

## CHAPTER 2: RIGHT OF ACCESS TO RECORDS

### A. *Right to Inspect Records*

SG §10-612(a) provides that, “[a]ll persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees.” The right is made clear in SG §10-613(a)(1), which states that, “[e]xcept as otherwise provided by law, a custodian shall permit a person or governmental unit to inspect any public record at any reasonable time.” Inspection or copying of a public record may be denied only to the extent permitted under the PIA. SG §10-613(a)(2).

The PIA grants a broad right of inspection to “any person.” The term “person,” defined in SG §1-101(d), extends to entities as well as individuals. There is no need for the person to show that he or she is “aggrieved” or a “person in interest.” *Superintendent v. Henschen*, 279 Md. 468, 369 A.2d 558, 561 (1977). Nor is access restricted to citizens or residents of Maryland. *Cf. Lee v. Minner*, 458 F.3d 194 (3d Cir. 2006) (holding that provision of Delaware FOIA law limiting access to Delaware citizens violated federal constitution). Thus, in general, a person need not justify or otherwise explain a request to inspect records and a custodian of records may not require that a person to say who they are or why they want the records as a prerequisite to responding to a request. SG §10-614(c)(1).

There are some instances in which the PIA provides a “person in interest” (defined generally by SG §10-611(e) as the subject of the record or, in some cases, that person’s representative) with a greater right of access to a particular type of record than that available to other requesters. In these instances, the custodian must find out whether the requester is a “person in interest.” Such special rights of access apply to the following types of records or information: examination records (SG §10-618(c)), information about a person’s finances (SG §10-617(f)(3)), higher education investment contracts (SG §10-616(n)(2)), information relating to notaries (SG §10-617(j)(4)), licensing information (SG §10-617(h)(4) and (k)(2)), medical or psychological information (SG §10-617(b)(2)), personnel records (SG §10-616(i)(2)), records pertaining to investigations (SG §10-618(f)(2)), retirement records (SG §10-616(g)), student records (SG §10-616(k)(2)) and records concerning persons with alarm or security systems (SG §10-617(l)). *See also Mayor and City Council of Baltimore*

*v. Maryland Committee Against the Gun Ban*, 329 Md. 78, 617 A. 2d 1040 (1993) ( political committee that was served a subpoena was not a “person in interest” in connection with records relating to a Baltimore City Police Department Internal Affairs investigation; the officers who served the subpoena were the subject of the investigation and, thus, were the “persons in interest”) and 71 *Opinions of the Attorney General* 297 (1986) (tape recording of a hearing involving involuntary admission of a patient to State mental health facility is available only to the patient, the person in interest, or the patient’s representative; recording is not available to others, including staff who participated in the hearing, absent patient’s consent).

The term “person in interest” includes the “designee” of the person who is the subject of the record. While the statute does not state how an individual is identified as a “designee,” agencies may find it useful to require affirmation from the person who is the subject of the record when access to the record is otherwise limited. Letter of Assistant Attorney General Bonnie A. Kirkland to Delegate Kevin Kelly (April 14, 2004). If a “person in interest” has a legal disability, then that individual’s parent or legal representative may act on the individual’s behalf as a “person in interest.” SG §§10-611(e)(2); 10-617(b)(2). However, a parent whose parental rights have been terminated with respect to a child may not act as a “person in interest on the child’s behalf.” 90 *Opinions of the Attorney General* 45, 58-59 (2005).

While a custodian cannot require a requester to explain the purpose for which the requester wants the records as a prerequisite to responding to a PIA request, the requester’s intended use may be an appropriate subject of discussion in certain circumstances. For example, a requester who wishes to convince a custodian that it is “in the public interest” for the requester to waive a fee under SG §10-621(e) or to release records covered by SG §10-618 may choose to explain the purpose underlying the request. *See* Part G of this Chapter and Chapter III.D, below.

An agency has no obligation to *create* records to satisfy a PIA request. For example, if a request is made for the report of a consultant and the consultant did not issue a written report, the PIA does not require that a written report be created in order to satisfy the request. Nor is an agency required to reprogram its computers or aggregate computerized data files so as to effectively create new records. *See Yeager v. DEA*, 678 F.2d 315, 324 (D.C. Cir. 1982). “Programming” involves the creation of new instructions to the database so that access to data linked in certain ways becomes possible. Thus, programming requires the expenditure of significant time by an individual with specialized knowledge of computer or

electronic databases to generate the particular report. *See* Memorandum to Committee on Access to Court Records, from Assistant Attorney General Robert N. McDonald (January 7, 2002). It would not be considered “programming” if a clerical employee with standard computer skills could generate the report by following pre-existing instructions. *Id.* Nor would redaction of material from an existing report generally constitute “programming.”

Sometimes a person will present an agency with a “standing request” which seeks production of a category of public records at regular intervals in the future as those records are created. Although an agency may honor such a request, the agency is not required to commit itself to provide records that have not yet been created. *See* Letter of Assistant Attorney General Jack Schwartz to Mark M. Viani, Associate County Attorney, Calvert County (May 22, 1998).

If a request is made for a type of record that has been designated by the official custodian to be made immediately available on request, there is no need for a formal written request. SG §10-614(a)(2)(i). Of course, records no longer retained by an agency obviously cannot be examined. *Prince George’s County v. Washington Post Co.*, 149 Md. App. 289, 323, 815 A.2d 859 (2003). However, a custodian should not destroy records to avoid compliance with a pending request or in a manner contrary to the agency’s record retention schedule.

***B. Governmental Agency’s Access to Records***

The PIA generally regulates the access of one governmental agency to the records of another. A governmental unit is specifically given the right to inspect public records in SG §§10-612, 10-613, and 10-614 and is given the right to appeal a denial of inspection by SG §§10-622 and 10-623. Thus, when a request for inspection of records is made to a State agency by another State agency, a federal agency, or a local governmental entity, the custodian should consider the effect of the PIA. *See Prince George’s County v. Maryland Comm’n on Human Relations*, 40 Md. App. 473, 485, 392 A.2d 105, 113 (1978), *vacated on other grounds*, 285 Md. 205, 401 A.2d 661; 81 *Opinions of the Attorney General* 164 (1996). In addition, the agencies involved should consider whether another law governs the matter of interagency access. For example, requests for access to records by the Legislative Auditor in connection with an audit are *not* governed by the PIA. 76 *Opinions of the Attorney General* 287 (1991). If the other law limits access to records, the requesting agency has no greater access under the PIA, as the PIA always defers to other law. 92 *Opinions of the Attorney General* 137, 145-47 (2007).

### **C. Scope of Search**

The PIA does not address the issue of the adequacy of the agency's search for records. Guidance may be found, however, in the case law under FOIA. In judging the adequacy of an agency's search for documents in response to a FOIA request, the court asks whether the agency has conducted a search reasonably calculated to uncover all relevant documents, not whether it has unearthed every single potentially responsive document. *Ethyl Corp. v. EPA*, 25 F.3d 1241 (4th Cir. 1994). Under this standard, agencies may be required to conduct relatively broad and time-consuming searches. *See e.g., Ruotolo v. Dept. of Justice*, 53 F.3d 4 (2d Cir. 1995) (onus is on the agency to demonstrate that a search would be unduly burdensome, and this obligation is met only in cases involving truly massive volumes of records).

### **D. Right to Copies**

SG §10-620 grants any person who has the right to inspect a public record the right to be furnished copies, printouts, or photographs for a reasonable fee. If the custodian does not have the facilities to reproduce a record, the applicant should be granted access to make a copy. A copy of a court judgment may not be provided, however, until the time for appeal has expired or until an appeal has been adjudicated or dismissed. SG §10-620(a)(2). This provision should be applied only to non-litigants, since the Maryland Rules of Procedure require copies to be furnished to litigants. *See* Memorandum to Clerks of the Circuit Courts from Assistant Attorney General Catherine M. Shultz (July 27, 1983). Another exception pertains to written promotional examinations: while certain individuals may review the examination and results after the examination has been graded, they are not entitled to a copy. SG §10-618(c)(2).

One issue unresolved by Maryland courts is whether the right to copies affords to a requester the right to pick the format in which records are copied. For example, does a requester have the right to obtain a disk containing computerized data when the agency offers to provide a printout? Under the Electronic Freedom of Information Act Amendments of 1996, a federal agency must provide a record in the format requested if the record is readily reproducible in that format. 5 U.S.C. §552(a)(3)(B). *See O'Reilly, Federal Information Disclosure* §7:37 (3d ed. 2000). The PIA has no similar express requirement; therefore, this issue remains open to interpretation. There is federal authority decided before the 1996 amendments and out-of-state authority for the position, which this office has consistently taken, that the agency, not the requester, has the right to select the format of disclosure. *See*

*Dismukes v. Department of the Interior*, 603 F. Supp. 760 (D.D.C. 1984); *Chapin v. Freedom of Info. Comm.*, 22 Conn. App. 316, 577 A.2d 300 (1990); 56 *Opinions of the Attorney General* 461 (1971); letter of advice to Sheriff Earnest Zaccanelli, Prince George's County Sheriff's Department, from Assistant Attorney General Emory A. Plitt, Jr. (June 27, 1983); Letter of Advice to F. Carvel Payne, Director, Department of Legislative Reference from Assistant Attorney General Kathryn M. Rowe, (January 9, 1995) (PIA does not require that the requested information be given in any particular form). Nevertheless, in furtherance of the PIA's general purposes, agencies should voluntarily accede to the requester's choice of format unless doing so imposes a significant, unrecoverable cost or other burden on the agency.

### ***E. Reasonable Fees for Copies***

An official custodian may charge a "reasonable fee" for copies. SG §10-621. "Reasonable fee" is defined as "a fee bearing a reasonable relationship to the recovery of actual costs incurred by a governmental unit." SG §10-621(a). Fees should not be set simply to deter requests to inspect records or get copies.

Many agencies have standard schedules of fees for copies. For example, the Department of Agriculture charges 15¢ per page for a copy of a record. COMAR 15.01.04.14. Agencies should adopt standard fee schedules so that the public and agency employees know what charges will be made. Note that if another law sets a fee for a copy, printout, or photograph, that law applies. SG §10-621(d)(1).

### ***F. Search and Preparation Fees***

Under SG §10-621(b), an official custodian may charge reasonable fees for the search and preparation of records for inspection and copying. Search and preparation fees are to be reasonably related to the actual costs to the governmental unit in processing the request. SG §10-621(a); *see also* 71 *Opinions of the Attorney General* 318, 329 (1986) ("[t]he goal ... should be ... neither to make a profit nor to bear a loss on the cost of providing information to the public"). Fees may not be charged, however, for the first two hours of search and preparation time. SG §10-621(c).

Search fees are the costs to an agency for locating requested records. Usually, this involves the cost of an employee's time spent in locating the requested records. Preparation fees are the costs to an agency to prepare a record for inspection or copying, including the

time needed to assess whether any provision of law permits or requires material to be withheld. For example, where a document contains both information that the public is entitled to see and information that the custodian may not by law release, an employee's time will be needed to prepare and copy the record with the exempt information deleted. Redaction will often be necessary where records contain investigatory or confidential financial information. Agencies should decide in advance what method they will use to charge for the time devoted to search and review.

Although the PIA does not address the issue of prepayment of fees, agency regulations may do so. Following the model regulations in Appendix D, many agencies require prepayment or a commitment to pay fees prior to copying records to be disclosed. *See, e.g.*, COMAR 08.01.06.11D(2) (Department of Natural Resources); COMAR 09.01.04.14D (Department of Licensing and Regulation). Federal agencies typically have regulations requiring prepayment or an agreement to pay fees as a prerequisite to the processing of a request, at least when fees are expected to exceed a set amount. *See, e.g.*, 16 C.F.R. §4.8(d)(3) (Federal Trade Commission); 43 C.F.R. §2.20(h) (Department of the Interior). *See Pollack v. Department of Justice*, 49 F.3d 115 (4<sup>th</sup> Cir.), *cert. denied*, 516 U.S. 843 (1995) (when requester refused to commit to pay fees in accordance with agency's regulations, agency had authority to stop processing FOIA request); *Stout v. United States Parole Comm'n*, 40 F.3d 136 (6th Cir. 1994) (an agency's regulation requiring payment of fees before release of already processed records was proper and did not violate FOIA); *Farrugia v. Executive Office for United States Attorneys*, 366 F.Supp. 2d 56 (D.D.C. 2005) (agency may require payment of search fee before sending records to requester).

### **G. Waiver of Fees**

An applicant may ask the agency for a total or partial waiver of fees. Under SG §10-621(e), the official custodian may waive any fee or cost assessed under the PIA if the applicant asks for a waiver and if the official custodian determines that a waiver would be in the public interest.

To determine whether a waiver is in the public interest, the official custodian must consider not only the ability of the applicant to pay, but also other relevant factors. A waiver may be appropriate, for example, when a requester seeks information for a public purpose rather than a narrow personal or commercial interest. In one case, the Court of Special Appeals found that Baltimore City's denial of a reporter's request to waive fees was arbitrary and capricious because the City only considered expense to itself and the ability of the

newspaper to pay and did not consider other relevant factors. The Court suggested that relevant factors included the public benefit in making available information concerning one of the City's major financial undertakings and the danger that imposing a fee for information upon a newspaper publisher might have a chilling effect on the full exercise of freedom of the press. *City of Baltimore v. Burke*, 67 Md. App. 147, 506 A.2d 683, *cert. denied*, 306 Md. 118, 507 A.2d 631 (1986). *See also* 81 *Opinions of the Attorney General* 154 (1996) (waiver of fee is dependent upon a number of relevant factors and cannot be based solely on the poverty of the requester or the cost to the agency).

In deciding whether to waive a fee, an official custodian may find it helpful to look at case law interpreting the comparable FOIA provision, 5 U.S.C. §552(a)(4)(A). In one useful case, *Project on Military Procurement v. Dept. of Navy*, 710 F. Supp. 362 (D.D.C. 1989), the federal court identified as material factors the potential that the requested disclosure would contribute to public understanding and the significance of that contribution. *See also* *Larson v. CIA*, 843 F.2d 1481 (D.C. Cir. 1988) (requester of information under FOIA seeking fee waiver must not have commercial interest in disclosure of information sought and must show that disclosure of information would be likely to contribute significantly to public understanding of government operations or activities); *National Treasury Employees Union v. Griffin*, 811 F.2d 644 (D.C. Cir. 1987) (fee waiver requests under FOIA grounded on public interest theory must show connection between material sought and matter of genuine public concern and must also indicate that fee waiver or production will primarily benefit public); *Crooker v. Bureau of Alcohol, Tobacco and Firearms*, 882 F. Supp. 1158 (D. Mass. 1995) (agency justified in denying request for fee where disclosure was not likely to contribute significantly to public understanding of government operations). *Cf. Diamond v. FBI*, 548 F. Supp. 1158 (S.D.N.Y. 1982) (court overturned agency's decision denying fee waiver).