STATE OF MARYLAND
OFFICE OF THE
PUBLIC ACCESS OMBUDSMAN

STATE OF MARYLAND
PUBLIC INFORMATION ACT
COMPLIANCE BOARD

Report on the Public Information Act: Preliminary Findings and Recommendations

Submitted by the Public Access Ombudsman and
Public Information Act Compliance Board pursuant to
Committee Narrative in the Report on the Fiscal 2020
State Operating Budget and the State Capital Budget

November 6, 2019

I. Introduction

The Report on the Fiscal 2020 State Operating Budget (HB 100) and the State Capital Budget (HB 101), published by the Chairmen of the Senate Budget and Taxation Committee and House Appropriations Committee in April 2019, asked the Office of the Public Access Ombudsman ("Ombudsman") and the Public Information Act Compliance Board ("Board" or "PIACB") to collect and report data on Public Information Act ("PIA") caseload and compliance from 23 State cabinet-level agencies (the "reporting agencies"),[1] and to make recommendations on ways to improve statewide PIA monitoring, compliance, and enforcement.

With regard to the reporting agencies, the Ombudsman and the Board (collectively "we") were asked to collect the following information for the 15-month period from July 1, 2018 through September 30, 2019:

- The number of PIA requests received;
- The disposition of those requests;
- The average response time;
- The number of fee waivers requested and granted;
- The number of Ombudsman mediation requests and the number conducted;
- Information on PIA response processes and procedures, including training;
- Information on records management processes and procedures, including training.

Due to the imminent reporting deadline, and because a portion of the reporting period was prospective, we split the process of collecting the data into two phases: 1) we requested data for the first 12-month period—July 1, 2018 to June 30, 2019—to be sent to us by July 31, 2019; and 2) we requested data for the remaining 3 months—July 1, 2019 to September 30, 2019—to be submitted by October 31. The survey data discussed in these preliminary findings are for the first 12 months of the reporting period only—that is, for the period from July 1, 2018 through June 30, 2019 ("FY 2019"). We are still receiving data for the last 3 months of the period.

On the PIA monitoring, compliance, and enforcement front, we were specifically asked to analyze the desirability and feasibility of:

- Requiring the reporting agencies to periodically self-report information related to their PIA caseload and performance; and
- Enhanced extrajudicial PIA enforcement processes, such as those used by other states, and by federal agencies under the Freedom of Information Act ("FOIA").

Our final report is due by December 31, 2019, and these preliminary findings and recommendations are published for the purpose of providing interested parties an opportunity to

[1] The reporting agencies do not include all State agencies, but, instead, those that comprise the Governor's Executive Council, as follow: Department of the Environment (**MDE**); State Police (**MSP**); Department of Transportation (**MDOT**); Department of Health (**MDH**); Department of Education (**MSDE**); Department of Labor (**DLLR**); Department of Public Safety and Correctional Services (**DPSCS**); Secretary of State (**SOS**); Department of Natural Resources (**DNR**); Department of General Services (**DGS**); Department of Agriculture (**MDA**); Department of Housing and Community Development (**DHCD**); Department of Human Services (**DHS**); Department of Planning (**Planning**); Department of Commerce (**Commerce**); Department of Juvenile Services (**DJS**); Department of Information Technology (**DOIT**); Military Department (**Military**); Department of Aging (**Aging**); Department of Veterans Affairs (**Veterans**); Higher Education Commission (**MHEC**); Department of Disabilities (**MDOD**); and Department of Budget and Management (**DBM**).

submit comments on a more informed basis in advance of our final report. Please send all comments by December 6, 2019, by email to: PIA.Ombuds@oag.state.md.us, referencing "Comments" in the subject line, or by regular mail to:

Office of the Attorney General
Attn: Public Access Unit
200 St. Paul Place
Baltimore, MD 21202

A. Methodology and Information Sources

To collect the requested quantitative data from the reporting agencies, we sent each agency a survey instrument in the form of a spreadsheet. To collect and analyze qualitative data related to enhanced PIA monitoring and extrajudicial enforcement processes, we gathered information from a number of sources, including:

- The Ombudsman's caseload and case outcomes from the beginning of the program in April 2016 through September 2019;
- The Board's caseload and outcomes since it began operations in March 2016 through August 2019;
- The Ombudsman's 2019 stakeholder survey;
- Data from the Office of Administrative Hearings ("OAH") for 2013-2015;
- Discussions with State Archives and the Department of General Services-Records Management Division ("DGS");
- Interviews and other information from the FOIA Ombudsman and from relevant open records dispute resolution programs in six other states;[2]
- The Final Report on the Implementation of the Public Information Act, Office of the Maryland Attorney General (Dec. 2017); and
- Comments received on this Committee Narrative project since August 2019.

We also rely on the combined institutional experience of the Ombudsman and the Board, both of which have been in operation for more than three years. The Ombudsman, in particular, is in a unique position to draw upon observations and insights gained from three years of deep and varied interactions with a host of requestors and agencies around the state. This provides us an institutional appreciation of and perspectives on the challenges faced by both the requestor and agency communities.

B. The Maryland Public Information Act ("PIA") Overview

The PIA is Maryland's chief open records law. Its central purpose is to provide members of the public with a broad right of access to government records with the least cost and delay, unless a specific exemption requires or allows some or all of a record to be withheld. To this end, the PIA sets time limits in which an agency must issue its initial and final written response—10 business and 30 calendar days, respectively, as a general rule.

[2] Specifically, we researched the Connecticut Freedom of Information Commission, the Hawaii Office of Information Practices, the Iowa Public Information Board, the New Jersey Government Records Council, the Pennsylvania Office of Open Records, and the Utah State Records Committee.

The PIA permits an agency to charge a reasonable fee to recoup its actual costs in responding to a record request, including time and labor on a prorated basis after the first 2 hours spent gathering or preparing records for production. Importantly, the PIA directs agencies to give consideration to any fee waiver request based on indigence, or any other factors that may indicate that waiver is in the public interest.

Currently, PIA disputes may be resolved in circuit court by way of a civil action filed by an agency or requestor,[3] or through limited alternative dispute resolution ("ADR") options created by the Legislature in 2015. These ADR options consist of: 1) mediation through the Office of the Public Access Ombudsman, in which the Ombudsman seeks to help parties reach a voluntary resolution by agreement; and 2) with respect to fee disputes greater than $350, review and decision by the PIACB as to whether the fee is reasonable—the decisions of the PIACB are published, binding on the parties, and subject to judicial review by the circuit court. The PIACB currently has no jurisdiction to decide any other disputes under the PIA, such as the denial of fee waiver requests, the application of exemptions, or whether requests are repetitive or vexatious.

Prior to the creation of the Ombudsman program and the PIACB in 2015, requestors who had been denied records by certain State agencies had the option to challenge those denials administratively, usually through the Office of Administrative Hearings ("OAH"). This option was eliminated in 2015 by House Bill 755—the same bill that created the Ombudsman and PIACB—apparently because the first version of the bill authorized the PIACB to review and decide most PIA disputes involving both State and local agencies. The administrative remedy was not restored, however, when the bill was amended to limit the PIACB's jurisdiction to its present scope. Consequently, current extrajudicial PIA enforcement options are more limited than in years prior to 2015, at least for disputes involving many State agencies.

II. Preliminary Findings

These findings are informed by multiple sources and types of data**,** as no single source allowed us to evaluate PIA performance, tracking, and compliance and enforcement matters. Taken together, these sources form the basis for these preliminary findings and the recommendations that follow.

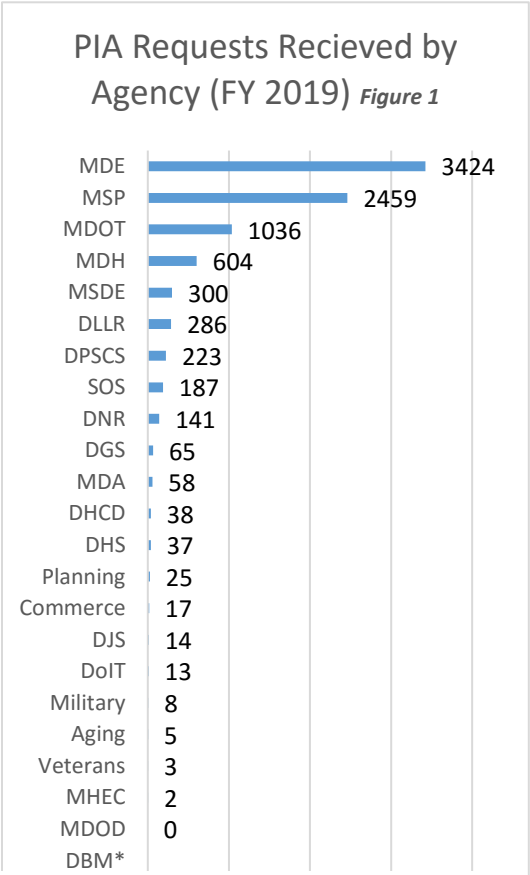
A. Quality of Survey Data

The survey of the 23 State reporting agencies, standing alone, is of limited use within the scope of our report. First, the reporting agencies comprise only about half of all State agencies, and no local agencies were included. Thus, the majority of all agencies subject to the PIA were not included in the survey. Nonetheless, based on other information sources, including the Ombudsman caseload from April 2016 through September 2019, we believe many of our observations likely apply across all State agencies, and at the local agency level.

[3] Requestors may bring a judicial action challenging an agency's full or partial denial of a PIA request, as well as for fee issues or any other aspect of an agency's handling of the PIA request. Agencies are authorized under the PIA to issue a "temporary denial" of a PIA request in cases in which there is doubt concerning whether a record should be disclosed, but must file a judicial action within 10 days thereafter seeking a court order authorizing the continued denial.

Second, much of the reporting agencies' quantitative data is incomplete. For example, DBM reported that it did not track and could not provide any data at all for the reporting period. MDOT and MDE reported that they did not did not track and could not provide data for more than half of the questions. Specifically, MDE reported not tracking 8 of the quantitative questions—including all of the questions in the section on PIA dispositions—while MDOT did not track data for 9 of the questions, including all of the questions in the section on fees. DHS provided data for only half of FY 2019, *i.e.*, the final 6 months, from January 1 to June 30, 2019.

Third, many agency responses were internally inconsistent to a degree that we could not rely on them for certain comparisons and evaluations. Specifically, we could not rely on responses for a particular topic where the sum of the data for that topic was not close to the total number of PIA requests received. For example, one topic is the number of initial PIA responses within and outside the statutory "10-day" deadline; where those responses added together are not equal to or within 5% of the total number of requests, we did not rely on that data when analyzing this topic.[4] In most instances where the data was deemed inconsistent, the deviation was far more than 5% from the total number of requests.[5] We recognize that some of this internal inconsistency may have been due to misinterpretations of the survey instrument, but think that it more often reflects the fact that many agencies are not currently tracking much of the detail we were asked to collect and report—itself an informative finding.



**Did not report any data for the reporting period.*

B. Reporting Agencies' PIA Caseloads

The survey data reflects that the PIA caseloads among the reporting agencies during FY 2019 vary considerably. For example, the number of requests per agency ranges from 0 (MDOD) to 3,424 (MDE),[6] with 3 agencies—MDE, MSP and MDOT—receiving 6,919, or

[4] By way of further illustration, if an agency reported having received 100 PIA requests during the period, but reported only 33 total responses either within or outside the 10 business day deadline, we could not confidently rely on that agency's numbers for purposes of assessing or comparing agency compliance with the 10 business day initial response deadline.

[5] The survey provided the reporting agencies with the opportunity to explain inconsistencies in each category of data with boxes marked "other"; *e.g.*, an agency could report the number of PIA requests still pending and within the 10-day initial response deadline as of the date they submitted the survey. We have taken into account any such relevant explanations in making our determination as to internal inconsistencies.

[6] MDE explains that its total number may even be understated, given that its tracking software aggregates multiple requests from the same requestor.

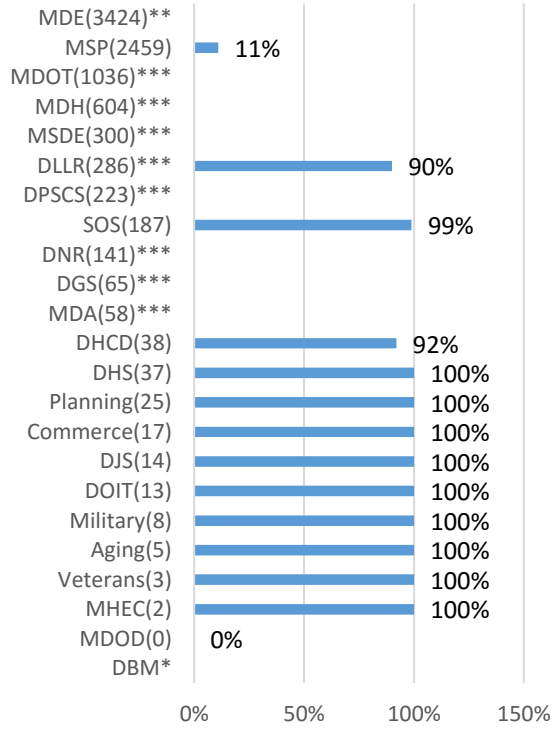
77%, of the 8,945 total PIA requests received by all reporting agencies (***Figure 1***).

This data also reflects that most of the reporting agencies have a light to moderate caseload, with some agencies reporting what might be described as a *de minimis* number of requests. Specifically, 11 agencies reported having fewer than 40 PIA requests during FY 2019, and 5 reported having fewer than 10. An additional 6 agencies reported receiving between 50 and 300 requests.[7]

We note, anecdotally, that many agencies at both the State and local levels report a significant increase in PIA requests in recent years. Our survey did not request comparative data from past years, but this trend seems likely due to the increasing prevalence of electronic records and the relative ease of making record requests via email and/or website. Still, it is worth noting that many reporting agencies do not have a voluminous PIA caseload, and this variation likely holds across other State and local agencies. Moreover, based on all data available to us, there does not appear to be a significant relationship between caseload volume and performance deficiencies, such as timeliness of response.

The disparity between agency caseloads suggests that improvements in performance will come from measures targeted to agency-specific problem areas, units, or processes, rather than from any "one size fits all" approach with respect to staffing, processes, or infrastructure. Rather, agencies with light to moderate caseloads can look to systems used by those with heavier caseloads, build on what works well, and learn from agencies with expertise in handling certain types of data and records, such as large data sets. We discuss some generally beneficial practices in our recommendations section below.

Response Time: Initial Response within 10 Business Days of Receipt ***Figure 2***



* *Did not report any data for the reporting period.*
** *Did not track this metric.*
*** *Data was internally inconsistent.*

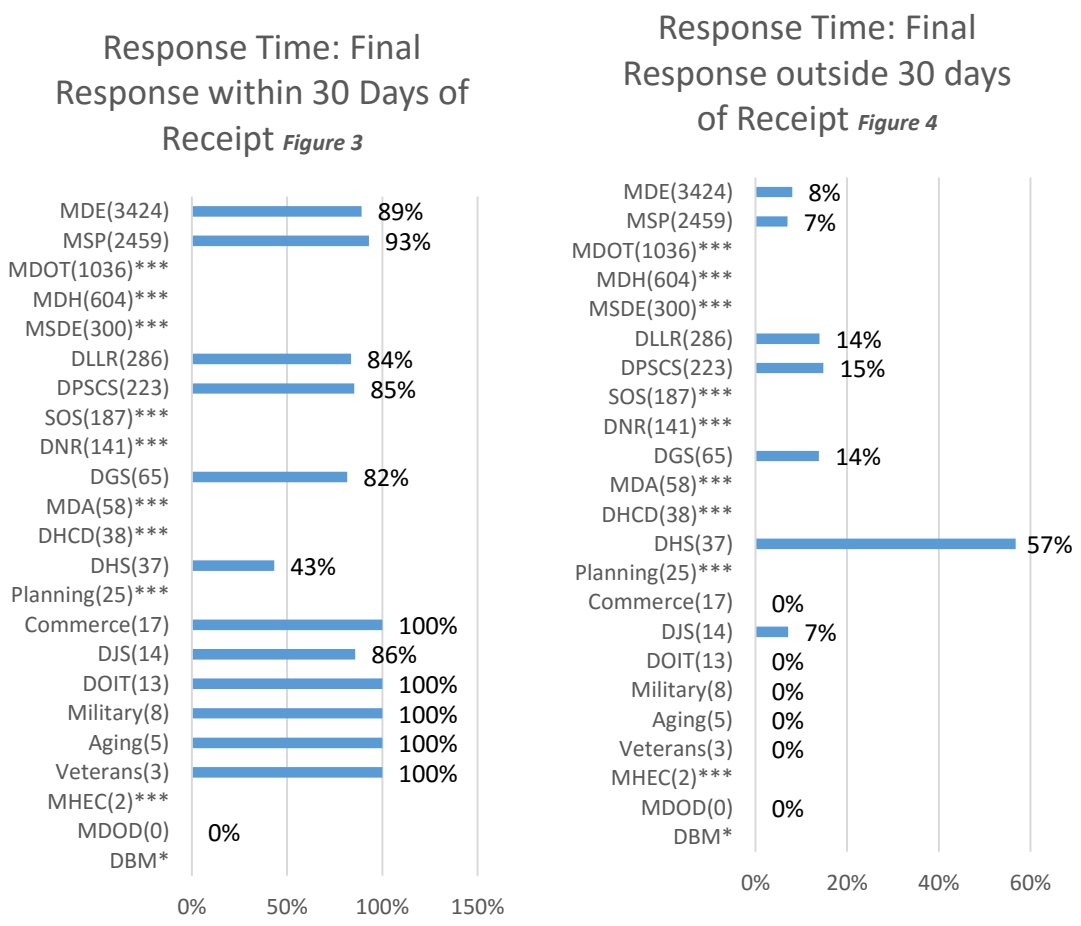
C. Timeliness of PIA Responses

Under the PIA, an agency has 10 business days in which to send an initial response to a request. If the response is not finalized at that time, the "10-day" response must provide the requestor with certain information, such as the reason for the delay and an estimate of fees, if any. An agency has 30 calendar days in which to send the final response, which can be extended by consent of the requestor.

[7] We are including DHS's total, even though that agency provided data only for the final six months of FY 2019. We are also including MSDE's reported figure of 300 total PIA requests, but note that when we followed up with that agency to inquire about certain inconsistencies in its data, it indicated the number may have been in error. However, the agency did not provide any amendment when invited to do so, so we have included the original reported number.

We asked agencies to report the number of initial responses sent within 10 days (***Figure 2***) and the number of final responses issued within 30 days (***Figures 3 & 4***). Five of the 7 highest volume agencies—those with more than 200 requests in FY 2019—either did not track one or both of these metrics, or were unable to provide consistent data for one or both metrics. In fact, only 9 agencies tracked and provided consistent data regarding their compliance with both the 10-day and 30-day deadlines, and 7 of those were agencies with the smallest caseloads, *i.e.*, fewer than 40 requests during FY 2019 (***Figures 2, 3, and 4***). That said, 4 of the agencies with caseloads higher than 200 in FY 2019 reported sending more than 80% of final responses within 30 days (***Figure 3***).

In the Ombudsman's experience, long overdue and missing responses regularly comprise around 20% of the mediation caseload. When an agency's response is missing or long overdue, it frequently indicates other compliance issues. In fact, the internal inconsistencies present in the



* *Did not report any data for the reporting period.*
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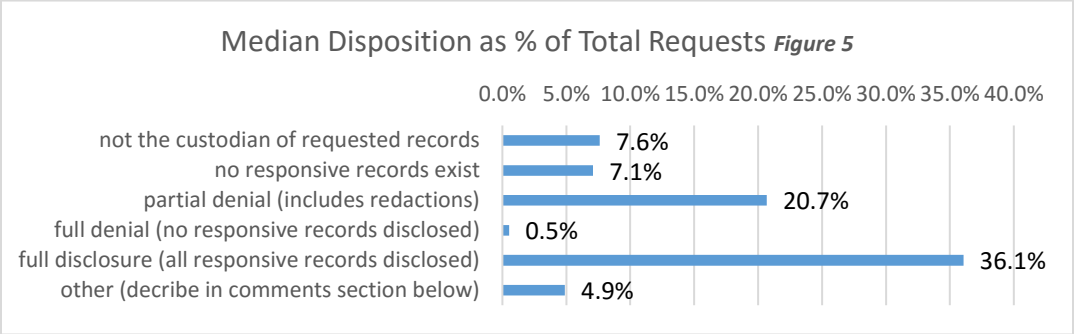
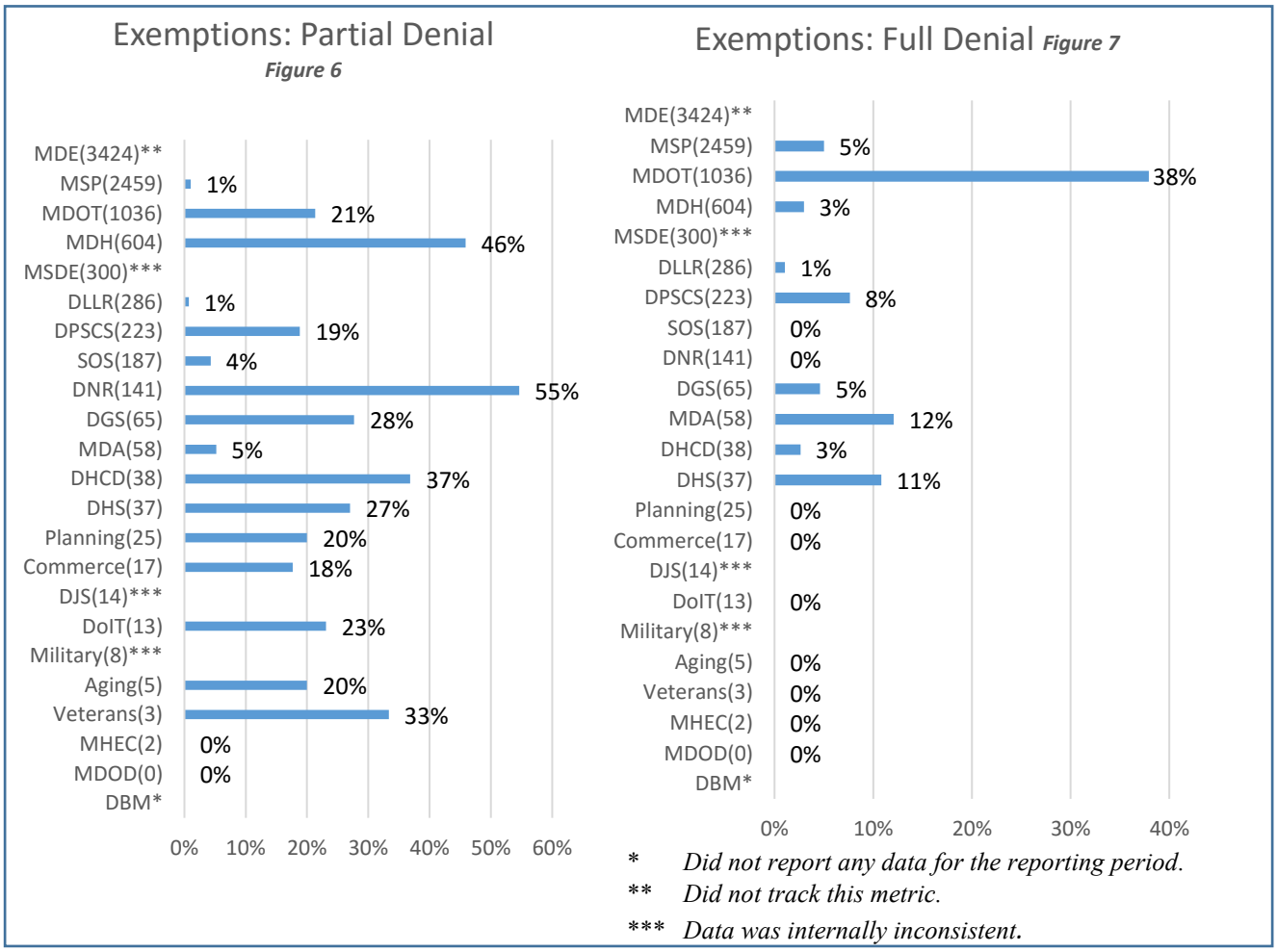
reporting agencies' survey data, together with the Ombudsman's experience, suggest that many agencies are not adequately tracking PIA requests, leading to tardy responses and other compliance issues. Thus, in order for agencies to fully comply with the PIA—including its deadlines—it is essential to accurately track all PIA requests from the time they are received though the time a final response is sent.

D. Disposition of PIA Requests

We asked the reporting agencies a number of questions pertaining to the dispositions of the PIA requests they received, as detailed in the table below (***Figure 5***).



The data suggests that agencies often receive requests for records of which they are not the custodian, or for which they do not have any responsive materials. Agencies also frequently respond to requests by disclosing all responsive records; overall, the reporting agencies responded to more than 36% of their total PIA requests with full disclosure of the requested record.

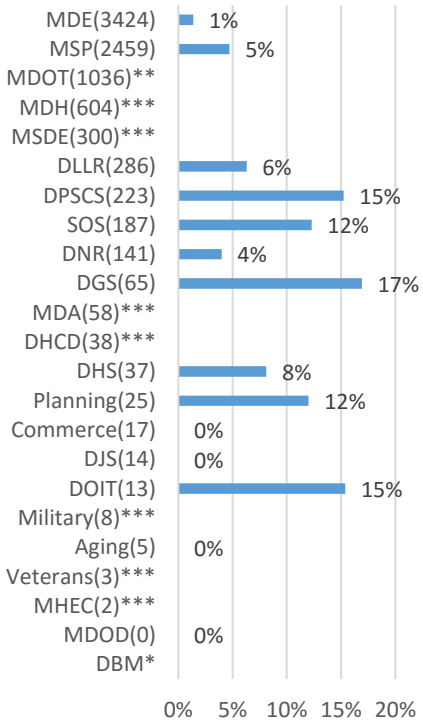


At the same time, many agencies report withholding some or all of the requested record in a significant number of cases. This occurs when an agency applies one or more of the PIA's exemptions. Depending on the material requested, the PIA may *require* an agency to withhold all or part of the record, or it may *permit*, on a discretionary basis, an agency to withhold all or part of a record. The tables above ***(Figures 6 & 7)*** indicate that most agencies relatively rarely withhold the entire requested record; MDOT is an outlier here, reporting that it denied the entire record in 38% of its responses. Many more agencies withhold a part of the requested record in a significant percentage of their responses. For example, DNR partially withheld the requested record in more than half of its responses, and 11 agencies provided partial denials in 18% to 46% of their responses.

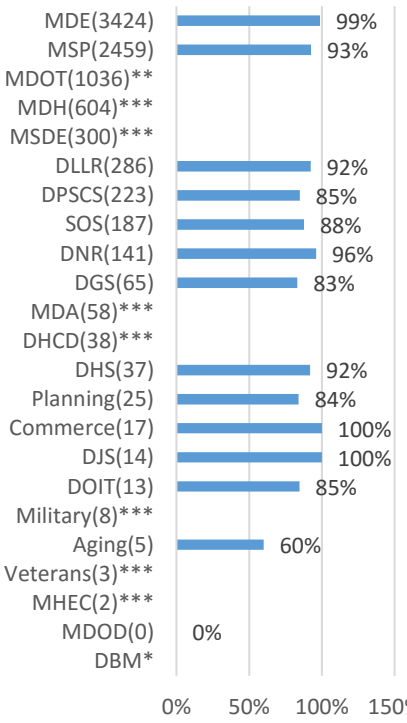
An agency's application of exemptions to either fully or partially deny the requested record presents a constant source of disputes. Since the Ombudsman's program began in 2016, more than 20% of all mediations have involved these kinds of issues. The resolution of many exemption-based disputes turns on a legal question and/or a review of the record at issue to assess the applicability of the claimed exemption or exemptions. Although the Ombudsman is often successful on this front, many of these disputes—about half—remain unresolved after mediation and could benefit from an extrajudicial forum with authority to review and issue a binding decision on the matter.

E. PIA Fees

Requests for which Fee was Charged ***Figure 8***

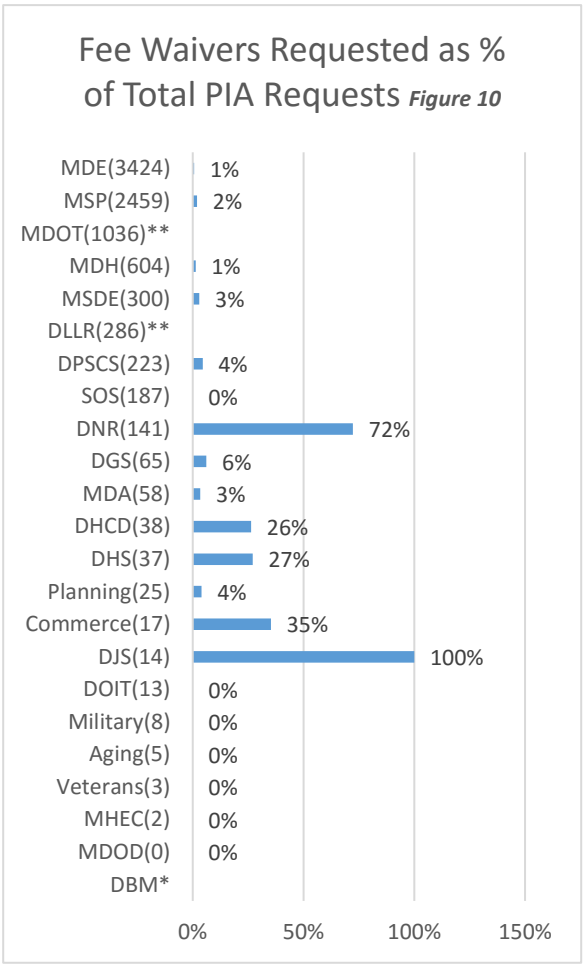


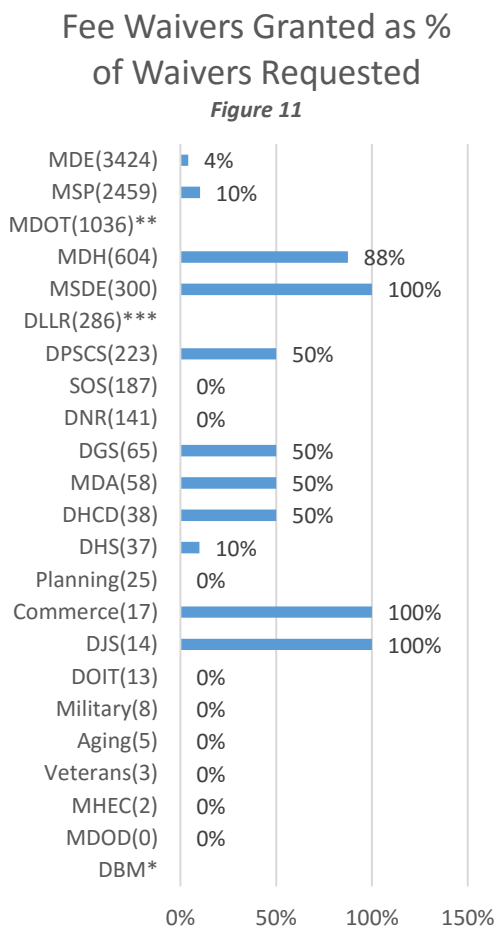
Requests for which No Fee was Charged ***Figure 9***



* *Did not report any data for the reporting period.*
** *Did not track this metric.*
*** *Data was internally inconsistent.*

We asked the reporting agencies to provide the number of PIA requests for which a fee was charged (***Figures 8 & 9***), the number of requests for which a fee waiver was requested (***Figure 10***), and the number for which a fee waiver was granted (***Figure 11***).





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The data suggests that most PIA requests are handled by agencies without fees. We interpret this category to include requests that were denied—*e.g.*, because one or more exemptions applied—those where no responsive records existed, and those which were handled in 2 hours or less. This category also may include some matters that were technically eligible for a fee, but in which no fee was charged for some reason, *e.g.*, because the charges were *de minimis*, were not accurately documented, or were otherwise waived.

With regard to fee waivers, as reflected in the tables above, it appears waivers are requested in a relatively small percentage of the reporting agencies' total caseload, subject to a few exceptions. The outliers are DNR and DJS, in which a waiver was requested in 72% and 100% of their requests, respectively. DNR did not grant any of those waiver requests, while DJS granted all of them. Overall, 8 of the 13 agencies that received waiver requests granted at least half of them. The notable exceptions are the two agencies with the largest caseloads—MDE and MSP—which

granted a relatively small percentage of their waiver requests—4% and 10%, respectively. The only other agency reporting more than 1,000 PIA requests—MDOT—did not track or report any fee data.

Fee disputes are present in a persistent number of the Ombudsman's mediations. The Ombudsman has concluded a total of 821 mediations involving State and local agencies since the program began. Approximately 6% of these mediations, about 50, have involved the denial of a fee waiver request, and another 9%, or about 74, have involved disputes over the amount of a fee. In other words, the Ombudsman has received more than 120 fee-related disputes in a little over 3 years.

During a roughly comparable 3-year period, the Board—which has jurisdiction only over fees greater than $350, but not over lesser fees or fee waivers—has received relatively few complaints that fall within its jurisdiction, issuing only 22 opinions. During the same time, it has received more than 15 complaints about an agency's denial of a fee waiver request, in addition to other complaints about PIA disputes that are not within its jurisdiction. The disparity between the Ombudsman's fee-related caseload and the Board's suggests that the majority of PIA fee-related disputes involve fees less than $350 and/or the denial of fee waiver requests, neither of which are within the Board's jurisdiction.

Based on this reality, we believe that any enhanced PIA dispute resolution or enforcement mechanism must have the authority to address more fee disputes in a meaningful way, especially with regard to fee waiver denials. In our combined experience, we believe that agencies' misunderstanding of the PIA's fee waiver provisions and/or default unwillingness leads to the routine denial of many waiver requests. Even in instances where a requestor provides an affidavit of indigency—which is the most specific statutory criteria for granting a waiver—many agencies nonetheless routinely deny the request. In some of these cases, it is clear the agency misunderstands the affidavit provision. *See, e.g.*, PIACB Opinion 19-08 (explaining that the wording of the PIA's fee waiver provision authorizes a custodian to grant a fee waiver "on the basis of an affidavit of indigency alone," without considering other public interest factors, and encouraging the agency to reconsider the waiver request to the extent that it misconstrued the waiver provision). Additionally, consistent with these findings, we believe the Legislature should consider reducing the fee threshold for review by the Board.

F. Records Management and Other Agency Practices & Needs

In addition to questions about the reporting agencies' core PIA caseload, we asked qualitative questions about the agecnies' other PIA and records management practices, including staffing, training, proactive disclosure, and use of technology. These areas bear directly on an agency's efficiency and its ability to fully and regularly comply with the PIA.

For example, because the PIA is essentially concerned with access to public records with the least cost and delay, effective records management practices—including maintenance, retention, retrieval, and destruction—are essential to a reliable and efficient PIA process. Confidence in these records management practices, or the lack thereof, inform all aspects of the PIA, from the search and retrieval process, to fees and disputes. Although our mandate in this report does not include a deep analysis of records management processes, or the need for related enforcement and compliance mechanisms, we do note the crucial connection between records

management and the PIA. Some of the findings that emerged from this portion of our survey include:

- There is wide diversity in the reporting agencies' compliance with and competence in records management practices—some agencies reported not knowing whether they had retention schedules on file at all, while others reported up-to-date schedules for all units within the department.
- As a general matter, the agencies with the most voluminous PIA caseload seem to have the best handle on records management practices and the most robust records management programs.
- But, even agencies with large PIA caseloads and robust records management programs do not appear to have comprehensive or integrated records management plans across all mediums, platforms, or devices, such as phones, email, and social media. Proper implementation of the PIA requires this kind of integration for purposes of effective search, retrieval, and production of records.
- Agencies underutilize tools of proactive records disclosure, such as maintaining lists of readily available documents that are able to be provided immediately without review; publishing such documents or links to them on the agency's website; publishing records that have already been disclosed under the PIA, especially where there is widespread public interest and/or the agency is likely to receive multiple requests for the same documents.
- Many agencies reported they would benefit from additional PIA and/or records management trainings and other resources.
- As most agencies transition to primarily electronic records and communications, their records management practices and retrieval and disclosure methods have not kept up with these technologies, which has complicated PIA processes and disputes.
- Although we did not collect similar data at the local government level, we suspect the trends are similar.

G. Need for Accessible PIA Enforcement Remedy

The Committee Narrative directed us to evaluate the need for and feasibility of expanding extrajudicial enforcement of the PIA, which currently is limited to Board review of fee disputes over $350. In order to assess the need for an expanded enforcement option, we reviewed all mediation matters handled by the Ombudsman both during FY 2019 and from the beginning of the program in April 2016.

The data involves an array of requestors and state and local agencies, and a wide variety of disputes—including disputes about timeliness, fees, exemptions and redactions, the completeness and accuracy of responses, and, on occasion, about repetitive, unduly burdensome, overly broad, or otherwise vexatious requests. This caseload review allowed us to determine both the number and type of disputes that could not be resolved by mediation and which seemed to be likely candidates for submission to a PIA Compliance Board—or other extrajudicial forum—with comprehensive enforcement authority.

The chart below (***Figure 12***) reflects our findings for all agencies—at both the State and local level—that have been involved in mediations with the Ombudsman during FY 2019. The reporting agencies alone—which reported receiving a combined total of 8,998 PIA requests during FY

2019—were involved in 46 mediations. Of those, 12 mediations—or approximately 26%—had unresolved issues at the conclusion of the mediation that we judged would likely have been submitted to the Board if it had jurisdiction to decide the issues.

A similar trend holds across the other agency categories. That is, for agencies other than the State reporting agencies, we found that a relatively similar portion of mediation matters contained unresolved issues at the end of mediation that we judged would likely have gone to a Board with expanded jurisdiction; that portion ranges from 19% of mediation matters with "other local" agencies, to 32% of mediations with "local law enforcement" agencies, including police departments and State's Attorney's Offices. Overall, of the 235 total Ombudsman mediations during FY 2019, 61—or 26%—were strong candidates for review and decision by an enforcement Board with expanded jurisdiction, if that option were available.[8]

Ombudsman Mediations: FY 2019 ***Figure 12***

Agency Category	Number of Mediations	Number Unresolved and Likely to go to Board with Expanded Jurisdiction	Percentage Unresolved and Likely to go to Board with Expanded Jurisdiction
State Reporting Agencies	46	12	26%
Other State Agencies	46	12	26%
Local School Systems	24	6	25%
Local Law Enforcement (Police and State's Attorneys)	65	21	32%
Other Local (County & Municipality)	54	10	19%
Total	**235**	**61**	**26%**

We also conducted the same review for *all* mediations handled by the Ombudsman since the program began. This data from 42 months of operation involves more than 520 unique requestors and more than 220 unique agencies at the State and local levels. The results are strikingly consistent with those captured for the FY 2019 reporting period. For example, during the 42-month period, the State reporting agencies were involved in 189 mediations, 49 of which—or 26%—were judged likely to have gone to a Board with expanded jurisdiction for review and a decision, if that option had been available. Similarly, of the 821 total mediations across all agency categories, 197—or about 24%—were judged likely in need of such a Board remedy.

In sum, we believe this retrospective analysis of the Ombudsman's caseload demonstrates a generally consistent unmet need for a practical and accessible extrajudicial enforcement option for PIA disputes that are not resolved at the mediation stage.[9] The analysis demonstrates that the

[8] In fact, the data shows that both the mean and median percentage of matters that were deemed to be likely candidates for decision by a PIACB with expanded jurisdiction was between 25% and 26%.

[9] Agencies currently do not have any extrajudicial remedies for overly repetitive or otherwise vexatious requests. We note that while these kinds of problems arise in a comparatively small number of cases, they often are time-consuming

number of unresolved disputes likely to go to the Board are relatively consistent throughout time and across agencies. Although we cannot be sure that the projected case volume would remain at the same level we estimated based on 2016-2019 data, we believe an exponential increase or decrease is unlikely in the near term. In fact, we would anticipate that the availability of an accessible enforcement option, together with a larger body of published substantive decisions, will enhance the effectiveness of mediations and bring about changes in agency and requestor behavior and expectations, all of which may lead to a long term decrease in disputes that need enforcement.

Our assessment of the need for an extrajudicial enforcement remedy is consistent with anecdotal information from requestors and agencies. For example, in early 2019, the Ombudsman conducted a program satisfaction survey directed to all requestors and agencies with whom the Ombudsman has worked since inception of the program. Of the more than 100 requestors who responded, more than 30—or roughly 30%—expressed frustration with the Ombudsman's inability to decide issues or to enforce the Act with respect to matters that were not resolved by mediation.

In addition, our qualitative surveys for this report asked for the reporting agencies' views concerning the need for and desirability of extrajudicial enforcement. Although many agencies expressed no general opinion on the matter,[10] or stated that the status quo is adequate,[11] others expressed support for any remedy that would keep PIA disputes out of court, that offered agencies a practical remedy for certain types of recurrent problems—such as repetitive, vexatious, or abusive requests—or that would enhance transparency and compliance.[12]

The current judicial remedies for PIA disputes appear to be infrequently used by either requestors or agencies. This likely is due to a variety of reasons, including the cost of a lawsuit and the fact that most requestors are *pro se*. Moreover, the formalities of the judicial process are

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and stressful for agency staff, sapping morale and draining resources that could be devoted to other requests. Currently, the only available remedy for such problems is a judicial action seeking injunctive relief.

Requestors and agencies also experience problems involving the PIA's deadlines, for which there currently are no effective remedies. For requestors, the issue typically revolves around late or "missing" responses, and for agencies, a recurrent issue is the inability to obtain an extension of the deadlines absent requestor agreement, even when the request is burdensome. Any extrajudicial enforcement body should be authorized to grant appropriate relief in such scenarios, on a case-by-case basis.

[10] **Aging** (answered N/A; Low Volume); **DBM** (no opinion); **Disabilities** (no opinion); **MDE** (no opinion, rarely any matters before Board, Ombudsman, or courts); **DJS** (no position); **DLLR** ("takes guidance from the Administration and General Assembly"); **Military** (no opinion); **Planning** (no opinion); **SOS** (did not respond); and **MSP** (no opinion).

[11] **MSDE** (current system adequate); **DGS** (current system adequate); **DHCD** (thinks Ombudsman is sufficient); **DHS** (current system adequate); **DOIT** (satisfied with existing system); **DNR** (no need for expanded enforcement); and **MDOT** (current system adequate, but would like to comment on any specific proposal).

[12] **MDA** (sees need for agency relief on certain problems; not opposed to extrajudicial remedy, but would like to comment on any specific proposal); **Commerce** (welcomes any additional review options that would prevent PIA cases from going to court); **DOH** (no objection to expanded enforcement and committed to PIA compliance); **DPSCS** (welcomes any process that increases transparency; sees need for funding of internal PIA compliance unit); and **Veterans** (welcomes the suggestion).

often inappropriate for many of the more routine PIA disputes, which usually involve simple fact patterns and the application of a limited body of law.

Accordingly, for all of these reasons, we believe that requestors and agencies would benefit from a practical, accessible, and inexpensive extrajudicial enforcement forum that could review and decide PIA disputes that cannot be resolved by the Ombudsman's voluntary mediation program.

III. Recommendations

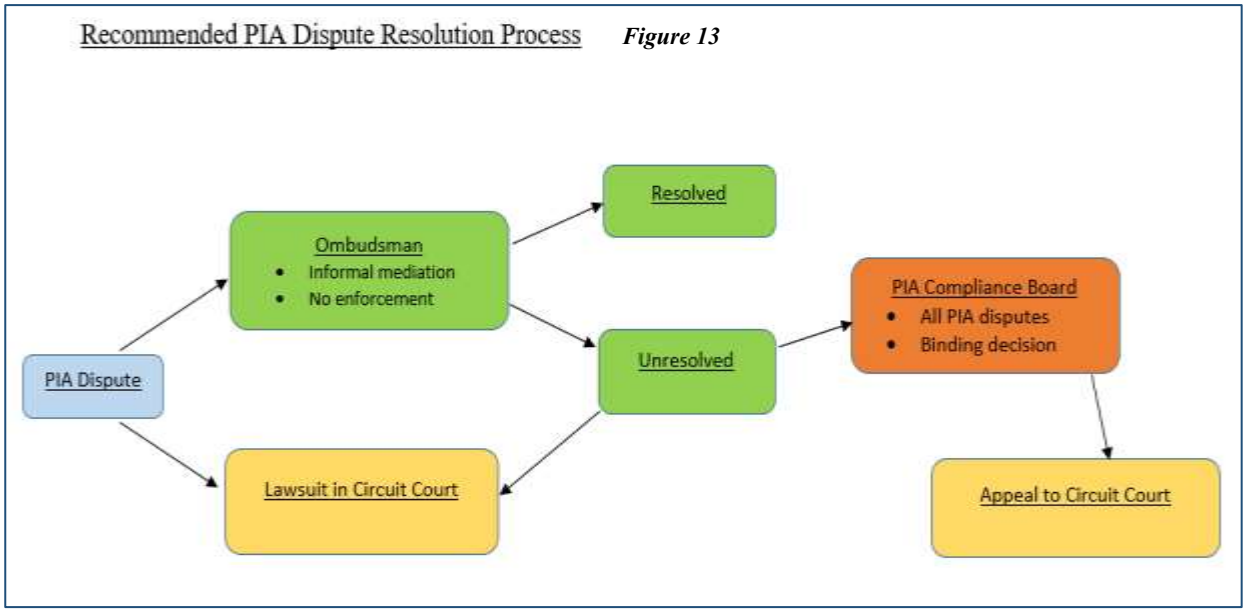
The problems and deficiencies highlighted above frequently undermine requestors'—and by extension, the public's—confidence in the transparency, integrity, fairness, and efficiency of State and local governments. At the same time, agencies' unresolved problems can undermine staff morale and disrupt their ability to handle other requests in a fair and orderly fashion. Thus, we believe it is in the best interest of all PIA stakeholders that informed and meaningful steps are taken to improve PIA performance and enforcement deficiencies.

Our preliminary findings suggest the recommendations outlined below, which cover PIA tracking and monitoring, the expansion of the current extrajudicial enforcement option, and practices that agencies can implement without new legislation that may lead to improvements in handling their PIA caseloads.

A. Expanding the Board's Jurisdiction

We recommend that the current extrajudicial PIA dispute resolution options be expanded by authorizing the Board to review and issue binding decisions on most PIA disputes that have not been resolved following mediation—or attempted mediation—with the Ombudsman. The Board's final decision in all cases would be appealable to circuit court and subject to on-the-record review, as is currently the case with the Board's decisions on fee disputes greater than $350. This recommendation for a streamlined PIA dispute resolution process is diagramed below ***(Figure 13)***.

Recommended PIA Dispute Resolution Process ***Figure 13***



We believe this framework meets four key criteria, as follows:

1. **Builds on and enhances programs that work well under current law.** Our recommendation preserves the Ombudsman program, which has been successful in resolving many, but not all, PIA disputes, while expanding the role and impact of the existing Board, which is currently underutilized due to its limited jurisdiction. Based on our program experience and conversations with staff of open records dispute resolution programs in several other states and at the federal level, we believe expansion of the Board's role is likely to enhance the effectiveness of mediations. Additionally, over time, the Board's opinions will lead to the development of a body of published PIA decisions, which will be a resource to requestors and agencies alike.

2. **Provides a comprehensive remedy.** Our recommendation provides an extrajudicial enforcement remedy for all types of PIA disputes, for all requestors, and for all State and local agencies subject to the PIA.

3. **Provides an accessible, user-friendly enforcement option without altering existing judicial remedies.** Most PIA disputes do not require a complex process or in-person hearing. Rather, most PIA disputes are simpler than other kinds of civil disputes in complexity, evidentiary requirements, and the need for formal process. The Board's process will reflect this simplicity, with most issues likely capable of being decided on the basis of a complaint, a response, and, as needed, on affidavit and/or following *in camera* review of the records at issue or of a privilege log. The Board would be able to call for a conference or hearing whenever needed.

4. **Provides a cost-effective and efficient extrajudicial enforcement process.** Expanding the Board's jurisdiction to provide a comprehensive extrajudicial enforcement option does not require the creation of any new office or program; rather, this proposal allows for an efficient and complimentary division of labor between the existing Board and Ombudsman program.

    - Even where the Ombudsman cannot resolve all issues, the Board's efficiency will be enhanced by the Ombudsman's intake and administrative processes. That is, when unresolved disputes are submitted to the Board following mediation, they will contain the basic information and records relevant to the dispute—such as identification of the parties, a description of the unresolved issues, and the PIA request or response at issue—thereby reducing the administrative burden on the Board and insuring that efforts to gather this information are not duplicated between programs.

    - Based on a detailed review of the Ombudsman's caseload and outcomes in mediations over the past several years, the Board's caseload is projected to increase by about 5 new Board complaints per month in addition to its current fee-based complaints, which have averaged far less than 1 per month.

        - Analysis of the Ombudsman's caseload included an estimate of the number and complexity of new matters that would likely be presented for Board review and decision if that option was available.

- In general, we concluded that approximately 25% of the disputes presented to the Ombudsman—between 50 and 60 per year, or 5 per month—are not resolved through mediation and could be expected to go to the Board.

- These matters range in complexity from relatively simple legal issues and easy procedural questions, to more involved matters that will likely require some legal research and analysis, resolution of more complex factual issues, and/or review of a potentially large number of records. We project that new Board matters will be roughly evenly split between the simpler issues and those that are more complex.

- Taking all these considerations into account, we estimate that the increased Board caseload can be handled by the addition of two full-time staff—an administrator and attorney. Currently, the Ombudsman and Board share two staff—an administrator and attorney—both of whom are provided by and housed within the Office of the Attorney General ("OAG"). The addition of 2 staff would bring the total number of staff to 5, including the Ombudsman.

  - On a periodic basis after implementing this new system, both the Board and Ombudsman should report on caseloads, staffing, and dispositions, as well as other matters pertaining to overall PIA performance, so that any necessary adjustments in these programs can be made.[13]

B. Other Enforcement Options We Considered

In addition to our recommended framework, we considered other expanded extrajudicial enforcement options, including reinstating the administrative appeals remedy that was removed in 2015, and frameworks that do not require mediation before seeking binding resolution from an enforcement body. We have concluded that none of these other models meet all of the four key criteria we outlined in the discussion of our recommended option, above. In addition, based on our research—including interviews with relevant program representatives in other states—we believe that many other models would be more costly and cumbersome to implement, and/or less effective than our recommended framework.

For example, the administrative appeal remedy that existed in Maryland prior to 2015 was not comprehensive in that it applied only to certain State agencies subject to the contested case provisions of the Administrative Procedure Act.[14] The Ombudsman's caseload suggests, however, that more than half—about 60%—of all PIA disputes arise from requests made to local agencies.

The administrative appeal remedy also appears to have been used rarely. Data provided to us by OAH for the years 2013 to 2015—the last three years the remedy was available—shows that

[13] Currently, the Board conducts an Annual Meeting to consider and approve, among other matters, its Annual Report which is issued each year by October 1. As a matter of practice, the Board has included a report and comments by the Ombudsman as an Appendix to its Annual Report. These reports are published on the websites of the OAG www.marylandattorneygeneral.gov/Pages/OpenGov/piacb.asp and Ombudsman news.maryland.gov/mpiaombuds/.

[14] Apparently, OAH has the ability to handle certain appeals from particular local agencies, but only by special arrangement. It is our understanding that this kind of arrangement was not typically used for local agency PIA appeals.

OAH handled 37 PIA appeals, involving only 12 State agencies. By contrast, during its first 3.5 years of operation, the Ombudsman's Office received more than 820 PIA disputes—189 of which involved the State reporting agencies. Of the total disputes, more than 190, including 49 from the reporting agencies, were not resolved by mediation and were judged likely candidates for extrajudicial review and decision. This suggests to us that the State administrative appeals option—at least as it pertains to PIA matters—was relatively inaccessible to and/or rarely used by many requestors.[15]

Extrajudicial enforcement models from other states also did not meet all of our four key criteria, for various reasons. For example, none of the six state models we examined *require* mediation before resort to a forum with binding resolution authority, though most have a mediation option. These models, thus, would not preserve the current benefits of the Ombudsman mediation program to the degree we believe is desirable; at the very least, we expect that requiring mediation first will result in fewer matters going to the Board than if mediation was not required. Moreover, some of these other state models include within their jurisdiction matters that are not related to records disputes, and/or contain procedures that we believe would not be as efficient as those in our recommendation. We will discuss the other models we explored in more depth in the final report.

C. Compliance Monitoring - Feasibility of Agency Self-Reporting

In addition to analyzing the reporting agencies' PIA caseload data, we asked the agencies to give us their views on the feasibility of caseload tracking and periodic self-reporting and evaluation. Most agencies reported that it is feasible to periodically report data on their PIA caseload, and many—particularly those receiving a sizeable volume of requests—report that they already track some or all of the data requested in the survey.[16] Agencies receiving a relatively small volume of requests also generally reported either a current ability to track and self–report, or expressed a willingness to consider doing so.[17] Only two agencies expressed the view that self-

[15] The administrative appeals model also did not afford any remedy to agencies, including relief from persistently vexatious or repetitive requests, or relief from deadlines for good cause in instances when compromise or agreement cannot be reached with the requestor.

[16] Agencies reporting an ability to track and report PIA data, including those that already do so internally, include **MDE** (using tracking database and software; currently reports annual statistics to DBM through "Managing MD for Results" process); **MSP** (currently maintains PIA log; periodic self-evaluations conducted by personnel in Central Records); **MDOT** (reports and verifies open requests daily; runs reports for senior leadership, official custodians, and PIA staff as needed); **MDH** (PIA coordinator provides quarterly reports to Secretary and senior staff and meets weekly to review MDH tracking log and discuss any overdue requests; with future use of "smart sheets", will be able to generate reports that identify different categories of cases—*e.g.*, overdue, pending, or completed—and statistics that will be viewed on internal dashboard by senior leadership and all PIA officers); **MSDE** (maintains database of all outstanding and completed requests which is regularly reviewed for accuracy and completion); **DLLR** (performs self-evaluation of caseload based upon spreadsheets maintained by agency counsel); **DPSCS** (has tracking system); **DNR** (self-report feasible on annual basis); **DGS** (self-report feasible); **MDA** (report on annual basis feasible; would develop its own internal survey and have each unit report responses and discuss results at staff meeting); **DHCD** (agency counsel maintains excel spreadsheet/log of PIA requests and their dispositions; tracks deadlines and whether estimated fees are paid); and **DHS** (self-report feasible for 2019 going forward using PIA web portal which tracks requests submitted via the portal).

[17] Agencies receiving comparatively few PIA requests that expressed one of these views include **DJS** (does not currently maintain log or database, but would consider doing so, though concerned about time requirements);

reporting is not feasible, or otherwise objected to the idea.[18] And one agency—MDOD—which reported receiving no PIA requests at all during the reporting period, responded to the question with "N/A".

We believe that a similar pattern likely exists among State and local agencies not included in our survey. That is, agencies with a significant volume of PIA requests are likely already tracking and logging at least some data, while those with a modest or *de minimus* volume of requests should be able to implement a basic tracking and reporting system without any investment in new software, infrastructure, or staff. We assume that agencies with heavy PIA caseloads already track their PIA data to some degree as necessary to manage their caseload.

As far as the quality of data is concerned, we recognize that the inability or failure by some of the reporting agencies to report some or all of the requested data in any reliable manner may be due to the fact that agencies were not expecting to have to report this data. After all, they are not currently required to track and report it, and each agency has more or less developed its own system and criteria for tracking and handling its PIA requests. Thus, to the extent the Legislature and other PIA stakeholders are interested in high quality data—*i.e.*, uniform, consistent, and reliable data—on PIA caseloads and dispositions, it will likely be necessary to mandate which data agencies must track and report. Some of the benefits of uniform, consistent tracking and reporting include:

- Likely reduction in "MIA" requests—*i.e.,* matters in which the first response to a PIA request is issued after the 30 day deadline has expired; currently, this category of disputes comprises about 20% of the Ombudsman's caseload.
- Informed assessments of the need for additional PIA-related resources, including personnel, funding, software systems, etc.; not all agencies have this need, and only systematic data will facilitate informed decisions about those that do.
- Identification of "peer" agencies in terms of PIA caseload, allowing agencies to exchange meaningful information and tips about procedures, software, and other technologies that improve PIA performance.
- Enhanced transparency with respect to PIA caseloads, dispositions, fees, and needs for future changes to existing law.

D. Other Recommendations – Best Practices and Agency Needs

In addition to asking the reporting agencies about PIA caseloads and procedures, we asked about practices and needs that are closely connected to their capacity to regularly comply with the

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Veterans (does not maintain electronic log or database; receives very few requests); **MHEC** (maintains electronic log of PIA requests, and in process of creating comprehensive internal PIA policy/procedures document for staff to ensure process carried out efficiently); **DBM** (receives moderate number of requests, and should be able to conduct internal self-evaluation using new "Google Sheets" tracking database); **Planning** (self-reporting feasible; has no database, but maintains searchable electronic records on all PIA requests and dispositions); **Commerce** (feasible to periodically perform self-evaluations)**; Military** (probably can perform self-evaluation, but needs more guidance from OAG as to how/what to evaluate)**;** and **Aging** (yes; low volume).

[18] These agencies include **DOIT** (would take extra time and resources that are not necessary for the Department to follow PIA requirements); and **SOS (**not feasible; there is only one employee who discharges agency's PIA responsibilities, and she has other duties, too).

PIA. For example, we asked questions about records retention and management, proactive records disclosure practices, participation in PIA and records management training, use of PIA tracking systems and software to retrieve and redact electronic records, and policies and procedures related to maintenance and retrieval, when applicable, of public records that may reside on remote or mobile devices, or on social media platforms.

Many agencies responded that they need additional resources, such as more staff, funding, training, and/or technologies to move forward in some or all of these areas. Although our final report will contain a more detailed analysis of agency responses, our preliminary recommendations in these areas include the following:

- **Proactive disclosure tools and methods should be maximized**: These methods include measures as simple as maintaining a current list of readily available documents, publishing such a list on the agency's website, or publishing frequently requested records to the agency's website or other central repository.

- **PIA training and professionalizing the front-line**: Many agencies are meeting PIA obligations with staff who are not solely dedicated to the PIA; while this practice is undoubtedly adequate for agencies with a low or *de minimus* volume of requests, agencies with consistently large—or steadily increasing—volumes of PIA requests need trained staff that are either solely or primarily dedicated to handling PIA matters. One reporting agency with a high volume of requests indicated that the reclassification of PIA-related positions, together with increased salaries, is needed to maintain and improve the handling of its PIA caseload.

- **The importance of agency culture and messaging from the top:** Several of the reporting agencies explained the ways in which the Secretary and senior staff collaborate with front-line PIA coordinators in the process of handling PIA requests and problems. In our experience, when Secretaries and senior management are involved in the PIA process, and emphasize the importance of PIA duties—*e.g.,* that compliance is not optional but mandatory, and that PIA compliance is an integral part of the agency's larger public mission—staff at all levels take notice and comply. We know of instances in which these types of efforts and initiatives have turned difficult situations into occasions for meaningful improvement.

- **Internal tracking and management of PIA requests:** Whether or not uniform tracking and self-reporting is mandated, we believe internal PIA tracking is critically important to an agency's overall PIA compliance and improved performance in the long run.

- **Leveraging technology:** With the accelerating pace of e-government initiatives and the proliferation of electronic records and communications at all governmental levels and across all platforms, finding and utilizing technologies that assist in the retention, maintenance, and retrieval of electronic records continues to be critically important for efficiency and transparency. In general, the reporting agencies indicate that there is a great deal of need in this arena; some agencies have little experience with specialized software or other technologies in this context, and others have more substantial experience. Large volume email retrieval, in particular, is consistently identified as problematic, and many agencies seek additional relevant training or technology.

IV. Conclusion

The Budget Committees commissioned this report because they are "interested in ensuring that the [PIA] increases government transparency through a robust review and disclosure process," and also in ensuring that agencies "have sufficient resources and sufficient procedures to respond to reasonable and legal information requests." To that end, they requested concrete information on topics that heretofore have been discussed largely anecdotally or in the abstract—specifically, information about the reporting agencies' PIA caseloads and related procedures, and on the need for and feasibility of PIA compliance monitoring and extrajudicial enforcement options.

The data we received from the reporting agencies provides a clearer picture of their overall PIA caseloads and procedures, but is limited with respect to providing a full understanding of their PIA performance because much of the data is either unavailable or inconsistent. Data from the Ombudsman's caseload provides some of this missing detail, not only for the reporting agencies, but for agencies across State and local government. What emerges on the compliance monitoring front is that many agencies likely are not tracking their PIA caseloads in any detailed or uniform way, but are not opposed to doing so. Because this kind of tracking can benefit agency PIA compliance internally, and lead to more informed decisions about resource allocation externally, the Legislature may wish to consider implementing a uniform self-tracking and reporting requirement.

On the extrajudicial enforcement front, the Ombudsman and Board's more than three years of caseload data and institutional experience make two things clear: 1) a consistent number of PIA disputes across State and local agencies cannot be resolved by mediation alone, and 2) the current Board is underutilized due to its limited jurisdiction. Our recommendation is to expand the Board's jurisdiction to review and decide most PIA disputes that are unresolved after mediation or attempted mediation with the Ombudsman. This recommendation provides the Board with the authority originally envisioned for it in the first version of the 2015 bill that created it, with the crucial addition that Ombudsman mediation will be a required first step in the alternative dispute resolution process.

We look forward to receiving comments on these preliminary findings and recommendations from all stakeholders in advance of the final report.