

MARYLAND PUBLIC INFORMATION ACT

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I. INTRODUCTION

A. Policy.

1. Embodies policy that people should enjoy broad access to public records.
 - a. Also functions as privacy act - government may only keep the information about a person that is needed to accomplish a governmental purpose and is relevant to the accomplishment of that purpose. GP § 4-102.
 - b. But exceptions to disclosure are narrowly construed.
2. In most cases, MPIA allows government to recoup its expenses of compliance.
3. A number of procedural requirements must be aware of.

B. Regulation. Do you have a local regulation? (e.g., Montgomery County executive regulation COMCOR Misc. 01).

1. Regulation is procedural only; substance of what is and isn't disclosable is still governed by MPIA
2. Legislative branch agencies have "signed on" to the regulation.

C. Don't Confuse With FOIA

1. County not subject to FOIA
2. FOIA applies only to federal agencies
3. no magic words for MPIA request - can't deny if used words "FOIA"

D. Moved

1. MPIA moved from State Government Article to new General Provisions Article (GP), Title 4. No substantive changes in the move.

E. Amendments in 2015

1. SB695 (Ch. 135) HB755 (Ch. 136) (2015)
2. SB444 (Ch. 350) (2015)
3. HB674 (Ch. 266) (2015)

F. Good Resource.

1. Attorney General's Public Information Act Manual (and Open Meetings Act Manual)
2. <http://www.oag.state.md.us/opengov/index.htm>

G. Contact your agency counsel

SUBSTANCE

II. PUBLIC ACCESS

A. Scope

1. **Public bodies and officials covered.**
 - a. Covers the state and political subdivisions
 - (1) county
 - (2) municipality

- (3) unincorporated town
 - (4) school district
 - (5) special district
 - b. Includes instrumentalities of government (e.g., Revenue Authority). *Baltimore Development Corp. v. Carmel Realty Associates*, 395 Md. 299, 910 A.2d 406 (2006) (nonprofit corporation formed to plan and implement long range development strategies in city was subject to substantial control by city and thus was instrumentality of city subject to PIA); *Andy's Ice Cream, Inc. v. City of Salisbury*, 125 Md. App. 125, 724 A.2d 717, cert. denied, 353 Md. 473, 727 A.2d 382 (1999) (Salisbury Zoo Commission subject to PIA, given the Mayor and City Council's role in the appointment of Commission members, authority over budget and by-laws, and power to dissolve Commission).
 - 2. **"Public Records" Defined**
 - a. Original or any copy of any documentary material made or received in connection with the transaction of public business. GP § 4-101(h).
 - b. Private contractor's own records are not "public records" if the agency doesn't possess them, even if agency has a contractual right to obtain them. But an agency's records remain "public records" even if the agency outsources the task of maintaining them to a private contractor. AG MPIA Manual 1-6 to 1-7.
- B. **General Rule:** a custodian shall permit a person to inspect a public record at any reasonable time. GP § 4-201.
 - 1. **Broad access**
 - a. MPIA generally construed in favor of permitting inspection. GP § 4-103.
 - b. exceptions narrowly construed
 - c. government generally bears burden to sustain its denial of public inspection. GP § 4-362(b)(2)(i).
 - 2. **Reason for request is usually irrelevant** but may be relevant as to fee waiver issue — whether public benefit v. private/commercial interest. *Stromberg v. Univ. of Md.* GP § 4-204(a).
 - 3. **Identity of requestor usually irrelevant** but maybe relevant if disclosure limited to person in interest. GP § 4-204(a).
- III. **PRIVACY: REQUIRED AND PERMISSIBLE DENIALS**
 - A. **Broad Public Access, But MPIA Also Functions As A Privacy Act.**
 - 1. Important difference from FOIA.
 - a. MPIA has **required** denials in GP, Title 4, Subtitle 3
 - (1) Part 2 §§ 4-304 to 4-327 (specific records)
 - (2) Part 3 §§ 4-328 to 4-342 (specific information)
 - b. MPIA has **permissible** denials in GP, Title 4, Subtitle 3, Part 4 §§ 3-343 to 4-357.
 - 2. Required denials especially important because of governmental and individual liability (civil and criminal) for unlawful disclosure. GP §§ 4-

401 & 4-402.

a. violation must be willful and knowing; must prove civil liability by clear and convincing evidence.

3. **Person In Interest.** Generally person in interest (person who is subject of the record) can inspect his or her own records (personnel records).

B. **Required Denials.** Custodian must not disclose certain specific types of records and certain specific types of information.

1. **Examples of specific records (§§ 4-304 to 4-327)**

a. adoption and welfare records

b. personnel records

(1) includes biographical information submitted by individuals seeking position as unpaid member of board or commission

(2) but not “directory-type information,” such as ranks, badge numbers, date of hire, job assignment (e.g., request for identity of employee driving bus observed going through stop sign).

c. letters of reference

d. retirement records

e. student records

f. library circulation records

g. arrest warrants

h. Police reports sought for marketing legal services

i. miscellaneous records

2. **Examples of specific information (§§ 4-328 to 4-342).** The custodian must deny access to **the part of a record** that contains the following information.

a. an individual’s finances, including assets, income, liabilities, net worth, bank balances, financial history or activities, or creditworthiness, salary of public employee excepted GP § 4-336(a)

(1) *Comptroller of Treasury v. Immanuel*, 216 Md. App. 259, 85 A.3d 878 (2014).

(2) Abandoned Property Act requires comptroller to annually publish list of abandoned property valued over \$100, but doesn’t require disclosing the property or its value. This would be undisclosable financial information of an individual under the MPIA, but the more specific Abandoned Property Act controls and requires publication.

(3) Plaintiff, a “tracer,” wanted list of top 5,000 most valuable property accounts, formatted from largest account to smallest, but excluding precise values.

(4) No. Sorting in that manner would reveal financial information of an individual.

(5) Montgomery County - request for unclaimed checks. We give information for corporate checks, but not individuals.

b. confidential commercial or financial information

- (1) must be information obtained from person outside government
 - (2) Procurement situation - see other bids
 - (3) few Maryland cases - look to federal cases
 - (4) would disclosure cause substantial competitive harm
 - (5) reverse MPIA (see below)
 - c. medical, psychological, or social information
 - d. public employee's home address or telephone number
 - e. occupational and professional licensing records
 - f. personal information about a person maintaining an alarm system
 - g. records of senior citizen activities centers
- C. **Permissible Denials** — Custodian may withhold the following **if disclosure would be contrary to the public interest** (§§ 3-343 to 4-357).
- 1. Inter and intra agency memoranda and letters (executive privilege).
 - a. applies to records containing confidential opinions, deliberations, advice or recommendations made to a public employee.
 - b. exemption is intended to preserve free and frank discussion and the internal deliberative process.
 - c. doesn't apply to purely factual data.
 - 2. testing data for employment or academic examinations
 - 3. research projects
 - 4. real estate appraisals until title has passed
 - 5. Investigatory records
 - a. MPIA allows custodian to deny inspection of investigatory file compiled for law enforcement purpose. Includes code enforcement
 - b. Where requestor is not person in interest - where investigation is closed and no danger that disclosure will interfere with ongoing law enforcement proceedings, custodian must put forth "a particularized factual basis for the 'public interest' denial." Custodian must say more than "disclosure would be contrary to the public interest." *Frederick v. Randall Family, LLC*, 154 Md. App. 543, 841 A.2d 10 (2004).
 - c. Person in interest (subject of the complaint) has greater access to investigatory file (custodian must make particularized showing for every document), but . . .
 - (1) custodian can deny inspection by person in interest to extent would interfere with ongoing law enforcement proceeding,
 - (2) even after investigation is closed, custodian can deny inspection by person in interest to extent inspection would disclose identity of confidential source, if information given under express or implied assurance of confidentiality
 - (a) purpose is not to protect complainant from potential harm, but to assist law enforcement officials in gathering information by ensuring reluctant sources that government will not disclose their identities.

6. inventions owned by higher education institutions
7. certain information owned by the Maryland Technology Development Corporation

D. **Personal Information.** There is no general exception for disclosure of “personal information” or “unwarranted invasion of privacy.” A denial must fit under a specific category (unless it is a temporary denial described below). *Police Patrol Security Systems, Inc. v. Prince George’s County, Maryland*, 378 Md. 702, 716, 838 A.2d 1191, 1199-1200 (2003); *Dashiell v. Maryland State Police Dept.*, 101 A.3d 562, 219 Md. App. 647 (2014).

1. But MPIA does use and define “personal information.”
 - a. information that identifies an individual, such as name, address, driver’s license number, SSN (but not 5 digit zip code). GP § 4-101(f).
 - b. Term used in conjunction with other exceptions.
 - c. Example: § 4-339 mandatory denial of part of public record that contains personal information about a person that maintains an alarm or security system
2. **Limitation On Personal Records.**
 - a. GP § 4-501. “Personal records may not be created unless the need for the information has been clearly established by the unit collecting the records.” A “personal record” is a public record that names or, with reasonable certainty, otherwise identifies an individual by an identifying factor such as: (1) an address; (2) a description; (3) a finger or voice print; (4) a number; or (5) a picture.
 - b. *ACLU v. Leopold*, No. 85 (Sept. Term 2014) (May 28, 2015). Plaintiffs could bring action against County, former County Executive and former Police Chief alleging that those employees collected, disseminated, and used personal information existing in legitimately created public records without a clearly established need. The information came from public records that were initially created legally (there was a clearly established need to create the records). But compiling them for use as personal dossiers of “enemies” violated the “established need” requirement of GP § 4-501. This is so regardless of whether the compilation of the information is considered the creation of a new record. COSA wrote: “The act of compiling the dossiers is a ‘use’ of the documents they contained under any sensible definition of the word, even if the documents were already in hand for some other purpose.”

E. **Temporary Denial.**

1. If official custodian believes disclosure of record that must otherwise disclose would do “substantial injury to the public interest,” custodian may temporarily deny and apply to circuit court within 10 working days for an order permitting denial.
2. Must confer with agency counsel first.

IV. OTHER LAWS

- A. **Other Law May Make Record Privileged Or Confidential.** MPIA recognizes that custodian must deny inspection where record is privileged or confidential by other law (attorney client privilege) or inspection contrary to state or federal law (federal Buckley Amendment re: student records)
- B. **Other Law May Compel Disclosure.** Converse is true; other law may compel disclosure
 - 1. Abandoned Property Act.
 - 2. Court order
 - 3. Subpoena
 - 4. *Boyd v. Gullett*, 64 F.R.D. 169 (D. Md. 1974) (MPIA doesn't create privileges for discovery); *Mezu v. Morgan State Univ.*, 269 F.R.D. 565, 576 (D. Md. 2010).
- C. **Other Freedom of Information Laws**
 - 1. Montgomery County Charter § 505 ("Right to Information"). This has been interpreted to be co-extensive with MPIA.

PROCEDURE

V. CUSTODIAN INFORMATION

- A. NEW Laws of MD 2015 Ch. 266 requires each governmental unit that maintains public records to (1) identify a representative who a member of the public may contact to request a public record; (2) maintain and publish specified contact information in a user-friendly format on the governmental unit's website or, if the governmental unit does not have a website, keep the information at a place easily accessible by the public; and (3) annually update the information.
- B. The governmental unit also must submit the contact information to the Office of the Attorney General annually. The office must post the contact information in a user-friendly format on its website and include the contact information in any Public Information Act Manual it publishes.

VI. WRITTEN REQUEST

- A. **Necessity Of Written Request**
 - 1. MPIA requires written consent unless
 - a. record falls into category of records custodian has designated as available upon immediate request [NEW Laws of MD 2015 Ch. 350 - used to say custodian should "consider" whether to designate records; now provides that custodian shall designate records] or custodian waives requirement.
 - (1) Example: Montgomery County:
 - (2) Generally custodian should make records available without written request
 - (3) Custodian must require written request if
 - (a) reasonably believe MPIA will require denial
 - (b) written request will materially assist Department in responding
 - (c) request may involve substantial cost or time in
 - b.

making records available

B. Contents Of Request

1. Can ask for applicant's identity for contact purposes. GP § 4-204(c).
 - a. Montgomery County regulation: must provide name, address, telephone number (cf. email request).
2. Must reasonably identify records sought. If unreasonably broad or unclear, may ask applicant to narrow or clarify.

C. Standing Request. Need not honor standing request for future records. AG MPIA Manual 2-4.

D. Records Creation. MPIA does not require custodian to create records; only allow inspection of existing records. AG MPIA Manual 2-3.

1. Custodian not required to reprogram its computers (creation of new instructions to the database to access linked data) or aggregate computerized data files to satisfy request.
2. It's not "reprogramming" if clerical employee with standard computer skills could generate report by following pre-existing instructions.
3. In a provision obligating a custodian of records to provide a copy of an electronic record in a "searchable and analyzable electronic format," the General Assembly indicated that the custodian was not required to "create, compile, or program a new public record." GP § 4-205(c)(4)(i). Further, that law also provides that, "if a public record exists in a searchable and analyzable electronic format, the act of a custodian providing a portion of the public record in a searchable and analyzable electronic format does not constitute creating a new public record." GP § 4-205(c)(5).
4. Example:
 - a. List of all dog owners in 20850 zip code
 - b. May not be categorized by zip code
 - c. Applicant can inspect all dog owner records and copy selected records
5. *Comptroller of Treasury v. Immanuel*, 216 Md. App. 259, 85 A.3d 878 (2014) (extracting or sorting information from database is no different in principle than producing something less than the full contents of a paper file).

VII. RESPONSE

A. If You Are Not The Custodian. You must notify applicant within 10 working days and provide name and location of the custodian, if known. GP § 4-202(c).

B. Custodian Must Grant Or Deny Within 30 Days Of Receiving Application.

1. If granted, custodian must produce record within 30 days after receiving application; sooner if custodian can reasonably produce record sooner.
2. NEW Laws of MD 2015 Chs. 135 and 136
 - a. If custodian reasonably believes production will take more than 10 working days, 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.
3. **No “unduly burdensome” denial.** Custodian cannot deny a request simply because it is “unduly burdensome.”
 - a. NEW Laws of MD 2015 Chs. 135 and 136. Cannot deny on grounds that request is intended to harass.
 - b. But the request must reasonably identify the records sought.
 4. **Scope of search.** Custodian must conduct search reasonably calculated to uncover all relevant documents
 5. If denied, within 10 working days of denial, custodian must give applicant written statement of reasons for denial, legal authority for denial, and appeal rights. NEW Laws of MD 2015 Chs. 135 and 136. Must, without disclosing protected information, give brief description of withheld record that will enable requestor to assess the denial.
 - a. NEW Laws of MD 2015 Chs. 135 and 136. If permissive category (GP § 3-343), must also explain “why the denial is necessary.”
 - b. Montgomery County - OCA must review denial before sent to applicant.
 - c. must give all reasons that support denial; otherwise could be limited on appeal
- C. **Redaction and Severability.** Custodian must permit inspection of any part of the record that is subject to inspection (NEW Laws of MD 2015 Chs. 135 and 136 deleted “and is reasonably severable”).
- D. **Time Extension.** Custodian may extend time limit up to 30 days with applicant’s consent.
1. Practical Tip: Keep the applicant informed.
- VIII. **FEES — SEARCH, PREPARATION, REPRODUCTION**
- A. **Recoup Fees.** Government can recoup its expenses for search, preparation, and reproduction.
 - B. **Search, Preparation, and Reproduction.**
 1. First two hours of search and preparation are free.
 2. After that, may charge actual cost for search, preparation, and reproduction (*e.g.*, cost of outside contractor or hourly rate of employee assigned to do work)
 - a. Montgomery County regulation: \$.15/page; more for large size or certified copy; no charge if total copying charge less than \$1.00.
 3. **Prepayment.** If anticipate large cost, may estimate and require prepayment from applicant.
 - C. **Right To Records In A Particular Format.**
 1. Electronic Records (effective 10/1/11). GP § 4-205(c).
 2. Must provide record in a searchable and analyzable electronic format upon request if it is in that format, subject to mandatory and permissive redactions.
 3. Don’t have to give an electronic copy of a record if it “would jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained.”
 4. Custodian can remove all metadata, **regardless of whether metadata**

could otherwise be redacted.

- a. can remove metadata by using software program, or
- b. convert into a different searchable and analyzable format.

D. Waiver.

1. Official custodian can waive or reduce fee upon request.
2. Custodian must consider:
 - a. Public interest v. personal or commercial interest
 - b. Ability of applicant to pay. NEW Laws of MD 2015 Chs. 135 and 136 applicant may file affidavit of indigency (family household income less than 50% of median family income for state as reported in the federal register).

IX. STATE PUBLIC INFORMATION ACT COMPLIANCE BOARD

A. NEW Laws of MD 2015 Chs. 135 and 136

B. The five-member board is charged with (1) receiving, reviewing, and resolving complaints alleging that a custodian of public records charged an unreasonable fee of more than \$350 [legislature removed provision that included complaint regarding failure to grant a fee waiver]; (2) issuing written opinions as to whether a violation has occurred; and (3) if the board finds that a violation has occurred, ordering the custodian to reduce the fee to an amount determined by the board to be reasonable and refund the difference.

1. Must file complaint within 90 days of action complained of.
2. Custodian gets 15 days to respond.
3. Board may hold an “informal conference” to hear from parties.
4. Board can issue opinion that it is unable to resolve the complaint.
5. Compliance with Board decision is not an admission of wrongdoing and is not admissible in any action challenging failure to produce a requested record under GP § 4-362.¹
6. Either party can appeal to circuit court. GP § 4-362(a)(2).

C. The board must also study ongoing compliance with the PIA by custodians and make recommendations to the General Assembly for improvements to the PIA.

X. PUBLIC ACCESS OMBUDSMAN

A. NEW Laws of MD 2015 Chs. 135 and 136

B. The ombudsman, who is appointed by the Attorney General, is charged with resolving disputes between applicants and custodians over requests for public records, including redactions, the application of exemptions, timeliness of production of a records, repetitive requests, and fee waivers.

C. If applicant challenges denial, custodian must demonstrate that exemption is clearly applicable to the requested record and, if denied under “permissive category,” that harm from disclosure is greater than public interest in access to information in the record. GP § 4-301(b).

D. When resolving disputes, the ombudsman is prohibited from compelling a custodian to disclose public records or redacted information to the ombudsman or an applicant or, except under certain circumstances, disclosing information received from an applicant or custodian without written consent from the

¹ The bill originally empowered the board to also decide whether the custodian wrongfully withheld a record; order the custodian to produce that record; and award statutory damages and attorney’s fees.

applicant or custodian.

E. If requestor seeks resolution through ombudsman, deadline for responding to MPIA request is extended pending resolution of dispute. GP § 4-203(d).

XI. **NOTIFICATION OF THOSE WHO MAY BE AFFECTED BY DISCLOSURE (“REVERSE MPIA ACTIONS”)**

- A. **Notification.** Custodian may notify person who could be adversely affected by disclosure and solicit their views on disclosure
- B. **Opportunity To File “Reverse MPIA Action.”** If custodian decides to disclose contrary to that person’s request, custodian may first provide that person opportunity to file appropriate action to prevent disclosure.
- C. Example — Procurement. Losing bidder may want to see other bidders’ submissions.
 - 1. Other submissions may contain confidential commercial or financial information
 - 2. Give other bidders opportunity to respond to request
 - 3. If decide to release other bids, may give those other bidders advance warning and opportunity to file “reverse PIA” action in circuit court

XII. **JUDICIAL REVIEW - FAILURE TO DISCLOSE**

- A. Two year statute of limitations to challenge in court CJ § 5-110.
- B. Government has burden of sustaining decision to deny.
- C. Court can order government to disclose.
- D. Government liable for actual damages (and statutory damages up to \$1,000) if the court finds that custodian willfully and knowingly failed to disclose or provide a copy. NEW Laws of MD 2015 Chs. 135 and 136 deleted requirement that requestor prove case by clear and convincing evidence.
- E. Court must assess attorney’s fees if plaintiff substantially prevails.

XIII. **CIVIL LIABILITY FOR UNLAWFUL DISCLOSURE.** A public employee who willfully and knowingly disclose records in violation of MPIA is liable for actual and punitive damages. Must prove by clear and convincing evidence. GP § 4-401.

XIV. **WHEN TO INVOLVE COUNTY ATTORNEY’S OFFICE**

- A. **Problem.** Whenever there’s a question about construction of MPIA.
- B. **Litigation.** If custodian knows the applicant is a party (or acting on behalf of a party) in litigation with the County or a County employee
- C. **Denial.** If you’re going to deny access to portion or entire record, must first consult County Attorney.
- D. **Temporary Denial.**