

February 19, 2021

Senate Education, Health, and Environmental Affairs Committee
2 West
Miller Senate Office Building
Annapolis, Maryland 21401

Via electronic submission

Re: SUPPORT for SB 449 Equitable Access to Records Act

Dear Chair Pinsky and Committee Members:

Thank you for the opportunity to comment in support of SB 449. Access to information is critical to public interest organizations, like ours, who work to ensure that the laws you pass to restore the Bay and keep Maryland's air and water clean and healthy are actually implemented and enforced. We use information obtained through Public Information Act Requests (PIAs) to participate in public processes for permitting, enforcement, and rule making. We strongly support this bill and its purpose to improve access to public records and to improve state agency accountability and transparency.

Access to Public Information is a Legal Right

Transparency is a critical component to good government, and the public has the legal right of access to environmental information. The Maryland Environmental Policy Act (MEPA) requires state agencies to provide "the fullest practicable provision of timely public information"¹ and Maryland's Public Information Act establishes that "all persons are entitled to have access to information about the affairs of government." The Maryland Department of the Environment, in particular, is required to encourage and utilize "active public involvement throughout the intergovernmental decision-making process ... to accomplish the objectives of State and federal laws and regulations."² In accepting the responsibility for implementing the federal Clean Water Act from the U.S. Environmental Protection Agency, the Department agreed that "public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program ... shall be provided for, encouraged, and assisted."³

The Department has not met these standards and, as detailed below, has obstructed the public's right to information. This failure is partly a result of a lack of agency staff and resources, but also due to institutional policies and norms that must be reformed through a more vigorous Public Information Act.

¹ Maryland Natural Resources § 1-303 (3).

² COMAR 26.08.01.02

³ 33 U.S. Code § 1251(e)

Maryland's Current System for Public Access to Information Needs Improvement

Our organizations routinely encounter challenges with PIA requests. While our challenges may have been exacerbated by the pandemic, they are not new. If anything, the COVID-19 crisis has shined a light on precisely how antiquated agency processes for document retention, organization, and dissemination to the public are detrimental to true transparency and efficiency.

A summary of some of the challenges our organizations routinely experience include:

- PIA requests go unanswered, requiring requesters to follow up with agency staff only to be told the request had been “overlooked.”
- State agencies responding to PIAs saying they have no files pertaining to a request, yet similar PIAs sent to local governments produced correspondence with state agencies on the same matter.
- Requests for time sensitive investigations or permit renewals languish for months with no agency response, only to then have the request fulfilled when the issue is no longer relevant (e.g. after the public comment period closes).
- Fee waivers requests denied with no explanation or providing justifications that are not relevant or consistent with the PIA law or the Maryland Public Information Act Manual.
- Inconsistency for when and how much fees are charged.

Our groups have reached out directly to agency staff to address these issues. For your reference, we have attached a letter sent to the Maryland Department of the Environment expressing our concerns and suggesting improvements.

The Public Information Act Compliance Board Should be Strengthened to Combat these Challenges and Give Effect to the Spirit of the Act.

Our groups have also engaged the Public Access Ombudsman. However, that position's effectiveness at resolving issues is constrained by a lack of authority. Although the Maryland General Assembly thoughtfully created the Public Information Act Compliance Board and the Public Access Ombudsman position in 2015 to mediate PIA disputes between agencies and the public when they arise, it did not provide adequate authority to either the Board or the Ombudsman to remedy the disputes.

Currently, the Board's duty is to hear and decide complaints involving allegations that a government custodian imposed an unreasonable fee of more than \$350; the Board cannot decide other issues that may arise between a requester and an agency. We also note that agencies routinely charge fees just under \$350, thus eliminating the public's ability to file a complaint. HB 183 would resolve this issue by giving the Board authority to hear any complaints if the Ombudsman has issued a final determination that the dispute was not resolved.

SB 449 would strengthen the Public Information Act Compliance Board's authority to address some of the significant challenges that the public faces in attempting to get information from state agencies.

Further, this bill provides increased agency accountability by requiring agencies to prepare a

report on the number of PIA requests it receives as well as the number of requests granted, denied, or outstanding.

For these reasons, we urge you to give SB 449 a favorable report.

Thank you,

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December 1, 2020

Suzanne Dorsey, Assistant Secretary
Maryland Department of the Environment
1800 Washington Boulevard
Baltimore, MD 21230
Via email to: Suzanne.dorsey1@maryland.gov

Re: Public Information Act Issues at Maryland Department of the Environment

Dear Ms. Dorsey:

Thank you for meeting with our organizations on November 12, 2020 to discuss challenges with the Public Information Act (PIA) process. We understand the COVID-19 pandemic has caused delays and barriers for the Maryland Department of Environment (MDE or Department) to fulfill requests in a timely manner. Nevertheless, transparency remains a legal requirement of Maryland agencies under the Public Information Act and for MDE in its operations, notably for present purposes under Section 101 of the Clean Water Act, the Maryland Environmental Policy Act, and MDE's own regulations. The public's access to information remains critical to meaningful engagement, including in the public processes currently underway for the many permits that MDE is currently re-issuing.

While the challenges we routinely encounter with PIA requests at MDE may have been exacerbated by the pandemic, they are certainly not new. If anything, the COVID-19 crisis has shined a light on precisely how MDE's current process for document retention, organization, and dissemination to the public is detrimental to true transparency and to the efficiency of agency operations.

MDE's lack of timely responses and lack of complete responses given to PIA requests erodes the public's faith in government transparency and hinders meaningful public participation. As we discussed, our organizations have experienced significant challenges getting adequate information in a timely manner from MDE in response to our PIA requests. We write to clarify our concerns and suggestions to address both short-term and long-term problems with the PIA process.

Some of the challenges we have experienced include requests:

- That were not issued acknowledgment letters, requiring us to follow-up with agency staff only to be told they had been “overlooked”.
- That MDE responded saying it held no files pertaining to the request, yet similar PIAs to local governments showed documents from and correspondence with MDE.
- That were requested for time sensitive compliance investigations or permit renewals but languished for months with no agency response.
- Where fee waivers were denied with no explanation or justification despite repeated attempts to request justifications.
- Where fee waiver denials were explained on the basis of reasons that were not relevant or consistent with the PIA law or the Maryland Public Information Act Manual.
- That MDE claims no electronic files are available to share despite knowledge of their existence in electronic format, thus contravening the purpose of section 4-205 of the General Provisions Article.
- That were confused with other requests or assumed to be the same request without MDE seeking clarification.
- That incurred large fees where other similar requests incurred no fees.

1. All Fee Waivers Should Be Granted During the COVID-19 Pandemic

During the pandemic, all fee waivers for PIAs should be granted, or at least all fees should be waived for requests made by nonprofit, public interest organizations, and indigent requesters. With some of MDE’s offices closed to the public, there is often no other way to safely and responsibly access files than to have MDE prepare and send the files. Organizations or individuals seeking to obtain documents cannot go in person to scan documents when the offices are closed. Further, with cases of COVID-19 on the rise in Maryland and the Governor encouraging everyone to stay at home, it is unnecessary and irresponsible to ask members of the public to drive to an MDE office that is open and to spend several hours indoors in a public space to review and scan documents. This presents risks to both the public, and more so, to agency staff. In recognition of these risks to agency staff, we have been mindful of what sorts of records we request and how we tailor our requests for information in order to make the process as efficient as possible. These risks do not, however, change our statutory right to this information.

2. MDE Should Apply Fee Waiver Criteria Uniformly

Furthermore, we request MDE provide clarity and consistency on the evaluation criteria it uses to decide whether to grant a fee waiver request. Our organizations consistently provide the same type

of information in support of PIA fee waiver requests, but MDE is inconsistent with its approval/denial of such requests and MDE does not provide justification when denying a request.

In our recent conversation, MDE staff suggested that the fee waiver decisions are based on internal agency guidance that states that, in order to grant a request, the agency must find that an applicant is both indigent **and** seeking the information for a public purpose. This, however, is contrary to Maryland General Provisions Code § 4-206(e) which specifies that fee waivers should be granted when the applicant asks for a waiver and: (1) if the applicant is indigent, **or** (2) the waiver is in the public interest.

When a PIA request is submitted from a 501(c)(3) nonprofit organization seeking the information in order to participate in a public process such as a general permit reissuance or to better understand and educate its members about the pollution impacts of a facility in significant noncompliance with a permit, the request is squarely in the public interest and a fee waiver should be granted. For most, or perhaps all, requests submitted by our organizations, our interest in the public records are fully consistent with the Department's mission and with the statutory duties MDE is charged with carrying out; as such, we are acting as partners with the Department in utilizing the requested records.

3. Electronic Documents Must be Provided Whenever Possible

Maryland General Provisions Code § 4-205 requires documents to be provided to requesters in electronic format when available in that format. This relatively recent amendment to the Public Information Act was established in recognition of the widespread understanding that electronic communications and records production are the default way in which agencies should and do operate in the 21st century, and that agencies' implementation of the Public Information Act should reflect this understanding.

We are concerned that we have been told by the Department that electronic materials are not available, only to then receive a printed copy of an electronic document during a file review process or receive such materials in electronic format from another source. For example, a printed version of an email that can be more easily downloaded or printed as a PDF versus an actual printed document. We urge MDE to collect, store, manage, and disseminate information electronically for the sake of public health in the short term and administrative efficiency in the longer term.

Of course, this issue is broader than the requirement to merely provide materials in an electronic format and speaks to a larger and more important issue of diligently and dutifully fulfilling the requirements of the Public Information Act. If records are to be withheld from the public, the requesters are owed an explanation for that withholding. If the improper withholding of records is

unintentional, we urge the Department to provide more staff and resources for staff charged with overseeing PIA compliance. The omission of a public record lawfully requested is a serious violation of the Act (GP 4-362) and erodes the public's confidence in the ability and willingness of an agency to serve the public.

4. Information Should be Made Publicly Available Online

We sympathize with the resource constraints faced by the Department and its staff. In fact, we and our partners have been vocal advocates for the Department for many years, showing up each legislative session to ask for more funding for core agency priorities. We understand that mistakes are made by staff faced with unreasonable workloads. We urge the Department to share with the Governor, Department of Budget and Management, and the budget committees of the General Assembly the difficulties its staff is facing, including in fulfilling basic agency functions such as providing access to public records and complying with legal obligations. Just as a lack of funding does not excuse violations of the environmental laws your agency is charged with administering, a lack of funding likewise cannot excuse noncompliance with the Public Information Act.

In addition to advocating for more budgetary resources for PIA compliance, we also urge the Department to continue taking actions within its authority to enhance transparency and accessibility of data and public records. Obviously, it would substantially reduce workloads for PIA officers and other agency staff if the Department's website contained a wealth of the data and other records the public is seeking, organized in an easily accessible manner. Numerous states around the country have successfully posted such data on publicly accessible websites. Specifically, the type of information that can and should be proactively placed online includes:

- Accurate and complete DMRs and other monitoring reports for non NPDES discharge permits
- Inspection reports
- Notices of violation
- Informal and formal enforcement actions: settlement agreements, consent orders/consent decrees
- Permit Applications and Permit Packages for new and renewal applications, including: NPDES Permits; Groundwater Discharge Permits; Nontidal and Tidal Wetlands Permits; Clean Air Act Permits; and Solid Waste Management Permits

5. MDE Should Employ a Consistent Process for Electronic Document Retention

In conversations with MDE staff, our organizations have learned that programs within MDE have widely varying processes for document retention. We routinely experience significant delays in

receiving documents with the explanation that staff could not find documents. It should be no surprise to MDE that PIA requests are likely to be made for things such as NPDES permit renewals and enforcement. MDE can reduce the burden on its staff and to the public by requiring staff to retain electronic documents in such a way that makes it easy to fulfill anticipated PIA requests.

We would appreciate a response to the issues raised in this letter.

Thank you,

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Kristin Reilly, Director
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Cc: Ben Grumbles, Secretary, Maryland Department of the Environment
Brian Frosh, Maryland Attorney General
Lisa Kershner, Maryland Public Access Ombudsman