

## Chapter 4: Request Procedures

### A. *Written Request*

The PIA envisions a written request. GP § 4-202. However, agencies must, under GP § 4-201(c), identify categories of records that are available for immediate release and must make those records available without a written request. GP § 4-202(b)(1). Furthermore, the agency may waive the requirement for a written application. GP § 4-202(b)(2). An agency need not and should not demand written requests for inspection of agency documents when there is no question that the public has a right to inspect them. For example, an agency's annual report and the agency's quarterly statistics are clearly open to the public for inspection. In other instances, a written request or the completion of an agency request form may help expedite fulfillment of the request when less commonly requested records are sought. A written request expressing a desire to inspect or copy agency records may be sufficient to trigger the PIA's requirements, even if it does not expressly mention the words "Public Information Act" or cite the applicable sections of the General Provisions Article.

In general, there is no requirement that the applicant give the reason for a request or identify himself or herself, although he or she is certainly free to do so. The reasons for which the information is sought are generally not relevant. *See Moberly v. Herboldsheimer*, 276 Md. 211, 227-28 (1975); 61 *Opinions of the Attorney General* 702, 709 (1976). These reasons might be pertinent, however, if the applicant seeks a waiver of fees. *See* p. 7-5 below, and Section A of Chapter 2. Knowledge of the purpose of the request may sometimes assist a custodian who is required under Part IV to make a "public interest" determination prior to releasing a record, *see* GP § 4-343, or to focus the custodian's search so as to reduce costs to the requester and the time needed for the response. In addition, a public institution of higher education has a right to know whether a requester seeking students' personal information is seeking records for a commercial purpose. GP § 4-355(b). The identity of an applicant is relevant if he or she is seeking access in one of the particular situations where the PIA gives a "person in interest" special rights of access.

The request must sufficiently identify the records that the applicant seeks. *See* Letter from Assistant Attorney General Kimberly Smith Ward to Deborah Byrd, Dorchester County Commissioner’s Office (May 7, 1996) (PIA request must sufficiently identify records so as to notify agency of the records requested); *see also Sears v. Gottschalk*, 502 F.2d 122, 125 (4th Cir. 1974) (FOIA calls for reasonable description, enabling government employee to locate requested records). In some instances, applicants may have only limited knowledge of the types of records the agency has and may not be able to describe precisely the records they seek. An agency should appropriately assist an applicant to clarify a request when feasible. *Glass v. Anne Arundel County*, 453 Md. 201, 232 (2017).

Generally, an agency may not require the Legislative Auditor to submit a written request pursuant to the PIA. However, if an employee of the Legislative Auditor—without stating an organizational affiliation and without invoking the powers granted under the audit statute (§§ 2-1217 to 2-1227 of the State Government Article)—requests information from an agency that is not the subject of the audit, the agency that receives the request should treat it as a request subject to all of the usual procedures of the PIA, including the requirement of a written application. *76 Opinions of the Attorney General* 287, 288, 298-99 (1991).

### ***B. Submitting the Request***

Requests may be submitted to the agency’s “official custodian,” a physical custodian of the record, or to the person the agency designates as its PIA representative under GP § 4-503(a). In practicality, though, all agency employees and officials should know where to direct a PIA request if they receive one, and a custodian may not deny a request simply because it was not sent to a designated representative or physical custodian. *See ACLU v. Leopold*, 223 Md. App. 97, 125 (2015) (explaining that a “higher-level official” may not simply “kick the PIA responsibility down the chain of command” to a physical custodian). To help make it easier for applicants to submit requests (and for agencies to process them), GP § 4-503(a) requires that each governmental unit identify a representative to whom applicants should send PIA requests and post the representative’s contact information on the unit’s website or, if it does not have one, “at a place easily accessible by the public.” The contact information must include the representative’s name, business address, phone number, and email address, and the unit’s internet address. Each unit must update the contact information

annually and submit it to the Office of the Attorney General, which will publish the information on its website and in this Manual. See Appendix J.

### *C. Time for Response*

Under GP § 4-203(b)(1), if a custodian determines that a record is responsive to a request and open to inspection, the custodian must produce the record “immediately” after receipt of the written request. An additional reasonable period “not to exceed 30 days” is available only where the additional PIA period of time is required to retrieve the records and assess their status under the PIA. A custodian should not, however, wait the full 30 days to allow or deny access to a record if that amount of time is not needed to respond.

If access is to be granted, the record should be produced for inspection and copying promptly after the written request is evaluated. If it will take more than 10 working days to produce the requested records, the custodian must notify the requester, in writing or by email, of that fact. GP § 4-203(b)(2). The notification must be sent within the same 10-working-day time period and must indicate the amount of time needed to respond, the reason for the delay, and an estimate of the range of fees that may be charged. A sample 10-day letter is contained in Appendix B.

When access is denied (either within the initial 10-working-day period or afterward), the custodian must provide the applicant with a written statement of the reasons for the denial within 10 working days of the denial, in accordance with GP § 4-203(c)(1). This 10-day period is in addition to the maximum 30-day (or, with an agreed extension, 60-day) period for granting or denying a request. *Stromberg Metal Works, Inc. v. University of Maryland*, 382 Md. 151, 158-59 (2004). However, in practice, the denial and explanation generally are provided as part of a single response.

If the request is unclear or unreasonably broad, the custodian should promptly ask the applicant to clarify or narrow the request. If the applicant responds promptly, the custodian should fulfill the revised request as soon as possible within 30 days of the initial request. But if good faith discussions take an extended period of time, the custodian should clarify when the 30-day period has begun. Under no circumstances should the custodian wait the full 30 days and deny the initial request on the grounds that it is unclear or unreasonably broad.

The time periods imposed by GP § 4-203 may be extended, with the consent of the applicant, for an additional period not to exceed 30 days. GP § 4-203(d)(1). Those same time periods are extended by operation of law if the applicant or the custodian turns to the Public Access Ombudsman for resolution of a dispute. GP § 4-203(d)(2).

A troubling question is presented where the custodian, acting in good faith, is unable to comply with the time limits set by the PIA. For example, a custodian may have trouble retrieving old records and then, after retrieval, may find that portions of the records must be redacted to protect confidential material from disclosure. Even with due diligence, the custodian may be unable to comply with the request within the time limits set by the PIA. Unless the applicant agrees to an extension under GP § 4-203(d), the custodian's failure to respond within 30 days may be deemed a denial of the request. GP § 4-203(b)(3).

To avoid a constructive denial, the custodian should make the best good faith response possible by: (1) providing an interim response within the 30-day period; (2) allowing inspection of any portion of the records that are currently available; and (3) informing the applicant, within the imposed time limit, of the reasons for the delay and an estimated date when the agency's review will be complete. The custodian may also bring the matter before the Public Access Ombudsman, who is authorized to make reasonable attempts to resolve disputes involving, among other things, "the amount of time a custodian needs, given available staff and resources, to produce public records." GP § 4-1B-04(a)(5). Either way, if the agency works with the applicant in good faith and complies with the 10-working-day notification requirement of GP § 4-203(b)(2), a reviewing court will likely consider the agency's failure to produce records within the requisite time period to be a bona fide dispute and not a knowing and willful violation of the Act. *See* GP §§ 4-203(b)(3); 4-362(d)(1).

This course should be followed only when it is impracticable for the custodian to comply with the PIA's time limits. Every effort should be made to follow the PIA's time limits. However, if an agency can show that it is exercising due diligence in responding to a request, courts have allowed the agency additional time. *See Leopold*, 223 Md. App. at 124 (finding no error where agency provided a partial response within 30 days and began a dialogue as part of reasonable response process); *see also Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 616 (D.C. Cir. 1976) (allowing FBI to handle large volume of requests for information by fulfilling requests on a first-in, first-out basis even though statutory time limits were exceeded); *Exner v.*

*FBI*, 542 F.2d 1121, 1123 (9th Cir. 1976) (holding that a “first in first out’ consideration of demands” is generally reasonable); *Hayden v. Department of Justice*, 413 F. Supp. 1285, 1288-89 (D.D.C. 1976) (recognizing that FOIA allows a time extension in the case of “exceptional circumstances” where the agency “is clearly making a diligent, good-faith effort to complete its review of requested records but [can] not practically meet the time deadlines set by the Act” (internal quotation marks omitted)). Other courts have resisted agency efforts to maintain a routine backlog of FOIA requests. *See Ray v. Department of Justice*, 770 F. Supp. 1544, 1549 (S.D. Fla. 1990) (routine administrative backlog of requests for records did not constitute “exceptional circumstances” allowing agency to respond outside FOIA’s 10-day requirement). *Accord Mayock v. INS*, 714 F. Supp. 1558, 1565-66 (N.D. Cal. 1989), *rev’d sub nom. on other grounds, Mayock v. Nelson*, 938 F. 2d 1006 (9th Cir. 1991).

While the time limits in the PIA are important and an agency or custodian may be sanctioned in a variety of ways under the statute for a failure to comply, *see* Chapter 8 below, an agency’s failure to respond within the statutory deadlines does not waive applicable exemptions under the Act. “[T]he custodian [is not] required to disgorge records that the Legislature has declared should not be disclosed simply because the custodian did not communicate his/her decision in a timely manner.” *Stromberg Metal Works Inc. v. University of Maryland*, 382 Md. 151, 161 (2004).

#### **D. Inspection**

A custodian is to permit a requester to inspect records “at any reasonable time.” GP § 4-201(a)(1). Agency regulations may elaborate on procedures for inspecting records. GP § 4-201(b). If records are held by various custodians in different locations, an agency is not necessarily obligated to transport them to a centralized location for inspection. *Ireland v. Shearin*, 417 Md. 401, 411-12 (2010). In situations where the requester is unable to personally inspect records, the agency may instead mail copies of the requested records at the requester’s expense. *Id.* However, with the advent of digital technology and electronic communications, it may be more convenient—and potentially less expensive—for both requesters and agencies if copies of the requested records are provided electronically. *See PIACB Opinions* 20-05, 3 (Nov. 7, 2019) (encouraging custodians to consider providing electronic copies if that would result in a lower fee).

### ***E. Records Not in Custodian's Custody or Control***

If a written request for access to a record is made to a person who is not the custodian, that person must, within 10 working days of the receipt of the request, notify the applicant of this fact and, if known, the actual custodian of the record and the location or possible location of the record. GP § 4-202(c).

### ***F. Written Denial***

When a request is denied, the custodian must provide, within 10 working days, a written statement that gives: (1) the reasons for the denial; (2) if an exemption in Part IV is invoked, a brief explanation why the denial is necessary and why redacting information would not address the reasons for the denial; (3) the legal authority for the denial; (4) a brief description of the withheld record that will enable the applicant to assess the applicability of the legal authority for the denial; and (5) notice of the remedies for review of the denial. GP § 4-203(c); *City of Frederick v. Randall Family, LLC*, 154 Md. App. 543, 560, 567-68 (2004) (denial letter was legally deficient because it failed to explain reason for denying access under what is now GP § 4-351, in connection with closed investigation). An itemized index of withheld documents—sometimes referred to as a *Vaughn* index—is not required at the administrative denial stage, as long as the letter complies with GP § 4-203(c). Generally, a denial letter should be reviewed by the agency's legal counsel before it is sent out to ensure that the denial is legally correct and to ensure that the five elements in GP § 4-203(c) are adequately and correctly stated in the letter. A sample denial letter is contained in Appendix C.

Before sending a denial letter and after consulting with counsel, a custodian should consider contacting the applicant or the applicant's attorney to explain what the agency will not produce. The applicant may choose to alter the part of the request that is giving the agency difficulty and thus avoid the need for a formal denial.

### ***G. Judicial Records***

Note that, for judicial records, the Supreme Court of Maryland had adopted its own rules that govern request and response procedures. Md. Rules 16-921 through 16-924. See Chapter 10 of this Manual for more details.