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LT. GOVERNOR



MICHELE L. COHEN, ESQ.
SAMUEL G. ENCARNACION
DEBRA LYNN GARDNER
NIVEK M. JOHNSON
DEBORAH MOORE-CARTER

STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 24-52

March 26, 2024

Office of the Public Access Ombudsman, Custodian
John Davis, Complainant

The complainant, John Davis, alleges that the Office of the Public Access Ombudsman violated the Public Information Act (“PIA”) by denying his request for records related to the Ombudsman’s handling of two mediation matters involving the Baltimore City State’s Attorney’s Office (“BCSAO”). The Ombudsman denied the request on the asserted grounds that the records of mediations conducted by the Ombudsman are not public records under § 4-101(k)(3)(ii) of the PIA,¹ that some of the requested records are covered by the attorney-client privilege, and that mediation records are confidential under the Maryland Mediation Confidentiality Act, *see* Md. Code Ann., Cts. & Jud. Proc. § 3-1803(a)(1) (“Mediation Act”), and thus exempt from disclosure under § 4-301. As explained below, we conclude that the Ombudsman’s denial was appropriate, though for somewhat different reasons than those provided by the Ombudsman in her response. We agree with the Ombudsman’s application of attorney-client privilege and her treatment of communications submitted to her office. The former is exempt from disclosure under § 4-301(a)(1), and the latter is excluded from the definition of “public record” under § 4-101(k)(3)(ii). As for communications *sent by* the Ombudsman, we conclude that they qualify as “mediation communications” that are, for the purposes of this tribunal, confidential under the Mediation Act and thus exempt from disclosure under § 4-301(a)(2)(i).

Background

The current dispute arises out of two matters before this Board, PIACB 24-27 and PIACB 24-29. Both matters involve PIA requests sent to the BCSAO in August 2023 and thereafter seeking records relating to certain criminal cases.

In August 2023, the BCSAO received three PIA requests from James Alford seeking records related to certain criminal matters. The BCSAO responded that it had no responsive records, and Mr. Alford took issue with that, initiating mediation with the Ombudsman (File No. 1016-02-24). Meanwhile, between August and September 2023, the BCSAO received 48 PIA requests from 18 different email addresses—none Mr.

¹ Statutory citations are to the General Provisions Article of Maryland’s Annotated Code, unless otherwise indicated.

Davis's—all relating to the same criminal matters that were the subject of Mr. Alford's requests. The BCSAO believed that the new requests had been coordinated by Mr. Alford and were frivolous, vexatious, or submitted in bad faith. The BCSAO also initiated mediation with the Ombudsman (File No. 1050-01-24).

After the BCSAO requested mediation, it continued to receive emailed PIA requests that it believed were part of the coordinated effort. By the end of October 2023, the BCSAO had received 57 requests from 23 different email accounts. A request from Mr. Davis's email account was among this second wave of requests.

Before opening the mediation requested by the BCSAO, the Ombudsman, on October 10, 2023, sent emails to the 18 email accounts from which the initial requests were made, notifying the requesters of the BCSAO's mediation request, informing them that their accounts had been implicated by the request, and stating that the Ombudsman intended to work with Mr. Alford to resolve the dispute. The Ombudsman asked the recipients of the email to let her know if they objected to the approach she was taking and, if so, to provide "proof of identity," presumably so that the Ombudsman could verify that the requests submitted through their email addresses were genuine and not, as the BCSAO contended, controlled by Mr. Alford. Because Mr. Davis's email account was not among the 18 that generated the initial 48 PIA requests that prompted the mediation, he was not part of the mediation and did not receive the October 10 email.

A number of the people who *did* receive the Ombudsman's October 10 email objected to it. One such recipient responded that the email was as an effort to "force another party"—presumably Mr. Alford—"into mediating my and potentially other individuals' PIA requests" and to "force me into providing . . . something," presumably proof of identity. That recipient asserted that the Ombudsman's email violated the Maryland Standards of Conduct for Mediators, and she asked for the Ombudsman's Maryland Attorney ID number.

On November 7, 2023, the Ombudsman issued final determinations terminating both mediations. Both determinations stated that the Ombudsman had terminated the mediations because, in her view, the email accusing her of violating mediation standards and requesting her bar number "threatens, at least by implication, to place her as a neutral mediator in a position that either is, or at a minimum may reasonably appear to be, adverse to a party to the mediation." Because the Ombudsman felt that she could not perform her role as a neutral mediator, she terminated the mediations.

Mr. Alford and the BCSAO each filed complaints with this Board, which assigned them case numbers 24-27 and 24-29, respectively. On March 6, 2024, the Board issued its decision in PIACB 24-27, in which it concluded that the BCSAO had conducted reasonable and adequate searches in response to Mr. Alford's requests and thus had not violated the PIA. A decision in PIACB 24-29 remains pending.

The First PIA Request at Issue

Although Mr. Davis was not part of the mediations that resulted in PIACB 24-27 or 24-29, he took issue with the Ombudsman's final determinations and submitted two PIA requests related to them, both sent on December 9, 2023. The first request was sent at 7:52 a.m. to this Board's email account (piaopengov@oag.state.md.us) and to two employees of the Attorney General's Office. In relevant part, this first request sought "any email, record, or exchange from Lisa Kershner or the PIA Ombudsman office in which I was informed of these two matters, invite[d] for mediation for these matters, or any document or record in which I consented to mediation, consented to allow Lisa Kershner to mediate any matter related to my PIA request, or consented to allow for any other person to mediate any PIA mat[t]er on my behalf."²

Although this first request was not addressed to the Ombudsman, it sought records within her custody, and the Ombudsman responded on December 22, 2023, at 2:55 p.m. The Ombudsman denied the request under §§ 4-301 and 4-101(k)(3). Section 4-301(a)(2)(i) requires denial if inspection of the public record "would be contrary to . . . a State statute." The Ombudsman invoked that provision on two grounds. First, because the PIA itself defines the term "public record" to exclude "a record or any information submitted to the Public Access Ombudsman" under the Act's mediation provisions, § 4-101(k)(3)(ii), the Ombudsman asserted that the records Mr. Davis requested "are not public records as defined by the PIA." Second, the Ombudsman maintained that "many" of the communications captured by Mr. Davis's request are protected by the Mediation Act and thus exempt from disclosure under § 4-301(a)(2)(i), which requires denial where inspection would be contrary to a "State statute." *See* Cts. & Jud. Proc. § 3-1803(a)(1) (requiring a mediator to "maintain the confidentiality of all mediation communications"). The Ombudsman also indicated that "some" of the requested records are covered by attorney-client privilege and thus exempt under § 4-301(a)(1), which requires denial of a request for any part of a public record that "is privileged or confidential." The Ombudsman closed with something akin to a "Glomar response," stating that "[n]othing in this response should be construed as an affirmation that the Ombudsman has any records responsive to this request[.]" *See* Maryland Public Information Act Manual at 3-45 (18th ed., Oct. 2023) (discussing "Glomar responses").

After denying the request, the Ombudsman informed Mr. Davis of his rights of appeal, both to the circuit court and through the process of obtaining this Board's review. Although the latter process ordinarily requires the administrative complaint to be submitted to the Ombudsman for mediation before coming to the Board, the Ombudsman concluded

² Mr. Davis also requested copies of the complaint files in PIACB 24-27 and PIACB 24-29, along with any record establishing that this Board has jurisdiction to review the dispute at issue in PIACB 24-29. The Ombudsman responded that this Board, and not the Ombudsman, was the custodian of those records. Mr. Davis does not challenge that aspect of the Ombudsman's response.

that approach was not available in this instance, because it “would not yield the usual input of a third party (requester, custodian, and Ombudsman).” The Ombudsman nevertheless offered to speak with Mr. Davis about his request. On Saturday, January 20, 2024, Mr. Davis submitted his complaint here, in which he challenges the Ombudsman’s denial.

The Second PIA Request at Issue

Mr. Davis’s second request was also sent on December 9, 2023, but at 8:01 a.m., nine minutes after the first request. Mr. Davis sent this second request to the Ombudsman’s email account (PIA.Ombuds@oag.state.md.us) and to one of the two employees of the Attorney General’s office to which the first request was sent. This second request sought two groups of records: (1) any record “in which you informed me of the matter in PIACB 24-29, in which you informed me of mediation for that matter, in which you invite me to a mediation attempt for that matter, and which I consented to mediation or to allow another individual to meditate on my behalf”; and (2) copies of “the mediator standards that have been adopted by your office” and “the final determination that was issued for my PIA request.”

The Ombudsman responded to this second request on the same date that she responded to the first request, though one minute later, at 2:56 p.m. She provided a copy of “The Maryland Standards of Conduct for Mediators,” but denied the remainder of the request on the same grounds that she denied the first request—information submitted to the Ombudsman is excluded from the definition of “public record”; mediation records are protected by the Mediation Act; and some of the records are covered by attorney-client privilege. This second denial is the focus of the Ombudsman’s response to the complaint, even though that complaint appeals the first denial, discussed above.³

The Complaint, Response, and Reply

Mr. Davis challenges each of the bases for the Ombudsman’s denial of his request. First, he contends that § 4-101(k)(3)(ii)—which excludes from the definition of “public record” information “submitted to the Public Access Ombudsman”—does not apply here, because he only requested records *sent by*, not submitted to, the Ombudsman.⁴ For that same reason, Mr. Davis challenges the Ombudsman’s suggestion that § 4-1B-04(d)(1)(ii) prohibits disclosure of the records he requests, as that provision only protects information

³ Ordinarily we would insist that the parties engage each other with respect to the same request, decision, and complaint, but the disconnect here does not affect our ability to resolve the appeal. The portions of the two requests that are at issue are substantively indistinguishable and the asserted grounds for denial are verbatim identical.

⁴ Although the lion’s share of records requested by Mr. Davis would have been sent by the Ombudsman, he also sought any record in which he consented to mediation or allowed another person to mediate on his behalf, which presumably would have been *submitted to* the Ombudsman and thus excluded from the definition of “public record.”

“received from” an applicant and, in any event, allows for disclosure with his “written consent,” which he had provided by asking for the information.

As for the Mediation Act, Mr. Davis does not directly contend in his complaint that the Act does not apply here. Instead, Mr. Davis suggests that the Ombudsman’s invocation of the Mediation Act cannot be justified because some of the documents identified by the Ombudsman as “confidential mediation communications” have been provided by the Office of the Attorney General in unredacted form. He also suggests that the mediation handled by the Ombudsman could not have been covered by the Mediation Act because the Ombudsman had acted in violation of “the professional conduct standards for mediators” and “the standards adopted by the PIA Ombudsman Office.”⁵

In her response to the complaint, the Ombudsman largely reiterates the bases for denial provided in her initial response, adding specific rejoinders to Mr. Davis’s complaint. First, the Ombudsman interprets § 4-101(k)(3)(ii) more broadly than does Mr. Davis. Although the plain language of that provision exempts from the definition of “public record” only those records or information “submitted to” the Ombudsman, she maintains that communications *sent by* the Ombudsman in the context of an active, prospective, or attempted mediation are also exempt, as they “necessarily contain or reflect ‘information submitted to’” the Ombudsman.

Second, with respect to attorney-client privilege, the Ombudsman points out that she is represented by an Assistant Attorney General and her communications with counsel are privileged. Accordingly, the “emails exchanged between the Ombudsman, staff, and her legal counsel concerning the mediation matters” (which she represents as containing “draft communications, questions from the client (i.e., the Ombudsman), and counsel’s thoughts and advice”) are exempt from disclosure under § 4-301(a)(1).

Finally, and “[f]or the sake of completeness,” the Ombudsman reiterates that the Mediation Act (a) requires all participants in a mediation to maintain the confidentiality of mediation communications and (b) prohibits the disclosure of mediation communications in any judicial, administrative, or other proceeding. *See* Cts. & Jud. Proc. § 3-1803(a). The Ombudsman maintains that the “strong public policy of protecting mediation communications” reflected in the Mediation Act is also reflected in the PIA and justifies non-disclosure. *See* § 4-1B-04(d)(1)(ii) and (3) (providing that the Ombudsman may not “disclose information received from an applicant . . . without written consent from the applicant” and may transfer certain information to the Board, so long as “appropriate steps

⁵ Mr. Davis also objects to the Ombudsman’s invocation of attorney-client privilege, pointing out that the Ombudsman did not represent him as an attorney. But as the Ombudsman states in her response to the complaint, her assertion of that privilege covers mediation-related communications between the Ombudsman and her counsel, not her communications with Mr. Davis.

have been taken to protect the confidentiality of communications made or received in the course of attempting to resolve” a mediation).

In his reply,⁶ Mr. Davis reiterates the three arguments presented in his initial complaint. He argues that the Ombudsman engaged in “threatening and harassing behavior,” which places her communications beyond the reach of the Mediation Act, and that the PIA only excludes from the definition of “public record” those communications provided *to* the Ombudsman, not those sent *from* her. As for the Ombudsman’s assertion of attorney-client privilege, Mr. Davis does not dispute that the privilege ordinarily would apply to the types of communications the Ombudsman describes. He maintains, however, that the communications fall within the crime-fraud exception to the attorney-client privilege because they relate to what he contends was the Ombudsman’s “fraudulent activity,” namely, coercing people to participate in the mediation and provide “proof of identity,” and issuing a final determination that he alleges falsely stated that the Ombudsman had “invited” people to participate in the mediation and had been “threatened” by one such person.

Analysis

The PIA provides the mechanism by which the public may obtain access to “public records” that contain information about the affairs of government and the official acts of public officials and employees. *See* § 4-201(a). The right of access is broad; the PIA ordinarily must be construed in favor of disclosure of public records. *See* § 4-103(b) (instructing that “unless an unwarranted invasion of the privacy of a person in interest would result,” the PIA “shall be construed in favor of allowing inspection of a public record”); *see also Amster v. Baker*, 453 Md. 68, 76 (2017) (explaining that “the provisions of the [MPIA] reflect the legislative intent that the citizens of the State of Maryland be accorded wide-ranging access to public information concerning the operation of their government,” and citing cases).

Not every piece of information in governmental agency files qualifies as a “public record.” Although the PIA “broadly defines” what qualifies as a “public record” subject to the Act’s provisions, *Lamson v. Montgomery Cnty.*, 460 Md. 349, 362 (2018), it expressly excludes from that definition certain types of information, including “a record or

⁶ Mr. Davis initially replied to the email conveying the Ombudsman’s response to his complaint by inviting three other requesters to email the Board with their own “responses” to the Ombudsman. All three requesters replied with emails supporting Mr. Davis’s complaint. The Ombudsman asked the Board to strike or disregard these emails, but in doing so, stated that Mr. Davis had already submitted, on February 26, 2024, at 5:57 p.m., a formal reply to the Ombudsman’s response. That reply, however, was received within the proceedings associated with PIACB 24-29, not this matter. As for the additional emails from non-parties, those filings echo arguments presented by Mr. Davis, so we will not address them separately.

any information submitted to the Public Access Ombudsman or the Board under Subtitle 1B of this title.” § 4-101(k)(3)(ii).

In addition, even where a public record is involved, the PIA contains exceptions to disclosure, some of which are mandatory in nature. *See Caffrey v. Department of Liquor Ctrl. for Montgomery Cnty.*, 370 Md. 272, 296-97 (2002) (discussing the difference between mandatory and discretionary exemptions in the PIA). One of those mandatory exceptions is § 4-301(a)(2)(i), which requires a custodian to deny inspection when “the inspection would be contrary to . . . a State statute.” *See MacPhail v. Comptroller*, 178 Md. App. 115, 122 (2008) (holding that § 13-202 of the Tax-General Article, which prohibits State employees from disclosing “tax information,” operated via what is now § 4-301(a)(2)(i) of the PIA to preclude disclosure of an estate tax return). Another mandatory exception is § 4-301(a)(1), which exempts from disclosure any record that “by law . . . is privileged or confidential.”

We are authorized to resolve complaints that allege certain violations of the PIA, including that a custodian wrongfully denied inspection of public records. *See* § 4-1A-04(a)(1)(i). If, after review of the submissions and any additional information we might request, *see* § 4-1A-06(b)(2), we conclude that a violation of the PIA has occurred, we must issue a written decision and order an appropriate remedy, as provided by the statute, § 4-1A-04(a)(2) and (3). Where we determine that a custodian has “denied inspection of a public record in violation of [the PIA],” we must “order the custodian to . . . produce the public record for inspection.” § 4-1A-04(a)(3)(i).

The Ombudsman asserts three grounds for her denial: (1) communications with the Ombudsman are excluded from the definition of “public record”; (2) mediation records are protected by the Mediation Act; and (3) some of the records are covered by attorney-client privilege. We will address each ground in turn, though in different order.

The Maryland Mediation Confidentiality Act

As we see it, this dispute turns principally on whether the Mediation Act covers the records that Mr. Davis seeks and thus are exempt from disclosure under § 4-301(a)(2)(i), because inspection of the records “would be contrary to . . . a State statute.” We believe it does.

First, we conclude that the Mediation Act applies to the Ombudsman’s mediation process. The Act applies to mediations where “(1) The parties are required to mediate by law; (2) The parties are referred to mediation by an administrative agency or arbitrator; or (3) The mediator states in writing to any and all parties to the mediation and persons with whom the mediator has engaged in mediation communications that: (i) The mediation communications will remain confidential in accordance with this subtitle; and (ii) The mediator has read and, consistent with State law, will abide by the Maryland Standards of Conduct for Mediators during the mediation.” Cts. & Jud. Proc. § 3-1802(a).

The Mediation Act applies here in several ways. Parties are not always required by law to mediate, as they could proceed directly to circuit court, but any party that wishes to bring a complaint *to this Board* is required by law to mediate with the Ombudsman before doing so. *See* § 4-1A-05(a). And consistent with that requirement, this Board *does* refer complainants to mediation as a precondition to invoking our jurisdiction. Because Mr. Davis himself sought mediation with the Ombudsman, the Board had no occasion to refer him there, but we do refer those complainants who seek to invoke our jurisdiction without mediating first. Finally, the Ombudsman has stated in writing that mediation communications are confidential and that she has read and would abide by the Maryland Standards of Conduct for Mediators. Those statements are provided twice in two different documents posted on the “Request Mediation” portion of the Ombudsman’s website. *See* “Confidentiality of Ombudsman Mediations” and “Standards of Conduct Applicable to the Ombudsman & Parties” (both available at <https://news.maryland.gov/mpiaombuds/request-mediation/>). A similar statement is provided in the Ombudsman’s regulations. *See* COMAR 14.37.03.01A (stating that “the Ombudsman shall maintain the confidentiality of all mediation information in accordance with the Act, the Standards of Conduct for Mediators, and the Mediation Confidentiality Act”). We think the Ombudsman’s regulations and explanatory materials satisfy the Mediation Act’s requirement that the mediator notify parties that “mediation communications will remain confidential” and that the Ombudsman “will abide by the Maryland Standards of Conduct for Mediators during the mediation.” *See* Cts. & Jud. Proc. § 3-1802(a).

Although we have never had occasion to elaborate on the applicability of the Mediation Act as we do here, this Board has noted on several occasions that “ordinarily communications and information exchanged between the Ombudsman and the parties to mediated dispute resolution are confidential” under §§ 3-1801(c)(1) and 3-1803(a) of the Mediation Act and thus exempt from disclosure under § 4-301(a)(2)(i) of the PIA. PIACB 24-06 at 6, n.6 (Sept. 6, 2023); *see also* PIACB 23-03 at 2, n.2 (Nov. 2, 2022) (same); PIACB 23-06 & 23-07 at 2, n.2 (Jan. 4, 2023) (same). We have also concluded that the confidentiality afforded by the Mediation Act ordinarily applies both to materials submitted to, and materials provided by, the Ombudsman. *See* PIACB 24-05 at 6, n.7 (Nov. 1, 2023) (“We cannot and do not consider the Ombudsman’s June 22, 2023, email because it constitutes a protected mediation communication.”). Consistent with those prior decisions, we conclude that the Mediation Act’s confidentiality requirements apply here.

There are, however, exceptions to the Mediation Act’s confidentiality mandate. Although Mr. Davis does not invoke it, § 3-1804(b)(2) of the Courts & Judicial Proceedings Article provides that a mediator or a participant “may disclose mediation communications . . . [t]o the extent necessary to assert or defend against allegations of mediator misconduct or negligence.” Given that Mr. Davis is asserting mediator misconduct, it may well be that the Mediation Act’s confidentiality mandate would not apply in an appropriate tribunal. This Board, however, has no jurisdiction to hear complaints about how the Ombudsman carries out her role as mediator.

The PIA carefully defines the types of applicant complaints we can adjudicate, and it does not give this Board jurisdiction over how the Ombudsman conducts the mediations that come before her. *See* § 4-1A-04(a)(1) (directing the Board to resolve complaints from any applicant alleging that a custodian “(i) denied inspection of a public record in violation of this title; (ii) charged an unreasonable fee under § 4-206 of this title of more than \$350; or (iii) failed to respond to a request for a public record within the time limits established under § 4-203(a) or (d) of this title”); *cf.* PIACB 24-03 at 4 n.5 (Oct. 6, 2023) (declining to consider allegations that an agency official violated ethical rules as they are “far beyond the scope of . . . our jurisdiction”). Because mediation communications are not necessary to assert a claim of mediator misconduct *that this Board can resolve*, we conclude that they remain confidential under the Mediation Act for purposes of our role under the PIA.

We turn now to whether the specific records requested by Mr. Davis qualify as mediation communications under the Mediation Act. That Act defines the term “mediation communication” as “a communication, whether by speech, writing, or conduct, made as part of a mediation,” including “a communication made for the purpose of considering, initiating, continuing, reconvening, or evaluating a mediation or a mediator.” Cts. & Jud. Proc. § 3-1801(c). All the records requested by Mr. Davis fall within this definition—“any email, record, or exchange from Lisa Kershner or the PIA Ombudsman office in which I was informed of these two matters, invite[d] for mediation for these matters, or any document or record in which I consented to mediation, consented to allow Lisa Kershner to mediate any matter related to my PIA request, or consented to allow for any other person to mediate any PIA matter on my behalf.” Any such records would involve either “considering” or “initiating” a mediation.

The conclusion that the Ombudsman’s mediation records are exempt from disclosure through the Mediation Act and § 4-301(a)(2) is consistent with the provisions of the PIA that govern how the Ombudsman interacts with this Board. Those provisions allow the Ombudsman to transfer to this Board “basic information about a dispute,” including “the nature of the dispute,” but she must ensure that “appropriate steps have been taken to protect the confidentiality of communications *made or received* in the course of attempting to resolve the dispute.” § 4-1B-04(d)(3) (emphasis added). Although that provision is limited to the Ombudsman’s interaction with this Board and is not framed as a generally applicable exemption from disclosure, it corroborates the conclusion under the Mediation Act that all mediation communications, whether sent to or by the Ombudsman, are confidential under the PIA.

Attorney-Client Privilege

We turn now to the Ombudsman’s assertion of attorney-client privilege. Mr. Davis does not dispute that communications between a client and her counsel ordinarily are privileged or that the types of documents over which the Ombudsman asserts privilege ordinarily would qualify. Mr. Davis contends, however, that the communications are

disclosable because they fall within the crime-fraud exception to the attorney-client privilege.

The crime-fraud exception provides that the attorney-client privilege does not cover “communications seeking advice or aid in furtherance of a crime or fraud.” *Newman v. State*, 384 Md. 285, 309 (2004). The Supreme Court of Maryland has cautioned, however, that the crime-fraud exception not “be viewed expansively.” *BAA, PLC v. Acacia Mut. Life Ins. Co.*, 400 Md. 136, 156 n.18 (2007). For otherwise privileged communications to fall within the exception, they must have been made in furtherance of a crime or fraud; it is not enough that they were made while fraudulent activity was occurring or even when the client had expressed the intent to commit crimes. *Newman*, 384 Md. at 309-11. Nor does the exception apply to all forms of conduct that might be deemed fraudulent. See *United Bank v. Buckingham*, 301 F. Supp. 3d 547, 554 (D. Md. 2018) (agreeing with Magistrate Judge’s conclusion that the fact that a transaction is fraudulent under Maryland Uniform Fraudulent Conveyances Act “does not *necessarily* trigger” the crime-fraud exception (emphasis in original)). Instead, the fraudulent conduct must constitute “actual fraud” (as opposed to “implied” fraud or fraud “in law”) and be carried out with “wrongful intent.” *Id.* at 554-55 (applying *Husky Int’l Elecs., Inc. v. Ritz*, 578 U.S. 355 (2016)).

To invoke the crime-fraud exception, a party need not prove the elements of crime or fraud, but it must do more than merely *allege* that the communications were made in furtherance unlawful activity. Instead, the party seeking disclosure—even if only for *in camera* review—must provide “a factual basis adequate to support a good faith belief by a reasonable person” that the materials may establish that the crime-fraud exception applies. *United States v. Zolin*, 491 U.S. 554, 572 (1989) (citation omitted); see *Newman*, 384 Md. at 313 n.7 (noting that the party opposing the privilege “would be required to proffer evidence demonstrating that the communication at issue was made with the object of seeking assistance in directly furthering an ongoing or future crime or fraud”); see also *In re Grand Jury Proc. #5 Empanelled Jan. 28, 2004*, 401 F.3d 247, 251 (4th Cir. 2005) (“The party asserting the crime-fraud exception . . . must make a prima facie showing that the privileged communications fall within the exception.”).

For several independent reasons, we conclude that the crime-fraud exception does not apply here to require disclosure of the communications that the Ombudsman has withheld on the grounds of privilege.

To begin with, and as discussed above, this body does not have jurisdiction over claims that the Ombudsman has engaged in fraudulent or criminal conduct. As a result, it is not in a position to make the evidentiary findings necessary to establish that the crime-fraud exception would apply here. Although a circuit court or the Attorney Grievance Commission may have jurisdiction to undertake that inquiry, this body does not.

But even if we were empowered to evaluate claims that the Ombudsman has engaged in fraudulent or criminal conduct, we would reach the conclusion that Mr. Davis

has not made a sufficient showing to invoke the crime-fraud exception. Mr. Davis alleges that the Ombudsman (1) used “threatening or harassing behavior” to “coerce” a party into mediation and “compel[]” parties to disclose personal information; (2) “falsely” stated in a final determination that another party “had threatened her”; and (3) “falsely” stated in a final determination that she had “contacted” people or “invited” them to participate. We do not believe that these allegations are borne out by the evidence before us.

First, we do not read the evidence as supporting the conclusion that the Ombudsman sought to “coerce” people to participate in the mediation. She sent emails to the 18 email addresses that the BCSAO had put at issue in its mediation request, but she did so to inform them that the Office had requested mediation and to invite them to participate, if they so wished. Nor did she “compel” the would-be participants to disclose personal information. She directed the recipients to provide “proof of identity” to establish that their email accounts were not, as the BCSAO contended, controlled by Mr. Alford. If the recipients of that email did not wish to identify themselves or participate in the mediation, they could just decline to do so, as the Ombudsman reports all did. Although the requesters objected to the tone of the Ombudsman’s email, it seems to us a reasonable step for the Ombudsman to take, given the nature of the BCSAO’s mediation request.

Second, the Ombudsman’s final determination does not state that one of the requesters threatened her. Although the Ombudsman used the word “threatens,” she used it in the sense of to *portend*, not to threaten harm, as in “the damaged building threatens to collapse.” In other words, the Ombudsman terminated the mediation because she did not believe she could play the role of neutral mediator in light of the parties’ accusations about her conduct, not because she felt that she had been threatened by the requesters. Mr. Davis and others might take issue with the Ombudsman’s decision to terminate the mediation on that basis, but it is not a false statement.

Finally, the Ombudsman’s statement in her final determination that she had “contacted” people and “invited” them to participate also was not false. It is undisputed that the Ombudsman *did* send emails to the holders of the 18 email accounts that were implicated by the BCSAO’s mediation request. In fact, several of them objected to those emails in communications sent to this Board. Although the Ombudsman did not send such an email to Mr. Davis, that was because his account was not part of the BCSAO’s mediation request, and the Ombudsman acknowledges that in her response. And while the recipients of those emails evidently considered the emails threats more than “invitations,” the emails notified them of the mediation and gave them the opportunity to participate. The recipients understandably may have been surprised to receive a communication about a mediation that was triggered by another’s (Mr. Alford’s) PIA request, but that was the direct result of the BCSAO’s mediation request, not any fraudulent activity on the Ombudsman’s part.

It is understandable that Mr. Davis and the other requesters would bristle at being accused by the BCSAO of being part of a coordinated effort to file frivolous, vexatious, or bad faith PIA requests. It is also understandable that they would object to being implicated

in the BCSAO's mediation request based on that accusation and then being told that they had to provide "proof of identity" to object to the Ombudsman proposal for handling that mediation. And it might also be that the Ombudsman could have phrased her emails in a way that would not have raised these objections. But the Ombudsman's communications here flow from the nature of the BCSAO's mediation request, not through an *ultra vires* effort to coerce or compel Mr. Davis or the other requesters to participate in mediation against their will. Because none of these allegations provides reasonable factual grounds on which to conclude that the Ombudsman's communications with counsel were in furtherance of a criminal or fraudulent scheme, those communications remained attorney-client privileged and exempt from disclosure under § 4-301(a)(1).

Definition of "Public Record"

Finally, we address whether communications from the Ombudsman to the mediating parties constitute "public records" subject to the requirements of the PIA. Before tackling that interpretive issue, however, we note that whether the Ombudsman's communications qualify as "public records" is of no moment here, because, as we conclude above, *all* communications relating to the mediation are confidential under the Mediation Act and thus exempt from disclosure under § 4-301(a)(2)(i) of the PIA. But given the parties' focus on this aspect of the statute, and the dispute over its proper interpretation, we offer the following by way of guidance to the parties and others.

The parties agree that the PIA's definition of "public record" excludes "a record or any information submitted to the Public Access Ombudsman," § 4-101(k)(3)(ii), but they disagree about whether it also excludes records or information *sent by* the Ombudsman. Mr. Davis contends that the provision's plain language is limited to information "submitted to" the Ombudsman, whereas the Ombudsman contends that her communications to the mediating parties are also excluded, as they "necessarily contain or reflect 'information submitted to'" the Ombudsman as part of the mediation effort.

We largely agree with the Ombudsman, though not entirely so. It stands to reason that her communications to the mediating parties would contain or reflect "information submitted to" the Ombudsman and, if so, that information could be redacted as falling outside the definition of "public record." *See Office of Governor v. Washington Post Co.*, 360 Md. 520, 536-43 (2000) (allowing redaction of records that do not qualify as "public records" or are beyond the scope of the request). But the inclusion of that information does not necessarily remove the rest of the communication from the definition of "public record." That interpretive conclusion begins with the text of § 4-101(k)(3)(ii), which plainly limits the exclusion to information "submitted to" the Ombudsman. The General Assembly could just as easily have provided that all "communications with" the Ombudsman fall outside the definition of "public record." We must honor the legislative choice not to do so. *Baltimore City Det. Ctr. v. Foy*, 461 Md. 627, 637-38 (2018) (statutory interpretation begins with "the statute's plain language" and ends there, "[i]f the plain language of the statute is . . . unambiguous (citations omitted)).

In addition, the PIA elsewhere requires custodians to “allow inspection of any part of the record that is subject to inspection.” § 4-203(c)(1)(ii). That provision precludes an agency from issuing a “blanket” denial when a more targeted one will suffice. *See Blythe v. State*, 161 Md. App. 492, 519 (2005) (“Even if some information in a contested file is exempted from disclosure, . . . the exemption may not be blanketly invoked to shield an entire file if the shielding of only a part of the file would suffice to serve the purpose of the exemption.”). Finally, the purpose of excluding “information submitted to” the Ombudsman from the PIA’s disclosure mandate is to encourage the mediation parties—half of whom typically are private parties—to speak freely in an effort to facilitate the mediation. The Ombudsman does not need the same encouragement; she is a State official statutorily charged with mediating these types of disputes. And whereas a party’s statements within the context of mediation do not say anything about the operation of government, the Ombudsman’s statements arguably do. Accordingly, we conclude that the Ombudsman’s communications *sent to* mediation parties qualify as “public records” to be evaluated for disclosure under the otherwise applicable exemptions set forth in the PIA. In this case, however, these same communications are deemed confidential under the Mediation Act and thus were properly withheld from disclosure.

Conclusion

Based on the parties’ submissions, we conclude that the Ombudsman has not violated the PIA. Communications between mediation participants and the Ombudsman qualify as “mediation communications” that, for purposes of this tribunal, are confidential under the Maryland Mediation Confidentiality Act and thus exempt from disclosure under § 4-301(a)(2)(i). And the Ombudsman’s communications with her legal counsel are attorney-client privileged and exempt from disclosure under § 4-301(a)(1).

Public Information Act Compliance Board*

Michele L. Cohen, Esq.
Samuel G. Encarnacion
Debra Lynn Gardner
Nivek M. Johnson

* Board member Deborah Moore-Carter did not participate in the deliberation, preparation, or issuing of this decision.