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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 23-32

October 6, 2023

Department of Public Safety and Correctional Services, Custodian
Dale Vernon Bigham, Complainant

The Department of Public Safety and Correctional Services (“DPSCS”) denied complainant Dale Vernon Bigham’s Public Information Act (“PIA”) request for records related to an audit of a certain correctional facility, citing § 4-351(a)(3)¹ of the PIA. The complainant challenges DPSCS’s application of that exemption to withhold responsive records. As explained below, we conclude that DPSCS has failed to justify application of the exemption and we therefore order DPSCS to produce the responsive records.

Background

In September of 2022, the complainant sent a PIA request to DPSCS seeking records related to an “[Americans with Disabilities Act, or “ADA”] audit conducted on 7-22-2021 at Jessup Correctional Center.” The request indicated that it included but was not limited to the:

- JCI request for audit
- Start and finish date of the physical audit on the compound at JCI
- Name of individuals or organization who conducted the audit (accessibility audit of correctional campuses report)
- Qualifications of individuals requested in (line #3) to conduct a certified ADA (American Disability Act) audit
- Results and recommendations pertaining to the accessibility audit of correctional campuses report (ADA audit)

The request also asked DPSCS to “produce any and all prior ADA audits, and conducted and preexisting to July 22, 2021 and after.” The complainant asked for a fee waiver and attached an affidavit of indigency to his request. DPSCS responded to the complainant’s PIA request on February 24, 2023.² DPSCS denied the request, citing § 4-351(a)(3) and

¹ Statutory citations are to the General Provisions Article of Maryland’s Annotated Code, unless otherwise specified.

² DPSCS’s response, issued more than five months after the date of the PIA request, did not comply with § 4-203(a) or (c), which require a custodian to “grant or deny the [request] promptly, but

stating that “the records requested contain intelligence information or security procedures of a State correctional facility.”

The complainant disagreed with DPSCS’s denial of his PIA request and thus sought the assistance of the Public Access Ombudsman. The Ombudsman was unable to resolve the dispute, however, and issued a final determination stating that the dispute was not resolved. The complainant then filed this complaint with our Board alleging that DPSCS improperly denied his PIA request. The complainant contends that there is “no security risk or intelligence information that would be expose[d] in the audit.” Or, in the event that there is such information, the complainant asks that DPSCS produce a Vaughn index³ indicating what information and records it believes are subject to withholding under § 4-351(a)(3).

In a late-filed response to the complaint,⁴ DPSCS indicates that “[i]n a good faith effort to fulfill the duties prescribed to a custodian” under the PIA, DPSCS will “accede” to the complainant’s PIA request and “amend[] the decision to a PARTIAL DENIAL pursuant to GP § 4-343, and subject to redactions in accordance with GP § 4-351(a)(3).” DPSCS advises that it will “diligently and meticulously assess the contents of the record(s)” to make sure that release of the responsive information will not cause one of the harms enumerated in § 4-351(b).⁵

not more than 30 days after receiving the [request],” and, in the case of a denial, to explain, among other things, the reasons for the denial “within 10 working days” of issuing the denial.

³ See *Lamson v. Montgomery County*, 460 Md. 349, 357 n.4 (2018) (explaining that a Vaughn index “requires the party in possession of a disputed document to submit a list of documents in [its] possession, setting forth the date, author, general subject matter and claim of privilege for each document claimed to be exempt”).

⁴ DPSCS’s response to the complaint was due by July 28, 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.”). We received DPSCS’s response on August 9, 2023.

⁵ Section 4-351(b) provides that a custodian “may deny inspection by a person in interest only to the extent that the inspection would:

- (1) interfere with a valid and proper law enforcement proceeding;
- (2) deprive another person of a right to a fair trial or an impartial adjudication;
- (3) constitute an unwarranted invasion of personal privacy;
- (4) disclose the identity of a confidential source;
- (5) disclose an investigative technique or procedure;
- (6) prejudice an investigation; or
- (7) endanger the life or physical safety of an individual.

In his reply, the complainant first thanks DPSCS for amending its response to a “partial denial.” The complainant agrees that “information dealing with the exterior perimeter of this facility may be excluded as a security issue.” However, the complainant contends that “all ADA compliance issues, pertaining to JCI, should be described as they have a direct impact on the safety and health of all incarcerated individuals and JCI staff.” The complainant maintains that he is not aware of any exemptions in the PIA that would allow DPSCS to withhold this information.

Because the submissions alone did not provide enough information for us to resolve the complaint, on August 15, 2023, we asked DPSCS to provide us with a descriptive index of the responsive records. *See* § 4-1A-06(b)(2)(ii)(1) (“On request of the Board, the custodian shall provide . . . [a] descriptive index of the public record.”). On September 6, 2023, DPSCS sent a copy of a 110-page responsive audit report and explained that “[p]age 13 of the document . . . provides an appropriate summary of the contents of the whole document” and would serve as the descriptive index. DPSCS indicated that it would redact information subject to “the exclusionary provision” of § 4-351(a)(3), in particular information about “dimensions, layouts, and security areas.” As required by the PIA, we will “maintain the confidentiality” of the audit report provided by DPSCS, § 4-1A-06(b)(5), and will refer to the record only by “generic descriptions or characterizations,” COMAR 14.02.06.05.

Analysis

Under § 4-1A-04(a)(1)(i), we are authorized to review and resolve complaints “alleging that a custodian . . . denied inspection of a public record in violation of [the PIA].” Before filing a complaint, a complainant must attempt to resolve a dispute through the Public Access Ombudsman and receive a final determination from the Ombudsman stating that the dispute was not resolved. § 4-1A-05(a). After we receive a complaint from a PIA requester, we send it to the relevant custodian and ask for their written response. § 4-1A-06(b)(1). On occasion, we also request additional information from the custodian—e.g., a “copy of the public record” or “descriptive index of the public record,” § 4-1A-06(b)(2)(ii)(1)—if that information will help us better resolve a complaint. If, after reviewing all that is before us, 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). In instances where we find that a custodian has improperly denied inspection of a public record, we must order the custodian to “produce the public record for inspection.” § 4-1A-04(a)(3)(i).

Maryland’s Public Information Act “reflects the need for wide-ranging access to public records,” thus “the statute should be construed in favor of disclosure for the benefit of the requesting party.” *Ireland v. Shearin*, 417 Md. 401, 408 (2010); *see also* § 4-103(b) (providing that “unless an unwarranted invasion of the privacy of a person in interest would result, [the PIA] shall be construed in favor of allowing inspection of a public record, with

the least cost and least delay”). A custodian who invokes one of the PIA’s disclosure exemptions “bears the burden in sustaining [the] denial.” *Fioretti v. Maryland State Bd. of Dental Examiners*, 351 Md. 66, 78 (1998). When the exemption invoked is a discretionary one—as is the case here—the burden “extends to both steps of the mandated inquiry.” *Id.* That is, a custodian must show both that the records fall within the scope of the exemption and that “disclosure is not warranted” because it would be contrary to the public interest. *Id.*

Section 4-351(a)(3) allows a custodian to deny inspection of “records that contain intelligence information or security procedures of . . . a State or local correctional facility” if the custodian determines that inspection by the requester “would be contrary to the public interest.” §§ 4-343, 4-351(a)(3). Though caselaw on this particular discretionary exemption is scant, *see, e.g., Germain v. Bishop*, No. 232, Sept. Term 2018, 2019 WL 2393862 at *2 (Md. App. Ct. June 6, 2019) (finding that information about “the location of security cameras within a correctional institution” was covered by § 4-351(a)(3)), we have previously determined that, *e.g.*, records revealing when a courthouse employee entered and exited a secured courthouse garage constituted records of the “security procedures” of the local sheriff’s office, *see* PIACB 23-04, at 9-10 (Nov. 9, 2022).

When deciding whether inspection “by the applicant,”⁶ § 4-343, would be contrary to the public interest, the applicant’s identity matters—at least as far as the relationship to responsive records is concerned. If the person requesting the records is a “person in interest”—*i.e.*, the person “that is the subject of a public record or a designee of the person,” § 4-101(g)(1)—then a custodian may deny inspection “only to the extent that the inspection would” cause one of seven specific harms, *see supra*, note 5, including “disclos[ing] the identity of a confidential source” or “endanger[ing] the life or physical safety of an individual,” § 4-351(b)(4) and (7). If the requester is not a person in interest, however, then a custodian 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). In most cases, though, a custodian must still provide a factualized basis for withholding. *See id.* at 567 (explaining, in a case involving a non-person in interest, that “where the police investigation is closed and where there is no danger that disclosure will interfere with ongoing law enforcement proceedings, a particularized factual basis for the ‘public interest’ denial must be put forth in order for the custodian of records to meet his/her burden of proof”);⁷ *see also, e.g.,* PIACB 23-04, at 10 (Nov. 9, 2022) (concluding, in a

⁶ An “applicant” is also known (perhaps more commonly) as a “requester.” *See* § 4-101(b) (defining “applicant” as “a person or governmental unit that asks to inspect a public record”).

⁷ When an investigation is open and ongoing, courts typically allow a custodian to demonstrate that disclosure would “interfere with a valid and proper law enforcement proceeding,” § 4-351(b)(1), in a more generic way, regardless of who the requester is. *See Blythe v. State*, 161 Md. App. 492, 538 (2005); *see also Randall Family*, 154 Md. App. at 566 (“In cases where defendants are awaiting trial or whe[n] criminal investigations are ongoing, the reason why it is

matter involving a non-person in interest, that the custodian justified application of § 4-351(a)(3) to records by explaining that disclosure would compromise “security protocols established to protect the courthouse, its staff and the public” and “implicate security concerns”).

Turning to the records at issue here, we first note that not every record related to a correctional facility contains “intelligence information or security procedures of” that correctional facility. At the same time, though the ADA is primarily focused on the “elimination of discrimination against individuals with disabilities,” 42 U.S.C.A. § 12101(b)(1), an ADA audit of a correctional facility may well contain some information related to that facility’s security procedures—especially as to a maximum security facility like JCI.⁸ The complainant himself acknowledges that “information dealing with [JCI’s] exterior perimeter” may fall within § 4-351(a)(3). Looking at the 110-page audit report that DPSCS has provided, and keeping in mind DPSCS’s intent to redact information about “dimensions, layouts, and security areas,” it is not clear to us the extent to which the report details “intelligence information or security procedures.” There is information about how various areas of JCI have failed to comply with ADA requirements, and recommendations for coming into compliance. While this information includes recorded measurements (i.e., “dimensions”), it is hard to see how those measurements constitute “intelligence information” or a “security procedure” of JCI.

At the same time, any areas of the facility to which incarcerated people do not have legitimate access for security reasons could conceivably relate to the facility’s “security procedures.” Thus, while it is difficult for us to discern the extent to which the audit report reflects such information, DPSCS could potentially redact the portions of the report detailing these off-limits areas pursuant to § 4-351(a)(3), assuming that DPSCS can explain why inspection would be contrary to the public interest.⁹

in the public interest to withhold the contents of an investigative file is obvious, i.e., disclosure almost always would ‘interfere with law enforcement proceedings.’”); *see, e.g.*, PIACB 23-19, at 5-6 (May 30, 2023) (involving a police department’s application of § 4-351(a)(1) to withhold body camera footage related to an open investigation).

⁸ *See* Dep’t Public Safety & Correctional Services, Jessup Correctional Institution, <https://www.dpscs.state.md.us/locations/jci.shtml> (last visited Oct. 4, 2023) (indicating that JCI is a maximum security level facility).

⁹ We note again that we asked DPSCS to provide a descriptive index, which, if provided, would have allowed DPSCS to point to specific information on the relevant pages and explain why that information is exempt from disclosure under § 4-351(a)(3). *See supra* note 3 (describing a descriptive index). Instead, after requesting two additional weeks to provide the index, DPSCS provided one of the responsive records and a somewhat generic claim as to what information it believed was protected.

Even if the audit report and other responsive records does contain potentially protectable “intelligence information or security procedures,” there is still a second issue, however. As discussed above, a custodian may withhold records or information subject to a discretionary exemption only if the custodian can provide a “particularized factual basis,” *Randall Family*, 154 Md. App. at 567, for why disclosure would be “contrary to the public interest,” § 4-343. DPSCS has failed to do that here. Although the complainant is not a person in interest—meaning that DPSCS could deny him inspection of information subject to § 4-351(a)(3) “if, for any reason, disclosure would be contrary to the public interest,” *Randall Family*, 154 Md. App. at 561—DPSCS must do more than simply repeat the statutory language regarding person in interest denials verbatim, which is what it has done. *See Blythe v. State*, 161 Md. App. 492, 527 (2005) (explaining that a custodian must demonstrate “with particularity and not in purely conclusory terms, precisely why the disclosure ‘would be contrary to the public interest’”). Though DPSCS advises that “the Requestor is housed at the facility that is the subject of said request,” DPSCS makes no arguments or assertions as to why that fact would make it so inspection by the complainant would be contrary to the public interest. Put simply, DPSCS has not met its burden to show that it appropriately exercised its discretion to withhold responsive records under § 4-351(a)(3).

Conclusion

DPSCS has failed to sufficiently demonstrate that the responsive records¹⁰—the 110-page audit report in particular—fall within the scope of § 4-351(a)(3) because they contain “intelligence information or security procedures” of JCI. Even if some of the information in the records does fall within the scope of the exemption, DPSCS has not adequately explained why inspection would be contrary to the public interest, as required by § 4-343. We thus order DPSCS to produce the responsive records to the complainant in full.

Public Information Act Compliance Board

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¹⁰ We note that the 110-page audit report does not seem responsive to all parts of the complainant’s PIA request.