

House Health and Government Operations Committee

Delegate Joseline Peña–Melnyk, Chairman

January 19, 2023, 1:00 p.m.
Room 240, House Office Building, Annapolis

AGENDA

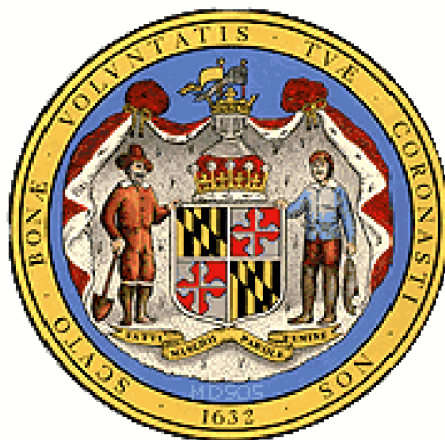
I. Overview of Maryland Transparency Laws

- Rachel Simmons, Assistant Attorney General, Open Meetings Compliance Board (presenting remotely)
- Lisa Kershner, Public Access Ombudsman (presenting remotely)
- Sara Klemm, Assistant Attorney General, Public Information Act Compliance Board (presenting remotely)

II. Overview of the Maryland Commission on Civil Rights

- Glendora C. Hughes, General Counsel, Maryland Commission on Civil Rights
- Cleveland L. Horton, Deputy Director, Maryland Commission on Civil Rights

THIRTIETH ANNUAL REPORT
OF THE
OPEN MEETINGS COMPLIANCE BOARD



BOARD MEMBERS

LYNN M. MARSHALL, ESQ., CHAIR
JACOB ALTSHULER, ESQ.

SEPTEMBER 2022

**THIRTIETH ANNUAL REPORT
OF THE
OPEN MEETINGS COMPLIANCE BOARD**

The Open Meetings Compliance Board submits this annual report for the period running from July 1, 2021, through June 30, 2022 (“FY 2022”), in accordance with § 3-204(e) of the General Provisions Article (“GP”). In this report, we discuss our activities and the opinions we issued this year, the number and nature of the complaints we received (highlighting those that alleged a failure to provide reasonable notice of a meeting), and the types of violations we found. We also provide summaries of our opinions, identifying each public body that violated a provision of the Open Meetings Act (the “Act”), and describe open meetings legislation that the General Assembly proposed and adopted during the 2022 legislative session.

INTRODUCTION

As detailed below, the Compliance Board’s primary function is to issue advisory opinions in response to complaints that public bodies have violated the Act. The Compliance Board also recommends improvements to the Act when needed. An additional function, in conjunction with the Office of the Attorney General, is conducting educational programs for the staffs and attorneys of public bodies, the Maryland Municipal League, the Maryland Association of Counties, and the Maryland Association of Boards of Education. GP § 3-204.

The Compliance Board was established as an independent State board of three members who are appointed by the Governor and serve without compensation. At least one member must be an attorney admitted to the Maryland bar. The Compliance Board currently has two members, Jacob Altshuler and Chair Lynn M. Marshall, both of whom are attorneys. The third seat on the Compliance Board is vacant.

The Compliance Board has no budget and no staff of its own. The Office of the Attorney General provides counsel and administrative support, as required by statute, and posts the Compliance Board’s opinions on the Open Meetings webpage of the Attorney General’s website. However, the Compliance Board is an independent body and is not a part of the Office of the Attorney General.

**I.
ACTIVITIES OF THE BOARD**

A. Complaint Statistics

1. Complaints received and opinions issued

From July 1, 2021, to June 30, 2022, we received **fifty-seven** written complaints—twenty-one more than last year—concerning **ninety-five** separate entities.¹ **One** complaint

¹ For this tally, we count a parent body and its related subcommittees as one entity. One complaint—alleging violations by sixty separate bodies—accounts for the majority of the ninety-five-entity count.

was withdrawn. **Three** complaints will carry over to the next fiscal year. No complaints involved allegations of prospective violations. *See* GP § 3-212 (setting forth the process for a complaint alleging that a future meeting, required to be open under the Act, will be closed).

This fiscal year, we issued **forty-eight** opinions, eighteen more than last year. **Six** opinions involved the consolidation of two or more complaints. **Five** opinions involved complaints that were filed the previous year. **One** opinion involved the reconsideration of an earlier opinion. In **twenty-five** opinions, we found violations, in varying degrees of seriousness, by **twenty** separate public bodies. In **thirteen** opinions, we found no violation. In **ten** opinions, we lacked sufficient information to determine whether a violation had occurred.

Several bodies drew multiple complaints, though not all of these complaints resulted in a finding of a violation. The Montgomery County Board of Education was the subject of four Compliance Board opinions (one of which resolved a complaint received the prior fiscal year). Baltimore Children and Youth Fund, Inc., the Board of Education of Carroll County, the Mayor and Council of Brunswick, the Mayor and Council of the Town of Fairmount Heights, and the Talbot Family Network were each the subject of two Compliance Board opinions. The Frederick County Council was the subject of two complaints and one request to reconsider an earlier opinion.

The complaint docket was as follows:

Docketed Complaints from FY 2021, pending on July 1, 2021:	5
Complaints of violations, received during FY 2022	57
Total complaints on the docket for FY 2022:	62
Complaints consolidated	16 to 6
Complaints dismissed without an opinion	0
Complaints withdrawn	1
Total matters to address:.....	51
Opinions issued in FY 2022:	48
Complaints still pending on July 1, 2022:	3

2. The provisions violated

We issued twenty-five opinions in which we found violations of one or more provisions of the Act. Last year, we issued nineteen opinions finding one or more violations.

In FY 2022, complainants in nineteen matters alleged violations of GP § 3-302, which requires reasonable notice of a meeting or its cancellation. We found violations in eleven cases. We provide more details below in Section I.B, beginning on page 5.

The other most common types of violations involved failures to satisfy the Act's requirements related to minutes, the procedure for closing a meeting to the public, and the general obligation (absent exceptions spelled out in the law) to conduct public business in meetings open to all members of the public who wish to observe.

In eighteen opinions we found violations of the Act's requirements relating to minutes.² *See* GP § 3-306. In nine of those opinions, we found a violation of the requirement to prepare minutes as soon as practicable after a meeting.³ In eleven opinions, we found a failure to provide sufficiently detailed closed session summaries in the minutes.⁴ In three opinions, we found a failure to keep adequately detailed closed session minutes,⁵ and in four opinions, we found a failure to post minutes online to the extent practicable.⁶

In thirteen opinions, we found a failure to satisfy the Act's procedural requirements for closing a meeting to the public. *See* GP § 3-305(d). The violations included failures to prepare a written statement before entering closed session,⁷ failures to provide enough details in a written closing statement,⁸ and failures to permit the public to object to a public body's vote to enter closed sessions.⁹

In eleven opinions we found that a public body was required—but failed—to conduct a meeting open to all members of the public who wanted to observe. *See* GP § 3-

² Among those eighteen cases we include one in which we found a *likely* violation of the requirement to prepare minutes as soon as practicable after a meeting. In that case, 15 *OMCB Opinions* 107 (2021), we determined that a parent body's committees were also public bodies subject to the Act, and that the committees had likely violated, among other provisions, the requirement to timely prepare minutes, as the committees were operating under the mistaken belief that they were not public bodies.

³ *See* 15 *OMCB Opinions* 107 (2021), 15 *OMCB Opinions* 113 (2021), 15 *OMCB Opinions* 123 (2021), 15 *OMCB Opinions* 144 (2021), 15 *OMCB Opinions* 184 (2021), 16 *OMCB Opinions* 1 (2022), 16 *OMCB Opinions* 69 (2022), 16 *OMCB Opinions* 110 (2022), 16 *OMCB Opinions* 129 (2022).

⁴ *See* 15 *OMCB Opinions* 99 (2021), 15 *OMCB Opinions* 123 (2021), 15 *OMCB Opinions* 156 (2021), 15 *OMCB Opinions* 174 (2021), 16 *OMCB Opinions* 12 (2022), 16 *OMCB Opinions* 30 (2022), 16 *OMCB Opinions* 81 (2022), 16 *OMCB Opinions* 97 (2022), 16 *OMCB Opinions* 110 (2022), 16 *OMCB Opinions* 123 (2022), 16 *OMCB Opinions* 129 (2022).

⁵ *See* 15 *OMCB Opinions* 156 (2021), 15 *OMCB Opinions* 174 (2021), 15 *OMCB Opinions* 184 (2021).

⁶ *See* 15 *OMCB Opinions* 113 (2021), 15 *OMCB Opinions* 174 (2021), 16 *OMCB Opinions* 30 (2022), 16 *OMCB Opinions* 129 (2022).

⁷ *See* 15 *OMCB Opinions* 156 (2021), 15 *OMCB Opinions* 144 (2021), 16 *OMCB Opinions* 144 (2022).

⁸ *See* 15 *OMCB Opinions* 99 (2021), 15 *OMCB Opinions* 156 (2021), 15 *OMCB Opinions* 174 (2021), 15 *OMCB Opinions* 184 (2021), 16 *OMCB Opinions* 30 (2022), 16 *OMCB Opinions* 81 (2022), 16 *OMCB Opinions* 97 (2022), 16 *OMCB Opinions* 123 (2022), 16 *OMCB Opinions* 144 (2022).

⁹ *See* 16 *OMCB Opinions* 12 (2022), 15 *OMCB Opinions* 123 (2021), 15 *OMCB Opinions* 136 (2021), 16 *OMCB Opinions* 81 (2022).

301 (providing, generally, that “a public body shall meet in open session”).¹⁰ In five of those opinions, a public body misapplied an exception in GP § 3-305(b) and improperly convened a closed session to discuss a topic that should have been discussed in an open session.¹¹ In four opinions, we found that the body had effectively closed meetings to the public by failing to make clear in the meeting notices that the body would convene in open session before entering closed session.¹² In another opinion, a public body violated the openness requirement by failing to provide an overflow room or livestream of a meeting that took place in a room that could not accommodate all members of the public who wished to observe. 15 *OMCB Opinions* 85 (2021). In yet another opinion, a public body violated the openness requirement by changing the date of a meeting without providing adequate notice to the public. 15 *OMCB Opinions* 113 (2021). In one opinion, we were unable to determine whether a violation of the openness requirement had occurred, because the complainant and the public body disputed the basic facts underlying the complaint. 16 *OMCB Opinions* 108 (2022).

Other violations involved failures to satisfy the Act’s requirements for agendas (GP § 3-302.1),¹³ and a failure to announce prior violations of the Act at an open meeting (GP § 3-211).¹⁴

3. *The complainants*

In FY 2022, forty-two different complainants alleged violations of the Act. These complainants included two companies, an industry association, a neighborhood association, and a union, as well as five current or former government officials. Eight complainants filed two or more complaints each. One individual accounted for ten of the complaints (about one-sixth) that we received in FY 2022.

4. *The entities alleged to have violated the Act*

The complaints that we received in FY 2022 concerned ninety-five different entities.¹⁵ In two opinions, we determined that an entity accused of violating the Act was

¹⁰ This general rule does not apply if the public body meets to carry out an administrative function, GP § 3-103(a)(1)(i), or if the public body satisfies one of fifteen exceptions in GP § 3-305(b) that allow for discussions of certain topics to take place in closed sessions.

¹¹ See 15 *OMCB Opinions* 99 (2021) (involving the misapplication of the personnel matters exception of GP § 3-305(b)(1)), 15 *OMCB Opinions* 174 (2021) (same), 16 *OMCB Opinions* 131 (2022) (same), 15 *OMCB Opinions* 136 (2021) (involving the misapplication of the legal advice exception of GP § 3-305(b)(7)), 16 *OMCB Opinions* 69 (2022) (same).

¹² See 15 *OMCB Opinions* 123 (2021), 15 *OMCB Opinions* 136 (2021), 16 *OMCB Opinions* 12 (2022), 16 *OMCB Opinions* 81 (2022).

¹³ See 15 *OMCB Opinions* 107 (2021), 15 *OMCB Opinions* 174 (2021), 16 *OMCB Opinions* 64 (2022).

¹⁴ See 16 *OMCB Opinions* 101 (2022).

¹⁵ As noted above, we count a parent body and its committees as one entity. A single complaint alleging violations against sixty boards and commissions in one county accounts for the vast majority of the ninety-five-entity count. This complaint was still pending at the close of FY 2022.

not actually a public body subject to the Act's requirements. *See* 16 *OMCB Opinions* 88 (2022) (concluding that the Montgomery County Public Schools COVID-19 Operations Advisory Team is not a public body), 16 *OMCB Opinions* 101 (2022) (concluding that a committee of the Talbot Family Network is not a public body). In two other opinions, we did not conclusively determine whether the entity at issue was a public body but found instead that there had been no "meeting" triggering the Act's provisions. *See* 15 *OMCB Opinions* 79 (2021),¹⁶ 16 *OMCB Opinions* 41 (2022). The other opinions that we issued in FY 2022 involved state agencies, county or municipal boards or commissions, and local school boards. Local legislative bodies were the focus of twenty-one of the forty-eight opinions that we issued in FY 2022; local school boards were the focus of ten opinions.

B. Complaints Involving the Failure to Provide Notice of a Meeting

Pursuant to GP § 3-204(e)(2)(iii), we highlight here, and in the opinion summaries below in Part III, those "complaints that reasonable notice of a meeting was not given." As already noted, *see above* page 2, nineteen matters alleged violations of GP § 3-302, which requires reasonable notice of a meeting or its cancellation. We found violations in eleven cases. The violations involved failures to specify in a meeting notice that a public body would meet in open session before entering a closed session, 15 *OMCB Opinions* 123 (2021), 15 *OMCB Opinions* 136 (2021), 16 *OMCB Opinions* 12 (2022), 16 *OMCB Opinions* 81 (2022); adjourning a meeting and immediately reconvening to discuss public business, without notice to the public, 16 *OMCB Opinions* 64 (2022); omitting some meetings from a calendar of meetings, 16 *OMCB Opinions* 30 (2022); failing to give notice of a meeting by the public body's usual method of providing notice, 16 *OMCB Opinions* 47 (2022); omitting from a notice the details of where a virtual meeting would take place and how the public could observe, 16 *OMCB Opinions* 1 (2022); changing a meeting date without notifying the public, 15 *OMCB Opinions* 113 (2021); and the failure of a parent public body to provide notice before a quorum of the body attended the meeting of a subcommittee and discussed the parent body's business, 15 *OMCB Opinions* 161 (2021). In the eleventh case, we found that committees of a parent public body were themselves public bodies subject to the Act, and that those committees, having operated under the misconception that they were not required to follow the Act, had likely violated several of the Act's provisions, including the notice requirements in GP § 3-302. 15 *OMCB Opinions* 107 (2021).

In seven other matters, complainants alleged a failure to provide adequate advance notice of a meeting, but we found no violation.¹⁷ In one additional case, we could not determine whether the public body had violated GP § 3-302, because it was not clear, based on the limited facts before us, whether the public body had deliberately delayed providing notice of a special meeting. *See* 16 *OMCB Opinions* 55.

¹⁶ The complaint in this matter was received in FY2021 but we issued our opinion in FY2022.

¹⁷ *See* 15 *OMCB Opinions* 168 (2021), 15 *OMCB Opinions* 174 (2022), 16 *OMCB Opinions* 6 (2022), 16 *OMCB Opinions* 22 (2022), 16 *OMCB Opinions* 77 (2022), 16 *OMCB Opinions* 110 (2022), 16 *OMCB Opinions* 123 (2022).

C. Conclusions from the Statistics – Overview of the Year

The issues that we addressed this year are listed in the topic descriptions in the opinion summaries in Part III, below. As we have noted in previous annual reports, one must view our statistics in perspective. The overall number of complaints, and of those in which we found a violation, remains small in proportion to the total number of public bodies statewide. This fiscal year saw a significant increase in the number of opinions we issued (forty-eight), which is eighteen more than the previous year and the most we have issued in a single year since at least Fiscal Year 2013. But much of this increase may be attributable to COVID-19: Many complaints alleged violations of the Act based on practices that public bodies have adopted in light of the pandemic (for example, requiring the public to observe meetings virtually¹⁸ or limiting how many people may attend a meeting in person¹⁹), or alleged violations related to meetings (or alleged meetings) that involved topics of discussion directly related to the pandemic (for example, masking policies²⁰ and other COVID-19 protocols²¹).

In any event, although we issued forty-eight opinions this year, we found violations in twenty-five opinions, a little over half the total number of opinions for FY 2022. Of those opinions involving one or more violations, fewer than half of the opinions (eleven) involved a failure to provide reasonable notice of a meeting. The most common type of violation (found in eighteen opinions) involved some deficiency related to meeting minutes, either the failure to prepare or post them timely, or the failure to provide enough details. Thirteen opinions involved the failure to fully satisfy the Act's procedural requirements for closing a meeting to the public. Eleven involved a violation of the Act's general openness requirements, most often because a public body failed to make clear in its meeting notice that the body would be meeting in open session before entering closed session, or because a public body misapplied an exception in GP § 3-305(b) and discussed a matter in closed session that should have been open to the public.

D. Financial Support and Educational Activities

The Attorney General's Office provides the Board with staff support, posts the Board's opinions and other Open Meetings Act materials on its website, and bears the incidental costs associated with administering the Board's work. The Board could not fulfill its statutory duties without this support, as no funds have ever been specifically appropriated for its operations.

The Institute for Governmental Service and Research at the University of Maryland hosts, maintains, and performs updates to the online class that many public bodies rely on

¹⁸ See 15 *OMCB Opinions* 161 (2021), 15 *OMCB Opinions* 168 (2021), 16 *OMCB Opinions* 1 (2022), 16 *OMCB Opinions* 6 (2022).

¹⁹ See 15 *OMCB Opinions* 85 (2021), 15 *OMCB Opinions* 91 (2021), 16 *OMCB Opinions* 26 (2022).

²⁰ See 15 *OMCB Opinions* 136 (2021), 16 *OMCB Opinions* 88 (2022).

²¹ See 16 *OMCB Opinions* 88 (2022).

to comply with the Act's training requirement. We thank the Institute for its service to the public in creating the online class, in conjunction with the Office of the Attorney General, and in making it continuously available to the general public, currently at no charge to the public for access, and, to date, without charging for its services.²² The Office of the Attorney General and the Institute are currently in the process of updating the online training to reflect changes to the Act that will take effect October 1, 2022. (Those changes are discussed below in Section II.A.).

E. Publication of Opinions Issued During the Fiscal Year

The Board's opinions for the 2022 fiscal year are posted at <http://www.marylandattorneygeneral.gov/Pages/OpenGov/OpenMeetings/index.aspx>, in Volume 15, beginning on page 79, and in Volume 16, pages 1 through 162. The table of contents for each volume lists each opinion, along with the name of the public body and notations of any provisions that we found violated. Summaries appear in Part III of this report.

II. LEGISLATION

A. Legislation proposed or enacted in 2022

The General Assembly adopted several amendments to the Open Meetings Act that will take effect October 1, 2022.

House Bill 246 (2022 Md. Laws, ch. 345) changes the retention periods for notices and closing statements. Currently, public bodies must retain these documents for at least one year, GP §§ 3-302(d), 3-305(d)(5); but come October 1, public bodies will have to retain these documents for at least three years. The new legislation also will require public bodies to post closing statements online “[t]o the extent practicable,” the same standard that already applies to posting minutes online.

Senate Bill 269 (2022 Md. Laws, ch. 346) affects numerous State bodies. The legislation expressly provides that five entities, previously exempt from the Act, will now be subject to its provisions.²³ The legislation also adds a new section to the Act—GP § 3-307—which will apply to seventeen State entities.²⁴ These bodies will be subject to all of

²² The online class is posted at https://www.igsr.umd.edu/VLC/OMA/class_oma_title.php.

²³ These five entities are the Maryland Economic Development Corporation, the Maryland Technology Development Corporation, the Maryland Agricultural and Resource-Based Development Corporation, the Maryland Clean Energy Center, and the Bainbridge Development Corporation.

²⁴ These entities are the Board of Directors of the Bainbridge Development Corporation, the Canal Place Preservation and Development Authority, the Maryland 911 Board, the Board of Directors of the Maryland Agricultural and Resource-Based Industry Corporation, the Board of Directors of the Maryland Clean Energy Center, the Board of Directors of the Maryland Economic Development Corporation, the Board of Directors of the Maryland Environmental Service, the Maryland Food Center Authority, the Maryland Health and Higher Educational Facilities

the Act's existing requirements as well as new obligations, such as a mandate to post the agenda of an open session, a summary of any finalized documents, written testimony from the public, and other materials that the public body will vote on to the public body's website at least 48 hours before a meeting (except in cases of emergencies).²⁵ Most of the public bodies that will be subject to GP § 3-307 will also have to livestream their meetings.²⁶ All public bodies subject to GP § 3-307 will also have to post to their websites the minutes of each open session (to be posted not more than two business days after the minutes are approved), and archived video recordings of meetings. Recordings will have to be kept online for at least one year, and minutes will have to be kept online for at least five years.

New GP § 3-307 also will impose several new agenda requirements for the seventeen enumerated State bodies. "To the extent practicable" (the standard that already applies to posting minutes online), each meeting agenda will have to indicate whether the public body intends to enter closed session and the expected time of any such closed session.²⁷ Each meeting agenda will also have to include consideration of the minutes from the most recent open meeting (unless the agenda is for an emergency meeting).

With respect to minutes, new GP § 3-307 will require the seventeen affected bodies to approve meeting minutes "in a timely manner." This will generally mean at the next open meeting, given the requirement that agendas will have to include consideration of the most recent open meeting.²⁸

In addition to House Bill 246 and Senate Bill 269, the General Assembly considered, but ultimately did not adopt, a bill that would have amended the Act's definition of "administrative function." In its present form, the Act does not apply to a public body when it is carrying out "an administrative function," GP § 3-103(a)(1)(i), which the Act defines in both the affirmative (what an administrative function is) and the negative (what it is not). "Administrative function" means the administration of a law of the State or a political subdivision, or a rule, regulation, or bylaw of a public body. GP § 3-101(b)(1). "Administrative function" does not include advisory, judicial, legislative, quasi-judicial, or quasi-legislative functions. GP § 3-101(b)(2). House Bill 235 proposed adding to this list

Authority, the Maryland Industrial Development Financing Authority, the Maryland Stadium Authority, the Maryland Transportation Authority, the Northeast Maryland Waste Disposal Authority, the Public Service Commission, the State Board of Elections, the Maryland Technology Development Corporation, and the Historic St. Mary's Commission.

²⁵ A public body need not disclose material that is protected under Maryland's Public Information Act.

²⁶ The Maryland Stadium Authority need only provide live *audio* streaming for meetings by telephone conference, and the Maryland Transportation Authority need only provide live video streaming if it's meeting at its headquarters or a location where the Authority met at least ten times in the last calendar year.

²⁷ GP § 3-302.1(a), which applies to all public bodies, already provides that, "before meeting in an open session, a public body shall make available to the public an agenda . . . indicating whether the public body expects to close any portion of the meeting."

²⁸ GP § 3-306(b)(1), which applies to all public bodies, provides that, "as soon as practicable after a public body meets, it shall have minutes of its session prepared."

of exclusions “the appointment, employment, assignment, promotion, discipline, demotion, compensation, removal, resignation, or performance evaluation of an appointee, employee, or official over whom a public body has direct jurisdiction.” Removing personnel matters from the definition of “administrative function” would make them subject to the Act, but not necessarily open to the public. That is because the Act also includes fifteen exceptions to the openness requirement, including a so-called “personnel matters exception.” GP § 3-305(b). Under this exception, a public body may meet in a session closed to the public to discuss: “(i) the appointment, employment, assignment, promotion, discipline, demotion, compensation, removal, resignation, or performance evaluation of an appointee, employee, or official over whom it has jurisdiction; or (ii) any other personnel matter that affects one or more specific individuals[.]” GP § 3-305(b)(1). House Bill 235 did not propose any change to this personnel matters exception in § 3-305(b)(1). The Compliance Board expressed concern that House Bill 235 would increase the workload of the Board and of public bodies—who would still have to comply with various procedural requirements under the Act when meeting to discuss personnel matters in closed sessions—without any appreciable benefit to the public. The sponsors of the bill ultimately withdrew the legislation.

B. Board recommendations for the 2023 Legislative Session

The Board does not recommend any legislative study or action at this time.

III.

SUMMARIES OF OPINIONS ISSUED FROM JULY 1, 2021 – JUNE 30, 2022²⁹

July 1 - September 30, 2021

15 OMCB Opinions 79 (2021)

Annapolis Democratic Central Committee

Topics Discussed: The Act’s definitions of “public body” and “meeting”

Opinion: The Compliance Board did not resolve the close question of whether the Committee is a “public body” subject to the Act because, regardless, the Committee’s monthly gatherings did not qualify as “meetings,” as they did not relate to the Committee’s narrow charge under law to fill vacancies on the Annapolis City Council and nominate members to the City’s elections board. Because the Committee was convening to discuss private political matters in a partisan setting rather than to consider public business, it was not “meeting,” and the Act did not apply.

Violation: None

²⁹ The opinions summarized here are posted on the Open Meetings webpage on the website of the Office of the Attorney General. See <https://www.marylandattorneygeneral.gov/Pages/OpenGov/OpenMeetings/index.aspx>. Statutory references are to the General Provisions Article of the Maryland Annotated Code.

15 OMCB Opinions 85 (2021)**Board of Education of Washington County**

Topics Discussed: The Act’s definition of “meeting,” how to satisfy the Act when an audience larger than the meeting room’s capacity wants to observe the meeting

Opinion: The Board of Education held an in-person hearing during the COVID-19 pandemic to take public comment on the proposed closure of two schools but restricted who could attend the hearing: Only speakers and their guests could enter the room and only for a portion of the hearing. Because the Board of Education did not provide an alternative means of observing the hearing, such as a livestream video or audio broadcast, the Compliance Board found a violation of GP § 3-303(a), which generally requires that the public be allowed to observe a public body’s meetings.

Violation: GP § 3-303(a)

15 OMCB Opinions 91 (2021)**Montgomery County Board of Education**

Topic Discussed: The propriety of allowing members of the press to attend a meeting in person but requiring other members of the public to observe the meeting remotely

Opinion: When the full membership of the Board of Education began meeting in person for the first time since the start of the COVID-19 pandemic, it invited the press to attend in person but required other members of the public to observe the proceedings via a livestream, a television broadcast, or a “listen only phone line.” The Compliance Board, recognizing the ongoing public health concerns surrounding COVID-19, concluded that the Board of Education’s practice was reasonable under the circumstances and did not violate the Act.

Violation: None

15 OMCB Opinions 97 (2021)**Baltimore Development Corporation**

Topic Discussed: The procurement exception

Opinion: The Compliance Board found that the Baltimore Development Corporation properly applied the procurement exception of GP § 3-305(b)(14), which allows a public body to exclude the public from a discussion “directly related to a negotiating strategy or the contents of a bid or proposal,” if public discussion “would adversely impact the ability of the public body to participate in the competitive bidding or proposal process.”

Violation: None

15 OMCB Opinions 99 (2021)**Dorchester County Council**

Topics Discussed: The required content and timing of agendas and written closing statements, the required content of closed session summaries, the personnel matters exception, required training for members of public bodies

Opinion: The Compliance Board found no violations of the Act’s requirements regarding agendas but found that the Council failed to provide in its closing statements the reasons for closing its meetings and sufficient detail about the topics to be discussed. The Council also violated the Act with respect to recording members’ votes to close meetings to the public, either because the presiding officer did not accurately record the votes of all members before the Council entered closed sessions, or because the Council’s minutes did not accurately record the vote. Finally, the Council violated the Act by failing to provide a sufficiently detailed closed-session summary, and by discussing a topic beyond the scope of the personnel matters exception, which does not encompass policy discussions. The Compliance Board found that the Council had complied with the Act’s requirement to designate at least one member of the public body to receive training on the Act before meeting in closed session.

Violations: GP §§ 3-301, 3-305(b)(1), 3-305(d)(2), 3-306(c)(2), and either 3-305(d)(2)(i) or 3-306(c)(2)(ii)

October 1 – December 31, 2021

15 OMCB Opinions 107 (2021)

Baltimore Children and Youth Fund, Inc.

Topics Discussed: When minutes must be posted online, the Act’s definition of “public body”

Opinion: The Compliance Board declined to find that it was practicable for the Fund to post minutes online sooner than it did but concluded that several of the Fund’s committees were public bodies subject to the Act and had likely violated the Act’s requirements related to notice, agendas, and minutes.

Likely Violations: GP §§ 3-302, 3-302.1, 3-306

15 OMCB Opinions 113 (2021)

Talbot Family Network

Topics Discussed: The Act’s definition of “public body” and the Act’s requirements for notice, preparing and posting minutes online, and the level of detail required of minutes

Opinion: The Compliance Board found that the Talbot Family Network’s Board of Directors violated the Act by changing the date of a meeting without notifying the public, failing to timely prepare and post minutes online, and failing to provide enough details in at least one set of minutes. The Compliance Board further found that some of the Network’s committees are “public bodies” that improperly disregarded the Act’s mandates.

Violations: GP §§ 3-302, 3-302.1, and 3-306

15 OMCB Opinions 123 (2021)

Mayor and Council of the Town of Fairmount Heights

Topics Discussed: The Act’s requirements for meeting notices, agendas, entering closed sessions, required disclosures before and after closed sessions, and preparing and posting minutes online

Opinion: The Compliance Board found that the Council violated the Act by failing to make clear in meeting notices that the Council intended to meet in open sessions before entering closed sessions. The Council further violated the Act by failing to provide the public opportunities to object to the Council’s votes to enter closed sessions, failing to prepare minutes as soon as practicable after meetings, and failing to include enough details in closed written statements and closed session summaries. The Compliance Board was unable to conclude whether the Council also violated the Act by not posting minutes online to the extent practicable, and by failing to provide an agenda for a special meeting, as it was not clear whether a quorum of the Council attended the meeting and discussed public business.

Violations: GP §§ 3-302, 3-305(d), 3-306(b)(1), 3-306(c)(2)

15 OMCB Opinions 132 (2021)

Montgomery County Council

Topics Discussed: The lack of a burden of proof in the Compliance Board’s complaint process, the required content of minutes

Opinion: The Complainant alleged that the Council violated the Act by omitting necessary information from meeting minutes and, on another occasion, by meeting in secret without providing notice to the public or subsequently preparing minutes. The Compliance Board found that the minutes accurately reflected what took place at the meeting in question, and the record did not support the Complainant’s assumption that the Council met in secret on another occasion.

Violation: None

15 OMCB Opinions 136 (2021)**Board of Education of Carroll County**

Topics Discussed: The required content of a meeting notice, requirements for providing notice of a meeting called on an urgent basis, the required procedure for meeting in closed session, the legal advice exception

Opinion: The Compliance Board found that the Board of Education violated the Act by failing to provide the location of a meeting in its notice and by failing to make clear that the Board of Education would be convening in open session before entering a closed session. The Board of Education further violated the Act by not using all the methods at its disposal, such as social media, to provide notice of a special meeting called on an urgent basis. The Board of Education's deficiencies in providing notice meant that the entire meeting was effectively closed to the public, who had no opportunity to object to the Board of Education's vote to enter closed session. Finally, the Board of Education's closed session discussion exceeded the scope of the legal advice exception because it went beyond simply obtaining legal advice and veered into a conversation about policy, specifically how the Board of Education would communicate to the public its position on a state mask mandate related to the COVID-19 pandemic.

Violations: GP §§ 3-302, 3-305(b)(7), 3-305(d)

15 OMCB Opinions 141 (2021)**County Council of Cecil County**

Topics Discussed: Whether a mistake in an agenda made available by one method violates the Act if the public body makes a correct agenda available by several other methods

Opinion: The Compliance Board found that the Council did not violate the Act, despite an omission in an agenda posted on the Council's website, because the record did not indicate that the omission was intentional, and the Council had made a complete agenda available to the public by several other methods.

Violation: None

15 OMCB Opinions 144 (2021)**Mayor and Council of the Town of Capitol Heights**

Topics Discussed: The required procedure for entering a closed session, the requirements for closing statements and minutes

Opinion: The Mayor and Council violated the Act by failing to prepare a closing statement, failing to explain its reason for entering a closed session, and failing to prepare and retain minutes.

Violations: GP §§ 3-305(d) and 3-306

15 OMCB Opinions 148 (2021)**Montgomery County Council**

Topic Discussed: When communications among members of a public body rise to the level of a "meeting" subject to the Act

Opinion: Five members—a quorum—of the Council issued a press release announcing their support for a transportation project. The Complainant asserted that the members must have reached consensus during a secret meeting, without proper notice to the public. The Council asserted that the individual members reached consensus following several one-on-one conversations and, thus, the Act did not apply. The Council's failure to provide factual details about the members' communications, however, left the Compliance Board unable to reach a conclusion as to whether a quorum convened to discuss public business without notice to the public, in violation of the Act.

Violation: Unable to determine if the Council violated GP § 3-301

15 OMCB Opinions 156 (2021)**Frederick County Council**

Topics Discussed: The required procedure for entering a closed session and the content required of written closing statements, closed session minutes, and closed session summaries in open session minutes

Opinion: The Compliance Board found that the Council violated the Act by failing to prepare a closing statement or adopt its agenda as a closing statement, and by failing to disclose the topics that the Council would discuss in closed session. The Council further violated the Act by failing to provide enough details in its closed session minutes and closed session summary in the open session minutes. Because of the lack of sufficiently detailed closed session minutes, the Compliance Board was unable to determine whether the Council's closed session discussion exceeded the scope of the claimed exceptions.

Violations: GP §§ 3-305(d) and 3-306(c)

15 OMCB Opinions 161 (2021)**Housing Opportunities Commission of Montgomery County**

Topics Discussed: Whether technical glitches in virtual meetings violate the Act, whether the members of a parent public body must provide notice when a quorum of the parent body attends a committee's meeting and discusses the parent body's business

Opinion: The Complainant alleged that the Commission's virtual meetings suffered several technical glitches but, because the record did not indicate whether any substantive discussions occurred while livestreams were malfunctioning, the Compliance Board could not determine whether members of the public had effectively been excluded from the meetings, in violation of the Act. The Compliance Board did, however, find that the Commission violated the Act when a quorum of its members attended a committee meeting and discussed the Commission's business, without providing notice that the Commission would be meeting.

Violation: GP § 3-302

15 OMCB Opinions 168 (2021)**State Board of Well Drillers**

Topics Discussed: Whether a public body violates the Act by removing from a virtual meeting someone who refuses to identify themselves, when a public body must provide the public links and passwords for virtual meetings, the requirements for posting minutes online

Opinion: The Compliance Board concluded that the Board of Well Drillers did not violate the Act by removing from a virtual meeting an individual who said nothing when asked to identify themselves; the Compliance Board noted that requiring individuals to identify themselves can reduce the risk of hackers disrupting virtual meetings and, thus, was reasonable under the circumstances. The Compliance Board further concluded that the Board of Well Drillers did not violate the Act by waiting until the agenda was available to provide the public the meeting link and password, as this practice is also a valid security measure. Finally, the Compliance Board declined to find that the Board of Well Drillers violated the Act by not posting minutes online more quickly when the response noted "staffing and technological challenges, especially during the COVID-19 period."

Violation: None

15 OMCB Opinions 174 (2021)**Montgomery County Revenue Authority**

Topics Discussed: The Act's personnel matters exception, requirements for providing notice, the timing and content of agendas, the content of written closing statements and closed session summaries, and when minutes must be posted online

Opinion: The Revenue Authority's practice of listing meetings in an events calendar was a reasonable method of providing notice, and the Revenue Authority was not required to include in an agenda the intended topics of discussion for a closed session. But the Revenue Authority violated the Act by describing an open session agenda item as a "recap" of an earlier discussion, without providing more details. The Revenue Authority also violated the Act by not timely making an agenda available to the public, failing to provide sufficient detail in written closing statements, discussing policy matters in a session closed to the public under the personnel matters exception, failing to prepare sufficiently detailed closed session minutes and closed session summaries, preparing an inaccurate closed session summary, and failing to timely post minutes online.

Violations: GP §§ 3-302.1(a); 3-301; 3-305(b)(1); 3-305(d)(2); 3-306(b), (c) & (e)

15 OMCB Opinions 184 (2021)**Montgomery County Council**

Topics Discussed: The real property acquisition and legal advice exceptions, the required contents of written closing statements and minutes, and the required contents and timing of closed session summaries

Opinion: The Compliance Board found no violation pertaining to the Council's discussions in sessions closed to the public under the real property acquisition and legal advice exceptions. But the Council violated the Act by failing to prepare sufficiently detailed closed session minutes or include in written closing statements reasons for closed sessions. The Council also violated the Act by failing to prepare a closed session summary and by waiting four months to provide the public summaries of some closed sessions.

Violations: GP §§ 3-305(d)(2), 3-306(b)(1) & (c).

January 1 – March 31, 2022**16 OMCB Opinions 1 (2022)****Development Review Committee of the Montgomery County Planning Department**

Topics Discussed: How to describe the “location” of a virtual meeting in a meeting notice, the Act’s requirements for agendas and minutes

Opinion: The Compliance Board found that the Development Review Committee violated the Act because its notices for virtual meetings did not provide a link or instructions on how to obtain access information for the virtual meetings. The Committee further violated the Act by failing to prepare or retain minutes before March 2020. The Complainant also alleged a violation based on the Committee’s failure to retain agendas, but the Compliance Board noted that the Act does not have a general retention policy for agendas as it does with minutes and meeting notices.

Violations: GP §§ 3-302(b)(2), 3-306(b) & (c)

16 OMCB Opinions 6 (2022)**Annapolis Department of Planning and Zoning**

Topics Discussed: The lack of a burden of proof in the Compliance Board’s complaint process, the Act’s requirements for notice and minutes, the reasonableness of virtual meetings during the COVID-19 pandemic

Opinion: The Compliance Board reiterated the lack of a burden of proof in the complaint process before addressing the merits of the complaint. The Board found that the planning department did not violate the Act’s notice requirement when it provided notice of a meeting in a local newspaper and posted a sign at the site of the proposed development to be discussed at the meeting. The Board likewise found that having the meeting virtually did not violate the Act’s general openness requirement, given the ongoing COVID-19 pandemic. Finally, the Board found no violation of the requirement to post minutes online to the extent practicable, as a recording of the meeting was available on the web.

Violation: None

16 OMCB Opinions 12 (2022)**Mayor and Council of Brunswick**

Topics Discussed: The Act’s requirements for notice, closing a meeting to the public, and disclosures to the public following a closed session.

Opinion: The Compliance Board found that the Mayor and Council violated the Act by failing to adequately notify the public that the Council would meet in open session before closing the meeting, by failing to provide the public an opportunity to object to the closure, and by failing to disclose, after the closed session, the proper statutory authority for the closure and an accurate list of individuals present during the closed session.

Violations: GP §§ 3-301, 3-302, 3-305(d), 3-306(c)(2)

16 OMCB Opinions 18 (2022)**Montgomery County Middle Eastern American Advisory Group**

Topics Discussed: The limits of the Compliance Board’s authority, the Act’s requirements for agendas, minutes, and training

Opinion: The Compliance Board clarified that it does not have the authority to fine public bodies, only to issue advisory opinions. The Board was unable, based on the limited facts in the record, to determine if the advisory group had violated the Act’s requirement that at least one individual affiliated with a public body receive training on the Act. The Compliance Board found that the advisory group satisfied the Act by making agendas available a week before each meeting for any member of the public who requested them, and was not required to post minutes online, given the group’s lack of “technical staff.”

Violation: None

16 OMCB Opinions 22 (2022)**Baltimore Children and Youth Fund, Inc.**

Topics Discussed: The Act's requirements for notice and minutes

Opinion: The Fund did not violate the Act's requirements to provide notice of meetings, because it had not had any meetings during the period in question. The Fund also did not violate the Act by taking thirty days to provide the Complainant minutes for six meetings of committees that, until the Board issued an opinion a week before the Complainant's request, the Fund did not believe were public bodies subject to the Act. Finally, the record did not establish that it was practicable—and that the Fund failed—to post the minutes of these meetings online, though the Compliance Board lacked the information necessary to determine whether Fund could have, but did not, post minutes of a 2020 meeting online.

Violation: None

16 OMCB Opinions 26 (2022)**Board of Education of Wicomico County**

Topic Discussed: Satisfying the Act's general openness requirement during the COVID-19 pandemic

Opinion: The Compliance Board found that the Board of Education did not violate the Act by limiting the number of people who could enter the meeting room at one time, given that the meeting took place during the ongoing COVID-19 pandemic, state officials recommended social distancing among unvaccinated individuals, more than half of Wicomico County residents were not fully vaccinated, the county's positivity rate exceeded one of the public health metrics for lifting restrictions, and the Board livestreamed the meeting.

Violation: None

16 OMCB Opinions 30 (2022)**Seat Pleasant City Council**

Topics Discussed: The Act's requirements for notices, agendas, written closing statements, and closed session summaries

Opinion: The Compliance Board found that the Council violated the Act's notice requirements by omitting special meetings from an online calendar used for regular meetings and by failing to make clear in notices that the Council would meet in open session before entering closed session. The Council also violated the Act by failing to provide enough details in written closing statements and closed session summaries, and by failing to timely post minutes online to the extent practicable. The Compliance Board lacked sufficient information to determine whether the Council also violated the Act by failing to provide notice of meeting cancellations, or by not including in an agenda an item indicating that the Council intended to enter closed session. The Compliance Board also provided general guidance about how public bodies can require registration for a virtual meeting without excluding members of the public who may learn of the meeting too late to register.

Violations: GP §§ 3-302, 3-305(d)(2), 3-306(c) & (e)

16 OMCB Opinions 41 (2022)**Washington County Delegation to the Maryland General Assembly**

Topics Discussed: The Act's definitions of "public body" and "meeting"

Opinion: The Complainant alleged that the Washington County Delegation violated the Act by meeting during the summer of 2021 without providing notice to the public or keeping minutes of the meeting. The Compliance Board concluded that, regardless of whether the delegation was a "public body" subject to the Act, the gathering in question was not a "meeting" because the delegation was not discussing the public business assigned to the delegation.

Violation: None

16 OMCB Opinions 47 (2022)**Maryland Statewide Independent Living Council**

Topics Discussed: The Act's requirements for notices, agendas, and minutes

Opinion: The Compliance Board found that the Council violated the Act by failing to give reasonable advance notice of a meeting because the Council's website, where it typically posted notice, reflected that a different meeting was taking place. Based on the limited factual record, The Board was unable to conclude whether the Council also failed to make the agenda available to the public in a timely manner. The Board found that the Council did not violate the Act by taking five weeks to prepare meeting minutes.

Violation: GP § 3-302(a)

16 OMCB Opinions 55 (2022)**Takoma Park City Council**

Topic Discussed: The Act's requirements for notice of a meeting called on an urgent basis

Opinion: The Complainant alleged that the Council planned a special meeting and deliberately waited a week to provide notice to the public, in violation of the Act. Because the submissions did not indicate when the Council actually fixed the date and time of the meeting in question, the Compliance Board could not conclude whether the Council impermissibly delayed the notice. The Compliance Board provided general guidance on the timing of notice and found no violation with the Council's method of giving notice, which involved posting notice online and through social media and bulk emails.

Violation: None

16 OMCB Opinions 62 (2022)**Montgomery County Board of Education**

Topic Discussed: The level of detail required in an agenda item

Opinion: The Compliance Board found that the agenda item description "2021-2022 School Year Calendar Modification" was sufficiently detailed to satisfy the Act, and the Board of Education was not required to append to the agenda any documents relevant to that agenda item.

Violations: None

16 OMCB Opinions 64 (2022)**Mayor and Council of the Town of Smithsburg**

Topics Discussed: The Act's requirements for notice and openness

Opinion: The Mayor and Council violated the Act by adjourning an open session and immediately thereafter reconvening to continue discussing public business, without notice to the public or an opportunity for the public to observe.

Violations: GP §§ 3-302(a), 3-302.1(a), and 3-303(a)

16 OMCB Opinions 66 (2022)**Prince George's County Council**

Topic Discussed: When communications among members of a public body rise to the level of a "meeting" subject to the Act

Opinion: The Complainant alleged that a quorum of the Council must have met secretly to achieve consensus on a matter before the Council. The Council denied that any communications among members of the Council rose to the level of a "meeting" subject to the Act, but the Council provided no details of any communications. Thus, the Compliance Board was unable to determine whether a meeting had occurred without notice to the public and an opportunity for the public to observe.

Violation: Unable to determine if the Council violated GP § 3-301

16 OMCB Opinions 69 (2022)**Family League of Baltimore City, Inc.**

Topics Discussed: The Act's requirements for agendas, closing statements, minutes, and announcing prior violations in open sessions

Opinion: The Compliance Board concluded that a virtual celebration was not a "meeting" for which the Family League was required to prepare an agenda, nor was the Family League required to disclose in the agenda for another meeting the topic that the body intended to discuss in an upcoming closed session. The Family League violated the Act by taking four months to approve meeting minutes but timely posted them online to the extent practicable by posting them to the Family League's website days after their approval. The Family League also violated the Act by engaging in a discussion beyond the scope of the legal advice exception, the only exception cited in the closing statement, but did not violate the Act by not posting its closing statements online. The Compliance Board found no violation based on the Family League's failure to announce and summarize an earlier opinion in which the Board found that Family League committees had been operating under the mistaken belief that they were not public bodies, because, although the Board noted that the Act likely had been violated, the Board did not conclusively find any violations in the earlier opinion.

Violations: GP §§ 3-305(d), 3-306(b)

16 OMCB Opinions 77 (2022)**Annapolis Planning Commission**

Topic Discussed: The Act's notice requirements

Opinion: The Compliance Board found no violation of the Act's notice requirement when a sign posted at the site of a proposed development indicated a hearing would take place on December 16, 2021 but was not updated to indicate that the hearing was held over and continued through numerous subsequent Commission meetings in January and February 2022. The Commission's other methods of notice—i.e., including the meetings in the city's online calendar and posting agendas for the meetings on a city webpage—provided adequate notice.

Violation: None

16 OMCB Opinions 81 (2022)**Mayor and Council of Brunswick**

Topics Discussed: The Act's notice requirement, the procedure for closing sessions to the public, and required disclosures before and after meeting in closed session

Opinion: The Council violated the Act by failing to notify the public that it would meet in open session before entering a closed session, by failing to allow the public to object to the closure, by failing to document a reason before closing the session; and by failing, after the closure, to cite proper statutory authority for closing the session in the closed session summary.

Violations: GP §§ 3-301, 3-302, 3-305(d), 3-306(c)

16 OMCB Opinions 85 (2022)**Montgomery County Board of Education**

Topic Discussed: The administrative function

Opinion: The Board of Education did not violate the Act by gathering without notice to the public and an opportunity for the public to observe, because the gathering was not a "meeting" subject to the Act. The Board of Education gathered to interview candidates for superintendent, an administrative function that falls beyond the scope of the Act.

Violation: None

16 OMCB Opinions 88 (2022)**Montgomery County Public Schools COVID-19 Operations Advisory Team**

Topic Discussed: The Act's definition of "public body"

Opinion: The Compliance Board concluded that the Advisory Team did not meet the Act's definition of "public body" and, thus, was not subject to the Act's requirements.

Violations: None

April 1 – June 30, 2022**16 OMCB Opinions 90 (2022)****Olney Town Center Advisory Committee**

Topics Discussed: The Act's definition of "public body," required training for public bodies subject to the Act

Opinion: The Compliance Board concluded that the Advisory Committee is a public body subject to the Act because the Olney Master Plan recommended the creation of the Committee, and the Maryland-National Capital Park and Planning Commission approved a resolution adopting the master plan. But the Compliance Board lacked the facts necessary to decide whether the Advisory Committee had violated the Act's training requirement.

Violation: Unable to determine if the Advisory Committee violated GP § 3-213

16 OMCB Opinions 97 (2022)**Frederick County Council**

Topics Discussed: The Act's requirements for written closing statements and closed session summaries

Opinion: The Compliance Board found that the Council violated the Act before a closed session by citing the wrong statutory authority for the closure and by failing to provide a reason for the closure in the written closing statement. The Council further violated the Act after the meeting by failing to cite the proper authority for closure in the closed session summary.

Violations: GP §§ 3-305(d)(2), 3-306(c)(2)

16 OMCB Opinions 101 (2022)**Talbot Family Network**

Topics Discussed: The Act's requirement for announcing prior violations in open session, the Act's definitions of "meeting" and "public body"

Opinion: The Compliance Board found that the Talbot Family Network violated the Act by having its executive director, not a member of the Board of Directors, announce a prior violation of the Act. The Board clarified that the Act does not require a public body to conduct its business in meetings but, rather, simply imposes certain requirements when a public body does meet, that is, when a quorum of the body convenes to conduct public business; thus, the Compliance Board found no violation based on complaints that the Talbot Family Network conducted business without a quorum present. The Compliance Board further found that a committee of the Talbot Family Network was not a public body subject to the Act.

Violation: GP § 3-211

16 OMCB Opinions 108 (2022)**District Heights City Commission**

Topics Discussed: The Compliance Board's inability to resolve factual disputes, the Act's definition of "meeting," the general openness requirement that applies to meetings

Opinion: The Complainant and the City Commission offered different accounts of the underlying facts, making it impossible for the Compliance Board to determine whether a quorum of the Commission had convened to discuss public business without notice to the public and an opportunity for the public to observe.

Violation: Unable to determine if the City Commission violated GP § 3-301

16 OMCB Opinions 110 (2022)**Mayor and Council of the City of College Park**

Topics Discussed: The Act's requirements for notices, agendas, written closing statements, minutes, and closed session summaries, and the required procedure for closing a session to the public.

Opinion: The Compliance Board found that the Mayor and Council violated the Act by failing to provide the public a summary of a closed session, by failing to timely provide summaries of three other closed sessions, and by failing to prepare minutes of an open session convened only for the purpose of entering a closed session. The Compliance Board found no violations of the Act's requirements with respect to meeting notices and agendas but was unable to determine whether the Mayor and Council allowed the public to object to a vote to close a session, as required by the Act. The Compliance Board also provided general guidance on informing the public of where to look to find closed session summaries.

Violations: GP § 3-306(b) & (c)(2)

16 OMCB Opinions 119 (2022)**Calvert County Board of County Commissioners**

Topics Discussed: The Act's definition of "meeting," the general openness requirement

Opinion: The Complainant asserted that the Board of County Commissioners must have met secretly to agree on a position before each commissioner issued an identically worded letter. The Compliance Board found no violation of the Act based on the county attorney's representation that he drafted the letter and provided copies to each of the Board members, who did not collaborate with each other.

Violation: None

16 OMCB Opinions 123 (2022)**Board of Education of Carroll County**

Topics Discussed: The Act's requirements for notices, closed sessions, and public disclosures following closed sessions, whether the Act applies to quasi-judicial functions, the administrative function exclusion

Opinion: The Board of Education adjourned a closed session and reconvened in closed session later, without preparing a new written closing statement. The Compliance Board, noting that this generally would have violated the Act, found no violation here because the Board of Education convened in the second closed session only to perform a quasi-judicial function, which is not subject to the Act. But the Compliance Board found violations based on missing details in the written closing statement for the first closed session and similar deficiencies in summaries of the closed session discussions.

Violations: GP §§ 3-104, 3-305(d)(2), 3-306(c)(2)

16 OMCB Opinions 129 (2022)**Mayor and Council of the Town of Fairmount Heights**

Topic Discussed: The Act's requirements for preparing and posting minutes online

Opinion: The Mayor and Council violated the Act's requirement to prepare minutes as soon as practicable after a meeting by sometimes taking as long as one year to do so. The Mayor and Council further violated the Act by failing to prepare summaries of closed sessions and by failing to post minutes online when it was practicable to do so.

Violations: GP § 3-306(b), (c), & (e),

16 OMCB Opinions 131 (2022)**Prince George's County Board of Education**

Topic Discussed: The Act's personnel matters exception

Opinion: The Board of Education violated the Act by invoking the personnel matters exception to enter closed session then discussing an organizational restructuring that exceeded the scope of that exception.

Violations: GP §§ 3-301, 3-305(b)(1)

16 OMCB Opinions 133 (2022)**Board of Education of Cecil County**

Topic Discussed: The Act's general openness requirement

Opinion: Because of hostile emails and phone calls the Complainant allegedly made to school district staff and Board of Education members, the county school superintendent's designee invoked § 26-102 of the Education Article of the Maryland Code and barred the Complainant from entering school district property, including the building where the Board of Education meets. The Complainant could still watch meetings via livestream. The Compliance Board concluded that, in light of these circumstances, the Board of Education did not violate the Act by excluding the Complainant from its physical meeting space. The Compliance Board emphasized that it did not have the authority to review the propriety of the invocation of § 26-102 of the Education Article.

Violation: None

16 OMCB Opinions 140 (2022)**Frederick County Council**

Topic Discussed: Requests for reconsideration, the legal advice and business relocation exceptions

Opinion: The Complainant asked the Compliance Board to reconsider an earlier opinion, in which the Board had said that the lack of detailed closed session minutes made it impossible to determine whether the County Council's closed session discussions exceeded the scope of the claimed exceptions (the legal advice and business relocation exceptions). The Complainant asserted that a public statement that the Council issued after the Compliance Board's first opinion provided proof that the closed session discussions were improper, but the Compliance Board determined that the factual record was still too ambiguous to conclude whether a violation had occurred.

Violation: None

16 OMCB Opinions 144 (2022)**Maryland-National Capital Park and Planning Commission**

Topics Discussed: Required public disclosures before and after meeting in closed sessions; the Act's definition of "public body"; the administrative function exclusion; the public security, collective bargaining, and legal advice exceptions; a public body's obligation to provide minutes upon request by the Compliance Board

Opinion: The Compliance Board found that the Commission and its Executive Committee failed to make sufficiently detailed disclosures to the public before and after meeting in closed sessions. The Commission also violated the Act by engaging in closed-door discussions that exceeded the scope of the statutory provisions that the Commission claimed as authority for excluding the public. The Commission's Retirement Board failed to satisfy the Act's requirements for disclosures before and after closed sessions, but the Compliance Board stopped short of finding violations because the Board could not determine whether, during the closed sessions in question, the Retirement Board was performing functions that are not subject to the Act. The Compliance Board similarly lacked the information necessary to conclude whether the Retirement Board or its committees violated certain other provisions of the Act, because the Commission did not provide the Compliance Board closed session minutes for any of the involved bodies, and the Commission did not provide a detailed response to certain allegations. The Compliance Board thus found a violation of the Act's provision governing a public body's response to a complaint.

Violations: GP §§ 3-206(b), 3-305(d)(2), 3-306(c)(2)

SEVENTH ANNUAL REPORT
OF THE
STATE PUBLIC INFORMATION ACT COMPLIANCE BOARD



BOARD MEMBERS

JOHN H. WEST, III, ESQ., CHAIR
DEBORAH F. MOORE-CARTER
MICHELE L. COHEN, ESQ.
CHRISTOPHER A. EDDINGS
DARREN S. WIGFIELD

SEPTEMBER 27, 2022

**SEVENTH ANNUAL REPORT
OF THE STATE
PUBLIC INFORMATION ACT COMPLIANCE BOARD**

The General Assembly created the State Public Information Act Compliance Board (“Board”) in 2015 to review allegations that records custodians had charged an unreasonable fee higher than \$350 under the Public Information Act (“PIA”). In 2021, the General Assembly expanded the jurisdiction of the Board to also include review of denials of inspection, failures to respond to PIA requests, and allegations that a PIA request was “frivolous, vexatious, or in bad faith.” 2021 Md. Laws, ch. 658. The Board’s expanded jurisdiction took effect on July 1, 2022. Pursuant to § 4-1A-04(d) of the General Provisions Article of the Maryland Code (“GP”), the Board submits this annual report for the period July 1, 2021, through June 30, 2022 (“FY2022”).

This report contains a description of the Board’s activities during FY2022, including summaries of the Board’s opinions, the number and nature of complaints filed with the Board, and information about the Board’s adoption of regulations pursuant to GP § 4-1A-04(c). In addition, although the law does not provide an opportunity for the Public Access Ombudsman to submit a similar annual report, the Board believes such a report is useful to understand the current state of extra-judicial dispute resolution under the PIA. For this reason, the Board has included a report from the Ombudsman as Appendix A to this report.

**I.
ACTIVITIES OF THE BOARD**

A. Responsibilities of the Board

In FY2022, the duties of the Board included:

- Receiving, reviewing, and resolving complaints that a custodian of public records charged an unreasonable fee that exceeds \$350;
- Issuing written opinions regarding whether a custodian has charged an unreasonable fee and, if so, ordering that the custodian reduce the fee to an amount the Board determines reasonable and refund the difference, if applicable;
- Studying ongoing compliance with the PIA by custodians of public records;
- Adopting regulations to carry out the Board’s powers and duties under Subtitle 1A of the PIA (as effective on July 1, 2022); and
- Making recommendations to the General Assembly for improvements to the PIA.

There are currently five members of the Board:¹

- John H. West, III, Esquire – Chair; citizen member – **term expired** 06/30/2022 (reappointed on 07/01/19 for a second term; holding over until successor is named)
- Deborah F. Moore-Carter – PIA knowledge/Maryland Association of Counties/Maryland Municipal League nominee – **term expired** 06/30/2018 (holding over until successor is named)
- Michele L. Cohen, Esquire – attorney member – term expires 06/30/2024 (appointed on 07/01/21)
- Darren S. Wigfield – citizen member – **term expired** 06/30/2022 (reappointed on 07/01/19 for a second term; holding over until successor is named)
- Christopher A. Eddings – non-profit/open government/news media nominee – term expires on 6/30/2023 (appointed to fill vacancy on 8/14/20)

The Attorney General’s Office provides the Board with the services of counsel and an administrator, posts the Board’s decisions and other Public Information Act materials on its website, and bears the incidental costs of administering the complaint and review process. The Board appreciates the excellent service it has received from the Attorney General’s Office in the performance of these tasks. Specifically, the Board wishes to thank Assistant Attorney General Sara Klemm, who serves as counsel to the Board, and Spencer Dove, who serves as the Board’s administrative officer.

The Board also extends its thanks to the Public Access Ombudsman, Lisa Kershner, who is always willing to offer her assistance in matters over which the Board previously had no jurisdiction, and who has always been effective in mediating fee disputes when jurisdiction overlaps. The Board anticipates that the Ombudsman, through her mediation services, will continue to resolve many matters that now fall within the Board’s expanded jurisdiction, thus alleviating the need for a Board complaint.

¹ In addition to expanding the Board’s jurisdiction, the law passed in 2021 also made changes to the statutory composition of the Board. The Board’s membership must now include two attorneys (rather than only one) and a member who is “knowledgeable about electronic records, including electronic storage, retrieval, review and reproduction technologies.” GP § 4-1A-02(a)(3) and (4). The Board’s current membership—which, as noted above, includes three members who are holding over after the expiration of their terms—satisfies these requirements. Both the Board Chair and Ms. Cohen are attorneys, and Mr. Wigfield possesses expertise in electronic records.

B. Processes and procedures

1. FY2022 and Before

Prior to the changes that became effective on July 1, 2022, the Board adhered to the statutory process then in effect for receiving and handling complaints.

In brief, complaints were received by Board staff at the Office of the Attorney General and numbered based on the date received. Board counsel then made an initial determination as to whether the complaint fell within the Board's limited jurisdiction over fee disputes. If it did, Board staff forwarded the complaint to the relevant custodian for a response, and, once all materials were compiled, the Board reviewed them and typically issued a written opinion within 30 days. (The Board did not hold any informal conferences in FY2022.) If the Board determined that the custodian charged an unreasonable fee, then it directed the custodian to reduce the fee to a reasonable amount and refund any overage paid.

When a complaint addressed only issues that were not within the jurisdiction of the Board, the matter was dismissed. These kinds of complaints, and those that included multiple issues in addition to the unreasonableness of a fee, often fell within the Public Access Ombudsman's authority to address. Thus, if the Board determined that it did not have jurisdiction, and/or that the complaint might benefit from mediation, it referred the complainant to the Ombudsman.

2. FY2023 and Going Forward

Post-July 1, 2022, the processes and procedures under which the Board operates are similar to those in effect prior to the expansion of the Board's jurisdiction. Now, however, in order for the Board's jurisdiction to attach, a complainant (i.e., a PIA requester or custodian) must have attempted to mediate the dispute through the Public Access Ombudsman and have received a final determination from the Ombudsman that the dispute was not resolved. After receiving the final determination, a complainant has 30 days to file a complaint with the Board. In addition to reviewing complaints about unreasonable fees higher than \$350, the Board now has authority to review complaints that a custodian wrongfully denied inspection of a public record or failed to respond to a request for a public record. The Board also has authority to review complaints from custodians that a PIA request is frivolous, vexatious, or in bad faith.

Once Board staff receive a complaint, the complaint is given a file number. Board counsel then makes an initial determination as to whether the complaint meets the pleading requirements (e.g., that there is a final determination from the Ombudsman stating that the

dispute was not resolved) and whether the nature of the dispute falls within the Board's jurisdiction. If the complaint passes this initial review, Board staff forwards the complaint and any attached material to the relevant custodian (or, in the case of complaints about frivolous, vexatious, or bad faith PIA requests, the PIA requester) for a response. The responding party has 30 days in which to file its response. Typically, once the Board receives the response, it will permit the complainant to file a reply within 15 days.

If the written submissions provide sufficient information for the Board to resolve the matter, then the Board issues a written decision within 30 days after receiving the response. If the Board needs more information, it may elect to hold an informal conference with the parties, *see* COMAR 14.02.04 (regulations governing informal conferences), in which case the Board's written decision is issued within 30 days after the informal conference. The Board may also request additional information if it is needed to resolve the complaint, including a descriptive index of the public records not disclosed or copies of the public records themselves.² *See* COMAR 14.02.05 (regulations governing requests for additional information) and COMAR 14.02.06 (regulations governing the Board's treatment and handling of confidential records or information). If the Board requests additional information, then it will issue its written decision within 30 days after receiving that additional information. If the Board is unable to issue its decision within these time periods, it must state the reasons why in writing and issue a decision as soon as possible, but no later than 120 days after the complaint was filed.

Depending on the issue raised in the complaint, the Board has authority to order certain remedies. As before, if the Board determines that a custodian has charged an unreasonable fee higher than \$350, it may order the custodian to reduce the fee to a reasonable amount and refund the difference, if applicable. If the Board determines that a custodian denied inspection of public records in violation of the PIA, it may order the custodian to produce those records. And, if the Board determines that a custodian failed to respond to a PIA request within applicable time limits, it may order the custodian to promptly respond and, if its decision states the reasons, the Board may also order the custodian to waive all or part of the fee they would otherwise be entitled to charge. If the Board determines that a PIA request is frivolous, vexatious, or in bad faith, it may permit

² If the custodian's response to the PIA request indicated that inspection was denied under GP § 4-301(a)(2)(ii) (denial because inspection would be contrary to a federal statute or regulation issued under the statute that has the force of law), then the custodian may not be required to produce the public records for Board review. GP § 4-1A-06(b)(3); *see also* COMAR 14.02.05.03A(1).

the custodian to ignore that request or any future requests that are substantially the same as that request.

A complainant or custodian may appeal the Board's decision to one of Maryland's circuit courts in accordance with GP § 4-362(a)(2). An appeal automatically stays the Board's decision pending the circuit court's decision.

C. Complaint and Opinion³ Activities for FY2022

1. Statistics

- New complaints submitted to the Board: 19
- Complaints dismissed without opinion: 9
 - Not within Board's limited jurisdiction: 6
 - Dismissed after resolution in mediation: 1
 - Dismissed after complainant failed to provide necessary information to determine jurisdiction: 2
- Opinions issued during FY2022: 13
 - Carryover from FY2021 complaints: 3
 - Opinions requiring conference with the parties: 0
- Complaints submitted in FY2022 and still pending on 7/1/22: 0

2. Complaints Dismissed without an Opinion

Just under a third of the complaints received by the Board in FY2022 either included issues other than an alleged unreasonable fee greater than \$350 (which was the sole issue within the Board's jurisdiction), or were filed more than 90 days after the custodian charged the fee. Some of these complaints were from complainants who claimed that their request for a fee waiver should have been granted, rather than that the fee was unreasonable. Other complaints concerned a custodian's failure to respond to a PIA request or an allegation that records were wrongly withheld, neither of which was within the Board's jurisdiction in FY2022.

³ Under the law passed in 2021, the Board now issues decisions rather than opinions. *See* 2021 Md. Laws, ch. 658; GP § 4-1A-07 (governing the Board's written decisions). However, because the statute effective during FY2022 still referred to the Board's written "opinions," this annual report will use that terminology.

The following matters did not result in a formal opinion of the Board because they were dismissed for lack of jurisdiction:

- **PIACB 22-01:** Complaint alleged that a custodian had improperly denied a request for specific documents from within a criminal file; complainant referred to the Ombudsman.
- **PIACB 22-02:** Complaint concerned denial of inspection and denial of a fee waiver request; complainant referred to the Ombudsman.
- **PIACB 22-12:** Complaint concerned denial of inspection; complainant referred to the Ombudsman.
- **PIACB 22-16:** Complaint was filed more than 90 days after the custodian charged the challenged fee.
- **PIACB 22-18:** Complaint was filed more than 90 days after the custodian charged the challenged fee.
- **PIACB 22-19:** Complaint alleged that a custodian had failed to respond to a PIA request; complainant referred to the Ombudsman.

The following matter did not result in a formal opinion of the Board because the Board dismissed the complaint after it was resolved through mediation with the Ombudsman:

- **PIACB 22-10:** Complaint alleged that a custodian charged an unreasonable fee higher than \$350 and also that the custodian wrongfully denied a fee waiver request.

The following matters did not result in a formal opinion of the Board because the complainant failed to respond to the Board's request for more information:

- **PIACB 22-03:** Complaint concerned a fee higher than \$350 and the complainant's status as indigent but did not indicate when the fee was charged, so the Board was unable to determine whether it had jurisdiction or not.
- **PIACB 22-04:** Complaint concerned a fee higher than \$350 and the complainant's status as indigent but did not indicate when the fee was charged, so the Board was unable to determine whether it had jurisdiction or not.

3. Complaints in which Board Issued an Opinion

When a complaint is within the jurisdiction of the Board and ripe for review, the Board will issue a written opinion. During FY2022, the Board issued thirteen opinions, all of which were decided on the basis of the parties' written submissions.

The Board's opinions appear on the Office of the Attorney General's website: <https://www.marylandattorneygeneral.gov/Pages/OpenGov/piaindex.aspx#InplviewHash9271b794-4b75-4046-be3e-d555c31cbb4e>. Summaries of the ten opinions issued for complaints filed in FY2022 appear in this report for ease of reference. In addition, the Board has provided summaries of the three FY2021 carry-over matters for which opinions were issued in FY2022 (and thus not included in the Board's FY2021 annual report). The summaries are provided in chronological order according to the date the opinion was issued.

- **PIACB 21-15 (July 7, 2021)**

Agency: City of Hyattsville ("City")

Issue: The City estimated that it would cost \$22,890 to respond to the complainant's request for records of certain communications between the Hyattsville Police Department and select City officials but did not require prepayment of the fee. The complainant alleged that the fee estimate was unreasonable.

Decision: Because the City did not demand prepayment of all or a portion of the estimated fee, the Board declined to issue a binding resolution. Instead, the Board provided guidance to the City and the requester. The Board encouraged the parties to work together to narrow the scope of the PIA request (as the complainant had indicated he was willing to do) and also suggested that the City use different search terms and employ a de-duplication function (if available) to reduce the number of duplicative responsive records. The Board also cautioned that the City should not expect its attorney to review *all* of the records that staff have already compiled and reviewed; rather, only those responsive records that present a genuine legal question about whether or not they may be disclosed (or whether redactions are needed) should be provided to the attorney for review.

- **PIACB 21-14 (July 23, 2021)**

Agency: Montgomery County Public Schools ("MCPS")

Issue: The complainant alleged that fee estimates for three different PIA requests were unreasonable: (1) \$1,360.32, for "emails, notes, text, files, phone

calls, notes of phone calls, etc.” between eight individuals over a span of five and a half months; (2) \$16,524.60, for any communications between more than 20 individuals that contained the complainant’s last name over a span of almost two and a half years; and (3) \$725.21, for “telephone logs and ledgers and all related notes, emails, messages, and all attachments” between two individuals on 24 specific dates.

Decision: The fee estimates appeared precise and based on a detailed calculation of anticipated costs. Because the MCPS asked for prepayment, the Board reviewed the fee estimates. The Board asked the MCPS for more information about the tasks associated with responding and the anticipated volume of responsive records, which the MCPS provided in part. The Board found that all three of the estimated fees were unreasonable to some extent and ordered reductions, with the caveats that if final fees were in excess of the estimates, then the MCPS could charge the complainant the difference and, if final fees were below the estimates, then the MCPS must refund the complainant the overage paid.

- **PIACB 21-16 (July 30, 2021)**

Agency: City of Hagerstown (“City”)

Issue: The City initially estimated that it would cost \$10,000 to respond to the complainant’s request for certain records related to the City’s Crime-Free Housing programs. After discussion, the complainant revised the request and the City reduced the estimated fee to between \$1,600 and \$1,800. The complainant challenged both the initial and revised estimates.

Decision: The City asked for a “down payment” of a portion of the fee prior to starting work on a response, and its estimates were based on a sufficiently precise breakdown of time expenditures and prorated salaries. Thus, the Board reviewed the estimates. In its response to the fee complaint, the City also provided a more detailed “near-final” fee of \$843.60, which the Board also reviewed. Ultimately, the Board concluded that both the initial \$1,600-1,800 range and the near-final fee bore a reasonable relationship to the actual or anticipated actual costs of responding to the complainant’s PIA request and therefore ordered no fee reduction.

- **PIACB 22-05 (December 10, 2021)**

Agency: Housing Opportunities Commission of Montgomery County (“HOC”)

Issue: The HOC estimated that it would cost \$1,550 to respond to the complainant’s PIA request for records related to the Montgomery County Attorney’s representation of the HOC. The complainant alleged that the estimated fee was unreasonable. The complainant also alleged that the HOC should have fully waived the fee.

Decision: Because the HOC required full prepayment of the estimated fee, the Board reviewed the fee to determine whether it was reasonable. Given that the complainant sought many types of records created over a span of 35 years, and that those records would likely need close review for privilege, the Board concluded that the estimated fee was reasonable. The Board declined to address the fee waiver issue.

- **PIACB 22-06 (January 18, 2022)**

Agency: Harford County Sheriff’s Office (“HCSO”)

Issue: The complainant alleged that the \$9,205.34 estimated fee that the HCSO sought to charge to respond to the complainant’s request for police internal affairs data previously provided, but without the officers’ names redacted, was unreasonable.

Decision: The HCSO required prepayment of the estimated fee, which was sufficiently precise, so the Board reviewed the matter and concluded that the estimated fee was unreasonable. First, the Board found that the hourly rates charged by the HCSO were unreasonable because they included costs other than salary and because the HCSO charged overtime rates. Second, the Board concluded, based on the type of information the complainant was seeking (and the information that had already been provided), that the HCSO’s estimated time expenditures were excessive. Third, the Board determined that the HCSO could not charge the complainant for duplicative review of records that were already “fully vetted.” The Board ordered a significant reduction of the estimated fee.

- **PIACB 22-07 (February 3, 2022)**

Agency: Department of Budget & Management, Central Collections Unit (“DBM-CCU”)

Issue: The complainant challenged two separate estimated fees: (1) \$221,367.23, for redacted records of certain communications between alleged debtors, DBM-CCU, and other State or federal agencies; and (2) \$97,100.18, for

three specific records from the files of alleged debtors who requested debt investigations between May 2018 and May 2020.

Decision: After discussing its authority to review estimated fees, the Board concluded that it did not have authority to review the estimated fees in this matter because, even though the DBM-CCU provided a detailed breakdown of its estimates, the DBM-CCU did not demand prepayment. Rather, the DBM-CCU denied the complainant’s PIA request in full, and provided the fee estimates only for informational purposes. Thus, the DBM-CCU had not “charged” a fee. The Board dismissed the complaint as not ripe for review.

- **PIACB 22-08 (February 23, 2022)**

Agency: Office of the State’s Attorney for Baltimore County (“BCSAO”)

Issue: The BCSAO charged an estimated fee of \$595 for production of public records from the complainant’s criminal case file. In his complaint, the complainant alleged that he was unable to pay the fee and asked the Board to review it.

Decision: The Board concluded that, even affording the complaint liberal construction, the complainant had not alleged that the estimated fee was unreasonable; rather, his complaint was in the nature of a complaint about a denial of a fee waiver request, which the Board lacks authority to review. Therefore, the Board dismissed the complaint.

- **PIACB 22-09 (March 21, 2022)**

Agency: Ocean City Police Department (“OCPD”)

Issue: The complainant alleged that the \$692.27 fee that the OCPD charged for internal affairs records of one police officer was unreasonable.

Decision: The Board determined that the amount of time attributed to redaction of the records was excessive and ordered a modest reduction in the fee. In light of some recent opinions finding that time attributed to attorney review was unreasonable under certain circumstances, the Board also clarified its view that attorney review of records already prepared may be a legitimate, non-duplicative cost that may be assessed.

- **PIACB 22-11 (April 15, 2022)**

Agency: Prince George’s County Police Department (“PGPD”)

Issue: The PGPD estimated that it would cost \$8,400 to respond to the complainant’s request for records related to databases that contain data about the gang affiliation of individuals. The complainant alleged that the estimated fee was unreasonable and that the PGPD erroneously denied a fee waiver request.

Decision: Despite initially defending its fee estimate, the PGPD later—but while the matter was still pending an opinion—indicated that it would respond to the complainant’s PIA request without charging a fee. Thus, the Board dismissed the complaint at moot.

- **PIACB 22-14 (May 6, 2022)**

Agency: Howard County Police Department (“HCPD”)

Issue: The complainant challenged a \$2,937.43 estimated fee charged by the HCPD for internal affairs records related to eleven different police officers.

Decision: The HCPD’s estimated fee was broken down in a precise manner and the HCPD required that the complainant prepay, so the Board reviewed the matter and concluded that the fee was unreasonable in two ways. First, the HCPD included FICA as well as healthcare and pension benefits in its hourly rate, rather than basing the hourly rate on prorated salary alone. Second, the HCPD could not show that the flat fees assessed for certain types of records (e.g., \$70 for each 911 call recording) per a resolution of the Howard County Council were reasonably related to anticipated actual costs. The Board ordered a discrete reduction based on the reduced hourly rate and directed the HCPD to revisit the flat fees and adjust them to reflect the anticipated actual costs of producing those records.

- **PIACB 22-13 (May 6, 2022)**

Agency: Baltimore County Police Department (“BCPD”)

Issue: The BCPD estimated that it would cost \$988.05 to produce body-worn camera footage that the complainant requested. The complainant alleged that the estimated fee was unreasonable.

Decision: Though the BCPD required prepayment of only a portion of the estimated fee—and that portion was less than \$350—the Board concluded that it had authority to review the matter because the prepaid amount was based on the full fee (i.e., it was 10% of that full fee) and because the prepaid amount was non-refundable. Based on the precise salary information provided, the Board determined that the hourly rate used to calculate the fee estimate was not reasonably related to anticipated actual costs and therefore ordered a small reduction in the estimated fee.

- **PIACB 22-17 (May 18, 2022)**

Agency: Montgomery County Police Department (“MCPD”)

Issue: The complainant challenged estimated fees related to two separate PIA requests: (1) \$325,223 for internal affairs complaints and records related to those complaints for 49 police officers; and (2) \$86,870, for the same types of records, but related to sixteen different police officers.

Decision: The MCPD provided a significant degree of detail about its estimated fees, which it charged in advance. Thus, the Board reviewed the matter. The Board found that the hourly rates used to calculate the estimated fees were reasonable, and that the anticipated time expenditures for production of documents and audio footage were also reasonable. However, the Board concluded that the MCPD’s anticipated time expenditure for production of video footage was excessive, and directed the MCPD to use a reduced amount of time in the calculation of estimated fees for video footage. The reduced figure was based on an average used by another police department and information provided in written testimony to the General Assembly by a representative of the Maryland Municipal League.

- **PIACB 22-15 (June 27, 2022)**

Agency: Takoma Park Police Department (“TPPD”)

Issue: The TPPD estimated that it would cost at least \$5,421.13 to respond to the complainant’s PIA request for internal affairs records related to one police officer. The complainant alleged that the fee was unreasonable.

Decision: Given that the estimated fee was, at least in part, based on a detailed breakdown of recoverable costs, and that the TPPD both indicated an intent to require prepayment of the fee and referred the complainant to the Board in the

event that she believed the fee to be unreasonable, the Board reviewed the matter. The Board concluded that, generally, the hourly rates used to calculate the fees were reasonable. Though the Board was concerned that certain time estimates related to retrieval and review of responsive records in electronic form may be excessive, it did not reduce those estimates but rather directed the TPPD to revisit those estimates. The Board determined that the estimated fee related to responsive records in non-electronic form was unreasonable and directed the TPPD to ascertain a rough approximation of the volume and content of responsive records before calculating an estimated fee.

D. Adoption of Regulations & Policy of Proactive Disclosure

As noted earlier, during the 2021 legislative session, the General Assembly passed House Bill 183, which enacted significant changes to the extra-judicial dispute resolution options provided by the PIA. *See* 2021 Md. Laws, ch. 658. The new law, which went into effect on July 1, 2022, provides that:

- Requesters and custodians seeking to resolve PIA-related disputes must first attempt to resolve those disputes through the Public Access Ombudsman, who continues to have broad authority to mediate a wide variety of issues.
- Generally, Ombudsman has 90 days in which to mediate a dispute before issuing a “final determination” that a dispute has either been resolved or not resolved; this deadline can be extended upon mutual consent of the parties.
- If a dispute is not resolved, and if it is within the expanded jurisdiction of the Board, the aggrieved party may file a complaint with the Board within 30 days after receiving the Ombudsman’s final determination.
- In addition to reviewing complaints that allege that a custodian has charged an unreasonable fee of more than \$350, the Board has authority to review and resolve complaints that allege that a custodian wrongfully denied inspection of a public record or failed to respond to a PIA request.
- The Board is also charged with reviewing complaints from custodians that allege that a “request or pattern of requests is frivolous, vexatious, or in bad faith.”
- Along with its expanded jurisdiction, the Board also has new powers regarding remedies. Depending on the nature of the complaint and the Board’s decision, the Board may order that a record be produced, that a custodian promptly respond to a PIA request and, in certain circumstances, that a custodian who has not timely responded waive part or all of a fee. And, if the Board finds that a

request is frivolous, vexatious, or made in bad faith, its order may state that a custodian may ignore the request or respond to a less burdensome version.

The new law also required the Board to “adopt regulations to carry out” Subtitle 1A of the PIA. *See* GP § 4-1A-04(c)(1). The Board began the process of drafting its regulations in the fall of 2021. Board members Michele Cohen and Darren Wigfield participated in the drafting process.

After the initial draft was complete, the Board met on December 10, 2021, to discuss the draft regulations and the adoption process. The meeting was held virtually via Microsoft Teams and open to the public.⁴ At the meeting, the Board voted to circulate the initial draft to interested stakeholders for informal public comment. (The Board also posted notice on its website that the public could request a copy of the draft regulations, along with instructions on how to submit any informal comment.) About a dozen people requested the draft regulations, and four submitted informal public comments to the Board. Those informal public comments are included as Appendix B to this annual report.

The Board met again on February 4, 2022, in another open virtual meeting. The Board reviewed the informal public comments that it received and discussed certain proposed changes to the draft regulations. The Board ultimately voted to make some changes in light of the informal comments. After receiving an overview of the next steps, the Board voted to begin the formal adoption process and to submit the proposed regulations to the Maryland Register. The proposal, which is attached as Appendix C, was published in the March 25, 2022, issue of the Maryland Register.

As required by law, the Board’s proposal included information about how the public could comment on the proposed regulations. The Board accepted comments through April 25, 2022; the Board did not hold a public hearing to take comments. One person submitted comments, which are attached as Appendix D. The Board held an open virtual meeting on May 10, 2022, to review the public comments. The Board did not make any changes to the proposed regulations and voted to submit notice of final adoption to the Maryland Register. That notice, attached to this annual report as Appendix E, was published on June 3, 2022. The Board’s regulations became effective ten days later, and are available through COMAR Online:

http://www.dsd.state.md.us/COMAR/subtitle_chapters/14_Chapters.aspx#Subtitle02

The new law also requires official custodians to “adopt a policy of proactive disclosure of public records that are available for inspection under [the PIA].” GP § 4-

⁴ The agenda and video minutes for this meeting (and all meetings held thereafter) are available on the Board’s website:

https://www.marylandattorneygeneral.gov/Pages/OpenGov/piacb_meetings.aspx.

104(a). At its May 10, 2022, the Board voted to adopt a policy of proactive disclosure. That policy is attached to this annual report as Appendix F.

II.

RECOMMENDATIONS FOR IMPROVEMENTS TO THE PIA

Given that substantial changes were made to the PIA during the 2021 legislative session, and that those changes have only just taken effect, the Board does not have any specific recommendations at this time for legislation in the 2023 session that would enact further changes.

The Board does note, however, that since Anton’s Law—which changed the status of records related to alleged police misconduct from non-disclosable personnel records, *see* GP § 4-311, to records that may be disclosed as investigative records pursuant to GP § 4-351 (unless they are records of “technical infractions”)—took effect on October 1, 2021, the Board has received a number of complaints related to fees charged by police departments for internal affairs related records. *See* PIACB 22-06 (Jan. 18, 2022); PIACB 22-09 (Mar. 21, 2022); PIACB 22-14 (May 6, 2022); PIACB 22-17 (May 18, 2022); PIACB 22-15 (June 27, 2022). These complaints, and the responses to these complaints, reveal a wide disparity as to what search and review processes are employed and also as to what fees are charged. For instance, while some police departments charge high hourly rates for lengthy legal review, others appear to prepare records without an attorney’s review (or, at least, if an attorney is reviewing the records, the custodian is not passing this cost along to the requester). At the same time, the complaints and responses were fairly uniform in the degree to which they laid bare the labor-intensive nature (and resulting high costs) of preparing video footage (including body-worn camera footage) for production under the PIA.

The Board is aware that, during the 2022 legislative session, the General Assembly enacted a law that creates a task force to study PIA requests made to law enforcement agencies. *See* 2022 Md. Laws, ch. 536. In addition to reviewing the fees that law enforcement agencies charge for records requested under the PIA and the procedures those same agencies employ to respond to PIA requests, the Board understands that the task force is directed to study “the status and operations” of this Board. The Board looks forward to providing whatever information or assistance it can to aid the task force as it studies these important issues in the PIA.

Appendix A.
REPORT FROM THE
PUBLIC ACCESS
OMBUDSMAN

APPENDIX A
REPORT OF THE PUBLIC ACCESS OMBUDSMAN
FY 2022

The General Assembly created the Office of the Public Access Ombudsman (“Office” or “Ombudsman”) in 2015 in the same law that created the Public Information Act Compliance Board (“Board” or “PIACB”). *See* 2015 Md. Laws, ch. 135.

The Ombudsman’s primary duty is to make reasonable attempts to resolve disputes between records custodians and applicants seeking public records under the Maryland Public Information Act (“PIA” or “Act”). Typically, the Ombudsman accomplishes this through voluntary, non-binding and confidential mediation. The Ombudsman has broad authority to try to resolve a wide variety of disputes that arise under the PIA, including: disputes involving exemptions; the failure of a custodian to respond in a timely way; fee waivers; and repetitive, overly broad, and alleged vexatious requests. *See* Md. Code Ann., Gen. Prov. (“GP”) § 4-1B-04; COMAR 14.37.02.

In addition to mediating PIA disputes, the Ombudsman also regularly provides informal assistance, resource material, and PIA trainings on request. These and other activities are published in summary reports that are periodically posted to the Ombudsman’s website, <https://piaombuds.maryland.gov>.

This report describes the Ombudsman’s activities from July 1, 2021, through June 30, 2022 (“FY 2022”). For context, comparative data concerning prior periods is provided in the tables below. Additional information about Ombudsman program activities during FY 2022 and since inception is included at the end of this report.

ACTIVITIES OF THE OMBUDSMAN

The Attorney General appointed Lisa Kershner as the first Public Access Ombudsman in March 2016 and reappointed her to a second four-year term effective March 30, 2020. The Ombudsman is housed within the Office of the Attorney General (“OAG”) and is supported by the same staff that support the PIACB. The program’s first Administrative Officer, Janice Clark, left the program in October 2021. The Ombudsman thanks Ms. Clark for her invaluable service, and is pleased to welcome Spencer Dove, who joined the program in this role starting in late December 2021. Assistant Attorney General Sara Klemm continues to serve as program counsel. The Ombudsman thanks the OAG and staff for their exceptional support, skill, and professionalism throughout the year. The Ombudsman could not operate effectively without their support.

Program Operations & Mediation Metrics: During FY 2022, the Ombudsman program continued to operate largely remotely, as have many of the State and local agencies with which the Ombudsman works. However, the Ombudsman’s current caseload data, discussed below, suggests that certain impacts of the COVID-19 pandemic began to abate during FY 2022.

Figure 1 below shows the overall volume of the Ombudsman’s caseload, consisting of requests for mediation and informal requests for assistance (referred to as “help-desk” or “HD” matters).

Time Period	Carry-Over from Prior Year	New Mediation Matters	New HD Matters	Total New Matters	Mediations Closed ¹
FY 2022	52	215	168	383	239 or 90%
FY 2021	49	235	212	447	232 or 82%
FY 2020	19	262	235	497	232 or 83%
Since Inception	N/A	1481	1004	2485	1453 or 98%

The substantial increase in carry-over matters at the start of FY 2021 and FY 2022 is one of the impacts resulting from the COVID-19 pandemic and accompanying State of Emergency that was in effect throughout Maryland from March 2020 until August 15, 2021. The number of carry-over matters, both month-to-month and year-to-year, is closely tracked because it impacts the length of the queue for the Ombudsman's services and, thus, the length of time required to bring a request for dispute resolution to closure. These factors, in turn, impact the efficiency with which mediations can proceed as well as the likelihood of successful outcomes. Thus, during FY 2022, the Ombudsman prioritized closing those matters that had been pending for a protracted period alongside new matters in an effort to reduce the queue and overall length of time needed to bring mediations to closure. This effort reduced the number of carry-over mediations entering FY 2023 to 28, a number which is much closer to pre-pandemic levels.

Figure 2 below broadly reflects the types of requesters using the Ombudsman program. The substantial majority this year, as in all previous years except for FY 2021, encompassed individual requesters seeking assistance for purposes unrelated to their business or occupation. At the same time, the Ombudsman continued to work with a diverse, albeit smaller, group of professional and occupational users, including press and media outlets, non-profit organizations, private attorneys, businesses, and others. As shown below, while occupational program users comprised the majority (51%) of all incoming requests for PIA mediation during FY 2021, that proportion dropped to 19% in FY 2022, a figure that, while still lower than FY 2020, is more in-line with previous years of reported data.

Time Period	Individual	Professional Occupational User
FY 2022	81%	19%
FY 2021	49%	51%
FY 2020	72%	28%
Since Inception	62%	38%

Figure 3 reflects the type of agencies participating in mediation during FY 2022. In previous years, both State and local agencies have tended to be more-or-less equally represented in the Ombudsman's caseload. In FY 2021, however, there was a greater percentage of mediation requests involving State agencies (45%), and a corresponding reduction in matters involving local government (17%). As we reported last year, this shift may have reflected a greater interest in and

¹ Closure rate reflected in the "Mediations Closed" column is obtained by dividing the number of mediation matters closed by the total number of open mediations during the period, which includes both "New Mediations" and those carried over from the prior year. "Help-desk" matters are not reflected in this statistic because they are generally closed quickly, usually within 24 to 48 hours.

need for records from those State agencies leading Maryland’s response to the pandemic. FY 2022 saw movement toward a relatively equal level of participation by state and local agencies. That said, requests made to public school districts and law enforcement agencies – which are captured in the category “Other” – comprised a substantial and somewhat increased portion of the Ombudsman’s caseload, reflecting continued strong public interest in K-12 public schools and the activities of law enforcement agencies.

Figure 3: Program Use – Agency Make-Up

Time Period	State	Local	Other*
FY 2022	30%	24%	46%
FY 2021	45%	17%	37%
FY 2020	32%	31%	37%
Since Inception	37%	24%	39%

**Other = public school districts & law enforcement agencies*

Figures 4 and 5 below document the types of issues submitted to the Ombudsman during FY 2022 as well as the length of time required to conclude mediations.

Figure 4: Issues Presented for Mediation

Time Period	No/ Incomplete Response	Other
FY 2022	52%	48%
FY 2021	65%	35%
FY 2020	54%	46%
Since Inception	47%	53%

Figure 5: Length of Time to Conclude Mediations

Time Period	3 Weeks	6 Weeks	9 Weeks	12 Weeks	12+ Weeks
FY 2022	18%	16%	17%	11%	38%
FY 2021	19%	13%	11%	9%	48%
FY 2020	29%	22%	18%	11%	20%
Since Inception	30%	18%	15%	9%	28%

The data is consistent with the Ombudsman’s sense that the prevalence of problems, such as missing, long delayed or incomplete PIA responses, which were observed during the State of Emergency are beginning to abate. Figure 4 shows that in FY 2022 there was a reduction in the proportion of mediations involving a missing or incomplete PIA response as compared to FY 2021. Consistent with this trend, Figure 5 illustrates that during FY 2022, a greater percentage of PIA mediations were concluded in 9 weeks or less, while the need for more than 12 weeks to resolve a PIA dispute through mediation declined.

As we reported last year, during FY 2021 the problem of a missing or incomplete PIA response was the presenting issue in a substantial majority – nearly two thirds – of all matters submitted to the Ombudsman for mediation. While these types of problems tended to be readily resolved once brought to the attention of the custodian prior to FY 2021, this often was not the case in FY 2021. Rather, these types of presenting problems tended to drag on, sometimes over very protracted periods, thereby contributing to an even greater backlog for both responding agencies and for the Ombudsman. Taken together, Figures 4 and 5 show that these issues which predominated FY 2021 are slowly abating in FY 2022. Greater detail for these two charts can be found in the Ombudsman’s statistical reports which are included at the end of this report.

Outreach & Training: The Ombudsman regularly receives requests for trainings and other assistance (“help-desk” matters) from both requesters and custodial agencies. The volume of these matters is reflected in the attached statistical reports included at the end of this report. Prior

to the COVID-19 pandemic, the Ombudsman regularly conducted in-person trainings on request. Since March 2020, however, the Ombudsman has conducted group trainings and presentations entirely remotely, a trend the Ombudsman expects to continue so long as the COVID-19 community transmission rate in Maryland remains high. In the meantime, the Office is reviewing strategies to expand the Ombudsman's footprint around the State while building awareness of the Office by harnessing social media and other internet-based tools.

Implementation of H.B. 183: The most exciting changes coming to the Office of the Public Access Ombudsman arise from H.B. 183 going into effect on July 1, 2022. For background, H.B. 183 expanded the jurisdiction of the PIACB while instituting an integrated PIA complaint dispute resolution process that includes the Ombudsman. Before a dispute may be filed as a complaint with the Board (assuming the Board has jurisdiction), a requester or custodian must attempt to first resolve the PIA dispute through the Ombudsman.² The Ombudsman must now bring disputes submitted for resolution to conclusion within 90 days unless the parties mutually agree in writing to an extension. At the conclusion of the process, the Ombudsman is also now required to issue a final determination that identifies the issues presented, and states whether the dispute was resolved, unresolved, or partially resolved.

During FY 2022, the Office made substantial efforts to ensure the smooth and seamless implementation of these changes. These efforts, undertaken by the Ombudsman and staff, include the following:

- Enhancing current case management systems for the Ombudsman to ensure proper tracking and reporting.
- Updating the Ombudsman's records retention schedules to include additional records that H.B. 183 now requires (e.g., final determinations).
- Developing and/or updating communications and publications related to the mediation process.
- Overhauling the Ombudsman's website and publishing the Ombudsman's Policy of Proactive Disclosure.
- Updating office protocols needed to implement H.B. 183.
- Disseminating educational materials and informational one-pagers to stakeholders and program users so that they were prepared for the law to take effect on July 1, 2022. Examples (Mediation Process One-Pager and "What's Changed?" One-Pager) are included at the end of this report.

While the impact of H.B. 183 is only just beginning to be realized in these first few months of FY 2023, the new requirements, including the 90-day timeframe for completing mediations, are expected to make the Ombudsman program more efficient and effective.

Looking Forward to FY 2023, the Ombudsman will continue to engage with stakeholders in order to identify opportunities for growth and improvement, as well as to better carry out the new law. Such engagement includes tracking and evaluating the new law's impact on the Ombudsman program with respect to caseload volumes, the length of time required to bring matters to conclusion, the actual outcomes or dispositions of mediations, and the experience of

² Despite the Board's expanded jurisdiction, the Ombudsman continues to have authority to address a wider variety of PIA-related disputes than the Board.

program users with the process as a whole. The Ombudsman also anticipates revising and adding to the Office's interpretive regulations to reflect changes in protocols needed to implement H.B. 183.

CONCLUSION

The Ombudsman wishes to thank the Attorney General for appointing her to this important position. In addition, the Ombudsman extends her thanks to the Board for providing this forum for sharing information about the Ombudsman program. Finally, the Ombudsman wishes to again thank the dedicated staff of the Office of the Attorney General – Spencer Dove and Sara Klemm – who tirelessly support the Office of the Public Access Ombudsman, as well as OAG law clerk, Andre Beasley, who provided valuable assistance to the Ombudsman during the Summer 2022 term regarding the handling of multiple mediation matters.

Additional program information, including statistical reports, helpful tips, and PIA-related news and developments, are regularly posted throughout the year to the Ombudsman's website <http://piaombuds.maryland.gov>, and on Twitter @MPIA_Ombuds.

Respectfully submitted,
Lisa Kershner
Public Access Ombudsman
September 2022

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

FY 2022 - Annual Report
 July 1, 2021 to June 30, 2022



**Annual Report
 FY 2022**

383 FY 2022

- ◆ 215 -Mediation requests
- ◆ 168 -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.

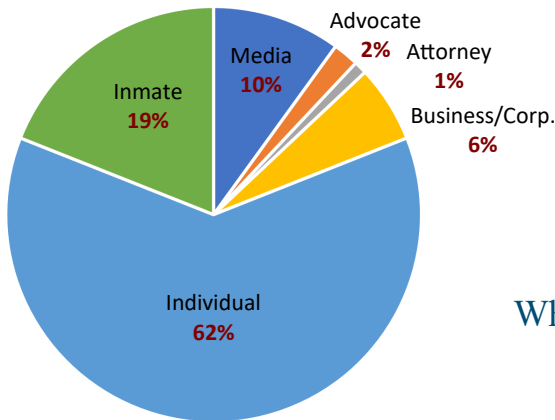
Total Mediation Cases, as of June 30, 2022	
Carry over from FY 2021	52
New/Incoming cases in FY2022	215
Total Number of Mediation cases	267
Total Mediation cases Closed FY 2022	239
Mediation cases carried over to FY 2023	28

The Agencies

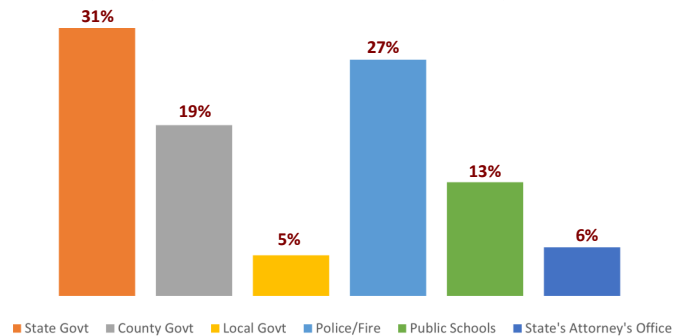
48 unique agencies participated in mediation matters with the PIA Ombudsman in Fiscal Year 2022, including agencies at the state, county, and municipal levels.

The Requesters

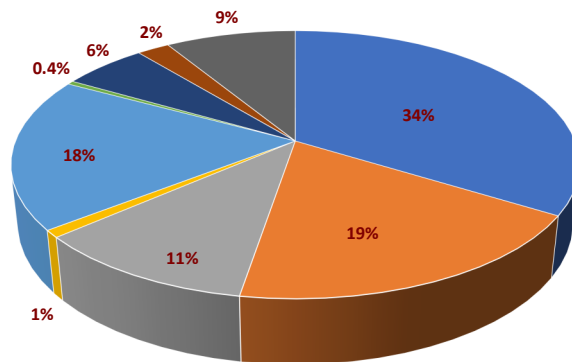
Requesters:
 Professional/Occupational requesters make up **19%** of requests for assistance, and all individuals make up **81%**.



What Agencies are Participating in Mediation?

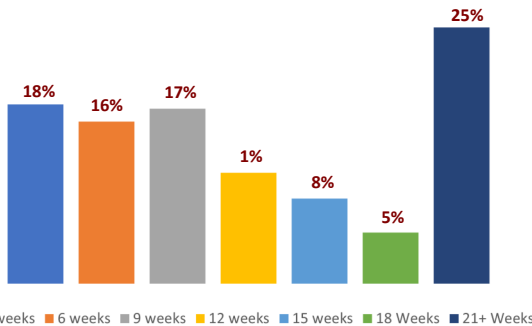


What are the PIA disputes?



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

How Long Does Mediation Take?



Range:
 1 – 455 days.
18% of the cases are closed within 3 weeks and **64%** by 90 days.

- Misapplication of exemption - 29%
- Redaction inappropriate - 18%
- Entire record withheld - 11%
- MIA: No Response - 34%
- Partial, nonresponsive, or incomplete response - 19%

- Fees excessive - 6%
- Fee waiver request denied or ignored - 2%
- Does not believe response - 1%
- Asked for explanation of response - 0.4%
- Other - 9%

Lisa Kershner

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Ombudsman's Website:

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**MPIA Ombudsman
on Twitter
@MPIA_Ombuds**

2022 Legislative Session

During the 2022 Legislative Session, six bills were introduced that impacted the PIA. Of these six, two bills were of great interest to the Office of the Public Access Ombudsman. The first, **Senate Bill 31**, set forth the circumstances under which a custodian of records, in accordance with the PIA, must deny or allow inspection of recordings from a body-worn camera worn by a law enforcement officer. This bill had been previously introduced. After passing the Senate, the House of Delegates did not take any further action on this bill. The second, **Senate Bill 777**, established the Task Force to Study Public Information Act Requests Made to Law Enforcement. The task force is charged with reviewing and studying (1) the costs charged by law enforcement agencies in relation to the disclosure of records under the PIA; (2) procedures applied by law enforcement agencies in the disclosure of records requested under the PIA, and (3) the status and operation of the PIA Compliance Board. The Office of the Attorney General was tasked with providing staff to the task force. This bill took effect on June 1, 2022. Both of these bills reflect the growing public attention in activities of law enforcement officers and agencies in recent years.

Additional analysis of 2022 Legislative Changes to the PIA can be found on the Ombudsman's Blog, *Open Matters* at news.maryland.gov/mpiaombuds/blog.

FY 2022 Open Matters: Blog of the Public Access Ombudsman

- **PIA Ombudsman program—Impact of Covid-19 and Mediation Metrics. Part 2**. Open Matters Blog, posted October 12, 2021.
- **PIA Ombudsman Program - Impact of Covid-19 and Mediation Metrics. Part 1**. Open Matters Blog, posted September 27, 2021.

RESOURCES/LINKS

- ◆ **MD Office of the Attorney General—PIA Manual 17th Edition:** http://www.marylandattorneygeneral.gov/OpenGov%20Documents/PIA_manual_printable.pdf. *The PIA Manual includes Appendix J a List of Public Record Custodians.*
- ◆ **Maryland 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/>
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 - * **Interpretive Regulations:** <https://tinyurl.com/y2cuqp55>
- ◆ **Virginia Freedom of Information Advisory Council:** <http://foiacouncil.dls.virginia.gov/foiacouncil.htm>

Outreach FY 2022

July 1, 2021 – June 30, 2022

Presentations, Workshops, Trainings, and Other Outreach

Due to the COVID-19 pandemic, the Public Access Ombudsman's Office conducted all trainings and presentations by remote means.

- Maryland Municipal League 2021 Virtual Summer Conference, *MPIA Overview*, virtual briefing in partnership with Judge David Carey. July 19, 2021.
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Select Publications

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- **Mediation Process Flow-Chart**



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—June 30, 2022



**75 Months
Since
Inception**

2485 March 30, 2016

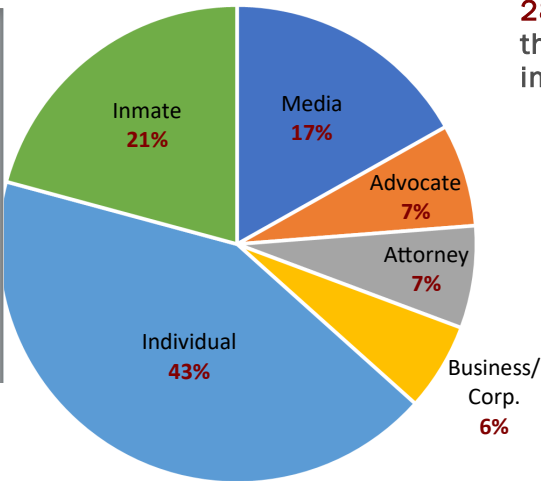
- ◆ 1481 - Mediation requests
- ◆ 1004 - Other / "help-desk" inquiries

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 Requesters

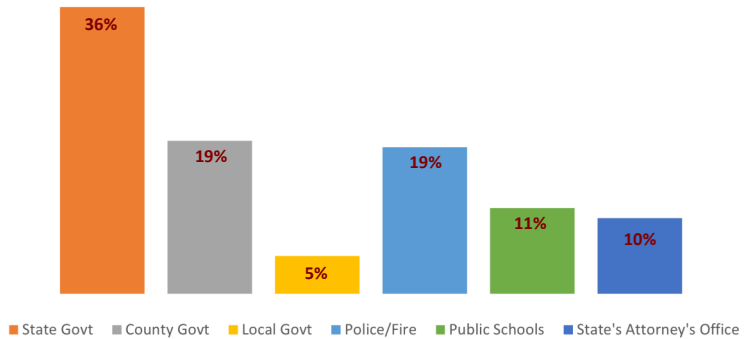
Aggregated Requesters: Professional/Occupational categories make up 36% of requests for assistance and all individuals make up 64%.



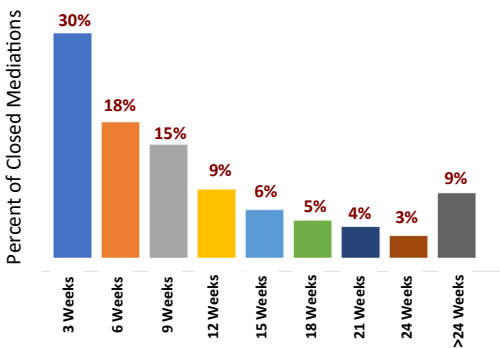
The Agencies

285 unique agencies participated in mediation matters with the PIA Ombudsman since the beginning of the program, including agencies at the state, county and local levels.

What Agencies are Participating in Mediation?

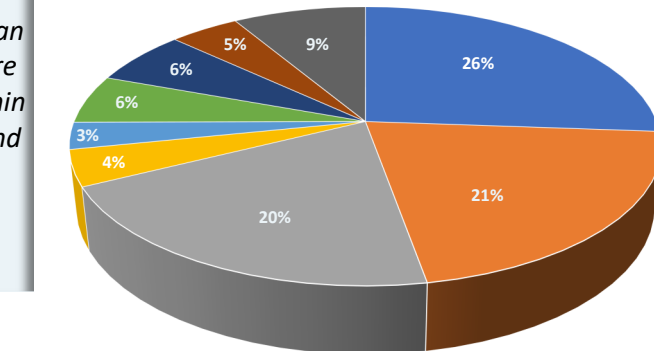


How Long Does Mediation Take?



30% of Ombudsman matters are closed within 3 weeks and **75%** by 90 days.

What are the PIA disputes?



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

Mediations March 30, 2016 – June 30, 2022	
New/Incoming Cases between 3/30/16–6/30/22	1481
Closed as of 6/30/22	1453

- Misapplication of exemption 23%
- Redaction inappropriate 3%
- Entire record withheld 20%
- MIA: No Response 26%
- Partial, nonresponsive, or incomplete response 21%
- Fees excessive 6%
- Fee waiver denied or ignored 5%
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- **Mediation Process Flow-Chart**



PUBLIC ACCESS OMBUDSMAN MEDIATION PROCESS QUICK GUIDE



Request Dispute Resolution

- Must be made in writing by mail, website form, e-mail, or fax to the Public Access Ombudsman.
- Must include original PLA request, any response(s) from custodian, a brief description of the dispute, and what outcome is being sought through mediation.

File Opened

- Dispute resolution request processed within 3 to 5 business days of receipt.
- 90-day deadline to complete mediation begins.
- Other party notified, consent to enter mediation requested. If consent is not received, file is closed and Final Determination issued.

Initial Discussion Between Initiating Party & Ombudsman (0-30 Days)

- Review of information submitted for mediation assistance.
- Discuss next-steps, set expectations for process.

Ombudsman Outreach to Other Party (30-60 Days)

- Discuss PLA request, custodian response(s), dispute, and desired outcomes.
- Identify next-steps.

Review Status of Mediation (60 Days)

- Follow-up on any outstanding action items.
- If an extension is necessary, parties and Ombudsman must agree to it in writing.

Final Determination Issued (90th Day)

- Matter will either be resolved, unresolved, or partially resolved.
- A brief description of the outcome should be included where necessary.
- Final Determination must be submitted with any complaint to PLA Compliance Board within 30 days of its receipt.

The processing times outlined here serve as benchmarks for both the Ombudsman and program users to set expectations. The speed with which a mediation can be conducted depends on a number of factors, including the nature/complexity of the PLA dispute, the responsiveness of the parties, and the number of requests pending in the Ombudsman's queue, as examples.

LARRY HOGAN
Governor

BOYD K. RUTHERFORD
Lt. Governor



LISA A. KERSHNER
Public Access Ombudsman

STATE OF MARYLAND
OFFICE OF THE
PUBLIC ACCESS OMBUDSMAN

WHAT'S CHANGED?

[Chapter 658](#) of the 2021 Acts of the Maryland General Assembly takes effect on July 1, 2022. This new law expands the jurisdiction of the PIA Compliance Board while instituting an integrated PIA complaint dispute resolution process that includes the Public Access Ombudsman. While the mediation process with the Ombudsman largely remains the same, there are some differences of which you should take note. Here are some of the key changes taking effect under the new law:

Before	After
Files with the Ombudsman can remain open for an indefinite period of time.	Files with the Ombudsman must be closed and a Final Determination issued within 90 days, unless parties agree to an extension in writing.
Upon conclusion of a mediation, the Ombudsman closes the file.	Upon conclusion of a mediation, the Ombudsman prepares and issues a Final Determination to the parties in order to close the file.
A file can be opened with the Ombudsman and a complaint can be submitted to the PIA Compliance Board at the same time.	Mediation must first be attempted with the Ombudsman for all PIA disputes and a Final Determination issued before the Board can review a complaint.
The PIA Compliance Board can only hear complaints involving unreasonable fees in excess of \$350.	The PIA Compliance Board will have the authority to hear disputes about denial of inspection of a public record; charging unreasonable fees higher than \$350; a failure to respond to a request for a public record within certain statutory time limits; and frivolous, vexatious, or bad faith requests.

Appendix B.
INFORMAL
PUBLIC COMMENTS

January 6, 2022

Via Email at piaopengov@oag.state.md.us

Public Information Act Compliance Board
c/o Office of the Attorney General
200 St. Paul Place
19th Floor
Baltimore, MD 21202

To Whom It May Concern:

My name is Erin Parker, and I represent Anne Arundel Community College. Previously, I represented other USM institutions and worked in the Educational Affairs Division of the Office of the Attorney General, and thus, have experience in representing Maryland public institutions of higher education who are subject to the Public Information Act. I am writing to provide informal feedback regarding the draft regulations regarding the Public Information Act Compliance Board (“Board”).

The Public Information Act, Md. Code, Gen. Prov., § 4-101 *et. seq.* (“PIA”) provides that the Board review and decide whether a public body “charged an unreasonable fee under § 4-206 of this title of more than \$350.” PIA, § 4-1A-04(a)(1)(ii). If the Board finds a fee to be unreasonable, the Board may order the custodian to “reduce the fee to an amount determined by the Board to be reasonable and refund the difference.” PIA, § 4-1A-04(a)(3)(ii). Under PIA, § 4-1B-04, the Ombudsman can resolve disputes regarding “fees imposed.” In each instance in which fees are discussed in the PIA, the legislature used the past tense of the verb to indicate that the fee had actually been assessed. The draft regulations, however, seem to allow for the Board to review “fee estimates,” in addition to fees charged or fees imposed. In this regard, the draft regulations say, “If a complaint alleges that the custodian charged an unreasonable fee **or fee estimate** of more than \$350...”

The term “fee estimates” does not appear in the PIA statute. Rather, the fee must have been “charged” or “imposed.” We believe that by including “fee estimates” within the scope of review by the Board or the Ombudsman, the proposed regulations, as drafted, would impermissibly expand the jurisdiction of the Board and Ombudsman beyond what was contemplated by the law.

A fee estimate is a tentative placeholder mandated by the PIA. Fee estimates are not ripe for review because they are approximations that are developed in anticipation of completing the work that is needed in order to search for, review, and produce the records that have been requested. The fee estimate is not final. Often times, upon receipt of a fee estimate, the requestor will narrow the scope of an overbroad request or limit the records that need to be searched in order to make the search more reasonable in light of the information sought.

The PIA defines a reasonable fee as “a fee bearing a reasonable relationship to the recovery of actual costs incurred by a governmental unit.” PIA, § 4-206(a)(3). When a public body calculates a fee estimate, it must rely on the best information available and rough calculations to arrive at a reasonable estimate, but it does not necessary reflect the actual costs that will be incurred by the public body once the work is performed. While attempting to ascertain the volume of records to be searched and individuals who would be involved in the search, review, and production of documents, the public body does not

necessarily know the precise volume of information that will need to be searched or exact individuals who will be needed to perform the search when it calculates the fee estimate.

Prior Board opinions clearly articulate that the Board does not review fee estimates. For example, in *Sharp v. DLLR*, the Board stated, “Because the calculation may yield a different fee once the records are gathered, prepared, and copied, the Board views the estimate as premature and, therefore, cannot evaluate it further for purposes of ordering a reduction or a refund.” PIACB-17-17; *see also* PIACB-17-15. The Board has further stated that “[A]n estimated fee does not reflect the actual costs incurred by a governmental unit and hinders this Board’s ability to direct a reduction or refund of the portion of a fee that appears to be unreasonable.” PIACB-18-08. Once the work is performed to locate, review, prepare the responsive documents for production, and copy the documents, if requested, the actual fee is, then, assessed. If the Board’s or Ombudsman’s jurisdiction were expanded to include fee estimates that are set forth in a ten-day letter, as a public body, we fear the result would be an onslaught of premature complaints that do not reflect the actual amount charged by the public body.

We believe the Board’s rationale remains true. The statutory language of the PIA has not changed to include fee estimates, and we respectfully request that the Board remove the words “fee estimate” throughout the draft regulations to reflect the legislative intent to afford review of only fees charged or imposed. This revision would further reflect the Board’s prior well-founded opinions that fee estimates are not subject to review.

More recently, the Board has permitted review of fee estimates when a public body has required prepayment of the fee in order to conduct the work required to produce responsive documents, stating:

Fee estimates—as opposed to fees charged for work already performed—can present challenges for review, and we have on occasion dismissed complaints about fee estimates as prematurely made. *See, e.g.,* PIACB 17-04 at 3-4 (Nov. 22, 2016). In other cases, where the custodian has asked for prepayment of a precise figure based on a breakdown of anticipated actual costs—as is the case here—we have been able to evaluate the reasonableness of a fee estimate. *See, e.g.,* PIACB 21-01 (Oct. 5, 2020); PIACB 20-13 (June 22, 2020). In these cases, if the parties’ submissions give us no reason to doubt an estimate, the Board will not disturb it. If, on the other hand, the submissions show that an estimate is not reasonably related to the anticipated actual costs of a response, we will instruct the agency to modify or eliminate that portion of the estimate that does not accurately reflect the agency’s actual costs. *See, e.g.,* PIACB 20-05 at 3-4 (Nov. 7, 2019). Any conclusions about the reasonableness of a fee estimate for tasks not yet performed do not change the fact that the final fee for tasks actually performed must bear a reasonable relationship to the actual costs incurred by the agency. *See* PIACB 21-01 at 3 (Oct. 5, 2020) (“[F]inal assessments of costs must be based on the time actually expended, at the rates of the staff who expended it.”). If that final fee deviates from the estimate paid, then a custodian may assess any additional actual costs incurred or, if the final cost is less than the estimate paid, must refund the requester the difference.

We submit that even when prepayment is required of an estimated fee, that the regulations should be revised to make clear that the Board does not review fee estimates and adopt its former reasoning and dismiss requests to review fee estimates. Nothing in the PIA itself supports the position that a fee estimate, even when prepayment is required, is subject to review by the Board or the Ombudsman.

Prepayment is a mechanism that public bodies use to ensure that they will be paid for the work performed. Without the ability to require prepayment of an estimated fee, too often requestors simply never paid the public body, leaving the public body footing the bill for many hours of work that was needed to fulfill the request. By explicitly including a provision for public bodies to charge a fee to search, review and prepare public records, the legislature made clear that it did not intend for public bodies to bear the costs associated with an individual's request for information. In this regard, the Office of the Attorney General has opined that "[t]his provision reflects a legislative judgment that the taxpayers need not subsidize PIA requestors (except for the first two hours of search and preparation time...)." 81 Opinions of the Attorney General 154, 157 (1996).

Responding to PIA requests often take hundreds of hours of public employees' time to gather, review, and produce information, which takes those employees' time away from the work of the public body. These costs to the business of the public body are real and should not be overlooked. Ultimately, the public body must refund any funds that were paid by the requestor, if the estimate was too high. Therefore, public bodies are motivated to make their best estimate and accurately reflect that they believe will be incurred to produce the requested records. When the actual fee is assessed based on the work that was, in fact, performed, any concerns about the fee estimate would likely be resolved and rendered moot.

Once the actual fees have been assessed to conduct the search, review, and production of records, a dispute regarding the actual amount charged is ripe for resolution. Until such time, the Board should clarify in the regulations that the fee estimate, even when prepayment is required, is not subject to review by the Board or the Ombudsman. We respectfully request that all references to fee estimates in the draft regulations be removed and the following statement be added to the regulations: "The Board and the Ombudsman may not review fee estimates, even if prepayment of the estimate is required by the public body." At a minimum, the regulations should clarify that fee estimate may only be reviewed if prepayment is required by the public body.

If you have any questions regarding these informal comments, please do not hesitate to contact me at eoparker1@aacc.edu or 410-777-1220.

Sincerely,



Erin O. Parker
General Counsel

Submitted by electronic mail to: piaopengov@oag.state.md.us

January 6, 2022

Informal Comments on Draft PIACB regulations dated 12/10/21

Thank you for the opportunity to review and comment informally on these draft regulations. I reserve the right to submit formal comments on the same or any other matters when the regulations are proposed and published for public comment.

01.01.B.

The Board should define “frivolous, vexatious, or in bad faith,” relying on relevant Maryland legal precedent.

01.05.B.(2)

The regulations referenced do not apply to county detention centers and thus this provision provides no protection for detention center detainees and inmates, given the use of “pursuant to.” At a minimum, explicit reference to an analogous or similar date stamp affixed at a county detention center should be included. The Board should also accept as evidence an attestation under oath from an inmate as to the date of deposit or personal delivery referenced in 01.05.B.(1) and provide a form for such attestation. Although not the subject of this section of the draft regulations, I urge that the Board provide by regulation for the creation of a form complaint for use by inmates, ensure that copies of the form are available in the libraries of prisons, county detention centers, and other detention facilities throughout Maryland, and include the form attestation of deposit or delivery for mailing on that form complaint.

02.03.C.(1).(d)

This provision does not fully comply with the statute. The Board should require a brief description of the undisclosed records “that will enable the applicant (and the Board) to assess the applicability of the legal authority for the denial.”

02.04.B.(1) and 03.04.B.(1)

Given that the time for filing a complaint or response is 30 days, the time for filing a reply should be 15 days.

02.08.B. and 03.08.B.

This provision is likely unworkable and will deny applicants and custodians a meaningful opportunity to refile a signed complaint. Given that there are no deadlines in the draft regulations for the transmission of information to the Board by the Ombud or for the dismissal of the complaint by the Board, there is no guarantee that the dismissal will be communicated to the applicant or custodian within 30 days of receipt of the Final Determination of the Ombud, or sufficiently in advance of the 30th day to allow for refileing. I urge the Board to allow for

*John Nethercut
Executive Director*

*Debra Gardner
Legal Director*

ATTORNEYS

*Michael Abrams
Ashley Black
Monisha Cherayil
Sally Dworak-Fisher
Matthew Hill
Charisse Lue
John Pollock
Renuka Rege
Russell R. Reno, Jr.
Tyra Robinson
David Rodwin
Maria Roumiantseva*
Zafar S. Shah
Albert Turner*

*In Memoriam:
Levern Blackmon
1996-2020*

PARALEGALS

*Fredson Desravines
Gabriela Dickson La Rotta
Patrick O'Toole
Carolina Paul
Lena Yeakey*

*Brenda Midkiff
Director of Administration*

*Sabrina Harris
Office Manager*

*Kathleen Gregory, CFRE
Director of Development*

*Erin Brock
Development Manager*

*Rebecca Reynolds
Development Associate*

**Admitted In New York only*

refiling within 15 days of receipt of the dismissal of the complaint, with notice of the time for refiling in the notice of dismissal.

06.06.B.(2)

In light of the possibility (and likelihood) of further appellate proceedings, this provision should provide for return or destruction of the records or information only after the entry of a final judgment in the matter.

Thank you again for the opportunity to submit informal comments at this stage. I am happy to discuss these comments if that would be helpful. If you need any further information, do not hesitate to contact me.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Debra Gardner", with a long horizontal flourish extending to the right.

Debra Gardner
Legal Director

PIA Board or to whom it may concern:

I am writing on behalf of UMBC to provide informal feedback regarding the draft regulations regarding the Public Information Act Compliance Board (“Board”). The Public Information Act, Md. Code, Gen. Prov., § 4-101 et. seq. (“PIA”) provides that the Board review and decide whether a public body “charged an unreasonable fee under § 4–206 of this title of more than \$350.” (PIA, § 4-1A-04(a)(1)(ii)) If the Board finds a fee to be unreasonable, the Board may order the custodian to “reduce the fee to an amount determined by the Board to be reasonable and refund the difference.” (PIA, § 4-1A-04(a)(3)(ii)) Under PIA, § 4-1B-04, the Ombudsman can resolve disputes regarding “fees imposed.” In each instance in which fees are discussed in the PIA, the Legislature used the past tense of the verb to indicate that the fee had actually, already been assessed. The draft regulations, however, seem to allow for the Board to review “fee estimates,” in addition to fees charged or fees imposed. In this regard, the draft regulations say, “If a complaint alleges that the custodian charged an unreasonable fee or fee estimate of more than \$350...”

The term “fee estimate” does not appear in the PIA statute. Rather, the fee must have been “charged” or “imposed.” We believe that by including “fee estimate” within the scope of review by the Board or the Ombudsman, the draft regulations, as drafted, would impermissibly expand the jurisdiction of the Board and Ombudsman beyond what was contemplated by the law and General Assembly.

A fee estimate is a tentative placeholder mandated by the PIA. Fee estimates are not ripe for review because they are approximations that are developed in anticipation of completing the work that is needed in order to search for, review, and produce the records that have been requested. The fee estimate is not final. Oftentimes, upon receipt of a fee estimate, the requestor will reasonably narrow the scope of an overbroad request or limit the records that need to be searched in order to make the search more focused to address the information sought.

The PIA defines a reasonable fee as “a fee bearing a reasonable relationship to the recovery of actual costs incurred by a governmental unit.” (PIA, § 4-206(a)(3)) When UMBC calculates a fee estimate, it must rely on the best information available and rough calculations to arrive at a reasonable estimate, but it does not necessarily reflect the actual costs that will be incurred by UMBC once the work is performed. While attempting to ascertain the volume of records to be searched and individuals who would be involved in the search, review, and production of documents, UMBC does not necessarily know the precise volume of information that will need to be searched or exact individuals who will be needed to perform the search when it calculates the fee estimate.

Prior Board opinions clearly articulate that the Board does not review fee estimates. For example, in *Sharp v. DLLR*, the Board stated, “Because the calculation may yield a different fee once the records are gathered, prepared, and copied, the Board views the estimate as premature and, therefore, cannot evaluate it further for purposes of ordering a reduction or a refund.” (PIACB-17-17; see also PIACB-17-15) The Board has further stated that “[A]n estimated fee does not reflect the actual costs incurred by a governmental unit and hinders this Board’s ability to direct a reduction or refund of the portion of a fee that appears to be unreasonable.” (PIACB-18-08) Once the work is performed to locate, review, prepare the responsive documents for production, and copy the documents, if requested, the actual fee is, then, assessed. If the Board’s or Ombudsman’s jurisdiction were expanded to include fee estimates if set forth in a ten-day letter, as a public body, we fear the result would be an onslaught of premature complaints that do not reflect the actual amount charged by the public body.

We believe the Board’s rationale remains accurate. The statutory language of the PIA has not changed to include fee estimates, and we respectfully request that the Board remove the words “fee estimate” throughout the draft regulations to reflect the legislative intent to afford review of only fees charged or imposed. This revision would further reflect the Board’s prior well-founded opinions that fee estimates are not subject to review.

More recently, the Board has permitted review of fee estimates when a public body has required prepayment of the fee in order to conduct the work required to produce responsive documents, stating:

Fee estimates—as opposed to fees charged for work already performed—can present challenges for review, and we have on occasion dismissed complaints about fee estimates as prematurely made. See, e.g., PIACB 17-04 at 3-4 (Nov. 22, 2016). In other cases, where the custodian has asked for prepayment of a precise figure based on a breakdown of anticipated actual costs—as is the case here—we have been able to evaluate the reasonableness of a fee estimate. See, e.g., PIACB 21-01 (Oct. 5, 2020); PIACB 20-13 (June 22, 2020). In these cases, if the parties’ submissions give us no reason to doubt an estimate, the Board will not disturb it. If, on the other hand, the submissions show that an estimate is not reasonably related to the anticipated actual costs of a response, we will instruct the agency to modify or eliminate that portion of the estimate that does not accurately reflect the agency’s actual costs. See, e.g., PIACB 20-05 at 3-4 (Nov. 7, 2019). Any conclusions about the reasonableness of a fee estimate for tasks not yet performed do not change the fact that the final fee for tasks actually performed must bear a reasonable relationship to the actual costs incurred by the agency. See PIACB 21-01 at 3 (Oct. 5, 2020) (“[F]inal assessments of costs must be based on the time actually expended, at the rates of the staff who expended it.”). If that final fee deviates from the estimate paid, then a custodian may assess any additional actual costs incurred or, if the final cost is less than the estimate paid, must refund the requester the difference.

We submit that even when prepayment is required of an estimated fee, that the regulations should be revised to make clear that the Board does not review fee estimates and adopt its former reasoning and dismiss requests to review fee estimates. Nothing in the PIA itself supports the position that a fee estimate, even when prepayment is required, is subject to review by the Board or the Ombudsman.

Prepayment is a mechanism that UMBC uses to ensure that we will be paid for the work performed. Without the ability to require prepayment of an estimated fee, too often requestors simply never pay UMBC, leaving our institution and taxpayers footing the bill for many hours of work that was needed to fulfill the abandoned request. These requests take our employees' time away from the work of serving our students and community. These real costs to UMBC should not be overlooked. Ultimately, UMBC must refund any funds that were paid by the requestor, if the estimate was too high. Therefore, we are motivated to make our best estimate and accurately reflect what we believe will be incurred to produce the requested records. When the actual fee is assessed based on the work that was, in fact, performed, any concerns about the fee estimate would likely be resolved and rendered moot.

Once the actual fees have been assessed to conduct the search, review, and production of records, a dispute regarding the actual amount charged is ripe for resolution. Until such time, the Board should clarify in the draft regulations that the fee estimate, even when prepayment is required, is not subject to review by the Board or the Ombudsman. We respectfully request that all references to fee estimates in the draft regulations be removed and the following statement be added to the regulations: "The Board and the Ombudsman may not review fee estimates, even if prepayment of the estimate is required by the public body." At a minimum, the regulations should clarify that fee estimate may only be reviewed if prepayment is required by a public body.

Thank you for welcoming informal comments. Respectfully submitted for your consideration,

Sincerely,

A handwritten signature in blue ink, appearing to read "Christopher Tkacik".

Christopher Tkacik
Sr. Associate General Counsel

January 7, 2022

To Whom it may Concern:

I am writing to provide informal feedback regarding the draft regulations prepared by the Public Information Act Compliance Board ("Board"). They appear to be well thought out and a strong effort to remove any doubt and provide clarity to all parties involved. This only helps us all.

However, I have three (3) areas of concern which relate to [a] failure to explicitly state the records retention schedule in the regulations [b] explicitly mentioning records protected by attorney-client privilege and [c] clarification regarding when a complaint related to the assessment of fees is ripe for review by the Board.

Area 1

I believe explicitly stating the records retention schedules for Chapter 04.06 on page 12 and Chapter 06.01.A on page 14 would be helpful. The general public (read: casual reader) does not know what schedule is being referenced or where the schedule may be found.

Area 2

Chapter 05.03.A.1 on page 13 only exempts records protected by federal law. However, I believe records protected by attorney-client privilege should also be specifically included in this section.

Area 3

The Public Information Act, Md. Code, Gen. Prov., § 4-101 *et. seq.* ("PIA") provides that the Board review and decide whether a public body "charged an unreasonable fee under § 4-206 of this title of more than \$350." PIA, § 4-1A-04(a)(1)(ii). If the Board finds a fee to be unreasonable, the Board may order the custodian to "reduce the fee to an amount determined by the Board to be reasonable and refund the difference." PIA, § 4-1A-04(a)(3)(ii). Under PIA, § 4-1B-04, the Ombudsman can resolve disputes regarding "fees imposed." In each instance in which fees are discussed in the PIA, the legislature used the past tense of the verb to indicate that the fee had actually been assessed. The regulations, however, seem to allow for the Board to review "fee estimates," in addition to fees charged or fees imposed. In this regard, the regulations say, "If a complaint alleges that the custodian charged an unreasonable fee **or fee estimate** of more than \$350..."

The term "fee estimates" does not appear in the PIA statute. Rather, the fee must have been "charged" or "imposed." I believe that by including "fee estimates" within the scope of review by the Board or the Ombuds, the regulations, as drafted, causes confusion and would

impermissibly expand the jurisdiction of the Board and Ombuds beyond what was contemplated – or is permitted -- by the law.

A fee estimate is a tentative placeholder mandated by the PIA, and appears in the 10-day letter. It is not a binding figure. Fee estimates are not ripe for review because they are merely approximations which are developed in anticipation of completing the work that is needed in order to search for, review, and produce the records that have been requested. The fee estimate is not final. Often times, upon receipt of a fee estimate in the 10-day letter, the requestor will narrow the scope of an overbroad request or limit the records that need to be searched in order to make the search more reasonable in light of the information sought.

The PIA defines a reasonable fee as “a fee bearing a reasonable relationship to the recovery of actual costs incurred by a governmental unit.” PIA, § 4-206(a)(3). When a public body calculates a fee estimate, it must rely on the best information available and rough calculations to arrive at a reasonable estimate, but it does not necessarily reflect the actual costs that will be incurred by the public body once the work is performed. While attempting to ascertain the volume of records to be searched and individuals who would be involved in the search, review, and production of documents, the public body does not necessarily know the precise volume of information that will need to be searched or exact individuals who will be needed to perform the search when it calculates the fee estimate for the 10-day letter.

Prior Board opinions clearly articulate that the Board does not review fee estimates in the 10-day letter. For example, in *Sharp v. DLLR*, the Board stated, “Because the calculation may yield a different fee once the records are gathered, prepared, and copied, the Board views the estimate as premature and, therefore, cannot evaluate it further for purposes of ordering a reduction or a refund.” PIACB-17-17; *see also* PIACB-17-15. The Board has further stated that “[A]n estimated fee does not reflect the actual costs incurred by a governmental unit and hinders this Board’s ability to direct a reduction or refund of the portion of a fee that appears to be unreasonable.” PIACB-18-08. Once the work is performed to locate, review, prepare the responsive documents for production, and copy the documents, if requested, the actual fee is, then, assessed. If the Board’s or Ombuds’ jurisdiction were expanded to include fee estimates set forth in a ten-day letter, as a public body, I fear the result would be an onslaught of premature complaints that do not reflect the actual amount charged by the public body. This only clogs the pipeline for the Board, Ombuds and public body.

I believe the Board’s rationale remains true. The statutory language of the PIA has not changed to include fee estimates, and I respectfully request that the Board remove the words “fee estimate” throughout the draft regulations to reflect the legislative intent to afford review of only fees charged or imposed. This revision would further reflect the Board’s prior well-founded opinions that fee estimates are not subject to review.

More recently, the Board has permitted review of fee estimates when a public body has required prepayment of the fee in order to conduct the work required to produce responsive documents, stating:

Fee estimates—as opposed to fees charged for work already performed—can present challenges for review, and we have on occasion dismissed complaints about fee estimates as prematurely made. See, e.g., PIACB 17-04 at 3-4 (Nov. 22, 2016). In other cases, where the custodian has asked for prepayment of a precise figure based on a breakdown of anticipated actual costs—as is the case here—we have been able to evaluate the reasonableness of a fee estimate. See, e.g., PIACB 21-01 (Oct. 5, 2020); PIACB 20-13 (June 22, 2020). In these cases, if the parties’ submissions give us no reason to doubt an estimate, the Board will not disturb it. If, on the other hand, the submissions show that an estimate is not reasonably related to the anticipated actual costs of a response, we will instruct the agency to modify or eliminate that portion of the estimate that does not accurately reflect the agency’s actual costs. See, e.g., PIACB 20-05 at 3-4 (Nov. 7, 2019). Any conclusions about the reasonableness of a fee estimate for tasks not yet performed do not change the fact that the final fee for tasks actually performed must bear a reasonable relationship to the actual costs incurred by the agency. See PIACB 21-01 at 3 (Oct. 5, 2020) (“[F]inal assessments of costs must be based on the time actually expended, at the rates of the staff who expended it.”). If that final fee deviates from the estimate paid, then a custodian may assess any additional actual costs incurred or, if the final cost is less than the estimate paid, must refund the requester the difference.

I submit that even when prepayment is required of an estimated fee, that the regulations should be revised to make clear that the Board does not review fee estimates presented in the 10-day letter and adopt its former reasoning and dismiss requests to review such fee estimates. Nothing in the PIA itself supports the position that a fee estimate, even when prepayment is required, is subject to review by the Board or the Ombuds.

Prepayment is a mechanism that public bodies use to ensure that they will be paid for the work performed and to offset taxpayer expense. Without the ability to require prepayment of an estimated fee, too often requestors simply never paid the public body, leaving the public body footing the bill for many hours of work that was needed to fulfill the request. These requests often take hundreds of hours of public employees’ time to gather, review, and produce information, which takes those employees’ time away from the core mission of the public body. These costs to the business of the public body are real and significant; they should not be overlooked. Ultimately, the public body must refund any funds that were paid by the requestor, if the estimate was too high. Therefore, public bodies are motivated to make their best estimate and accurately reflect that they believe will be incurred to produce the requested records. When the actual fee is assessed based on the work that was, in fact, performed, any concerns about the fee estimate in the 10-day letter would be resolved and rendered moot.

Once the actual fees have been assessed to conduct the search, review, and production of records, a dispute regarding the actual amount charged is ripe for resolution. Until such time, the Board should clarify in the regulations that the fee estimate, even when prepayment is required, is not subject to review by the Board or the Ombuds. I respectfully request that all

references to fee estimates in the drafted regulations be removed and the following statement be added to the regulations: “The Board and the Ombuds may not review fee estimates, even if prepayment of the estimate is required by the public body.” At a minimum, the regulations should clarify that fee estimate may only be reviewed if prepayment is required by the public body.

Thank you for your consideration,

Sincerely,
Laura Anderson Wright, Esq.
Associate General Counsel

Appendix C.

REGULATORY

PROPOSAL

Title 14
INDEPENDENT AGENCIES
Subtitle 02 STATE PUBLIC INFORMATION ACT COMPLIANCE BOARD

Notice of Proposed Action

[22-071-P]

The State Public Information Act Compliance Board proposes to adopt, under a new subtitle, **Subtitle 02 State Public Information Act Compliance Board**:

- (1) New Regulations **.01—.07** under **COMAR 14.02.01 Definitions; General Provisions**;
- (2) New Regulations **.01—.09** under **COMAR 14.02.02 Complaint Process — Applicants**;
- (3) New Regulations **.01—.09** under **COMAR 14.02.03 Complaint Process — Custodians**;
- (4) New Regulations **.01—.06** under **COMAR 14.02.04 Informal Conference**;
- (5) New Regulations **.01—.07** under **COMAR 14.02.05 Request for Records or Additional Information**;
- (6) New Regulations **.01—.08** under **COMAR 14.02.06 Confidential Records or Information Provided Under COMAR 14.02.05.03**;
- (7) New Regulations **.01—.05** under **COMAR 14.02.07 Decisions of Board**; and
- (8) New Regulations **.01** and **.02** under **COMAR 14.02.08 Meetings of Board**.

This action was considered at a February 4, 2022, public meeting of the State Public Information Act Compliance Board, held virtually.

Statement of Purpose

The purpose of this action is to provide regulations governing the policies and procedures of the State Public Information Act Compliance Board as it will operate after July 1, 2022, with the expanded jurisdiction provided by Ch. 658, Acts of 2021.

Comparison to Federal Standards

There is no corresponding federal standard to this proposed action.

Estimate of Economic Impact

The proposed action has no economic impact.

Economic Impact on Small Businesses

The proposed action has minimal or no economic impact on small businesses.

Impact on Individuals with Disabilities

The proposed action has no impact on individuals with disabilities.

Opportunity for Public Comment

Comments may be sent to Sara Klemm, Assistant Attorney General, Office of the Attorney General, 200 St. Paul Place, Baltimore, MD 21202, or call 410-576-7034, or email to sklemm@oag.state.md.us, or fax to 410-576-7004. Comments will be accepted through April 25, 2022. A public hearing has not been scheduled.

Open Meeting

Final action on the proposal will be considered by the State Public Information Act Compliance Board during a public meeting to be held on early May, at a virtual meeting through Microsoft Teams.

14.02.01 Definitions; General Provisions

General Provisions Article, §4-1A-04, Annotated Code of Maryland

.01 Definitions.

A. In this subtitle, the following terms have the meanings indicated.

B. Terms Defined.

(1) “Act” means the Maryland Public Information Act, General Provisions Article, Title 4, Annotated Code of Maryland.

(2) “Applicant” has the meaning stated in General Provisions Article, §4-101(b), Annotated Code of Maryland.

(3) “Board” means the State Public Information Act Compliance Board, as described in General Provisions Article, §4-1A-02, Annotated Code of Maryland.

(4) “Custodian” has the meaning stated in General Provisions Article, §4-101(d), Annotated Code of Maryland.

(5) “Designated representative” means an attorney, an employee organization representative, or any other individual authorized in writing by a party to represent the party.

(6) “Dispute” has the meaning stated in COMAR 14.37.01.01B.

(7) “Exemption” has the meaning stated in COMAR 14.37.01.01B.

(8) “Final Determination” means the written document issued by the Public Access Ombudsman pursuant to General Provisions Article, §4-1B-04(b), Annotated Code of Maryland, stating that a specific dispute has been resolved or partially resolved or not been resolved.

(9) “Inmate” means an individual who:

(a) Is confined in a correctional or other detention facility pursuant to a court order in a criminal or juvenile delinquency case; and

(b) Has no direct access to the U.S. Postal Service or the ability to submit a complaint or other information electronically.

(10) “Official custodian” has the meaning stated in General Provisions Article, §4-101(f), Annotated Code of Maryland.

(11) “Ombudsman” means the Public Access Ombudsman, as described in General Provisions, §4-1B-03, Annotated Code of Maryland.

(12) “Public record” has the meaning stated in General Provisions Article, §4-101(k), Annotated Code of Maryland.

(13) “Sociological information” means any of the following information concerning a person that may be contained in a record of the Board:

(a) Social security number;

(b) Personal address;

(c) Personal phone number;

(d) Personal email address; and

(e) Date of birth.

(14) “Unreasonable fee” means a fee that does not bear a reasonable relationship to the recovery of actual costs incurred by a governmental unit responding to a request for a public record.

.02 Jurisdiction.

A. Subject to the procedure outlined in COMAR 14.02.02, the Board shall review and resolve complaints from an applicant or the applicant’s designated representative alleging that a custodian:

(1) Denied inspection of a public record in violation of the Act;

- (2) Charged an unreasonable fee or charged an unreasonable estimated fee of more than \$350 under General Provisions Article, §4-206, Annotated Code of Maryland; or
- (3) Failed to respond to a request for a public record within the time limits established under General Provisions Article, §4-203(a) or (d), Annotated Code of Maryland.

B. Subject to the procedure outlined in COMAR 14.02.03, the Board shall review and resolve complaints from a custodian alleging that an applicant's request or pattern of requests is frivolous, vexatious, or in bad faith.

.03 Recusal of Board Members.

A. Standard for Recusal.

(1) A Board member shall recuse himself or herself from Board proceedings that involve circumstances in which the Board member:

- (a) Has a conflict of interest; or
- (b) Cannot participate fairly and impartially.

(2) Personal familiarity with an applicant or custodian does not, of itself, require recusal of a Board member.

B. The Board member who is recused from a matter before the Board may not:

- (1) Participate in the Board's discussion or decision on the matter; or
- (2) Discuss the matter or the Board's review of the matter with members of the Board, the parties, or staff or counsel to the Board.

C. The Board shall document the recusal of the Board member from a matter in its written decision on the matter.

.04 Consolidation of Complaints.

In its discretion, the Board may consolidate complaints filed under COMAR 14.02.02 and COMAR 14.02.03 if both complaints involve the same applicant and same custodian, and if consolidation will promote efficient and fair resolution of the complaints.

.05 Computation of Time.

Computation of a period of time shall be governed by General Provisions Article, §1-302, Annotated Code of Maryland.

.06 Date of Receipt.

A. A complaint, response, or reply to a response is deemed received on the date that it is postmarked or sent by email to the Board.

B. Inmate Applicants.

(1) A complaint, response, or reply to a response is deemed received on the date that the complaint, response, or reply to a response, in mailable form and with proper postage affixed is:

- (a) Deposited by the inmate applicant into a receptacle designated by the facility for outgoing mail; or
- (b) Personally delivered to an employee of the facility authorized by the facility to collect such mail.

(2) A date stamp affixed pursuant to COMAR 12.02.20.04A or COMAR 12.12.20.04A, or a similar date stamp affixed by a county detention center or other detention facility not within the control of the Division of Correction, is evidence of the date on which an inmate applicant sent a complaint, response, or reply to a response under §B(1) of this regulation.

.07 Record.

A. The Board shall maintain a record of each matter, including an index.

B. The Board's internal record of a matter shall consist of the following, if filed in a matter:

- (1) The complaint;
- (2) The response to a complaint;
- (3) The reply to the response;
- (4) Written notices;
- (5) Written requests for information;
- (6) Records or additional information received by the Board pursuant to COMAR 14.02.05.03;
- (7) The recording of an informal conference; and
- (8) The Board's written decision.

C. The public record of a matter shall consist of the records listed in §B of this regulation, if filed, except that records or additional information received by the Board pursuant to COMAR 14.02.05.03 may not be included.

14.02.02 Complaint Process — Applicants

Authority: General Provisions Article, §§4-1A-04(a) and (c), 4-1A-05, and 4-1A-06, Annotated Code of Maryland

.01 Filing a Complaint.

A. An applicant or the applicant's designated representative may file a complaint with the Board within 30 days after receiving a Final Determination from the Ombudsman that a specific dispute has not been resolved.

B. The complaint shall:

- (1) *Pertain only to the dispute described in the Final Determination;*
 - (2) *Be submitted in writing; and*
 - (3) *Be signed by the applicant.*
- C. *The substance of the complaint shall, at minimum:*
- (1) *Identify the custodian that is the subject of the complaint; and*
 - (2) *Describe the action of the custodian, the date of the action, and the circumstances of the action.*
- D. *A complaint may be filed by email or regular mail.*

.02 Documents Attached to Complaint.

- A. *If available, an applicant shall attach to the complaint:*
- (1) *A copy of the original request for a public record;*
 - (2) *A copy of the custodian's response; and*
 - (3) *The Ombudsman's Final Determination.*
- B. *An applicant may attach to the complaint additional documents relevant to the dispute, including correspondence between the applicant and the custodian.*

.03 Response to Complaint.

- A. *Upon receipt of a complaint, the Board shall:*
- (1) *Promptly send the complaint to the custodian identified in the complaint; and*
 - (2) *Request that the custodian send a response to the Board.*
- B. *A custodian shall file a written response to a complaint within 30 days after receiving the complaint and request for a response from the Board.*
- C. *Complaints Alleging that a Custodian Denied Inspection of a Public Record in Violation of the Act.*
- (1) *If a complaint alleges that a custodian denied inspection of a public record in violation of the Act, the custodian's response shall, to the extent relevant to the dispute:*
 - (a) *Explain why denial was necessary;*
 - (b) *Explain why redacting information would not address the reasons for denial;*
 - (c) *Provide the legal authority for the denial; and*
 - (d) *Without disclosing protected information or creating a descriptive index, provide a brief description of the undisclosed records that allows the Board to assess the applicability of the legal authority for the denial.*
 - (2) *If the custodian's response to the applicant's request for public records contains all of the information required by §C(1) of this regulation, then it is sufficient for the custodian to attach the response.*
- D. *If a complaint alleges that a custodian charged an unreasonable fee or charged an unreasonable estimated fee of more than \$350 under General Provisions Article, §4-206, Annotated Code of Maryland, the response shall, to the extent relevant to the dispute, include:*
- (1) *The hourly salary rates for the staff who responded or who are likely to respond to the applicant's request for a public record;*
 - (2) *The number of hours expended by each staff, or the number of hours the custodian anticipates will be expended by each staff, to respond to the applicant's request for a public record;*
 - (3) *A description of the tasks each staff performed or is likely to perform to respond to the applicant's request for public records; and*
 - (4) *An explanation of how fees for reproduction of the records are calculated.*
- E. *If a complaint alleges that a custodian failed to respond to a request for a public record within the time limits established by General Provisions Article, §4-203(a) or (d), Annotated Code of Maryland, the response shall, to the extent relevant to the dispute:*
- (1) *Provide the date and nature of correspondence with the applicant, if any;*
 - (2) *Describe the circumstances that prevented the custodian from responding in a timely manner; and*
 - (3) *Explain how the custodian intends to respond to the applicant's request for public records.*
- F. *A custodian may not attach to its response records that it claims are confidential, privileged, or otherwise exempt from disclosure.*
- G. *A custodian shall send a copy of the response to the applicant.*

.04 Reply to Response.

- A. *The Board may, in its discretion, permit the applicant to file a reply to the custodian's response.*
- B. *If permitted to file a reply, the applicant shall:*
- (1) *File the reply within 15 days after receiving the custodian's response; and*
 - (2) *Send a copy of the reply to the custodian.*

.05 Effect of Failure to Respond.

If a written response from a custodian is not received within 30 days after the Board notifies the custodian of the complaint and requests a response and the Board has not requested any additional information, the Board shall decide the case on the facts before it.

.06 Transfer of Information from Ombudsman.

- A. The Ombudsman may transfer basic information about a dispute to the Board, including:
- (1) The identity of the applicant and custodian;
 - (2) A brief summary of the nature of the dispute; and
 - (3) A copy of the Final Determination relevant to the complaint.
- B. Confidential Communications or Information.
- (1) The Ombudsman may not disclose to the Board any confidential mediation communications or mediation information, defined in COMAR 14.37.01.01B(8) and (10), that are made or received in the course of attempting to resolve a dispute.
 - (2) The Ombudsman may disclose confidential communications or information referenced in §B(1) of this regulation if all parties have consented to the disclosure in writing.

.07 Withdrawal of Complaint.

An applicant may withdraw a complaint at any time until the Board's decision is issued.

.08 Dismissal of Complaint.

- A. The Board shall dismiss a complaint if:
- (1) The Board lacks jurisdiction to review the complaint;
 - (2) The complaint is filed more than 30 days after the applicant received the Ombudsman's Final Determination;
- or
- (3) The complaint is not signed by the applicant.
- B. If the Board dismisses a complaint because it is not signed by the applicant, the applicant may refile a signed complaint within the same 30 days of receiving the Final Determination from the Ombudsman.

.09 Effect of Filing.

A complaint, the custodian's response to a complaint, and a reply to the custodian's response are public records of the Board subject to inspection under the Act.

14.02.03 Complaint Process — Custodians

Authority: General Provisions Article, §§4-1A-04(b) and (c), 4-1A-05, and 4-1A-06, Annotated Code of Maryland

.01 Filing a Complaint.

- A. A custodian may file a complaint with the Board within 30 days after receiving a Final Determination from the Ombudsman that a dispute has not been resolved.
- B. The complaint shall:
- (1) Pertain only to the dispute described in the Final Determination;
 - (2) Be submitted in writing; and
 - (3) Be signed by the custodian.
- C. The substance of the complaint shall, at minimum:
- (1) Identify the applicant that is the subject of the complaint;
 - (2) Describe the action of the applicant, the date of the action, and the circumstance of the action, including:
 - (a) The number and scope of the applicant's past requests, if any;
 - (b) The custodian's responses to past requests, if any; and
 - (c) Efforts to cooperate with the applicant; and
 - (3) Explain why, in the custodian's opinion, the applicant's request or pattern of requests is frivolous, vexatious, or in bad faith.
- D. A complaint may be filed by email or regular mail.

.02 Documents Attached to Complaint.

- A. If available, a custodian shall attach to the complaint:
- (1) A copy of the original request for a public record;
 - (2) A copy of the custodian's response; and
 - (3) The Ombudsman's Final Determination.
- B. A custodian may attach to the complaint additional documents relevant to the dispute, including correspondence between the applicant and the custodian.

.03 Response to Complaint.

- A. Upon receipt of a complaint, the Board shall:
- (1) Promptly send the complaint to the applicant identified in the complaint; and
 - (2) Request that the applicant send a response to the Board.
- B. An applicant shall file a written response to a complaint within 30 days after receiving the complaint and request for a response from the Board.
- C. An applicant shall send a copy of the response to the custodian.

.04 Reply to Response.

- A. The Board may, in its discretion, permit the custodian to file a reply to the applicant's response.
- B. If permitted to file a reply, the custodian shall:
 - (1) File the reply within 15 days after receiving the applicant's response; and
 - (2) Send a copy of the reply to the applicant.

.05 Effect of Failure to Respond.

If a written response from an applicant is not received within 30 days after the Board notifies the applicant of the complaint and requests a response and the Board has not requested any additional information, the Board shall decide the case on the facts before it.

.06 Transfer of Information from Ombudsman.

- A. The Ombudsman may transfer basic information about a dispute to the Board, including:
 - (1) The identity of the applicant and custodian;
 - (2) A brief summary of the nature of the dispute; and
 - (3) A copy of the Final Determination relevant to the complaint.
- B. Confidential Communications or Information.
 - (1) The Ombudsman may not disclose to the Board any confidential communications or information, defined in COMAR 14.37.01.01B(8) and (10), that are made or received in the course of attempting to resolve a dispute.
 - (2) The Ombudsman may disclose confidential communications or information referenced in §B(1) of this regulation if all parties have consented to the disclosure in writing.

.07 Withdrawal of Complaint.

A custodian may withdraw a complaint at any time until the Board's decision is issued.

.08 Dismissal of Complaint.

- A. The Board shall dismiss a complaint if:
 - (1) The Board lacks jurisdiction to review the complaint;
 - (2) The complaint is filed more than 30 days after the custodian received the Ombudsman's Final Determination;or
 - (3) The complaint is not signed by the custodian.
- B. If the Board dismisses a complaint because it is not signed by the custodian, the custodian may refile a signed complaint within the same 30 days of receiving the Final Determination from the Ombudsman.

.09 Effect of Filing.

A complaint, the custodian's response to a complaint, and a reply to the custodian's response are public records of the Board subject to inspection under the Act.

14.02.04 Informal Conference

Authority: General Provisions Article, §§4-1A-04(c) and 4-1A-07(b), Annotated Code of Maryland

.01 Board's Discretion.

If the Board is unable to reach a decision based on the written submissions before it, the Board may schedule an informal conference to hear from the complainant and affected custodian or applicant, or any other person with relevant information about the subject of the complaint.

.02 Notice of Informal Conference.

- A. After receipt of a complaint, the response, and a reply to the response, if one is filed, the Board shall notify the parties if it intends to hold an informal conference.
- B. Notice of an informal conference shall state:
 - (1) The names of the complainant and affected custodian or applicant;
 - (2) The matter number;
 - (3) The date and time of the informal conference; and
 - (4) The location of the informal conference.
- C. The Board may coordinate the date, time, and location of the informal conference with the complainant and the affected custodian or applicant prior to issuing the notice under §B of this regulation.
- D. Notice of an informal conference shall be sent by email, if provided, and regular mail to the address provided.

.03 Location of Informal Conference.

- A. An informal conference shall be held in a location that is as convenient as practicable to the complainant and the affected custodian or applicant.
- B. An informal conference may be held by videoconference or teleconference, at the Board's discretion.

.04 Timing of Informal Conference.

An informal conference shall be held as soon as practicably possible after receipt of all written submissions, but no later than 30 days after receipt of all written submissions unless extenuating circumstances require an extension.

.05 Procedure During Informal Conference.

A. Charge of Informal Conference.

(1) *The Chair of the Board shall have charge over the conduct of an informal conference.*

(2) *If the Chair is recused from a matter under COMAR 14.02.01.03, then a Board member designated by the Chair shall have charge over the conduct of an informal conference.*

B. Evidence.

(1) **Testimony.**

(a) *In addition to live testimony, the Board may allow the parties to testify by teleconference or to submit written testimony by email or regular mail, provided that any written testimony is also submitted to the other party.*

(b) *The Board may ask questions of and elicit testimony from the parties during the informal conference.*

(c) *Cross-examination may be conducted as the Chair, or the Board member designated by the Chair to have charge over the informal conference, finds it required for full and true disclosure of the facts.*

(2) *The Board may allow documentary or other nontestimonial evidence to be submitted at an informal conference, provided that it is also sent to the other party.*

(3) *The strict rules of evidence observed by the courts do not apply to an informal conference.*

(4) *In its discretion, the Board may exclude irrelevant or unduly repetitive evidence.*

C. *An informal conference is not a contested case within the meaning of State Government Article, §10-202(d), Annotated Code of Maryland.*

.06 Record of Informal Conference.

The Board shall record an informal conference.

14.02.05 Request for Records or Additional Information

Authority: General Provisions Article §§4-1A-04(c) and 4-1A-06(b), Annotated Code of Maryland

.01 Form of Request.

A. *The Board may send a request for additional information by email or regular mail.*

B. *The Board shall send a copy of a request for additional information to all parties.*

C. *The Board may direct the party providing the additional information to send a copy of the additional information provided in response to the Board's request to the other party.*

.02 Request for Custodian's Response to Request for Public Record.

If a complaint alleges that a custodian failed to respond to a request for a public record within the time limits established under General Provisions Article, §4-203(a) or (d), Annotated Code of Maryland, the Board may request the response to the request for a public record.

.03 Requests Related to Public Records.

A. *If a complaint alleges that a custodian denied inspection of a public record in violation of the Act, the Board may request that the custodian provide, as appropriate in the Board's discretion:*

(1) *A copy of the public record for in camera inspection, unless the custodian's response to the request for a public record indicated that inspection was denied under General Provisions Article, §4-301(a)(2)(ii), Annotated Code of Maryland;*

(2) *A descriptive index of the public record; or*

(3) *A written reason why the record cannot be disclosed.*

B. *The Board shall maintain the confidentiality of records or information provided under §A of this regulation.*

.04 Request for Basis for Fee Charged.

If a complaint alleges that a custodian charged an unreasonable fee or estimated fee under General Provisions Article, §4-206, Annotated Code of Maryland, the Board may request that the custodian provide more information about the basis for the fee or estimated fee charged.

.05 Frivolous, Vexatious, or Bad Faith Requests.

If necessary to resolve the complaint, the Board may request more information related to an alleged frivolous, vexatious, or bad faith request, including information about the applicant's pattern or history of requests.

.06 Request for Affidavit or Statement.

The Board may request that a custodian or applicant provide an affidavit, in the form provided by Maryland Rule 1-304, or a statement containing the facts that are at issue in the complaint.

.07 Timing.

A. *The Board shall request additional records or information, if needed, as soon as practicably possible.*

B. A custodian or applicant shall send to the Board the additional records or information requested as soon as practicably possible after receipt of the Board's request, but no later than 30 days after receipt of the request.

14.02.06 Confidential Records or Information Provided Under COMAR 14.02.05.03

Authority: General Provisions Article, §§4-101(k), 4-1A-04(c), and 4-1A-06(b), Annotated Code of Maryland

.01 General Confidentiality Provisions.

A. Records or Information Received by the Board.

(1) A record or information received by the Board pursuant to COMAR 14.02.05.03 is not a public record of the Board subject to inspection under the Act.

(2) A complaint, the response, and a reply to the response received by the Board are public records of the Board subject to inspection under the Act.

B. The Board shall maintain the confidentiality of a record or information received by the Board from a custodian pursuant to COMAR 14.02.05.03.

.02 Provision of Confidential Records or Information.

A. Records or information received by the Board pursuant to COMAR 14.02.05.03 may be sent by regular mail, certified mail, email, or hand-delivery.

B. Records or information sent to the Board under this regulation shall contain an inspection index.

C. Each individual record or information sent to the Board under this regulation shall be Bates numbered consecutively and correspond to the numbers as listed in the index.

.03 Storage of Confidential Records or Information.

A. Hardcopy records or information received by the Board pursuant to COMAR 14.02.05.03 shall be stored on behalf of the Board in a locked file of the Public Access Unit of the Office of the Attorney General.

B. Electronic records or information received by the Board pursuant to COMAR 14.02.05.03 shall be stored on behalf of the Board in a secure electronic file.

.04 Access to Confidential Records or Information.

A. Only the Board, an Assistant Attorney General assigned to the Public Access Unit, the administrator to the Board, and individuals working under the supervision and at the direction of the staff of the Public Access Unit may inspect records or information received by the Board pursuant to COMAR 14.02.05.03.

B. The individuals listed in §A of this regulation shall safeguard the confidentiality of records or information received by the Board pursuant to COMAR 14.02.05.03.

.05 Reference to Confidential Records or Information.

References in the Board's decision to specific records or information received by the Board pursuant to COMAR 14.02.05.03 shall be by the Bates numbers or by generic descriptions or characterizations as set forth in the inspection index.

.06 Return or Destruction of Confidential Records or Information.

A. No Appeal of Board Decision Filed.

(1) After 45 days from the issuance of the Board's decision, the Board shall notify the custodian to make appropriate arrangements for the return of all records or information received by the Board pursuant to COMAR 14.02.05.03.

(2) Destruction of Records or Information.

(a) If a custodian fails to make arrangements for the return of records or information received by the Board pursuant to COMAR 14.02.05.03, the Board shall destroy the records or information after 90 days from the issuance of the Board's decision.

(b) Destruction of electronic records or information shall be accomplished by deleting the records or information from email and the internal network drive of the Public Access Unit.

(c) Destruction of hardcopy records or information shall be accomplished by shredding the records.

B. Appeal of Board Decision Filed.

(1) The Board shall continue to store records or information received by the Board pursuant to COMAR 14.02.05.03 according to Regulation .03 of this chapter.

(2) Once the opinion of the circuit court has issued, the Board shall return or destroy the records or information received by the Board pursuant to COMAR 14.02.05.03 according to the time periods provided in §A of this regulation.

.07 Effect of Providing Confidential Records or Information.

A. A custodian may not be civilly or criminally liable under Maryland law for providing or describing a public record to the Board under General Provisions Article, §4-1A-06(b), Annotated Code of Maryland.

B. The provision of a record or a description of a record to the Board under General Provisions Article, §4-1A-06(b), Annotated Code of Maryland, may not be construed as a waiver of any applicable privilege.

.08 Record on Appeal.

- A. The Board shall prepare and transmit the record in accordance with the Maryland Rules.
- B. The Board shall transmit any part of the record that contains records or information received by the Board pursuant to COMAR 14.02.05.03, or that are otherwise not open to public inspection, under seal.

14.02.07 Decisions of Board

Authority: General Provisions Article, §§4-1A-04, 4-1A-07, and 4-362(a)(2), Annotated Code of Maryland

.01 Written Decision.

- A. The Board shall issue a written decision.
- B. In its written decision, the Board shall refer to any confidential records or information in accordance with COMAR 14.02.06.05.
- C. A decision of the Board may state that it is unable to resolve the complaint.
- D. The Board shall send a copy of the written decision to the complainant and the affected custodian or applicant.
- E. The Board may send to any custodian in the State any written decision that will provide the custodian with guidance on compliance with the Act.
- F. As required by statute, the Attorney General shall post on the website of the Office of the Attorney General all of the Board's written decisions.

.02 Timing Generally.

- A. Except as provided in Regulation .03 of this chapter, the Board shall issue a written decision within 30 days after receiving the written response, a reply, if filed, and all records or information requested under COMAR 14.02.05.
- B. Except as provided in Regulation .03 of this chapter, if the Board holds an informal conference under COMAR 14.02.04, the Board shall issue a written decision within 30 days after the informal conference.

.03 Statement of Delay.

- A. If the Board is unable to issue a decision within the time periods specified in Regulation .02 of this chapter, it shall state in writing the reason for its inability to issue a decision.
- B. The Board shall issue a decision as soon as possible, but no later than 120 days after the filing of the complaint.

.04 Remedies.

- A. If the Board finds that a custodian has denied inspection of all or part of a public record in violation of the Act, the Board may order the custodian to produce the public record for inspection.
- B. If the Board finds that a custodian charged an unreasonable fee or charged an unreasonable estimated fee under General Provisions Article, §4-206, Annotated Code of Maryland, the Board may order the custodian to reduce the fee or estimated fee to an amount the Board determines is reasonable and refund the difference, if applicable.
 - C. Remedies for Custodian's Failure to Respond.
 - (1) If the Board finds that a custodian failed to respond to a request for a public record within the time limits established under General Provisions Article, §4-203(a) or (d), Annotated Code of Maryland, the Board may order the custodian to promptly respond.
 - (2) The Board may order a custodian to waive all or part of the fee that the custodian is entitled to charge under General Provisions Article, §4-206, Annotated Code of Maryland, if:
 - (a) The Board finds that a custodian failed to respond to a request for a public record within the time limits established under General Provisions Article, §4-203(a) or (d), Annotated Code of Maryland; and
 - (b) The Board includes its reasons for ordering the waiver in its written decision.
 - D. If the Board finds that an applicant's request is frivolous, vexatious, or in bad faith based on the totality of the circumstances, the Board may issue an order authorizing the custodian to:
 - (1) Ignore the request that is the subject of the custodian's complaint;
 - (2) Ignore any future requests that are substantially the same as the request that is the subject of the custodian's complaint; or
 - (3) Respond to a less burdensome version of the request within a time frame that the Board determines is reasonable.

.05 Appeal Rights.

- A. A complainant or custodian may appeal the Board's decision in accordance with General Provisions, §4-362(a)(2), Annotated Code of Maryland.
- B. An appeal filed pursuant to §A of this regulation automatically stays the Board's decision pending the circuit court's decision.
- C. A party may not appeal a decision of the Board that states that the Board is unable to resolve the complaint.

14.02.08 Meetings of Board

Authority: General Provisions Article, §4-1A-04(c), Annotated Code of Maryland

.01 Deliberations.

- A. To resolve a complaint, the Board may deliberate by email, teleconference, videoconference, or in person.*
- B. Deliberations under this regulation shall pertain only to the resolution of a complaint.*

.02 Meetings.

- A. The Board may elect to convene regular standing meetings to deliberate and resolve complaints, and to address any other business of the Board.*
- B. All meetings shall be held in accordance with General Provisions Article, Title 3, Annotated Code of Maryland, to the extent applicable to the meeting.*
- C. All meetings shall be governed by commonly accepted rules of parliamentary procedure as determined by the Chair of the Board.*

JOHN H. WEST, III
Chair
Public Information Act Compliance Board

Appendix D.

PUBLIC COMMENTS

Klemm, Sara

From: joel hurewitz [REDACTED]
Sent: Monday, April 25, 2022 2:40 PM
To: Klemm, Sara
Subject: Comments to Maryland Public Information Act Compliance Board Proposed Rules

[You don't often get email from [REDACTED] Learn why this is important at <http://aka.ms/LearnAboutSenderIdentification.>]

Ms.Klemm,

Thank you for our discussion Friday on the proposed rules for the Public Information Act Compliance Board.

To reiterate my core issue, I believe that Applicants should have an automatic right to file a reply to the Custodian's response under 14.02.02 Complaint Process - Applicants. This procedure is analogous to judicial review under Maryland Rule 7-207(a), and thus the timeline and procedures should generally be copied.

Usually the Custodian is in a superior position to members of the public who are requesting documents; they have greater staff and funding and most importantly, they have knowledge of the actual contents of the withheld document. The reply to the complaint might be the first time that the Custodian will have to fully justify its position rather than just asserting an exception as they will have done throughout the initial denial and Ombudsman process. If the Applicant does not have a right to file a reply, they will need to prebut what the Custodian might say in its response to the complaint.

This is particularly relevant when the exception is one based on caselaw and interpretation including attorney-client privilege or the inter- or intra-agency exemption, deliberative process privilege.

Furthermore, it is unclear how and when the Applicant would get permission from the Board to file a reply and how the time would run while the Board will be granting permission for the reply.

Thank you for your consideration of these issues in the proposed rules,

Sincerely,

Joel Hurewitz
Columbia, MD

Appendix E.
NOTICE OF
FINAL ADOPTION

Title 14
INDEPENDENT AGENCIES
Subtitle 02 STATE PUBLIC INFORMATION ACT COMPLIANCE BOARD
Notice of Final Action

[22-071-F]

On May 10, 2022, the State Public Information Act Compliance Board adopted:

- (1) New Regulations .01—.07 under COMAR 14.02.01 Definitions; General Provisions;
- (2) New Regulations .01—.09 under COMAR 14.02.02 Complaint Process — Applicants;
- (3) New Regulations .01—.09 under COMAR 14.02.03 Complaint Process — Custodians;
- (4) New Regulations .01—.06 under COMAR 14.02.04 Informal Conference;
- (5) New Regulations .01—.07 under COMAR 14.02.05 Request for Records or Additional Information;
- (6) New Regulations .01—.08 under COMAR 14.02.06 Confidential Records or Information Provided

Under COMAR 14.02.05.03;

- (7) New Regulations .01—.05 under COMAR 14.02.07 Decisions of Board; and
- (8) New Regulations .01 and .02 under COMAR 14.02.08 Meetings of Board.

This action, which was proposed for adoption in 49:7 Md. R. 475—481 (March 25, 2022), has been adopted with the nonsubstantive changes shown below.

Effective Date: June 13, 2022.

Attorney General's Certification

In accordance with State Government Article, §10-113, Annotated Code of Maryland, the Attorney General certifies that the following changes do not differ substantively from the proposed text. The nature of the changes and the basis for this conclusion are as follows:

COMAR 14.02.03.09: The changes correct an obvious drafting mistake. Chapter .03 provides regulations for custodians who file complaints with the State Public Information Act Compliance Board. It is clear from the regulations in that chapter that the custodian is the initial complaint, and that the applicant will file a response to the complaint, see Regulations .01 and .02 of Chapter .03. However, as proposed, the text of Regulation .09 erroneously refers to the “custodian’s response to a complaint” and the “reply to the custodian’s response.” The changes correct the mistake so that the regulation refers to the “applicant’s response to a complaint” and the “reply to the applicant’s response.” These changes are not substantive because they simply correct that obvious drafting error, and because they do not substantially affect the rights, duties, or obligations of a member of the public.

14.02.03 Complaint Process — Custodians

Authority: General Provisions Article, §§4-1A-04(b) and (c), 4-1A-05, and 4-1A-06, Annotated Code of Maryland

.09 Effect of Filing.

A complaint, the [[custodian’s]] applicant’s response to a complaint, and a reply to the [[custodian’s]] applicant’s response are public records of the Board subject to inspection under the Act.

JOHN H. WEST, III
Chair
Public Information Act Compliance Board

Appendix F.
POLICY OF PROACTIVE
DISCLOSURE

LARRY HOGAN
GOVERNOR

BOYD K. RUTHERFORD
LT. GOVERNOR



JOHN H. WEST, III, ESQ.
CHAIR

MICHELE L. COHEN, ESQ.
CHRISTOPHER EDDINGS
DEBORAH MOORE-CARTER
DARREN S. WIGFIELD

STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

Policy of Proactive Disclosure
Adopted: May 10, 2022

The Public Information Act Compliance Board provides the following policy of proactive disclosure pursuant to § 4-104 of the General Provisions Article of Maryland's Annotated Code.

Section 4-1A-08(b) of the Public Information Act ("PIA") requires that the Attorney General post the Board's written decisions on the website of the Office of the Attorney General ("OAG"). In addition to the written decisions, it is the policy of the Board to have posted on its OAG website page the following information about each pending and decided matter:

- The names of the applicant and custodian
- The date the Board received the complaint
- The issue(s) involved (e.g., fee, exemption, vexatious request)
- The date the Board issued its written decision

It is also the policy of the Board to proactively disclose via its OAG website page the following records:

- The Board's annual reports
- Agendas and minutes of Board meetings
- Material related to the promulgation of regulations and revised regulations
- Testimony before the Maryland General Assembly

Maryland Commission on Civil Rights
State Gov. Art., Title 20

House Health & Government Operations Briefing

Presenters:

Glendora C. Hughes, General Counsel

Cleveland L. Horton, Deputy Director

Title 20 Statute

Discrimination Protections

- Maryland Commission on Civil Rights (MCCR) enforces the State's anti-discrimination law:
 - **State Government Article, Title 20, Annotated Code of MD**

State Gov. Art., Title 20 protects against discrimination in:

- Employment
- Housing
- Public Accommodations
- Commercial Non-Discrimination (**State Contracts**)
- Health Services & Facilities (**Concurrent Jurisdiction-Department of Health**)
- Insurance (**Concurrent Jurisdiction-Insurance Commission**)
- Sexual Harassment-Training the Trainers for State Agencies

Persons are protected against unlawful discrimination because of :

- Race
- Color
- Religion
- Sex
- National Origin
- Familial Status (**Housing Only**)
- Marital Status
- Physical and Mental Disabilities
- Age (**Employment & Public Accommodations**)
- Sexual Orientation
- Genetic Information (**Employment Only**)
- Gender Identity
- Source of Income (**Housing Only**)

Federal Partners

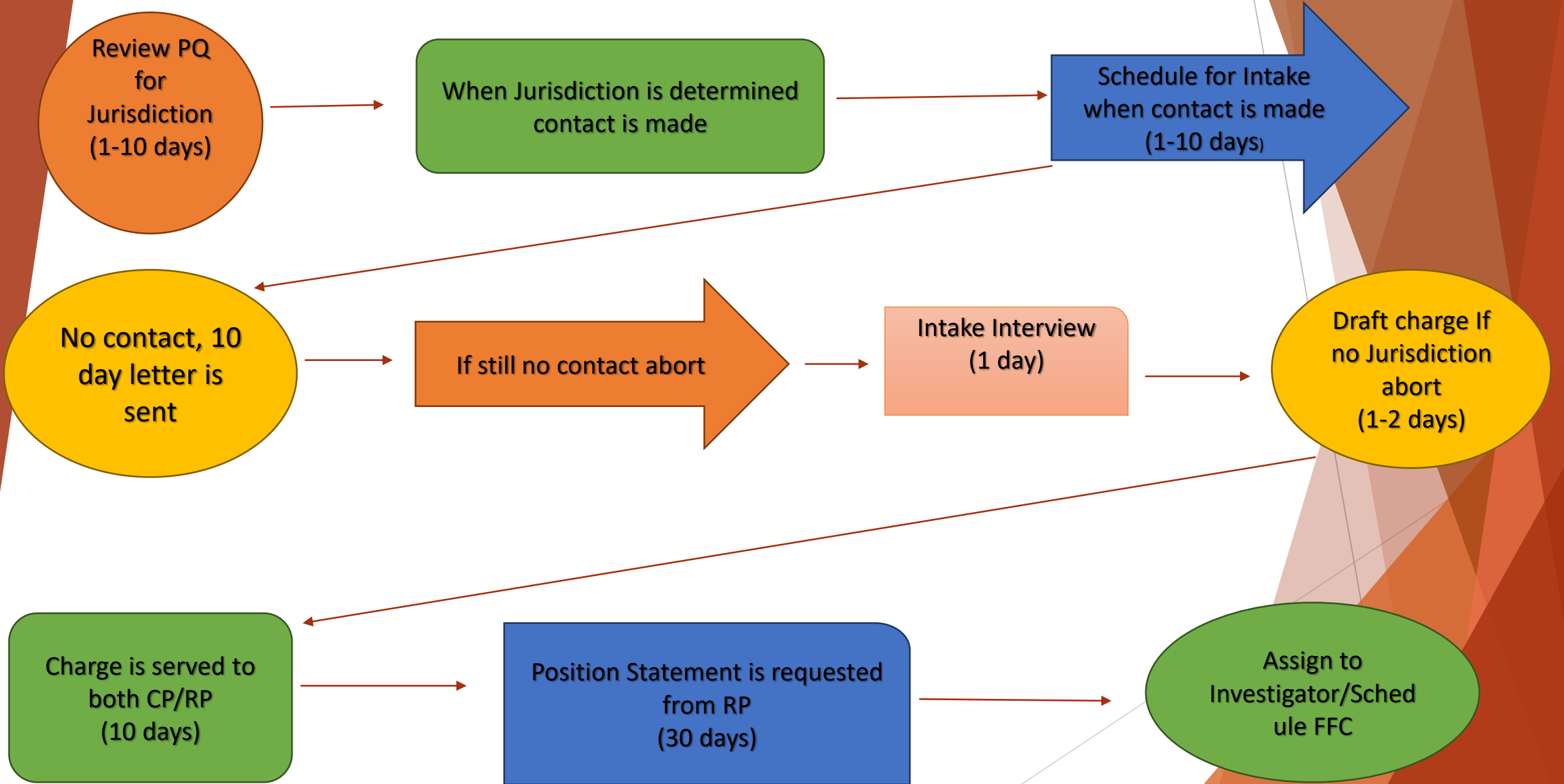
Work-sharing Agreements

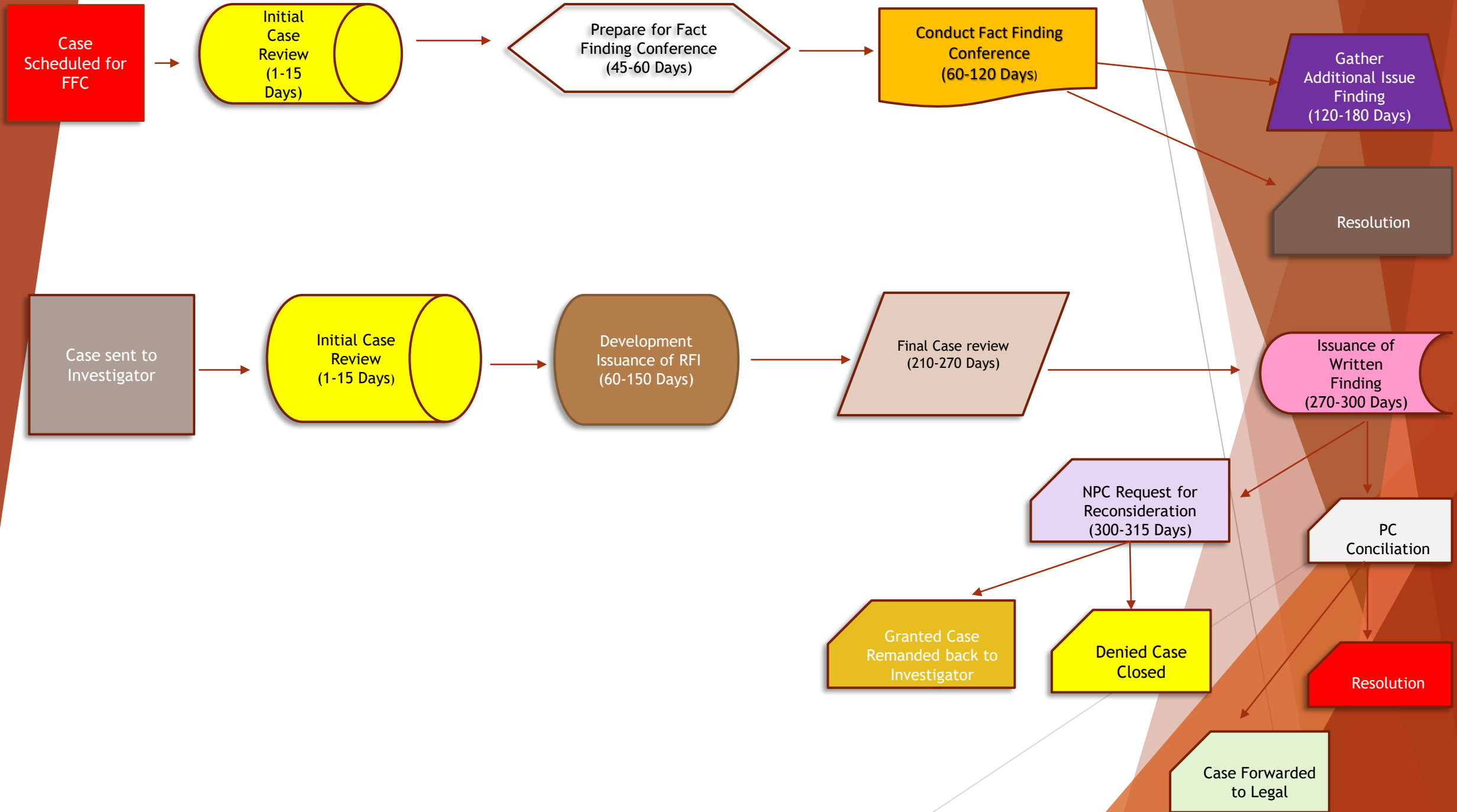
- ▶ Equal Employment Opportunity Commission (EEOC)
- ▶ Department of Housing & Urban Development (HUD)



Case Processing

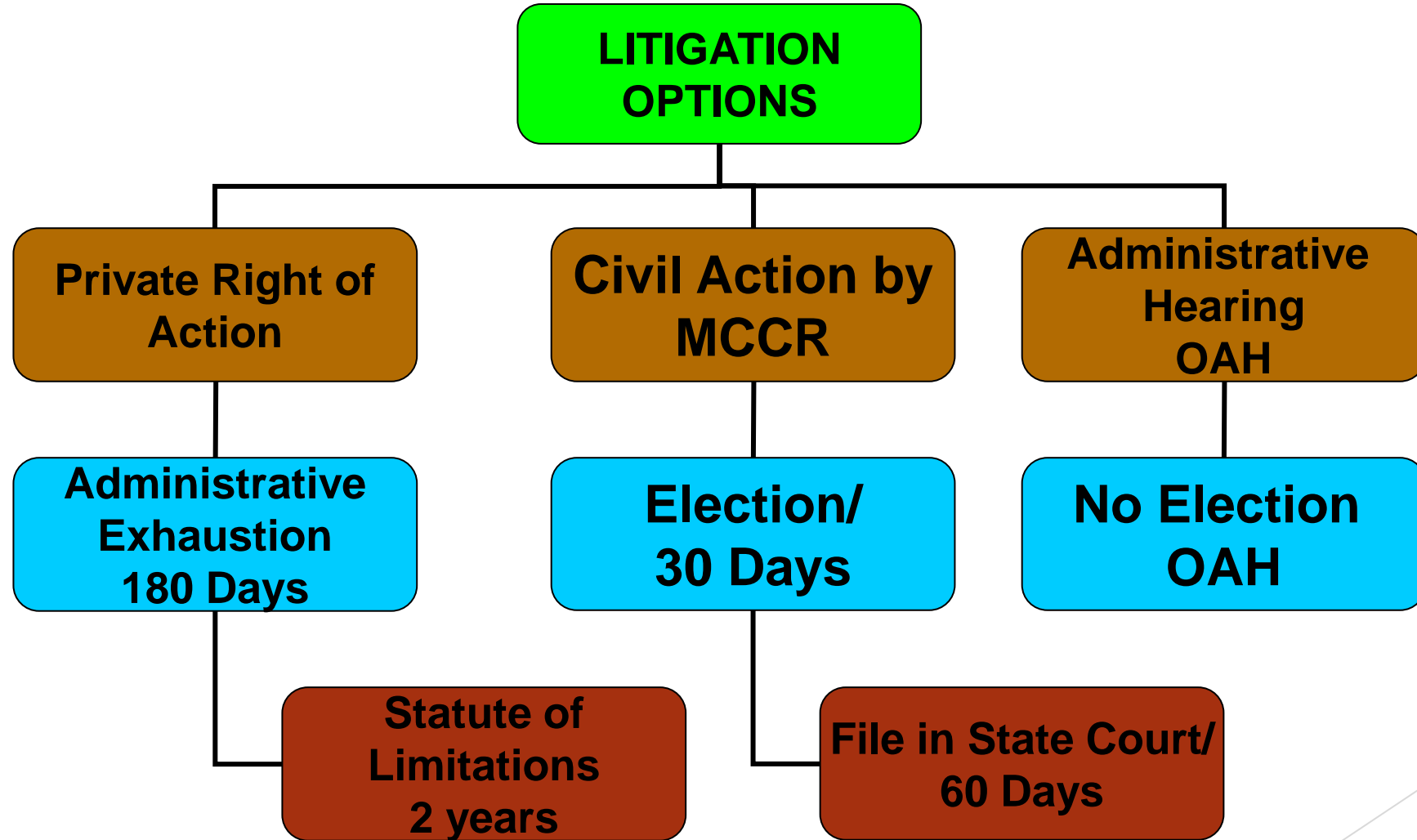
Intake Unit Flow Chart



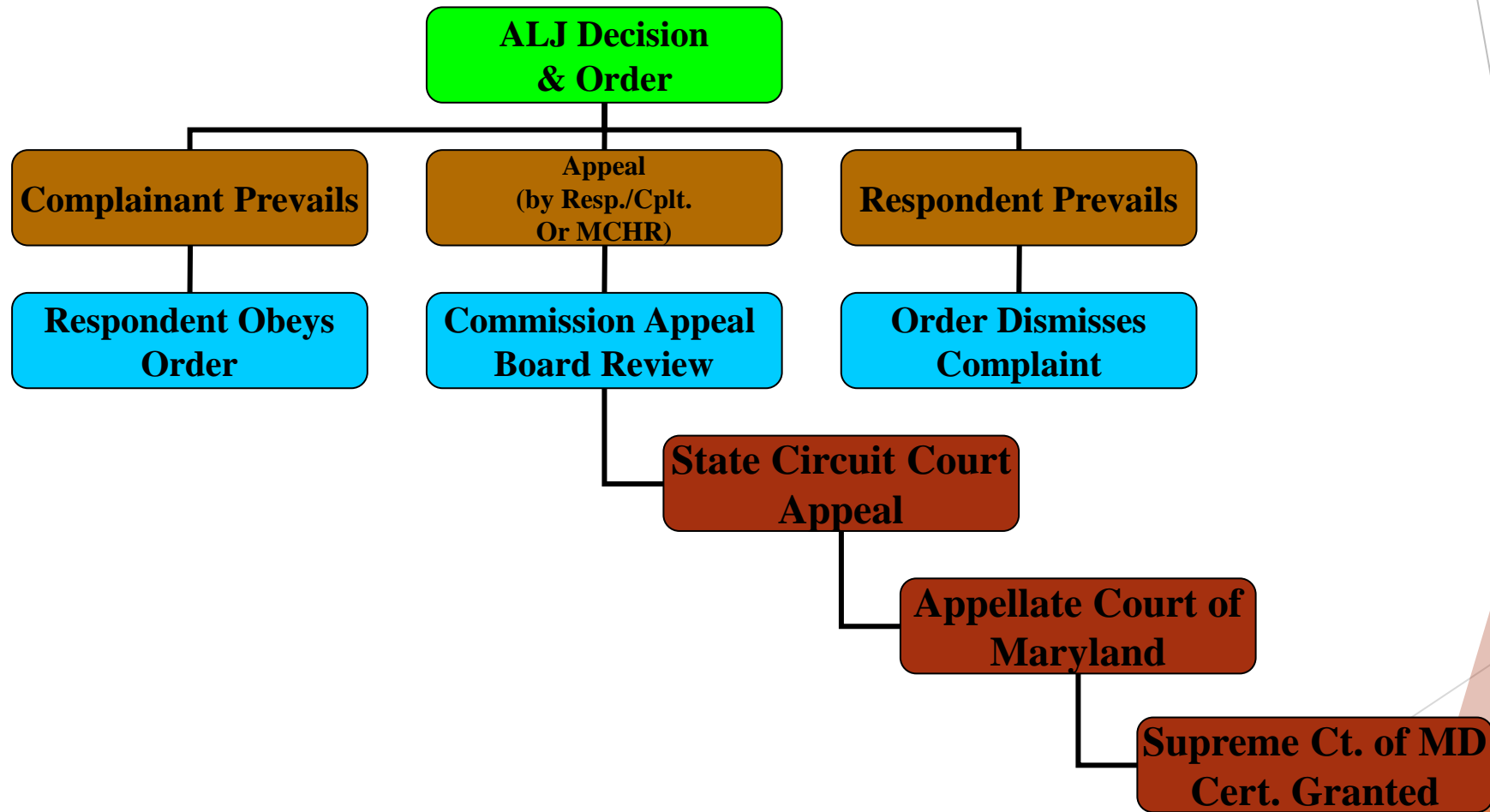


LITIGATION

MCCR LITIGATION



APPELLATE REVIEW OAH



APPELLATE REVIEW

Circuit Court

