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POSITION ON PROPOSED LEGISLATION

BILL: SB296-Public Information Act - Public Access Ombudsman - Delegation of Powers

FROM: Maryland Office of the Public Defender

POSITION: Favorable

DATE: 2/4/2025

The Maryland Office of the Public Defender respectfully requests that the Committee issue a favorable report on SB296.

For these reasons, the Maryland Office of the Public Defender urges this Committee to issue a favorable report on SB296.

Delays during the Mediation Process with the Public Access Ombudsman

Our experience with the mediation process facilitated by the Office of the Public Access Ombudsman has been consistently characterized by fairness and thoroughness. The Ombudsman demonstrates a commitment to ensuring a comprehensive review of each case, which is commendable. However, it is important to note that the office's substantial caseload has led to significant delays in processing. As a result, the duration of the process has been slower than anticipated and slower than is fair to the individuals being forced to wait for justice. Many of our clients are facing pending hearing dates, and, regrettably, the prospect of engaging in a mediation process that spans three to four months is no longer a feasible option for them. This lengthy timeline presents significant challenges, especially given the urgency of resolving these matters in a timely manner. Our hope is that additional personnel will enable the Ombudsman to speed up the process thereby making it a more viable option for our office and our clients.

Since July 1, 2022, all complaints under the Maryland Public Information Act (MPIA) have been required to undergo mediation through the Ombudsman's office prior to being submitted to the Public Information Act Compliance Board. This legislative change has, without question, resulted in a significant increase in the volume of mediation requests filed with the Ombudsman's office. The mandated mediation process aims to facilitate the resolution of disputes before formal complaints are escalated to the Compliance Board, which, while beneficial in promoting early resolution, has undoubtedly contributed to a substantial rise in case filings, placing additional strain on the Ombudsman's office resources.

In certain instances, this procedural requirement presents an unnecessary obstacle and contributes to congestion in the Ombudsman's schedule. For example, our office is currently involved in an ongoing MPIA matter with an agency that routinely issues blanket denials in response to our requests. In 2023, after receiving one such denial, we pursued the mediation process and successfully resolved one specific issue. Despite the resolution, our subsequent MPIA requests on behalf of other clients have been denied using the same generalized reasoning. Unfortunately, the continued recurrence of this issue with the agency renders it both daunting and impractical to pursue the mediation process for each and every MPIA request. The need for a more efficient and effective resolution to these recurring issues is critical, as the current process is overly burdensome and constitutes a waste of valuable resources.

Pursuant to GP § 4-362, a party may seek judicial review by filing an action in circuit court. In some instances when the mediation process proves to be unduly lengthy or ineffective in resolving a dispute regarding public records access, the Maryland Office of the Public Defender has filed an action in the Court. While judicial review serves as an essential mechanism for ensuring compliance with the Maryland Public Information Act, the necessity of resorting to

litigation places additional burdens on both the courts and the parties involved. Increasing resources allocated to the Ombudsman's Office could help streamline the mediation process, reducing delays and facilitating more efficient resolutions. Strengthening the Ombudsman's office would not only expedite resolutions for requesters but also alleviate the burden on the courts, promoting a more efficient and accessible process for addressing public records disputes.

Obstacles to Maryland Public Information Act Requests

a. Delays

In response to our MPIA requests, we frequently encounter instances of noncompliance and, at times, a blatant disregard for the custodial obligations as outlined in the Maryland Public Information Act. Despite the clear requirements established by the Act, many custodians fail to fulfill their responsibilities in a timely and transparent manner, hindering the proper functioning of the law. This consistent lack of adherence not only undermines the intent of the MPIA but also creates unnecessary delays and obstacles in accessing public records, which ultimately impedes the efficiency of public information requests and frustrates the principle of transparency.

The Maryland Public Information Act spells out specific timelines for the Custodial agency to comply with:

1. Once an application is submitted to an agency, the custodian shall grant or deny it within 30 days or less of receiving the application. GP § 4-203(a)(1)
2. If a custodian reasonably believes that it will take more than 10 working days to produce the public record, the custodian shall indicate in writing or by electronic mail within 10 working

days after receipt of the request: the estimated time of completion, the estimated range of fees, and the reason for the delay. GP § 4-203(b)(2)

3. Any time limit imposed under this section, with the consent of the applicant, may be extended for not more than 30 days. GP § 4-203(d)(1)

We frequently encounter agencies that fail to respond to our requests within the 10 working days mandated by the Maryland Public Information Act (MPIA). This lack of timely response undermines the efficiency and transparency intended by the Act and significantly delays the process of obtaining public records. More problematic, we often face situations where agencies take months, and in some cases, over a year, to fulfill our record requests. It is not uncommon for our follow-up emails seeking updates to go unanswered or to receive delayed responses. Many agencies cite staffing shortages as the primary reason for these delays, but the ongoing lack of responsiveness severely impedes the timely access to public information.

The MPIA Manual acknowledges that if an agency is making a “good faith” effort to process a request, a reviewing court may not consider such delays as a knowing and willful violation of the Act. Specifically, the MPIA Manual (p.4-4) states: “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.” While this provision offers some flexibility for agencies, it also creates a broad interpretation of what constitutes a “good faith” effort, leaving room for further delays without significant consequences. Unfortunately, despite the provisions of the MPIA, the Act often appears to lack sufficient enforcement mechanisms, rendering it ineffective in ensuring timely compliance. As a result, both we and our clients find ourselves at the mercy of the

custodian's discretion, with little recourse when delays persist or agencies fail to meet their legal obligations.

b. High fees

A significant challenge our office encounters when submitting Maryland Public Information Act (MPIA) requests is the excessively high fees imposed by various agencies. Under GP § 4-206, an official custodian may charge reasonable fees for the “actual costs” for the search and preparation of records for inspection and copying. In 2024 alone, our division submitted over 70 MPIA requests to multiple State's Attorney's Offices and law enforcement agencies. In response to these requests, we frequently receive fee estimates that exceed several hundred dollars. When requesting body-worn camera footage from certain law enforcement agencies, the quoted fees can be particularly prohibitive, sometimes reaching several thousand dollars. Unfortunately, our division routinely is forced to abandon MPIA requests when charged high fees.

For example, in response to a request for internal affairs disciplinary records concerning a law enforcement officer at a Sheriff's Office, our office was presented with a prepayment request of \$3,000 and an estimated total fee ranging from \$4,500 to \$5,500. The agency cited an estimated 70 hours of work to fulfill the request, which included 200 pages of records and approximately eleven hours of audio and video recordings. Due to the excessive cost, our office was compelled to withdraw the request. The prohibitive nature of these fees significantly hampers transparency and public access to information. As a result, our division is often forced to rescind MPIA requests due to financial constraints.

Pursuant to the Maryland Public Information Act (MPIA), the official custodian has the discretion to waive any fee or cost associated with an MPIA request if the applicant requests a waiver and either demonstrates indigency or if the custodian determines that granting the waiver would serve the public interest (§ 4-206(e)). Our office submits MPIA requests on behalf of clients who are indigent, and in each request, we explicitly cite their indigent status and formally request a fee exemption. However, despite our consistent efforts, we have only been granted a fee waiver on a single occasion during my three years in this role at the Office of the Public Defender.

In a 2023 opinion, the Maryland Public Information Act Compliance Board (PIACB) acknowledged the significant barriers posed by fees, particularly for indigent requesters. The Board stated:

"At the same time, in circumstances such as these, where an indigent requester's access to public records is hindered by the imposition of even modest fees, we encourage custodians to grant indigency-based fee waivers when properly requested under § 4-206(e). As one scholar has explained, the purpose of open records laws, 'to provide citizens with access to government records, supports granting fee waivers to indigent [people] because, whereas denying a non-indigent [person's] fee-waiver request merely determines that [they] will bear the cost of access to agency records, denying an indigent [person's] fee-waiver request determines that [they] will have no access to the agency records at all.'"

— John E. Bonine, *Public-Interest Fee Waivers Under the Freedom of Information Act*, 1981 Duke L.J. 213, 260 (1981); PIACB23_025 p. 6.

The infrequent granting of fee waivers poses a significant obstacle to ensuring equal access to public records, particularly for indigent individuals who rely on such information to protect their rights. Despite statutory provisions permitting waivers, the practical application of these provisions remains inconsistent, effectively undermining the intended purpose of the MPIA and restricting transparency for those most in need.

c. Required documentation

Lastly, some law enforcement agencies have recently implemented additional documentation requirements in response to our MPIA requests. These requirements often include, but are not limited to, our client's photo identification and agency-specific forms signed by our clients. The agencies assert that these documents are necessary to establish proof of legal representation. In an effort to comply, we offered to provide Notices of Appearance by Defense Counsel that have been formally filed in Maryland Courts, but were informed that this would not suffice to meet the agency's stipulations.

This additional documentation requirement presents a significant burden on our office. The process of obtaining the requested materials from our clients—such as photo identification and completed forms—often takes at least four weeks, if not longer, due to the time required for mailing and receiving the documents. The delays involved in this process are not only time-consuming but also impede the timely resolution of our clients' cases. Given the extended timeframe required to fulfill these requirements, the overall efficiency of the MPIA request process is severely compromised, placing undue strain on both our office and the clients we serve.

Submitted by: Maryland Office of the Public Defender, Government Relations Division.

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