

WES MOORE
GOVERNOR

ARUNA MILLER
LT. GOVERNOR



MICHELE L. COHEN, ESQ.
SAMUEL G. ENCARNACION
DEBRA LYNN GARDNER
NIVEK M. JOHNSON
DEBORAH MOORE-CARTER

STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 24-04
October 5, 2023
Baltimore County Board of Appeals, Custodian
Frederick Homan, Complainant

Complainant Frederick Homan alleges that the Baltimore County Board of Appeals (“BOA”) violated the Public Information Act (“PIA”) by redacting records contained in the BOA’s file of a specific retirement-related case. The complainant also more broadly alleges that the BOA’s removal of unredacted opinions addressing retirement-related disputes from its website contravenes the PIA. The BOA responds first that it is not required to post opinions online, and second that the redactions applied to the responsive records were proper under § 4-312,¹ the PIA’s exemption for retirement records. As explained below, we stay resolution of the complaint as to the BOA’s redaction of responsive records pending resolution of that question by the Circuit Court for Baltimore County, and conclude that we lack jurisdiction to address the complainant’s broader claim about the BOA’s removal of the unredacted opinions from its website.

Background

In April of 2023, the complainant sent a PIA request to the BOA seeking “the Tirabassi file and all retirement cases appealed to the [BOA] since December 2010 through the present.” The BOA responded by producing redacted copies of responsive records. As explanation for the redactions, the BOA advised that the records contained retirement information, and therefore constituted “retirement records” protected by § 4-312, the PIA’s mandatory exemption for “a retirement record for an individual.” The BOA indicated that the redactions were applied to shield the retirement information. The complainant, believing that the redactions were improper, contacted the Public Access Ombudsman for assistance in resolving his dispute with the BOA. Ultimately, the Ombudsman issued a final determination stating that the dispute was not resolved and the complainant filed this complaint.

The complaint raises two separate allegations. The first, which is limited to the records related to the Tirabassi file, is that the BOA improperly redacted the records in response to his PIA request. The second allegation is broader. That allegation charges

¹ Citations are to the General Provisions Article of Maryland’s Annotated Code, unless otherwise indicated.

that, for the last year, Baltimore County has improperly “denied the citizens of the County complete access to the retirement appeal hearing files for the [BOA].” The complainant alleges that the County amended the BOA’s rules of practice in order to “accomplish” this, explaining that, shortly after the rule was amended, the retirement appeal hearing files were removed from the BOA’s website.² After that action was challenged, the complainant contends, the County began to “excessively” redact the retirement related files. Thus, the broader issue that the complainant asks us to address is “whether the MPIA can be interpreted to inhibit the public’s access to the files of administrative agencies such as the [BOA], which, otherwise by law, are required to be transparent.” The complainant also notes that he and the County are currently engaged in PIA-related litigation,³ but the complainant does not believe that “the events that have taken place here will be addressed” by that litigation.

In response, the BOA argues that there is nothing in the PIA or in the BOA’s rules of practice and procedure that require the BOA to post its opinions online. The BOA acknowledges that, “[p]rior to the current Administration,” the BOA posted retirement-related opinions on its website. The BOA explains that it made the decision not to post retirement-related opinions because the “retirement information contained in the opinions was not proper for public disclosure.” While the BOA has discretion to post opinions and other records on its website, the BOA maintains that it is not required to do so.

As to the complainant’s more narrowly-focused allegation, the BOA provides additional context regarding the redacted Tirabassi records that the BOA produced. First, the BOA states that “the issue of whether those redactions are permissible under the retirement records exception is the subject of litigation that is now pending before the Circuit Court for Baltimore County.” The BOA notes that the complainant initiated that litigation, which relates to two previous PIA requests that the complainant filed for Tirabassi-related records from the County’s Office of Budget and Finance and Office of Law. The BOA attaches those two PIA requests to its response and stresses that, in the second PIA request sent on April 8, 2021, the complainant advised that he had already reviewed the BOA’s Tirabassi file, presumably in unredacted form. As to the complainant’s civil lawsuit, the BOA notes that the parties are still awaiting the circuit court’s final opinion and order.

The BOA also defends its redaction of the Tirabassi records. Emphasizing the mandatory nature of § 4-312, the BOA points to the lack of judicial or other guidance as to

² The relevant rule, amended in April 2022, currently provides that “[a]ll records and dockets of the Board shall be open to the public during normal business hours subject to limitation by the Maryland Public Information Act.” Balt. County Code of Ord., App. B, Rules of Prac. & Proc. of County Bd. of Appeals, Rule 2d.

³ See Case No. C-03-CV-21-002454, filed in the Circuit Court for Baltimore County on July 28, 2021, which will be discussed further below.

how to interpret the term “retirement record,” a term that is not defined in the PIA. The BOA points out that the PIA provides for civil and criminal liability for disclosing records or information in violation of its provisions. Arguing that its application of the exemption here was “fair and reasonable,” the BOA explains that it interprets “retirement record” to mean “any information contained within or derived from any retirement information contained within a public record.”

In reply, the complainant contends that the BOA has failed to justify the redactions. The complainant first highlights the public-facing nature of the matter to which the records relate—i.e., that Mr. Tirabassi filed an appeal of the County’s decision for a retirement-related request and that Mr. Tirabassi appeared before the BOA to argue his case and in doing so spoke openly about his retirement dispute with the County. In particular, the complainant questions the redaction of the “denial letters” that were the subject of Mr. Tirabassi’s appeal, as well as the redactions applied to the County’s pre-hearing memorandum and the transcript of the hearing.

Turning to his civil suit against the County, the complainant explains that his suit is not based on “excessive redaction” because, at the time he filed it, the BOA had provided its entire unredacted Tirabassi file. The redactions at issue here, the complainant maintains, were applied ten months after he had filed the lawsuit. Thus, he implicitly urges that we ignore his civil suit as a red herring and review those redactions.

As to his broader allegation regarding the BOA’s posting (or failure to post) retirement-related opinions on its website, the complainant’s reply suggests that prior County Attorneys “had very different views than [the current County Attorney] and supported the retirement appeal files of the BOA being open to the public, including on the website.” The complainant stresses that the BOA was subject to the PIA during the time it allowed inspection of retirement-related BOA files and posted unredacted versions of those opinions.

Lastly, the complainant addresses his understanding of what constitutes a “retirement record.” He argues that, in this case, the “maximum benefit calculation requires no information about a beneficiary selection, no information about investments . . . , and no information about health care choices.” The complainant emphasizes that the factors used to calculate the maximum benefit are “provided in the law,” and that he has “never heard that the years of service and compensation of an employee are protected information under the MPIA.” The complainant argues that the information redacted from the records in the BOA’s Tirabassi file has to do with the BOA’s jurisdiction and certain actions taken or not taken regarding Mr. Tirabassi’s retirement-related request. In light of all of this, the complainant contends that the records that the BOA produced “should serve as the poster boy for excessive redaction.” He asks our Board to determine whether the

PIA “requires redactions of documents prepared for a public hearing as well as the transcript of that hearing.”⁴

Analysis

The PIA authorizes us to resolve complaints that allege certain violations of its provisions, including that a custodian improperly redacted a public record. *See* § 4-1A-04(a)(1)(i) (authorizing review of an allegation that a custodian denied inspection 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 stating that the dispute was not resolved. § 4-1A-05(a). Our review is thus limited to those disputes that are presented for mediation with the Ombudsman. *Id.*; *see also* COMAR 14.02.02.01B(1) (complaint shall “[p]ertain only to the dispute described in the Final Determination”); PIACB 23-23, at 3 n.4 (June 20, 2023) (noting that “[w]e use the term ‘presented for mediation’ rather than ‘mediated’ in recognition of the fact that not all Board-eligible disputes are *actually* mediated through the Ombudsman,” and that in some instances “a custodian may decline to mediate a dispute”). If, after review of all that is before us, we conclude that the alleged violation of the PIA has occurred, we must issue a written decision and order a statutory remedy. § 4-1A-04(a)(2) and (3). For example, if we determine that a record has been improperly redacted, we must direct the custodian to remove the improper redactions. *See* § 4-1A-04(a)(3)(i) (“[I]f the Board finds that the custodian has denied inspection of a public record in violation of the [PIA],” then we must “order the custodian to . . . produce the public record for inspection.”).

Before turning to the allegation regarding the BOA’s redaction of the Tirabassi records—an allegation that, as discussed below, presents a threshold procedural question—we address the complainant’s challenge to the BOA’s removal, and then redaction, of the retirement-related opinions on its website. As we see it, this allegation does not present a PIA-related issue within our jurisdiction. Though the PIA requires each official custodian to “adopt a policy of proactive disclosure of public records that are available for inspection under [the PIA],” § 4-104(a), this proactive disclosure provision does not *require* an official custodian to proactively publish or post public records, *see* § 4-104(b)(2) (providing that “[t]he policy adopted under subsection (a) of this section *may* . . . include publication of records on the website of the governmental unit, to the extent practicable, ” (emphasis added)). The BOA did not post its retirement-related opinions on its website in response to a PIA request, and the PIA does not speak to the BOA’s decision to remove those opinions from its website (or to redact the opinions that it does post). We thus cannot

⁴ The complainant’s reply also alleges that the BOA has violated the Open Meetings Act and the Express Powers Act. Such allegations fall outside of our jurisdiction. In addition, the complainant’s reply contains a detailed explanation of how the complainant believes Mr. Tirabassi’s maximum retirement benefit should be calculated. We do not see how this discussion relates to the PIA or to the redactions applied to the records.

address or resolve the complainant’s broader allegation concerning the BOA’s decision to remove and then redact the retirement-related opinions it posts online unrelated to a PIA request. *Cf.* 15 *OMCB Opinions* 57, 62 (2021) (explaining that “[g]iven that ‘the [Open Meetings Act [or “OMA”] does not require public bodies to provide members of the public with the opportunity to comment,’” an allegation that a public body violated the OMA by not providing for public comment was beyond the OMA Compliance Board’s jurisdiction).

This brings us to the complainant’s allegation that the BOA improperly redacted the records from the BOA’s Tirabassi file, an allegation that is ordinarily within our jurisdiction.⁵ *See* § 4-1A-04(a)(1)(i). However, the County’s assertion that “the issue of whether those redactions are permissible under the retirement records exception is the subject of litigation that is now pending before the Circuit Court for Baltimore County” gave us pause. We thus asked the County to clarify which, if any, of the approximately 159 pages of records that the BOA produced in response to the complainant’s April 2023 PIA request are currently pending review by the Circuit Court. The County’s response indicates that the vast majority of the records before us here are also currently before the Circuit Court.⁶ This makes a certain amount of sense given that the Office of Law—one of the parties to the complainant’s lawsuit—was also a party in the Tirabassi litigation before the BOA. Even in redacted form, it is clear that many of the records, including memoranda, notices, and other filings, were either generated by lawyers in the Office of Law or served on them. Notably, the complainant’s 2021 PIA request, addressed to the County Attorney and the then-Director of the Office of Budget and Finance, sought a broad array of records related to Mr. Tirabassi’s retirement-related disputes with the County.

Given that the Circuit Court is currently reviewing nearly all of the disputed records here, we must determine whether our Board can or should review them as well. We start by noting that § 4-362(a)(1) provides that “whenever a person or governmental unit is denied inspection of a public record . . . the person or governmental unit may file a complaint with the Circuit Court. “A person or governmental unit need not exhaust the administrative remedy under this subtitle before filing suit.” § 4-1A-10(a). Thus, we have neither exclusive nor primary jurisdiction over PIA-related disputes. *See Zappone v. Liberty Life Ins. Co.*, 349 Md. 45, 60 (1998) (explaining that an administrative remedy is

⁵ We note that the complainant’s April 2023 PIA request to the BOA included “*all* retirement cases appealed to the [BOA] since December 2010 through present,” and that the complainant attached the redacted records related to non-Tirabassi matters to his complaint. However, the Ombudsman’s final determination indicates that “[t]he dispute presented for mediation was the redaction of produced records responsive to the Tirabassi file.” Any review by our Board is thus constrained to those records. *See* § 4-1A-05(a); COMAR 14.02.02.01B(1).

⁶ According to the County, of the 159 pages of responsive BOA records, only twenty-three pages are *not* currently pending review by the Circuit Court. Of those twenty-three pages of records, it appears that only ten are in redacted form. Many are copies of the same subpoena with the same information redacted.

exclusive when it “preclude[es] any resort to an alternative remedy,” and primary when “a claimant must invoke and exhaust the administrative remedy, and seek judicial review of an adverse administrative decision, before a court can properly adjudicate the merits of the alternative judicial remedy”). Rather, we share concurrent jurisdiction with the circuit courts—i.e., “the administrative remedy and the alternative judicial remedy” are “fully concurrent, with neither remedy being primary, and the plaintiff at his or her option may pursue the judicial remedy without the necessity of invoking and exhausting the administrative remedy.” *Id.* at 61.

We understand that the PIA request underlying this dispute was made after the complainant initiated litigation in the circuit court, *see supra*, note 2, and was sent to a different agency within the Baltimore County government. But, the timing of the PIA request and the identity of the County custodian challenged do not change the fact that we are being asked to review the very same records that are already pending review by the Circuit Court. As we see it, review at this stage—where the complainant has already opted to pursue a judicial remedy regarding these records—would be inefficient. Were we to resolve this complaint by, e.g., finding that the redactions were properly applied, the complainant would be left with the option of filing an appeal of our decision in circuit court. §§ 4-362(a)(2), 4-1A-10(b). Assuming the appeal was filed in the Circuit Court for Baltimore County,⁷ there would then be two separate proceedings focused on the question of whether these records were properly redacted or not. Either way, the Circuit Court would have the final say as to whether the information redacted from these records is subject to § 4-312.

We thus stay this matter as to the narrow question of whether the BOA properly redacted the Tirabassi records responsive to the complainant’s request pending the outcome of the Circuit Court’s decision in Case No. C-03-CV-21-002454.⁸ *Cf. Carter v. Huntington Title & Escrow, LLC.*, 420 Md. 605, 638 (2011) (finding, in a matter in which the administrative body had primary jurisdiction, that the circuit court “should stay further proceedings . . . until the outcome of the administrative action”). In doing so, we note that the complainant would not seem to be prejudiced by the delay in the resolution of his complaint given his representation that he already possesses the unredacted versions of the BOA’s Tirabassi records.

⁷ The PIA provides that such an appeal “shall be filed with the circuit court for the county where: (i) the complainant resides or has a principal place of business; or (ii) the public record is located.” § 4-362(a)(2) and (3).

⁸ As the BOA notes in its response to this complaint, the public online docket entries for the complainant’s civil lawsuit indicate that the Public Access Ombudsman provided written guidance to the parties and the Court.

Conclusion

We conclude that we lack jurisdiction to resolve the complainant's allegation regarding the BOA's posting (or failure to post) unredacted versions of its retirement-related opinions on its website. We therefore dismiss that allegation. However, we stay resolution of the complaint's more narrowly-focused allegation that the BOA improperly redacted the Tirabassi records responsive to his request pending the Circuit Court for Baltimore County's opinion and order in Case No. C-03-CV-21-002454. We expect that the Circuit Court's opinion and order will resolve that remaining allegation.

Public Information Act Compliance Board

Michele L. Cohen, Esq.
Samuel G. Encarnacion
Debra Lynn Gardner
Nivek M. Johnson
Deborah Moore-Carter