

ANTHONY G. BROWN
Attorney General



CANDACE MCLAREN LANHAM
Chief of Staff

CAROLYN A. QUATTROCKI
Deputy Attorney General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

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410-576-6327

March 30, 2023

To: The Honorable Brian J. Feldman
Chair, Senate Education, Energy, and the Environment Committee

From: Office of the Attorney General

Re: HB 1051 Public Information Act - Decisions of the State Public Information Act
Compliance Board - Appeals (SUPPORT)

The Office of the Attorney General (“OAG”) is committed to the principles of open access to public records and to promoting a consistent application of the Public Information Act (“PIA”) throughout the State. Indeed, OAG has long worked toward ensuring the correct implementation of the PIA through, among other things, publication of its Public Information Act Manual.

The purpose of this bill is to clarify two questions about the appeal of decisions of the State Public Information Compliance Board (“PIACB”) that have arisen after the PIACB’s jurisdiction was expanded in 2021. *See* 2021 Md. Laws, ch. 658. The PIACB is an independent board that resolves certain kinds of disputes that arise under the PIA. Although the PIACB was at first limited to deciding disputes about the reasonableness of fees charged under the PIA, it was recently given broader jurisdiction to decide other categories of disputes, including disputes over whether records are subject to, or protected from, disclosure under the PIA as well as disputes over whether a PIA request was frivolous, vexatious, or in bad faith.

The first change proposed by the bill is to clarify that, when a decision by the State Public Information Act Compliance Board (“PIACB”) is appealed to a circuit court for judicial review, the circuit court’s decision can be further appealed to Maryland’s appellate courts. In cases where the PIACB has jurisdiction, it issues a written decision that can then ordinarily be appealed to circuit court. *See* Md. Code Ann., Gen. Prov. §§ 4-1A-07 through 4-1A-10; *see also* Gen. Prov. § 4-362(a)(2). There is ambiguity, however, about whether the decision by a circuit court on judicial review can be further appealed by the losing party in circuit court to Maryland’s appellate courts. Under the Administrative Procedure Act (“APA”), similar types of decisions by State administrative agencies in so-called contested cases can ordinarily be appealed to circuit court, Md. Code Ann., State Gov’t § 10-222, and then the circuit court’s ruling can usually be further appealed to the appellate courts, State Gov’t § 10-223. But decisions by the PIACB are not contested cases as defined under the APA, *see* Gen. Prov. § 4-1A-07(b)(3), meaning that it is unclear whether a circuit court’s decision on judicial review can be further appealed or whether

the circuit courts will have the last word in these PIA cases. *See* Md. Code Ann., Courts & Jud. Proc. § 12-302(a) (“Unless a right to appeal is expressly granted by law, § 12-301 of this subtitle does not permit an appeal from a final judgment of a court entered or made in the exercise of appellate jurisdiction in reviewing the decision of the District Court, an administrative agency, or a local legislative body.”); *Mayor & City Council of Baltimore v. ProVen Mgmt., Inc.*, 472 Md. 642 (2021) (summarizing the complicated law as to whether, absent specific statutory authority, a circuit court decision on review of an administrative agency decision can be further appealed to the appellate courts).

In our Office’s view, there are at least two problems caused by the possibility that circuit court decisions might serve as the final word in these PIA cases. First, a custodian could be forced to disclose a document (or a requester could be denied access to a document) even though the appellate courts, if they’d been given an opportunity to weigh in, would have decided the issue differently. Questions about the scope and meaning of the PIA, like questions that arise in contested cases under the APA, are important enough that the appellate courts should have an opportunity to serve as the final decision-maker. Second, the lack of an ability to appeal the circuit court’s decision to the appellate courts is likely going to lead to confusion, in some cases, about how to apply the provisions of the PIA that were the subject of the PIACB’s decision. Because circuit court judges are not bound to follow the decisions of other circuit court judges, it is likely that different circuit court judges across the State will come to differing conclusions on the interpretation of some of the PIA provisions that come before the PIACB. When that happens, if there’s no ability to appeal the circuit court’s ruling to the appellate courts, custodians across the State will be put between a rock and a hard place, as they won’t know which circuit court decision to follow in responding to future PIA requests. Therefore, this clarifying change is important to ensure consistent interpretation and application of the PIA across the State.

The second change proposed by the bill, as amended in the House of Delegates, was suggested by the Public Access Ombudsman and clarifies that a PIA requester (known under the PIA as an “applicant”) can appeal to the circuit court a decision by the PIACB finding that the requester’s request was frivolous, vexatious, or in bad faith. Right now, the statute only provides a right of appeal to the “complainant” or the “custodian.” GP § 4-362(a)(2). That made sense before the 2021 bill that expanded the PIACB’s jurisdiction because, before that time, the requester was always the complainant, so the statute provided an equal right of appeal to requesters and custodians alike. But when the statute was changed to allow a custodian to be the “complainant” in one specific situation—when alleging that a request is frivolous, vexatious, or in bad faith under GP § 4-1A-04(b)—it raised questions about whether the requester would be able to appeal a decision in that type of dispute, as the requester is neither the complainant nor the custodian in that one limited circumstance. Thus, the bill as amended makes clear that an “applicant” (i.e., the requester) may appeal a PIACB decision to circuit court, even when the “applicant” is not the “complainant.”

For these reasons, we urge a favorable report on this bill.

cc: Members of the Energy, Education, and the Environment Committee