Discretionary Exemptions Series: Investigative Records

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The Maryland Public Information Act ("PIA") provides access to government records of all kinds, but it also protects certain records and information under both its own provisions and under the provisions of other laws. There are five categories of exceptions to the general rule of disclosure, specifically:

- Part I: **Mandatory, Other Law**
- Part II: **Mandatory, Specific Records**
- Part III: **Mandatory, Specific information**
- Part IV: **Discretion of Custodian**
- Part V: **Withhold under Special Court Order**

In this blog post, we briefly explain discretionary exceptions to the PIA, and more specifically the Investigative Records, exemption Md. Code, General Provisions Art. ("GP"), § 4-351. This is the first in a series of blog posts about some of the specific discretionary exemptions.

Discretionary Exemptions

Under the PIA, records should be disclosed unless there is a specific exemption that prohibits disclosure of a specific record. The PIA also favors allowing inspection of a record over withholding the record when there is a discretionary exemption that might apply. Section 4-343 allows the custodian of the record to deny inspection of a part of a public record under a discretionary exemption contained in Part IV of the PIA if he or she believes disclosure would be contrary to the public interest. Thus, when considering whether to apply one of the Part IV discretionary exemptions, a custodian should weigh the public benefit of transparency against the privacy protections of the exemption and withhold the exempt part of the record only if the public interest in withholding the exempt portion outweighs the public interest in disclosure of the entire record.

Investigative Records Exemption

The PIA allows various law enforcement agencies—including local police departments and State's Attorney's offices—to protect records of investigations if releasing those records would be contrary to the public interest, e.g., an open investigation that needs to remain secret to be successful. But, what if a records request is made to a public entity that is being investigated?

The question brought to the Ombudsman's office was, "if a public entity is the subject of the investigation can they cite the Investigative Exemption for withholding records?" What follows is an analysis of that question.

Analysis

Multiple levels of inquiry are required to determine whether § 4-351's discretionary exemption for investigative records applies. First, we must figure out whether the public records at issue fall within the exemption's purview. If they do, then we must evaluate the custodian's explanation of

why disclosure is contrary to the public interest. Certain factors, including the legal status of the requester and whether the relevant investigation is open or closed, inform the custodian's burden in offering a sufficient explanation.

The question above asks whether there might be an added element for consideration—the nature and/or status of the agency invoking an exemption under § 4-351. Does it matter if the agency, or an agency employee, holding the records is the target or related to the target of the investigation? The answer appears to be no, so long as the elements of the exemption are satisfied and the custodian provides a sufficient explanation as to why disclosure would be contrary to the public interest. We explain more below.

What type of records is the requester asking for?

There are essentially two types of records that fall within § 4-351's discretionary exemption. Under subsection (a)(1) "records of investigations" conducted by certain enumerated agencies qualify; under subsection (a)(2) an "investigatory file compiled for any other law enforcement, judicial, correctional, or prosecution purpose" qualifies. Subsection (a)(1) does not require proof that the record is for law enforcement or prosecution, etc., purposes. Instead, the records of the enumerated agencies—all of which are in the business of law enforcement—are presumed to relate to investigations conducted for such purposes. See Superintendent, Md. State Police v. Henschen, 279 Md. 468, 475 (1977) below.

"The statutory language, and particularly the use of the word other before the phrase 'law-enforcement or prosecution purposes,' suggests that the Legislature believed that investigatory records of one of the enumerated law enforcement agencies were presumptively for law enforcement or prosecution purposes, but that investigatory records compiled by other agencies might or might not be for such purposes."

When the agency is not one of the enumerated agencies it must prove that the records it claims are exempt were compiled for law enforcement, judicial, correctional, or prosecution purposes. To do so, "an agency must, in each particular PIA action, demonstrate that it legitimately was in the process of or initiating a specific relevant investigative proceeding in order to come under the aegis of the exemption"; a simple and bare assertion that the records were compiled for law enforcement purposes is "insufficient under the language of the exemption." Fioretti v. Md. State Bd. Dental Examiners, 351 Md. 66, 82 (1998). The records need only have been compiled for such purposes at the time of the PIA request—they need not have originally been created for law enforcement reasons. John Doe Agency v. John Doe Corp., 493 U.S. 146, 155 (1989).[1] However, it is clear that an agency may not initiate an investigation upon receipt of a PIA request in order to avail itself of the exemption; the investigation must have already been underway in order for the records to qualify.

Is disclosure contrary to the public interest?

If the records are of the sort that could be exempt under § 4-351, a custodian must still justify withholding them by explaining why he or she believes disclosure would be contrary to the public interest. In most cases, simply stating that "disclosure is contrary to the public interest" is not a sufficient explanation. Instead, a custodian must point to the specific ways in which the public interest might be harmed by disclosing the investigatory records at issue. In the case of records

relating to open and ongoing investigations, however, the fact that the investigation is open is usually sufficient to show that disclosure would harm the public's interest in efficient and effective law enforcement. Blythe v. State, 161 Md. App. 492, 538 (2005).

Who is requesting the records?

Note that when the requester is a "person in interest"—meaning that he or she is requesting his or her own investigatory record, such as might be the case with an incarcerated individual—then the law places a heightened burden on the custodian to show that disclosure is contrary to the public interest. Blythe v. State, 161 Md. App. 492, 531 (2005). Section 4-351(b) provides seven specific factors a custodian must consider when weighing the public interest against disclosure to a "person in interest," including, e.g., whether disclosure would reveal the identity of a confidential source, disclose an investigative technique, or endanger the life or physical safety of someone. Even if one or more of those factors are present, a custodian still must determine whether the investigative record can be provided in redacted form so that, for instance, any identifying information about a confidential source or an investigative technique is removed. Thus, so long as (1) the investigative records are of the type specified in § 4-351, (2) the custodian can explain why disclosure would be contrary to the public interest, and (3) the custodian has considered the additional factors he or she must consider if the requester is a "person in interest," then the exemption is likely properly applied, regardless of the nature or status of the agency invoking the exemption.

In summary,

- The PIA favors allowing inspection of a record over withholding the record.
- The Investigative Records Exemption is discretionary and when the agency is not one of the enumerated agencies specified in the exemption, the agency must prove that the records it claims are exempt were compiled for law enforcement purposes.
- Releasing records from a closed investigation is less likely to harm the public interest, so an agency that denies a request for closed investigation records should explain in detail why releasing them would harm the public interest. See PIA Manual, 3-34.

~We hope this article provides the information you need to make more efficient requests for investigative records. The advice given is not legal advice nor is it a binding legal opinion. To make a request for Ombudsman's assistance, please email our office at pia.ombuds@oag.state.md.us.

[1] John Doe Agency considered § 552(b)(7) of the Freedom of Information Act ("FOIA"), which provides an exemption for investigative records substantially the same as § 4-351 of the PIA. Maryland courts therefore consider persuasive the federal courts' treatment of the exemption. Fioretti v. Md State Bd. Dental Examiners, 351 Md. 66, 75–76 (1998).