Chapter 5:
Judicial Review and Alternative Dispute Resolution

A. Judicial Enforcement

The PIA provides for judicial enforcement of the rights provided under the Act. GP § 4-362. It authorizes a suit in the circuit court to "enjoin" an entity, official, or employee from withholding records and order the production of records improperly withheld. Under a 2014 amendment to this provision, the right to judicial review now expressly includes the right to challenge an agency's refusal to provide copies of responsive records. *See* 2014 Md. Laws, ch. 584.

1. Limitations

The Appellate Court of Maryland has held that original actions for judicial review under GP § 4-362(a)(1) of the PIA are controlled by § 5-110 of the Courts and Judicial Proceedings Article, which has a two-year limitations period, rather than by what is now Rule 7-203, which would require the action to be brought within 30 days. *Kline v. Fuller*, 56 Md. App. 294, 308 (1983). The Court did not decide whether proceedings under what is now GP § 4-362 are subject to any other rules governing administrative appeals. Given that a requester may make a new PIA request after a period of limitations has expired concerning the denial of a prior request, Maryland's Appellate Court has characterized the two-year limitations period as of "minuscule significance." *Blythe v. State*, 161 Md. App. 492, 512 (2005).

2. Procedural Issues

- **Venue.** Venue is proper where the complainant resides or has a principal place of business or where the records are located. GP § 4-362(a); *see Attorney Grievance Commission v. A.S. Abell Co.*, 294 Md. 680, 690 (1982).

- **Answer.** The defendant must answer or otherwise plead within 30 days after service, unless the time period is expanded for good cause shown. GP § 4-362(b)(1).

- **Expedited hearing.** GP § 4-362(c) provides for expedited court proceedings in PIA cases. The agency and counsel should cooperate if the plaintiff seeks a quick judicial determination.

- **Intervention.** In some cases, it may be appropriate for a third party to intervene in an action for disclosure. For example, if the issue is the release of investigatory, financial, or similar records, the person who is the subject of the records may wish to intervene under Maryland Rule 2-214. In an appropriate case, particularly one involving confidential commercial or financial records, the agency should consider inviting affected persons to intervene. In that event, an affected person's failure to seek intervention may itself be an indication that the records are not truly confidential.

3. Agency Burden

The burden is on the entity or official withholding a record to sustain its action. GP § 4-362(b)(2). The PIA specifically provides that the defendant custodian may submit a memorandum to the court justifying the denial. GP § 4-362(b)(2)(ii). The level of detail necessary to support a denial of access is discussed in *Cranford v. Montgomery County*, 300 Md. 759, 781-82 (1984).

To satisfy the statutory burden, an entity or official withholding a record must put forth evidence sufficient to justify the decision. The Supreme Court of Maryland has explained that a custodian may satisfy this burden in at least one of three ways. *See Lamson v. Montgomery County*, 460 Md. 349, 367-68 (2018).

First, the court may examine the questioned records *in camera* to determine whether the claimed exemption applies. GP § 4-362(c)(2); *see Lamson*, 460 Md. at 365, 368; *Equitable Trust Co. v. State Comm'n on Human Relations*, 42 Md. App. 53, 77-79 (1979), *rev'd on other grounds*, 287 Md. 80 (1980). A court need not conduct an *in camera* review, however; the decision is a discretionary one that ultimately depends on whether the trial judge believes that it is needed to resolve the claims of exemption at

issue. *See Lamson*, 460 Md. at 365-67 (the court "must be satisfied that the agency rationale offered in denying a [PIA] request is fully supported" and "justified"); *Cranford*, 300 Md. at 779; *see also Zaal v. State*, 326 Md. 54, 84-87 (1992) (discussing some approaches other than *in camera* review to protect sensitive records).

Second, as an alternative to *in camera* review, especially where the documents at issue are voluminous, a court may require the agency to file a so-called *Vaughn* index (named after *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973)) detailing each record withheld or redacted by author, date, and recipient, stating the particular exemption claimed, and providing enough information about the subject matter to permit the requester and court to test the justification of the withholding. *See Lamson*, 460 Md. at 367; *Blythe*, 161 Md. App. at 521.

As a third method for determining the applicability of an agency's claimed exemptions, the court may accept evidence in the form of testimony or affidavits which "detail the nature of the denial and establish the basis for the denial." *Lamson*, 460 Md. at 367.

In deciding which method to apply, a trial court considers several factors, including "the conclusory nature of the agency affidavits, bad faith on the part of the agency, disputes concerning the contents of the document, whether the agency has proposed *in camera* inspection, and the strength of the public interest in disclosure." *Id.* at 368; *see Cranford*, 300 Md. at 779.

With respect to some exceptions, there are specialized rules governing the agency's burden. For example, if the custodian invokes the inter- or intra-agency memoranda exception in GP § 4-344 and the trial court determines that one of the privileges embraced within that exemption applies, the custodian will have met the burden of showing that disclosure would be contrary to the public interest. *Cranford*, 300 Md. at 776.

Another such special rule is that a regulatory agency that denies a "person in interest" access to an investigatory file under GP § 4-351 generally must establish first, that the file was compiled for a law enforcement purpose and, second, that disclosure would have one of the effects under GP § 4-351(b). *Fioretti v. State Board of Dental Examiners*, 351 Md. 66, 83 (1998) (holding in plaintiff's favor because the agency failed to support its motion to dismiss with affidavits, a summary of the file, or other relevant

evidence). In contrast, a law enforcement agency enumerated under GP § 4-351(a)(1) is presumed to have compiled an investigatory file for law enforcement purposes. *Blythe*, 161 Md. App. at 525 n.6. Because a generic determination of interference with a pending investigation can be made, a "*Vaughn* index" listing each document, its author, date, and general subject matter, and the basis for withholding the document, is not required. *See Office of the State Prosecutor v. Judicial Watch*, *Inc.*, 356 Md. 118, 138-40 (1999). However, the custodian nevertheless bears the burden of "demonstrating, with particularity and not in purely conclusory terms, precisely why the disclosure [of an investigatory record] 'would be contrary to the public interest'" and exploring the feasibility of severing a record "into disclosable and non-disclosable parts." *Blythe*, 161 Md. App. at 527.

When a trial court's grant of a motion for summary judgment in a PIA action is appealed, the appellate court will review the lower court's decision *de novo*, i.e., without deference to the trial court. *Amster v. Baker*, 453 Md. 68, 75 (2017).

B. Alternative Dispute Resolution

In addition to judicial review, the PIA provides two options for less formal resolution of PIA disputes: the Public Access Ombudsman and the State Public Information Act Compliance Board. Both were added to the statute during the 2015 session at the same time the previous mechanism for administrative review of State agency PIA decisions was removed. The Ombudsman provides confidential mediation for a wide range of PIA-related disputes, but does not have enforcement authority. The Board, on the other hand, is empowered to issue binding resolutions of a more limited variety of disputes. While the Ombudsman and Board initially operated independently of one another, under a law that became effective on July 1, 2022, applicants and custodians must first attempt to resolve their disputes through the Ombudsman before filing a complaint with the Board. *See* 2021 Md. Laws, ch. 658.

1. Public Access Ombudsman

The Ombudsman is a State official charged with making reasonable attempts to resolve PIA disputes between custodians and applicants. The Ombudsman is appointed by the Attorney General and receives support from that Office, but operates autonomously and independently. *See* GP § 4-1B-02(b). Although the Ombudsman's

role is not limited to particular types of disputes, the statute lists some disputes that the Ombudsman is specifically charged with hearing:

- the application of an exemption;
- redactions;
- the failure to respond in a timely manner or to provide all responsive records;
- overly broad requests;
- the amount of time a custodian needs, given available staff and resources, to produce public records;
- requests for or denials of fee waivers;
- repetitive or redundant requests;
- fees imposed under § 4-206; and
- a request or pattern of requests alleged to be "frivolous, vexatious, or made in bad faith."

GP § 4-1B-04(a). The Ombudsman plays the role of mediator only. The Ombudsman does not have the power to compel the custodian to disclose records or information or even to provide materials for *in camera* review. GP § 4-1B-04(d)(1)(i). Nor does the Ombudsman have the power to conclusively resolve a dispute for purposes of judicial review. Instead, the Ombudsman is charged with trying to resolve disputes in a manner that is acceptable to both the custodian and the applicant. The Ombudsman's mediation process is confidential; generally, the Ombudsman—and the Ombudsman's staff—may not disclose any information obtained from the parties without written consent. GP § 4-1B-04(d)(1)(ii); COMAR 14.37.03. In addition, "a record or any information submitted to the Public Access Ombudsman or the [Public Information Act Compliance] Board under Subtitle 1B" is not a public record for purposes of—and is thus not subject to inspection under—the PIA. GP § 4-101(k)(3)(ii).

Once the Ombudsman receives a request for dispute resolution from an applicant or custodian, the Ombudsman typically has 90 days in which to try to resolve the dispute. GP § 4-1B-04(b). That deadline may be extended if the parties mutually agree to it. *Id.* At the conclusion of the mediation, the Ombudsman is required to issue a

final determination that states that the dispute has been either resolved or not resolved. *Id.* If the final determination indicates that the dispute has *not* been resolved, then the Ombudsman must "inform the applicant and the custodian of the availability of review by the Board under § 4-1A-04" of the General Provisions Article. GP § 4-1B-04(c). Although, as noted above, the Ombudsman is generally required to maintain the confidentiality of mediation information, the statute permits the Ombudsman to transmit "basic information," such as the identities of the parties and 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." GP § 4-1B-04(d)(3).

The Act does not expressly require an applicant or custodian to bring a dispute to the Ombudsman—or the Board—before seeking judicial review under GP § 4-362. *See, e.g.*, GP § 4-1A-10(a) ("A person or governmental unit need not exhaust the administrative remedy under this subtitle before filing suit."). Given that the Ombudsman's resolution of a dispute is non-binding, the intent of the Legislature appears to have been to provide a separate, voluntary means of resolving disputes. Although Ombudsman review is non-binding, the burden is on the custodian to demonstrate that a denial is "clearly applicable to the requested public record." GP § 4-301(b)(1). And if the denial is based on one of the discretionary exemptions in Part IV, the custodian must demonstrate that "the harm from disclosure . . . is greater than the public interest in access to the information in the public record." GP § 4-301(b)(2).

Applicants (i.e., requesters) or custodians may request dispute resolution through the Ombudsman by email, pia.ombuds@oag.state.md.us; by website submission, piaombuds.maryland.gov; or by mail: Public Access Ombudsman c/o Office of the Attorney General, 200 St. Paul Place, Baltimore, MD 21202. A request for dispute resolution should include the following: (1) the original PIA request; (2) the custodian's 10-day letter (if applicable) and/or response, if any; (3) a brief description of the dispute; and (4) any relevant correspondence between the applicant and custodian.

2. State Public Information Act Compliance Board

The State Public Information Act Compliance Board is a five-member volunteer Board that is staffed by the Office of the Attorney General. Members are appointed by

the Governor and confirmed by the Senate, and serve staggered three-year terms. Until July 1, 2022, the Board's jurisdiction was limited to resolving complaints that a custodian had charged an unreasonable fee under GP § 4-206 of more than $350. However, a law passed in 2021 expanded the Board's jurisdiction so that, in addition to reviewing complaints that an agency has charged an unreasonable fee higher than $350, the Board now has authority to issue binding decisions resolving complaints that allege that a custodian has erroneously denied inspection of a public record or has failed to respond to a request for a public record within the applicable time limits. The Board also has jurisdiction to review complaints from custodians that an applicant's "request or pattern of requests is frivolous, vexatious, or in bad faith." Note that the Board does not have authority to review every PIA-related dispute. For example, the Board does *not* have jurisdiction to review complaints about a custodian's denial of a fee waiver request, although the Ombudsman certainly has the power to mediate this type of dispute.

To file a Board complaint, a party must have first attempted to mediate the dispute with the Ombudsman and received a final determination that the dispute was not resolved. GP § 4-1A-05(a). Among other things, the statute requires that a complaint identify the custodian or applicant subject to the complaint, that it be signed by the complainant, and that it be filed within 30 days after receiving the Ombudsman's final determination. GP § 4-1A-05(b). In addition, the Board has adopted regulations governing the complaint process. *See* COMAR 14.02.02 (applicants) and 14.02.03 (custodians).

After a complaint is filed, the Board must refer it to the custodian or applicant identified in the complaint. The custodian or applicant then has 30 days from receipt of the complaint in which to file a written response. If a custodian fails to respond to a complaint, then the Board must "decide the case on the facts before the Board." GP § 4-1A-06(c); *see, e.g.*, *PIACB Decisions* 23-21 & 23-22 (June 30, 2023) (ordering disclosure of certain records where the custodian failed to respond to the complaint). Typically, the Board will also permit the complainant to file a reply to the response; the reply must be filed within 15 days after receiving the response. COMAR 14.02.02.04 and 14.02.03.04. To assist the Board in resolving a complaint, the Board may elect to hold an informal conference to hear from the parties, GP § 4-1A-07(b), or it may

request additional information—including "a copy of the public record,[1] descriptive index of the public record, or written reason why the record cannot be disclosed"—from the custodian, GP § 4-1A-06(b)(2). *See also* COMAR 14.02.04 (governing informal conferences) and 14.02.05 (governing requests for records or additional information).

If the Board holds an informal conference, the Board may allow the parties to present testimony in person, via tele- or videoconference, or in writing. If the parties elect to participate in person, the Board must hold the conference at a location "as convenient as practicable" to the parties. GP § 4-1A-07(b). Although the conference allows for the Board to hear testimony and admit evidence, it is not a contested case hearing within the meaning of the APA. GP § 4-1A-07(b)(3).

If the Board requests records or additional information, it must generally maintain the confidentiality of those records or information. GP § 4-1A-06(b)(5). In addition, the definition of "public record" in the PIA excludes "a record or any information submitted to the Public Access Ombudsman or the [Compliance] Board under Subtitle 1B." GP § 4-101(k)(3)(ii). The exact scope of this definitional provision as applied to the Board is not entirely clear, however, given that records and information are submitted to the Board under Subtitle 1A, not Subtitle 1B. In any event, a different provision in the PIA requires Board to "maintain the confidentiality of any record or information submitted by a custodian or an applicant under this subsection." GP § 4-1A-06(b)(5). Though the provision is broadly worded, it is doubtful that the General Assembly intended to make confidential the initial complaint or the initial response to a complaint, at least not in every case. In fact, the Board's regulations state that the complaint, the response to the complaint, and any reply to the response that is filed are public records of the Board subject to inspection under the Act. COMAR 14.02.02.09 and 14.02.03.09. It seems more likely that the Legislature intended to provide an explicit protection for confidential information submitted to the

[1] If the complaint alleges that the custodian denied inspection under GP § 4-301(a)(2)(ii), which precludes inspection where it would be "contrary to . . . a federal statute or a regulation that is issued under the statute and has the force of law," the custodian cannot be required to produce the record for Board review, but the Board may request information about the public record. GP § 4-1A-06(b)(3); *see also PIACB Decisions* 23-15, at 5-8 (June 2, 2023) (discussing this provision).

Board by the respondent to assist it with its efforts to resolve a complaint, such as a descriptive index or a copy of the disputed record itself.

The statute also provides that a custodian may not be held criminally or civilly liable for providing or describing the public record to the Board. GP § 4-1A-06(b)(6). Similarly, the provision or description of a record to the Board cannot be construed as a waiver of any privilege that might apply to the record. GP § 4-1A-06(b)(7). The statute directs the forms of relief that the Board may provide. *See* GP § 4-1A-04(a)(3). If the Board determines that a custodian has denied inspection of a record in violation of the PIA, the Board must order that the record be produced. Where the Board finds that a custodian failed to respond to a PIA request within the applicable time limits, the Board must order the custodian to promptly respond. Further, if its written decision contains its reasons for doing so, the Board has discretion to order that a custodian who has not responded waive all or part of the fee that it would otherwise be entitled to charge. Regarding decisions finding that a custodian charged an unreasonable fee higher than $350, the Board must order the custodian to reduce the fee to an amount the Board determines is reasonable. In cases where a custodian has alleged that a request is frivolous, vexatious, or made in bad faith, the Board considers such factors as the number and scope of the applicant's past requests, and the custodian's responses to those requests and efforts to cooperate with the applicant. GP § 4-1A-04(b)(3). If, based on these considerations, the Board finds the request frivolous, vexatious, or made in bad faith, the Board must order that the custodian may ignore the request or "respond to a less burdensome version of the request within a reasonable time frame." *Id.*

The Board has adopted regulations regarding all of these remedies. *See* COMAR 14.02.07.04. The Board must issue a written decision within 30 days of receiving the written response and any additional records or information the Board requests. GP § 4-1A-07(a). If the Board elects to hold an informal conference, then the decision must issue within 30 days after the conference. GP § 4-1A-07(b)(4). If the Board is unable to render a decision within those time periods, it must state the reasons for its inability and issue a decision as soon as possible thereafter, but not later than 120 days after the filing of the complaint. GP § 4-1A-07(c)(1). The Board may, however, state that it is unable to resolve the complaint. GP § 4-1A-07(c)(2). The Board's decisions are posted on the Attorney General's website.

An applicant need not pursue a complaint before the Board but may instead elect to proceed straight to judicial review without having to exhaust the administrative remedy.[2] GP § 4-1A-10(a). Further, nothing prevents an applicant from attempting to mediate a dispute through the Ombudsman and, if unsuccessful, then pursuing review in circuit court under GP § 4-362(a)(1) rather than filing a complaint with the Board. If an applicant elects to file a complaint with the Board, however, the Board's resolution of that complaint may be appealed—by either party, depending on the outcome—to the circuit court for the county where the complainant resides or has a principal place of business or where the public record is located. GP §§ 4-1A-10(b)(1); 4-362(a)(2), (3). When the Board determines that an applicant's request was frivolous, vexatious, or in bad faith, the applicant may file an appeal in the circuit court where the applicant "resides or has a principal place of business." GP § 4-362(a)(3)(i). The filing of an appeal automatically stays the effect of the Board's decision pending the decision of the circuit court. GP § 4-1A-10(b)(2). Note that a party may not appeal a decision of the Board that states that the Board is unable to resolve a complaint. GP § 4-1A-07(c)(2)(ii). Under an amendment enacted in 2023, "a party who is aggrieved by a final judgment of a circuit court in a judicial review proceeding under [GP § 4-362(a)(2)] may appeal to the Appellate Court of Maryland in the manner that law provides for appeal of civil cases." GP § 4-362(g). This amendment cleared up an ambiguity in the statute about whether the losing party in circuit court could further appeal to Maryland's appellate courts.

With the exception of a custodian for a local school system that charges a fee under subsection § 4-206, the PIA does not require a custodian to inform an applicant of the availability of Ombudsman and Board review regarding fees. *See* GP § 4-206(f) (requiring a custodian for a local school system that charges a fee under GP § 4-206(b) to "provide written notice to the applicant that the applicant may file a complaint with the [Public Information Act Compliance] Board to contest the fee"). Note that, under the changes that took effect on July 1, 2022, an applicant wishing to contest *any* fee—including those charged by local school systems—must first attempt to resolve the

[2] The PIA does not afford custodians the right to seek direct judicial review in the courts of frivolous, vexatious, or bad faith requests under GP § 4-362(a)(1); thus, the Ombudsman and Board are the only express dispute resolution options available to custodians at the outset. However, the statute does permit a custodian to *appeal* to a circuit court a Board decision regarding such requests. GP § 4-1A-10(b).

dispute through the Ombudsman before filing a complaint with the Board. GP § 4-1A-05(a). However, many custodians routinely do inform applicants of the extra-judicial dispute resolution options available under the PIA, and under § 4-203(c)(1), a custodian who denies inspection *must* provide "notice of the remedies under [the PIA] for review of the denial."

C. Dispute Resolution for Judicial Records

As mentioned briefly in Chapter 1, the Supreme Court of Maryland has adopted separate rules governing administrative review and dispute resolution for judicial records. *See* Md. Rules 16-931 through 16-934; *see also* Md. Rule 16-931 (stating that the PIA's dispute resolution provisions do not apply to judicial records). See Chapter 10 of this Manual for more details.