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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 24-06
September 6, 2023
Board of Education of Calvert County, Custodian
Joshua Johnson, Complainant

In April 2023, the Board of Education of Calvert County (“CCBOE”) denied complainant Joshua Johnson’s Public Information Act (“PIA”) request for “a full docs line item budget for [the] 2023-2024 year.” The complainant challenges that denial. In response, the CCBOE urges us first to dismiss the complaint on technical grounds, and also contends that the executive and deliberative process privileges shield the record from disclosure. As we explain below, we disagree and direct the CCBOE to produce the responsive budget record.

Background

The complainant sent his PIA request for the CCBOE’s line item budget in April of 2023. The CCBOE responded that, because the 2024 budget was then in draft form, it was subject to the executive and deliberative process privileges, and therefore exempt from disclosure under § 4-301(a)(1)¹ of the PIA. The CCBOE explained that, until formally adopted, adjustments to the budget would be “continuously made.” The response indicated that the budget should be “finalized and adopted formally by the [CCBOE] in June.”

The complainant pushed back. He argued that, because the budget was “made public” in several meetings and there had been “public asks for funding,” it was not protected by executive privilege. The complainant also contended that the CCBOE was in violation of the PIA as related to a different request from October 2022.² In response, the CCBOE explained that a link previously sent in response to the October 2022 request contained the only records in the CCBOE’s custody. The CCBOE also provided information about the complainant’s options for disputing the CCBOE’s responses to his PIA requests. The CCBOE did not further address the PIA request at issue here.

The complainant sought dispute resolution assistance from the Public Access Ombudsman, who ultimately issued a final determination stating that the dispute was not

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

² We do not address that allegation here.

resolved. The complainant then filed this complaint with our Board. The complaint, which attaches the Ombudsman’s final determination, asks for “any and all methods of assistance . . . regarding the 2023 existing budget and the proposed 2024 budget.” The cover email transmitting the complaint further explains that the complainant is filing a “formal complaint . . . as there ha[ve] been multiple denials of FOIA³ requests.”

The CCBOE’s response to the complaint first asks that we dismiss the complaint on technical grounds. Specifically, the CCBOE argues that the complaint is deficient because: (1) the complainant did not sign the complaint form; (2) the complainant does not identify the CCBOE actions that he is challenging; and (3) the complaint raises issues not addressed in mediation through the Ombudsman. In addition, the CCBOE maintains that it properly denied access to the draft 2023-2024 line item budget under § 4-301(a)(1) because the draft is protected by the executive and deliberative process privileges. Noting that “[e]ven the categories in a budget are subject to change,” the CCBOE also asserts that redacting the draft budget is “completely unworkable” because the entire document is a draft. Denial of inspection was required, the CCBOE argues, “to protect the Calvert Board’s deliberative process.”

Analysis

Section 4-1A-04(a)(1)(i) authorizes us to review and resolve allegations that a custodian improperly denied inspection of public records. Before filing a complaint, a PIA requester must first attempt to resolve the dispute through the Public Access Ombudsman, and receive a final determination from the Ombudsman that the dispute was not resolved. § 4-1A-05(a). Once a complaint has been filed and we have received the response, we must determine whether the alleged violation of the PIA has occurred and issue a written decision. § 4-1A-04(a)(2). If we do find a violation, then we must order the remedy provided by the PIA. *See, e.g.*, § 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 the Board must order the custodian to “produce the public record for inspection.”).

“The presumption of the [PIA] is in favor of disclosure.” *Stromberg Metal Works, Inc. v. Univ. of Maryland*, 382 Md. 151, 160 (2004). At the same time, the General Assembly has “carefully carved out” certain categories of records “for which it necessarily found some supervening public policy that justified their shielding.” *Id.* For some records and information, those exceptions to disclosure are mandatory; withholding is required. *See, e.g.*, § 4-301(a)(1) (mandatory denial of inspection of records that are “by law . . . privileged or confidential,” or where inspection would be “contrary to . . . a State statute”); § 4-311 (mandatory denial of personnel records); § 4-329 (mandatory denial of “medical or psychological information about an individual”). For others categories however, a

³ “FOIA” is the acronym for the Freedom of Information Act, the PIA’s federal counterpart. *See* 5 U.S.C.A. § 552.

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; *see, e.g.*, § 4-344 (“A custodian may deny inspection of any part of an interagency or intra-agency letter or memorandum that would not be available by law to a private party in litigation with the unit.”); § 4-351(a)(1) (discretionary exemption for “records of investigations” conducted by certain law enforcement agencies).

When a custodian’s decision to deny inspection of public records is challenged, that custodian bears the burden of justifying its application of an exemption in the PIA. *Office of the Governor v. Washington Post Co.*, 360 Md. 520, 545 (2000). For mandatory exemptions, this means providing enough information about the disputed records so that a reviewing body may make a “responsible determination” as to whether the records fall within the ambit of the claimed exemption. *Lamson v. Montgomery County*, 460 Md. 349, 366 (2018). When the application of a discretionary exemption is challenged, a custodian must both show that the records fall within the scope of the exemption and provide a particularized factual basis for why disclosure of those records would be contrary to the public interest. *Fioretti v. Maryland State Bd. of Dental Examiners*, 351 Md. 66, 78 (1998); *see also City of Frederick v. Randall Family, LLC*, 154 Md. App. 543, 567 (2004) (noting that, ordinarily, “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”). In addition, for discretionary denials, a custodian must also explain why “redacting information would not address the reasons for the denial.” § 4-203(c)(1)(i)(2)(B).

Before turning to the specific exemptions invoked here, we provide some brief background as to the law governing county school district budgets. Each county board of education must, “with the advice of the county superintendent . . . prepare an annual budget.” Md. Code Ann., Educ. (“Educ.”) § 5-101(a)(1). Statute provides the “major categories” that the budget must contain, in addition to any other major categories that the State Board of Education may require. *Id.* § 5-101(a)(1) and (b). A county board must “submit an annual school budget in writing to the county commissioners, county council, or county executive . . . not less than 45 days before the date for levying local taxes” or, as a county’s fiscal authority may request, “on an earlier date on or after March 1.”⁴ *Id.* § 5-

⁴ According to the CCBOE’s website, the county superintendent submits a proposed operating budget to the CCBOE in January each year. Calvert County Public Schools, Budget, <https://www.calvertnet.k12.md.us/departments/finance/budget> (last visited Sept. 5, 2023). That proposed budget is apparently “made available to the public for review” and the public is “given the opportunity to submit written comments to the Board.” *Id.* As the CCBOE reviews the superintendent’s proposed budget, it may “request changes” or “recommend the budget as it was presented to them.” *Id.* In March, the CCBOE votes on the proposed budget, which then becomes “The Board of Education’s Proposed Operating Budget.” *Id.* The CCBOE’s proposed budget is “submitted to the Board of County Commissioners no later than April 1.” *Id.* In June, the CCBOE votes to adopt the final budget, after it is approved by the Commissioners. *Id.*

102(b); *see also* 94 Md. Op. Att’y Gen. 177, 179 (2009) (“Once the local board prepares its proposed annual budget, it is subject to the county budget process and procedures.” (citing *Chesapeake Charter, Inc. v. Anne Arundel Bd. of Educ.*, 358 Md. 129, 139 (2000)); *see, e.g.*, Calvert County Code of Public Local Laws, § 5-102(a)(1) (“On or before a date set by the County Commissioners, each County department, agency, or board receiving County funds shall submit to the County Commissioners . . . an itemized budget request for all funds requested for the next fiscal year for compilation into the staff-recommended budget.”). “[S]ubject to certain limitations and requirements,” the county governments “have ultimate approval power over [the education budget].” *Chesapeake Charter, Inc.*, 358 Md. at 139. State law provides that “[c]opies of the budget shall be made available to the public, on request, at the time it is submitted by the county board.” Educ. § 5-102(e)(1).

Against this backdrop, the CCBOE claims that the requested draft form of the line item 2023-2024 budget is protected by § 4-301(a)(1)’s mandatory exemption for records that are “by law . . . privileged or confidential,” and specifically the executive and deliberative process privileges. Though related in many ways, for purposes of the PIA these two privileges are distinct. The Supreme Court of Maryland has explained that certain “kinds of executive privilege . . . are encompassed within [what is now § 4-301(a)(1)]—the Constitutionally-based privilege that, when invoked, must be given the most serious attention and, when properly invoked by the person holding the privilege, require[s] the custodian to deny inspection.” *Stromberg*, 382 Md. at 162. The type of records subject to executive privilege in this sense include “records made in connection with the deliberative decision-making process used by chief or high Executive officials—Presidents, Governors, and their immediate advisors” and also records that reflect “diplomatic, military, and security-laden secrets that may not involve those officials.” *Id.* at 161-62; *see also* 66 Md. Op. Att’y Gen. 98, 100-101 (1981) (“[T]he doctrine of Executive Privilege is based on both: (i) the need for frank advice and confidential deliberations within the Executive Branch; and (ii) the separation of powers provisions of Article 8 of the Declaration of Rights.”). Maryland’s highest court has stressed that the executive privilege exists “for the benefit of the public and not the governmental officials who claim the privilege.” *Hamilton v. Verdow*, 287 Md. 544, 563 (1980).

In contrast to the executive privilege encompassed within § 4-301(a)(1) stands “the broader deliberative process privilege that arose from the common law, from rules of evidence, and mostly from rules governing discovery in civil judicial proceedings.” *Stromberg*, 382 Md. at 163. The exemption for records subject to this privilege is § 4-344, a discretionary exemption for interagency or intra-agency letters or memoranda that “would not be available by law to a private party in litigation with the unit.” *Admin. Office of the Courts v. Abell Found.*, 480 Md. 63, 89 (2022).

Like the executive privilege, the deliberative process privilege is focused on the quality of decision-making by government officials, and is thus similarly concerned with its benefit to the public, and not necessarily those officials. *See Stromberg*, 382 Md. at

164-65 (explaining that the public policy motivating the privilege is encouraging “open, frank discussion between subordinate and chief concerning administrative action,” and that the “focus is on the decision-making process,” (quotations and citations omitted)). To qualify for protection under § 4-344, a custodian must first “establish that the record is both pre-decisional and deliberative.” *Id.* at 165. If the record qualifies, then a custodian must explain why inspection by the requester would be “contrary to the public interest,” § 4-343—i.e., a custodian must give “specific reasons why agency decision-making may be compromised if the questioned records are released,” *Maryland Public Information Act Manual* (17th ed. July 2022) (“PIA Manual”), at 3-38; *see also id.* (“In applying the deliberative process privilege, an agency should determine whether disclosure of the requested information ‘would actually inhibit candor in the decision-making process if made available to the public.’” (quoting *Army Times Publishing Co. v. Dep’t of the Air Force*, 998 F.2d 1067, 1072 (D.C. Cir. 1993))).

Turning now to the record in dispute here, we start by addressing the two primary arguments that the CCBOE’s advances for dismissing the complaint. First, we reject the CCBOE’s contention that the complaint is not signed. While the CCBOE is correct that the *form* itself is not signed, we note—as is stated on that form—that use of the form complaint is not required.⁵ The email transmitting the complaint is signed with the complainant’s first and last name, which we think satisfies § 4-1A-05(b)(3). We note further that the subtitle governing complaints to the Open Meetings Law Compliance Board—which predates our Board, and which contains many provisions substantially similar to ours—also requires that a complaint “be signed by the complainant.” § 3-205(b)(3). The apparent purpose of the requirement is to prevent anonymous complaints. *See Open Meetings Act Manual* (11th ed. Oct. 2022), at 7-3 (explaining that complaints must be “signed and therefore may not be submitted anonymously”). The complainant is not anonymous here; in fact, based on the communications attached to the CCBOE’s response, it appears that the CCBOE’s custodian is familiar with the complainant. We thus find that the complaint is “signed” for purposes of § 4-1A-05(b)(3).

Second, the CCBOE argues that we must dismiss the complaint because it does not sufficiently describe the CCBOE actions that the complainant is challenging, or the circumstances of those actions, as required by § 4-1A-05(b)(2). We decline to do so. First, we construe the complaint, including its attachments, broadly. *See Kirwan v. Diamondback*, 352 Md. 74, 81 (1998) (explaining that the PIA’s provisions “must be liberally construed . . . in order to effectuate the Public Information Act’s broad remedial purpose,” (citations omitted)). In his email transmitting the complaint, the complainant

⁵ The form complaint is available on our webpage. *See* Maryland Attorney General, Public Information Act Compliance Board Procedures, https://www.marylandattorneygeneral.gov/Pages/OpenGov/piacb_procedures.aspx (last visited Sept. 6, 2023). While we encourage complainants to use the form because it helps ensure that we have the information we need, a complainant need not use it.

indicates that he filing a complaint regarding “multiple denials” of PIA requests. And, the complainant attaches the Ombudsman’s final determination,⁶ which indicates that the matter concerned the complainant’s request for “a full docs line item budget for the 2023-2024 year,” and that the unresolved dispute presented for mediation was the CCBOE’s “denial of the PIA request under GP § 4-301(a)(1).” Moreover, though the CCBOE appears to suggest that the complaint creates a “confused or muddled state of mind concerning the facts underlying the litigation,” the CCBOE’s response to the complaint belies any such concerns. *Cf. Blythe v. State*, 161 Md. App. 492, 507 (2005) (declining to dismiss a PIA-related case due to alleged “procedural shortcomings” and finding that “the proper defendants, by some wondrous necromancy, 1) were fully on top of the case from the moment of its filing; 2) were on station before the trial court, admirably prepared, on the scheduled hearing date; and 3) defended the case with consummate competence and skill”). Indeed, the CCBOE provides a robust defense of its denial of the precise record at issue—i.e., the CCBOE’s “draft 2023-2024 budget.”⁷

So, having declined to dismiss the complaint, we must determine whether the CCBOE violated the PIA when it denied the complainant’s request to inspect the “full docs line item budget for the 2023-2024 year.” The timing of the complainant’s request is important to our ultimate conclusion. The complainant sent his PIA request on April 14, 2023, and the CCBOE denied the request on April 25. At that point in time, it appears that the CCBOE had received the Superintendent’s Proposed Operating Budget, *see supra*, note 4, and had “voted 3 to 2 to approve the budget,” Board of Education of Calvert County, March 23, 2023, Meeting Minutes, [https://go.boarddocs.com/mabe/calvert/Board.nsf/files/CQTSEJ6ECCF1/\\$file/032323%20minutes.pdf](https://go.boarddocs.com/mabe/calvert/Board.nsf/files/CQTSEJ6ECCF1/$file/032323%20minutes.pdf) (last visited Sept. 6, 2023). Presumably, then, the CCBOE had also submitted that budget, which was then considered “The Board of Education’s Proposed Operating

⁶ In this decision, we refer to the Ombudsman’s final determination in greater detail than is normally the case. We note that ordinarily communications and information exchanged between the Ombudsman and the parties to mediated dispute resolution are confidential. *See* Md. Code Ann., Cts. & Jud. Proc. §§ 3-1801(c)(1) and 3-1803(a); COMAR 14.37.03.01. The PIA, however, permits the Ombudsman to transfer “basic information about a dispute,” including “the nature of the dispute,” to the Board so long as “appropriate steps have been taken to protect the confidentiality of communications made or received in the course of attempting to resolve the dispute.” § 4-1B-04(d)(3).

⁷ The CCBOE also argues that, to the extent that the complaint raises disputes that were not raised with the Ombudsman, we should not consider them. Here we agree with the CCBOE. The complaint does refer to “the 2023 existing budget,” which was not among the records at issue during mediation with the Ombudsman. We therefore cannot consider any disputes about that record. *See* § 4-1A-05(a) (permitting complaints if “the complainant has attempted to resolve *the dispute*” through the Ombudsman and the Ombudsman has “issued a final determination stating that *the dispute* was not resolved,” (emphasis added)). Our review is limited to the CCBOE’s 2023-2024 budget.

Budget,” to the Calvert County Board of Commissioners. *See supra*, note 4 (indicating a submission deadline of “no later than April 1”); *see also* Marty Madden, *Historic \$271.37 Million Calvert School Board Budget Scrutinized*, S. Md. News (Mar. 8, 2023)⁸ (“A March 23 deadline for the submission of a proposed budget for Calvert County Public Schools to take effect July 1 is looming.”).

Thus, when the complainant made his PIA request on April 14, the CCBOE had already adopted the proposed budget and submitted it to the Board of County Commissioners. Section 5-102(e)(1) of the Education Article requires that the CCBOE make copies of the budget “available to the public, on request, at the time it is submitted by the county board.”⁹ That disclosure provision prevails over any of the exemptions in the PIA. *See* § 4-343 (“*Unless otherwise provided by law . . . the custodian may deny inspection . . . as provided in this part.*” (emphasis added)); *cf.*, *e.g.*, *Comptroller v. Immanuel*, 216 Md. App. 259, 273-74 (2014), *aff’d*, 449 Md. 76 (2016) (explaining that an “affirmative and specific disclosure obligation” in the Abandoned Property Act “trumps the application of the more general disclosure exemption of individual financial information”). For purposes of § 4-301(a)(1), it means that the CCBOE’s budget, once it has been submitted to the County Commissioners, is not “by law . . . privileged or confidential.” Although it may have been in the form of a “proposed” budget at that point, the CCBOE was obligated, under Educ. § 5-102(e)(1), to disclose the 2023-2024 budget in response to the complainant’s April 14 PIA request. We find that the CCBOE’s denial of inspection violated the PIA.

Given our conclusion, it is not necessary for us to definitively determine whether the CCBOE could have properly invoked the executive or deliberative process privileges in the absence of Educ. § 5-102(e)(1). We do, however, have some broad observations. First, it is not clear to us that the executive privilege, at least as recognized by § 4-301(a)(1) of the PIA, is available to county- and municipal-level executives in light of the privilege’s focus on “chief or high Executive officials—Presidents, Governors, and their immediate

⁸ *See* https://www.somdnews.com/recorder/news/local/historic-271-37-million-calvert-school-board-budget-scrutinized/article_d6e075f7-6f22-51ac-96da-f11c6e1b8a2b.html.

⁹ We recognize that Educ. § 5-102(e)(1) does not explicitly state that the budget must be made available to the public “at the time it is submitted by the county board to the County Commissioners.” But, when interpreting a statute, we must look to the “normal, plain meaning of the language,” and “read[] the statute as a whole.” *Berry v. Queen*, 469 Md. 674, 687 (2020) (quotations and citations omitted). Reading § 5-102 “as a whole,” it is clear that subsection (e)(1) refers to submission to the county’s governing body—here the Board of Calvert County Commissioners. Subsection (b) governs “submission of annual school budget,” and directs county school boards to “submit an annual school budget” to “the county commissioners, county council, or county executive.” Educ. § 5-102(b)(1). The word “submit” is not used in any other context.

advisors”—and constitutional separation of powers.¹⁰ *See Stromberg*, 382 Md. at 161-62 (explaining that the deliberative process aspect of the executive privilege “has its roots in the Constitutional doctrine of separation of powers”); *see also* Md. Const. Decl. Rights, Art. 8 (providing that “the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other”); *Chesapeake Charter Inc.*, 358 Md. at 135 (“County school boards are creatures of the General Assembly.”). And, we doubt that the CCBOE’s budget contains any “diplomatic, military, and security-laden secrets.” *Stromberg*, 382 Md. at 162. Thus, to the extent that any form of deliberative privilege might be available regarding the school budget, it is likely to be the discretionary form encompassed by §§ 4-343, 4-344.

Assuming a draft form of the county’s school budget—a draft different from the one at issue here which, as we have explained above, must be disclosed under Educ. § 5-102(e)(1)—contains information that is both pre-decisional and deliberative,¹¹ then the CCBOE may be able invoke the deliberative process privilege under § 4-344 to shield that information from disclosure. To do so, the CCBOE would need to explain why disclosure

¹⁰ The PIA Manual tends to suggest that the executive privilege would not be available to county school boards: “The executive privilege encompassed within GP § 4-301(a)(1) is not limited to the executive branch of government; it extends to the Chief Judge of the [Supreme Court of Maryland] and presiding officers of the General Assembly as well.” PIA Manual at 3-6. Notably, these examples are all high-ranking State officials with positions rooted in Maryland’s constitution. As the PIA Manual explains, “[r]ecords that reveal the deliberative process of *other government officials* may be protected under a broader common law deliberative process privilege that is encompassed by the discretionary inter- and intra-agency exemption in GP § 4-344.” *Id.* (emphasis added).

¹¹ To this end, we note the *Stromberg* court’s finding that the “total forecasted cost of [a university’s student union construction] project,” which was redacted by the university under § 4-344, was not deliberative in nature:

If we were dealing with any clear articulation of [the project manager’s] views—if, in his report, Mr. Mitchell set forth his analysis of pending or possible claims, or what remained to be done, or the extent to which further construction would likely occur on schedule, or whether additional funding was necessary or should be sought, or whether the project should be scaled back, enhanced, or changed in some material way—we might well regard that information as deliberative and consultative in nature. If the deliberative aspects could be separated from the purely factual aspects, they might be subject to shielding. The one aggregate number that allegedly incorporates but does not identify or segregate Mr. Mitchell’s consultative views does not have that status, however. It is impossible to tell from that number what Mr. Mitchell’s views are with respect to any particular claim, much less whether the project should be altered or additional funding should be sought.

would be contrary to the public interest—i.e., how disclosure would harm the CCBOE’s decision-making process. *See Abell Found.*, 480 Md. at 92 (The purpose of the privilege is to encourage such employees and officials to give completely candid advice by reducing the risk that they will be subject to public disclosure, criticism and reprisals, and to enable decisionmakers to think out loud uninhibited by the danger that tentative but rejected thoughts will become the subject of public discussion.” (cleaned up)).

Conclusion

Because Educ. § 5-102(e)(1) provides that “[c]opies of the [board of education’s] budget shall be made available to the public, on request, at the time it is submitted by the county board,” the CCBOE was obligated to disclose its proposed budget to the complainant when he requested it on April 14, 2023, after the proposed budget had been submitted to the Calvert County Board of Commissioners. The CCBOE therefore violated the PIA when it denied inspection of that proposed budget. Accordingly, we order that the CCBOE disclose that proposed budget to the complainant.

Public Information Act Compliance Board

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