

## SUMMARY OF NEW PIA PROVISIONS EFFECTIVE OCTOBER 1, 2015

### Office of the Maryland Attorney General

In this past legislative session, the General Assembly enacted three pieces of legislation that amend the Public Information Act (“PIA”). Chapter 136 is the most sweeping change; it eliminates administrative review of agency PIA decisions and provides instead the opportunity to seek review by two newly-created entities: The State Public Information Act Compliance Board and the “Public Access Ombudsman.” The legislation also makes a number of specific changes to how agencies process and respond to requests, and impose fees, under the Act. The two other measures—Chs. 266 and 350—create certain notification and posting requirements that, while not as sweeping as those enacted by Ch. 136, nevertheless affect agencies’ obligations under the Act.

#### ***Chapter 136 (H.B. 755, S.B. 695)***

The changes effected by the bill fall into three categories: (1) the establishment of a State Public Information Act Compliance Board with the power to resolve disputes over fees in excess of \$350; (2) the creation of a new Public Access Ombudsman within the Attorney General’s Office to mediate PIA disputes more generally; and (3) miscellaneous changes to the Act’s administrative requirements, fee waiver provisions, and damages provisions.

#### **A. State Public Information Act Compliance Board**

The bill creates a State Public Information Act Compliance Board (“the Board”) to consider complaints that an agency has imposed an “unreasonable” fee “of more than \$350.” Md. Code Ann., General Provisions Article (“GP”) § 4-1A-05(a). The Board was modeled on the Open Meetings Compliance Board (“OMCB”) and, in many respects, proceedings before the two boards should be similar. In most instances, complaints will be resolved on the papers in fairly short order. Like the OMCB, the Board is empowered to hold “informal conferences”; and as with the OMCB, these conferences are not contested case hearings. GP § 4-1A-07(b).

Perhaps the most significant difference between the two boards is that, whereas the OMCB issues advisory opinions only, the PIA Compliance Board is authorized to issue *binding* opinions. The Board determines the reasonableness of the agency’s fee and is authorized to order the agency to refund the unreasonable portion of the fee. GP § 4-1A-04(a)(3).

The Board’s decisions may be appealed to circuit court, and either party may file an appeal. There is, however, no “exhaustion” requirement; an applicant need not initiate a Board proceeding before seeking judicial review. If an appeal is filed, the Board’s decision is put on hold for a period of up to 30 days after the defendant files a responsive pleading or until the court rules, whichever comes first. *See* GP § 4-1A-10.

#### **B. Public Access Ombudsman**

Chapter 136 also creates the position of Public Access Ombudsman within the Office of the Attorney General. The Ombudsman may consider any dispute “relating to requests for public records” under the Act, including certain specific types of disputes, some of which would

be brought by the applicant (*e.g.*, agency denials or redactions, the failure of the agency to produce records in a timely manner, fee waiver denials) and some of which would be brought by the agency (*e.g.*, “overly broad requests,” the amount of time a custodian “needs, given available staff and resources, to produce public records,” “repetitive or redundant requests”). *See* GP § 4-1B-04(a).

The Ombudsman acts as a mediator only; he or 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. And, if a custodian elects to provide the Ombudsman with copies of the records at issue, the Ombudsman may not disclose those records to anyone other than his or her staff without the custodian’s permission. This confidentiality extends to any “information” that either party provides to the Ombudsman. *See* GP § 4-1B-04.

In most respects, the Ombudsman process exists entirely outside the statutory process of rendering and reviewing PIA decisions. There are no timeframes governing the Ombudsman’s mediation role, the Ombudsman’s decisions have no compulsory effect, and there is no opportunity for judicial review. There are, however, some ways in which the otherwise applicable portions of the statute are altered by the dispute-resolution process overseen by the Ombudsman. For example, if an applicant goes to the Ombudsman, all of the time limits under the Act are extended pending a resolution of the dispute. GP § 4-203(d)(2). Also, the agency must meet a heightened burden of proof before the Ombudsman; it must demonstrate that an exemption is “clearly applicable” and, if it invoked one of the discretionary exemptions under Part IV of the Act, that the “harm from disclosure of the public record is greater than the public interest in access to the information in the public record.” GP § 4-301(b).

### **C. Other Miscellaneous Changes**

In addition to creating the compliance board and the office of Public Access Ombudsman, Chapter 136 makes a number of other changes to how the Act operates:

#### **1. Damages**

In addition to actual damages, the statute will now authorize a reviewing court to require an agency to pay to the complainant “statutory damages” not to exceed \$1,000 for the whole case. The reviewing court still may impose damages only if it finds that the agency’s violation was “knowing[] and willful[],” but the previous requirement that the court make the finding by “clear and convincing evidence” has been deleted. The provisions directly relating to the potential liability of the *custodian* have not changed. *See* GP § 4-362(d).

#### **2. 10-Day Letter or E-Mail**

The bill creates a new requirement to notify the applicant if it will take more than ten working days to produce responsive records. The notice must be provided in writing or by email within ten working days of receipt of the request. The notice must tell the applicant how much time it 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. If an agency ultimately denies access and has failed to provide a 10-day letter or e-mail, a reviewing court could conclude that the denial

was not the result of a “bona fide dispute,” which could potentially be relevant to whether an agency is liable for statutory damages. *See* GP § 4-203(b)(2).

### **3. Information in Denial Letter**

The amendments require that agencies provide more detail about the records that they withhold under the Act’s many exemptions from disclosure. As amended, the statute requires that agencies, “without disclosing the protected information,” provide 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. The statute does not require, however, that agencies prepare an itemized index of the withheld records—typically referred to as a *Vaughn* index.

### **4. Fee Provisions**

#### **a. How Fees Are Charged**

The statute’s fee provisions have been altered to provide greater uniformity across agencies. Although agencies are still authorized to charge reasonable fees that allow them to recover their actual costs, the statute now expressly requires that agencies calculate their costs based on “each individual’s salary and actual time” attributable to the response, including “attorney review costs.” *See* GP § 4-206(b)(2).

The new fee provisions also create a distinction between requests for records to be provided in “customized format” and those provided in a “standard format.” When the applicant seeks records in a “customized format,” the agency may charge a “reasonable fee” for the search for, preparation of, and reproduction” of the records. But when an applicant seeks records prepared in a “standard format,” the agency may charge a “reasonable fee *for the actual costs*” of these same tasks. Agencies likely have a little more leeway when providing records in assessing costs for records provided in a customized format. *See* GP § 4-206(b)(1).

#### **b. Fee Waivers**

The new law alters the fee waiver provisions by adding an indigence provision. While the “ability of the applicant to pay” remains a mandatory consideration in determining whether a fee waiver is “in the public interest,” indigence is now also a second, independent basis on which an agency is authorized to waive fees. In order for an agency to be able to waive fees under this provision, the applicant must be an “individual,” must be indigent (*i.e.*, has a “family household income less than 50% of the median family income for the State as reported in the Federal Register”), and must file an “affidavit of indigency.” Because the new indigence provision applies to *individuals*, it is not available to organizational applicants. Corporations, advocacy groups, and other organizational applicants would still be governed by the pre-existing “public interest” provision. *See* GP § 4-206(a), (e).

### **5. Other Provisions**

In addition to the specific revisions described above, the bill added a number of other provisions that will change how agencies comply with the Act:

- Agencies that invoke any of the discretionary exemptions set forth in Part IV of the Act must provide “a brief explanation of why the denial is necessary.” GP § 4-203(c)(1)(i)1.
- Agencies may no longer decline to redact a record on the grounds that the exempt material is not “reasonably severable.” That phrase has been deleted from the Act. GP § 4-203(c)(1)(ii); 2015 Md. Laws, ch. 136.
- An agency may not “ignore an application” because it was “intended for purposes of harassment.” GP § 4-203(c)(2).

#### ***Chapter 266 (H.B. 674): Designation of PIA Contact Person***

Effective October 1, 2015, each “governmental unit” subject to the Act’s requirements must make available the name and contact information of an agency “representative” to whom applicants should submit PIA requests. The contact information includes the agency representative’s business address, telephone number, and email address and the governmental unit’s Internet address. Each agency must post the contact information in a “user-friendly format” on its website or, if it does not have a website, “at a place easily accessible by the public.” In addition, agencies must annually update that information and submit it to our Office for publication on our website and in the PIA Manual. *See* GP § 4-503.

#### ***Chapter 350 (S.B. 444): Designation of Immediately Available Records***

This bill makes two changes to the Act. First, it requires all official custodians to designate types of records that are to be made available to any requester immediately upon request, and to maintain a list of such records. GP § 4-201(c). The law previously only required custodians to “consider” whether to do so. Second, the new law changes the timing of when court judgments may be released. Whereas the law had previously prohibited the release of a judgment until the time for appeal expires or the appeal is dismissed or adjudicated, Chapter 350 deletes these restrictions, with the result that court judgments will now be available immediately upon issuance (subject to otherwise applicable exemptions).