



Final Report
of the
Office of the Attorney General
on the
**Implementation of the
Public Information Act**

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Executive Summary

In 2015, the General Assembly amended the Public Information Act (“PIA”) to reform the process by which PIA responses are issued and reviewed. 2015 Md. Laws, ch. 135. At the same time, the General Assembly also directed the Office of the Attorney General to report to the Governor and General Assembly on a number of issues relating to the implementation of the PIA, with an interim report due at the end of 2016 and a final report due at the end of 2017.

Based on the input we have received from custodians and requesters alike, we make the following recommendations on the issues identified in the reporting provisions of Chapter 135:

- The PIA Compliance Board should retain its formal neutrality, but the time constraints under which it operates should be altered to enable it to refer matters to the Ombudsman when the Board believes that mediation might resolve the dispute. The General Assembly may also wish to consider expanding the Board’s jurisdiction to include complaints about agency fee waiver decisions.
- The duties of the Public Access Ombudsman should not be modified.
- The enforcement provisions of the statute should not otherwise be altered until the Board and the Ombudsman have been in place longer and have developed a longer track record of performance.
- The PIA Compliance Board should not be combined with the Open Meetings Compliance Board at this time, but if the jurisdiction of the PIA Compliance Board is expanded such that it can no longer function as a volunteer board, a combined, paid board would be appropriate.
- Although we believe that federal case law already provides sufficient guidance for public interest fee waiver decisions, if the

General Assembly wishes to provide additional *statutory* criteria, it should consider adopting the criteria applicable under the federal Freedom of Information Act.

- The General Assembly should consider amending the PIA to provide indigent individuals with a one-time, mandatory fee waiver when requesting specific records about themselves as a “person in interest.”
- The records of third-party contractors that store government records are already subject to the PIA. We recommend that the General Assembly not extend the Act’s requirements to *all* third-party contractors without first studying the effect that such an extension would have on existing contracts and on the government’s ability to procure goods and services at the lowest price.
- Section 8-801.1 of the Agriculture Article should be amended to specify the types of identifying information that must be redacted when agencies disclose nutrient management plans under the PIA.

In addition to our recommendations on the issues described above, we also recommend to government custodians certain best management practices that should improve the implementation of the PIA. Given the range of government entities subject to the PIA, however, we do not recommend mandating these organizational steps by statute:

- Governmental agencies should, where practicable, consider centralizing responsibility for PIA compliance in one or more employees whose job performance would be evaluated, at least in part, on that basis.
- Governmental agencies should post blank indigence affidavits on their websites or otherwise make them easily available to the public.

Finally, we offer the following additional observations about matters that were not included in our reporting mandate, but which we identified in our Interim Report:

- Although commercial requests fall outside the intended purpose of the PIA and remain a burden on custodians, the ease with which a prohibition of commercial requests could be circumvented counsels against revising the PIA to address this issue.
- High-volume requesters continue to command an out-sized portion of agency resources. Although we do not recommend limiting the number of requests an individual requester may submit, the General Assembly may wish to limit the extent to which agencies must provide the first two hours of response time free of charge on each request for every high-volume requester.
- Legislative action is not necessary to clarify that the definition of median family income employed by the Low-Income Home Energy Assistance Program, and published in the Federal Register, should be used as the standard for determining whether a requester qualifies as “indigent” under the PIA.

I Introduction

The Maryland Public Information Act provides the public with a broad right of access to records of State and local government, subject to various enumerated exemptions and the imposition of reasonable response fees. *See* Md. Code Ann., Gen. Prov. (“GP”) § 4-101 *et seq.* Ever since the enactment of the PIA in 1970, both aspects of the statute—exemptions and fees—have proven controversial for requesters and records custodians alike. Because the exemptions are in tension with the statute’s public access goal, complaints about how government agencies¹ apply those exemptions have been common.

¹ We use the term “agency” throughout this report as a shorthand term for all of the State, county, and municipal governmental units that are subject to the Act.

Disputes about the imposition of response fees also arise. Some requesters have expressed the concern that government agencies charge high fees as a means of frustrating access, while others object to the notion of charging for access to “public” records to begin with.

Custodians, for their part, resent the accusation that they are trying to block access. Instead, they see themselves as doing their best, with limited resources, to implement a statute that favors disclosure but that not only requires them to review each record for information that they must withhold, but also specifically authorizes them to impose fees when the cost of a response should not be borne by the general public. Custodians believe that the public often does not understand the painstaking nature of the task.

Traditionally, disputes about how government agencies implement the Act could be brought only in circuit court or, if a State agency decision was at issue, in a contested case before the Office of Administrative Hearings. Both remedies were widely perceived as being too formal and too expensive for most requesters to effectively pursue.

In 2015, the General Assembly took up these issues and legislated the most comprehensive revisions to the Act since its enactment almost fifty years ago. *See* 2015 Md. Laws, Ch. 135. The 2015 amendments included a number of changes to the Act’s administrative requirements:

- An agency must notify the applicant, within ten working days, if it will take more than ten working days to produce responsive records. That “10-day letter” must state how much time the agency will take to produce the record, the reason for the delay, and an “estimate of the range of fees” that might be involved in producing the record. GP § 4-203(b)(2).
- Agencies must provide more detail about the records they withhold, including a “brief description of the undisclosed record that will enable the applicant to assess the applicability of the legal authority for the denial.” GP § 4-203(c)(1)(i)3. When an agency withholds a record on the basis of one of the discretionary exemptions set forth in Part IV of

the Act, the agency must provide “a brief explanation of why the denial is necessary.” GP § 4-203(c)(1)(i)1. (Legislation enacted in 2017 expanded on this theme; now agencies, when denying inspection of a record under one of the “discretionary” exemptions in Part IV of the PIA, must provide “an explanation of why redacting information would not address the reasons for the denial.” See 2017 Md. Laws, ch. 360 (codified at GP § 4-203(c)(1)(i)2.B)).

- With respect to fees, agencies may still charge reasonable fees that allow them to recover the actual cost of responding. Now, however, agencies must calculate their costs based on “each individual’s salary and actual time” attributable to the response, including “attorney review costs.” GP § 4-206(b)(2).
- The 2015 amendments added a new basis for waiving the fees that would otherwise be chargeable under the Act. In addition to waiving fees when “in the public interest,” indigence is now also a second, independent basis on which an agency is authorized to waive fees.

The 2015 amendments also altered the avenues for seeking review of agency PIA decisions. Judicial review remains available, and PIA requesters may now be awarded “statutory damages” of up to \$1,000 if they prevail in court. The requester’s right to request a contested case hearing was removed, but it was replaced with two wholly new opportunities for review.

First, a State Public Information Act Compliance Board was created to consider complaints that an agency has imposed an “unreasonable” fee of more than \$350. The Board was modeled on the Open Meetings Compliance Board in many respects, but unlike its Open Meetings counterpart, the PIA Compliance Board is authorized to issue *binding* opinions and issue enforceable orders requiring the agency to refund the unreasonable portion of the fee. Because the Board’s decisions are binding, they may be appealed to circuit court, and either party may file an appeal. See *generally* GP § 4-1A-01 *et seq.* The PIA Compliance Board held its first meeting on February 10, 2016.

Second, the Office of the Public Access Ombudsman was created as an independent office to mediate PIA disputes more generally and otherwise serve as a resource for the public. The Ombudsman may consider any dispute “relating to requests for public records” under the Act, whether that dispute is initiated by the applicant or the custodian. The Ombudsman, however, acts as a mediator only. Although she is to make “reasonable attempts to resolve disputes,” she has no power to issue binding decisions. Nor can the Ombudsman compel an agency to disclose records, either to the applicant or even to the Ombudsman. *See generally* GP § 4-1B-01 *et seq.* Our Office appointed Lisa Kershner as the Ombudsman, and she began work on March 30, 2016.

II

Attorney General Reporting Requirement

In addition to the significant changes to the Act described above, the 2015 amendments directed our Office to prepare interim and final reports on various aspects of the PIA:

That the Office of the Attorney General, in consultation with the Maryland Association of Counties, the Maryland Municipal League, and stakeholders from the custodian, news media, and open government communities, shall submit an interim report on or before December 31, 2016, on its preliminary findings and a final report on or before December 31, 2017, to the Governor and, in accordance with § 2-1246 of the State Government Article, the General Assembly, on its findings and recommendations for improving the implementation of the Public Information Act, including:

(1) whether the neutrality and the statutory duties of the State Public Information Act Compliance Board are appropriate, including whether the Board should be authorized to impose statutory damages and whether the functions of the Board and the Public Access Ombudsman should be modified;

- (2) the merits and feasibility of merging the State Open Meetings Law Compliance Board with the State Public Information Act Compliance Board;
- (3) the use of fee waivers in general and for reasons of indigency, including how often waivers are requested, denied, or granted, to include the amount of the fees that have been waived as a result;
- (4) an analysis of the denial process used by custodians;
- (5) an analysis of requested public records that are held by a nongovernmental custodian and the appropriate remedies to ensure public access to those records; and
- (6) an analysis of State law exemptions outside of the Public Information Act.

2015 Md. Laws, ch. 135, § 3.

In an effort to ensure that our Office’s recommendations reflect more than just our own experience, we worked with the Maryland Association of Counties, the Maryland Municipal League, Public Justice Center, Common Cause, and the MDDC Press Association to develop a survey of PIA custodians and requesters on the issues identified above. The survey was made available to public information officers in State agencies; to the Maryland Association of Counties, the Maryland Municipal League, and the MDDC Press Association, for those organizations’ distribution to their membership; and to other interested parties. The survey was also posted on the website of the Office of the Attorney General and advertised through our Office’s social media account. In addition, the Baltimore Sun published an editorial disseminating the survey to its readership. Baltimore Sun, “Putting the ‘public’ back in the Public Information Act” (Sept. 14, 2016).

At the end of 2016, our Office issued an interim report that summarized the results of the survey and, based on those results and our Office’s experience with the PIA, included preliminary findings, one immediate recommendation,

and some possible recommendations for inclusion in this final report. *See* Interim Report of the Office of the Attorney General on the Implementation of the Public Information Act (Dec. 2016) (“Interim Report”). Our Office distributed electronic copies of the Interim Report to the people who participated in the survey and posted it on our website for public review and comment. The comment period initially ran until June 30, 2017, but was extended until September 15. During that period we received 24 comments from Maryland citizens and organizations, including comments from the Public Access Ombudsman and the Second Annual Report of the PIA Compliance Board, both of which shared their outlook on the issues that are covered in the Interim Report.

III

Final Findings & Recommendations

We address the questions asked by the General Assembly in the order in which they appear in the legislation.

1. Whether the Neutrality and the Statutory Duties of the State Public Information Act Compliance Board Are Appropriate, Including Whether the Board Should Be Authorized to Impose Statutory Damages and Whether the Functions of the Board and the Public Access Ombudsman Should Be Modified

This question involves two different entities: the PIA Compliance Board and the Public Access Ombudsman. Rather than treat them together in a single response, we will identify the different questions that relate to one or the other and address them separately. But before doing so, we convey the results of our informal review of how other states address enforcement of their open records laws.²

² Our review draws heavily from the work of the Colorado Freedom of Information Coalition, which recently surveyed approximately half of the states. *See* CFOIC, “Freedom of Information: State-by-State Evaluation of Alternative Dispute Resolution Processes (August 2016); *see also* Laura Danielson, *Giving Teeth to the Watchdog: Optimizing Open Records Appeals Processes to Facilitate the Media’s Use*

Generally speaking, there are four approaches to reviewing public records disputes: judicial action, review by an independent agency, review by the attorney general, and intervention by an ombudsman. These approaches are not mutually exclusive; all states allow for judicial enforcement, and many states augment judicial review with one or more of the other review mechanisms.³ But distinguishing these different approaches can be helpful in evaluating Maryland's options.

Judicial Enforcement. The most common approach to enforcing open records laws is through judicial action. All states provide the opportunity to bring open records challenges in court and in a little more than one third of the states, judicial enforcement is the *only* mechanism available. Prior to 2015, Maryland would have been included in this category.

Independent Administrative Body. Roughly one third of states have an independent administrative body that plays a role in the review of open records decisions. Connecticut, Pennsylvania, and Utah are examples of this approach, with Connecticut often cited as the model. The Connecticut Freedom of Information Commission hears complaints from requesters who have been denied access to records, and it can issue binding orders requiring the disclosure of records if the denial was not in compliance with law. The Commission's staff also function as ombudsmen and are available to informally mediate open records disputes.

States with independent open records commissions tend to receive high marks in terms of effectiveness. The only obvious downside to this approach is

of FOIA Laws, 2012 Mich. St. L. Rev. 981 (2012).

³ At the federal level, FOIA review is available through judicial review, 5 U.S.C. § 552(a)(4)(B), although agencies typically provide for an internal administrative review in the first instance. *See, e.g.*, 40 C.F.R. § 2-104(j) (U.S. Environmental Protection Agency). Requesters may also seek the assistance of the Office of Government Information Services, a division of the National Archives that reviews agency compliance with FOIA, provides mediation services to resolve FOIA disputes, and identifies policies and procedures for improving FOIA compliance. The Office of Government Information Services does not, however, issue binding decisions.

cost. With 13 full-time employees, the Connecticut Commission's 2016-2017 budget was just under \$1.5 million, while Pennsylvania's Office of Open Records—which has similarly broad powers—has 18 staff members with a budget that is reportedly \$2 million.⁴

Attorney General Review. Approximately one third of states give their attorney general's office some independent role in reviewing the sufficiency of open records responses. Many states authorize their attorneys general to issue opinions on the sufficiency of open records responses. Some of those opinions are binding and enforceable, others only advisory. Other states authorize their attorneys general to file suit on behalf of requesters to enforce the law, some with the limitation that the requester first seek the attorney general's opinion. Others still give their attorneys general a mediation role, much like the Ombudsman's role here in Maryland.

The more robust of these attorney general-based mechanisms are fairly well regarded, the most common criticism being that they depend heavily on the incumbent attorney general's commitment to open government. This approach also comes at a cost. Although smaller states like North Dakota appear to be able to offer this service at relatively low cost, Texas reportedly must devote an entire division of its attorney general's office to handling open government matters. CFOIC Survey at 32.

Ombudsman. By our count, only nine states—including Maryland—have a separate ombudsman position. In some states, the ombudsman appears to be the only mechanism for obtaining non-judicial review of open records decisions, while in others the ombudsman offers a review option in addition to other non-judicial options. Ombudsmen seem to receive universally high marks for being able to resolve some disputes quickly and inexpensively, but the lack of enforcement power renders the institution unsuited for addressing more intractable disputes.⁵

⁴ See www.ct.gov/foi/cwp/view.asp?a=3171&q=488272 (Connecticut); CFOIC Survey at 35, www.openrecords.pa.gov/Staff.cfm (Pennsylvania).

⁵ A New Hampshire commission tasked with recommending ways to expand the

With this range of options in mind, we turn now to the specific issues presented to our Office.

A. The Neutrality of the Public Information Act Compliance Board

We believe that it is appropriate to retain the formal neutrality of the State Public Information Act Compliance Board. The Board is an independent, quasi-judicial body, with the power to render binding decisions subject to judicial review, much as the circuit court would in a judicial challenge to a PIA fee decision. It seems appropriate for the Board’s review—like the circuit court review it was intended to at least partially supplant—to be carried out dispassionately and without a finger on one side of the scale or the other. Preserving the Board’s neutrality would also help ensure that all parties before it perceive it to be a fair forum.

As we discussed in the Interim Report, the PIA already includes an interpretive bias in favor of allowing inspection of a public record “*with the least cost and least delay*” to the requester. GP § 4-103(b) (emphasis added). Because the statute already requires the Board to render its decisions consistent with a mandate of openness, we believe it is appropriate to retain the Board’s formal neutrality.

B. Whether the Statutory Duties of the PIA Compliance Board Should be Modified

As for the Board’s duties, it is still too early in the Board’s tenure to recommend radically altering its jurisdiction or powers. In less than two years of work, the Board has already clarified important aspects of how fees are imposed, issuing binding decisions that caution against charging for duplicative review and including overhead and benefits within the salary rate that forms

resolution of open records disputes beyond traditional court action recently recommended the creation of a new ombudsman position with full powers to order the release of records, subject to judicial review. *See* Final Report of the Commission to Study Processes to Resolve Right-to-Know Complaints (Nov. 1, 2017), <http://www.orol.org/rtk/rtknh/2017-10-31-HB178-Commission-Report.pdf>.

the basis for the PIA fee. *See, e.g.*, PIACB-16-05 (June 1, 2016). It has also moved the debate forward with respect to other issues, most notably how the PIA relates to the records of third-party vendors—a topic that we address in greater detail below. *See* PIACB-17-07 (Feb. 28, 2017).

Although the Board’s opinions have proven helpful, it does seem as if the narrowness of the Board’s jurisdiction limits its reach. Although the Board reports that the number of filings it receives has increased over the two years of its existence, it still has had the opportunity to issue only 14 opinions over two years. Increasing the Board’s case volume will correspondingly increase the Board’s opportunity to build a body of decisions that will provide the type of detailed guidance that many commenters believe is currently lacking. At the same time, increasing the Board’s caseload risks overburdening the Board’s members, who graciously volunteer their time.

One way that we considered expanding the Board’s jurisdiction was by lowering the \$350 threshold for filing complaints. Requesters and custodians disagreed on this point. Requesters urged thresholds of \$250, \$100, and \$50, while custodians urged that the \$350 threshold be left in place, noting that it was one of the carefully-negotiated compromises reflected in the 2015 amendments.

We recommend that the \$350 threshold not be changed. Lowering the fee threshold will increase the number of cases the Board hears, but not meaningfully so. And, while lowering the threshold would, in theory, make the Board’s streamlined review process available to more requesters, in practice, the vast majority of the Board’s cases involve fees well in excess of \$350. If few requesters come to the Board with complaints about fees near \$350, it seems unlikely that many more would come with fees near \$250, \$100, or lower.

More importantly, lowering the Board’s jurisdictional threshold would not enhance the range of issues the Board has the opportunity to reach. It might issue a few more opinions, but those opinions would remain limited to whether the fee charged by the agency is reasonable.

Instead, if the General Assembly wishes to expand the Board's role, we would recommend that it consider giving the Board a limited authority to hear disputes involving an agency's decision not to waive a fee in excess of the Board's threshold amount. The Board interprets its current authority—correctly, we believe—as not encompassing fee waiver decisions. *See* PIACB-16-01 (April 21, 2016) (concluding that “the Compliance Board does not have the authority to review a custodian's decision to deny a request that a fee be waived”); GP § 4-1A-05. Although giving the Board jurisdiction over fee waivers would pose certain difficulties, we believe it can be done in such a way as to minimize those difficulties and improve the implementation of the PIA in several ways.

First, expanding the Board's jurisdiction to include fee waiver disputes would provide a disinterested arbiter of what is, and is not, in the public interest. Agencies do not have a *financial* incentive to deny fee waivers; response fees typically go to the State or local government's general funds and not directly into the responding agency's budget. But requesters widely believe that agencies deny fee waivers as a means to block access to records. Our experience does not bear that out; the vast majority of custodians do their level best to apply the fee waiver provisions honestly and even-handedly. That said, the governmental employees who implement important State-law programs and policies tend to believe that the work *they* do is in the public interest. That perspective can cause them to see requests by community activists and advocacy groups—who might be critical of governmental policies—as *not* being in the public interest. The Board—which includes members with experience as custodians and as requesters, *see* GP § 4-1A-02(a)—is better positioned to review the “public interest” determination objectively.

Second, the development of a body of Board opinions on fee waivers would provide some measure of uniformity across the state. One of the recurring criticisms about the PIA was that practices vary widely across agencies. Some of that variability undoubtedly stems from the statute itself, which provides little guidance for agencies to determine whether a fee waiver is, or is not, in the public interest. We elaborate on that issue elsewhere in this Report. *See* discussion below, at pages 20-23. But the lack of uniformity likely also stems from the widely varying circumstances of the responding agencies.

The PIA applies to everything from small municipalities and boards without staff to large State agencies with interactive websites dedicated to responding to requests. Funneling some fee waiver disputes to the Compliance Board will enable it to develop a consistent and unified body of decisions that should help custodians to apply more consistent standards to fee waiver requests.

Finally, placing fee waiver disputes with the Compliance Board would give requesters a single, low-cost means of addressing all significant fee disputes. As the Compliance Board indicates in its 2017 annual report, it is not uncommon for the Board to receive complaints that dispute both the fee imposed and the decision not to waive fees. Under its current practice, the Board refers the fee waiver issues—which are currently beyond its jurisdiction—to the Ombudsman, but retains the underlying fee dispute. Second Annual Report of the State Public Information Act Compliance Board, at 9 (Sept. 2017) (“2017 PIACB Report”). The two issues, however, are closely tied, such that resolving one typically resolves the other. Combining them thus makes sense, both for requesters and to the Board itself.

In our Interim Report, we identified two reasons not to take this step: (1) the Ombudsman already mediates disputes over fee waiver denials and has achieved considerable success, so expanding the Board’s jurisdiction may not be necessary; and (2) having the Board consider fee waiver denials would increase the Board’s workload, perhaps significantly. Although we continue to believe that these are important concerns, we think the Board’s jurisdiction can be expanded in a way that takes advantage of the Ombudsman’s success, minimizes the risk of overwork, and results in more consistent fee waiver decisions.

Specifically, we recommend that the General Assembly amend the PIA to authorize the Board to refer a matter to the Ombudsman for her to mediate in the first instance and to alter the deadlines in the Board’s review process to accommodate such referrals. In the event the dispute is not resolved through informal mediation, the Ombudsman would refer the matter back to the Board for its more formal review. The Board makes this same recommendation in its Second Annual Report, though within the context of its existing jurisdiction. *See* 2017 PIACB Report at 9.

Currently, the principal obstacle to this type of referral is that the Act requires the Board to issue its decision within 90 days of the complaint. The Ombudsman tells us, however, that 90 days is often not sufficient to allow for the successful mediation of fee disputes. As a result, the Board must take the matter back and render a decision regardless of whether the parties have had a full opportunity to resolve their differences. In cases involving a dispute about fees and a waiver, it makes little sense to decide the fee issue if the parties ultimately agree to a waiver of some kind.

Thus, to remove the timing constraint, we recommend that the General Assembly amend the statutory provisions that govern the Board's process to authorize the Board to refer matters to the Ombudsman and to toll the statutory timing restrictions while the matter is with the Ombudsman. The specific language we suggest is set forth in Appendix A.

We think that amending the statute in this fashion would give the Board the flexibility to refer to the Ombudsman matters that appear suited for informal mediation without impairing its ability to consider the matter fully should it become necessary to take the matter back after mediation proves unsuccessful. Referring matters to the Ombudsman as a sort of "gatekeeper" should also allow the Board to manage the additional volume of complaints that it would receive by expanding its jurisdiction to include waiver requests involving fees of more than \$350. Given the Ombudsman's early track record of success, she should be able to resolve a significant percentage of the matters referred to her, resulting in a smaller number of cases returning to the Board for its more formal review.⁶

By contrast, we believe that assigning to the Board the power to adjudicate *a//*PIA disputes and assess statutory damages—as some commenters suggested—would place unreasonable expectations on the Board and its staff. Based on our Office's informal review of other states' open records bodies, we would expect that such an expansion of the Board's jurisdiction would result in

⁶ We do not discount the possibility, however, that her workload would increase to the point where additional mediation staff is needed.

a volume of work that would be asking far too much of volunteer board members.

That the PIA Compliance Board—unlike the Open Meetings Compliance Board—has *binding* authority magnifies our concern about overtaxing the volunteer members of the Board. With the authority to issue binding decisions comes the corresponding duty to develop a factual record on which the Board’s decision rests. It is thus not sufficient for the Board to simply issue legal opinions; it must also render findings of fact that could form the basis for judicial review. That fact-finding responsibility is manageable in the small number of fee-related cases that currently come before the Board, but expanding the Board’s jurisdiction to include all PIA disputes would almost certainly overwhelm the Board and its limited staff.

In sum, we recommend that the PIA Compliance Board retain its formal neutrality, but that the time constraints under which it operates be altered to enable it to refer matters to the Ombudsman when the Board believes that mediation might resolve the dispute. The General Assembly may also wish to consider expanding the Board’s jurisdiction to include complaints about agency fee waiver decisions.

C. Whether the Functions of the Public Access Ombudsman Should be Modified

We recommend against modifying the functions of the Public Access Ombudsman beyond adding the limited “gatekeeping” role that we describe above with respect to the PIA Compliance Board. We make that recommendation for several reasons.

First, the Ombudsman has not been in place long enough to generate a sufficient track record to gauge either her normal workload or the effectiveness of mediation, as it is currently structured, in preventing and resolving PIA disputes. The Ombudsman began work on March 30, 2016, so we have had less than two years’ experience with her role and her effectiveness. Moreover, much of her first year in office was taken up by her investigation of, and report

on, the manner in which the Howard County Public School System has been implementing the PIA. *See* 2016 Md. Laws, ch. 132.

Second, the Ombudsman’s track record to date suggests that there is a place for her brand of informal mediation in an effective PIA compliance regime. The Ombudsman reported that, over her first 17 months in office, she had received 327 mediation requests, approximately half of which were successfully resolved within eight weeks of initiation.

We continue to believe that one of the benefits of the Ombudsman’s current, less formal role is that she can facilitate a conversation between requesters and custodians about PIA requests. In our view, much of the conflict that surrounds the implementation of the PIA stems from an “us” versus “them” mentality, in which some custodians see PIA requests as a diversion from their other governmental duties and some requesters suspect custodians of deliberately trying to block access to otherwise disclosable records. The Ombudsman is proving effective at bridging the gap that sometimes emerges between the requester and custodian.

By contrast, giving the Ombudsman more formal authority would likely stifle that conversation. Several commenters suggested that the Ombudsman be given the power to *compel* agencies to share records with her. That makes a fair amount of sense, but it would necessarily require that participation in mediation be made mandatory instead of voluntary, as it currently is. After all, if the process remains voluntary but the Ombudsman can order the release of records, the agency involved can simply withdraw from the mediation when confronted with a records demand from the Ombudsman. In other words, giving the Ombudsman *any* type of coercive power requires that her mediation services be made mandatory, which we believe would undermine the value of her role.⁷ Instead, agencies would most likely handle the proceedings as they would any other formal adversary proceeding. We think that would run

⁷ Requiring agencies—particularly local governments—to disclose records to an independent State entity also might waive privileges that apply or even violate federal and State law confidentiality provisions that prohibit or restrict agencies from sharing certain types of private information.

counter to the reasons why the Ombudsman role was created in the first place and burden the mediation process with excessive legal argument.

Giving the Ombudsman formal enforcement authority would also require due process protections for those who appear before the Ombudsman. Just as the PIA Compliance Board's decisions are appealable because they are binding, the Ombudsman's decisions would have to be appealable if they had the effect of requiring either an agency to provide a record or a requester to narrow his or her request. And because the Ombudsman's decisions would be binding, due process would also require that her role be formalized through the same types of fact-finding procedures that govern the PIA Compliance Board. This too would likely undermine the efficacy of the Ombudsman's mediation efforts.

Finally, giving the Ombudsman binding authority over *all* PIA disputes would radically increase the volume of matters that she receives and easily exceed the resources available to her. Although the Ombudsman successfully resolved roughly half of her cases within eight weeks, that pace would be difficult to maintain if the process she oversees becomes more formal and contentious. Additional resources would almost certainly be necessary.

2. The Merits and Feasibility of Merging the State Open Meetings Compliance Board with the State Public Information Act Compliance Board

We believe that it is appropriate to keep the Open Meetings Compliance Board and the PIA Compliance Board separate. We would revisit that conclusion if the General Assembly were to expand the responsibilities of either board to the point that it would be asking too much of volunteer board members. For example, based on our informal review of other states' public records boards, we would expect the number of PIA-related complaints to increase dramatically if the PIA Compliance Board were given jurisdiction over *all* PIA disputes. If Maryland were to follow that path, the PIA board would likely have to be compensated and, at that point, it would probably make sense to combine the two into one, compensated board.

Combining the two boards would offer some advantages. First, it would allow for the development of open government expertise that cuts across statutory lines. Although the Open Meetings Act and the PIA are different, the broad principles overlap in several respects—the presumption of openness, the need for the government entity to become versed in the exemptions to that presumption, and the extent to which PIA exemptions provide a basis for meeting in closed session, to name a few.

We also believe that, if the two boards are combined and compensated, the General Assembly should consider making them an independent entity, much like the State Ethics Commission. Under current law, the Office of the Attorney General provides staff and legal counsel to both boards and to the Ombudsman, even when those entities handle matters involving complaints against the State agencies that our Office represents. Our Office manages actual conflicts through the erection of conflicts walls and appointment of substitute counsel, but moving all of these entities into a separate, independent, paid commission would accomplish these same objectives and promote the public's faith in the process.

Several other states have independent boards that hear both public records and open meetings disputes. Connecticut, Iowa, and Minnesota are examples.

3. The Use of Fee Waivers in General and for Reasons of Indigence, Including How Often Waivers Are Requested, Denied, or Granted, and the Amount of Fees that Have Been Waived as a Result

As we indicated in our Interim Report, neither agencies nor requesters track fee waiver decisions in a way that allows us to say, empirically, how often waivers are requested, denied, or granted, or the amount of fees that have been waived as a result. We can, however, describe some broad trends in how fee waivers are reportedly handled under the PIA and suggest some ways in which the statute might be amended to improve the process.

The PIA provides two avenues for obtaining a waiver of the fee that would ordinarily be charged for processing a request for records: public interest

and indigence. We address the two types of waivers separately below, suggesting possible amendments specific to each.

A. Public Interest Standard

Under the public interest standard, an agency custodian is authorized to waive the fee if “the custodian determines that the waiver would be in the public interest.” GP § 4-206(e)(2)(ii). In determining whether a waiver would be in the public interest, a custodian is only required to consider the applicant’s ability to pay the fee and “other relevant factors,” but the statute does not specify what those factors are. The absence of more specific statutory criteria might explain the wide variation in fee waiver decisions that commenters have observed.

Although the statute, in its current form, does not identify the criteria that custodians should consider in their waiver decisions, we believe that those criteria can be borrowed from the large body of federal case law construing the fee waiver provision of the federal Freedom of Information Act. That Act—commonly referred to as FOIA—requires at least partial fee waivers⁸ “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). Maryland’s appellate courts have found federal FOIA case law—both generally and with respect to fees—“persuasive” in interpreting analogous provisions of the PIA. *See, e.g., Glass v. Anne Arundel County*, 453 Md. 201, 208 (2017); *Mayor & City Council of Baltimore v. Burke*, 67 Md. App. 147, 156 (1986).

Because of their shared purpose, the principles that emerge from federal case law seem familiar to, and useful for interpreting, the PIA. According to the Department of Justice’s FOIA guidance, federal courts consider the

⁸ Although the PIA does not expressly provide for partial fee waivers, we have long interpreted the Act as allowing for them. *See* Maryland Public Information Act Manual (14th ed., Oct. 2015) (“PIA Manual”) at 7-3 (“An applicant may ask the agency for a total or partial waiver of fees.”).

following factors in determining whether a fee waiver meets the “governmental operations” portion of the FOIA standard:

- (1) *The subject of the request.* Whether the subject of the requested records concerns “the operations or activities of the government”;
- (2) *The informative value of the information to be disclosed.* Whether the disclosure is “likely to contribute” to an understanding of government operations or activities;
- (3) *The contribution to an understanding of the subject by the general public likely to result from disclosure.* Whether disclosure of the requested information will contribute to “public understanding”; and
- (4) *The significance of the contribution to public understanding.* Whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities.

FOIA Update: New Fee Waiver Policy Guidance (Jan. 1, 1987) (“DOJ Fee Guidance”), www.justice.gov/oip/blog/foia-update-new-fee-waiver-policy-guidance.

Courts will also consider the burdensomeness of the request in determining whether an agency’s decision to deny all or part of a waiver request complies with the federal standard. *See id.* at n.4 (agencies may appropriately charge a partial fee when a request “minimally satisfies the ‘public interest’ requirement” and imposes on the agency an “exceptional burden or expenditure of public resources”); *see also Stewart v. U.S. Dep’t of Interior*, 554 F.3d 1236, 1243 (10th Cir. 2009) (stating that “the district court was correct in upholding the denial of the fee waiver because the underlying search would be unduly burdensome given the speculative nature of the records requested”).⁹

⁹ Under FOIA, the burdensomeness of the request is accounted for in other ways as well, for example, in the requirement that requesters “reasonably describe” the

The factors that the federal courts consider in determining whether a request is primarily in the requester's commercial interest are also familiar to the PIA:

- (1) *The existence and magnitude of a commercial interest.* Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so
- (2) *The primary interest in disclosure.* Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."

DOJ Fee Guidance; *Compare, e.g., Immanuel v. Comptroller of Maryland*, 449 Md. 76, 93 (2016) (observing, in the context of a commercial request, that "[t]he MPIA is a statutory mechanism for revealing matters of governance," not information about private activity that happens to be in government records).

Because of the substantial overlap between the FOIA and PIA fee waiver provisions, we believe that federal case law already provides the necessary interpretive guidance for determining whether a fee waiver would be "in the public interest." In fact, our Office has long recommended federal FOIA case law to custodians evaluating fee waiver requests. *See* PIA Manual at 7-3; *see also* 81 *Opinions of the Attorney General* 154, 158 (1996) (citing FOIA case in fee waiver context). Accordingly, we do not see a pressing need to alter the current language of the PIA. But if the General Assembly wishes to specify additional criteria, it should consider adopting the FOIA statutory language. Either way, any criteria employed should continue to allow agencies to

records sought, 5 U.S.C. § 552(a)(3)(A), and when evaluating the sufficiency of the agencies' search. *See* Department of Justice Guide to the Freedom of Information Act, Procedural Requirements at 25 ("[C]ourts have held that agencies are not required to conduct wide-ranging, 'unreasonably burdensome' searches for records." (emphasis omitted)).

consider the burdensomeness of the request in determining whether a fee waiver is in the public interest.

B. Fee Waivers on the Basis of Indigence

Under the indigence waiver standard, a custodian is authorized to waive fees if an indigent requester asks for a waiver and files an affidavit of indigence. GP § 4-206(e)(2)(i). A requester qualifies as “indigent” if his or her “family household income is less than 50% of the median family income for the State as reported in the Federal Register.” GP § 4-206(a)(2).

Based on the survey responses we received and our experience with the PIA requests received by the State agencies that we represent, it seems that the vast majority of fee waiver requests sought on the grounds of indigence are submitted by inmates, typically without an affidavit. Although there is a widespread view that inmate fee waiver requests are “routinely denied,” 2017 PIACB Report at 8, some agencies report that they only charge inmates when the request is extensive.

Some commenters argued that agencies should be *required* to waive fees when the requester is indigent. The statute, as it currently reads, leaves fee waivers to the discretion of the agency. *See* GP § 4-206(e) (providing that the “custodian *may* waive a fee” if the applicant is indigent) (emphasis added). Making fee waivers *mandatory* for indigent requests raises a number of problems, however. First, it removes the only meaningful disincentive against burdensome or repetitive requests. Our experience with PIA compliance tells us that, when requesters are required to internalize the costs of their PIA requests, they have a concrete incentive to focus on the records that lie at the heart of the issue they are concerned about, which records can then be disclosed quickly and at little cost.

There is also a policy question here: Should Maryland taxpayers be required to pay the cost of responding to requests from indigent requesters? Maybe; some commenters expressed the view that it is morally and constitutionally wrong to deny indigent requesters access to public records that other requesters would be able to obtain.

Agency commenters, however, noted that inmates sometimes submit repeated requests for their own prosecution file. Although it might be equitable to allow an indigent inmate free access to his or her file, it makes less sense to allow such requesters to submit multiple requests free of charge. Other commenters described their experience with indigent requesters serving as proxies for other interested parties who would not qualify for a fee waiver on their own. For example, the owner of a business who seeks records for a commercial purpose might ask a family member or friend who qualifies as indigent to submit the request on his behalf if he knows that it would generate a large fee if he submitted it on his own. Even without proxies, a mandatory fee waiver in cases of indigence also poses a financial question: What effect would such a waiver have on State and local budgets?

One way to provide inmates and other indigent requesters affordable access without opening the door to repetitive requests or gamesmanship is to entitle indigent requesters to a one-time fee waiver, and only when they make specific requests for which they qualify as a “person in interest.”¹⁰ Under that approach, indigent inmates, for example, would be able to obtain, free of charge, one copy of the records relating to *their own* convictions or incarceration, but not records relating to prison management more generally or records pertaining solely to others’ cases. Providing for mandatory fee waivers in this limited way addresses much of the perceived inequity in how fees are charged, while retaining the disincentive against repetitive requests and the use of indigent proxies.¹¹

¹⁰ Any amendment entitling indigent requesters to a fee waiver must be limited in a way that requires the requester to identify the records they seek with specificity. An indigent requester who, for example, asks for all records about himself—without any indication what those records might be—can impose significant search costs on agencies with little corresponding benefit.

¹¹ In the Interim Report, we suggested that one solution worth exploring might be to eliminate indigence fee waivers altogether and instead increase the number of hours provided free of charge to indigent requesters. Some states follow a similar approach. Many open government advocates opposed the idea, seeing it as a retreat

We recognize that providing for mandatory fee waivers on even this limited basis would increase the financial burden on agencies that handle a disproportionate amount of requests from indigent requesters. We also recognize that providing inmates cost-effective access to their own prosecution files might be better addressed through the court rules, which already provide access under certain conditions. *See, e.g.*, Md. Rule 4-263. But if the General Assembly is considering further amendments to the PIA on this topic, it might wish to consider providing indigent requesters with a one-time mandatory fee waiver when seeking specific records that are available to the requester as a person in interest.

We also recommend that agencies be required to make blank indigence affidavits easily available, either on their websites or otherwise. Given that all agencies already must identify their PIA coordinator on their website (if they have one), it would seem like a modest step to include a link to a blank indigence affidavit. Those jurisdictions that do not maintain a website should be required to make the blank affidavits available at a place easily accessible by the public, as the PIA already requires for the agency's PIA contact person. *See* GP § 4-503(a)(3). With respect to inmates, who generally do not have access to the internet, this requirement would mean that the State and local agencies that operate correctional facilities and detention centers would have to make indigence affidavits available through the facility's library or in other ways that are reasonably accessible by inmates.

One of the measures we preliminarily recommended—clarifying that the reference to “median family income” in the current definition of “indigent” means the standard used by the federal Low-Income Home Energy Assistance Program or “LIHEAP”—is probably not necessary. Commenters who were involved in the legislative process that resulted in the 2015 amendments to the PIA indicate that the legislative history makes clear that the General Assembly intended to adopt the LIHEAP standard. That fact, along with the guidance that this report and others provide on this point is probably sufficient to clarify any ambiguity about which standard applies. Nevertheless, should the General

from the Act's indigence fee waiver provision.

Assembly take up consideration of other amendments to the Act, we would recommend that it also clarify this point as a housekeeping measure.

We note also that the LIHEAP standard is not easy to locate or apply, so agencies may wish to consider including a summary of the current median income figures on their website or otherwise make it easily available to requesters. For fiscal year 2017, the median household income for a Maryland family of four was \$109,262. 81 Fed. Reg. 57589, 57590 (Aug. 23, 2016). The figure for fiscal year 2018 is \$110,038, although that number does not appear to have been published in the Federal Register.¹² Once you have the median income number, you must halve it to generate the indigence threshold for purposes of the PIA. For 2017 and 2018, the resulting figure is approximately \$55,000 for a family of four. Our Office will post a complete list of Maryland median income figures for 2018 once they have been published in the Federal Register.

4. The Denial Process Used by Custodians

The PIA requires that, “except as otherwise provided by law,” a custodian of public records is to permit a member of the public “to inspect any public record at any reasonable time.” GP § 4-201(a)(1). However, as the introductory clause suggests, not all public records are available for inspection under the PIA.

¹² See www.acf.hhs.gov/ocs/resource/liheap-im2017-03. The median household income depends on how many people reside in the household. To arrive at the median household income for a one-person household, you multiply the four-person-household figure by 52 percent. For a two-person household, you multiply by 68 percent; three-person 84 percent; five-person 116 percent; and six-person 132 percent. The federal Department of Health & Human Services—which generates the LIHEAP income standards—does not calculate the income limits for households of sizes greater than six persons. Those limits can be calculated off of the figure for a four-person family by multiplying that figure by a total of 132 percent plus 3 percentage points for each household member above six. *Id.*

The exceptions to the PIA’s general rule of disclosure can be grouped into four categories of exemptions. First, the PIA defers to various types of law—common law privileges, federal and State statutes, federal regulations, court rules, and court orders—that may preclude disclosure of a record. GP § 4-301(a). Documents that are covered by the attorney-client privilege and executive privilege fall within this category of exemptions, as do student records protected under the federal Family Educational Rights and Privacy Act, 20 U.S.C. § 1232(g) (“FERPA”), and medical records protected under the federal Health Insurance Portability and Accountability Act of 1996, Pub.L. 104-191, 110 Stat. 1936 (“HIPAA”). Some laws, such as FERPA, impose penalties for the disclosure of protected documents.

Second, the PIA itself *requires* custodians to shield certain records and specified categories of information from public inspection. These exemptions appear in Part II (GP §§ 4-304 through 4-327) and Part III (GP §§ 4-328 through 4-343) of Subtitle 3 of the PIA and are sometimes referred to as “mandatory” exemptions or denials. The most commonly-invoked mandatory exemptions are for personnel records, GP § 4-311, confidential commercial information, § 4-335, and information about the finances of an individual, GP § 4-336.

Third, with respect to certain types of records, the PIA gives the custodian of the record discretion to deny access to the record, or severable portions of the record, if the custodian “believes that inspection . . . by the applicant would be contrary to the public interest.” GP § 4-343. The exemptions in this category are sometimes referred to as “discretionary” exemptions and include inter- and intra-agency letters or memoranda, GP § 4-344, and investigatory records, GP § 4-351.

Finally, the PIA includes a mechanism that, in appropriate circumstances, protects records from inspection even if no exemption covers those records. If no provision of law or the PIA bars disclosure of a record, but the custodian believes that public inspection of the record would cause “substantial injury to the public interest,” the custodian may temporarily deny inspection and seek a special court order to continue to deny inspection. GP

§ 4-358. This last provision has historically been considered the only “catch-all” exemption under the Act. *See Glenn v. Maryland Dep’t of Health & Mental Hygiene*, 446 Md. 378, 386 (2016); *Bowen v. Davison*, 135 Md. App. 152, 165 (2000).¹³

As we indicated in the Interim Report, we do not understand our reporting mandate as requiring us to evaluate how agencies apply each of the 47 exemptions set forth in the statute. Instead, we will limit our observations to the procedural aspects of how custodians go about withholding records on the basis of one or more exemptions.

The requesters who responded to our survey criticized a variety of things about how the denial process works under the PIA: custodians look for ways to deny access, not to provide it; they do not adequately explain why documents are withheld; agencies refuse to provide digital materials in digital form, even when asked.

The fact that requesters repeatedly cited these recurring problems is, of course, cause for concern, but the statute already addresses these issues. Section 4-103(b) already requires that the Act be construed “in favor of allowing inspection”; § 4-203(c) already requires custodians to identify the “reasons” and “legal authority” for the denial, and a description of the record “that will enable the applicant to assess the applicability of the legal authority for the denial”; and § 4-205(c) already requires agencies to provide records in electronic format if the requester asks for them in that form. These comments thus do not weigh in favor of amending the substantive provisions of the PIA. Instead, they relate to enforcement issues.

The General Assembly has just recently, in the 2015 amendments, expanded the Act’s enforcement provisions, adding \$1,000 in statutory damages to the actual damages and attorneys’ fees already available under the Act. It

¹³ We are aware of at least one case in which a court assessed attorneys’ fees against a county that sought such an order. Although the case was not appealed, the role of the provision has likely been diminished by the potentially significant financial consequences of initiating court action.

might be best to let those amendments play out before re-opening the enforcement provisions a second time. Perhaps more importantly, strengthening PIA enforcement comes at a cost. As discussed above, assigning a broad enforcement role to the PIA Compliance Board would likely increase its workload to a degree that could not be managed by a volunteer board. And giving the Ombudsman formal enforcement powers would eliminate the one source of informal conflict-resolution that the law currently provides. Neither strikes us as a desirable approach at this early stage of the two entities' existence. Instead, we recommend that the General Assembly hold off on making more than the modest adjustments we suggest here and allow these still relatively new entities to develop a longer track record.

5. Public Records that Are Held by a Nongovernmental Custodian and the Appropriate Remedies to Ensure Public Access to Those Records

Our Office has traditionally advised that records maintained by government contractors typically do not constitute “public records” subject to the PIA. The PIA defines the term “public record” to include only those materials “made or received” by the government in the transaction of public business. Records that are created by a third-party contractor and have not been transferred to the government are not public records because they have not been “made or received” by the government.

That said, a “public record” does not cease being a public record simply because it is held by a private third party. *64 Opinions of the Attorney General* 274 (1979) (colonial public records remain public records even when held by private auction house). Thus, a government contractor could qualify as a “custodian” under the PIA if it has physical custody and control of public records. *See 80 Opinions of the Attorney General* 257, 259 n.4 (1995). For this reason, the government cannot transfer its records to a private storage facility and avoid its PIA obligations by doing so. *Napata v. Univ. of Maryland Med. Sys. Corp.*, 417 Md. 724, 738 n.9 (2011) (third party, record-storage vendors “must comply with the PIA insofar as any request pertains to” the government records it stores, even though its own unrelated records are not subject to the PIA).

These two types of records—a company’s own business records and public records held by a private entity—lie at the two ends of a spectrum of contractual relationships involving more or less governmental involvement. Closer to the private end of the spectrum are situations where the third-party contractor creates and maintains the record for itself and the contract only gives the government a contractual right of access to the documentation associated with the contract. We have previously advised that such records become “public records” only if the government invokes the clause and receives the documentation, but not before. *See generally* PIA Manual at 1-6 (citing *Forsham v. Harris*, 445 U.S. 169 (1980), and 80 *Opinions of the Attorney General* at 259).

Somewhat closer to the public end of that spectrum are situations where the contract between the government and the contractor gives the government *ownership* of records within the contractor’s possession. *Cf. Forsham*, 445 U.S. at 173 (observing that grantee, not the federal government, owned the data at issue). So too are situations where the government effectively controls the records at issue; under federal law, that is enough to render the records “agency records” under FOIA. *See* Department of Justice Guide to the Freedom of Information Act, Procedural Requirements, at 10-12 (available at www.justice.gov/sites/default/files/oip/legacy/2014/07/23/procedural-requirements.pdf).

Lying at the public end of the spectrum are speed camera vendors, which essentially perform a governmental function—enforcement of speed limits. In much the same way that the government cannot avoid the PIA by storing its public *records* with a private vendor, there is some force to the argument that the government should not be able to avoid the PIA by delegating its public *responsibilities* to a private vendor. Although there are no reported appellate decisions on the topic here in Maryland, we are aware of one circuit court decision in which the court appears to have concluded that the government violated the PIA by not disclosing records maintained by its third-party speed camera vendor. *See Ely v. Town of Morningside*, Order, CAL12-23425 (Pr. G. Cir. Ct., May 29, 2014); *see also, e.g.*, Ark. Op. Atty. Gen. 2008-154 (Nov. 12, 2008) (concluding that state public records law applied to private company

hired to operate school bus system because that was “a task that would otherwise be conducted by the [government]”).

Since our Interim Report was issued, the PIA Compliance Board issued an opinion that touches upon this issue. The Board concluded that, under the facts presented to the Board, a municipal government was obligated to seek records from its third-party speed camera vendor if doing so would provide a less expensive means of responding to a PIA request. *See* PIACB-17-07 (Feb. 28, 2017).

For several reasons, we recommend that the Legislature not extend the PIA to encompass the records of third-party contractors, at least without further study. First, the wide variety of government contracts makes it difficult to establish a bright-line rule for when the records of non-governmental entities are subject to the PIA. For example, the speed camera vendor in the matter before the PIA Compliance appears not to have objected to providing its records at cost. Software vendors, by contrast, are typically fairly protective of their records. And, as more and more government services are provided through private entities acting under government contracts or through public-private partnerships, what qualifies as a “public” record will become only more complicated.

Second, providing for blanket access to third-party contractors’ files could have ramifications for government procurements. For companies in some industries—again, think software providers—the applicability of the PIA might be a significant disincentive to contracting with the government. Even with the exemptions for trade secrets and confidential commercial information, these firms might prefer not to participate in a procurement rather than risk having to disclose their files to the public and, potentially, competitors.

Third, it is not necessary to extend the PIA to third-party vendors when existing law is sufficient to do so on a case-by-case basis. As discussed above, circuit courts and the PIA Compliance Board are already beginning to address this issue, and time may tell that a legislated rule is not necessary. After all, the law already provides an analytical framework for determining whether a third-party vendor, by undertaking the implementation of a governmental program,

qualifies as an “instrumentality of the State” for purposes of the government contract at issue. *See* GP § 4-101(j) (defining “public record” to include records made or received by “a unit or an instrumentality of the State or of a political subdivision”). In this way, the Court of Appeals has already extended the PIA and the Open Meetings Act to seemingly private entities that nevertheless are controlled by the government or perform important governmental services. *See Baltimore Dev. Corp. v. Carmel Realty Associates*, 395 Md. 299 (2006); *see also Andy’s Ice Cream, Inc. v. City of Salisbury*, 125 Md. App. 125 (1999).

Because existing law is capable of addressing this issue, we recommend that the General Assembly not extend the PIA to third-party contractors without further study and a full opportunity to examine the potential effects of doing so.

6. State Law Exemptions Outside of the Public Information Act

The PIA defers to other laws in that, if another law requires the custodian to keep a record confidential, that law controls. The converse is also true; if another law requires that a record be made publicly available, that law controls over an exemption in the PIA. As one might imagine, many federal and State statutes have confidentiality provisions that prevail over the PIA’s mandate of disclosure.

At the federal level, FERPA restricts access to student records, HIPAA restricts the disclosure of medical records, and the federal tax laws contain broad confidentiality provisions, *see* 26 U.S.C. § 6103. The Department of Justice annually lists the federal statutory provisions that similarly restrict access to records under FOIA and, in 2016, it listed 168 such provisions. *See* U.S. Department of Justice, “Statutes Used by Federal Departments and Agencies in Conjunction with Exemption 3 of the FOIA As Reported in Fiscal Year 2014 Annual FOIA Reports,” www.justice.gov/oipfoia-resources2016-exemption3-statutes/download.

State statutes also contain confidentiality provisions that supersede the requirements of the PIA. For example, § 8-507 of the Courts & Judicial Proceedings Article prohibits the disclosure of grand jury information, § 5-314

of the State Personnel & Pensions Article makes confidential information gathered as part of a whistleblower investigation, and several provisions of the Public Ethics Law prohibit the disclosure of information relating to certain actions taken by the State Ethics Commission. *See* GP §§ 5-301, 5-303, 5-407.

Only two of these statutory confidentiality provisions drew comment: § 3-107(e)(1)(ii) of the Public Safety Article, which governs the hearing process under the Law Enforcement Officer’s Bill of Rights, and § 8-801.1 of the Agriculture Article, which governs the confidentiality of nutrient management plans.

A. The Law Enforcement Officer’s Bill of Rights (“LEOBR”)

The Law Enforcement Officer’s Bill of Rights was amended in 2016 to provide that police disciplinary hearings would presumptively be open to the public. 2016 Md. Laws, ch. 519. Section 3-107(e)(1)(ii) of the Public Safety Article now provides that police disciplinary hearings “shall be . . . open to the public,” unless the head of the law enforcement agency finds that the hearing should be closed for “good cause,” including protecting the identities of a confidential source, undercover officer, or child witness. Some commenters expressed the view that the personnel records exemption of the PIA—§ 4-311, which has been applied to exempt from disclosure police disciplinary records—is inconsistent with this more recent mandate. They argue that the PIA should be amended to make it consistent with LEOBR’s open-hearing requirement.

For a couple of reasons, we do not recommend this change. First, we do not see the LEOBR as an unequivocal mandate for openness in police disciplinary matters. For example, the officer who is the subject of a disciplinary proceeding is able to obtain a copy of the investigatory file only if he or she executes a confidentiality agreement not to disclose any material in the file other than in the proceeding itself. Public Safety § 3-104(n)(1)(ii)1. Thus, while the hearings may be open, the records are generally not. *See Robinson v. State*, 354 Md. 287, 308 (1999) (stating that LEOBR “limits access to the internal investigation file to the affected officer . . . and does not expressly provide for access by anyone else”).

Second, and more importantly, we believe it is beyond our reporting mandate to recommend how to resolve the public policy questions that are involved with this issue. Few PIA issues are as fraught with controversy as access to law enforcement disciplinary files. As a result of incidents in Maryland and elsewhere throughout the country, police disciplinary matters are the stuff of headlines and public protests. The controversy has reached the Court of Appeals, which has issued three decisions on this topic over the last seven years, most recently confirming that police internal affairs files categorically qualify under the personnel records exemption. *See Maryland Dep't of State Police v. Dashiell*, 443 Md. 435 (2015); *see also Montgomery County Maryland v. Shropshire*, 420 Md. 362 (2011); *Maryland Dep't of State Police v. Maryland State Conference of NAACP Branches*, 430 Md. 179 (2013). The 2017 legislative session saw an unsuccessful effort to legislatively overrule *Dashiell* by amending the personnel records exemption to remove police internal affairs files from its reach. *See* 2017 Leg. Sess., H.B. 698 (proposing to amend § 4-311 to provide that “a record of an investigation or adjudication of alleged job-related misconduct by a law enforcement officer, including a record of any discipline imposed, is not a personnel record”). Ultimately, these questions reach well beyond the PIA implementation issues that we have been asked to address in this report.

B. The Confidentiality of Nutrient Management Plans Under § 8-801.1 of the Agriculture Article

The other State-law confidentiality provision that drew comment was § 8-801.1 of the Agriculture Article, which governs the public availability of nutrient management plans. Nutrient management plans identify the levels of manure and other nutrients—typically nitrogen and phosphorous—that can be applied to farmland to maximize crop yields while minimizing the potential for runoff to nearby streams. The application rates identified in the plans are tailored to the nutrient content of the soil and manure at each specific farm field. The plans are prepared by University of Maryland Extension advisors or private consultants and farmers who are certified to do so. All farms above a certain income or animal unit threshold are required to prepare and implement nutrient management plans.

Section 8-801.1 of the Agriculture Article requires farmers to file with the Department of Agriculture a “summary of each nutrient management plan.” The General Assembly specifically addressed the extent to which nutrient management planning information would be publicly available: “The Department shall maintain a copy of each summary for 3 years in a manner that protects the identity of the individual for whom the nutrient management plan was prepared.” Md. Code Ann., Agric. § 8-801.1(b)(2).

This one-sentence provision was the subject of seven years of litigation arising out of the Department of Agriculture’s response to PIA requests from various environmental organizations. The Department’s responses to those requests were the subject of circuit court complaints filed by both the Waterkeeper Alliance, which argued for a narrow construction of § 8-801.1(b)(2), and the Maryland Farm Bureau, which argued for a broader construction. One of the issues in the case was whether the Department, in order to “protect[] the identity” of the farmer, must redact only the farmer’s name, address, and unique identification numbers, or whether it must also redact any other information that *could be used* to identify the farm or farmer associated with the plan. Under the broader interpretation, information about the size of the farm or what types of crops it grows might have to be redacted, because it could be enough to identify the farm, under the right circumstances.

The Circuit Court for Anne Arundel County concluded that § 8-801.1 required the Department to redact the farmer’s name, address, signature, and unique identification number, as well as any other information that, if disclosed, “could be used to create a linkage between a specific individual and a specific [NMP].” *Waterkeeper Alliance, Inc. v. Maryland Dep’t of Agriculture*, 211 Md. App. 417, 454 (2013), *judgment vacated, appeal dismissed by* 439 Md. 262 (2014). The Waterkeeper Alliance appealed, and the Court of Special Appeals upheld the circuit court’s decision. *Id.* The Court of Appeals subsequently concluded, however, that the appeal was procedurally improper and so vacated the lower appellate court’s decision with instructions to remand it to the circuit court for further proceedings. *Waterkeeper Alliance, Inc. v. Maryland Dep’t of Agriculture*, 439 Md. 262, 290 (2014). The Waterkeeper Alliance elected to dismiss the case when it returned to the circuit court.

As discussed in the Interim Report, environmental advocates and farming interests disagree strongly about the pros and cons of providing greater public access to nutrient management plans. That is a policy decision that requires the balancing of important interests that lie beyond the scope of this report and its focus on the PIA. However, an agency's difficulty in administering a provision causes both delay and expense, and that has been the case with § 8-801.1 of the Agriculture Article. We thus focus our remarks here on whether and how § 8-801.1 might be amended to improve the way in which the PIA is implemented.

With that focus, we recommend that § 8-801.1 of the Agriculture Article be amended to specify what identifying information should be withheld when nutrient management plans are provided in response to a PIA request. Because of the policy implications of this issue, we are not in a position to recommend precisely what types of information must be withheld from a nutrient management plan. Name, address, phone number, and social security number—if one is provided in the plan—would be the obvious choices, but there might be other identifying information that the Legislature believes should be withheld. Another option would be to require the withholding of “personal information,” as that term is defined in § 4-101(h) of the General Provisions Article.¹⁴ Ultimately, we recommend only that the General Assembly clarify the provision so as to avoid further unnecessary expenditure of public resources, not that it clarify it in any particular way.¹⁵

¹⁴ The PIA defines “personal information” to include an individual’s name, address, driver’s license number or any other identification number, medical or disability information, photograph or computer-generated image, Social Security number, and telephone number. The term does not include an individual’s five-digit zip code or certain information about his or her driving record. GP § 4-101(h).

¹⁵ If the General Assembly elects to amend § 8-801.1, it may also wish to consider amending § 8-1010 of the Agriculture Article, which contains the same language requiring that Maryland Agricultural Certainty Program records be maintained “in a manner that protects the identity of the person for whom the records or information relates.”

7. Other Findings and Recommendations for Improving the Implementation of the Public Information Act

In addition to our findings and recommendations on the specific questions that the General Assembly asked, we offer here our more general findings about the implementation of the Public Information Act and recommend ways in which it might be improved.

A. Investing in PIA Compliance

In our Interim Report we sought comments on the possibility of requiring that agencies centralize the process of reviewing records for disclosure. We indicated that we believed that doing so would enable the employees who carry out those reviews to develop the experience and expertise necessary to reach more informed and more consistent conclusions about what is, and is not, disclosable. That would also reduce, if not eliminate, the need to have all PIA decisions reviewed by an attorney, which tends to drive up PIA compliance costs. We cited the existing requirement that agencies identify a single PIA contact person as a potential model for a new mandate. *See* GP § 4-503(a)(1).

This issue, like many PIA issues, highlights the difficulty of devising measures that are practicable both for large agencies, which have staff and counsel, and small municipalities, some of which have no full-time staff and most of which must retain outside counsel for advice on PIA issues. Because of the range of circumstances of the public bodies subject to the PIA, we ultimately conclude that legislating centralized PIA compliance is not workable. That said, all government agencies should be encouraged to adopt best management practices that allow for staff to develop experience and expertise in how to handle PIA requests.

B. Commercial Requesters

Several custodian respondents—in the survey and in comments on the Interim Report—expressed frustration about the number of requests they receive from private companies that use public records requests as a way to generate business. For some companies, that might involve seeking previously successful bids in order to improve their own bids in subsequent procurements.

For others, it might mean learning the names of individuals who have sought certain types of governmental benefits and thus might be in need of the services the companies provide. Others use the PIA to obtain information about private individuals for the purpose of selling that information.

These types of commercial requests are not what the PIA was designed to facilitate. Instead, disclosure under the PIA is “for the purpose of helping citizens understand and oversee the workings of government.” *Immanuel v. Comptroller of Maryland*, 449 Md. 76, 90 (2016) (upholding agency’s decision not to disclose value of unclaimed assets to commercial “finder,” who re-unites people with their assets for a fee). Although there is currently no statutory basis for excluding commercial requests altogether, there is at least one provision that prohibits such requests when they seek personal information in student records. *See* GP § 4-355(b)(2) (prohibiting disclosure “if the information is requested for commercial purposes”); *see also, e.g.*, Election Law § 3-506 (list of registered voters may not be used for “commercial solicitation” or “any other purpose not related to the electoral process”). We therefore invited comment on whether a similar prohibition should be adopted for all public records or whether other options—for example, increasing the response fee applicable to commercial requests—might be more workable.

Although commenters agreed that the commercial purpose of these types of requests was inconsistent with the PIA’s focus on governmental operations, they raised a number of concerns about how a prohibition on commercial requests would operate in practice. Some indicated that such a prohibition would be too easily circumvented by having an individual make the request instead of a company representative. Others worried about the erosive effect of such a prohibition on the PIA’s mandate of openness. These commenters both recommended further study before taking this step.

We tend to agree that the difficulties in implementing a full prohibition on commercial requests suggests that further study may be required before taking this step. In the meantime, a smaller step might prove more workable: Do not provide the first two hours free of charge when fulfilling a commercial PIA request. We can see no valid public policy purpose behind asking Maryland taxpayers to shoulder any part of the burden of responding to commercial PIA

requests. And while determining what is, and is not, a commercial request might be difficult at the margins, the consequences of getting that determination wrong are not as great if only two hours of fees are at stake, as opposed to the right of access itself.

C. High-Volume Requesters

As discussed in the Interim Report, custodians express frustration with individual requesters who submit PIA requests at such a high rate that it ties up staff and makes it difficult to complete other work. For example, one agency reported that during the past year, a staff member spent 20 percent or more of his full-time schedule responding to the requests of one individual. Another agency reported receiving more than 150 requests from the same requester in 2016. Even if each of those requests requires less than two hours to generate either a response or a fee estimate, the burden on the agencies would remain substantial. In the Interim Report, we sought comment on whether and how the statute might be amended to address this concern.

Although some commenters echoed the frustrations described in the Interim Report, we are not able to recommend amendments to address this phenomenon. Requesters are legitimately concerned that, in some cases, multiple requests might well be necessary, particularly if the requester works with the custodian to engage in an iterative process, requesting a small number of documents and then using that to focus the scope of subsequent requests—a practice that our Office encourages. In the eyes of many commenters, any limit on requests—however high—will be arbitrary and could frustrate legitimate access to public records.

Instead of limiting the number of requests someone can make, a less controversial approach might be to limit the number of free hours provided to a specific requester, perhaps within a certain time period. As indicated above, current law provides that the first two hours spent on a response are provided free of charge. But if a requester submits, say, 10 unrelated requests in a month, and each request takes up 2 hours, that amounts to 20 hours provided free of charge to a single requester. Providing for only two free hours per requester per month, for example, might be a better way of ensuring that the requester bears the actual costs of these types of frequent requests.

Even if the General Assembly does not pursue either of these controversial steps, custodians still have tools available to them to get at this problem, where it exists. As we discussed in the Interim Report, agencies may aggregate requests on the same topic and treat them as one large request when it appears that the requester is trying to take undue advantage of the statutory provision that requires the first two hours to be provided free of charge. Agencies also have the option of referring the situation to the Ombudsman. Although the success of her efforts relies entirely on the voluntary participation of the parties involved, she has a track record of facilitating the resolution of these types of disputes. We encourage all agencies to consider engagement with the Ombudsman early on when they anticipate difficulties with a particular request or requester.

D. Reducing Fees

Commenters from the requester community suggested a number of measures that, in their eyes, would help reduce the cost of obtaining access to public records. Some recommended that agencies be prohibited from charging for attorney review time; others would prohibit an agency from charging a fee if it takes longer than 30 days to respond. Although both of these measures would operate to keep down costs, neither strikes us as a workable solution.

Maryland governmental jurisdictions have long included attorney review time in their cost calculations, and for good reason. The PIA is not a one-way street. Although it carries a mandate of openness, the Act (and the many State and federal laws it incorporates) affirmatively *prohibits* agencies from disclosing certain types of materials. Custodians thus must navigate between these two competing statutory directives, something that often requires legal advice. A custodian's need for legal advice is made particularly acute, some commenters observed, by the fact that the custodian can be held *personally* liable for disclosing certain types of records that the Act requires to be kept confidential. *See* GP §§ 4-401, 4-402.

Our Office has long recommended against the practice of submitting all responses—however routine—for attorney review or having attorneys *run* an agency's PIA compliance altogether. These practices result in higher-than-

necessary response costs and can sometimes prevent agency staff from developing expertise in how to implement the Act's requirements. But attorney review is surely necessary and desirable when an agency is trying to identify the precise contours of its obligations. And, when attorney review is necessary, the cost of obtaining that review is an "actual cost" that may be charged by the agency that pays the attorney's fee or salary. The question that lies at the heart of fee-shifting provisions in general—who should pay, the requester or Maryland taxpayers?—applies with equal force here. All told, we do not recommend that the PIA disallow costs for attorney review time.

A prohibition on charging fees when an agency fails to respond within 30 days is more promising. After all, the 30-day limit is a statutory requirement, and it helps incentivize compliance if an agency knows that it will suffer administrative costs if it does not. In fact, some states include within their open records laws provisions along these lines. *See, e.g.*, Mich. St. § 15.234(9)(a) (requiring agency to reduce fee by 5% for each day of delay beyond the statutory response period, not to exceed a total reduction of 50%).

Like seemingly all PIA issues, this proposal has its own difficulties. Most obviously, some PIA requests simply cannot be fulfilled within 30 days, or even within 60 days, without disrupting agency operations. In those situations, it seems unfair to require the agency—and through it, the taxpayers—to shoulder the cost of responding. Although the agency could involve the Ombudsman in these difficult situations, an agency-initiated mediation process does not stay the 30-day response period¹⁶ and ultimately carries no guarantee of an equitable resolution.

We do not formally recommend the adoption of this proposal. In some cases, particularly for smaller jurisdictions, a custodian's slow response could be attributable to a lack of resources. When the agency is moving as quickly as it can, it seems unnecessarily punitive to require the agency and its taxpayers to shoulder the cost of a response. However, if the General Assembly wishes to

¹⁶ *See* GP § 4-203(d)(2) (providing that the time limits under the PIA are extended pending the Ombudsman's resolution of a dispute when "the applicant," not the custodian, "seeks resolution" of the dispute).

take steps along these lines, we would recommend that the fee-prohibition apply only where the agency fails to respond *at all* during the 30-day (or, with extension, 60-day) response period. An agency that provides a 10-day notice letter, keeps the requester apprised of its progress, or provides an initial to-be-supplemented response within the statutory period should not be penalized simply because the breadth of the request makes it difficult or impossible to fulfill within 30 days. *See ACLU v. Leopold*, 223 Md. App. 97, 124 (2015) (no error where agency provided a partial response within 30 days and began a dialogue as part of reasonable response process). By contrast, this type of proposal might prove helpful in encouraging agencies to keep track of PIA requests so that they do not become “missing in action”—a situation that makes up roughly one fifth of the Ombudsman’s caseload.

E. Uniform Fee Provisions

We also see merit in a different fee-related measure, namely, making the hourly rates and per-page copy charges uniform across all governmental bodies. Currently, agencies are free to establish their own copy charges, so long as they “bear a reasonable relationship to the recovery of actual costs incurred.” GP § 4-206. The resulting per-page copy charges vary dramatically among State agencies, from as little as 10¢ per page to as high as 50¢. It seems unlikely that the actual reproduction costs incurred by these agencies—paper, toner, machine wear-and-tear—varies quite so dramatically.¹⁷ Legislating a flat-rate copy charge applicable to all entities subject to the PIA would eliminate some of the concerns about agencies using high fees as a means to frustrate access.

We considered whether to recommend something similar for salary rates, but ultimately concluded that it is not necessary to do so. The statute currently permits the agency to charge the actual hourly rates of the people

¹⁷ It may be that the agencies with higher per-page copy charges include within that charge the staff time spent at the copy machine, while the agencies with lower charges do not. Although that might explain the variation, it does not address the public’s perception that the fees are arbitrary. An amendment imposing a uniform method for calculating the copy costs would address that perception and still allow agencies to recover their actual expenses.

involved in the response, § 4-206(b)(2), which makes sense. This too can result in some variation in response fees; agencies that involve attorneys extensively or that utilize outside counsel incur greater costs than those that handle responses with staff resources. But given that salaries vary among different levels of government, legislating a uniform hourly rate does not seem workable, both because it would affect governmental agencies differently and because it would require periodic amendment of the statute. On balance, we believe the hourly rate approach in the current version of the statute is the most workable.

IV Conclusion

As set forth above, we make the following recommendations on the issues identified in the reporting provisions of Chapter 135:

- The PIA Compliance Board should retain its formal neutrality, but the time constraints under which it operates should be altered to enable it to refer matters to the Ombudsman when the Board believes that mediation might resolve the dispute. The General Assembly may also wish to consider expanding the Board's jurisdiction to include complaints about agency fee waiver decisions.
- The duties of the Public Access Ombudsman should not be modified.
- The enforcement provisions of the statute should not otherwise be altered until the Board and the Ombudsman have been in place longer and have developed a longer track record of performance.
- The PIA Compliance Board should not be combined with the Open Meetings Compliance Board at this time, but if the jurisdiction of the PIA Compliance Board is expanded such that it can no longer function as a volunteer board, a combined, paid board would be appropriate.

- Although we believe that federal case law already provides sufficient guidance for public interest fee waiver decisions, if the General Assembly wishes to provide additional *statutory* criteria, it should consider adopting the criteria applicable under the federal Freedom of Information Act.
- The General Assembly should consider amending the PIA to provide indigent individuals with a one-time, mandatory fee waiver when requesting specific records about themselves as a “person in interest.”
- The records of third-party contractors that store government records are already subject to the PIA. We recommend that the General Assembly not extend the Act’s requirements to *all* third-party contractors without first studying the effect that such an extension would have on existing contracts and on the government’s ability to procure goods and services at the lowest price.
- Section 8-801.1 of the Agriculture Article should be amended to specify the types of identifying information that must be redacted when agencies disclose nutrient management plans under the PIA.

In addition to our recommendations on the issues described above, we also recommend to government custodians certain best management practices that should improve the implementation of the PIA. Given the range of government entities subject to the PIA, however, we do not recommend mandating these organizational steps by statute:

- Governmental agencies should, where practicable, consider centralizing responsibility for PIA compliance in one or more employees whose job performance would be evaluated, at least in part, on that basis.

- Governmental agencies should post blank indigence affidavits on their websites or otherwise make them easily available to the public.

Finally, we offer the following additional observations about matters that were not included in our reporting mandate, but which we identified in our Interim Report:

- Although commercial requests fall outside the intended purpose of the PIA and remain a burden on custodians, the ease with which a prohibition of commercial requests could be circumvented counsels against revising the PIA to address this issue.
- High-volume requesters continue to command an out-sized portion of agency resources. Although we do not recommend limiting the number of requests an individual requester may submit, the General Assembly may wish to limit the extent to which agencies must provide the first two hours of response time free of charge on each request for every high volume requester.
- Legislative action is not necessary to clarify that the definition of median family income employed by the Low-Income Home Energy Assistance Program, and published in the Federal Register, should be used as the standard for determining whether a requester qualifies as “indigent” under the PIA.

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APPENDIX A

§ 4-1A-06.

- (a) Except as provided in subsection (c) of this section and § 4-1A-07, on receipt of a written complaint, the Board promptly shall:
- (1) send the complaint to the custodian identified in the complaint; and
 - (2) request that a response to the complaint be sent to the Board.
- (b) (1) The custodian shall file a written response to the complaint within 15 days after the custodian receives the complaint.
- (2) On request of the Board, the custodian shall include with its written response to the complaint the basis for the fee that was charged.
- (c) If a written response is not received within 45 days after the notice is sent, the Board shall decide the case on the facts before the Board.

§ 4-1A-07.

- (a)(1) The Board shall review the complaint and any response.
- (2) If the information in the complaint and response is sufficient for making a determination based on the Board's own interpretation of the evidence, within 30 days after receiving the response, the Board shall issue a written opinion as to whether a violation of this title has occurred or will occur.
- (b)(1)(i) Subject to subparagraph (ii) of this paragraph, if the Board is unable to reach a determination based on the written submissions before it, the Board may schedule an informal conference to hear from the complainant, the custodian, or any other person with relevant information about the subject of the complaint.
- (ii) The Board shall hold the informal conference under subparagraph (i) of this paragraph in a location that is as convenient as practicable to the complainant and the custodian.
- (2) When conducting a conference that is scheduled under paragraph (1) of this subsection, the Board may allow the parties to testify by teleconference or submit written testimony by electronic mail.
- (3) An informal conference scheduled by the Board is not a contested case within the meaning of § 10-202(d) of the State Government Article.
- (4) The Board shall issue a written opinion within 30 days after the informal conference.

(c)(1) If the Board is unable to issue an opinion on a complaint within the time periods specified in subsection (a) or (b) of this section, the Board shall:

- (i) state in writing the reason for its inability to issue an opinion; and
- (ii) issue an opinion as soon as possible but not later than 90 days after the filing of the complaint.

(2) An opinion of the Board may state that the Board is unable to resolve the complaint.

(d) At any stage of the Board's process, the Board may refer a matter to the Public Access Ombudsman for mediation, in which case the time periods in which the Board must render a decision are tolled while the matter is before the Ombudsman.

~~(d)~~(e) The Board shall send a copy of the written opinion to the complainant and the affected custodian.