the two entities. Second, in our view, there is not a high degree of overlap between the OMCB and our recommended PIACB to warrant combining the two. Although both the PIA and the Open Meetings Act broadly serve the objectives of transparent government, the compliance and enforcement landscapes under the two laws are vastly different, as are the remedies for violations. Finally, the OMCB is authorized only to issue advisory opinions—likely because open meetings violations usually involve events that have already occurred—while we are recommending the PIACB have authority to review and issue binding opinions on live PIA disputes. Thus, we do not recommend consolidating the two boards.

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<sup>37</sup> GP §§ 3-101 through 3-501.

### III. PIA Tracking and Reporting Recommendations

#### A. Survey of Reporting Agencies

We were asked to collect the following information from the 23 State reporting agencies for the 15-month period from July 1, 2018 through September 30, 2019:

- The number of PIA requests received;
- The disposition of those requests;
- The average response time;
- The number of fee waivers requested and granted;
- The number of Ombudsman mediation requests and the number conducted;<sup>38</sup>
- Information on PIA response processes and procedures, including training; and
- Information on records management processes and procedures, including training.

To collect the quantitative data, we sent the reporting agencies a survey instrument in the form of a spreadsheet. Due to our year-end reporting deadline, and because a portion of the reporting period was prospective, we split the process of collecting the data into two phases: first, we requested data for the first 12-month period—July 1, 2018 to June 30, 2019—be sent to us by July 31, 2019; and second, we requested data for the remaining three months—July 1, 2019 to September 30, 2019—be submitted by October 31.

To collect the necessary qualitative data, we asked the agencies to complete a questionnaire. Both the quantitative and qualitative survey instruments, together with our explanatory cover letter to the reporting agencies, are included in [Appendix B](#).

Our Preliminary Findings and Recommendations, which we issued on November 6, 2019, discussed the survey data for the first 12 months of the reporting period—that is, from July 1, 2018 through June 30, 2019 (“FY2019”)—in detail. This data and our findings are unchanged except that three reporting agencies—MSDE, DBM, and MHEC—supplemented or corrected their data. Due to the timing of these corrections, we were not able to include them in the Preliminary Findings, but have done so here, both in the data tables and, where necessary, in the text.<sup>39</sup>

Since we issued the Preliminary Findings, we also received from the reporting agencies data for the final three months of the reporting period, that is, from July 1, 2019 through September 30, 2019 (“1<sup>st</sup> Quarter FY2020”). We have included that data—along with a brief analysis and comparative data tables that match the FY2019 tables—in [Appendix D](#). We do not otherwise refer

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<sup>38</sup> Aggregate statistical data on the number of mediations conducted involving the State reporting agencies during FY 2019, and since the inception of the Ombudsman program through September 30, 2019, is discussed in Section II, above. We cannot report an agency-by-agency breakdown of mediation participation given the Ombudsman’s confidentiality requirements. See GP § 4-1B-04(b).

<sup>39</sup> Specifically, MSDE corrected its data to reflect that it received 184 rather than 300 PIA requests during FY2019, a correction which rendered more of its data internally consistent. Likewise, MHEC, which received two PIA requests during FY2019, corrected certain other data which made its data internally consistent. Lastly, DBM, which initially reported no quantitative data, reported that it received 30 PIA requests in FY2019, but did not track and was unable to report other data fields. DBM reported that it has since begun tracking this other data.

to the 1st Quarter FY2020 data in this Final Report, other than to note here that it is largely consistent with our discussion of the FY2019 data.

The 1st Quarter FY2020 data does differ from the FY2019 data in one respect: most agencies were able to provide consistent data in more reporting categories than they had done with their FY2019 data, albeit in some cases, after additional follow-up from us. We suspect this is because the agencies were “on notice” as of May 2019 that they were expected to report detailed PIA caseload data for this prospective time period, and so likely began tracking the information we requested, if they were not already doing so. Nonetheless, we note that two of the agencies with the largest PIA caseloads—MDE and MDOT—still did not track any additional fields.

### 1. Quality of Survey Data

The survey of the 23 State reporting agencies, standing alone, is of limited use within the scope of our report. First, the reporting agencies comprise only about half of all State agencies, and no local agencies were included. Thus, the majority of all agencies subject to the PIA were not included in the survey. Nonetheless, based on other information sources, including the Ombudsman caseload from April 2016 through September 2019, we believe many of our observations likely apply across all State agencies, and at the local agency level.

Second, much of the reporting agencies’ quantitative data is incomplete. For example, MDOT and MDE reported that they did not track and could not provide data for more than half of the questions. Specifically, MDE reported not tracking eight of the quantitative questions—including all of the questions in the section on PIA dispositions—while MDOT did not track data for nine of the questions, including all of the questions in the section on fees. In addition, DHS provided data for only half of FY2019, *i.e.*, the final 6 months, from January 1 to June 30, 2019.

Third, many agency responses were internally inconsistent to a degree that we could not rely on them for certain comparisons and evaluations. Specifically, we could not rely on responses for a particular topic where the sum of the data for that topic was not close to the total number of PIA requests received. For example, one topic is the number of initial PIA responses within and outside the statutory “10-day” deadline; where those responses added together are not equal to or within 5% of the total number of requests, we did not rely on that data when analyzing this topic.<sup>40</sup> In most instances where the data was deemed inconsistent, the deviation was far more than 5% from the total number of requests.<sup>41</sup>

We recognize that some of this internal inconsistency may have been due to misinterpretations of the survey instrument. However, we followed up with every agency that provided us with inconsistent data to explain what we were looking for, and many were able to

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<sup>40</sup> By way of further illustration, if an agency reported having received 100 PIA requests during the period, but reported only 33 total responses either within or outside the 10 business day deadline, we could not confidently rely on that agency’s numbers for purposes of assessing or comparing agency compliance with the 10 business day initial response deadline.

<sup>41</sup> The survey instrument provided the reporting agencies with the opportunity to explain inconsistencies in each category of data with boxes marked “other”; *e.g.*, an agency could report the number of PIA requests still pending and within the 10-day initial response deadline as of the date they submitted the survey. The survey instrument also invited narrative comment so that an agency could elaborate or further explain its data if it wished to do so. We have taken into account any such relevant explanations that were provided in making our determination as to internal inconsistencies. The survey instruments are provided in [Appendix B](#).

make changes accordingly. For example, MSP had at first reported highly inconsistent numbers but, after discussing their data with us, provided consistent and reliable data for all fields. Other agencies were not responsive to our attempts at clarification, or only provided corrected data too late to be incorporated into our Preliminary Findings.

We also recognize that because agencies were not expecting to report this level of PIA caseload detail until notified of this project in May 2019, they may not have been tracking the requested fields. Nonetheless, to the extent that most of what we asked for could be considered basic metrics of PIA performance, —e.g., timeliness of responses and imposition of fees—we think the lack of tracking is itself an informative finding.

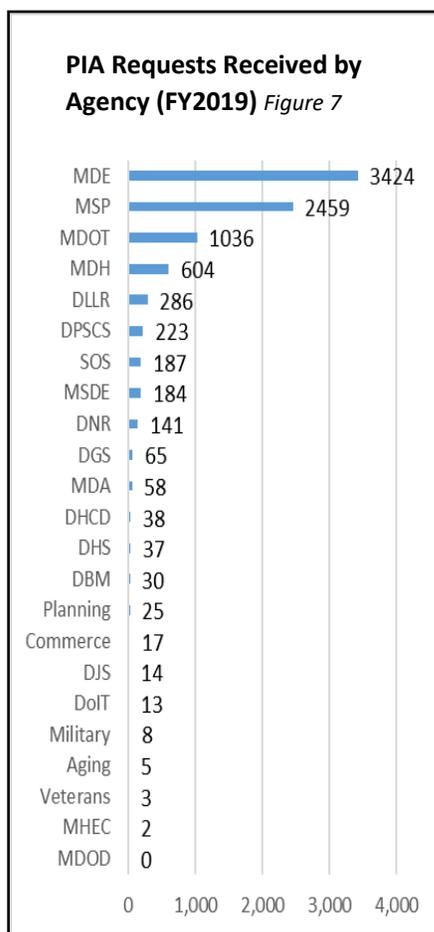
## 2. Reporting Agencies' PIA Caseloads

The survey data reflects that the PIA caseloads among the reporting agencies during FY2019 varied considerably. For example, the number of requests per agency ranges from 0 (MDOD) to 3,424 (MDE),<sup>42</sup> with three agencies—MDE, MSP and MDOT—receiving 6,919, or 77%, of the 8,859 total PIA requests received by all reporting agencies. See *Figure 7*.

This data also reflects that most of the reporting agencies have a light to moderate caseload, with some agencies reporting what might be described as a *de minimis* number of requests. Specifically, twelve agencies reported having fewer than 40 PIA requests during FY2019, and five reported having fewer than ten. An additional seven agencies reported receiving between 50 and 300 requests.<sup>43</sup>

We note, anecdotally, that many agencies at both the State and local levels report a significant increase in PIA requests in recent years. Our survey did not request comparative data from past years, but this trend seems likely due to the increasing prevalence of electronic records and the relative ease of making record requests via email and/or website.

Still, it is worth noting that many reporting agencies do not have a voluminous PIA caseload, and this variation likely holds across other State and local agencies. Moreover, based on all data available to us, there does not appear to be a significant relationship between caseload volume and performance deficiencies, such as timeliness of response.



<sup>42</sup> MDE explains that its total number may even be understated, given that its tracking software aggregates multiple requests from the same requestor.

<sup>43</sup> We are including DHS's total, even though that agency provided data only for the final six months of FY2019.

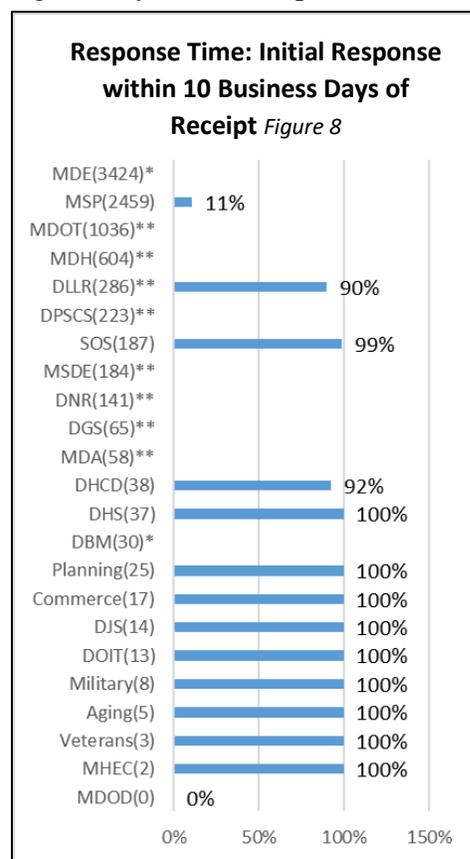
The disparity between agency caseloads suggests that improvements in performance will come from measures targeted to agency-specific problem areas, units, or processes, rather than from any “one size fits all” approach with respect to staffing, processes, or infrastructure. Rather, agencies with light to moderate caseloads can look to systems used by those with heavier caseloads, build on what works well, and learn from agencies with expertise in handling certain types of data and records, such as large data sets. We discuss some generally-beneficial practices in our recommendations section below.

### 3. Timeliness of PIA Responses

Under the PIA, an agency has 10 business days in which to send an initial response to a request. If the response is not finalized at that time, the “10-day” response must provide the requestor with certain information, such as the reason for the delay and an estimate of fees, if any. An agency has 30 calendar days in which to send the final response, which can be extended by consent of the requestor.

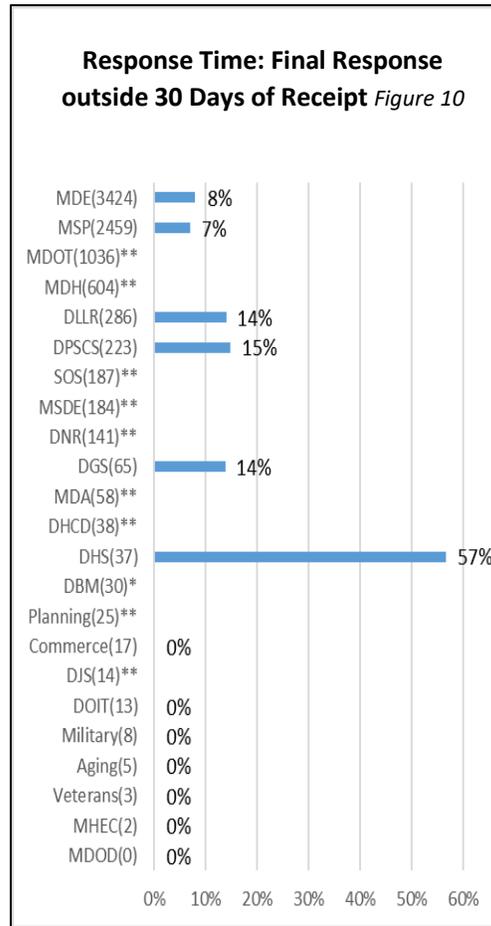
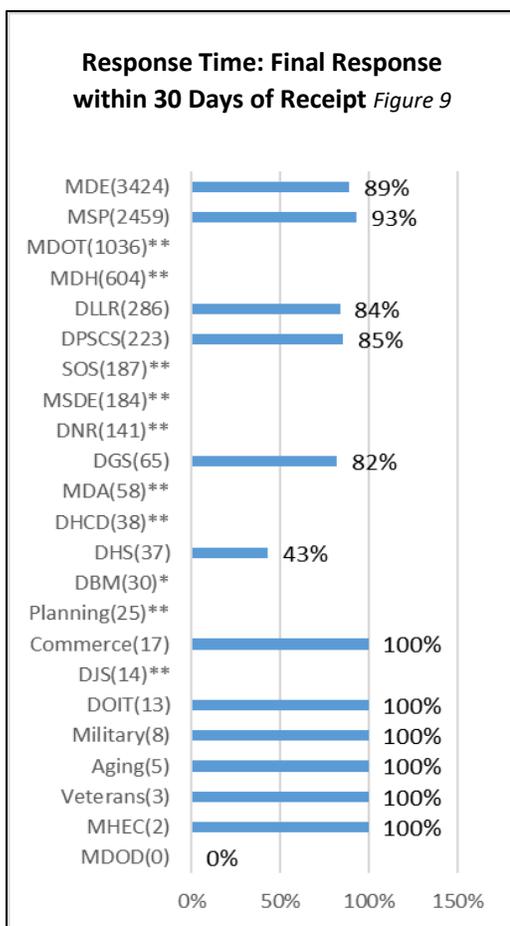
We asked agencies to report the number of initial responses sent within 10 days, *see Figure 8*, and the number of final responses issued within and outside 30 days, *see Figures 9 and 10*, below. Five of the six highest volume agencies—those with more than 200 requests in FY 2019—either did not track one or both of these metrics, or were unable to provide consistent data for one or both metrics.

In fact, only nine agencies tracked and provided consistent data regarding their compliance with both the 10-day and 30-day deadlines, and seven of those were agencies with the smallest caseloads, *i.e.*, fewer than 40 requests during FY2019. *See Figures 8, 9, and 10.* That said, four of the agencies with caseloads higher than 200 in FY 2019 reported sending more than 80% of final responses within 30 days. *See Figure 9*, below.



\* Did not track this metric | \*\* Data was internally inconsistent.

The Ombudsman regularly receives complaints about long overdue and missing responses, in which the agency has not sent even an initial response within 30 days. When an agency’s response is missing or long overdue, it frequently indicates other compliance issues. In fact, the internal inconsistencies present in the reporting agencies’ survey data, together with the Ombudsman’s experience, suggest that many agencies are not adequately tracking PIA requests, leading to tardy responses and other compliance issues. Thus, in order for agencies to fully comply with the PIA—including its deadlines—it is essential to accurately track all PIA requests from the time they are received through the time a final response is sent.



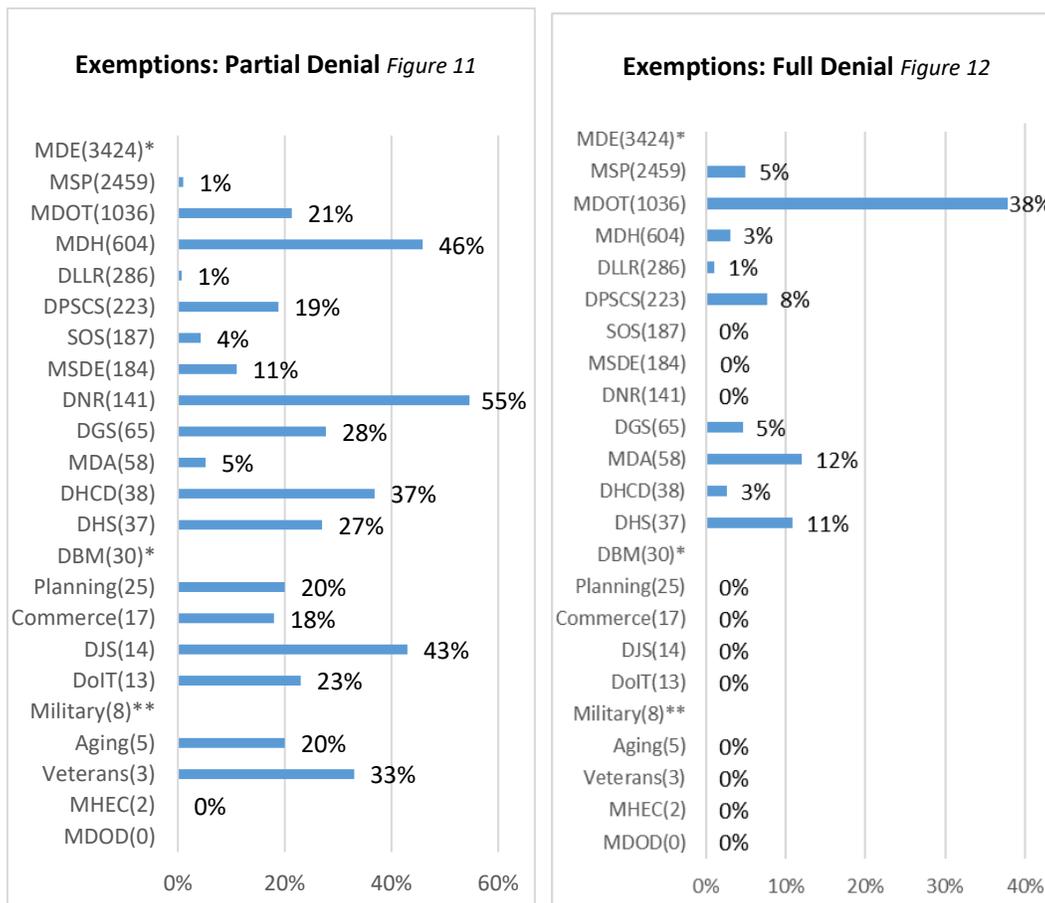
\* Did not track this metric. / \*\*Data was internally inconsistent.

#### 4. Disposition of PIA Requests

We asked the reporting agencies a number of questions pertaining to the dispositions of the PIA requests they received. The data suggests that agencies often receive requests for records of which they are not the custodian, or for which they do not have any responsive materials. Agencies also frequently respond to requests by disclosing all responsive records. Overall, the reporting agencies responded to more than 36% of their cumulative PIA requests with full disclosure of the requested record.

At the same time, many agencies report withholding some or all of the requested record in a significant number of cases. This occurs when an agency applies one or more of the PIA’s exemptions. Depending on the material requested, the PIA may *require* an agency to withhold all or part of the record, or it may *permit*, on a discretionary basis, an agency to withhold all or part

of a record. *Figures 11 and 12*, below, indicate that most agencies relatively rarely withhold the entire requested record; MDOT is an outlier here, reporting that it denied the entire record in 38% of its responses. Many more agencies withhold a part of the requested record in a significant percentage of their responses. For example, DNR partially withheld the requested record in more than half of its responses, and twelve agencies provided partial denials in 18% to 46% of their responses.



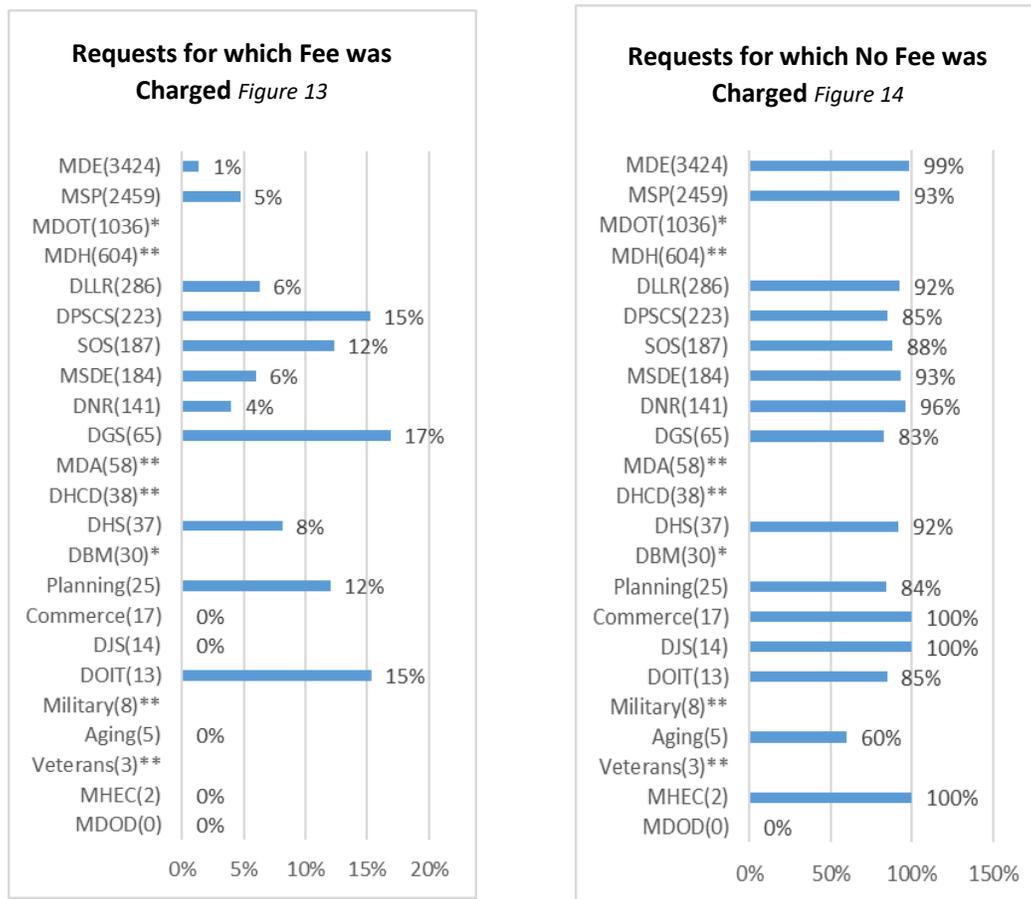
\* Did not track this metric. / \*\*Data was internally inconsistent.

An agency’s application of exemptions to either fully or partially deny the requested record is a constant source of disputes. Since the Ombudsman’s program began in 2016, more than 20% of all mediations have involved these kinds of issues. The resolution of many exemption-based disputes turns on a legal question and/or a review of the record at issue to assess the applicability of the claimed exemption or exemptions. Although the Ombudsman is often successful on this front, many of these disputes—about half—remain unresolved after mediation and would benefit from our recommendation for a Board with comprehensive jurisdiction to review and issue a binding decision on the matter.

## 5. PIA Fees

We asked the reporting agencies to provide the number of PIA requests for which a fee was charged, *see Figures 13 and 14*, below, the number of requests for which a fee waiver was requested, *see Figure 15*, below, and the number for which a fee waiver was granted, *see Figure 16*, below.

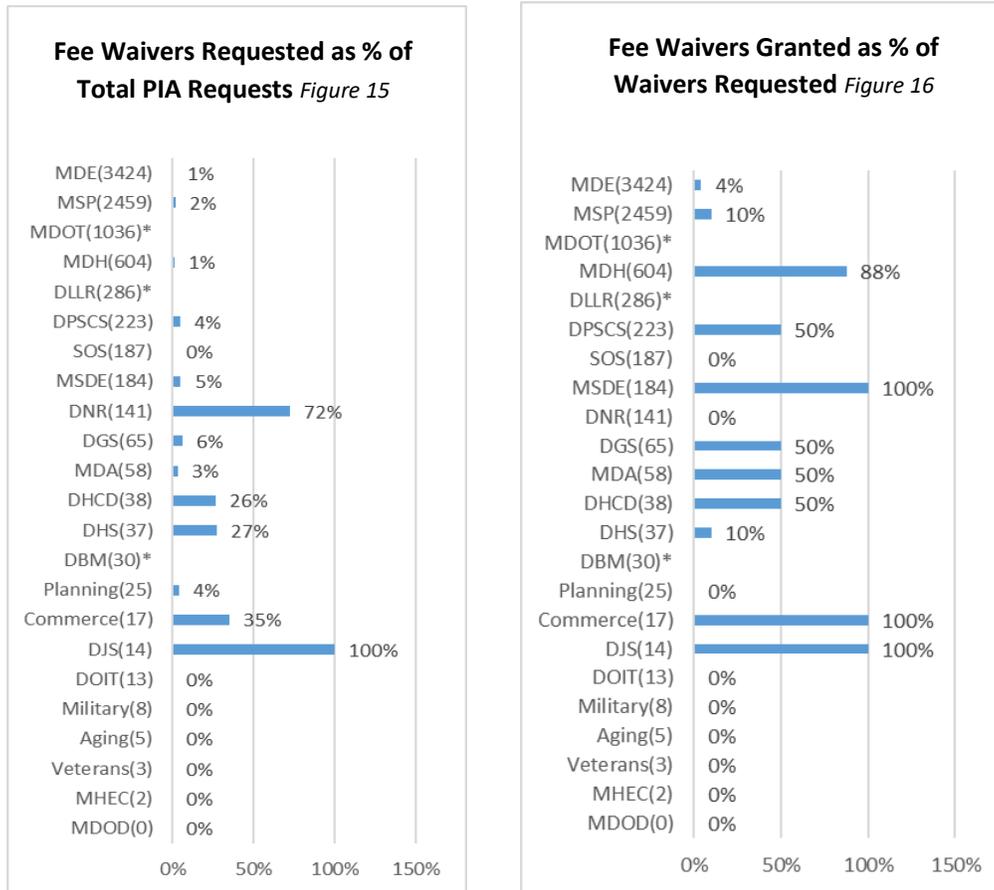
The data suggests that most PIA requests are handled by agencies without fees. We interpret this category to include requests that were denied, *e.g.*, because one or more exemptions applied, those where no responsive records existed, and those which were handled in two hours or less. This category also may include some matters that were technically eligible for a fee, but in which no fee was charged for some reason, *e.g.*, because the charges were *de minimis*, were not accurately documented, or were otherwise waived.



\* Did not track this metric. / \*\* Data was internally inconsistent.

With regard to fee waivers, as reflected in *Tables 15 and 16*, below, it appears waivers are requested in a relatively small percentage of the reporting agencies' total caseloads, subject to a few exceptions. The outliers are DNR and DJS, in which a waiver was requested in 72% and 100% of their requests, respectively. DNR did not grant any of those waiver requests, while DJS granted all of them. Overall, eight of the thirteen agencies that received waiver requests granted at least half of them. The notable exceptions are the two agencies with the largest caseloads—

MDE and MSP—which granted a relatively small percentage of their waiver requests—4% and 10%, respectively. The only other agency reporting more than 1,000 PIA requests—MDOT—did not track or report any fee data.



\* Did not track this metric. / \*\* Data was internally inconsistent.

Fee disputes are present in a consistent percentage of the Ombudsman’s mediations. The Ombudsman has concluded a total of 800 mediations involving State and local agencies as of September 30, 2019. Approximately 6% of these mediations—about 50—have involved the denial of a fee waiver request, and another 9%—or about 74—have involved disputes over the amount of a fee. In other words, the Ombudsman has received more than 120 fee-related disputes in the 42 months of operation through September 30, 2019.

During a roughly comparable period, the Board—which has jurisdiction only over fees greater than \$350, but not over lesser fees or fee waivers—has received relatively few complaints that fall within its jurisdiction, issuing only 22 opinions. During the same time, it has received more than 15 complaints about an agency’s denial of a fee waiver request, in addition to other complaints about PIA disputes that are not within its jurisdiction. The disparity between the Ombudsman’s fee-related caseload and the Board’s suggests that the majority of PIA fee-related disputes involve fees less than \$350 and/or the denial of fee waiver requests, neither of which are within the Board’s jurisdiction.

Based on this data, we believe that any enhanced PIA dispute resolution mechanism must have the authority to address more fee disputes in a meaningful way. With regard to the fee

threshold that is eligible for Board review, we believe the Legislature should reduce it to \$200, and our proposed amendments reflect this recommendation. See [Appendix E](#). With regard to fee waivers, our recommendation for vesting the Board with comprehensive jurisdiction includes jurisdiction to review an agency's denial of a waiver.<sup>44</sup> See [Appendix E](#).

## **B. Compliance Monitoring: Feasibility of Agency Self-Reporting**

In addition to analyzing the reporting agencies' PIA caseload data, we asked the agencies to give us their views on the feasibility of caseload tracking and periodic self-reporting of that data. Most agencies reported that it is feasible to periodically report data on their PIA caseload, and many—particularly those receiving a sizeable volume of requests—report that they already track some or all of the data requested in the survey.<sup>45</sup> Agencies receiving a relatively small volume of requests also generally reported either a current ability to track and self-report, or expressed a willingness to consider doing so.<sup>46</sup> Only two agencies expressed the view that self-reporting is not

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<sup>44</sup> In our combined experience, we believe that agencies' misunderstanding of the PIA's fee waiver provisions and/or default unwillingness to grant fee waivers leads to the routine—rather than discretionary—denial of many waiver requests. For example, in instances where a requestor provides an affidavit of indigency—which is the most specific statutory criteria for granting a waiver, see GP § 4-206(e)(2)—many agencies nonetheless routinely deny the request. In some of these cases, it is clear the agency misunderstands the affidavit provision. See, e.g., PIACB Opinion 19-08 (explaining that the wording of the PIA's fee waiver provision authorizes a custodian to grant a fee waiver “on the basis of an affidavit of indigency alone,” without considering other public interest factors, and encouraging the agency to reconsider the waiver request to the extent that it misconstrued the waiver provision).

<sup>45</sup> Agencies reporting an ability to track and report PIA data, including those that already do so internally, include **MDE** (using tracking database and software; currently reports annual statistics to DBM through “Managing MD for Results” process); **MSP** (currently maintains PIA log; periodic self-evaluations conducted by personnel in Central Records); **MDOT** (reports and verifies open requests daily; runs reports for senior leadership, official custodians, and PIA staff as needed); **MDH** (PIA coordinator provides quarterly reports to Secretary and senior staff and meets weekly to review MDH tracking log and discuss any overdue requests; with future use of “smart sheets”, will be able to generate reports that identify different categories of cases—e.g., overdue, pending, or completed—and statistics that will be viewed on internal dashboard by senior leadership and all PIA officers); **MSDE** (maintains database of all outstanding and completed requests which is regularly reviewed for accuracy and completion); **DLLR** (performs self-evaluation of caseload based upon spreadsheets maintained by agency counsel); **DPSCS** (has tracking system); **DNR** (self-report feasible on annual basis); **DGS** (self-report feasible); **MDA** (report on annual basis feasible; would develop its own internal survey and have each unit report responses and discuss results at staff meeting); **DHCD** (agency counsel maintains excel spreadsheet/log of PIA requests and their dispositions; tracks deadlines and whether estimated fees are paid); and **DHS** (self-report feasible for 2019 going forward using PIA web portal which tracks requests submitted via the portal).

<sup>46</sup> Agencies receiving comparatively few PIA requests that expressed one of these views include **DJS** (did not previously maintain log or database, but, as of December 1, 2019, is implementing a data-collection system that will track future PIA requests and responses); **Veterans** (does not maintain electronic log or database; receives very few requests); **MHEC** (maintains electronic log of PIA requests, and in process of creating comprehensive internal PIA policy/procedures document for staff to ensure process carried out efficiently); **DBM** (receives moderate number of requests, and should be able to conduct internal self-evaluation using new “Google Sheets” tracking database); **Planning** (self-reporting feasible; has no database, but maintains searchable electronic records on all PIA requests and dispositions); **Commerce** (feasible to periodically perform self-evaluations); **Military** (probably can perform self-evaluation, but needs more guidance from OAG as to how/what to evaluate); and **Agging** (yes; low volume).

feasible, or otherwise objected to the idea.<sup>47</sup> And one agency—MDOD—which reported receiving no PIA requests at all during the reporting period, responded to the question with “N/A.”

We believe that a similar pattern likely exists among State and local agencies not included in our survey. That is, agencies with a significant volume of PIA requests are likely already tracking and logging at least some data, while those with a modest or *de minimis* volume of requests should be able to implement a basic tracking and reporting system without any investment in new software, infrastructure, or staff. We assume that agencies with heavy PIA caseloads already track their PIA data to some degree as necessary to manage their caseload.

We recommend that in order to obtain uniform, consistent, and reliable information on PIA caseloads and dispositions, the Legislature should specify the data agencies must track and report, and require agencies to publish this data periodically on their websites to the extent feasible. Some of the benefits of uniform, consistent tracking and reporting include:

- Likely reduction in “MIA” matters, *i.e.*, matters in which the first response to a PIA request is issued after the 30 day deadline has expired; currently, this category of disputes comprises about 20% of the Ombudsman’s caseload.
- Informed assessments of the need for additional PIA-related resources, including personnel, funding, and software systems; not all agencies have this need, and only systematic data will facilitate informed decisions about those that do.
- Identification of “peer” agencies in terms of PIA caseload, allowing agencies to exchange meaningful information and tips about procedures, software, and other technologies that improve PIA performance.
- Enhanced transparency with respect to PIA caseloads, dispositions, fees, and need for future changes to existing law.

### **C. Other Recommendations and Agency Needs**

#### **1. PIA Performance**

In addition to asking the reporting agencies about PIA caseloads and procedures, we asked about practices and needs that are closely connected to their capacity to regularly comply with the PIA. For example, we asked questions about records retention and management, proactive records disclosure practices, participation in PIA and records management training, use of PIA tracking systems, software to retrieve and redact electronic records, and policies and procedures related to maintenance and retrieval of public records that may reside on remote or mobile devices, or on social media platforms.

The agency responses are available on the Ombudsman’s website at the following link: [Reporting Agencies’ Qualitative Responses](#). Many agencies report that they need additional resources, such as more staff, funding, training, and/or technologies—including software and additional software licenses—to move forward in some or all of these areas. And while there is a

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<sup>47</sup> These agencies are **DOIT** (would take extra time and resources that are not necessary for the Department to follow PIA requirements); and **SOS** (not feasible; there is only one employee who discharges agency’s PIA responsibilities, and she has other duties, too).

great deal of variability in agency caseloads and response capacities, we believe the following general practices would enhance agency efficiency and performance.

- **Maximizing proactive disclosure tools and methods.** These methods include measures as simple as maintaining a current list of readily available documents, publishing such a list on the agency’s website, or publishing frequently requested records to the agency’s website or other central repository.<sup>48</sup>

For example, Howard County Public School System (“HCPSS”) recently instituted an online initiative of tracking and monitoring PIA requests and proactively disclosing public records.<sup>49</sup> The online system was created in-house from scratch at a low development cost by the HCPSS Communications Division, in consultation with its PIA Representative, following study of similar systems. The HCPSS system allows the public to submit PIA requests through an online form, and to follow the status of their requests as HCPSS works to respond. The system also makes summary information regarding each submitted PIA request available for public inspection, along with responsive documents previously provided to requestors.<sup>50</sup>

- **Training and professionalizing the PIA front-line.** Many agencies are meeting PIA obligations with staff who are not solely dedicated to the PIA. Although this practice is undoubtedly adequate for agencies with a low or *de minimis* volume of requests, agencies with consistently large—or steadily increasing—volumes of PIA requests need trained staff that are either solely or primarily dedicated to handling PIA matters.

One reporting agency with a high volume of requests indicated that the reclassification of PIA-related positions, together with increased salaries, is needed to maintain and improve the handling of its PIA caseload. This observation is consistent with the approach and recommendations of the FOIA Advisory Committee for recruiting talent and developing career models for information management professionals. See [FOIA Advisory Committee 2016-2018 Final Report](#) at 14–15 (discussing bringing in talent and building a career path).

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<sup>48</sup> See, e.g., [Open Matters: The Ombudsman’s Blog, “Proactive Disclosure Saves Time and Money, and It’s the Law”](#) (January 28, 2019); see also [Report to the Archivist of the United States: Freedom of Information Act Federal Advisory Committee, Final Report and Recommendations, 2016-2018 Committee Term](#) at 18-24 (April 17, 2018) (“FOIA Advisory Committee 2016-2018 Final Report”) (discussing recommended practices regarding proactive disclosure).

<sup>49</sup> See [Open Matters: The Ombudsman’s Blog, “PIA Technology Solutions: HCPSS – Transparency in Public Schools”](#) (September 26, 2018).

<sup>50</sup> The HCPSS’ PIA Representative explains that,

[a] key benefit is that we are able to make more public records readily available online. Many times, the same information is sought by different requestors, which they can find through the built-in search feature. In this way, we are using technology to help meet the intent of the PIA to provide records with the least cost and delay. It’s an invaluable tool- both for ease of public access and for use internally to track custodians of records, identify keywords to find trends in requests, and monitor timeliness of responses.

- **Changing agency culture and messaging from the top.** Several of the reporting agencies explained the ways in which the Secretary and senior staff collaborate with front-line PIA coordinators in the process of handling PIA requests and problems. *See* footnote 45, herein. In our experience, when Secretaries and senior management are involved in the PIA process, and emphasize the importance of PIA duties—*e.g.*, that compliance is not optional but mandatory, and that PIA compliance is an integral part of the agency’s larger public mission—staff at all levels take notice and comply. We know of instances in which these types of efforts and initiatives have turned difficult situations into occasions for meaningful improvement.
- **Tracking and managing PIA requests internally.** We believe internal PIA tracking is critically important to an agency’s overall PIA compliance and improved performance in the long run. Many of the reporting agencies have described in detail the steps they are taking to more effectively track, monitor, and trouble-shoot the agency’s response process from start to finish. *See* footnotes 45 and 46, herein.<sup>51</sup>
- **Leveraging technology:** With the accelerating pace of e-government initiatives and the proliferation of electronic records and communications at all governmental levels and across all platforms, finding and utilizing technologies that assist in the retention, maintenance, and retrieval of electronic records continues to be critically important for efficiency and transparency. In general, the reporting agencies indicate that there is a great deal of need in this arena; some agencies have little experience with specialized software or other technologies in this context, and others have more substantial experience. Large volume email retrieval, in particular, is consistently identified as problematic, and many agencies seek additional relevant training or technology.

The above general practices highlight the ways in which some State and local agencies are using technology to improve their PIA process. For additional perspectives on this topic, *see* [FOIA Advisory Committee 2016-2018 Final Report](#) at 16-18, and [Office of Government Information Services \(OGIS\) Assessment: Leveraging Technology to Improve Freedom of Information Act \(FOIA\) Searches](#) (July 31, 2019).

## 2. Records Management Practices

In addition to questions about the reporting agencies’ core PIA caseload, we asked qualitative questions about the agencies’ other PIA and records management practices, including staffing, training, proactive disclosure, and use of technology. These areas bear directly on an agency’s efficiency and its ability to fully and regularly comply with the PIA.

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<sup>51</sup> For additional examples of tracking and monitoring initiatives undertaken by other State and local agencies, *see* Open Matters: The Ombudsman’s Blog, “[PIA Technology Solutions: Maryland Insurance Administration’s PIA Web-Portal](#)” (November 20, 2018); “[Innovative Approach to Case Management Aids Anne Arundel’s Compliance with the PIA](#)” (March 29, 2018); and “[PIA Technology Solutions: HCPSS – Transparency in Public Schools.](#)” *See also* [FOIA Advisory Committee 2016-2018 Final Report](#) at 17, 20-21 (containing detailed recommendations regarding tracking systems and FOIA Log recommendations).

For example, because the PIA is essentially concerned with access to public records with the least cost and delay, effective records management practices—including maintenance, retention, retrieval, and destruction—are essential to a reliable and efficient PIA process.

Confidence in these records management practices, or the lack thereof, inform all aspects of the PIA, from the search and retrieval process, to fees and disputes. Although our mandate in this report does not include a deep analysis of records management processes, or the need for related enforcement and compliance mechanisms, we do note the crucial connection between records management and the PIA. Some of the findings that emerged from this portion of our survey include:

- There is wide diversity in the reporting agencies' compliance with and competence in records management practices—some agencies reported not knowing whether they had retention schedules on file at all, while others reported up-to-date schedules for all units within the department.
- As a general matter, the agencies with the most voluminous PIA caseload seem to have the best handle on records management practices and the most robust records management programs.
- However, even agencies with large PIA caseloads and robust records management programs do not appear to have comprehensive or integrated records management plans across all mediums, platforms, or devices, such as phones, email, and social media. Proper implementation of the PIA requires this kind of integration for purposes of effective search, retrieval, and production of records.
- Agencies underutilize tools of proactive records disclosure, such as maintaining lists of readily available documents that are able to be provided immediately without review, publishing such documents or links to them on the agency's website, or publishing records that have already been disclosed under the PIA, especially where there is widespread public interest and/or the agency is likely to receive multiple requests for the same documents.
- Many agencies reported they would benefit from additional PIA and/or records management trainings and other resources. Maryland State Archives and the Department of General Services jointly conducted four "Record Management 101" trainings across Maryland during 2019, which were attended by representatives of many of the reporting agencies and others. If there is sufficient interest, we would like to explore the possibility of conducting joint PIA and records management trainings in the future.
- As most agencies transition to primarily electronic records and communications, their records management practices and retrieval and disclosure methods have not kept up with these technologies, which has complicated PIA processes and disputes.
- There is a need for agencies to develop and/or integrate their policies on the use of remote and mobile devices as well as social media with records retention and PIA requirements. In general, public records, including those on remote or mobile devices and, potentially, on social media platforms, must be retained in accordance with records retention requirements and must be accessible in accordance with PIA requirements.
- Although we did not collect similar data at the local government level, we suspect the trends are similar.

## IV. Public Comments

We conducted extensive outreach for comments during the course of our work on this project. In this section, we discuss the comments we received that are specifically directed to or have a bearing on our recommendations in this report. The full text of these and other comments we received are included in [Appendix F](#).

### A. *Comments from the Office of the Attorney General, Patrick Hughes, Chief Counsel, Opinions and Advice (December 6, 2019).*

**Comment.** *“In general . . . our Office agrees that some sort of expanded jurisdiction for the PIACB is an avenue that is at least worth exploring, particularly if the proposal would retain the incentive for parties to participate in informal mediation with the Ombudsman before seeking review from the PIACB.”*

**Response** We are unsure what is meant by “retain[ing] the incentive for parties to participate in informal mediation with the Ombudsman.” As outlined above, there is currently little or no incentive for both parties to meaningfully participate because there are few consequences for not participating and cooperating with the Ombudsman. On the contrary, we believe that the only way to truly incentivize parties to participate in informal mediation with the Ombudsman is to have a review and decisional mechanism built in to the process. Only when parties know that they may face a binding resolution in the event that mediation with the Ombudsman does not resolve the matter will they approach the mediation process in a way that maximizes its benefits.

**Comment.** *“We continue to have concerns . . . about the potential workload of a PIACB with expanded jurisdiction and about whether an all-volunteer board could handle a caseload that would increase significantly in both volume and in legal complexity.”*

**Response.** This comment appears to stem from the mistaken assumption that other states’ open government boards and commissions—or many other kinds of appointed boards, for that matter—are other than volunteer. Five of the seven state models we examined—Connecticut, Iowa, Mississippi, New Jersey, and Utah—utilize appointed boards, commissions, or councils, and, as far as we can tell, none of those members are paid a salary for their services. At most, a member may be reimbursed for expenses—as is the case with the PIACB—and receive a per diem payment for the time they attend meetings of the body, which is usually only once per month. *See, e.g.,* New Jersey Statutes Annotated, 47:1A-7(a).

In all cases—including the PIACB—most of the day-to-day work of the body, including complaint intake, mediation functions, legal research, and opinion drafting is handled by professional paid staff. We acknowledge that the workload of Board staff will increase if its jurisdiction is expanded as we recommend, and that is why we are also recommending an addition of two full time staff, including at least one additional attorney.

**Comment.** *“Although the preliminary findings estimate that the PIACB would be asked to handle approximately 61 matters per year, that figure appears to assume that the number of requests for mediation will remain the same, even though the Ombudsman would be the first step in a process by which the requester could get a binding resolution from the PIACB. In*

*our view, it is highly likely that more requesters would seek to take advantage of the Ombudsman's services once that route becomes the gateway to a binding administrative proceeding.”*

**Response.** This comment implicitly assumes one of two things with regard to the total number of PIA disputes in Maryland: either 1) the total number of PIA disputes will somehow increase once the Board has comprehensive jurisdiction, or 2) there are currently many PIA disputes that are not going to the Ombudsman, but that will go to the Ombudsman if the Board is vested with comprehensive jurisdiction. The OAG has not offered any support for either assumption, beyond speculation.

Our caseload projections for a hypothetical Board with comprehensive jurisdiction are based on real data from the Ombudsman’s more than 42 months of operation. The number of disputes received by the Ombudsman are remarkably consistent each year—around 200 on average. It is unclear to us why this consistent number would suddenly and dramatically increase just because the Ombudsman becomes the “gateway to a binding administrative proceeding.”

The Ombudsman is currently the only extrajudicial dispute-resolution option for most types of PIA disputes, and we believe most parties with substantive disputes who are not willing or are unable to pursue judicial remedies would at least attempt mediation with the Ombudsman’s Office. In the alternative, if it is true that parties with substantive disputes are not currently coming to the Ombudsman, but would do so if the Board receives expanded jurisdiction, then that supports our conclusion that there is real need for an expanded dispute-resolution process with a binding review and decisional option. *See also* our discussion of factors influencing the Board’s projected caseload and the Ombudsman’s caseload in footnotes 27 and 28, herein.

At the very least, even if we are underestimating the need for an expanded Board option, that is not a reason to deny a clearly needed remedy. The Board’s actual caseload and processes can be examined and reported in the future as the reality becomes clear, and any additional resources, if necessary, can then be based on concrete operations, not speculation.<sup>52</sup>

**Comment.** “[M]ost agencies in other states that resolve public records disputes have large caseloads. That is true both for states with populations larger than Maryland's and those with populations much smaller than Maryland's. . . . Although these statistics do not enable us to predict caseloads in Maryland with any certainty or precision, they do show that large numbers of requesters in other states are using their states' extra-judicial enforcement options, and there is no reason to think that large numbers of requesters in Maryland would not do the same.”

**Response.** It is impossible to pinpoint the various contingencies, contexts, histories, and structures that result in the wide caseload range of the other open records review/decisional bodies we examined. State population is clearly not the only factor—Connecticut, for instance,

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<sup>52</sup> It is our recommendation that the Board continue to report annually on its caseload, disposition, and need for any additional resources. If future caseloads warrant it, we believe it might be worth exploring the possibility of amending the PIA to allow the Board to refer some disputes to the Office of Administrative Hearings, particularly those that are factually complex or might benefit from that Office’s procedures. The OAH has advised us that it has the capacity to handle adjudicatory cases referred by the Board, and that such could be accomplished with appropriate amendments to the PIA.

received over 750 complaints in 2018, while Iowa, which has a similar-sized population, received just over 120. Moreover, the New Jersey Government Records Council, which is the model closest to the one we recommend—in terms of single open records jurisdiction, board structure, and staff size—had a similar caseload to the Ombudsman’s in 2018.

What we can say is that the best data we have available to project the caseload in Maryland is the Ombudsman’s own caseload data for the past 42 months of operations. As we explained in our response above, the Ombudsman’s caseload during that time has been quite consistent, averaging around 200 matters per year, and we have no reason to believe that expanding the Board’s jurisdiction would result in a dramatic and sudden increase. The OAG’s speculation on this point must stem either from the assumption that PIA disputes themselves will increase, or that the Ombudsman has not been receiving numerous disputes solely because there is not currently an enforcement option on the back end. We know of no support for either of these assumptions. *See also* footnotes 27 and 28, herein.

**Comment.** *“Even if the PIACB’s caseload does not increase as much as we expect in raw numbers, the caseload would undoubtedly increase in legal complexity. . . . As a result, on those matters, the PIACB would have to issue thorough, detailed, legally complicated opinions, requiring far more time per case than the fee disputes that it currently adjudicates.”*

**Response.** We agree that expanding the Board’s jurisdiction as we recommend would result in more complex issues coming before the Board than the ones it currently handles—indeed, the need for such review is the basis for our recommendation. That is one of the reasons we are recommending at least one additional attorney for the Board. The OAG is responsible for hiring the Ombudsman and the lawyers and other staff for the programs, all of whom to date have been extremely experienced and capable professionals. There is no reason to believe that the OAG would not be able to hire similarly well-qualified and competent attorneys to meet any additional staffing that may be required.

Moreover, the Ombudsman already deals with complex legal issues, in which she is capably assisted by the assistant attorney general who she shares with the Board. There is no reason to believe that one to two additional full time attorneys dedicated to the PIA dispute-resolution process would not be able to handle the Board’s increased caseload and complexity. Moreover, as discussed above, we anticipate the complex Board matters to be balanced by a similar number of more simple matters.

Ultimately, the prospect of complex matters coming before the Board is to be welcomed—it will provide the Board with an opportunity to issue opinions on little-explored exemptions and other issues that will serve as guidance for subsequent matters on the same or similar topics. Such guidance is needed on many PIA exemptions that have not yet been thoroughly examined in case law, and it will serve both to make subsequent matters easier to resolve, and to guide PIA practitioners.

**Comment.** *“[I]f the intent is to grant the PIACB power to review disputed records in camera to determine whether a particular exemption applies, the members might also have to sort through piles of documents in rendering an opinion. All of that is asking a lot of an all-volunteer board, particularly when only one member of the board is required to be a lawyer. See GP § 4-1A-02(a)(3).”*

**Response.** As a threshold matter, and to reiterate, the professional, paid staff members of the Board will typically be the ones doing the “heavy lifting” when it comes to initial legal research, document review, and drafting in order to present the Board with a distilled and concise version of the dispute and the issues that require a final decision. This is the division of labor in every other open records board/commission model we examined. Moreover, although other board/commission models we have examined do not require any members to be an attorney, *see, e.g.*, New Jersey Statutes Annotated 47:1A-7, we believe that requiring at least two of the five PIACB members to be Maryland attorneys would be helpful, and have included language to that effect in our draft amendments, *see* [Appendix E](#).

That said, we do expect that some PIA disputes coming before the Board will require a review of the documents at issue in order to determine the application of claimed exemptions, and have drafted a provision in the recommended legislation to that effect. *See* [Appendix E](#). Indeed, the Ombudsman and her staff currently conduct such reviews when it is relevant and when the parties consent to the process. For the most part, these reviews have not been onerous and have proven extremely fruitful.

Even when the documents at issue are voluminous, a thorough review need not always entail examining every page in order to determine the appropriateness of an exemption. For example, depending on the circumstances, it may suffice for the Board to review a representative sampling of documents, and/or a descriptive index of the documents and the exemptions claimed. Courts often use those methods of review in order to conserve judicial resources, and we anticipate that in many such scenarios, the Board could as well. We have included language to that effect in our draft legislation. *See* [Appendix E](#).

**Comment.** “[O]ne possibility would be to grant the PIACB expanded jurisdiction over some - but not all - PIA disputes that the Ombudsman is unable to resolve, [such as disputes over lower fee amounts or fee waivers].”

**Response.** We see little utility in expanding the Board’s jurisdiction in a piecemeal fashion. For example, lowering the fee threshold for Board review might result in a few more fee matters coming to the Board, but would do nothing for the many kinds of other PIA disputes that are in need of resolution. Even the OAG’s 2017 Report recognized the limited utility of such a proposal. *See* 2017 OAG Report at 12 (opining that solely expanding the Board’s jurisdiction by lowering the fee threshold “will increase the number of cases the Board hears, but not meaningfully so” and “would not enhance the range of issues the Board has the opportunity to reach”). Similarly, expanding the Board’s jurisdiction only to fee waivers would play a marginal role in PIA compliance and dispute-resolution broadly.

As discussed in our report, the vast majority of PIA disputes are not fee-related, and many disputes contain multiple issues that are intertwined. Only a comprehensive and accessible PIA review and dispute resolution mechanism such as we recommend will be able to meaningfully address the PIA disputes that cannot be resolved through mediation.

**Comment.** “[A]nother option would be to place the PIACB and the Open Meetings Compliance Board (“OMCB”) together under the umbrella of a single independent agency that could provide joint staff and attorney support or even to merge the PIACB and OMCB into a

*single independent commission on open government (much like the Ethics Commission), with designated staff and a general counsel's office.”*

**Response.** Most of the OAG's comments about our proposal point out how expanding the Board's jurisdiction will result in an increased workload for the Board, which might strain current resources. It is therefore somewhat surprising that the OAG suggests creating an entirely new entity with staff and attorneys, which would undoubtedly require more resources and institutional reorganization than we are recommending. Currently, the OAG provides staff to the Ombudsman, the PIACB, and the Open Meetings Compliance Board (“OMCB”). It certainly has the discretion to organize the staff that serve those entities into a single administrative unit, if it wishes.

We do not, however, see the need to create any new office, agency, or other new entity. The Ombudsman, PIACB, and OMCB already exist as independent units—from one another and from the OAG—and current internal measures are adequate to avoid conflicts of interest. Moreover, we do not believe there is a high degree of potential synergy between the OMCB and our recommended PIACB to warrant combining the two. Although both the PIA and the Open Meetings Act broadly serve the objectives of transparent government, the compliance and enforcement landscapes under the two laws are vastly different. Moreover, the OMCB is authorized only to issue advisory opinions—likely because open meetings violations usually involve events that have already happened—while we are recommending the PIACB have authority to review and issue binding opinions on live PIA disputes.

**Comment.** “[W]e think that at least two additional attorneys would be necessary to meet the increased needs of the Ombudsman and PIACB under the proposal outlined in the preliminary findings.”

**Response.** We do propose two additional staff, at least one of which should be an attorney. The Board will be reporting annually and can make requests for additional staffing as appropriate.

**Comment.** “[W]e do not yet have a position about whether agencies should be affirmatively required to track and report information about their caseloads. As your preliminary findings point out, tracking may have many benefits in terms of evaluating PIA compliance and in gauging the need of agencies for additional resources. For informational purposes, however, we note that, in at least some cases, a requirement to track and report PIA requests may slow down an agency's response to requests. For example, agencies that frequently respond to oral requests from members of the press or others may have to ask those requesters to put their requests in writing so that they can be more easily tracked.”

**Response.** To the extent that agencies regularly respond to oral requests for information, they need not require the request reduced to writing in order to make a simple notation that a request was received and a response provided. For agencies that have rapid and efficient information sharing practices, simple tracking still offers efficiency benefits, such as providing useful data about the frequency and types of requests received so as to better inform proactive disclosure practices, and ensuring institutional knowledge when staff turnover occurs. And for agencies that do not have such informal response practices, simple tracking can be expected to lead to more efficient handling of PIA requests and reduced response times. Moreover, tracking

would allow all agencies to present an accurate picture of PIA caseloads and demands—a crucial component of demonstrating responsive government and pinpointing need for additional resources.

**Comment.** *“We agree wholeheartedly . . . that agencies need adequate funding to hire personnel devoted, at least primarily if not solely, to the handling of PIA requests. The broader point is that responding to PIA requests and doing so accurately and on time has costs, both direct and indirect. . . . In considering possible amendments to the PIA, we thus urge that the benefits of any proposed changes be balanced with the costs (including the hidden costs) of compliance with those changes.”*

**Response.** Considering costs is important. However, the Legislature, by enacting the PIA, has already mandated that agencies comply fully. It is up to agencies to make informed and well-justified budget requests for additional resources if needed to ensure their ability to comply with their legal obligations. It may well be the case that agencies have felt little need to pursue additional resources for PIA compliance because there is currently no real consequence for failure to comply.

**B. *Comments from the Maryland, Delaware, and District of Columbia Press Association (“MDDC”), Rebecca Snyder, Executive Director (December 6, 2019).***

**Comment.** *“We agree with many of the recommendations outlined in the report. However . . . [i]t is important that disputes will not require mediation, although we agree that mediation should always been offered as a first option. Our concern is that requiring a mediation may slow down the process when it is obvious that a clear opinion by the PIACB is needed.”* (emphasis in original).

**Response.** Our proposal requires a dispute to go to the Office of the Ombudsman as a first step in a comprehensive extrajudicial PIA dispute-resolution process for a number of reasons. It allows the Ombudsman an opportunity to assess the issues presented, gather follow-up information if needed, and make a determination whether mediation will be appropriate. Our experience suggests that for the majority of disputes, the Ombudsman’s informal process will end up serving some useful end, be it in resolving some or all issues, or in distilling the central unresolved issue or issues into a form most readily and efficiently able to be resolved by the Board. Accordingly, we believe it is essential to the efficiency and effectiveness of the program to require the Ombudsman’s Office as a first step.

Your concern about delay is well taken, and we believe our proposed process will avoid unnecessary delays to the extent possible. For example, if, after an initial consultation with the parties, the Ombudsman concludes she is unable to resolve the dispute, she will inform the parties of that fact and provide them with information for filing a complaint with the Board. In all cases, the Ombudsman must make a determination within 90 days of receiving the dispute—absent consent to an extension from the parties—as to whether the dispute has or has not been resolved. The Ombudsman’s determination will trigger the possibility of Board review, and the parties will be provided with information about filing a complaint. Our proposed amendments include provisions to this effect. See [Appendix E](#).

**Comment.** *“The [Preliminary Findings] report clearly lays out that the overall data provided by the surveyed agencies was lacking, partly because the agencies were not expected to track this data, and partly because PIA requests often take a back seat to other work in the agency’s purview. Reporting by the agencies would almost certainly result in more focus to the disposition of requests, and, as the report notes, a “likely reduction in “MIA” requests,” which is of particular concern for our members. We urge the Ombudsman to make agency reporting a formal recommendation.”*

**Response.** We are recommending that, in order to obtain uniform, consistent, and reliable information on PIA caseloads and dispositions, the Legislature should specify the data agencies must track and report, and require them to publish this data periodically on their websites to the extent feasible. *See* Section III.B, above.

**Comment.** *“The Ombudsman is a neutral party who can mediate disputes . . . and this role has been effective. We believe that the report recommendations will provide the office with more tools to encourage resolution of mediated cases by providing a fuller body of precedent from the PIACB. We believe a modest annual report to the legislature from the Ombudsman, identifying caseload and trends, would be helpful. On an informal basis, this already occurs.”*

**Response.** Annually since the Ombudsman program was created, the Ombudsman has included an appendix to the Board’s Annual Report that includes program-level statistics about her caseload and practices, including types of disputes, category of parties, and the extent of outreach and training. The Ombudsman expects to continue this practice, but is not opposed to formalizing it in statute.

**Comment.** *“The Ombudsman could be more effective if custodians were more strongly encouraged, or even required, to share the potentially responsive records with the Ombudsman in the course of the mediation. Such records could be reviewed by the Ombudsman without being disclosed to the requester until/unless they are deemed public. This practice would help provide context for the mediation discussion, and improve the quality of advice. If the public body refused to provide information to the Ombudsman, she could send the case to the PIA Compliance Board, who could then make a ruling and potentially compel the agency to release the record.”*

**Response.** The Ombudsman from time to time has secured the parties’ consent to review disputed records and provide her opinion as to the applicability of claimed exemptions; generally, this process has been fruitful. However, under our recommendation for expanded Board jurisdiction, the voluntary and informal nature of the Ombudsman’s process will not change, and we believe it is important to preserve these aspects of the program.

The Board, instead, will have the authority to obtain contested documents for review, or, in appropriate cases, a descriptive index of those documents; this authority is more appropriate in the quasi-judicial setting in which the Board operates than in the informal mediation process. Of course, it may be that parties are more willing to voluntarily allow the Ombudsman to review and provide her opinion on contested documents when they are aware that such review might be required by the Board, to the extent the dispute is not resolved in mediation.

**Comment.** *“We also believe that the Ombudsman would be able to pinpoint problems within agencies more quickly if whistleblower protections were added to the PIA. Many times, rank and file staffers may have information about recordkeeping and maintenance of public records that would be useful to dispute resolution. Absent whistleblower protections, these staffers may not come forward due to fear of retaliation, and the whole community suffers.”*

**Response.** Whistleblower protections could be useful in the PIA context, to the extent that such protections do not already apply. However, we have not reviewed the law in this area or examined how such protections would be integrated and administered, and thus are not making any recommendation on this subject.

**Comment.** *“Maryland’s deadline of 30 days to fulfill a request is one of the longest in the country. At the federal level, the deadline is 20 days, and in Virginia, the deadline is five business days. We recommend that Maryland’s fulfillment period be brought to 10 days.”*

**Response.** Although considering changes to the statutory response deadlines within the PIA is outside the scope of our report as such, it suffices to say that, in the Ombudsman’s experience, the statutory deadlines for responding to PIA requests seem to have little connection with an agency’s ability, willingness, and/or motivation to comply with those deadlines. Thus we believe that shortening the deadlines alone will have little impact on an agency that has been inattentive to its internal processes or has under-prioritized PIA compliance.

Likewise, shortening the deadlines does nothing to help an agency that is working in good faith to respond to a very large request, but which is unable to secure an extension from the requestor. What is needed in both of these scenarios is not a truncated one-size-fits-all response deadline, but resolution by a decisional body that can apply the facts to a particular case and order appropriate relief. Our recommendation for a Board with comprehensive PIA jurisdiction provides this option, and we believe such a remedy will go much farther in resolving overall timeliness problems than changing the statutory deadlines.

**Comment.** *“The use of fee waivers is unclear based on the data provided by the interim report’s survey. In our practical experience, public bodies across the state have widely varying, and sometimes conflicting, approaches to determining whether a fee waiver is justified based on the public interest.*

*This inconsistency in the application of fee waivers across the state creates confusion and mistrust among requestors. We believe that clarification of the standards for fee waivers is important, and the federal government’s FOIA standards requiring at least partial fee waivers if disclosure is in the public interest should be applied. Fees and costs should not be a prohibitive bar to the public’s ability to monitor the activities of its state and local governments in Maryland.”*

**Response.** Considering changes to the fee waiver provisions of the PIA, as such, is outside the scope of our report. Nonetheless, we point out that—even under the current statute—agencies must give consideration to a requestor’s affidavit of indigence or to other public interest factors, and must not deny a fee waiver request in an arbitrary or capricious manner. Although federal FOIA-related case law provides guidance on the types of public interest

factors that should be considered and how they should be weighed, similar guidance is lacking in Maryland.

Our recommendation would vest the PIACB with authority to review an agency’s decision to deny a fee waiver request, thus providing it with the opportunity to develop and provide guidance on the relevant factors, and to ensure that custodians are making the determination on an individualized, case-by-case basis.

**Comment.** *“There are elements of the PIA that often require a balancing of privacy rights against the public’s legitimate interest in the records. In our experience, disciplinary records of public employees where those records intersect with the public interest, confidential financial information / trade secrets, provisions of the Agriculture Article, active investigation exemptions, and discretionary deliberative exemptions are often used too broadly as a deterrent to public access. We recommend amending the PIA and the Agriculture Article to make it clearer that privacy, in all these contexts, is not an absolute consideration, and that the impact of disclosure must be balanced against the potential harm of withholding records whose disclosure may be in the public interest. . . . We believe the PIA should be amended to require custodians to consider those factors as part of their deliberation and articulate a specific harm that would result from disclosure, in addition to simply qualifying for these specific exemptions.”*

**Response.** As we discuss in Section II.B.1, above (“The Problem with the Status Quo”), in the Ombudsman’s experience, agencies all too often assert discretionary exemptions with no real analysis and balancing of the public interest factors they are required by law to consider. We point out that GP § 4-343 permits a custodian to apply one of the PIA’s enumerated discretionary exemptions *only* if they believe disclosure “would be contrary to the public interest.” If the custodian’s application of the exemption is challenged—either in court or through our recommended Board process—the custodian is required to articulate the reasons for determining that the public interest in withholding the public record outweighs the presumed public interest in disclosure. A Board with comprehensive jurisdiction as we recommend would be in a position, through its decisions on such matters, to develop a body of guidance that is currently lacking for many of the PIA’s exemptions, both discretionary and mandatory.

***C. Joint Comments from the ACLU Maryland and the Public Justice Center, Joseph Spielberg, Public Policy Counsel, ACLU of Maryland, and Debra Gardner, Legal Director, Public Justice Center (December 6, 2019).***

**Comment.** *“We advocate to change ‘may’ to ‘shall’ in GP § 4-206(e), to compel agencies to comply with [the provision that permits custodians to waive fees based upon an affidavit of indigence]. Allowing agencies to routinely deny legitimate fee waiver requests sends the message that poor Marylanders are entitled to only a limited measure of transparency, whereas their wealthy counterparts can buy access to more public information.*

*We also request more guidance for agencies administering public interest waivers. In our experience requesting public interest waivers, there remains a great deal of confusion among custodians regarding what is considered to be in the public interest.”*

**Response.** As we noted in a response to one of MDDC’s comments, above, considering changes to the fee waiver provisions of the PIA is outside the scope of our report as such. Nonetheless, we point out that our recommendation would vest the PIACB with authority to review an agency’s decision to deny a fee waiver request in any context, thus providing the Board with the opportunity to develop and provide guidance both on the statute’s standalone indigence factor, and on the other public interest factors for granting a fee waiver.

**Comment.** *“We agree that the \$350 threshold to fall within the PIA Compliance Board’s jurisdiction for a dispute is too high and should be lowered. . . . Lowering the threshold will bring more fee-related disputes under the Board’s jurisdiction, and ensure more equitable treatment and transparency for requestors with limited means.”*

**Response.** Our proposed amendments that implement our recommendation for comprehensive Board jurisdiction reduce the fee threshold to \$200. See [Appendix E](#).

**Comments.** *“We . . . urge that the Board be granted the authority to standardize duplication costs for all government entities based on actual costs of photocopy reproduction.”*

**Response.** This suggestion is not within the scope of our report as such. We note, however, that we have received other comments likewise questioning the wide disparity in agencies’ fee practices and charges. The PIA requires all fees to be reasonable, and a “reasonable fee” is defined as “a fee bearing a reasonable relationship to the recovery of actual costs incurred by a governmental unit.” GP § 4-206(a)(3). Presumably, any fee charged for photocopy reproduction must be based on the actual costs of that reproduction, and a custodian should be prepared to support the photocopying charge. In our proposal, the Board could review all such charges when a fee is more than \$200. See [Appendix E](#).

**Comment.** *“We call for shortening the [PIA’s] initial response time to 5 business days, and the final written response to 15 calendar days.”*

**Response:** See our response to MDDC’s similar comment, above.

#### ***D. Joint Comments from the Maryland Association of Counties (“MACo”) and the Maryland Municipal League (“MML”) (December 16, 2019).***

**Comment.** *“MACo and MML are concerned that while the scope of the survey only included 23 state agencies and no local agencies, the Report’s recommendations apply to both to the State and local jurisdictions. . . . MACo and MML do not believe that the survey data is suitable for creating recommendations regarding local government Public Information Act (PIA) issues.”*

**Response.** MACo and MML misunderstand the basis for our recommendation for a comprehensive PIA dispute resolution process. The recommendation to expand the Board’s jurisdiction is not primarily based on the PIA caseload data we received from State reporting agencies; in fact, we recognize and explain the many limitations of this data. While we considered the reporting agencies’ data as one of many sources of information, the principal basis for our recommendation to expand the Board’s jurisdiction is based on the Board’s minimal caseload and the Ombudsman’s caseload over nearly four years of operation. That

data reveals a significant number of unresolved disputes which are nearly evenly split between State and local agencies. Any expanded dispute resolution remedy should be comprehensive, *i.e.*, include all agencies subject to the PIA so as to have the fullest impact.

**Comment.** *“MACo and MML are concerned about the recommendations regarding expansion of the Board’s authority. The original legislation creating the Board set a \$350 threshold regarding fee disputes only after much debate and consideration by stakeholders. The threshold was set at that level to reflect cases of significant fiscal impact to records requestors.*

*People who wish to contest other aspects of a records request may either use the voluntary mediation provided through the Ombudsman or raise the issue in Maryland court. We do not believe creating a secondary and redundant enforcement step through the Board will reduce costs and staff time for local governments, but rather increase them. MACo and MML do not believe the Board’s enforcement authority should be expanded.”*

**Response.** The first draft of the legislation creating the Board actually gave it broad authority to resolve all PIA disputes, but that authority was drastically narrowed to the \$350+ fee jurisdiction, which has resulted in few complaints over nearly four years of operation, and general underutilization of the Board. At the same time, the Ombudsman regularly receives disputes involving fees less than \$350, which pose a financial hardship to many PIA requestors. Our recommendation for comprehensive Board jurisdiction includes reducing the fee review threshold to \$200. See [Appendix E](#).

A Board vested with comprehensive PIA jurisdiction will not be a “redundant enforcement step,” because it would provide a relatively simple and comprehensive remedy for requestors and agencies who would not or could not otherwise seek judicial review, and whose disputes cannot be resolved through voluntary Ombudsman mediation. For reasons outlined in our report, the judicial review option is largely inaccessible for many PIA requestors due to factors such as cost, complexity, necessity of an attorney, and time requirements. This leaves the Ombudsman as the only alternative dispute resolution option for most PIA disputes, but the Ombudsman’s process is completely voluntary, offers no decision-making or enforcement remedy, and results in many PIA disputes going unresolved.

**Comment.** *“MACo and MML believe that local governments should retain their existing discretion regarding the issuance of fee waivers but could consider enhancing education regarding fee waivers.”*

**Response.** It is true that the decision to grant a fee waiver, under current law, is left to the discretion of the agency.<sup>53</sup> However, the agency may not exercise that discretion in an arbitrary or capricious manner. In the Ombudsman’s experience, many agencies refuse to grant fee waivers in a blanket fashion, instead of carefully weighing indigence and other public interest factors on a case-by-case basis. Moreover, for the reasons given in our report and in the response above, judicial review of an agency’s fee waiver decision is largely inaccessible for many requestors, especially where many fee waiver requests come from indigent individuals.

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<sup>53</sup> See GP § 4-206(e).

A Board with comprehensive PIA jurisdiction—including over fee waivers—would ensure that agencies are making this individualized analysis, and would be in a position to expand upon the necessary public interest factors that should be considered; currently, there is little State law regarding the matter.

**Comment.** *“MACo and MML strongly oppose any recommendation allowing the Board to review documents subject to a discretionary or mandatory denial. Currently, contested documents can be reviewed in camera by a judge as part of a formal judicial proceeding. . . . This provides privacy protections for the subject of the document as well as critical liability protections for record custodians. . . .*

*However, the Report’s recommendation would allow appointed individuals, who are not part of the judicial system, to compel document production from local governments outside of a judicial proceeding. This could expose local governments to significant liability risks if a custodian releases a document based on the Board’s order and a court subsequently holds that the document release should have been denied. There is no exemption in many state and federal laws that would allow disclosure outside of the court system to an appointed official.”*

**Response.** First, any meaningful PIA dispute-resolution remedy must include the ability to review an agency’s application of exemptions to withhold public records; as explained in the previous two responses, the judicial review remedy is not practically accessible to many PIA requestors. Accordingly, any comprehensive expansion of the Board’s jurisdiction should include this authority. Such review would require Board staff to examine the documents at issue or, in appropriate cases—such as where a custodian believes federal law prevents disclosure of the document even to Board staff—to review a descriptive index of the documents being withheld. Our proposed amendments permit an agency to provide only a descriptive index of withheld documents in appropriate cases, and require that the Board protect as confidential all information submitted to it for review. See [Appendix E](#).

The Board functions as an administrative, quasi-judicial body. And, as with many such bodies, it is authorized to make findings of fact and conclusions of law, with the assistance of competent professional legal staff. Moreover, any Board decision is appealable to the circuit court. Therefore, if an agency truly disagrees with a Board order that requires it to disclose certain records, and is concerned about the liability risks of doing so, it can seek judicial review of that decision before actually disclosing those records.

**Comment.** *“MACo and MML have concerns over making Ombudsman mediation a mandatory part of the PIA process. Currently, using the Ombudsman is voluntary for both parties and not directly connected to Board or judicial review. We believe that part of the Ombudsman’s success is because of that disconnect and because parties who voluntarily agree to mediation are generally acting in good faith. However, if the mediation is mandatory, it becomes just another link in the chain in the review process and would likely lose its effectiveness. Parties will start treating it more as part of the adversarial proceeding process and less like a valuable form of alternative dispute resolution. It would also significantly delay a final decision on a request to view a document—the opposite of the PIA’s stated intent. MACo and MML support keeping the Ombudsman mediation process voluntary.”*

**Response.** Our proposal does not make Ombudsman mediation a mandatory part of the PIA process. No requestor or agency need ever avail themselves of the Ombudsman process if they do not wish to do so. This is the case under the current law, and would remain unchanged under our proposal. Moreover, under our proposal, the Ombudsman’s process does not lose its voluntary and informal character. Rather, it is only when a dispute cannot be resolved by that process—or when a party refuses to meaningfully participate in that process—that the Board remedy becomes available.

However, for the reasons explained in our report, we believe that mediation will become more effective because the parties will be all the more likely to cooperate in the Ombudsman’s process, since they will want to avoid the possibility of a Board decision that may not be favorable to them. In this way, parties will have incentives to seek common ground in mediation that they do not have now.

**Comment.** *“MACo and MML believe that the current voluntary Ombudsman mediation process has been extremely successful. As the Report notes, for FY 2019 the Ombudsman enjoyed an overall success rate of 74%. This is a testament to both the current Ombudsman and the structure of the mediation process.”*

**Response.** As explained in our report, the 74% “success” rate of the Ombudsman’s program does not consist solely or even principally of matters in which parties were satisfied with the outcome of mediation, nor does it in any sense reflect a “success rate” in resolving disputes. See Section II.B.3 at 14, and footnote 27, above. In fact, this figure includes unresolved matters that could have gone to the current Board but did not, many other matters that were not resolved to the parties’ satisfaction, but which, for unrelated reasons, were judged unlikely to be submitted to the Board, as well as those that were resolved—all of these scenarios are included in the 74% figure.

In short, the only significance to the 74% figure is that it reflects the Ombudsman’s assessment of the percentage of mediation matters over the past nearly four years in which she judged the parties unlikely to have availed themselves of a comprehensive Board remedy. The other side of this coin is that 26% of disputes coming to the Ombudsman were judged in need of a comprehensive review/enforcement remedy, and were judged likely to be submitted to the Board by one or both parties.

Our recommendation that the Board’s jurisdiction be expanded does not discount the benefits offered by the Ombudsman. Rather, we believe that the recommendation will actually enhance the effectiveness of the Ombudsman’s process, as explained in the previous response, while providing an accessible, cost-effective, and comprehensive remedy for the persistent number of PIA disputes that cannot be resolved through voluntary mediation alone and for which a decision is desired.

#### **E. *Miscellaneous Comments.***

**Comment.** *“I would be interested in more detail on how it was determined that [certain unresolved cases in the Ombudsman’s case history] would likely go to the Board instead of straight to Circuit Court. I can think of scenarios where a requestor would skip the iterative*

*Board step and go straight to court.” Michael B. Swygert, Director of the Records Management Division of DGS (Dec. 4, 2019).*

**Response:** Under current law, aggrieved requestors can go straight to court without accessing the Ombudsman or Board, but very few do so. As discussed above, the judicial process is largely inaccessible to the vast majority of requestors due to the expense and time required. This is the primary reason why an extrajudicial PIA review and decisional mechanism is needed. We do not, in any event, believe that providing an accessible extrajudicial review remedy will result in parties seeking out the less accessible and more costly judicial option.

**Comment.** “[W]e would be interested in learning about any software solutions [for internal PIA processes] that are being discussed and opportunities for piggyback purchasing. Alternately, if the State decides to develop its own software tool, we would like to ask that consideration be given to making it available to local governments as well.” Sara B. Visintainer, Chief of Staff, Caroline County Commissioners Office (Nov. 18, 2019).

**Response.** We agree. Information-sharing among custodians is important and will enhance agencies’ ability to improve their processes. For examples of the ways in which some State and local agencies are improving their processes through the use of technology, see our discussion in Section III above.

**Comments.** “1. On page 7 of the PIA report, the graphs representing partial and full denials state that DJS has inconsistent data. Our data was accurate, but did not match the criteria that was provided in the survey. 2. On page 17 of the PIA report, the footnote states that DJS “does not currently maintain log or database, but would consider doing so.” Beginning on December 1, 2019, DJS plans to implement a data collection system that will track future PIA requests and responses.” Eric Solomon, Director of Communications, DJS (Nov. 8, 2019).

**Response.** We appreciate the update on your plans, which we incorporated in our discussion in Section III. See footnote 46, herein.

**Comment.** “After reading the PIA [Preliminary Findings] Report, I was frustrated because the report is not consistent with the information MHEC submitted. MHEC had NO late response times, for 10 or 30 day responses (see attachment). Yet, the report says our data was internally inconsistent for the 30 day response. We also reported NO fees reported on the survey we submitted, and yet the report stated our data was internally inconsistent.” Rhonda Wardlaw, Director of Communications, MHEC (Nov. 7, 2019).

**Response:** We note that you made a supplemental submission that rendered your data internally consistent. Your submission was sent too late to be included in the Preliminary Findings, but we have noted the correction in this Final Report. See footnote 39.

**Comment.** “I’m confused as to whether the proposal involves either 1) ‘binding arbitration’ by the PIACB or 2) another level of review by the PIACB that could be appealed to the Circuit Court. If 1), I would not be in favor of it, especially if damages could be awarded. If 2), then would the Circuit Court review be an administrative agency review on the record?” Kemp W. Hammond, Assistant County Attorney, Anne Arundel County Office of Law (November 1, 2018).

**Response.** We note that this comment was received before we published our Preliminary Findings and Recommendations on November 6, 2019, and hope that our proposal is now clear. Our recommendation is not to require “binding arbitration” by the Board, but rather to vest the Board with comprehensive jurisdiction to review and issue binding administrative decisions on PIA disputes that cannot be resolved through the Ombudsman’s informal mediation program. The Board’s decision will be appealable to the circuit court for review of an administrative agency’s decision, and that review will be on the record. *See* Md. Rule 7-201 (permitting judicial review of an order of an administrative agency); *Priester v. Bd. of Appeals of Baltimore Cty.*, 233 Md. App. 514, 533 (2017) (explaining that judicial review of an administrative agency’s decision is “narrow,” and will be affirmed “if there is substantial evidence in the record as a whole to support the agency’s findings and conclusions” and if the decision is based on a correct conclusion of law).

**Comment.** “[T]here are some effective alternatives to the dispute resolution process as set up by the attorney general’s office. Here is an example: the venue. The parties involved in a mediation should be able to jointly choose the venue. . . . The parties involved should also have the option to select a mediator or additional co-mediators and not have only one choice: Lisa Kershner. I think a mediator outside the attorney general’s office might be better for me . . . .” Kyle Ross (Oct. 30, 2019).

**Response.** The Ombudsman is appointed by the Attorney General, but is independent from that Office. Currently, the Legislature has provided for only one Ombudsman position, and only one position has been funded. That said, parties who choose to mediate with the Ombudsman can always agree on a venue of their choice for any in person meetings. Apart from the Ombudsman, there are many other mediation programs operating privately, and, for those who have filed suit, through the judicial process.

**Comment.** “*The Office of the Public Access Ombudsman (“Ombudsman”) is totally ineffective and a waste of taxpayer resources. The Ombudsman rarely facilitates any resolution and only serves to delay or distract good faith PIA requestors from pursuing effective means of resolution through the court system. The result of having only one acting Ombudsman leads to cozy relationships between agencies that most frequently offend against the PIA and leave requestors feeling that the mediation is rigged.*” Theresa Johnson (Oct. 23, 2019).

**Response.** See our response immediately above. In addition, we believe that our recommendation for vesting the Board with comprehensive jurisdiction to decide disputes that cannot be resolved by the Ombudsman will ensure accountability, independence, and compliance with the PIA. Moreover, requestors may always seek relief through the judicial process without first attempting mediation through the Ombudsman; this is the case under current law, and would remain so under our proposal.

**Comment.** “*My problem . . . lay in the quicksand between recordkeeping and disclosure laws, and you reportedly had no jurisdiction over the former, without which you had no reach into the latter . . . [A]nything the State can or will do to facilitate enforcement of PIA laws, including by providing the Ombuds with jurisdiction over the underlying recordkeeping laws, without which the PIA is toothless . . . would be an improvement.*” Andrew Strongin (Sept. 10, 2019).

**Response.** We recognize the close connection between records management/retention and agencies' PIA response processes. *See* discussion in Section III.C, above. It is true that the Ombudsman plays no role in the State's records retention laws, and has no enforcement authority over any laws, including the PIA. Examining records retention enforcement options is beyond the scope of this report. We note, however, that State Archives and the Department of General Services offered four trainings in 2019 across the State on records retention requirements and practices. We are interested in the possibility of conducting joint trainings with DGS and Archives in the future that cover both records retention and PIA requirements and practices.

## V. Conclusion

The Budget Committees commissioned this report because they are “interested in ensuring that the [PIA] increases government transparency through a robust review and disclosure process,” and also in ensuring that agencies “have sufficient resources and sufficient procedures to respond to reasonable and legal information requests.” To that end, they requested concrete information on topics that heretofore have been discussed largely anecdotally or in the abstract—specifically, information about the reporting agencies’ PIA caseloads and related procedures, and on the need for and feasibility of PIA compliance monitoring and expanded extrajudicial dispute resolution.

This report has allowed the PIACB and Ombudsman to bring their nearly four years of operational PIA dispute resolution experience to bear on these questions. While the data we received from the State reporting agencies provides a clearer picture of the diversity in overall PIA caseloads and procedures—a diversity we believe likely exists at the local and municipal levels as well—it is limited with respect to providing a full understanding of their PIA performance because much of the data is either unavailable or inconsistent.

Data from the Ombudsman’s caseload provides some of this missing detail, not only for the reporting agencies, but for agencies across State and local government. What emerges on the compliance monitoring front is that many agencies likely are not tracking their PIA caseloads in any detailed or uniform way, but are not opposed to doing so. Because this kind of tracking can benefit agency PIA compliance internally, and lead to more informed decisions about resource allocation externally, we recommend that the Legislature specify the data agencies must track and report, and require agencies to publish this data periodically on their websites to the extent feasible.

On the enforcement front, it is clear there is no generally-accessible remedy for PIA disputes in need of a decision. This void not only leaves many individual citizens and organizations without any practical remedy for their unresolved PIA disputes, but also undermines the effectiveness of the Ombudsman program.

Thus, our recommendation is to expand the Board’s jurisdiction to review and decide PIA disputes that are unresolved after reasonable efforts have been made by the Ombudsman. By providing the Board with the authority originally envisioned for it, with the crucial addition that the Ombudsman’s process will be a required first step, the Legislature will create a generally-accessible and comprehensive PIA remedy that:

- 1) preserves and maximizes the genuine, potential benefit of the Ombudsman program and the Board;
- 2) provides a meaningful remedy where none presently exists; and
- 3) establishes an integrated dispute resolution system that is likely to lead to long term benefits for Maryland citizens and their State and local governments.

Ultimately, the Legislature needs to determine if it wishes to provide for independent, meaningful oversight of PIA compliance and implementation. If it does, we believe our recommendations are by far the most cost-effective way to do so.

Respectfully submitted,

John H. West, Chair  
Public Information Act Compliance Board

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Office of the Public Access Ombudsman