Chapter 5:
Judicial Review and Alternative Dispute Resolution

A. Judicial Enforcement

The PIA provides for judicial enforcement of the rights provided under the Act. GP § 4-362. It authorizes a suit in the circuit court to "enjoin" an entity, official, or employee from withholding records and order the production of records improperly withheld. Under a 2014 amendment to this provision, the right to judicial review now expressly includes the right to challenge an agency's refusal to provide copies of responsive records. *See* 2014 Md. Laws, ch. 584.

1. Limitations

The Court of Special Appeals has held that actions for judicial review under GP § 4-362 of the PIA are controlled by § 5-110 of the Courts and Judicial Proceedings Article, which has a two-year limitations period, rather than by what is now Rule 7-203, which would require the action to be brought within 30 days. The Court did not decide whether proceedings under what is now GP § 4-362 are subject to any other rules governing administrative appeals. *Kline v. Fuller*, 56 Md. App. 294 (1983). Given that a requester may make a new PIA request after a period of limitations has expired concerning the denial of a prior request, the Court of Special Appeals has characterized the two-year limitations period as of "minuscule significance." *Blythe v. State*, 161 Md. App. 492, 512 (2005).

2. Procedural Issues

- **Venue.** Venue is proper where the complainant resides or has a principal place of business or where the records are located. GP § 4-362(a); *see Attorney Grievance Commission v. A.S. Abell*, 294 Md. 680 (1982).

- **Answer.** The defendant must answer or otherwise plead within 30 days after service, unless the time period is expanded for good cause shown. GP § 4-362(b)(1).

- **Expedited hearing.** GP § 4-362(c) provides for expedited court proceedings in PIA cases. The agency and counsel should cooperate if the plaintiff seeks a quick judicial determination.

- **Intervention.** In some cases, it may be appropriate for a third party to intervene in an action for disclosure. For example, if the issue is the release of investigatory, financial, or similar records, the person who is the subject of the records may wish to intervene under Maryland Rule 2-214. In an appropriate case, particularly one involving confidential commercial or financial records, the agency should consider inviting affected persons to intervene. In that event, an affected person's failure to seek intervention may itself be an indication that the records are not truly confidential.

3. Agency Burden

The burden is on the entity or official withholding a record to sustain its action. GP § 4-362(b)(2). The PIA specifically provides that the defendant custodian may submit a memorandum to the court justifying the denial. GP § 4-362(b)(2)(ii). The level of detail necessary to support a denial of access is discussed in *Cranford v. Montgomery County*, 300 Md. 759, 776 (1984).

To satisfy the statutory burden, an entity or official withholding a record must put forth evidence sufficient to justify the decision. The Court of Appeals has explained that a custodian may satisfy this burden in at least one of three ways. *See Lamson v. Montgomery County*, 460 Md. 349 (2018).

First, the court may examine the questioned records *in camera* to determine whether the claimed exemption applies. GP § 4-362(c)(2); *see Lamson*, 460 Md. at 365; *Equitable Trust Co. v. State Comm'n on Human Relations*, 42 Md. App. 53 (1979), *rev'd on other grounds*, 287 Md. 80 (1980). A court need not conduct an *in camera* review, however; the decision is a discretionary one that ultimately depends on whether the trial judge believes that it is needed to resolve the claims of exemption at issue. *See*

Lamson, 460 Md. at 365-67 (the court "must be satisfied that the agency rationale offered in denying a [PIA] request is fully supported" and "justified"); *Cranford*, 300 Md. at 779; *see also Zaal v. State*, 326 Md. 54 (1992) (discussing some approaches other than *in camera* review to protect sensitive records).

Second, as an alternative to *in camera* review, especially where the documents at issue are voluminous, a court may require the agency to file a so-called *Vaughn* index (named after *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973)) detailing each record withheld or redacted by author, date, and recipient, stating the particular exemption claimed, and providing enough information about the subject matter to permit the requester and court to test the justification of the withholding. *See Lamson*, 460 Md. at 367; *Blythe v. State*, 161 Md. App. 492, 521 (2005).

As a third method for determining the applicability of an agency's claimed exemptions, the court may accept evidence in the form of testimony or affidavits which "detail the nature of the denial and establish the basis for the denial." *Lamson*, 460 Md. at 367.

In deciding which method to apply, a trial court considers several factors, including "the conclusory nature of the agency affidavits, bad faith on the part of the agency, disputes concerning the contents of the document, whether the agency has proposed *in camera* inspection, and the strength of the public interest in disclosure." *Id.* at 368; *see Cranford*, 300 Md. at 779.

With respect to some exceptions, there are specialized rules governing the agency's burden. For example, if the custodian invokes the inter- or intra-agency memoranda exception in GP § 4-344 and the trial court determines that one of the privileges embraced within that exemption applies, the custodian will have met the burden of showing that disclosure would be contrary to the public interest. *Cranford*, 300 Md. at 776.

Another such special rule is that a regulatory agency that denies a "person in interest" access to an investigatory file under GP § 4-351 generally must establish first, that the file was compiled for a law enforcement purpose and, second, that disclosure would have one of the effects under GP § 4-351(b). *Fioretti v. State Board of Dental Examiners*, 351 Md. 66 (1998) (holding in plaintiff's favor because the agency failed to support its motion to dismiss with affidavits, a summary of the file, or other relevant

evidence). In contrast, a law enforcement agency enumerated under GP § 4-351(a)(1) is presumed to have compiled an investigatory file for law enforcement purposes. *Blythe*, 161 Md. App. as 525-26 n.6 (2005). Because a generic determination of interference with a pending investigation can be made, a "*Vaughn* index" listing each document, its author, date, and general subject matter, and the basis for withholding the document, is not required. *See Office of the State Prosecutor v. Judicial Watch, Inc.*, 356 Md. 118 (1999). However, the custodian nevertheless bears the burden of "demonstrating, with particularity and not in purely conclusory terms, precisely why the disclosure [of an investigatory record] 'would be contrary to the public interest'" and exploring the feasibility of severing a record "into disclosable and non-disclosable parts." *Blythe*, 161 Md. App. at 527.

When a trial court's grant of a motion for summary judgment in a PIA action is appealed, the appellate court will review the lower court's decision *de novo*, *i.e.*, without deference to the trial court. *Amster v. Baker*, 453 Md. 68, 75 (2017).

B. Alternative Dispute Resolution

In addition to judicial review, a PIA applicant has two options for less formal resolution of PIA disputes: the Public Access Ombudsman and the State Public Information Act Compliance Board. Both were added to the statute during the 2015 session at the same time the previous mechanism for administrative review of State agency PIA decisions was removed. A PIA custodian may also seek the assistance of the Public Access Ombudsman in resolving PIA disputes.

1. Public Access Ombudsman

The Ombudsman is a State official charged with making reasonable attempts to resolve PIA disputes between custodians and applicants. The Ombudsman is appointed by the Attorney General and receives support from that Office, but operates autonomously and independently. *See* GP § 4-1B-02(b). Although the Ombudsman's role is not limited to particular types of disputes, the statute lists some disputes that the Ombudsman is specifically charged with hearing:

- the application of an exemption;
- redactions;

- the failure to respond in a timely manner or to provide all responsive records;
- overly broad requests;
- the amount of time a custodian needs, given available staff and resources, to produce public records;
- requests for or denials of fee waivers; and
- repetitive or redundant requests.

GP § 4-1B-04(a). The Ombudsman plays the role of mediator only. The Ombudsman does not have the power to compel the custodian to disclose records or information or even to provide materials for *in camera* review. GP § 4-1B-04(b)(1)(i). Nor does the Ombudsman have the power to conclusively resolve a dispute for purposes of judicial review. Instead, the Ombudsman is charged with trying to resolve disputes in a manner that is acceptable to both the custodian and the applicant. The ultimate decision whether to accept the Ombudsman's resolution—or to participate in the mediation process at all—lies with the parties. *See* COMAR, Title 12, Subtitle 37 (setting forth interpretive and procedural regulations governing the Ombudsman's program and process). The Ombudsman's mediation process is confidential; the Ombudsman—and the Ombudsman's staff—may not disclose any information obtained from the parties without written consent. GP § 4-1B-04(b)(1)(ii); COMAR 14.37.03.

The Act does not expressly require an applicant or custodian to bring a dispute to the Ombudsman before seeking judicial review under GP § 4-362. Given that the Ombudsman's resolution of a dispute is non-binding, the intent of the Legislature appears to have been to provide a separate, entirely voluntary means of resolving disputes. Although Ombudsman review is voluntary and non-binding, the burden is on the custodian to demonstrate that a denial is "clearly applicable to the requested public record." GP § 4-301(b)(1). And if the denial is based on one of the discretionary exemptions in Part IV, the custodian must demonstrate that "the harm from disclosure . . . is greater than the public interest in access to the information in the public record." GP § 4-301(b)(2).

Requesters or custodians can seek the Ombudsman's assistance by email, pia.ombuds@oag.state.md.us; by website submission, piaombuds.maryland.gov; or by

mail: Public Access Ombudsman c/o Office of the Attorney General, 200 St. Paul Place, Baltimore, MD 21202

2. State Public Information Act Compliance Board

The State Public Information Act Compliance Board is charged with resolving complaints that a custodian has charged an unreasonable fee of more than $350. For the Board to have jurisdiction, the fee charged must exceed $350 and the complainant must allege that the fee is unreasonable; a smaller fee cannot form the basis of a complaint before the Board. GP §§ 4-1A-04(a)(1), 4-1A-05(a). In this respect, then, the Board's jurisdiction is more limited than the Ombudsman's.

Within that more limited jurisdiction, however, the Board has greater powers than the Ombudsman. Whereas the Ombudsman plays the role of informal mediator, the Board is authorized to issue written decisions with binding effect. Specifically, the Board, if it determines that the custodian has charged an unreasonable fee of more than $350, has the power to order the custodian to reduce the fee to a reasonable amount determined by the Board and refund the difference. GP § 4-1A-04(a)(2), (3). The Board's opinions are posted at https://www.marylandattorneygeneral.gov/Pages/OpenGov/piacb.aspx.

Because custodians often ask requesters to pay all or part of a fee estimate before undertaking all of the work to provide a final response, the Board has considered whether it has jurisdiction to review the reasonableness of a fee *estimate* greater than $350, as opposed to a final fee. Generally, when the fee estimate represented a precise figure or range based upon a sufficiently detailed breakdown of anticipated costs, the Board has reviewed the estimate for reasonableness. *See*, *e.g.*, *PIACB Opinions* 20-05 (Nov. 7, 2019).

Proceedings before the Board are initiated by the filing of a complaint signed by the applicant or the applicant's designated representative. GP § 4-1A-05. The complaint, among other things, must identify the custodian and describe the fee that the custodian charged, the date it was charged, and the circumstances surrounding the imposition of the fee. GP § 4-1A-05(b). The complaint must be filed within 90 days after the date of the challenged action. *Id.*

After a complaint is filed, the Board must refer it to the custodian identified in the complaint. The custodian then has 15 days from receipt of the complaint in which

to file a written response. If requested by the Board, the custodian must include in the response the basis for the fee that was charged. GP § 4-1A-06(b). If the custodian does not file a response within 45 days of the Board's notice, the Board must decide the case on the facts before it. GP § 1-4A-06(c). If the custodian files a response and the information in the complaint and response is sufficient for the Board to resolve the complaint, the Board may do so without further inquiry and issue a written opinion determining whether the fee violated the "reasonable fee" provisions of GP § 4-206. GP § 4-1A-07(a)(2).

If the Board is not able to resolve the complaint on the basis of the complaint and response, it may hold an informal conference to "hear from the complainant, the custodian, or any other person with relevant information about the subject of the complaint." GP § 4-1A-07(b). The Board may allow the parties to present testimony in person, via teleconference, or in writing. If the parties elect to participate in person, the Board must hold the conference at a location "as convenient as practicable" to the parties. *Id.* Although the conference apparently allows for the Board to hear testimony and admit evidence, it is not a contested case hearing within the meaning of the APA. GP § 4-1A-07(b)(3).

The Board must issue a written opinion within 30 days of receiving the custodian's response or, if it elects to hold an informal conference, within 30 days after the conference. If the Board is unable to render a decision within that time period, it must state the reasons for its inability and issue an opinion as soon as possible thereafter, but not later than 90 days after the filing of the complaint. GP § 4-1A-07(c)(1). The Board may, however, state that it is unable to resolve the complaint. GP § 4-1A-07(c)(2). The Board's opinions are posted on the Attorney General's website.

The applicant need not pursue a complaint before the Board, but may instead elect to proceed straight to judicial review without having to exhaust the administrative remedy. GP § 4-1A-10(a). If an applicant elects to file a complaint with the Board, however, the Board's resolution of that complaint may be appealed—by either party, depending on the outcome—to the circuit court for the county where the complainant resides or has a principal place of business or where the public record is located. GP §§ 4-1A-10(b)(1); 4-362(a)(2), (3). The filing of an appeal automatically stays the effect of the Board's decision for 30 days from the date on which the defendant serves an answer or otherwise pleads to the complaint, whichever is sooner. GP § 4-1A-10(b)(2).

This limited stay appears to have been designed to allow the custodian a period of time in which to seek from the circuit court, under the provisions of Title 7 of the Maryland Rules, a more extended stay pending appeal.

The PIA does not require a custodian that charges a fee greater than $350 to inform the applicant of the availability of Board review, with the exception of a custodian for a local school system. *See* GP § 4-206(f) (requiring a custodian for a local school system that charges a fee under GP § 4-206(b) to "provide written notice to the applicant that the applicant may file a complaint with the [Public Information Act Compliance" Board to contest the fee). Nonetheless, any custodian who charges a fee greater than $350 should consider informing the applicant of all available remedies should the applicant disagree with the fee, including the Public Access Ombudsman and the Board.

C. Dispute Resolution for Judicial Records

As mentioned briefly in Chapter 1, the Court of Appeals has adopted separate rules governing administrative review and dispute resolution for judicial records. Md. Rules 16-931 through 16-934 (stating that the PIA's dispute resolution provisions do not apply to judicial records). See Chapter 10 of this Manual for more details.