

Privacy Beyond the Grave: Does the PIA Protect the Personnel Records of a Deceased Employee?

July 13, 2018

The Maryland Public Information Act (“PIA”) protects the confidentiality of personnel records. Md. Code Ann., General Provisions Article (“GP”), § 4-311(a) (2014, 2017 supp.). A personnel record includes “an application, a performance rating, or scholastic achievement information.” GP § 4-311(a). It also includes “those documents that directly pertain to employment and an employee’s ability to perform a job,” *Kirwin v. The Diamondback*, 352 Md. 74, 82-84 (1998), and records “relating to hiring, discipline, promotion, dismissal, or any other matter involving an employee’s status,” *Montgomery County v. Shropshire*, 420 Md. 362, 378 (2011). In other words, the personnel records category is very broad. Public employees (and their supervisors) can obtain their own personnel records under the PIA, but they can’t get someone else’s, and no other third party can get theirs. GP § 4-311(b).

You might ask what happens if the employee is deceased, or no longer works at the agency — are their records still protected? The PIA does not distinguish between the personnel records of the living and deceased, or between the records of an active and departed employee. The PIA Manual notes that this “suggests, then, that the personnel records of former employees do not receive less protection than those of current employees.” PIA Manual, 3-12 – 3-13 (available [here](#)).

This conclusion is consistent with what federal courts have said about personnel records under the federal Freedom of Information Act (“FOIA”). FOIA’s so called “Exemption 6” protects information about individuals in personnel files. 5 U.S.C. § 552(b)(6) (2006). Unlike the mandatory protection for personnel records required by the PIA, Exemption 6 allows a custodian to decide whether disclosure of the protected personnel information “would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). Although federal courts have recognized that “the death of the subject of personal information does diminish to some extent the privacy interest in that information . . . it by no means extinguishes that interest; one’s own and one’s relations’ interests in privacy ordinarily extend beyond one’s death.” *Grandison v. U.S. Dept. of Justice*, 600 F.Supp.2d 103, 114 (2009) (internal quotation marks omitted) (citation omitted) (emphasis added). See also *Davis v. DOJ*, 460 F.3d 92, 97-98 (D.C. Cir. 2007) (recognizing “that the privacy interest in nondisclosure of identifying information may be diminished where the individual is deceased.” (internal quotation marks omitted) (citation omitted)).

In the Exemption 6 context, therefore, the fact of an individual’s death does not create a “bright line” after which the need to protect their privacy vanishes. Privacy protection is even stronger in the PIA context because, unlike FOIA Exemption 6, the Maryland PIA does not give the custodian discretion to balance personal privacy interests against the public interest when deciding whether to release a personnel record – it simply forbids a custodian from releasing that record. Accordingly, under the PIA, a custodian shouldn’t even consider whether an employee is living or dead, or active or departed, when responding to a PIA request for a personnel record.

To sum up, the PIA’s personnel records exemption (GP § 4-311) makes no distinction between a living/active employee’s personnel records and a deceased/departed employee’s personnel

records. And, even if it did, it is likely that a deceased/departed employee's privacy interests in those records continue after their death or departure.