

2021 Legislative Changes to the PIA (Pt. 2) – H.B. 183

June 21, 2021

The General Assembly considered several PIA-related bills this session, but only two passed both chambers and went on to become law. This is the second of two blog posts dealing with legislative changes to the PIA during the 2021 session. The first post concerned certain changes to investigatory and other records related to police misconduct (SB 178) and can be found at <https://news.maryland.gov/mpiaombuds/2021/06/07/2021-legislative-changes-to-the-pia-two-part-series/>. This post deals with the changes to the expanded jurisdiction of the PIA Compliance Board and its interaction with the Public Access Ombudsman beginning July 1, 2022 (H.B. 183).

2021 Md. Laws, ch. 658 (H.B. 183):

This bill, which passed both chambers unanimously, expands the role of the PIA Compliance Board (“Board”) and provides a system that better integrates the work of the Public Access Ombudsman (“Ombudsman”) and Board. Currently the Board has narrow jurisdiction to review only allegations that a custodian charged an unreasonable fee higher than \$350. The Ombudsman has jurisdiction to mediate a much wider range of PIA disputes, but participation in the program is purely voluntary and the Ombudsman has no enforcement authority. The Ombudsman and Board generally work independently of one another under the current system; though at times the Board’s consideration of a complaint will be deferred where a complainant has other issues in mediation in an attempt to resolve all disputes—including the fee issue—via mediation.

When the new law takes effect in July 2022, all parties wishing to resolve PIA-related disputes outside of the judicial system must first attempt to mediate the dispute with the assistance of the Ombudsman. The Ombudsman will have ninety days in which to attempt to resolve the dispute, unless all parties agree on an extension of time. At the close of mediation, the Ombudsman must issue a “final determination” that the dispute was either resolved or not resolved. If the dispute is not resolved, the Ombudsman must inform the parties if Board review is available or not.

Under the new law, the Board has expanded authority to review a wider range of complaints relating to the PIA, namely that a custodian: denied inspection of a record; charged an unreasonable fee higher than \$350; or failed to respond to a request at all or within applicable time limits. The Board can also review complaints from custodians that a request is “frivolous, vexatious, or in bad faith.” 2021 Md. Laws, ch. 658. Note that the Board will not have authority to consider complaints regarding a custodian’s denial of a request for a fee waiver.

Once the Ombudsman’s final determination has been issued, a party has thirty days to submit a complaint to the Board. The other party’s response must be submitted within thirty days after receipt of the complaint. With the exception of records withheld pursuant to GP § 4-301(a)(2)(ii) (where inspection would be contrary to federal statute or regulation), the new law permits the Board to inspect and review records that have been withheld. The Board will also continue to have authority to convene “informal conferences” when it needs more information or finds that it would be helpful to hear from the parties. The Board must issue a decision within thirty days of receiving the written response and all additional information requested, or within thirty days of an informal conference, if one is held.

Depending on the nature of the dispute, the new law permits the Board to order certain remedies. The Board may order that records or parts of records be produced for inspection. In cases where a custodian has failed to respond or has not responded in a timely fashion, the Board may order that the custodian respond and/or that the custodian waive all or part of the fee that the custodian would otherwise be entitled to charge (if ordering a fee waiver, the Board's decision must include its reasons for doing so). If the Board finds that a request was frivolous, vexatious, or made in bad faith, the Board may order that the custodian may ignore the request or respond to a less burdensome version of the request within a reasonable timeframe.

It is important to keep in mind that the new law does not change the fact that the parties are not required to participate in extra-judicial dispute resolution. All existing judicial remedies remain in tact.

The new law also contains a "proactive disclosure" provision. Under that provision, custodians must "adopt a policy of proactive disclosure of public records that are available for inspection." 2021 Md. Laws, ch. 658. The policy may "vary as appropriate" to the type of record and to reflect staff and budgetary resources. *Id.* The policy may also—but is not required to—include publication of records on a website or publication of prior responses to PIA requests.

~As noted above, the new law does not take effect until July 1, 2022. In the meantime, both the Ombudsman and Board will be developing new procedures so that the new system is administered as efficiently and effectively as possible. Additionally, the new law requires the Board to adopt regulations, so please stay tuned for announcements regarding that process.