

**RESPONDING TO A REQUEST UNDER THE
MARYLAND PUBLIC INFORMATION ACT**

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An OCA Quick Guide

1. **Regulation.** Familiarize yourself with the County's MPIA regulation. COMCOR Misc 01.
2. **Are you a custodian?** Do you have responsive records? If not, notify the requestor of the proper custodian, if known, within 10 days of receipt of the request.
3. **Are the responsive records "public records"?** Public records are records made or received in connection with the transaction of public business (e.g., an appoint for a personal doctor's visit is not a public record, even if maintained on your County Outlook calendar).
4. **Need for a written request.** The County's regulation provides that the custodian should make public records available **without** a written request unless
 - A. the custodian believes he or she may have to deny the request,
 - B. a written request will assist the custodian in responding, or
 - C. the request will involve substantial time/cost.
5. **Suspend your archiving policy** for all public records responsive to the request. **DO NOT DESTROY ANY RECORDS RESPONSIVE TO THE REQUEST WHILE THE REQUEST IS PENDING (OR IN LITIGATION).**
6. **The 10-day notice. (effective OCTOBER 1, 2015)**
 - A. If custodian reasonably believes production will take more than 10 working days to respond, must inform requestor reason for delay, how long it will take, and provide estimate of fees.
 - B. Failure to timely produce record constitutes a denial that may not be considered the result of a bona fide dispute unless custodian gave the 10-day notice and is working with the requestor in good faith.
7. **Prepayment.** Determine if you are you going to demand prepayment for the cost of search, preparation, and reproduction of responsive records **before** you begin work on the request. Remember, the first 2 hours of searching is free. In making this determination, you should consider various factors, including:

- A. **Fee Waiver.** Consult with your agency counsel in OCA **first** if the requestor asked for a fee waiver. We can advise you as to the factors you must consider in making a fee waiver determination.

- B. **Time To Search And Retrieve.** Based on the estimated number of responsive records within your department (e.g., 10 boxes, 400 emails, 500 sheets of paper, etc.), estimate how many hours it will take your staff to search through those records to determine which are responsive to the request. Example: if you get a request for records regarding the “Smith matter,” do you have those records in one place, or must they be pulled from various locations. If you are going to request prepayment you should support that request with a description of the work involved to find and gather the responsive records (e.g., will this require a manual search of files, will you have to go to archives, will you have to print out hundreds of emails to review them manually?).

- C. **Time To Review For Mandatory and Permissive Non-Disclosure.** Estimate how many hours it will take your staff to read through every one of those responsive records and flag certain records for further attorney review for mandatory/permissive non-disclosure. The MPIA also functions as a privacy act, listing about 33 types of records and information that a custodian must withhold and an additional 13 types of information that a custodian may withhold under certain circumstances. Other laws (e.g., HIPPA) may also require non-disclosure. If you have questions about your obligation/ability to withhold certain records, your agency counsel in OCA can provide guidance to your staff on what records to flag for OCA review (common reasons for withholding documents include medical information, personnel files, confidential commercial or financial information, attorney-client communications, internal deliberative communications and policy recommendations).

- D. **OCA agency counsel only.** Estimate how many hours it will take OCA staff to review the flagged documents and finalize the documents for inspection.

- E. **“Reverse MPIA.”** An MPIA request may encompass information about, or records from, a third party that the third party would consider confidential. In that case, you may want to conduct a “reverse MPIA”—a procedure where you solicit that third party’s input (e.g., in an MPIA request for competing bids on a contract, a reverse MPIA would involve asking those bidders whether they believe their bids contain non-disclosable commercial information). If, after reviewing the third party’s comments you determine that you must disclose some records contrary to the wishes of that third party, you would give that third party notice before you disclose the records so that third party can file a reverse MPIA action in court challenging your decision before disclosure. The County may also have contractually obligated itself (or had a contractual obligation imposed upon it) to let a third party know about, and respond to, the pending MPIA request. (E.g., article 66(C)(13) of the FOP collective bargaining agreement with regard to

requests for police cruiser video.) If you will conduct a reverse MPIA action, estimate how many hours that process will take.

Breakout Costs. If you are going to demand prepayment, provide the requestor with a breakout of staff costs. Example: if it will take 2 program specialists, each of whom make \$45/hour, 10 hours each to search for and retrieve records, that cost would be shown as follows: \$45 x 10 hours = \$450 for each employee. When computing staff costs, use the employee's actual cost to the County (usually salary plus one-third for benefits). The total of all these anticipated expenses will represent the total prepayment cost to search for and prepare the requested records for inspection by the requestor.

Prepayment letter. If you are going to demand prepayment, your OCA agency counsel will review your demand letter.

8. **Gather Responsive Records And Flag.** If there is no demand for prepayment (or if you are waiving prepayment, or after receiving any prepayment), gather all responsive records and flag for further attorney review for possible non-disclosure. Your OCA agency counsel will provide guidance to your staff on what to flag (common reasons for withholding documents include medical information, personnel files, confidential commercial or financial information, attorney-client communications, internal deliberative communications and policy recommendations).
9. **Conduct a "reverse MPIA" if warranted.** See explanation above.
10. **Final Decision.** Make a final decision regarding which records will be made available for inspection and copying, in consultation with your OCA agency counsel. You must make records available within 30 days of receiving the request, unless the requestor gives written consent for an additional 30 day period.

The following is a listing of the current mandatory and permissive bases for withholding records. A detailed explanation of these categories is beyond the scope of this guide. Consult your OCA agency counsel for guidance. The Attorney General's MPIA Manual is also a helpful resource. <http://www.oag.state.md.us/Opengov/pia.htm>

REQUIRED DENIALS FOR SPECIFIC RECORDS

adoption records
welfare records
letters of reference
library circulation records
confidential gift to library or museum
retirement records
certain police records when requested for soliciting or marketing legal services
personnel records
student records
risk based capital records (insurance)

certain Maryland Transportation Authority records
higher education investment contracts
recorded images from automated monitoring systems
MVA records containing personal information
records pertaining to arrest warrants
certain Maryland Transit Administration records
Maryland Department of Natural Resources' records containing personal information
application for renewable energy credit certification or claims for credits
criminal surveillance images

REQUIRED DENIALS FOR SPECIFIC INFORMATION (deny part of the record)

medical and psychological information
sociological information per adopted regulation
commercial information
home address/telephone number of public employee
financial information of an individual
information about security of an information system
licensing records
records of a transportation contractor's suspected collusive or anticompetitive activity
notary publics
license application containing social security numbers
personal information about a person that maintain an alarm or security system
records of senior citizen activities centers

PERMISSIVE WITHHOLDING (can withhold if disclosure would be contrary to the public interest)

executive privilege
examinations
research projects
real property appraisal
records of investigation conducted for law enforcement purposes
site-specific location of certain plants, animals or property
inventions owned by state public institutions of higher learning
trade secrets and commercial information of the Md. technology Development Corp.
emergency response plans, including building plans that include security information
certain Maryland Port Administration records
certain Univ. of Md. Univ. College records
certain records of a public institution of higher learning