STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 23-21 & 23-22
June 30, 2023
Department of Public Safety and Correctional Services, Custodian
Steven Szekely, Complainant

These consolidated complaints[1] involve two different Public Information Act ("PIA") requests made by complainant Steven Szekely to the Department of Public Safety and Correctional Services ("DPSCS"). The request sent first in time sought, among other things, records related to certain weapons and contraband recovered by DPSCS at Western Correctional Institution ("WCI"). DPSCS denied the complainant's request, citing § 4-351.[2] The second PIA request sought records related to the procedures that DPSCS uses to detect employees that are "domestic extremists, white supremacists, or gang members," and information about employees who have been "dismissed, fired [or] reassigned" due to their affiliation with such groups. DPSCS ultimately denied the complainant's second PIA request on grounds that the records responsive to the first part of the request were subject to § 4-351 and that DPSCS did not have records responsive to the second part of the request. In November of 2022, the complainant sought dispute resolution assistance through the Office of the Public Access Ombudsman for both of his PIA requests. After the Ombudsman was unable to resolve the disputes, the complainant filed his complaints with this Board. DPSCS did not respond to those complaints. As explained below we conclude, based on the facts before us, that DPSCS has violated the PIA by denying inspection of certain records responsive to the complainant's PIA requests. We are unable to resolve the complaint with regard to one part of one of the PIA requests.

Background

In September of 2020, the complainant sent a PIA request to DPSCS asking for, as relevant to this complaint, (1) "a legible copy of each of the weapons that ha[d] been recovered or connected or suspected to be connected to any one of the 223 serious incident reports from WCI between the dates of 2018 January 1st through 2020, April," and (2) "photo copies only . . . [o]f any and all metals, wood, plastics concerning contraband

[1] See COMAR 14.02.01.04, providing the Board with discretion to consolidate complaints where they "involve the same applicant and same custodian" and where "consolidation will promote efficient and fair resolution of the complaints."

[2] Statutory citations are to the General Provisions Article of Maryland's Annotated Code, unless otherwise indicated.

[recovered] in WCI from 01/11/2018 through 04/30/2020 that ha[d] been recorded or memorialized by WCI/DPSCS." DPSCS denied the request, citing § 4-351, and explained that the records were "compiled as part of an investigation for a correctional purpose" and that disclosure would "disclose investigative techniques and procedures" and "compromise security at the institution."

Then, in April of 2022, the complainant sent DPSCS a PIA request seeking (1) the "[n]ame and number of procedures in place at DPSCS, DOC WCI to detect domestic extremist white supremacist gang member employees of DPSCS, DOC, WCI," and (2) the "[n]umber of employees of DPSCS, DOC, WCI dismissed, fired [or] reassigned d[ue] to their discovered membership affiliation with white supremacist groups, white nationalist groups, domestic extremists like oathkeepers, proud boys, boogaloos." In a response sent in August of 2022, DPSCS produced the "Maryland State Application" form in response to the first part of the complainant's PIA request, and denied the second part pursuant to §§ 4-311 and 4-351. Regarding § 4-311, DPSCS simply stated that personnel records are exempt from disclosure. As to § 4-351, DPSCS explained that release of responsive records "compiled as part of an investigation for a correctional purpose" would "deprive another person of a right to a fair trial or an impartial adjudication, disclose an investigative technique or procedure, or prejudice an investigation."

Unhappy with DPSCS's responses to his PIA requests, the complainant sought assistance from the Ombudsman. Though the Ombudsman was ultimately unable to resolve either dispute, DPSCS did produce a supplemental response "amending" the "previously issued response" to the complainant's second PIA request. In the supplemental response, DPSCS denied inspection of records responsive to the first part of his request—seeking records related to DPSCS's detection of employees affiliated with domestic extremism—and asserted that it did not have records responsive to the second part of the request. As to the records related to detection of extremism, DPSCS explained that the "[p]rocedures utilized to identify members of security threat groups are set forth in executive directives Intelligence and Investigative Division – Intelligence Unit (IIU.110.0012) and Intelligence Division (OSIIF.110.0012)," but stated that, because those "policy directives" contained "intelligence information or security procedures of a State correctional facility," DPSCS would not disclose them. DPSCS cited § 4-351(a)(3) as authority for its position. Regarding the complainant's request for records related to DPSCS employees affiliated with domestic extremism, DPSCS advised that there were no records "maintained in a searchable and analyzable electronic format" that were responsive to the request; rather, DPSCS would have to manually search for and compile the data. In DPSCS's estimation, such an endeavor would constitute the creation of a new record, which is not required by the PIA.

The complainant then filed complaints with this Board alleging that DPSCS's denial of both of his PIA requests constitutes "structural error." We sent both complaints to DPSCS by email on April 12, 2023, along with a request that DPSCS respond to the

complaints by May 12, 2023. *See* § 4-1A-06(b)(1) ("The custodian or applicant shall file a written response to the complaint within 30 calendar days after receiving the complaint."). When DPSCS did not respond by that date, we sent a second request by email, on May 16, 2023, for written responses to the complaints, this time directing DPSCS to respond as soon as possible. When DPSCS failed to even acknowledge our second request for a response, we sent a third request by email on May 22, 2023.[3] In that request, we directed DPSCS to submit its responses to the complaints no later than May 26, 2023. Again, DPSCS did not respond. Thus, we must "decide the case on the facts before [us]." § 4-1A-06(c).

Analysis

The PIA authorizes us to review and resolve complaints that allege certain violations of its provisions, including an allegation that a custodian wrongfully denied inspection of public records.[4] *See* § 4-1A-04(a)(1)(i). Once a custodian has received a Board complaint, the custodian "shall file a written response to the complaint within 30 calendar days." § 4-1A-06(b)(1). If we conclude that a violation of the PIA has occurred, we must issue a written decision and order an appropriate remedy, as provided by the statute. § 4-1A-04(a)(2) and (3). For example, if we determine that a custodian "denied inspection of a public record in violation of [the PIA]," then we must order the custodian to "produce the public record for inspection." § 4-1A-04(a)(3)(i).

The PIA "establishes a public policy and a general presumption in favor of disclosure of government or public documents." *Kirwan v. The Diamondback*, 352 Md. 74, 80 (1998). "[U]nless an unwarranted invasion of the privacy of a person in interest would result," the PIA must be "construed in favor of allowing inspection of a public record." § 4-103(b). A custodian who has denied inspection of public records bears the burden of justifying that denial. *Office of the Governor v. Washington Post Co.*, 360 Md. 520, 545 (2000); *see also Fioretti v. Maryland State Bd. of Dental Examiners*, 351 Md. 66, 77-78 (1998) (noting that "courts must interpret the exemptions narrowly and in favor of disclosure" and that "the public agency involved bears the burden in sustaining its denial

[3] For this communication, which was sent to multiple individuals, we requested "read receipts" and "delivery receipts." We did not receive any responses to the request for "read receipts." *See* Microsoft, *Add Delivery Receipt to Track an E-Mail Message*, https://support.microsoft.com/en-us/office/add-delivery-receipt-to-track-an-e-mail-message-69cd1b39-2300-482d-96c6-22e2f4a96848 (last visited June 1, 2023) (noting that a "message recipient might decline to send a read receipt" or "the recipient's email program might not support read receipts"). We did, however, receive confirmation that "[d]elivery to these recipients or groups is complete, but no delivery notification was sent by the destination server."

[4] Before filing a complaint, a complainant must attempt to resolve the dispute through the Office of the Public Access Ombudsman and have received a final determination from the Ombudsman that the dispute was not resolved. § 4-1A-05(a).

of the inspection of public records"). When an agency "has frustrated judicial review" a court may "exercise its discretion . . . simply by ordering disclosure because of the agency's failure to meet its burden of satisfying the court that an exemption applies." *Fioretti*, 351 Md. at 78 (quoting *Cranford v. Montgomery County*, 300 Md. 759, 780 (1984)).

The PIA contains exceptions to the general rule favoring disclosure of public records, including two invoked by DPSCS in its responses to the complainant's PIA requests. Section 4-311(a) requires a custodian to deny inspection of "a personnel record of an individual, including an application, a performance rating, or scholastic achievement information." The provision is mandatory; if a public record qualifies as a personnel record, a custodian may not disclose it unless an exception applies.[5] Thus, to successfully defend the application of § 4-311, a custodian must provide enough information about the purported personnel records to allow a reviewing body to make a "reasonable determination" that those records actually fall within the scope of the exemption. *Lamson v. Montgomery County*, 460 Md. 349, 366-67 (2018). A custodian can meet this burden in a variety of ways, including through "submission of testimony or affidavits which detail the nature of the denial and establish the basis for the denial." *Id.* at 367.

Section 4-351 permits a custodian to deny inspection of certain law enforcement records, including records from "an investigatory file compiled for [a] law enforcement, judicial, correctional, or prosecution purpose," § 4-351(a)(2), and "records that contain intelligence information or security procedures of . . . a State or local correctional facility," § 4-351(a)(3). Unlike § 4-311, this exemption is discretionary, meaning that a custodian may deny inspection only if the "custodian believes that inspection of a part of a public record by the applicant would be contrary to the public interest." § 4-343. To justify withholding records under § 4-351(a)(2) or (3), then, a custodian must first demonstrate that the records are part of an "investigatory file" that the agency has compiled for one of the purposes listed in the statute, or that the records "contain intelligence information or security procedures" of a qualifying agency. As with all exemptions, one way to accomplish this is to submit testimony or affidavits that provide some detail about the records. *Lamson*, 460 Md. at 367; *see, e.g.*, PIACB 23-19, at 5 (May 30, 2023) (discussing an affidavit provided by a police department in support of its application of § 4-351(a)(1)). Once the custodian has shown that the requested records fall within the scope of § 4-351(a)(2) or (3), the custodian still must establish that disclosure of those records would be contrary to the public interest.[6] § 4-343; *see, e.g.*, *Fioretti*, 351 Md. at 78 (explaining,

[5] There are certain circumstances—not relevant here—under which a custodian must allow inspection of a personnel record, including when an employee wishes to inspect his or her own records, or when "an elected or appointed official who supervises the work of the individual" requests inspection. *See* § 4-311(b).

[6] Under § 4-351(b), a custodian may deny inspection of the records identified in subsection (a) to a person in interest "only to the extent that the inspection would" cause one or more of seven specific harms to result—e.g., "interfere with a valid and proper law enforcement proceeding" or

regarding what is now § 4-351(a)(2), that a custodian's burden "extends to both steps of the mandated inquiry"—i.e., showing both that the records qualify for withholding under the exemption, and that "disclosure is not warranted"). In general, a custodian must provide a "particularized factual basis" as to why disclosure of the records would be "contrary to the public interest"; otherwise, "the custodian would have no meaningful burden to meet." *City of Frederick v. Randall Family, LLC*, 154 Md. App. 543, 567 (2004).

With the legal context outlined above in mind, we turn to the complainant's PIA requests. As previously noted, DPSCS has failed to respond to the allegations that the complainant has put before this Board. DPSCS has not offered any further evidence or justification for its denials of his PIA requests. Given that DPSCS's failure to respond to the complaints requires us to "decide the case on the facts before [us]," § 4-1A-06(c), we start by setting out those facts, few as they may be. Regarding the complainant's **first PIA request** for records related to the recovery of certain weapons and contraband at WCI from January 2018 through the end of April 2020, all we have is the explanation that DPSCS provided in its initial response to the request.[7] That response indicates that the records were "compiled as a part of an investigation for a correctional purpose," and that disclosure would "disclose investigative techniques and procedures and would compromise security at the institution." This explanation is insufficient to meet DPSCS's burden. As the Supreme Court of Maryland has explained, "simply because an agency asserts that its files were compiled for law enforcement purposes is insufficient under the language of the exemption." *Fioretti*, 351 Md. at 82. Rather, a custodian "must, in each particular PIA action, demonstrate that it legitimately was in the process of or initiating a specific relevant investigative proceeding in order to come under the aegis of the exemption." *Id.* DPSCS has provided no evidence or information about any "specific relevant investigative

"disclose an investigative technique or procedure." § 4-351(b)(1) and (5). The Supreme Court of Maryland has explained that a person in interest is "entitled to . . . more favorable treatment" under § 4-351(b) than other PIA requesters. *Office of the State Prosecutor v. Judicial Watch*, 356 Md. 118, 139 (1999). A "person in interest" is, among other things, "a person . . . that is the subject of a public record." § 4-101(g)(1). Nothing here suggests that the complainant is a person in interest as to the records he requested. Thus, DPSCS may deny inspection "if, for any reason, disclosure would be contrary to the public interest." *City of Frederick v. Randall Family, LLC*, 154 Md. App. 543, 561 (2004). Of course, DPSCS is still obligated to explain, in particularized fashion, *why* disclosure would be contrary to the public interest. *Id.* at 567.

[7] Our regulations allow a custodian to rely on the response to the PIA request as the custodian's response to a Board complaint if that response contains all of the necessary information. *See* COMAR 14.02.02.03C(2) ("If the custodian's response to the applicant's request for public records contains all of the information required by § C(1) of this regulation, then it is sufficient for the custodian to attach the response.") Though DPSCS has not indicated an intention to rely on its responses to the complainant's PIA requests—indeed, it has indicated nothing at all in response to the Board complaints—we nevertheless will consider those responses.

proceeding[s]," and thus has failed to demonstrate that § 4-351(a)(2) applies. We therefore direct DPSCS to disclose the records responsive to the complainant's first PIA request.

We find the evidence justifying DPSCS's denial of the complainant's **second PIA request** similarly lacking. We address each of the two parts of the second PIA request in turn. DPSCS apparently believed—at least initially—that the "Maryland State Application" form was the only record responsive to the first part of the PIA request, which sought the "name and number of procedures" that DPSCS has in place to "detect domestic extremist white supremacist gang member-employees." However, DPSCS later "amended" that response, explaining that there were actually specific procedures in place "utilized to identify members of security threat groups." DPSCS denied inspection of those procedures on grounds that they "contain intelligence information or security procedures of a State correctional facility" and are thus exempt under § 4-351(a)(3).

Even assuming that the requested records fall within the scope of § 4-351(a)(3), DPSCS has offered no explanation whatsoever—much less a "particularized factual basis," *Randall Family*, 154 Md. App. at 567—as to why inspection of those records would be contrary to the public interest under § 4-343. Based on what is before us, DPSCS has not met its burden under §§ 4-343 and 4-351(a)(3) to demonstrate that it appropriately exercised its discretion to deny inspection of the records responsive to the first part of the complainant's second PIA request. *Cf. Prince George's County v. Washington Post Co.*, 333 (ordering disclosure of certain investigatory files where the custodian "only argued that the release of the eight closed cases would be contrary to the public interest," and the record was "absent any information concerning the public harm that might be caused by the release of the closed CID records"). Thus, DPSCS must disclose the records responsive to the first part of the complainant's second PIA request.

In the second part of his second PIA request, the complainant asked for records reflecting the number of employees "dismissed, fired [or] reassigned" due to their membership in or affiliation with various white supremacist or extremist groups. In its initial response, DPSCS denied inspection on grounds that the responsive records qualified for withholding either under § 4-351(a)(2) or because they were personnel records exempt under § 4-311. In its amended response, DPSCS claimed that no responsive records exist. DPSCS further explained that it does not maintain such records in a "searchable and analyzable electronic format," or collect the requested data in a way that would allow DPSCS to extract it "within its existing functionality." Providing the requested records would, DPSCS maintained, require a "manual search to analyze and/or summarize data"—i.e., the creation of a new record.

At the outset, we note that the records described by the complainant in his PIA request—i.e., records related to employees who were "dismissed, fired [or] reassigned" for certain reasons—would seem to fall within the scope of personnel records exempt from disclosure under § 4-311. *See Kirwan*, 352 Md. at 83 (explaining that what is now § 4-311

protects records that "directly pertain to employment and an employee's ability to perform a job"); *see also Md. Dep't of State Police v. Dashiell*, 443 Md. 435, 454 (2015) ("[A] 'personnel record' relates to an employee's hiring, discipline, promotion, dismissal, or any matter involving his status as an employee." (citation and quotation omitted)). Thus, the very nature of the PIA request suggests, to some degree, that responsive records might be non-disclosable.

However, to the extent that responsive records may exist in a way that would allow DPSCS to aggregate and anonymize the information such that the records are no longer traceable to "an individual," § 4-311 might not apply. *See, e.g., Maryland Dep't State Police v. Maryland State Conf. of NAACP Branches*, 430 Md. 179, 195 (2013) ("After the names of State Police troopers, the names of complainants, and all identifying information are redacted," records related to complaints about racial profiling "clearly do not fall within the statutory language of [personnel] 'record[s] of an individual.'").

Here, though, DPSCS has represented, in its supplemental response to the PIA request, that the data and records are not maintained in a manner that would allow DPSCS to extract aggregated or anonymized information responsive to the second part of the complainant's second PIA request. *Compare, e.g., Comptroller of the Treasury v. Immanuel*, 216 Md. App. 259, 271-72 (2014), *aff'd*, 449 Md. 76 (2016) (holding that "the mere act of extracting, sorting, or formatting data" collected and maintained in a database did not require the Comptroller to create a new record when those acts were "within [the] existing functionality and in the normal course" of functions that IT staff could perform); *see also* § 4-205(c)(4)(iii) (section of the PIA governing production of records in electronic format "may not be construed to . . . require a custodian to create, compile, or program a new public record"). We do not have any information beyond those representations—e.g., how the records or information responsive to the PIA request actually are maintained—that would allow us to definitively resolve the issue one way or the other. We therefore conclude that we are unable to resolve this particular aspect of the complaint. *See* 4-1A-07(c)(2)(i) ("A decision of the Board may state that the Board is unable to resolve the complaint.").

Conclusion

DPSCS has wholly failed to engage with the provisions for dispute resolution outlined under §§ 4-1A-04 through 4-1A-06 of the PIA. DPSCS's failure to submit the required responses to the complaints means we must "decide the case on the facts before [us]." § 4-1A-06(c). Based on those facts, we conclude the following:

- As to **PIACB 23-21**, which relates to the complainant's **second PIA request**, sent in April of 2022, DPSCS has *not* justified it application of § 4-351(a)(3) to the first part of that request. DPSCS has provided no explanation whatsoever as to why disclosure of the records would be "contrary to the public interest," and has thus not

met its burden under the exemption. DPSCS must therefore disclose responsive records, including "executive directives Intelligence and Investigative Division – Intelligence Unit (IIU.110.0012) and Intelligence Division (OSIIF.110.0012)." We are unable to resolve the complaint as to the second part of the complainant's second PIA request. To the extent that responsive records constitute personnel records protected under § 4-311, DPSCS may not disclose them. Regarding whether or not any responsive records exist in the first place, we simply do not have sufficient information to make that determination.

- As to **PIACB 23-22**, which relates to the complainant's **first PIA request**, sent in September of 2020, DPSCS has *not* justified its application of § 4-351(a)(2). DPSCS has not sufficiently demonstrated that the records concern any specific investigative proceedings and has therefore failed to show that the records relate to "an investigatory file compiled for [a] law enforcement, judicial, correctional, or prosecution purpose." Thus, DPSCS must produce the records responsive to the complainant's first PIA request.

Public Information Act Compliance Board

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