

Public Information Act Compliance Board

Minutes of Annual Meeting
August 9, 2017
Office of the Attorney General
200 St. Paul Place, Baltimore, Maryland

In attendance:

Board and Board staff:

John H. West, III, Chair
Christopher A. Eddings
Deborah F. Moore-Carter
René C. Swafford
Darren S. Wigfield
Karen L. Federman Henry, Board Counsel
Janice Clark, Board Administrator

Members of the public:

Kemp Hammond, Assistant County Attorney, Anne Arundel County Office of Law
Margaret-Ann Howie, General Counsel, Baltimore County Public Schools
Lisa Kershner, Public Access Ombudsman
Ann MacNeille, Assistant Attorney General, OAG
Rebecca Snyder, Executive Director, MDDCPress

Call to order and welcoming remarks

The Board Chair called the meeting to order at 11:00 a.m. The Board Chair invited the Board members and members of the public in attendance to introduce themselves and to note their affiliations.

Discussion

Overview of Draft Second Annual Report of the PIACB

The Chair provided a brief overview of the draft annual report and thanked staff for providing a comprehensive review of the past year's activities. The Chair highlighted the importance of the Public Access Ombudsman program in responding to numerous Public Information Act (PIA) issues. He also noted that the Board has no authority to decide fee waiver issues under the PIA. The Chair stated that the Annual Report will be submitted to the Legislature for its oversight. He asked Board members to identify and discuss issues to study or recommend for legislative action under the Public Information Act.

Fee Waivers

Ms. Moore raised a question of whether the Board should consider changes that would give the Board the authority to waive fees or otherwise address the waiver issue. Board members recognized that the cost to requesters often is high, but noted that fee waivers pose an economic issue for state agencies that may not have the resources to provide total fee waivers. Board

members also noted that this change could greatly increase the workload of the voluntary PIACB after only two years of operation. Board members did not come to agreement on how to address the issue of waivers and high fees, but agreed that the issue presents concerns.

Agency Response Form

Mr. Eddings noted that it may be useful for the Board to create a template reply form for a custodian's denial of a PIA request. Board members described what that form may look like including a checklist option. Although the PIA manual currently includes sample replies, Board members agreed that a template with checklists could be helpful as an alternate sample in the Manual and speed up the response time for agencies. The Board directed its counsel to prepare an appropriate template and seek its inclusion in the PIA Manual.

Directing Complaints to the Ombudsman

Mr. Eddings noted that the Board's and the Public Access Ombudsman's work are tied together and that there should be a process for directing complaints to the Ombudsman when the complaint is not within the jurisdiction of the Board. The discussion addressed whether matters should start with the Ombudsman or with the Board, with sound reasons for either approach. The Board members agreed that the current practice allows complaints to be reviewed first by the Board's counsel, who makes a recommendation for referral when appropriate.

Inmate Requests for Records

Mr. Eddings noted that there is a systemic issue regarding inmate requests for case files and investigation records relating to their individual conviction. Board members discussed the difference between discovery through the court system before and during trial and PIA requests, noting that it appears that inmates do not always obtain all of the records through the discovery process. This is heightened after trial during post-conviction proceedings, especially when they are incarcerated and have already pursued an initial post-conviction proceeding, but seek to re-open a later post-conviction challenge. Board members agreed that, to some extent, it is a problem without a clear solution. Nevertheless, it is a significant point of concern to the Board that fees for inmate records can be well beyond the ability of inmates to pay, which prevents them from obtaining the records. Board members discussed potential solutions for fees for inmate records, and noted that this is an area that would benefit from research and review by the Legislature to discern potential solutions.

PIA Ombudsman, Lisa Kershner, added to the conversation by noting that she has encountered the inmate issue often during her tenure. In her experience, inmates usually request case files from State's Attorneys and police departments, and sometimes request records from courts and the Department of Public Safety and Correctional Services. The requests are more frequent in the higher-population jurisdictions of the State. The intent of these records requests, generally, are to identify new evidence for post-conviction proceedings, e.g., DNA evidence. The Ombudsman shared her views of common problems and possible solutions:

- common problems include:
 - application of exemptions as an automatic response, rather than reviewing materials in a meaningful way (e.g. investigatory files that may have been closed and can now be provided);

- outdated or non-existent records management systems that increase the cost to the requester due to the time needed to gather and review information;
- no clear discovery rules apply to post-conviction proceedings;
- agencies have insufficient funds and/or staff to address requests or to organize files in a way that would improve the response time and costs;
- some agencies have no logical records retention system in place for storage or retrieval of records;
- many inmates are unrepresented or have limited access to attorneys.
- possible solutions include:
 - provide agencies with adequate resources and a plan to create a records management system that meets the agency's needs;
 - direct agencies to bring records management systems up to date and provide training in proper records management practices;
 - establish interagency agreements among law-enforcement entities to facilitate providing information to inmates quickly and at low or no cost.

The Chair noted that Senate Bill 44 (SB44), passed during the 2017 legislative session, requires all public agencies to keep accurate inventories of their records. The Board supports this legislation as a useful step. To summarize the conversation for purposes of the report, Mr. Wigfield noted that inmates may not always obtain access to their case records through discovery and, instead, use the PIA to request these records, which may not always be successful. He also noted that the General Assembly has shown an interest in addressing inmate issues through other legislation. The Board agreed that appropriate amendments might occur through criminal justice reform statutes and do not have to occur through the PIA.

Fee Reduction through the PIACB Process

Mr. Wigfield suggested that the Annual Report should highlight those instances in which a fee was reduced as a result of the Board's process, even if the Board did not order the reduction. Sometimes the process of asking the jurisdiction to justify its fees results in the reduction of fees. He asked that, when applicable, the review of the cases during the past year make a note of that beneficial outcome.

Mr. Eddings noted that additional areas where the Board has had an impact involve excluding benefits from the salary rate used and avoiding duplication of costs by ensuring that multiple individuals do not review the same material. Fewer agencies include these costs in their estimates since the Board issued an opinion discussing both issues in FY2016.

Storing and Retrieving Digital Records

Mr. Wigfield noted there is a need for understanding by the PIACB regarding digital recordkeeping and that, as the membership of the Board changes, there should always be at least one member with technology knowledge. He also suggested that PIA custodians should have a basic understanding of how their agency's vendors store, manage, and retrieve information. As more governmental units rely on third-party contractors to store and manage public records, it will become useful to extend SB44 to include vendors managing that information, as well the agencies themselves.

Working with the Public Access Ombudsman

Mr. Wigfield asked whether the Ombudsman has a mechanism for giving feedback to the General Assembly. The Ombudsman noted that there is no formal mechanism, but that she appeared before a Committee of the Legislature last November to present an overview of the program and that she tracks statistics on the Office's mediation matters. Mr. Wigfield asked the Board to consider including an opportunity for the Ombudsman to provide feedback through the Board's Annual Report, and the Board members unanimously agreed to the suggestion. The Ombudsman welcomed the opportunity.

Mr. Wigfield also asked the Ombudsman to identify challenges that she has encountered regarding the mediation process, especially any that could be alleviated by the Board. The Ombudsman noted that she has encountered the challenges discussed earlier regarding inmate requests, and she described the process used when complaints straddle both the Ombudsman's Office and the Board. The Ombudsman noted that the Board has coordinated with her Office in practice, but that a more formal protocol would be helpful.

Mr. Wigfield noted that mediation is important to the Board's effort and asked the Ombudsman whether it would be helpful for the Board to obtain the custodian's justification of fees before the Ombudsman conducts a mediation effort. The Ombudsman noted that having that information would be helpful, and the Board members agreed that this will become part of the protocol when a complaint is received by the Board.

The Ombudsman also asked the Board to consider whether its jurisdiction should be expanded much more broadly to encompass all PIA complaints. The Ombudsman's Office has no enforcement authority, so to incentivize the mediation process, there needs to be a mechanism for enforcement in the complaint process. The Ombudsman proposed one option as having her Office compile the initial information that would then go to the Board if the parties did not resolve their dispute. The law might need amending to address the confidentiality that currently precludes the Ombudsman from sharing the information she gathers. The Board agreed that the Ombudsman has been given a platform to bring that up in the report, but suggested that any expansion of the Board's jurisdiction should be gradual and incremental.

Report Next Steps

Staff was instructed to prepare appropriate language and revise the report for the Board's review and approval. The Board will reconvene by conference call to finalize and approve the Annual Report, which is due October 1, 2017. The Board acknowledged the efforts of staff and thanked the Office of the Attorney General for its great support.

Closing remarks and adjournment

The Board Chair thanked everyone for attending and adjourned the meeting at 12:30 p.m.