

LAWRENCE J. HOGAN, JR.
Governor

BOYD K. RUTHERFORD
Lt. Governor



LISA A. KERSHNER
Public Access Ombudsman

**STATE OF MARYLAND
OFFICE OF THE
PUBLIC ACCESS OMBUDSMAN**

**Testimony of Lisa Kershner, Public Access Ombudsman, in support of H.B. 183
Submitted to
Health and Government Operations Committee
February 9, 2021**

Dear Chair Pendergrass, Vice Chair Pena-Melnyk, and Members of the Committee:

I serve as Maryland's Public Access Ombudsman, a position I have held since the program began in 2016. I submit this testimony in support of H.B. 183, which strengthens the Maryland Public Information Act ("PIA") and enhances transparency and good government by providing:

1. an accessible administrative remedy, where none currently exists, that will be available to both requestors and agencies to decide PIA disputes that cannot be resolved through mediation alone;
2. for the development by agencies of policies of proactive disclosure of their public records, a measure that will greatly increase public access and at the same time reduce agency workload in responding separately to routine PIA requests; and
3. for the annual reporting by an agency subject to the Act of certain data regarding the PIA requests it receives and the disposition of those requests, thereby increasing transparency regarding actual PIA performance and providing reliable data that can inform future resource allocations and other improvements to the law.

A. Need for Administrative Remedy for Disputes that Cannot be Resolved by Mediation Alone

The purpose of the PIA is to make public records broadly available upon request with the least cost and delay possible unless an exemption from disclosure provided by the Act applies. The animating premise of the Act is that transparency is essential to build trust in government and to the functioning of a healthy democratic system of governance—principles which have never been more important—or more in jeopardy—than they are today. The legislature recognized in 2015, when it created the Office of the Public Access Ombudsman and the PIA Compliance Board, that in order to fulfill the purpose of the PIA, it was necessary to establish readily accessible dispute resolution mechanisms that would be broadly available to and accessible by the many diverse requestors who seek access to public records as well as to state and local agencies that are subject to the Act.

To achieve these goals, the Office of the Public Access Ombudsman was created and given a broad mandate to try to resolve a wide range of disputes regarding access to public records under the PIA, but only on a purely voluntary basis. At the same time, the legislature also created a separate program to provide an administrative remedy for PIA disputes via the PIA Compliance Board ("Board"), a five-member volunteer Board whose members are nominated by stakeholder organizations, such as the press, open government advocacy communities, MACO and MML.

Unlike the Ombudsman program, the Board was given decisional authority, but ultimately under 2015's H.B. 755/S.B. 695 as enacted, its jurisdiction was limited to a tiny fraction of actual PIA disputes, namely, PIA fee disputes over \$350.¹ This configuration of the two existing extra-judicial PIA dispute resolution programs has resulted in a Board that is severely under-utilized and of no value in resolving more difficult and protracted disputes such as those involving denials of access to public records, denials of fee waiver requests, and other disputes that are central to the proper implementation of the PIA. While the Ombudsman has broad authority to try to mediate all of these types of disputes, she has no ability to decide or compel any action, and in too many cases, simply is unable to even induce parties to engage with the mediation process in a meaningful way.

H.B. 183 addresses these defects by restoring to the Board the full plenary jurisdiction that was envisioned when it was originally proposed in 2015. One difference is that, under H.B. 183, in order to proceed to Board review, the complaining party must first attempt to mediate the dispute through the Ombudsman, who must then certify that following good faith efforts to mediate, specific issues remain unresolved.

In 2019 and again in 2020, the Office of the Ombudsman performed a detailed review of the Ombudsman's caseload in order to determine the number of disputes, and their level of complexity, that are likely to be in need of a Board remedy.² The data is highly consistent: whether examined on an annual or "since inception" basis, approximately a quarter of the Ombudsman's caseload—or some 50 new matters—are likely to go to the Board for review and decision each year. Additionally, based on our knowledge of the issues present in these matters, we believe that about half of the new matters going to the Board will be subject to summary disposition, with the other half likely to involve some additional work such as research and/or review of additional documentation, for example, record indices or descriptions of privileged records. Based on this evaluation, we believe that the full Board remedy provided by H.B. 183 can be implemented with the addition of two new staff, one of whom would be an attorney and the other, an administrator or paralegal.³

¹ Prior to the changes enacted in 2015, requestors denied access to records by certain State agencies had the ability to challenge those denials administratively through the Office of Administrative Hearings ("OAH"). While H.B. 755 / S.B. 695 originally provided the Board with plenary jurisdiction to decide PIA disputes, the bill was amended to limit the Board's jurisdiction to fee disputes over \$350. Consistent with the original proposed full Board jurisdiction, the bill also eliminated the jurisdiction of OAH to decide PIA disputes. When the bill was amended to provide for the Board's current very limited jurisdiction, the authority of OAH was not reinstated. This history and its impact on dispute resolution under the PIA is described in a 2019 report jointly authored by the Board and Ombudsman. See *Final Report on the Public Information Act* at 9-17 (Dec. 27, 2019), <https://news.maryland.gov/mpiaombuds/wp-content/uploads/sites/20/2019/12/Final-Report-on-the-PIA-12.27.19.pdf>.

² For more details about the case review conducted for all matters handled by the Ombudsman from the start of the program in March 2016 through September 30, 2019 (42 months), please see *Final Report on the Public Information Act* at 13-17. In preparation for submitting this testimony concerning H.B. 183, a similar case review was performed for all matters handled by the Ombudsman from September 30, 2019 through December 31, 2020 (15 months). Thus, our caseload projections and staffing needs assessment are based on a detailed review of specific matters handled by the Ombudsman over 57 months. As further background for the Committee, the Ombudsman's statistical report for 2020, as well as since the start of the program in 2016 are attached to this testimony.

³ The Board and Ombudsman currently are supported by two staff of the Office of Attorney General ("OAG"), an Administrator and Assistant Attorney General. Thus, the provision in H.B. 183—§ 4-1A-03(d)(2)—that calls

If H.B. 183 is enacted, the full Board remedy it provides will maximize the efficiency and effectiveness of the current Ombudsman program and significantly reduce the number of unresolved public record disputes and the resulting frustrations, suspicions and other negative fallout of unresolved, protracted and proliferating disputes with agencies that erode trust in government and sap the productivity and morale of agency staff.

B. Need for Proactive Disclosure of Public Records

H.B. 183 directs agencies to develop practical policies that they can implement to proactively disclose—for example, via a website or other media—their public records in advance of receiving an actual PIA request. Many agencies do this to some degree already. The bill directs that policies be developed at the agency level to implement proactive disclosure to the extent practicable, taking into account the type of records maintained by the agency. Doing so will reduce agency workload by relieving staff of the need to separately answer many routine record requests and will afford requestors greater ease of access to many important agency records.

C. Need for Agency Tracking and Self-Reporting of PIA Data

H.B. 183 also calls for agencies to track and report annually certain basic data about PIA requests and the dispositions of those requests. This tracking and reporting can be done via something as simple as an Excel spreadsheet and/or by maintaining the data and report in any manner that is convenient to the agency and also ensures that the tracking data is either proactively disclosed or readily available on request. Most agencies with any sizeable caseload already do some PIA tracking, and those with a *de minimis* caseload can readily implement such tracking on a going forward basis.⁴ Tracking and annual reporting of PIA data will have several important benefits that cannot be reliably achieved by any other means: 1) it will provide data on agency PIA performance and compliance on a regular and systematic basis; 2) it will assist agencies in spotting areas for improvement and staff training; and 3) it will allow agencies to make a data-based case for the provision of more resources that might be needed to adequately and timely respond to PIA requests.

Conclusion

Right now, there is a pressing need to restore peoples' trust and faith in their government. Allowing people to see and better understand what their government is doing will go a long way toward restoration of trust and faith. The provisions of H.B. 183 will play a critical and much needed role in insuring that the promise of the PIA is actually fulfilled and functions properly. I thank the Committee for its consideration of this testimony in support of H.B. 183 and look forward to addressing any questions Committee members may have. For all of the reasons discussed above, I ask that the Committee issue a favorable report on H.B. 183.

Respectfully Submitted,



Public Access Ombudsman

footnote continued. for the Board and Ombudsman to be supported by a total of four staff of the OAG, actually provides for the hiring of only two new additional staff.

⁴ *Final Report on the Public Information Act* at 32-33.

MARYLAND PUBLIC INFORMATION ACT (PIA)

The public's right to information about government activities lies at the heart of democracy.

Metrics Handout Office of the Public Access Ombudsman

Since Inception Report
March 30, 2016—December 31, 2020



57 Months
Since
Inception

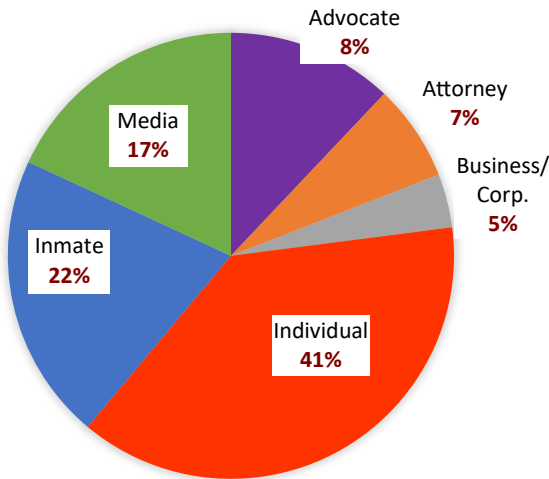
1887 since March 30, 2016

- ◆ 1153 - Mediation requests
- ◆ 734+ - Other / "help-desk" inquiries

The Big Picture: Mediation Matters!

Early resolution of disputes saves time and resources and increases public knowledge and awareness of the PIA process. Mediation is entirely voluntary, confidential, and in many cases doesn't require an attorney.

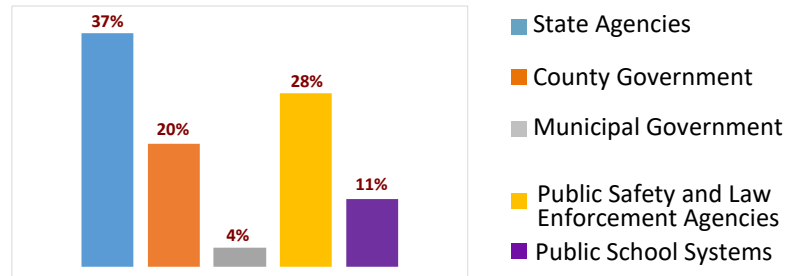
The Requestors



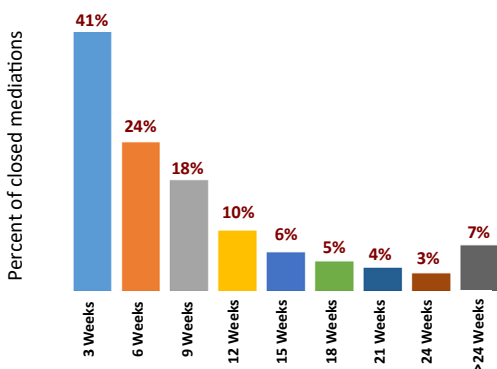
The Agencies

281 unique agencies participated in mediation matters with the PIA Ombudsman since the beginning of the program. Agency jurisdictions are state, county and local level.

What Agencies are Participating in Mediation?

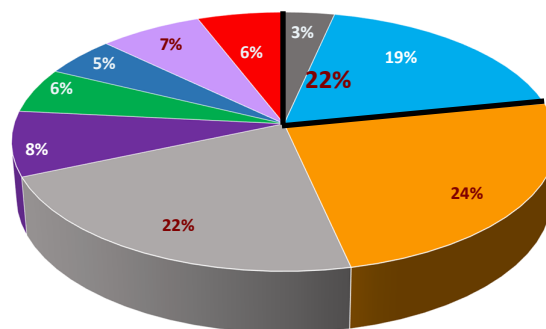


How Long does Mediation Take?



41% of Ombudsman matters are closed within 3 weeks and 65% by 6 weeks.

What are the PIA disputes?



Disputes are presented as framed by the requestor. Characterizations are based on how the requestors describe the issues. These are not findings.

Mediations March 30, 2016 – December 31, 2020	
New/Incoming cases between 3/30/16–12/31/20	1153
Closed as of 12/31/20	1071

- Misapplication of exemption 22%
- Redaction inappropriate 3%
- Entire Record withheld 19%
- No Response in any form 24%
- Partial, nonresponsive, or incomplete response 22%
- Fees excessive 8%
- Fee waiver denied or ignored 6%
- Does not believe response 5%
- Asked for explanation of response 7%
- Other 6%

Lisa Kershner

200 St. Paul Place,
25th Floor
Baltimore, MD 21202

Phone: 410-576-6560
Email: pia.ombuds@oag.state.md.us
Twitter: @MPIA_Ombuds

Ombudsman's Website:

<http://piaombuds.maryland.gov>

MARYLAND PUBLIC INFORMATION ACT (PIA)
The public's right to information about government activities lies at the heart of a democratic government.

Mediation Metric Report of the Public Access Ombudsman

2020 Annual Report—12 Months
 January to December 31, 2020



**2020
 12 Month
 Report**

477 in 2020

- ◆ 250 -Mediation requests
- ◆ 227 -Other/"help-desk" inquiries

The Big Picture: Mediation Matters!

Early resolution of disputes saves time and resources and increases public knowledge and awareness of the PIA process. Mediation is entirely voluntary, confidential, and in many cases doesn't require an attorney.

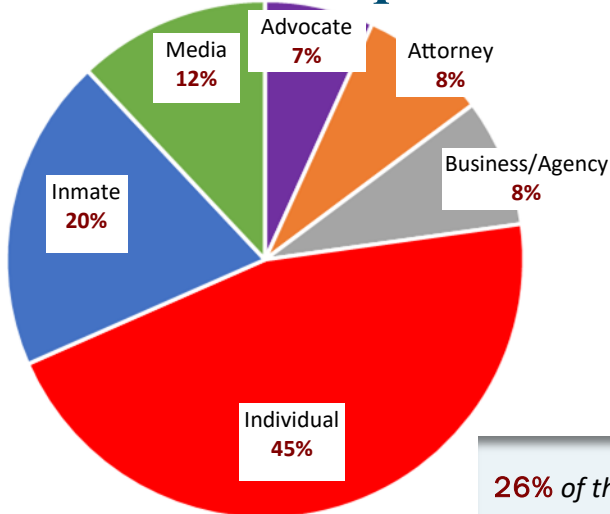
Total Mediation Cases 2020

Carry over from 2019	46
New/Incoming cases in 2020	250
Total Number of Mediation cases	296
Mediation cases currently open	82
Total Mediation cases closed	214

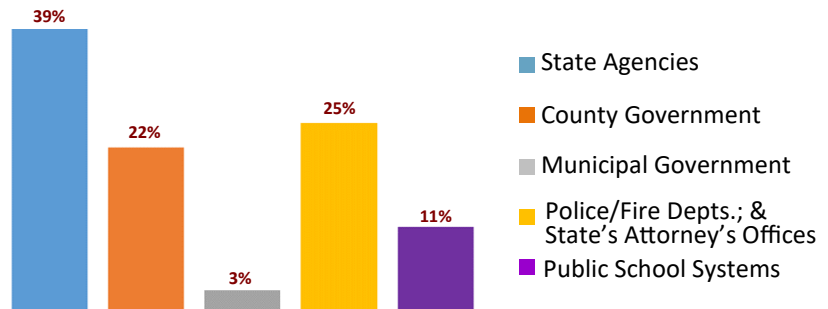
The Agencies

110 unique agencies participated in new mediation matters with the PIA Ombudsman in 2020. Agency jurisdictions include state, county and local level.

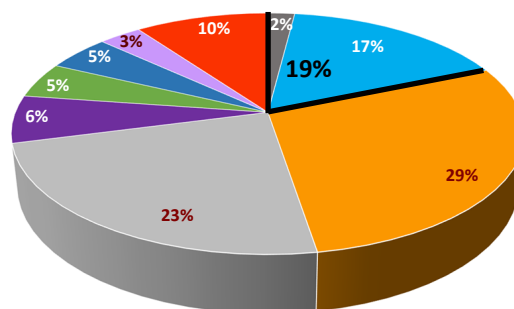
The Requestors



What Agencies are Participating in Mediation?

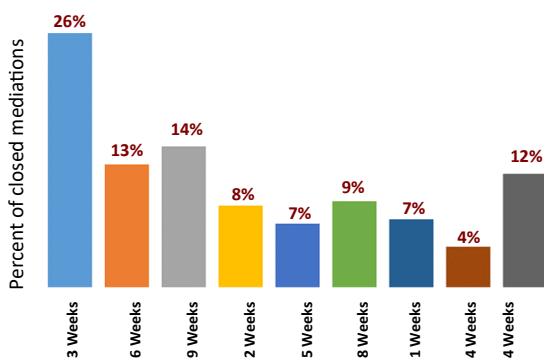


What are the PIA disputes?



Disputes are presented as framed by the requestor. Characterizations are based on how the requestors describe the issues. These are not findings.

How Long does Mediation Take?



26% of the cases are closed within 3 weeks and **39%** by 6 weeks.

Lisa Kershner

200 St. Paul Place,
 25th Floor
 Baltimore, MD 21202

Phone: 410-576-6560
 Email: pia.ombuds@oag.state.md.us
 Twitter: @MPIA_Ombuds

Ombudsman's Website:

<http://piaombuds.maryland.gov>

**MPIA Ombudsman
on Twitter**
@MPIA_Ombuds

2020 Legislative Session

Multiple bills were introduced during the 2020 Legislative session that would have impacted the PIA. The session was terminated early due to COVID-19 State of Emergency. None of the PIA legislation was passed including HB 502/SB590, which was based on the recommendations of the Public Access Ombudsman and PIA Compliance Board in its *2019 Report on the PIA* published December 27, 2019.

Open Matters: Blog of the Public Access Ombudsman

- **Discretionary Exemptions Series: Investigative Records.** Open Matters Blog, posted 12/28/20
- **New Court Rules Govern Access to Judicial Records .** Open Matters Blog, posted 7/30/20
- **What Criminal Records Can I Get Under the PIA?** Open Matters Blog, posted 07/09/20
- **Update on Agency PIA Practices during the Pandemic.** Open Matters Blog, posted 5/28/20
- **Importance of Accurate PIA Custodian Contact Information.** Open Matters Blog, posted 4/06/20
- **Ombudsman's PIA Guidance During COVID-19 State of Emergency.** Open Matters Blog, posted 3/23/20
- **Ombudsman and members of the PIA Compliance Board unanimously support HB 502/SB590.** Open Matters Blog, posted 2/14/20
- **MSA – Records Management and the Public Information Act.** Open Matters Blog, posted 1/7/20

Outreach 2020

Presentations, Workshops, Trainings, and Other Outreach

Due to the COVID-19 State of Emergency the Public Access Ombudsman's Office canceled three scheduled trainings in the second quarter of 2020.

- Health and Government Operations Committee, Testimony HB502, February 11.
- Education, Health, and Environmental Affairs Committee, Testimony SB590. February 13.
- PIACB Annual Meeting Presentation, Ombudsman's Report, July 29.
- Maryland Municipal League, Academy for Excellence in Local Government, October 9.
- Government Operations and Health Facilities Subcommittee, Open Government Briefing, October 28.
- Carroll County Sheriff's Office, PIA 101 for Law Enforcement, November 17.
- Maryland Association of Counties, Winter Conference, December 16.

Select Publications

Publications can be found on the Ombudsman's Website at <https://news.maryland.gov/mpiaombuds/paoresources/>.

- **Ombudsman comments**, included as an Appendix to the 2020 Annual Report of the PIA Compliance Board. September 2020
- Testimony of the Ombudsman and PIA Compliance Board submitted to the House Health and Government Operations Committee concerning 2020 HB 502. February 2020
- **Final Report on the Public Information Act.** Submitted by the PIA Compliance Board and the Public Access Ombudsman and pursuant to Committee Narrative in the Report on the Fiscal 2020 State Operating Budget and the State Capital Budget. December 27, 2019
- **Public Access Ombudsman's Interpretive Regulations:** <https://tinyurl.com/y2cuqp55>, June 2019
- **HB 1105 Report:** *Ombudsman's Report Concerning the Howard County Public School System's Handling of Requests Under the Public Information Act.* December 30, 2016

RESOURCES/LINKS

- ♦ **MD Office of the Attorney General—PIA Manual 15th Edition (2020):** http://www.marylandattorneygeneral.gov/OpenGov%20Documents/PIA_manual_printable.pdf
The PIA Manual includes Appendix J a List of Public Record Custodians.
- ♦ **MD State Archives:** <http://msa.maryland.gov> is a resource for custodians' record management and retention practices.
- ♦ **Office of Government Information Services (OGIS – FOIA)** <https://www.archives.gov/ogis>
- ♦ **Federal FOIA (Freedom of Information Act)** : <https://www.foia.gov/>
- ♦ **PUBLIC ACCESS OMBUDSMAN**
 - * **Request for Mediation Form:** <https://news.maryland.gov/mpiaombuds/request-mediation>
 - * **Interpretive Regulations:** <https://tinyurl.com/y2cuqp55>
- ♦ **DC Office of Open Government:** <https://www.open-dc.gov/office-open-government>

