



**Interim Report**  
of the  
**Office of the Attorney General**  
on the  
**Implementation of the  
Public Information Act**

**BRIAN E. FROSH**  
**ATTORNEY GENERAL**

**DECEMBER 2016**

TABLE OF CONTENTS

**Executive Summary**..... 1

**I. Introduction** ..... 4

**II. Attorney General Reporting Requirement** ..... 6

**III. Summary of Survey and Preliminary Findings**..... 9

    1. Whether the Neutrality and the Statutory Duties of the State Public Information Act Compliance Board Are Appropriate, Including Whether the Board Should Be Authorized to Impose Statutory Damages, and Whether the Functions of the Board and the Public Access Ombudsman Should Be Modified ..... 9

        A. The Neutrality and Statutory Duties of the State Public Information Act Compliance Board ..... 9

        B. The Functions of the Public Access Ombudsman ..... 13

    2. The Merits and Feasibility of Merging the State Open Meetings Compliance Board with the State Public Information Act Compliance Board..... 16

    3. The Use of Fee Waivers in General and for Reasons of Indigence, Including How Often Waivers Are Requested, Denied, or Granted, and the Amount of Fees that Have Been Waived as a Result ..... 17

    4. The Denial Process Used by Custodians ..... 21

    5. Public Records that Are Held by a Nongovernmental Custodian and the Appropriate Remedies to Ensure Public Access to those Records ..... 25

    6. State Law Exemptions Outside of the Public Information Act ..... 29

7. Other Findings and Recommendations for Improving the  
Implementation of the Public Information Act.....33

IV. Conclusion.....38

**APPENDIX**

Summary of PIA Survey ..... Appendix A

## Executive Summary

In 2015, the General Assembly amended the Public Information Act (“PIA”) to reform the process by which PIA responses are issued and reviewed. At the same time, the General Assembly also directed the Office of the Attorney General to report to the Governor and General Assembly on a number of issues relating to the implementation of the PIA, with an interim report due at the end of 2016 and a final report due at the end of 2017.

Our Office—in consultation with the Maryland Association of Counties, the Maryland Municipal League, the Maryland/Delaware/D.C. Press Assn., and other open government advocates—performed a survey seeking the input of the individuals who submit PIA requests and the government custodians who fulfill those requests. This interim report summarizes the results of the survey and, based on those results and our Office’s experience with the PIA, includes preliminary findings, one immediate recommendation, and some possible recommendations we are considering for inclusion in the final report due at the end of 2017.

Our one immediate recommendation is that, given the brief period of time in which the Ombudsman and PIA Compliance Board have been operating, the General Assembly should make no substantive changes to either entity during the 2017 legislative session.

We also offer the following preliminary findings and invite public comment on them:

- The PIA Compliance Board should retain its formal neutrality;
- The PIA Compliance Board should not be combined with the Open Meetings Compliance Board at this time, but if the jurisdiction of the PIA Compliance Board is expanded such that it can no longer function as a volunteer board, a combined, paid board would be appropriate;
- The definition of “indigent” should be revised to clarify that median family income is determined by reference to the definition

used for the Low-Income Home Energy Assistance Program or “LIHEAP”; and

- Agencies<sup>1</sup> should be provided a level of funding sufficient to centralize responsibility for PIA compliance in one or more employees whose job performance would be evaluated principally on that basis.

Finally, we are considering making recommendations on the following issues in our final report and we seek public comment on them here:

- Whether the PIA Compliance Board’s jurisdiction should be expanded by lowering the threshold for complaints from \$350 to \$250 and by giving it jurisdiction over complaints about agency fee waiver decisions;
- Whether the PIA should be amended to provide additional criteria by which custodians make fee waiver decisions;
- Whether agencies should be required to post blank indigence affidavits on their websites;
- Whether the enforcement provisions of the statute should be strengthened and, if so, how;
- Whether the PIA should be amended to make the records of all third-party government contractors subject to the Act;
- Whether § 8-801.1 of the Agriculture Article should be amended to specify the types of identifying information that must be redacted when agencies disclose nutrient management plans under the PIA;

---

<sup>1</sup> We use the term “agency” throughout this interim report as a shorthand term for all of the State, county, and municipal governmental units that are subject to the Act’s requirements.

- Whether the PIA should be amended to prohibit requests submitted for commercial purposes; and
- Whether and how the PIA might be amended to prevent an individual requester from submitting a burdensome number of requests to one or more agencies.

We offer these preliminary findings and potential recommendations for public scrutiny and comment, with the goal of offering our final findings and recommendations in the final report due at the end of 2017. That final report will provide a longer view of the respective workloads of the Ombudsman and the Board. It will also include the results of our research into how other states handle the issues that the General Assembly has asked us to address.

## I Introduction

The Maryland Public Information Act provides the public with a broad right of access to records of State and local government, subject to various enumerated exemptions and the imposition of reasonable response fees. *See* Md. Code Ann., Gen. Prov. (“GP”) § 4-101 *et seq.* Ever since the enactment of the PIA in 1970, both aspects of the statute—exemptions and fees—have proven controversial for requesters and records custodians alike. Because the exemptions are in tension with the statute’s public access goal, complaints about how government agencies apply those exemptions have been common. Disputes about the imposition of response fees also arise. Some requesters have expressed the concern that government agencies charge high fees as a means of frustrating access, while others object to the notion of charging for access to “public” records to begin with.

Custodians, for their part, resent the accusation that they are trying to block access. Instead, they see themselves as doing their best, with limited resources, to implement a statute that favors disclosure but that requires them to withhold certain materials and that specifically authorizes the imposition of response fees when the cost of a response should not be borne by the general public.

Traditionally, disputes about how government agencies implement the Act could be brought only in circuit court or, if a State agency decision was at issue, in a contested case before the Office of Administrative Hearings. Both remedies were widely perceived as being too formal and too expensive for most requesters to effectively pursue.

In 2015, the General Assembly took up these issues and legislated the most comprehensive revisions to the Act since its enactment almost fifty years ago. *See* 2015 Md. Laws, Ch. 135. The 2015 amendments included a number of changes to the Act’s administrative requirements:

- An agency must notify the applicant, within ten working days, if it will take more than ten working days to produce responsive records. That

“10-day letter” must state how much time the agency will take to produce the record, the reason for the delay, and an “estimate of the range of fees” that might be involved in producing the record. GP § 4-203(b)(2).

- Agencies must provide more detail about the records they withhold, including a “brief description of the undisclosed record that will enable the applicant to assess the applicability of the legal authority for the denial.” GP § 4-203(c)(1)(i)3. When an agency withholds a record on the basis of one of the discretionary exemptions set forth in Part IV of the Act, the agency must provide “a brief explanation of why the denial is necessary.” GP § 4-203(c)(1)(i)1.
- With respect to fees, agencies may still charge reasonable fees that allow them to recover their actual costs. Now, however, agencies must calculate their costs based on “each individual’s salary and actual time” attributable to the response, including “attorney review costs.” GP § 4-206(b)(2).
- The 2015 amendments added a new basis for waiving the fees that would otherwise be chargeable under the Act. In addition to waiving fees when “in the public interest,” indigence is now also a second, independent basis on which an agency is authorized to waive fees.

The 2015 amendments also altered the avenues for seeking review of agency PIA decisions. Judicial review remains available, and PIA requesters may now be awarded “statutory damages” of up to \$1,000 if they prevail in court. The requester’s right to request a contested case hearing was removed, but it was replaced with two wholly new opportunities for review.

First, a State Public Information Act Compliance Board was created to consider complaints that an agency has imposed an “unreasonable” fee of more than \$350. The Board was modeled on the Open Meetings Compliance Board in many respects, but unlike its Open Meetings counterpart, the PIA Compliance Board is authorized to issue *binding* opinions and issue enforceable orders requiring the agency to refund the unreasonable portion of the fee.

Because the Board's decisions are binding, they may be appealed to circuit court, and either party may file an appeal. *See generally* GP § 4-1A-01 *et seq.* The PIA Compliance Board held its first meeting on February 10, 2016.

Second, the Office of the Public Access Ombudsman was created to mediate PIA disputes more generally and otherwise serve as a resource for the public. The Ombudsman may consider any dispute "relating to requests for public records" under the Act, whether that dispute is initiated by the applicant or the custodian. The Ombudsman, however, acts as a mediator only; she is to make "reasonable attempts to resolve disputes" but has no power to issue binding decisions. Nor can the Ombudsman compel an agency to disclose records, either to the applicant or even to the Ombudsman. *See generally* GP § 4-1B-01 *et seq.* Our Office appointed Lisa Kershner as the Ombudsman, and she began work on March 30, 2016.

## II

### Attorney General Reporting Requirement

In addition to the significant changes to the Act described above, the 2015 amendments directed our Office to prepare interim and final reports on various aspects of the PIA:

That the Office of the Attorney General, in consultation with the Maryland Association of Counties, the Maryland Municipal League, and stakeholders from the custodian, news media, and open government communities, shall submit an interim report on or before December 31, 2016, on its preliminary findings and a final report on or before December 31, 2017, to the Governor and, in accordance with § 2-1246 of the State Government Article, the General Assembly, on its findings and recommendations for improving the implementation of the Public Information Act, including:

- (1) whether the neutrality and the statutory duties of the State Public Information Act Compliance Board are

appropriate, including whether the Board should be authorized to impose statutory damages and whether the functions of the Board and the Public Access Ombudsman should be modified;

(2) the merits and feasibility of merging the State Open Meetings Law Compliance Board with the State Public Information Act Compliance Board;

(3) the use of fee waivers in general and for reasons of indigency, including how often waivers are requested, denied, or granted, to include the amount of the fees that have been waived as a result;

(4) an analysis of the denial process used by custodians;

(5) an analysis of requested public records that are held by a nongovernmental custodian and the appropriate remedies to ensure public access to those records; and

(6) an analysis of State law exemptions outside of the Public Information Act.

2015 Md. Laws, ch. 135, § 3.

In an effort to ensure that our Office's recommendations reflect more than just anecdotal evidence, we worked with the Maryland Association of Counties, the Maryland Municipal League, Public Justice Center, Common Cause, and the MDDC Press Association to develop a survey of PIA custodians and requesters on the issues identified above. The survey was made available to public information officers in State agencies; to the Maryland Association of Counties, the Maryland Municipal League, and the MDDC Press Association, for those organizations' distribution to their membership; and to other interested parties. The survey was also posted on the website of the Office of the Attorney General and advertised through our Office's social media account. In addition, the Baltimore Sun published an editorial disseminating the survey to its readership. Baltimore Sun, "Putting the 'public' back in the Public

Information Act” (Sept. 14, 2016). A copy of the survey questions and numerical results appears in Appendix A.

The public response to the survey was fairly strong. Total responses came to 305, with 192 requesters and 113 custodians taking the survey. Requester respondents ranged from the occasional PIA requester, to those who use the PIA more frequently; 55% indicated that they had submitted fewer than 5 requests, while 13% indicated that they had submitted more than 20. The custodian respondents, for their part, were fairly well distributed across the different levels of government: 43 reported that they worked at a State agency, 26 at a county entity, and 30 at a municipality.

The results of the survey, though drawn from a cross-section of the PIA community, are by no means scientific; respondents were not required to substantiate their answers with empirical support. The survey instead provides a series of snapshots of the PIA process, taken from one perspective or the other. Generally speaking, custodians responded that the Act was being implemented appropriately, while requesters indicated that the Act’s requirements were routinely being violated. This is illustrated by a question about the time it takes for agencies to respond. Only 5.5% of custodians indicated that their average response time was more than 30 days, while 62% of the requesters indicated that the average agency response time exceeded 30 days. Conversely, 55% of custodians responded that their average response time was less than 15 days, while only 4% of requesters reported average response times that low.

The survey, while imperfect, offers some insight into how the public records process might be improved. This interim report summarizes the results of the survey on the questions asked by the General Assembly and provides our Office’s preliminary views on those questions based on our extensive experience advising State agencies on the implementation of the Act’s requirements. We offer these preliminary views and recommendations for public comment and will provide our final findings and recommendations in the final report due at the end of 2017.

### III

#### Summary of Survey and Preliminary Findings & Recommendations

We will address the questions in the order in which they appear in the legislation.

*1. Whether the Neutrality and the Statutory Duties of the State Public Information Act Compliance Board Are Appropriate, Including Whether the Board Should Be Authorized to Impose Statutory Damages and Whether the Functions of the Board and the Public Access Ombudsman Should Be Modified*

This question relates to two different entities: the PIA Compliance Board and the Public Access Ombudsman. Rather than treat them together in a single response, we will identify the different questions that relate to one or the other and address them separately. It should be remembered that, as of the drafting of this report, both the Board and the Ombudsman have been in place for less than a year. Our conclusions thus are preliminary.

*A. The Neutrality and Statutory Duties of the State Public Information Act Compliance Board*

Only 18 respondents replied that they had any interaction with the PIA Compliance Board, so the survey results here do not reflect broad-based reactions to the Board and its functions. Still, the responses reflect some general trends in how custodians and requesters view the Compliance Board. As to the Board's neutrality, 85% of respondents who had a view on the topic believed that it was appropriate for the Board to remain neutral, and 62% felt that the Board had accomplished that goal. The two respondents who replied that the Board should *not* be neutral—both requesters—indicated that the Board should favor public access.

As to the PIA Compliance Board's functions and duties, the responses again reflected whether the respondent was a custodian or requester. All custodians who responded believed that the \$350 threshold was either reasonable or should be increased to \$500. Requesters had the opposite view;

eight of the ten who had a view responded that the threshold should be lowered to \$50 or lower still.

The same pattern emerged with respect to whether the Compliance Board should have additional responsibilities: All four custodians who responded indicated that the Board's duties were sufficient, while nine out of ten requesters indicated that the Board should be given additional powers. As for what additional powers might be appropriately assigned to the Board, few requesters provided suggestions, but the suggestions offered ranged from the ability to adjudicate other fee-related disputes, including fee waivers, to issuing opinions on *all* matters of PIA compliance, much as the Open Meetings Compliance Board does for Open Meetings Act compliance.

#### *Preliminary Findings & Recommendations*

We believe, at least preliminarily, that it is appropriate to retain the formal neutrality of the State Public Information Act Compliance Board. The Board is an independent, quasi-judicial body, with the power to render binding decisions subject to judicial review, much as the circuit court would in a judicial challenge to a PIA fee decision. It seems appropriate for the Board's review—like the circuit court review it was intended to at least partially supplant—to be carried out dispassionately and without a finger on one side of the scale or the other. Preserving the Board's neutrality would also help ensure that all parties before it perceive it to be a fair forum.

Although we believe that the Board ought to remain *formally* neutral, the PIA already includes within it an interpretive bias in favor of allowing inspection of a public record “*with the least cost and least delay*” to the requester. GP § 4-103(b) (emphasis added). Because the statute already requires the Board to render its decisions consistent with a mandate of openness, we believe it is appropriate—at least at this stage of the Board's development—to retain the Board's formal neutrality.

As for the Board's duties, it is too early in the Board's tenure to say whether its jurisdiction or powers should be altered and, if so, how. It does seem, however, that the Board's narrow jurisdiction limits its impact. The

Board had the opportunity to issue only seven opinions over its first year of operation, and only three of those reached the merits of a fee dispute. The other four were dismissed as premature or outside the Board's jurisdiction.

One way to enhance the Board's role would be to decrease the \$350 threshold for filing complaints. Although custodians and requesters disagree on this point, one possibility might be to lower the threshold to \$250, which is the point at which the federal government considers a fee large enough to require prepayment. *See* 5 U.S.C. § 552(a)(4)(A)(v) ("No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed \$250.").

Another, potentially more promising, way in which the Board's jurisdiction might be increased would be to give it the authority to hear disputes involving an agency's decision not to waive a fee in excess of the Board's threshold amount. The Board interprets its current authority—correctly, we believe—as not encompassing fee waiver decisions. *See* PIACB-16-01 (April 21, 2016) (concluding that "the Compliance Board does not have the authority to review a custodian's decision to deny a request that a fee be waived"); GP § 4-1A-05. Although giving the Board jurisdiction over fee waivers would pose certain difficulties, it might improve the implementation of the PIA in several different ways.

First, expanding the Board's jurisdiction to include fee waiver disputes would provide a disinterested arbiter of what is, and is not, in the public interest. Although response fees go into the General Fund and thus are not a budgetary benefit to agencies, requesters widely believe that agencies deny fee waivers as a means to block access to records.

Second, the development of a body of Board opinions on fee waivers would provide some measure of uniformity across the state. Two of the recurring criticisms voiced in the survey were that PIA practices vary widely across agencies and that there is little guidance for determining what is, and is not, in the public interest. Some of the lack of uniformity undoubtedly stems from the statute itself, which provides little guidance for agencies to determine whether a fee waiver is, or is not, in the public interest. But the lack of

uniformity likely also stems from the widely varying circumstances of the responding agencies: The PIA applies to small municipalities and boards without staff as well as to large State agencies with staff and interactive websites dedicated to responding to requests. Funneling some fee waiver disputes to the Compliance Board will enable it to develop a consistent and unified body of decisions that should help custodians make these determinations on their own.

Finally, placing fee waiver disputes with the Compliance Board would give requesters a single, low-cost means of addressing all significant fee disputes.

Still, we see at least two reasons for not adding fee waiver disputes to the Board's role, at least not at this early point in the Board's existence. First, as the Board has reported, the Ombudsman already mediates disputes over fee waiver denials and has "achieved great success" in that respect. 2016 Public Information Act Compliance Board, Annual Report ("PIACB Annual Report") at 3. At last count, the Ombudsman had fielded 157 inquiries and had resolved roughly two-thirds of them. Assuming that success continues, there may not be a particular need to bring fee waiver disputes under the Board's more formal authority.

The second reason is one of practicability. The opportunity to appeal fee waiver denials would increase the Board's workload—perhaps significantly—given the frequency with which waivers are requested. It should be remembered in this respect that the General Assembly structured the Board as an entirely volunteer board. Thus, any expansion of the Board's jurisdiction must be weighed against the additional imposition on the individual members' time as well as the impact on the Board's ability to continue to decide matters within the short deadlines that have been set for it.

We believe, for example, that assigning to the Board the power to adjudicate *all* PIA disputes—as some survey respondents suggested—would place unreasonable expectations on the Board and its staff. Based on our Office's informal review of other states' open records bodies, we would expect

that such an expansion of the Board's jurisdiction would result in a volume of work that would be asking far too much of volunteer board members.

That the PIA Compliance Board—unlike the Open Meetings Compliance Board—has *binding* authority magnifies our concern about overtaxing the volunteer members of the Board. With the authority to issue binding decisions comes the corresponding duty to develop a factual record on which the Board's decision rests. It is thus not sufficient for the Board to simply issue legal opinions; it must also render findings of fact that could form the basis for judicial review. That fact-finding responsibility is manageable in the small number of fee-related cases that currently come before the Board, but expanding the Board's jurisdiction to include all PIA disputes would almost certainly overwhelm the Board and its limited staff.

Our final report will look at how other states have handled these types of issues and what options with a track record of success might be adopted here in Maryland. At this stage of the Board's existence, though, we invite public comment on the advantages and disadvantages of the more modest recommendations we are considering, namely, expanding the Board's jurisdiction to include fees in excess of \$250 and fee waiver decisions involving the same.

### ***B. The Functions of the Public Access Ombudsman***

The Public Access Ombudsman began work on March 30, 2016, so we have had less than a year's experience with her role and her effectiveness. Moreover, much of the time she has held office has been taken up by matters other than mediating PIA disputes. Less than two weeks after the Ombudsman took office, the General Assembly enacted, and the Governor signed, H.B. 1105, which directed the Ombudsman to investigate and report back on the manner in which the Howard County Public School System has been implementing the PIA between 2012 and the end of 2015. *See* 2016 Md. Laws, ch. 132. The Ombudsman's report is due by January 1, 2017.

The Ombudsman's limited time in office was reflected in the survey results: Only 44 respondents indicated that they had any interaction with the

Ombudsman. Of those who had experience with the Ombudsman and expressed a view about the effectiveness of her role, almost two-thirds indicated that she was able to reach an “adequate arrangement on information disclosure.” Conversely, only one in six respondents indicated that the Ombudsman role was ineffective.

Although respondents were generally positive about the Ombudsman’s role, almost two-thirds of those who expressed a view—mostly requesters—indicated that her role should be expanded. The most commonly offered suggestion was that the Ombudsman’s role should be expanded to include the power to *order* agencies to provide records or reduce fees.

### *Preliminary Findings & Recommendations*

Our preliminary recommendation is that the Ombudsman’s role should not be altered, at least not during the 2017 session. We make that recommendation for three principal reasons: First, the Ombudsman has not been in place long enough to generate a sufficient track record to gauge either her normal workload or the effectiveness of mediation, as it is currently structured, in preventing and resolving PIA disputes. Second, much of the time since her appointment has been occupied with her investigation into the Howard County Public School System, which made 2016 an unrepresentative year for evaluating the Ombudsman’s role.

Finally, one of the benefits of the Ombudsman’s current, less formal role is that she can facilitate a conversation between requesters and custodians about PIA requests. In our view, much of the conflict that surrounds the implementation of the PIA stems from an “us” versus “them” mentality, in which some custodians see PIA requests as a diversion from their other governmental duties and some requesters suspect custodians of deliberately trying to block access to otherwise disclosable records. The tension between the two parties can sometimes lead to unreasonable demands and bureaucratic, unhelpful responses.

This tension can be eased in many different ways. As discussed elsewhere in this report, the new 10-day notice letter gives agencies the

opportunity to begin a dialogue early on as to how the costs associated with a request might be minimized. The informal nature of the Ombudsman's mediation role can also help in this respect. Agencies are more likely to engage in a full and frank conversation when they know that the Ombudsman does not have the authority to compel them to handle a request in a particular way. Giving the Ombudsman more formal authority would likely stifle that conversation. Instead, agencies would most likely handle the proceedings as they would any other formal adversary proceeding, which we think would run counter to the reasons why the Ombudsman role was created in the first place.

Giving the Ombudsman formal enforcement authority would also require due process protections for those who appear before the Ombudsman. Just as the PIA Compliance Board's decisions are appealable because they are binding, the Ombudsman's decisions would have to be appealable if they had the effect of requiring an agency to provide a record or a requester to narrow his or her request. And because her decisions would be binding, due process would also require that the Ombudsman's role be formalized through the same types of fact-finding procedures that govern the PIA Compliance Board. This too would likely undermine the efficacy of the Ombudsman's mediation efforts. Currently, the mediation discussions remain confidential, much like settlement discussions. If an enforcement component were added, the information gathered during mediation could become public, which would further deter open and honest discussions.

We continue to believe that there is a place within a workable PIA compliance regime for an officer with an informal role, who can be called into a dispute early on, before the parties have dug in. We note in this respect that the PIA Compliance Board has found the Ombudsman to be very helpful in resolving disputes that otherwise would have been heard by the Board. 2016 PIACB Annual Report at 3 (noting the Ombudsman's success in mediating fee disputes and finding that, during her first year in office, "the Public Access Ombudsman provided extraordinary service to the public"). For all of these reasons, we recommend keeping the Ombudsman's powers in their current form, at least for now.

## *2. The Merits and Feasibility of Merging the State Open Meetings Compliance Board with the State Public Information Act Compliance Board*

The survey respondents were largely opposed to the idea of merging the two boards. Although respondents generally acknowledged that both boards operate in the larger field of “open government,” they indicated that PIA and open meetings issues are very different. Respondents also expressed the concern that, if the two boards were combined, overall staffing would be cut and backlog and wait times would increase. Accordingly, any combination of the two should be accompanied by additional funding. Finally, respondents were fairly evenly split on whether the boards, if combined, should take a form similar to the State Ethics Commission, with full-time staff and legal counsel independent from the Office of the Attorney General.

The Open Meetings Compliance Board has preliminarily addressed the possibility of combining the two boards and echoed a number of these concerns. The Board noted that the PIA and the Open Meetings Act are different laws that do not overlap very much, and thus combining the two boards might not provide much synergy. The increased workload created by routing all PIA and open meetings disputes to a single board might also make it “difficult to find people to serve on the board.” Minutes, Open Meetings Compliance Board Annual Meeting (Sept. 8, 2016). The open meetings board also questioned whether merging the two boards “would cause Open Meetings Act issues to be subsumed by PIA issues.” *Id.*

### *Preliminary Findings & Recommendations*

We believe that it is appropriate to keep the Open Meetings Compliance Board and the PIA Compliance Board separate. We would revisit that conclusion if the General Assembly were to expand the responsibilities of either board to the point that it would be asking too much of volunteer board members. For example, based on our informal review of other states’ public records boards, we would expect the number of PIA-related complaints to increase dramatically if the PIA Compliance Board were given jurisdiction over *all* PIA disputes. If Maryland were to follow that path, the PIA board would

have to be compensated and, at that point, it would probably make sense to combine the two into one, compensated board.

Combining the two boards would offer some advantages. First, it would allow for the development of open government expertise that cuts across statutory lines. Although, as respondents pointed out, the Open Meetings Act and the PIA are different, they overlap in several respects—the presumption of openness, the need for the government entity to become versed in the exemptions to that presumption, and, more specifically, the extent to which PIA exemptions provide a basis for meeting in closed session, to name a few.

We also tend to believe that, if the two boards are combined and compensated, the General Assembly should consider making them an independent entity, much like the State Ethics Commission. Under current law, the Office of the Attorney General provides staff and legal counsel to both boards and to the Ombudsman, even when those entities handle matters involving complaints against the State agencies that our Office represents. Our Office manages actual conflicts through the erection of conflicts walls and appointment of substitute counsel, but moving all of these entities into a separate, independent, paid commission would accomplish these same objectives.

### ***3. The Use of Fee Waivers in General and for Reasons of Indigence, Including How Often Waivers Are Requested, Denied, or Granted, and the Amount of Fees that Have Been Waived as a Result***

Our survey did not yield much hard data on how fee waivers have been handled under the PIA. Agencies typically do not track their fee waiver decisions with specificity and often forgo charging a fee without formally acting on a request for a waiver. Requesters, for their part, presumably do not track PIA responses and likely responded to the survey based more on their personal recollection of how their own waiver requests are handled. These limitations make it difficult to answer the questions presented to us with empirical support.

That said, the survey did suggest some broad trends in how fee waivers are handled under the PIA and how the process might be improved. First, it appears that few waiver requests are sought on the grounds of indigence. No requesters indicated that they had asserted indigence as the basis for their waiver requests, and only 14% of agency respondents indicated that they had handled a request based on indigence. We can see several reasons for this relative lack of experience. Inmates frequently justify their waiver requests on the basis of indigence, but restrictions on their access to the internet likely prevented them from taking the survey, if they were otherwise inclined to do so. Also, public interest legal services groups often submit requests on their own behalf, as opposed to on behalf of their indigent clients, and those groups request fee waivers under the public interest standard instead.

Second, some survey respondents expressed the view that it would help requesters if agencies were to post blank indigence affidavits on their websites or otherwise make them available to the public. Although some agencies already do so—our Office, for example, posts a blank affidavit with the other PIA materials on our website—it seems that many do not.

Turning to public interest fee waivers, requesters and custodians alike indicated that waivers were granted roughly 50% of the time, and when waivers are granted, the fee at issue is typically less than \$100. But it is impossible to say, based on the survey responses, what the total amount of waived or foregone fees would be for any particular governmental entity or statewide.

Several commenters offered suggestions for how to improve the way in which fees are imposed. Some suggested that the definition of “indigent” be amended to make the qualifying income level easier to determine. The current definition states simply that the term “indigent” means “the median family income for the State as reported in the Federal Register.” GP § 4-206(a)(2). Accessing the Federal Register and finding the applicable regulation are not necessarily easy tasks for the general public.

The PIA Compliance Board, in its first Annual Report, has made its own recommendations for how the fee provisions of the PIA might be improved.

Specifically, the Board recommended that the law be amended to (a) prohibit charges for duplicate reviews (*i.e.*, when two agency personnel are reviewing the same record); (b) clarify whether the term “salary,” used in § 4-206(b)(2) to calculate response fees, was intended to include benefits or not; and (c) provide clearer guidelines for when a fee waiver is appropriate. 2016 PIACB Annual Report at 6-8.

*Preliminary Findings & Recommendations*

Based on the results of our survey and our Office’s experience with these issues, we have identified three aspects of the fee provisions that could be meaningfully improved. First, the reference to the Federal Register in the current definition of “indigent” could specify which calculation of median family income—in the tens of thousands of Federal Register pages published annually—the General Assembly intended to adopt. An on-line search for the phrase “median family income” reaches the State Median Income Estimates for use in the federal Low-Income Home Energy Assistance Program or “LIHEAP.” *See, e.g.*, 81 Fed. Reg. 57589 (Aug. 23, 2016) (listing the median household income for a family of four for the federal fiscal year, October 1, 2016, through September 30, 2017). It is not immediately clear to the reader that this is the *only* listing of median family income in the Federal Register or that the General Assembly would have intended to adopt the LIHEAP standard for the PIA.

That said, the LIHEAP standard seems to be the only generally available standard for state-specific median family income. It also appears to be the one adopted by the Maryland Volunteer Lawyers Service, which provides legal services free of charge to qualifying individuals. *See* <http://mvlslaw.org/get-legal-help/do-i-qualify/> (stating that 50% of the median family income in Maryland is \$54,631, which is consistent with the \$109,262 figure published in the Federal Register). It would be helpful if the statute specifically referred to the LIHEAP standard if that is the General Assembly’s intent.

Second, the General Assembly should consider amending the statute to specify the factors that agencies should consider when evaluating whether a fee waiver is in the public interest. The current standard requires the agency

to consider the applicant's ability to pay—which overlaps with the other ground for a waiver, indigence—but otherwise leaves it to the agency to determine what is in the “public interest.” The lack of specific criteria results in fee waiver decisions that, according to survey respondents, vary considerably across the State.

One possible factor could be modeled on one of the factors used by federal agencies to determine whether to waive fees under federal law. The federal Freedom of Information Act (“FOIA”) requires at least partial fee waivers “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). The federal standard's focus on learning about how the government is operating seems consistent with how the Court of Appeals described the PIA in its most recent case on the topic. *See Immanuel v. Comptroller of Maryland*, 449 Md. 76 (2016) (stating that the PIA, like its federal counterpart, “is a powerful tool for understanding the activities and actions of the State government” and that “[t]he legislative intent in enacting the MPIA is to allow Marylanders to learn about what their government is doing”). The federal standard also has the advantage of an already established body of federal case law construing the standard, which provides additional guidance to requesters, custodians, and state courts alike.

With respect to fee waivers based on indigence, the statute currently does not identify *any* standards—other than the applicant's indigence—that an agency must consider in deciding whether to waive fees. Under one reading of the statute, that might mean that an agency is *required* to waive fees when the requester submits an affidavit of indigence. That seems inconsistent with the language of the statute, which leaves fee waivers to the discretion of the agency, *see* GP § 4-206(e) (providing that the “custodian *may* waive a fee” if the applicant is indigent) (emphasis added), but in the absence of other criteria, it is not clear on what basis the agency could deny an indigent's request for a fee waiver.

We note here that requiring fees be waived when the requester is indigent would remove the most meaningful check on overbroad requests. Take, for example, an inmate who requests the prosecution files for all defendants tried for a particular type of crime. It might be perfectly understandable that an inmate would want such information to evaluate whether his or her conviction is consistent with the outcomes in similar cases, but the cost of fulfilling the request would likely be in the tens of thousands of dollars, if not more. Or, a commercial requester might submit its requests through a proxy who qualifies as indigent. Agencies should be allowed to deny fee waivers in such instances. One solution worth exploring might be to eliminate indigence fee waivers and instead increase the number of hours provided free of charge to indigent requesters. Doing so would reduce or eliminate the financial burden on indigent requesters without requiring a waiver decision and without removing the check on burdensome or proxy requests.

The third way in which the fee waiver provisions might be improved would be to require agencies to have blank indigence affidavits easily available either on their websites or otherwise. Given that all agencies already must identify their PIA coordinator on their website, it would seem like a modest step to include a link to a blank indigence affidavit. We recognize, though, that even modest steps contribute to the administrative burden on agencies, so we invite comment on this issue as well.

#### *4. The Denial Process Used by Custodians*

The PIA requires that, “except as otherwise provided by law,” a custodian of public records is to permit a member of the public “to inspect any public record at any reasonable time.” GP § 4-201(a)(1). However, as the introductory clause suggests, not all public records are available for inspection under the PIA.

The exceptions to the PIA’s general rule of disclosure can be grouped into four categories of exemptions. First, the PIA defers to various types of law—common law privileges, federal and State statutes, federal regulations, court rules, and court orders—that may preclude disclosure of a record. GP

§ 4-301(a). Documents that are covered by the attorney-client privilege and executive privilege fall within this category of exemptions, as do student records protected under the federal Family Educational Rights and Privacy Act and medical records protected under the federal Health Insurance Portability and Accountability Act of 1996.

Second, the PIA itself *requires* custodians to shield certain records and specified categories of information from public inspection. These exemptions appear in Part II (GP §§ 4-304 through 4-327) and Part III (GP §§ 4-328 through 4-343) of Subtitle 3 of the PIA and are sometimes referred to as “mandatory” exemptions or denials. The most commonly-invoked mandatory exemptions are for personnel records, GP § 4-311, confidential commercial information, § 4-335, and information about the finances of an individual, GP § 4-336.

Third, with respect to certain types of records, the PIA gives the custodian of the record discretion to deny access to the record, or severable portions of the record, if the custodian “believes that inspection . . . by the applicant would be contrary to the public interest.” GP § 4-343. The exemptions in this category are sometimes referred to as “discretionary” exemptions and include inter- and intra-agency letters or memoranda, GP § 4-344, and investigatory records, GP § 4-351.

Finally, the PIA includes a mechanism that, in appropriate circumstances, protects records from inspection even if no exemption covers those records. If no provision of law or the PIA bars disclosure of a record, but the custodian believes that public inspection of the record would cause “substantial injury to the public interest,” the custodian may temporarily deny inspection and seek a special court order to continue to deny inspection. GP § 4-358. This last provision has historically been considered the only “catch-all” exemption under the Act. *See Glenn v. Maryland Dep't of Health & Mental Hygiene*, 446 Md. 378, 386 (2016); *Bowen v. Davison*, 135 Md. App. 152, 165 (2000).

We do not understand the General Assembly’s charge for this report as requiring us to evaluate how agencies apply each of the 47 exemptions set forth

in the statute. Instead, we will limit our comments to the procedural aspects of how custodians go about withholding records on the basis of one or more exemptions.

### *Views Expressed in Response to Survey*

Requesters who responded to the survey expressed frustration with virtually every part of the PIA process, consistently maintaining that agencies fail to comply with the statute's mandate of openness. The most common criticisms, in rough order of frequency, were:

*Failure to respond within 30 days, if at all.* Most of the requester comments indicated that agencies either responded after the 30-day statutory deadline or failed to respond at all. Others indicated that, even when agencies responded by the deadline, they typically waited until day 30 to do so.

*Looking for ways to deny access, not to provide it.* Many requesters expressed the view that agencies are applying the statutory exemptions broadly to deny access.

*Using high fees as a means to deny access.* Many requesters indicated that agencies charge high fees—by inflating the response time or unnecessarily charging for attorney review time—because they know the requester will not, or cannot, pay them and thus use fees as a means to deny access.

*Not explaining why documents are withheld.* Requesters commented that agencies often do not provide useful explanations about why documents are withheld, relying instead on opaque, bureaucratic boilerplate.

*Refusing to provide digital materials in digital form.* Some requesters indicated that agencies often insist on providing digital materials in pdf or paper form to frustrate the requester's ability to manipulate the data within their native format.

### *Preliminary Findings & Recommendations*

There is little doubt that the PIA is not always properly implemented, but some of the criticisms leveled at custodians might reflect the distrust that

is endemic in the PIA process more than the reality of how agencies implement the PIA.

For example, from the perspective of a requester who is seeking “public” records, it might seem as if agencies are looking for ways to deny access rather than applying the statute in a manner consistent with its mandate of openness. But when the statute includes mandatory exemptions from disclosure and makes the custodian subject to sanctions for providing exempt materials, it is only rational (and correct) for custodians to proceed carefully. Making the determination as to whether material is exempt from disclosure takes time and sometimes the assistance of legal counsel—both of which contribute to higher response costs. But that does not mean that the agency is intentionally running up the tab to frustrate access.

Some commenters expressed the view that custodians should be able to produce electronic records immediately. Depending on the search capacities of a particular agency’s software, that is sometimes true. However, in many respects electronic records make the response process *more* difficult, not less. The sheer volume of electronic records makes the process of responding to PIA requests much more involved than simply locating the relevant file in a filing cabinet. Email systems typically are not arranged by subject matter, and word searches can tie up limited computer resources to the detriment of the agency’s other matters. Often, searches of electronic records capture items that do not respond to the request, which requires extensive review time by staff even before evaluating whether any records are exempt from disclosure. And that does not account for the fact that many governmental files remain in paper form, and many reside in off-site storage, sometimes with minimal indexing. When you add declining agency budgets and increasing numbers of PIA requests, it becomes clear that PIA compliance is not as easy as it might seem.<sup>2</sup>

---

<sup>2</sup> Some commenters expressed the view that agencies should not be allowed to charge requesters for search times that are due to an agency’s outmoded recordkeeping practices. Sound records maintenance and retention policies would undoubtedly help make the PIA response process more efficient, and agencies should be encouraged to modernize their recordkeeping practices as much as budgets allow.

The fact that requesters repeatedly cited these recurring problems is, of course, cause for concern, but we are not able to offer any easy solutions at this point. That is partly due to the fact that the statute already addresses these issues; it need not be amended on that basis.

The solution suggested by most requesters is to enhance the enforcement provisions of the Act to give it more “teeth.” But increasing the penalties available under the Act, or making it easier to assess them through an informal administrative process, comes at a cost. As discussed above, assigning a broad enforcement role to the PIA Compliance Board would likely increase its workload to a degree that could not be managed by a volunteer board. And giving the Ombudsman formal enforcement powers would eliminate the one source of informal conflict-resolution that the law currently provides. In our view, it would be premature to change the PIA to attempt to resolve problems that the General Assembly has so recently addressed. However, we invite public comment on ways in which the PIA’s enforcement provisions could be amended.

##### ***5. Public Records that Are Held by a Nongovernmental Custodian and the Appropriate Remedies to Ensure Public Access to Those Records***

The vast majority of requesters who took the on-line survey did not identify this as a recurring issue. The comments left by those who had experienced this type of response illustrate the many ways in which this issue might arise, albeit infrequently. Sometimes the issue is really a question as to whether the custodian of the record qualified as a governmental unit subject to the Act; the Baltimore Development Corporation was cited in this respect, as was the Elkton Chamber and Alliance. Other respondents suggested that governmental entities were deliberately housing their files with private parties to avoid the PIA.

---

How best to do so, however, is a topic that lies beyond the scope of this report. Here it is enough to note that the statute allows the agency to recover its “actual costs,” GP § 4-206, which would reflect the existing condition of the agency’s records.

More commonly, requesters raised concerns about not being able to access the records of government contractors. One example of this concern arises in the context of speed camera vendors. People who wish to challenge the accuracy or legality of automated speed camera tickets sometimes file PIA requests for the data underlying the issuance of the tickets. Local governments do not, however, administer their speed camera systems on their own. Instead, they contract with third-party vendors, which maintain the equipment and process the data associated with the violations. As a result, the contractor might collect and retain more information about the speeding ticket than the local government does. In fact, it is our understanding that some contractors operate the entire system more or less on their own. So when a local government receives a PIA request, it might respond with little more than the ticket itself—if anything—because that is the only record over which the government has physical custody.

More generally, some commenters noted that extending the PIA to records held by all government contractors might have adverse consequences for government procurements. Private contractors that do not wish to expose their files to public scrutiny may decide not to bid public works projects, which would tend to result in higher contract prices over the long run. Requiring third-party contractors to provide PIA-related services to the public would also broaden the scope of work in many contracts.

### *Preliminary Findings & Recommendations*

Our Office has traditionally advised that records maintained by government contractors do not necessarily constitute “public records” subject to the PIA. The PIA defines the term “public record” to include only those materials “made or received” by the government in the transaction of public business. Records that are created by a third-party contractor and have not been transferred to the government are not public records because they have not been “made or received” by the government.

That said, a “public record” does not cease being a public record simply because the government chooses to house the record with a private third party. 64 *Opinions of the Attorney General* 274 (1979) (colonial public records remain

public records even when held by private auction house). Thus a government contractor could qualify as a “custodian” under the PIA if it has physical custody and control of public records. *See 80 Opinions of the Attorney General* 257, 259 n.4 (1995). For this reason, the government cannot transfer its records to a private storage facility and avoid its PIA obligations by doing so.

These two situations—purely private records and purely public records held by a private entity—lie at the two ends of a spectrum of contractual relationships involving more or less governmental involvement. Closer to the private end of the spectrum are situations where the third-party contractor creates and maintains the record for itself and the contract only gives the government a contractual right of access to the documentation associated with the contract. We have previously advised that such records become “public records” only if the government invokes the clause and receives the documentation, but not before. *See generally* Maryland Public Information Act Manual (14th ed., October 2015) at 1-6 (citing *Forsham v. Harris*, 445 U.S. 169 (1980) and *80 Opinions of the Attorney General* at 259).

Closer to the public end of that spectrum are situations where the contract between the government and the contractor gives the government *ownership* of records within the contractor’s possession. *Cf. Forsham*, 445 U.S. at 173 (observing that grantee, not the federal government, owned the data at issue). So too are situations where the government effectively controls the records at issue; under federal law, that is enough to render the records “agency records” under FOIA. *See* Department of Justice Guide to the Freedom of Information Act, Procedural Requirements, at 10-12 (available at [www.justice.gov/sites/default/files/oip/legacy/2014/07/23/procedural-requirements.pdf](http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/procedural-requirements.pdf)).

Finally, third-party contractors might also be subject to the PIA directly if they qualify as “instrumentalities of the State” for purposes of the government contract at issue. *See* GP § 4-101(j) (defining “public record”). There is no bright-line test for determining whether an entity qualifies as an instrumentality; instead, the courts employ a multi-factored test that includes the degree of control exercised by the government and the extent to which the contractor is carrying out governmental functions. *See, e.g., Napata v. Univ.*

*of Maryland Med. Sys. Corp.*, 417 Md. 724, 733-34 (2011). Applying this multi-factored test, the Court of Appeals concluded that a nonprofit corporation formed to plan and implement long-range development strategies for Baltimore City was subject to substantial control by the City and thus was an “instrumentality” of the City for purposes of the PIA. *See Baltimore Dev. Corp. v. Carmel Realty Associates*, 395 Md. 299 (2006); *see also Andy’s Ice Cream, Inc. v. City of Salisbury*, 125 Md. App. 125 (1999). Similarly, some states have open records laws that have been interpreted to cover government contractors if they perform governmental functions through a delegation from an agency. *See, e.g., Ark. Op. Atty. Gen. 2008-154* (Nov. 12, 2008) (concluding that state public records law applied to private company hired to operate school bus system because that was “a task that would otherwise be conducted by the [government]”). Although there are no reported appellate decisions on the topic here in Maryland, we are aware of one circuit court decision in which the court appears to have concluded that the government violated the PIA by not disclosing records maintained by its third-party speed camera vendor. *See Ely v. Town of Morningside*, Order, CAL12-23425 (Pr. G. Cir. Ct., May 29, 2014).

The wide variety of different government contracts makes it difficult to establish a bright line rule for when the records of non-governmental entities are subject to the PIA. And, as more and more government services are provided through private entities acting under government contracts, the identification of public records will become only more complicated. No legislation is required, however, to provide public access to such records. Instead, the fact-specific circumstances of each situation will largely determine whether the records held by the third-party contractor are “public records” or not.

If, however, the General Assembly, as a policy matter, wishes to provide access to records maintained by *all* third-party vendors, it would have to revise the definition of “public record” to provide for it. We strongly recommend, however, that the statute not be amended to provide for blanket access to third-party contractors’ files without first thoroughly evaluating what the ramifications for government procurements might be, an issue that lies beyond the scope of this report.

## *6. State Law Exemptions Outside of the Public Information Act*

The PIA defers to other laws in that, if another law requires the custodian to keep a record confidential, that law controls. The converse is also true; if another law requires that a record be made publicly available, that law controls over an exemption in the PIA. As one might imagine, many federal and State statutes have confidentiality provisions that prevail over the PIA's mandate of disclosure.

At the federal level, the Family Educational Rights and Privacy Act of 1974 (FERPA, 20 U.S.C. § 1232(g)) restricts access to student records, the Health Insurance Portability and Accountability Act of 1996 (HIPAA, Pub.L. 104-191, 110 Stat. 1936, enacted Aug. 21, 1996) restricts the disclosure of medical records, and the federal tax laws contain broad confidentiality provisions. *See* 26 U.S.C. § 6103. The Department of Justice annually lists the federal statutory provisions that similarly restrict access to records under FOIA and, in 2014, it listed 166 such provisions. *See* U.S. Department of Justice, "Statutes Used by Federal Departments and Agencies in Conjunction with Exemption 3 of the FOIA As Reported in Fiscal Year 2014 Annual FOIA Reports" (available at [www.justice.gov/oip/foia-resources/2014-exemption3-statutes/download](http://www.justice.gov/oip/foia-resources/2014-exemption3-statutes/download)).

State statutes also contain confidentiality provisions that similarly supersede those of the PIA. For example, § 8-507 of the Courts & Judicial Proceedings Article prohibits the disclosure of grand jury information, § 5-314 of the State Personnel & Pensions Article makes confidential information gathered as part of a whistleblower investigation, and several provisions of the Public Ethics Law prohibit the disclosure of information relating to certain actions taken by the State Ethics Commission. *See* GP §§ 5-301, 5-303, 5-407.

### *Views Expressed in Response to Survey*

The survey results suggest that these other State law confidentiality provisions generally are not a recurring source of frustration with requesters. Although many requesters had experience with these provisions, none highlighted them in a way that suggested the need for legislative attention.

The one exception was § 8-801.1 of the Agriculture Article, which was the subject of comments by representatives of the environmental community made outside of the survey itself.

Section 8-801.1 of the Agriculture Article governs the public availability of nutrient management plans. Nutrient management plans identify the levels of manure and other nutrients—typically nitrogen and phosphorous—that, when applied to farmland, maximize crop yields while minimizing the potential for runoff to nearby streams. The application rates identified in the plans are tailored to the nutrient content of the soil and manure at each specific farm field. The plans are prepared by University of Maryland Extension advisors or private consultants and farmers who are certified to do so. All farms above a certain income or animal unit threshold are required to prepare and implement nutrient management plans.

Section 8-801.1 of the Agriculture Article requires farmers to file with the Department of Agriculture a “summary of each nutrient management plan.” The General Assembly specifically addressed the extent to which nutrient management planning information would be publicly available: “The Department shall maintain a copy of each summary for 3 years in a manner that protects the identity of the individual for whom the nutrient management plan was prepared.” Md. Code Ann., Agric. § 8-801.1(b)(2).

This one-sentence provision was the subject of seven years of litigation arising out of the Department of Agriculture’s response to PIA requests from various environmental organizations. The Department’s responses to those requests were the subject of circuit court complaints filed by both the Waterkeeper Alliance, which argued for a narrow construction of § 8-801.1(b)(2), and the Maryland Farm Bureau, which argued for a broader construction. One of the issues in the case was whether the Department, in order to “protect[] the identity” of the farmer, must redact only the farmer’s name, address, and unique identification numbers, or whether it must also redact any other information that *could be used* to identify the farm or farmer associated with the plan. Under the broader interpretation, information about the size of the farm or what types of crops it grows might have to be

redacted, because it could be enough to identify the farm, under the right circumstances.

The Circuit Court for Anne Arundel County concluded that § 8-801.1 required the Department to redact the farmer's name, address, signature, and unique identification number, as well as any other information that, if disclosed, "could be used to create a linkage between a specific individual and a specific [NMP]." *Waterkeeper Alliance, Inc. v. Maryland Dep't of Agriculture*, 211 Md. App. 417, 454 (2013), *judgment vacated, appeal dismissed by* 439 Md. 262 (2014). The Waterkeeper Alliance appealed, and the Court of Special Appeals upheld the circuit court's decision. *Id.* The Court of Appeals subsequently concluded, however, that the appeal was procedurally improper and so vacated the lower appellate court's decision with instructions to remand it to the circuit court for further proceedings. *Waterkeeper Alliance, Inc. v. Maryland Dep't of Agriculture*, 439 Md. 262, 290 (2014). The Waterkeeper Alliance elected to dismiss the case when it returned to the circuit court.

Representatives of the environmental community commented on the role that nutrient management plans play in maintaining water quality in the Chesapeake Bay and the importance of public access to those plans. The agricultural over-application of phosphorous, nitrogen, and other fertilizers is a contributing factor to the water quality challenges that face the Bay. Nutrient management plans protect water quality by helping farmers to apply fertilizers, animal manure, and other nutrient sources in an effective and environmentally sound manner. Shielding those plans from meaningful public scrutiny undermines the public's ability to determine the extent to which agricultural land management practices contribute to poor water quality in the Bay.

By contrast, representatives of the farming community have expressed a variety of concerns about the public disclosure of nutrient management plan information. Because the plans contain farm-specific information about soil characteristics and crop yields, farmers believe that they are "confidential business documents" that must not be disclosed to competing farms. See Maryland Farm Bureau, Press Release (May 8, 2013), at

<http://mdfarmbureau.com/wp-content/uploads/2013/12/NMVictory.pdf>. The Maryland Farm Bureau also indicated that how farmers apply nutrients to their crop fields “may be misunderstood by people who do not understand the farming business” and that “land rents will increase because farmers will see the precise conditions (e.g., nitrogen, phosphorus, and pH levels) of soil, as well as soil productivity and yield record, on every farm that has a NMP.” Brief of Appellee Maryland Farm Bureau, Inc.; *Waterkeeper Alliance, Inc. v. Maryland Dept. of Agriculture*, 439 Md. 262 (2014) (No. 087, Sept. Term, 2013); Brief of Appellee Maryland Farm Bureau, Inc., *Waterkeeper Alliance, Inc. v. Maryland Dept. of Agriculture*, 211 Md. App. 417 (2013) (No. 1289, Sept. Term, 2011).

### Preliminary Findings & Recommendations

The extent to which nutrient management plans should be publicly available is a policy decision that requires the balancing of agricultural and environmental interests, something that lies well beyond the scope of this report. However, an agency’s difficulty administering a provision causes both delay and expense, as has been the case with § 8-801.1 of the Agriculture Article. We thus focus our remarks here on whether and how § 8-801.1 might be amended to improve the way in which the PIA is implemented.

In that spirit, we preliminarily find that § 8-801.1 of the Agriculture Article should be amended to specify what identifying information should be withheld when nutrient management plans are provided in response to a PIA request. The current provision—“The Department shall maintain a copy of each summary for 3 years in a manner that protects the identity of the individual for whom the nutrient management plan was prepared”—has proven difficult to apply, since it provides little guidance as to what types of information must be redacted to protect the identity of the farmer. That issue spawned seven years of litigation in which *both* sides of this dispute—the environmental community and the agricultural community—sued the Department of Agriculture over its implementation of the provision. The Court of Special Appeals decision, though helpful in some respects, does not provide meaningful guidance as to what types of information “could be used to create a linkage between a specific individual and a specific [NMP].” We thus

seek public input on how the provision could be amended to provide greater specificity.

### *7. Other Findings and Recommendations for Improving the Implementation of the Public Information Act*

In addition to our findings and proposed recommendations on the specific questions that the General Assembly asked, we offer here our more general findings about the implementation of the Public Information Act and the ways in which it might be improved. We offer these preliminary findings with the expectation that custodians, requesters, and members of the general public will provide comments that will help us determine whether to formally recommend specific measures in our final report.

#### *Investing in PIA Compliance*

The requesters who responded to our survey fairly consistently criticized custodians for reading exemptions too broadly, using fees as a means to block access, and failing to respond in a timely fashion, if at all. The custodians, for their part, indicated that they are being asked to process a higher volume of requests at a time when tight budgets do not allow for the staffing necessary to handle the additional workload. Although the volume of responses varied dramatically, State and county agencies averaged roughly 400 requests each year, with some agencies processing more than 1,000. Municipal custodians reported lower volumes—approximately 60 as an annual average—but one reported handling as many as 500-1,000 requests each year.

The difficulty of handling a high volume of requests is magnified by the fact that the requests being submitted are becoming more complicated. Requests often take the form of litigation discovery demands, seeking “any and all” documents relating to a particular topic rather than a discreet record or set of records. Or they seek multiple years of emails on the expectation that all that is required of the custodian is a couple of keystrokes in a database search function. But PIA responses are rarely that simple. Even if limited to electronic records—and not all of those are easily searchable—most search terms generate a significant number of “false positives,” *e.g.*, records that contain the search term but do not relate to the subject of the request. Those

non-responsive records must be identified and removed. Then, the remaining responsive records must be reviewed for any of the exemptions set forth in the statute, to say nothing of the federal statutory provisions that might render such records confidential, the State statutes that do the same, and the common law privileges that might apply. All of this takes time.

As many custodians indicated in their survey responses, the time spent responding to PIA requests comes at a cost to the taxpayer. For those agencies that have personnel dedicated to PIA compliance—a topic we will address further below—that cost is reflected in the salaries of the PIA coordinators. But for other agencies, that cost takes the form of delays in the provision of other governmental services. This is not to say that it is not time well-spent; providing citizen insight into government operations is every bit as important as the other governmental tasks that agencies perform. But it is important that any policy debate about expanding the PIA not lose sight of that cost.

This fundamental problem—that PIA compliance takes time and requires resources—is not something that can be solved through regulatory legislation. Instead, it requires investment of resources in PIA compliance. Agencies must receive the funding necessary to identify and train employees whose roles within the agency are dedicated to implementing the PIA.

Many of the larger agencies currently have public information officers or other employees whose role includes handling PIA responses, but often they oversee the responses only, with other subject-specific employees handling the more labor-intensive process of reviewing records for exempt material. Those subject-specific employees typically were not drawn to government service by the prospect of fulfilling PIA requests; instead, they are environmental engineers, tax professionals, and police officers, trained and expert in their given field, but not necessarily in the requirements of the PIA. For these subject-specific personnel, PIA compliance might sometimes seem a distraction from the important public services they were hired to provide.

This has a number of adverse consequences for PIA compliance. First, when PIA compliance is seen as a distraction from the employee's other work, the employee might make it a lower priority than the subject-specific tasks they were hired to perform. If so, a PIA response might not be issued until it

*becomes* a priority, due to the impending 30-day deadline or the threat of litigation. Second, public employees are generally not evaluated on the strength of their PIA compliance, so they generally do not have a professional incentive to improve their records-retrieval practices. Finally, having subject-specific employees conduct the record reviews loses an opportunity to develop PIA expertise within the agency. If agencies centralized the process of reviewing records for disclosure, the employees who carry out those reviews would reach more informed and more consistent conclusions about what is, and is not, disclosable. That will also reduce, if not eliminate, the need to have all PIA decisions reviewed by an attorney, which tends to drive up PIA compliance costs.

The statute already requires all governmental units to identify “a representative who a member of the public should contact to request a public record from the governmental unit.” GP § 4-503(a)(1). Agencies should be encouraged to include PIA compliance within their budgets and identify and train employees—perhaps the same PIA contact person addressed by statute—whose responsibilities are focused on PIA compliance. Many large agencies already do this.

This issue, like many PIA issues, highlights the difficulty of devising measures that are practicable both for large agencies, which have staff and counsel, and small municipalities, some of which have no full-time staff and most of which must pay outside counsel for advice on PIA issues. Any legislation must account for the range of circumstances of the public bodies subject to the PIA. But even small municipalities and boards that cannot afford a PIA-dedicated staff person might take steps to funnel all PIA requests to a single employee. Even that degree of centralization can result in many of the benefits described above by giving that person the experience needed to handle PIA requests.

#### *Encouraging Dialogue*

In addition to custodians being asked to do more with less, many of the problems associated with the implementation of the PIA can be traced to institutional distrust between custodians and respondents. As noted above, both tend to approach the PIA from an “us vs. them” perspective. Many of

the requesters who took the survey accused custodians of trying to find ways not to disclose documents, generating exorbitant fee demands as a way to frustrate access, and even lying about the non-existence of documents. They repeatedly criticized custodians for not acknowledging requests, not updating the requester on where the process stands, and, in some cases, not responding at all. Custodians, for their part, note that requesters often submit overbroad, litigation-style requests for “any and all information” relating to a subject, which requires the custodian to ascertain all of the contexts in which the agency might have created records on the subject. In this respect and others, custodians often see PIA requests as diverting them from their other responsibilities, and see requesters as combative, demanding, and unreasonable. *Both* sides tend not to view PIA-related issues from the other’s perspective or seem willing to acknowledge that the other is probably doing the best they can with limited information or limited resources.

In our view, one way to break down these barriers is for the two sides to talk to one another during the PIA process. Requesters typically do not know what records an agency has and how those records are organized; to be safe, they often craft their requests broadly to cover all records relating to an issue. Early communication can help a requester focus on the information he or she is interested in, improve response times, and keep costs down. Custodians who engaged in this type of dialogue uniformly found it successful in making the PIA response process more efficient for everyone involved. Requesters also generally indicated that they found the discussion helpful, although some expressed the concern that agencies might be using that narrowing process to shield records from public review. The PIA Compliance Board, for its part, highlighted this dialogue as a less formal means of improving the implementation of the statute as it currently exists. 2016 PIACB Annual Report at 8.

Although it is difficult to *legislate* a change in perspective, two provisions added to the statute in 2015 help facilitate the type of communication we have in mind. First, the requirement that agencies respond to a requester within 10 working days and give, among other things, “an estimate of the range of fees that may be charged,” GP § 4-203(b)(2), provides an opportunity to begin a dialogue with the requester. We routinely

advise agencies to take advantage of that opportunity by discussing with the requester precisely why the request is generating a high fee amount and how the request might be altered to reduce the fee.

The office of the Public Access Ombudsman has also proven helpful in facilitating dialogue between custodians and requesters. The Ombudsman's role as an independent, unbiased mediator gives her credibility with both sides, which allows her to serve as a go-between when the two sides are reluctant to speak to one another. Although the creation of the Ombudsman position was originally seen as a way to resolve formal disputes that would otherwise be resolved only through litigation, she can (and does) play this less formal role of facilitating discussion.

#### *Commercial Requesters*

Several custodian respondents expressed frustration about the number of requests they receive from companies that use public records requests as a way to generate business. For some companies, that might involve seeking previously successful bids in order to improve their own bids in subsequent procurements. For others, it might mean learning the names of individuals who have sought certain types of governmental benefits and thus might be in need of the services the companies provide. Others use the PIA to obtain information about private individuals for the purpose of selling that information.

These types of commercial requests are not what the PIA was designed to facilitate. Instead, disclosure under the PIA "must be for the purpose of helping citizens understand and oversee the workings of government." *Immanuel v. Comptroller of Maryland*, 449 Md. 76, 90 (2016) (quoting *U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 774-75 (1989), and upholding agency's decision not to disclose value of unclaimed assets to commercial "finder"). Although there is currently no mechanism for excluding commercial requests altogether, there is at least one provision that prohibits such requests when they seek personal information in student records. See GP § 4-355(b)(2) (prohibiting disclosure "if the information is requested for commercial purposes"); Election Law § 3-506 (list of registered voters may not be used for "commercial solicitation" or "any other purpose not

related to the electoral process”). We invite comment on whether a similar prohibition should be adopted for all public records or whether other options—for example, increasing the response fee applicable to commercial requests—might be more workable.

### *High-Volume Requesters*

Some custodians expressed frustration with individual requesters who submit PIA requests at such a high rate that it ties up staff and makes it difficult to complete other work, including other PIA requests. For example, one agency reported that during the past year, a staff member spent 20 percent or more of his full-time schedule responding to the requests of one individual. Another agency reported receiving more than 150 requests from the same requester in 2016. Even if each of those requests requires less than two hours to generate either a response or a fee estimate, the burden on the agencies would remain substantial.

Our Office has traditionally been of the view that agencies may aggregate requests on the same topic and treat them as one large request when it appears that the requester is trying to take undue advantage of the statutory provision that requires the first two hours to be provided free of charge. But when the requests are on separate topics—as the requests in these examples often are—it is less clear that agencies may do so. Agencies also have the option of referring the situation to the Ombudsman, but her purely voluntary efforts might not be enough, as has been the case in the examples described above. Other ways to get at this issue—for example, by placing limits on the number of requests that an individual may submit—seem problematic as well. We therefore seek comment on whether and how the statute might be amended to address this concern.

## IV Conclusion

As set forth above, we recommend against making any substantive changes to the powers of the Ombudsman and PIA Compliance Board. Both have been in operation for too short a time to identify how they might be productively revamped.

We also offer the following preliminary findings and invite public comment on them:

- The PIA Compliance Board should retain its formal neutrality;
- The PIA Compliance Board should not be combined with the Open Meetings Compliance Board at this time, but if the jurisdiction of the PIA Compliance Board is expanded such that it can no longer function as a volunteer board, a combined, paid board would be appropriate;
- The definition of “indigent” should be revised to clarify that median family income is determined by reference to the definition used for the Low-Income Home Energy Assistance Program or “LIHEAP”; and
- Agencies should be provided a level of funding sufficient to centralize responsibility for PIA compliance in one or more employees whose job performance would be evaluated principally on that basis.

Finally, we are considering making recommendations on the following issues in our final report and we seek public comment on them here:

- Whether the PIA Compliance Board’s jurisdiction should be expanded by lowering the threshold for complaints from \$350 to \$250 and by giving it jurisdiction over complaints about agency fee waiver decisions;
- Whether the PIA should be amended to provide additional criteria by which custodians make fee waiver decisions;
- Whether agencies should be required to post blank indigence affidavits on their websites;
- Whether the enforcement provisions of the statute should be strengthened and, if so, how;

- Whether the PIA should be amended to make the records of all third-party government contractors subject to the Act;
- Whether § 8-801.1 of the Agriculture Article should be amended to specify the types of identifying information that must be redacted when agencies disclose nutrient management plans under the PIA;
- Whether the PIA should be amended to prohibit requests submitted for commercial purposes; and
- Whether and how the PIA might be amended to prevent an individual requester from submitting a burdensome number of requests to one or more agencies.

We offer these preliminary findings and proposed recommendations for public scrutiny and comment, so that we may offer our final findings and recommendations in the report due at the end of 2017. That final report will include the results of our research into how other states handle the issues that the General Assembly has asked us to address. We recommend that the General Assembly not make substantive amendments to the statute until that process is complete.

Brian E. Frosh  
Attorney General

Adam D. Snyder  
Chief Counsel, Opinions & Advice