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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 24-47
March 19, 2024
Harford County, Custodian
Harford County Sheriff Jeffrey Gahler, Complainant

In September of last year, the complainant, Harford County Sheriff Jeffrey Gahler, sent a six-part Public Information Act (“PIA”) request to Harford County (“County”). Only one part of that PIA request—the one that sought records of communications involving a certain architecture and design firm—is at issue in this complaint. The County denied inspection of records responsive to this part of the complainant’s PIA request, stating that it was unable to perform a search of its servers. The complainant now challenges that denial. In response to the complaint, the County indicates that, while it believes it has authority to comply with the PIA request, it is precluded from doing so because the Sheriff has taken the position, in a different matter, that “searching for and retrieving emails from a County-owned server” constitutes illegal wiretapping. Based on the information before us, we conclude that the County has improperly denied inspection of public records and thus violated the PIA. We explain further below.

Background

In his PIA request to the County,¹ the complainant asked for, among other records, “[a]ny and all documents, letter and/or emails to and from any County employee that mentions ‘MW Studios Architecture Master Planning’ OR to or from an email address ending with ‘@mwsarch.com’ since December 5, 2022.” The complainant provided extensive background about the matters driving his request.

On November 15, 2023, the County sent the complainant a letter in response in which it explained that it was “unable to perform a search of its servers to access” the records he requested because “Councilman Penman has accused the Executive Branch of illegal wiretapping by searching its servers for electronic records,” and, in response to that

¹ The complainant sent his PIA request to “Mr. Robert McCord, County Administrator, Harford County.” The “County Administrator”—formally known as the Director of Administration—is appointed by the County Executive, subject to confirmation by the County Council, and serves “at the pleasure of the County Executive.” Harford County Code, § 4-39. The Director of Administration is charged with performing “administrative duties” and exercising “general supervision over the agencies of the Executive Branch as the County Executive may direct.” *Id.*

accusation, the Sheriff's Office had "dispatched" employees to "harass" certain County employees. Further, the County explained, the Office of the State Prosecutor ("OSP") had opened an investigation into the allegations upon referral from the Harford County State's Attorney ("HCSAO"). The letter concluded by stating that "until a court of law has issued an opinion that having a County employee search the County computer servers for electronic records, including emails, is not illegal wiretapping . . . or is not illegal hacking into electronically stored information . . . no County employee will be directed to search the County servers."

The County's response issued more than two months after the complainant sent his PIA request.² Thus, the complainant had already contacted the Public Access Ombudsman before receiving the County's November 15 letter.³ During mediation, the complainant disputed the County's denial of his request for records related to the architecture and design firm. The dispute was not resolved and the Ombudsman issued a final determination stating so. The complainant then filed this complaint with our Board.

In his complaint, the complainant challenges the County's "outright false assertion" that it cannot search for emails of its employees due to the open criminal investigation being conducted by OSP. The complainant acknowledges that there is such an open investigation, but stresses that it is "centered on the County Executive's Office searching the emails of a Councilman who is not their employee," and that the investigation "in no way negates the County's ability or duty" to respond to his PIA request.

The County states at the outset of its response to the complaint that it "fully believes that it has the authority to comply with [the complainant's] request," but that its denial was "necessary because of unfounded and reckless allegations of illegal interception of electronic communications leveled against the County Executive" by a councilman and the complainant. The County explains that it "finds itself in an impossible position where it would be required to engage in the very conduct [the complainant] has characterized as illegal and criminal in order to even begin to search for records responsive to this request." To support its position, the County attaches several exhibits, including a press release from the councilman, and social media posts from the complainant and the HCSAO addressing the allegations and investigation.

The County "categorically disagrees with the assertion that the retrieval of electronic communications from a server owned by the County constitutes an illegal

² See Md. Code Ann., Gen. Provisions § 4-203(a)(1) (ordinarily requiring a custodian to respond to a PIA request "promptly, but not more than 30 days after receiving the [request]").

³ The PIA charges the Public Access Ombudsman with making "reasonable attempts to resolve disputes between applicants and custodians relating to requests for public records under [the PIA], including disputes over . . . the failure of the custodian to produce a public record in a timely manner." Md. Code Ann., Gen. Provisions § 4-1B-04(a)(3).

interception of electronic communications.” But, the County continues, complying with the complainant’s PIA request would “invariably require the County to search for the requested records on the County’s computer servers,” which, the County contends, the complainant believes is criminal conduct. It cannot, therefore, “even begin its search for responsive records without running afoul” of the complainant’s “view of the pertinent wiretapping and illegal hacking statutes.” The County is thus steadfast in its position that it will not respond to the complainant’s PIA request “until such a time that there is an official, binding court opinion that definitively states that the search and retrieval of emails from a County-owned server constitutes neither illegal wiretapping nor criminal spying.”⁴

In his reply, the complainant stresses that his PIA request is “clearly focused on County employees.” The complainant contends that the County is attempting to “conflate . . . two distinct issues” when it asserts that it cannot search the servers for emails of its own employees. Such a search, the complainant maintains, presents a meaningfully different scenario than a PIA request that would require, e.g., the County to search the emails of the State’s Attorney, despite the fact that the HCSAO is also on the County’s servers. The complainant thus argues that the question before our Board is “simply, can the County legally continue to refuse to search their servers for documents responsive to [his] MPIA request related to their employees.” The complainant notes that the Sheriff’s Office regularly searches its employees’ email accounts to comply with PIA requests, and suspects that it occurs routinely at every government agency in the State. The complainant underscores that he has “not requested a search of the Council members’ emails, . . . the State’s Attorney’s emails, . . . [or] of any other organizations or individuals who may be on the ‘County servers.’” Rather, his request is “limited to only employees of Mr. Cassilly’s Administration,” which the complainant contends is “well within their ability and legal obligation to respond.”

Analysis

The PIA charges us with reviewing and resolving complaints that allege certain violations of its provisions, including that a custodian improperly denied inspection of

⁴ It appears that the County has taken this position in response to other PIA requests for electronically stored public records. See Bryan P. Sears, *As Grand Jury Investigates, Harford County Denies Public Records Request for Emails*, Maryland Matters (Sept. 14, 2023), <https://www.marylandmatters.org/2023/09/14/as-grand-jury-investigates-harford-county-denies-public-records-request-for-emails/>.

public records.⁵ See § 4-1A-04(a)(1)(i).⁶ After receiving a complaint and the custodian's response, we must review the submissions and, if we conclude that the alleged violation of the PIA has occurred, we must issue a written decision and order a statutory remedy. § 4-1A-04(a)(2) and (3). When we determine that a custodian has improperly denied inspection of public records, we must "order the custodian to . . . produce the public record[s] for inspection." § 4-1A-04(a)(3)(i).

The PIA is rooted in the principle 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." § 4-103(a). The mechanism by which this principle is realized is found in § 4-201(a)(1), which states that "[e]xcept as otherwise provided by law, a custodian shall allow a person or governmental unit to inspect any public record at any reasonable time." Under the PIA, a "custodian" is "the official custodian" or "any other authorized individual who has physical custody and control of a public record." § 4-101(d). An "official custodian" is "an officer or employee of the State or of a political subdivision who is responsible for keeping a public record, whether or not the officer or employee has physical custody and control of the public record." § 4-101(f). "Often, the 'official custodian' will be the head of the agency." *Maryland Public Information Act Manual* (18th ed. Oct. 2023), at 1-9.

Upon receipt of a PIA request, a custodian must "conduct a search in good faith that is reasonably designed to capture all responsive records," and that uses "methods that can be reasonably expected to produce the information requested." *Glass v. Anne Arundel County*, 453 Md. 201, 232 (2017) (citing *Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)). Thus, when a PIA request seeks records of email communications, a custodian has an obligation to search for those records "where responsive records are likely to be found." *Id.*; see also, e.g., *id.* at 234 (police department was required to search for archived emails that were stored with its Office of Information Technology). If a PIA request is directed to an individual who is not actually the custodian of the records sought, the PIA requires that non-custodian to provide the requester "notice of that fact," and "the name of the custodian" and "the location or possible location of the public record," if those things are known. § 4-202(c).

In this case, the County is undeniably a custodian of records responsive to the complainant's PIA request.⁷ As noted, *supra*, note 1, the complainant sent his PIA request

⁵ Before filing a complaint, a complainant must attempt to resolve a dispute through the Public Access Ombudsman and receive a final determination that the dispute was not resolved. Md. Code Ann., Gen. Provisions § 4-1A-05(a).

⁶ Statutory citations are to the General Provisions Article of Maryland's Annotated Code unless otherwise indicated.

⁷ For purposes of the PIA, the County may or may not be a custodian of, e.g., the County Council's email records or the HCSAO's email records. The County Council is part of the legislative, not

to the Director of Administration, who “exercise[s] general supervision over the agencies of the Executive Branch as the County Executive may direct.” Harford County Code, § 4-39. Thus, the Director of Administration is an “authorized individual who has physical custody and control” over the public records that those executive agencies receive and create, regardless of where they are stored. *See Glass*, 453 Md. at 234-35 (police department retained custody and control over archived emails, even though they were archived offsite and not in the agency’s “immediate physical custody” and the agency “needed the assistance of another County department . . . to access them”); *see also* PIACB 23-09, at 5 n.8 (Dec. 28, 2022) (noting that the Office of the Public Defender is the custodian of records its stores offsite at the State Records Center).

For purposes of the PIA, then, the question is not necessarily who owns the servers on which the email records are stored. Rather it is a question of who is *authorized* to have physical custody and control of the public records stored on those servers. It might be the case that the County (vis-à-vis the Director of Administration overseeing the executive branch) is not ordinarily authorized to access, e.g., the email records of the HCSAO, *see supra*, note 7. Thus, a response to a PIA request directed to the County seeking such email records might properly cite § 4-202(c) and direct the requester to the custodian of the HCSAO’s records.⁸ But, as the complainant points out, he has not asked explicitly for HCSAO email communications—rather, he has asked broadly for emails of “County employees.” The County is undoubtedly authorized to access the email records of many of its employees. This is especially so when a PIA request prompts that access. The County appears to recognize this, as it repeatedly states that it believes that it has authority to comply with the complainant’s PIA request.

executive, branch of the County government. *See* Harford County Code, § 4-1. The Harford County State’s Attorney is an independent entity created by the State constitution and governed by State statute. *See* Md. Const., art. V, § 7; *see also* Md. Code Ann., Crim. Proc. § 15-413 (generally governing the Harford County State’s Attorney and requiring the Harford County government to “pay all reasonable expenses for the conduct of the [HCSAO]”); *Valle v. Pressman*, 229 Md. 591, 599 (1962) (“[A] State’s Attorney is a State rather than a local officer.”). We need not, however, make that determination here.

⁸ We stress, however, that a custodian may not direct a PIA requester to resubmit a request to a different department or division within the agency or governmental unit simply because the responsive records may be located in that department or division. *See Ireland v. Shearin*, 417 Md. 401, 409-10 (2010) (finding it improper for a warden to direct a requester to other departments within a correctional facility because the warden was “a custodian of the requested documents,” and “[r]egardless of whether collection from another department within [the warden’s] own agency would have been more expeditious or appropriate, the burden to collect and assemble the requested records falls squarely on the State rather than the [PIA] applicant”). Notably, § 4-202(c) applies only to individuals who are “*not* the custodian of the public record.” (emphasis added).

While it is far beyond our role to decide what may or may not constitute wiretapping under Maryland's criminal laws, we nevertheless observe that the Wiretap Act has not been an apparent impediment to custodians' access to email records. In addition to pointing to court cases involving requests for email records, *e.g.*, *Glass* 453 Md. at 234; *ACLU v. Leopold*, 223 Md. App. 97, 107 (2015), we note that we have resolved numerous complaints within the last six months that raised various issues related to email records, *see, e.g.*, PIACB 24-30 (Feb. 8, 2024) (records of email exchanged between a police chief and mayor); PIACB 24-23 (Feb. 14, 2024) (records of email exchanged between a university researcher and certain individuals); PIACB 24-08 (Sept. 28, 2023) (records of email exchanged between "County personnel"); PIACB 24-03 (Oct. 6, 2023) (email records of an assistant state's attorney). None of those issues, however, involved questions of whether a custodian could lawfully access those email records under the PIA.

Conclusion

We agree that, by refusing to search for records received or generated by County employees that may be responsive to the complainant's PIA request, the County has effectively denied inspection of those records and thus violated the PIA. We direct the County to "conduct a search in good faith that is reasonably designed to capture all responsive records," *Glass*, 453 Md. at 232, and to disclose all non-exempt responsive public records to the complainant, § 4-1A-04(a)(3)(i).

Public Information Act Compliance Board

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