

1 City of Glenarden, Maryland
2 2011-2012 Legislation
3

4 **Resolution:** R-114-2012
5 **Introduced By:** James Herring, Councilmember
6 **Co-Sponsors:**
7 **Session:** Regular
8 **Date of Introduction:** February 13, 2012
9

10 A Resolution to Amend the Maryland Public Information Act Fee Schedule
11

12 WHEREAS, §10-611 et seq. of the State Government Article, Annotated Code of
13 Maryland, known as the Maryland Public Information Act ("MPIA"), generally provides that any
14 person has a right of access to information about the affairs of government, and to inspect public
15 records, unless the records (or any portion of the records) are protected from disclosure; and
16

17 WHEREAS, per Resolution R-98-2011, the Council adopted a policy and fee schedule
18 with respect to MPIA requests for records, to insure that timely responses are provided, that
19 public records are made available as required, and that provision is made for recovery of costs as
20 allowed by law; and
21

22 WHEREAS, the fee schedule allowed for the first five pages to be copied at no charge;
23 and

24 WHEREAS, various individuals or groups could make separate requests that involve
25 only five pages at a time, to avoid paying any fee, even though the copies involve use of paper,
26 toner and staff time.
27

28 NOW, THEREFORE, BE IT RESOLVED, by the City Council of Glenarden, Maryland sitting
29 in Regular Session this 13th day of February, 2012 as follows:
30

31 1. That the Maryland Public Information Act Fee Schedule adopted per Resolution R-98-
32 2011 be and it is hereby amended to set a charge of \$.50 per page for all copies; and
33

34 2. That this resolution shall take effect immediately.
35

36 Date Approved: February 13, 2012
37

38 ATTEST:

39 Toni Taylor
40 Toni Taylor, Clerk to the Council
41

City Council of Glenarden

42 Margaret Dade
43 Margaret Dade, President, Ward II
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6 Carolyn Smallwood
7 Carolyn Smallwood, Vice President, Ward I

8 Elaine A. Carter
9 Elaine A. Carter, Councilwoman, Ward II

10 James Herring
11 James Herring, Councilman, Ward I

12
13 NO
14 Jennifer A. Jenkins, Councilwoman, Ward III

15
16 NO
17 Maxine E. Phifer, Councilwoman, At Large

18
19 Celestine Wilson
20 Celestine Wilson, Councilwoman, At Large

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22
23
24 Votes:

25
26 Yes 5
27 No 2
28 Abstain -0-

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Chapter 7:

Fees

A. 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.

On a rare occasion, a requester (or group of requesters) may attempt to artificially break a large request into a series of smaller requests to obtain two free hours searching for each request in order to circumvent the assessment of fees. If the purpose is clear, it seems reasonable for the agency to aggregate those requests as a single request with the appropriate fee. On the other hand, nothing in the Act prohibits a requester from making multiple requests and an agency should not artificially aggregate separate requests to increase the fee to discourage those requests.

Although the PIA does not address the issue of prepayment of fees, agency regulations may do so. The Court of Appeals has indicated that an agency may appropriately require prepayment of fees. *Ireland v. Shearin*, 417 Md. 401, 412 en.8, 10 A.3d 754 (2010) (agency may require inmate to prepay fees for copies when inmate is

unable to inspect records personally due to incarceration). 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. §2.18 (Department of the Interior). See *Pollack v. Department of Justice*, 49 F.3d 115 (4th 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).

B. 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).

C. 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

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Request Procedures

A. *Written Request*

The PIA envisions a written request. SG §10-614. Nevertheless, an agency need not and should not demand written requests for inspection of agency documents when there is no question that the public has a right to inspect them. For example, an agency's annual report and the agency's quarterly statistics are clearly open to the public for inspection. Moreover, a request expressing a desire to inspect or copy agency records may be sufficient to trigger the PIA requirements, even if it does not expressly mention the words "Public Information Act" or cite the applicable sections of the State Government Article.

In general, there is no requirement that the applicant give the reason for a request or identify him or herself, although he or she is certainly free to do so. The reasons that the information is sought are generally not relevant. *See Moberly v. Herboldsheimer*, 276 Md. at 227; 61 *Opinions of the Attorney General* 702, 709 (1976). These reasons might be pertinent, however, if the applicant seeks a waiver of fees. *See* Part IIG above. In addition, the identity of an applicant is relevant if he or she is seeking access in one of the particular situations where the PIA gives "persons in interest" special rights of access.

While there is no requirement that an applicant give a reason for the request, the request must sufficiently identify the records that the applicant seeks. *See* letter of advice to Deborah Byrd, Dorchester County Commissioner's Office, from Assistant Attorney General Kimberly Smith Ward (May 7, 1996) (PIA request must sufficiently identify records so as to notify agency of records that the applicant wishes disclosed). *See also Sears v. Gottschalk*, 502 F.2d 122 (4th Cir. 1974), *cert. denied*, 422 U.S. 1056 (1975) (FOIA calls for reasonable description, enabling government employee to locate requested records). In some instances, applicants may have only limited knowledge of the types of records the agency has and may not be able to describe precisely the records they seek. An agency may appropriately assist an applicant to clarify a request when feasible.

Generally, an agency may not require the Legislative Auditor to submit a written request pursuant to the PIA. However, if an employee of the Legislative Auditor requests

information from an agency that is not the subject of the audit without stating an organizational affiliation and without invoking the powers granted under the audit statute

subject to all of the procedures of the PIA, including the requirement of a written application. 76 *Opinions of the Attorney General* 287 (1991).

B. Time for Response

Under SG §10-614(b)(2), if a record is found to be responsive to a request and is recognized to be open to inspection, it must be produced “immediately” after receipt of the written request. An additional “reasonable period, not to exceed 30 days” is available only where the additional period of time is required to retrieve the records and assess their status under the PIA. A custodian should not wait the full 30 days to allow or deny access to a record if that amount of time is not needed to respond. If access is to be granted, the record should be produced for inspection and copying promptly after the written request is received. Similarly, when access to a record is denied, the custodian is to “immediately” notify the applicant. SG §10-614(b)(3)(i). Within ten working days after the denial, the custodian must provide the applicant with a written statement in accordance with SG §10-614(b)(3)(ii). In practice, the denial and explanation generally are provided as part of a single response.

There appears to be some conflict between the “immediate” access requirement of SG §10-614(b)(2) and the 30 days allowed to grant or deny a request by SG §10-614(b)(1). This conflict is resolved, however, if the custodian immediately grants access where the right to access is clear. If the custodian, after an initial review of the records, determines that there is a question about the applicant’s right to inspect them, then a period of up to 30 days may be used to determine whether a denial is authorized and appropriate. If the problem is that the request is unclear or unreasonably broad, the custodian should ask the applicant to clarify or narrow the request promptly. The custodian should not wait the full 30 days and deny the request only because it is unclear or unreasonably broad.

The 30-day time periods in SG §10-614(b)(1) and (2) and the other time periods imposed by SG §10-614 may be extended, with the consent of the applicant, for an additional period not to exceed 30 days. SG §10-614(b)(4).

Access to Government Records Under the Maryland Public Information Act

What is the Public Information Act?

Maryland's Public Information Act ("PIA") gives the public the right to access government records without unnecessary cost and delay.

The PIA applies to all three branches of Maryland state government as well as local government entities. The PIA is found in the State Government Article ("SG"), §§10-611 through 10-630, Annotated Code of Maryland.

It is similar to the federal Freedom of Information Act which applies to federal executive branch agencies and independent federal regulatory agencies.

The PIA grants you the right to review the available records that are disclosable and to obtain copies of those records. It does not require an agency to answer informational questions or to create a record to satisfy your request.

What is a public record?

A public record is defined as the original or copy of any documentary material in any form created or received by an agency in connection with the transaction of public business. Included in this definition are written materials, books, photographs, photocopies, films, microfilms, records, tapes, computerized records, maps, drawings and other materials.

Who can submit a PIA request?

Anyone.

Are all government records available?

No. The PIA attempts to balance the public's right to access government records with other policies that respect the privacy or confidentiality of certain information.

For example, some public records are confidential under federal or state statutes, under court rules, or under various common law privileges such as attorney-client privilege and executive privilege. SG §10-615. The PIA itself also protects certain records from disclosure (for example, adoption records, personnel records, certain personal information in Motor Vehicle Administration records). In addition, some information contained in public records must remain confidential (for example, an individual's medical information, confidential commercial information and trade secrets). SG §§10-616, 10-617. In some cases, these protections may be waived.

Other records may be withheld if the agency decides that disclosure of those records would be "contrary to the public interest." Examples of records subject to discretionary disclosure include investigatory records, information related to academic, licensing, and employment examinations, and documents of a pre-decisional and deliberative nature. SG §10-618.

Do I have a right to obtain a record about me even if it is otherwise confidential under the PIA?

In some cases, yes. The PIA grants a "person in interest" a right to access some records that are otherwise not available to the public under the PIA. A person in interest is usually the person who is the subject of the record.

Whom do I contact to get access to a record under the PIA?

There is no central agency that is responsible for PIA requests. You should contact the agency that has the type of record you are seeking. If you are uncertain about what agency would have the record, you might review the "Maryland Manual" (available online at www.mdarchives.state.md.us/msa/mdmanual/html/mmtoc.html), check agency web sites, or contact your local library where the reference staff might be able to help identify the agency that has the particular type of record.

Is there a particular form that I must use?

No, although some agencies have created request forms to help the agency respond to PIA requests.

In some cases, a telephone call to the appropriate person in a government agency may satisfy your request for a document. In other cases, you will need to submit your request in writing. Address your request to the individual in the agency who is responsible for the particular record. If you do not know who that is, address your request to the agency's public information officer or to the head of the agency.

It is important that you specifically describe the records you seek so that the agency can research your request. Sometimes discussions with agency personnel will clarify your request and help the agency find the records you are seeking.

How long will it take for an agency to respond to my request?

In many instances, an agency will be able to respond to your request immediately. In fact, for some frequently requested records, an agency may already have records available on its web site. (For example, the State Department of Assessments and Taxation makes property assessment information publicly available through its web site). Otherwise, an agency is normally expected to comply with a PIA request within 30 days, but there may be instances where an agency needs additional time to locate and review the requested records.

Is there a charge for obtaining records under the PIA?

The PIA allows an agency to charge a "reasonable fee" for copies of public records.

An agency may also charge a reasonable fee for searching for a public record - a charge that may include the time required for locating and reviewing the record. The first two hours of search time are free, but an extensive search may prove time-consuming and therefore expensive. Thus, it is in both your interest and the agency's interest to ensure that a PIA request clearly and accurately describes the records sought.

Actual fee schedules may be found in agency regulations. Agencies may chose to waive fees in particular cases.

What happens if my request for records is denied?

If an agency denies all or part of your request, it must provide you with a written explanation that includes the reason for the denial, the legal authority justifying the denial, and your appeal rights.

Depending on the agency, you may have a right to administrative review of the decision. Otherwise, you will need to go to court if you wish to challenge the agency's decision. (Even if administrative remedies are available, you have the right to go to court without first pursuing any administrative review.) The PIA authorizes a court to award attorney fees and litigation costs to an applicant who "substantially prevails."

How can I learn more about the PIA?

The Office of the Attorney General publishes a detailed legal analysis of the PIA in the Maryland Public Information Act Manual. The Manual also includes the text of the PIA and a sample request letter to help you make a PIA request. The Manual is available for purchase for \$10 by sending a check to the Office of Attorney General, Opinions and Advice Division, 200 St. Paul Place, Baltimore, Maryland 21202. The manual is also available without charge on the Attorney General's website, [http://www.oag.state.md.us/Open gov/pia.htm](http://www.oag.state.md.us/Open%20gov/pia.htm).