

## Ombudsman Comments on OAG Interim Report of December 2016

The Ombudsman recently submitted a program report and evaluation to the Public Information Act Compliance Board (PIACB), which includes comments and suggestions regarding a number of systemic PIA implementation issues. The Board graciously included these comments as an Appendix to its Second Annual Report that was issued in September 2017 and may be found at:

[http://www.marylandattorneygeneral.gov/OpenGov%20Documents/PIACB/2nd\\_Annual\\_Report\\_PIA\\_C\\_B\\_fy17.pdf](http://www.marylandattorneygeneral.gov/OpenGov%20Documents/PIACB/2nd_Annual_Report_PIA_C_B_fy17.pdf).

The comments that follow elaborate on those provided to the Board, with specific reference to the OAG's preliminary recommendations published in its December 2016 Interim Report on the Implementation of the Public Information Act.

### Recommendations Regarding Fees, Fee Waiver Requests, Monitoring & Enforcement

- ◆ *The definition of "indigent" should be revised to clarify that median family income is determined by reference to the definition used for the Low-Income Home Energy Assistance Program or "LIHEAP" (see Interim Report of the Office of the Attorney General on the Implementation of the Public Information Act pp. 1-2)*

*Comment:* The current definition of "indigent" is unwieldy and generally inaccessible to most PIA users. The suggested use of a more readily ascertainable standard would improve the utility of the fee waiver provision based on indigency. A more significant problem with the current fee waiver provisions in the PIA, however, is the lack of any objective or identifiable criteria concerning the factors to be evaluated in determining whether a fee waiver is in the "public interest". The absence of clear criteria facilitates the routine practice used by agencies of denying fee waiver requests submitted by individual requestors, even where indigency is established. Indeed, of the matters submitted to the Ombudsman over the past 17-18 months, no waiver request *based on indigency* has been granted, either prior to or as a result of mediation.

For these reasons, the Ombudsman suggests that other substantive changes to the PIA's fee provisions be considered, including changes that would make waiver of fees automatic or mandatory in certain circumstances; for example,

- provide for a mandatory waiver of fees when an agency does not respond to a PIA request in accordance with the PIA's time requirements, at least in the absence of demonstrated good faith efforts to comply;
- provide for an automatic waiver of fees when an individual requestor establishes indigency by affidavit and the request is made as a "person in interest;" and

- provide authority for the PIACB to review and decide fee waiver denials and/or to review and decide the assessment of fees (in any amount) by an agency that violates these types of objective criteria/standards.

◆ ***Whether the PIACB's jurisdiction should be expanded by lowering the threshold for complaints from \$350 to \$250 and by giving it jurisdiction over complaints about agency fee waiver decisions***

**Comment:** Lowering the threshold for review would be helpful to address some of the access issues noted above; some requestors, and virtually all who establish indigency, are unable to pay even very modest fees (including fees well under \$100). Thus, the Ombudsman believes that access and performance will be improved only by making fee waivers mandatory under clearly defined circumstances or criteria, and by providing a practical, accessible enforcement process, such as through review by the PIACB.

◆ ***Whether agencies should be required to post blank indigency affidavits on their websites***

**Comment:** It would be helpful for agencies to publish a sample or form affidavit online; however, doing so will not enhance access to public records for persons who are indigent, unless an agency *actually grants* waiver requests on this basis. (It should be noted that some agencies do not yet provide any readily apparent way to submit a PIA request online.) Thus, the Ombudsman believes that while it may be useful for agencies to post a form affidavit of indigency online, this measure *alone* is not likely to improve access for persons without funds to pay for public records, nor for those who lack access to computers or the internet.

◆ ***Whether the enforcement provisions of the statute should be strengthened and, if so, how***

**Comment:** There should be a practical, accessible enforcement mechanism (apart from the court process) for both agencies and requestors. Providing a practical means of enforcement would increase incentives toward voluntary compliance, improved performance, and would increase the effectiveness of mediation. The Ombudsman believes the PIACB may provide a model forum for such extra-judicial enforcement, and that the State could consider expanding the Board's jurisdiction to include, on a trial basis, certain types of recurring issues that may be readily handled according to clear criteria. The key to the cost-effectiveness of this type of extra-judicial enforcement process is that the issues are capable of decision based on clear, objectively determinate criteria like those suggested above for fee waiver requests.

In addition to an enforcement mechanism, the Ombudsman believes that some form of independent compliance monitoring would be useful in pinpointing the types of problems and needs experienced by different agencies across the State. Such a program would also enable agencies to learn from the experience of other agencies and assist in identifying cost-effective strategies for improvement.

The FOIA Ombudsman program, which has been operating for about 8 years, includes such a compliance monitoring (or audit) component, and may provide a useful model. (NB: FOIA responses are subject to administrative appeal; if mediation through the FOIA Ombudsman is successful, the appeal is dismissed, but appellate deadlines are not tolled pending mediation. This multi-pronged approach and context provides incentives for all parties to make the most constructive use of the mediation process and to do so expeditiously. Such non-judicial enforcement and compliance monitoring components do not exist under current Maryland law, except as to the PIACB's currently narrow jurisdiction over the reasonableness of fees charged by agencies.)

◆ ***Whether and how the PIA might be amended to prevent an individual requestor from submitting a burdensome number of requests to one or more agencies***

***Comment:*** The Ombudsman believes that agencies are in need of a practical mechanism for enforcing the PIA, including reasonableness and civility standards. The Ombudsman believes amendment of the PIA to allow for enforcement of such standards, for example, by potentially allowing agencies to bring such matters to the PIACB in the event mediation is unsuccessful, is preferable to imposing new blanket restrictions, e.g., in the form of a “cap” on the number of requests a particular requestor is permitted to make.

◆ ***Agencies should be provided a level of funding sufficient to centralize responsibility for PIA compliance in one or more employees whose job performance would be evaluated principally on that basis***

***Comment:*** Having resources for a dedicated PIA coordinator, who is able to work in conjunction with records managers, IT and program staff to fulfill PIA requests on a timely basis would be extremely useful. As noted in previous comments, about 20% of the PIA matters brought to the Ombudsman involve requests to which no response has been made by the agency. And in many instances, the Ombudsman has heard from agencies that have seen an increasing number of PIA requests each year. A centralized coordinator would be a very positive step toward minimizing the “MIA” scenario and may become essential as requests increase during the coming years.

### *Other issues that merit review*

◆ *Personal information issues that the PIA does not currently address*

**Comment:** The PIA defines “personal information,” but does not prohibit or even allow for data included in the definition to be withheld except in a few, very narrowly circumscribed circumstances. This has resulted in some confusion, inconsistent treatment and other problems for a number of State and local agencies. Additionally, the PIA does not expressly address the status of email addresses, leading to some questions and inconsistent treatment (i.e., as to whether email addresses obtained in various contexts can or should be disclosed). The Ombudsman believes it would be appropriate for the Legislature to consider amendments that expressly address the status of email addresses under the PIA and the handling of data included within the definition of “personal information.”

◆ *Temporary denials pose a dilemma for agencies*

**Comment:** Sometimes an agency seeks court review within 10 days of a denial of a request based on the agency’s uncertainty regarding the nature of the information (e.g., agency cannot identify an exemption or other basis for withholding but is concerned about disclosing it). The current practice is to file an adversarial action that names the requester, even though the agency really seeks the court’s direction and guidance as to whether to withhold or disclose the records. In these situations, the requester is not really a party in the traditional sense. The Ombudsman recommends that the agency be allowed to file either a “John Doe” pleading or use “In re agency’s temporary denial of PIA request” instead. This could be a legislative change or achieved through the Maryland Rules.

◆ *Outreach by the OAG to inform agencies of the Ombudsman’s services*

**Comment:** The Ombudsman has established strong relationships with many agencies during the first months of operations, which enhances the program, and the OAG has helped include the Ombudsman in various training programs to make sure the agencies are aware of the services available for PIA disputes. The OAG should continue to inform agencies of their access to the Ombudsman’s services. Also, agencies should be encouraged to include a reference to the Ombudsman program in the 10-day letter, which identifies any denial, estimated fees, and the estimated time for responding. Doing so would enable both the agency and the requestor to contact the Ombudsman early in the process, which facilitates a successful outcome in a way that delays do not.

Respectfully submitted,  
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Public Access Ombudsman

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