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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 24-62

April 12, 2024

Office of the Public Access Ombudsman, Custodian
Rachel Garcia, Complainant

This complaint is related to the one we resolved in PIACB 24-52. As the complainant there did, the complainant here, Rachel Garcia, alleges that the Office of the Public Access Ombudsman violated the Public Information Act (“PIA”) by denying her 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 defends her denial of 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 PIA¹ 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 we concluded in PIACB 24-52, we conclude here that the Ombudsman’s denial was appropriate. Although we do not read § 4-101(k)(3)(ii) as broadly as the Ombudsman does, we agree that it covers the responsive records here, all of which were submitted to the Ombudsman and thus excluded from that provision’s definition of “public record.” We also conclude that mediation-related emails sent by or to the Ombudsman 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

This dispute, as did the dispute at issue in PIACB 24-52, arises out of two matters brought to this Board as complaints, PIACB 24-27 and PIACB 24-29. Both of those matters involved 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,

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

the BCSAO received 48 PIA requests from 18 different email addresses, including Ms. Garcia'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).²

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.

Ms. Garcia responded on October 26, 2023, and objected to the Ombudsman's email, which she believed to be an attempt to "force" unrelated PIA requesters into the consolidated mediation. She also objected to the Ombudsman's request that she provide proof of identity. She informed the Ombudsman that she considered the email a "violation of the Maryland Standards of Conduct for Mediators" and asked for the Ombudsman's Maryland Attorney ID number.

Counsel for the Ombudsman responded on November 2, 2023, and explained why the Ombudsman had sent the emails to Ms. Garcia and the other email accounts that the BCSAO believed to have been part of the coordinated effort. She began by assuring Ms. Garcia that the email was not intended to "force anyone to do anything." Counsel explained that the Ombudsman believed that the BCSAO "had a good faith basis to believe that the many PIA requests it was receiving for the same records were coming from one person (or a group of people acting in concert and at the direction of that person)" and that the Ombudsman had sent emails to the email addresses to alert them to the Office's request for mediation and invite them to participate, if they wished to do so. Counsel also explained that the Ombudsman's request for "proof of identity" was necessary to determine whether "the PIA request submitted from this email address came from a different person," which was reasonable "in light of the information that the BCSAO provided to [the Ombudsman] with its request for mediation." As for the Ombudsman's bar number, Counsel referred Ms. Garcia to the page of the Judiciary's website where one can look up that information for any attorney barred in Maryland.

² 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. Our opinion in PIACB 24-29 contains a detailed account of the many emails received by the BCSAO during this period.

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 State’s Attorney’s Office each filed complaints with this Board, which assigned them case numbers 24-27 and 24-29, respectively. We have since issued decisions in both matters. On March 6, 2024, we issued our decision in PIACB 24-27, in which we concluded that the BCSAO had conducted reasonable and adequate searches in response to Mr. Alford’s requests and thus had not violated the PIA. On March 29, 2024, we issued our decision in PIACB 24-29. There we concluded that the requests made by Mr. Alford, Ms. Garcia, and others were part of a bad faith, coordinated effort “to harass and annoy the BCSAO, and to serve as a platform for wielding serious (and largely unsubstantiated) accusations of misconduct at its employees, and thus were not truly made for purposes of obtaining public records.” PIACB 24-29 at 25. Accordingly, we ordered that the BCSAO need not respond to the requests.

Ms. Garcia’s PIA Request

On December 15, 2023, Ms. Garcia submitted a PIA request seeking three categories of records related to the Ombudsman’s handling of the mediations at issue in PIACB 24-27 and 24-29:

all documents, emails, and correspondences of Lisa Kershner threading³ PIA applicants into a forced mediation attempt, in violation of the self determination and impartiality adopted by her office;

all documents and records of PIA applicants indicating that her actions are a violation of mediator standards, to include my email, in which I indicated such to Lisa Kershner; and

all documents and records of Lisa Kershner making a materially false representation and statement of fact when she falsely proclaimed that she was being “threatened” when in fact she had been threatening everyone else at the behest of the [State’s Attorney’s Office].

The Ombudsman responded on December 22, 2023, and denied the request under §§ 4-301 and 4-101(k)(3)(ii). Section 4-301(a)(2)(i) requires denial if inspection of the

³ Appears as such in the original, but given the allegations of the complaint, should probably read “threatening.”

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 Ms. Garcia requested “are not public records as defined by the PIA.” Second, the Ombudsman maintained that “many” of the communications captured by Ms. Garcia’s request are protected by the Mediation Act and thus exempt from disclosure under the PIA. *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 Ms. Garcia of her 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 that approach was not available in this instance. Because she was the custodian of the records at issue, she explained, mediation before her “would not yield the usual input of a third party (requester, custodian, and Ombudsman).” The Ombudsman nevertheless offered to speak with Ms. Garcia about her request. On February 8, 2024, Ms. Garcia submitted her complaint, in which she challenges the Ombudsman’s denial.

The Complaint, Response, and Reply

Ms. Garcia challenges two bases for the Ombudsman’s denial of her request. First, she contends that the Ombudsman’s communications cannot be confidential “mediation communications” because her October 10 email “belligerently threatening people for documents, money, or information is not a part of ‘mediation.’” Instead, Ms. Garcia contends, the email was sent “at the behest of” the BCSAO, purportedly in an effort to ascertain the identities of the requesters so that the BCSAO could retaliate against them in some way. Second, she 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 she only requested records *sent by*, not submitted to, the Ombudsman. Ms. Garcia did not address the Ombudsman’s invocation of the attorney-client privilege as a basis for the denial.

In her response to the complaint, the Ombudsman revises the rationale she provided in her initial denial. Rather than deny all three aspects of Ms. Garcia’s request, the Ombudsman clarifies that her office has no records responsive to the first and third parts of Ms. Garcia’s PIA request. The Ombudsman states that she has no records showing that

she “threa[tened] PIA applicants into a forced mediation attempt,” or “ma[de] a materially false representation and statement of fact” about being herself threatened, because the Ombudsman never threatened the mediation participants and never claimed to have been threatened by them. As for the second part of Ms. Garcia’s request, seeking “all documents and records of PIA applicants indicating that her actions are a violation of mediator standards,” the Ombudsman states that she has responsive records, as she has emails from Ms. Garcia and others that accuse the Ombudsman—wrongly, the Ombudsman contends—of violating mediator standards.

The Ombudsman also revises the legal grounds that she asserted in her initial denial. In her response, the Ombudsman no longer invokes attorney-client privilege, presumably because the only responsive records would have come from parties who were not represented by the Ombudsman and also were not communications between her and her legal counsel. Beyond that, however, the Ombudsman reiterates the grounds stated in that denial. First, the Ombudsman asserts that § 4-101(k)(3)(ii), though its plain language exempts from the definition of “public record” only those records or information “submitted to” the Ombudsman, also covers mediation-related communications *sent by* the Ombudsman, as they “necessarily reflect ‘information submitted to’” the Ombudsman. The Ombudsman notes, however, that all the emails responsive to the second part of Ms. Garcia’s request were *submitted to* the Ombudsman.

Second, the Ombudsman states that all the responsive communications “directly relate or refer to an actual or prospective mediation” and thus qualify as “mediation communications” under the Mediation Act. Because that 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 contends that all mediation-related communications with the Ombudsman are confidential “by law” and thus exempt from disclosure under § 4-301(a)(1). The Ombudsman also points out that “the strong public policy of protecting mediation communications” is reflected in the PIA. *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 have been taken to protect the confidentiality of communications made or received in the course of attempting to resolve” a mediation).⁴

⁴ Although § 4-1B-04(d)(1)(ii) of the PIA expressly allows for the disclosure of mediation materials with the party’s consent, the Mediation Act does not. And because the PIA defers to the disclosure requirements of other State statutes, *see* § 4-301(a)(2)(i), the Ombudsman’s decision not to provide Ms. Garcia with her own email is consistent with that aspect of Maryland law. But even if that were not the case, the Ombudsman’s failure to provide Ms. Garcia with a copy of her own email surely would constitute harmless error.

In her reply, Ms. Garcia repeats her accusations that the Ombudsman (1) “falsely indicated” in her final determination that she actually contacted people to “invite them” to “mediation”; (2) “threatened the respondent/victim PIACB 24-29 into a forced mediation attempt against his will”; (3) “falsely indicated that she received a ‘threatening’ email, or an ‘email that threatened [Lisa Kershner]’”; and (4) “falsely indicated that someone other than me was using my, or anyone else’s email account” in an effort to “privilege” the BCSAO. And because, according to Ms. Garcia, the Ombudsman sent emails from her own personal government email account (as opposed to using the pia.ombuds@oag.state.md.us account) and used her personal phone to conduct business (as opposed to using “her Ombudsman-provided phone”), she is “using public funded government resources and infrastructure, which would make this waste, fraud, and abuse the subject of public interest and public business.”

Those accusations, Ms. Garcia contends, show that the Ombudsman’s communications were not made in connection with a legitimate mediation and thus the confidentiality provisions of the Mediation Act do not apply. She also contends that the Ombudsman never informed Ms. Garcia, in writing, that the alleged mediation communications would remain confidential by statute, and that the Ombudsman would abide by the standards for mediator conduct. Although Ms. Garcia does not dispute that those statements appear on the Ombudsman’s website, she contends that “[i]t was not [her] job to go on an Easter egg hunt and find this on an obscure government website that still has social media links to twitter.”

Finally, Ms. Garcia repeats her contention that the term “submitted to” used in § 4-101(k)(3)(ii) cannot mean “sent by” because the two terms are antonyms, and the intent behind protecting the information provided by applicants and agencies is to protect those applicants and agencies, not the Ombudsman.⁵

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

⁵ Ms. Garcia’s reply also addresses attorney-client privilege, contending that the crime-fraud exception to the privilege applies here. *See Newman v. State*, 384 Md. 285 (2004) (discussing the exception). But the Ombudsman no longer asserts attorney-client privilege over the responsive records, all of which would have come from parties who were not represented by the Ombudsman. For that reason, and because Ms. Garcia did not raise the issue in her complaint, we do not address the privilege further, other than to note that we addressed similar arguments in PIACB 24-52.

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 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 two grounds for her denial: (1) information submitted to the Ombudsman is excluded from the definition of “public record”; and (2) mediation records are protected by the Mediation Act. We will address each ground in turn. But before doing so, we evaluate the Ombudsman’s determination that she has no records responsive to the first and third parts of Ms. Garcia’s request.

The Ombudsman’s Determination of No Responsive Records

In the first and third parts of her request, Ms. Garcia sought, respectively, all records in which the Ombudsman “threa[tened] PIA applicants into a forced mediation attempt” or “falsely proclaimed that she was being ‘threatened.’” The Ombudsman determined that

she had no records responsive to either request, as she denies having threatened PIA requesters or being threatened by them. We conclude that the Ombudsman's response to these aspects of the requests did not violate the PIA.

First, we do not read the evidence as supporting the conclusion that the Ombudsman sought to "threaten" 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. We perceive no threat here.

We also conclude that the Ombudsman properly determined that she did not have any records in which she stated that she had been threatened. This aspect of Ms. Garcia's complaint rests on a misunderstanding of the Ombudsman's use of the word "threatens." As the Ombudsman confirms in her response here, her final determination used the word "threaten" in the sense of *portend*—as in "the damaged building threatens to collapse"—and not in the sense of threatening harm. Ms. Garcia's misunderstanding of that fact is evident in her quotation of the Ombudsman's final determination, which she edited to add language suggesting that the Ombudsman had terminated the mediation because she had received an "email that threatened [Lisa Kershner]." We think it is plain from the final determination that 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. *See* PIACB 24-52 at 11. We can find no basis in the record before us on which to conclude that the Ombudsman claimed that she had been threatened.

Because we find no basis in the record on which to find that the Ombudsman either threatened PIA requesters or claimed to have been threatened by them, we conclude that the Ombudsman properly responded that she had no records responsive to the first and third parts of Ms. Garcia's request. We turn next to the legal grounds that the Ombudsman asserted as the basis for her decision to deny access to the records responsive to the second part of Ms. Garcia's request, i.e., for "all documents and records of PIA applicants indicating that [the Ombudsman's] actions are a violation of mediator standards, to include my email, in which I indicated such to Lisa Kershner."

Definition of "Public Record"

We begin by addressing whether the records responsive to the second part of Ms. Garcia's request constitute "public records" subject to the requirements of the PIA. 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. Ms. Garcia contends that the provision's plain language is limited to communications "'sent' to the Ombudsman Office or 'provided' to the Ombudsman Office," whereas the Ombudsman contends that her communications to the mediating parties are also excluded, as they "necessarily reflect 'information submitted to'" the Ombudsman as part of the mediation effort.

We addressed this interpretive disagreement in PIACB 24-52. There we concluded that, while it stands to reason that the Ombudsman's communications to the mediating parties would contain or reflect "information submitted to" the Ombudsman, the appropriate course of action in that situation is to redact that information as falling outside the definition of "public record," not blanketly shielding the entire record. *See* PIACB 24-52 at 12-13 (citing *Office of Governor v. Washington Post Co.*, 360 Md. 520, 536-43 (2000), and *Blythe v. State*, 161 Md. App. 492, 519 (2005)). But here, the only part of the request that the Ombudsman denied, by its terms, is limited to communications *sent to* the Ombudsman, i.e., "records of PIA applicants indicating that [the Ombudsman's] actions are a violation of mediator standards," including the complainant's own email to that effect. Because all these communications would have been "submitted to" the Ombudsman in connection with a mediation effort, they are expressly excluded from the definition of "public record." *See* 4-101(k)(3)(ii).

The Maryland Mediation Confidentiality Act

Our conclusion that the responsive records do not constitute "public records" suffices to resolve Ms. Garcia's complaint. But as an alternative basis for our decision, we also conclude, as we did in PIACB 24-52, that the Mediation Act covers the records that Ms. Garcia seeks, such that inspection of the records would be exempt from disclosure under § 4-301(a)(2)(i) even if they qualified as "public records."

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 Ms. Garcia herself sought mediation with the Ombudsman, the Board had no occasion to refer her there, but we do refer those complainants who seek to invoke our jurisdiction without mediating first. Ms. Garcia does not contest these first two grounds for the applicability of the Mediation Act.

Ms. Garcia *does* contest the third ground, namely, that the Ombudsman did not state, in writing, that the mediation communications would remain confidential by statute, and that the Ombudsman would abide by the standards for mediator conduct. But the Ombudsman has made those statements, in writing, 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/>). Although Ms. Garcia contends, in a way, that such public statements do not suffice as a statement “to” the parties, Cts. & Jud. Proc. § 3-1802(a)(3), she provides no support for her contention, other than to assert that “[i]t was not [her] job to go on an Easter egg hunt and find this on an obscure government website that still has social media links to twitter.”

For several reasons, we conclude that the written statements on the Ombudsman’s website and in regulation suffice to trigger the confidentiality provisions of the Mediation Act. First, the Ombudsman’s website is hardly “obscure.” Although Ms. Garcia might not have an obligation to search the internet for the requisite mediation disclosures, it was reasonable for the Ombudsman to include the disclosures on the website devoted to initiating the very mediation that Ms. Garcia sought to initiate here. Second, although disclosures provided on websites might not suffice when they appear in “fine print” and “technical jargon” on hard-to-find pages, *see Matter of Cricket Wireless, LLC*, 259 Md. App. 44, 84 (2023) (concluding that website disclosures were not sufficient to inform the public about potential deactivation of cell service), the mediation-related statements here are set forth clearly and prominently in webpages appropriately titled “Confidentiality of Ombudsman Mediations” and “Standards of Conduct Applicable to the Ombudsman & Parties.” Finally, the Ombudsman provides a similar statement in the regulations that govern the mediation process. *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”). Although private mediators may have to provide an individualized statement, *see Sang Ho Na v. Gillespie*, 234 Md. App. 742, 751 (2017), a public mediator like the Ombudsman can issue public, legally binding rules and regulations to govern the large number of mediations that she is statutorily charged with conducting, *cf. Benik v. Hatcher*, 358 Md. 507, 532 (2000) (observing that everyone is “presumed to know the law regardless of conscious knowledge or lack thereof”). For all these reasons, we reaffirm our conclusion in PIACB 24-52 that the Ombudsman’s regulations and explanatory materials satisfy the Mediation Act’s jurisdictional requirements, including 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). Accordingly, the Mediation Act’s confidentiality provisions apply to the Ombudsman’s communications with parties mediating, or seeking to mediate, PIA disputes.

There are, however, exceptions to the Mediation Act’s confidentiality mandate. Although Ms. Garcia 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 Ms. Garcia is asserting mediator misconduct, it may well be that the Mediation Act’s confidentiality mandate would not apply in an appropriate tribunal. As we observed in PIACB 24-52, however, this Board 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 responsive to Ms. Garcia’s request 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 Ms. Garcia in the second part of her request fall within this definition. Communications from PIA applicants objecting to the Ombudsman’s handling of the BCSAO’s mediation request obviously are related to that mediation—they relate to the Ombudsman’s “considering” or “initiating” a mediation, or are made for the purpose of “evaluating a mediation or a mediator.” Either way, they fall within the Mediation Act’s definition of “mediation communication.”

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.

Conclusion

Based on the parties’ submissions, we conclude that the records responsive to the complainant’s request do not qualify as “public records” under the PIA. In the alternative, we conclude that all such records qualify as mediation communications that, for purposes of this tribunal, are confidential under the Maryland Mediation Confidentiality Act and thus exempt from disclosure under the PIA.

Public Information Act Compliance Board*

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