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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 25-02
September 26, 2024
Maryland Department of Labor, Custodian
Jillian Lord, Complainant

Jillian Lord, the complainant, sent two Public Information Act (“PIA”) requests to the Maryland Department of Labor (“DOL”) seeking the names of three individuals nominated for the position of Executive Director of the Maryland Real Estate Commission and other related information. DOL advised that it had no responsive records and that, even if it did, the names of the individuals would be subject to § 4-311,¹ the PIA’s exemption for personnel records. The complainant challenges DOL’s responses in this complaint. After review of the submissions, we find no violation of the PIA and explain further below.

Background

In March of this year, the complainant sent two PIA requests to DOL. The first, sent on March 1, 2024, asked for:

The names of the three individuals selected by The Secretary (Portia Wu) for the Maryland Real Estate Commission Executive Director position. Prior to hiring Raquel Meyers as the current Maryland Real Estate Commission’s Executive Director in February 2024. The list should have been provided to her from a list of 3 nominees submitted by the Commission (Board Members), per [Business Occupations and Professions Article, or “BOP”] §17–205.

Given the statutory reference to the Maryland Real Estate Brokers Act, DOL interpreted the PIA request to seek “the names of three people nominated by the Commission for the Real Estate Commission’s executive director position.” DOL responded to the request by a letter dated March 11, 2024, stating that it had no responsive records. DOL also stated, “[m]oreover, the release of any such records would be prohibited by . . . § 4-311, as a confidential personnel record.”

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

After receiving DOL's response, the complainant sent a second PIA request, on March 13, 2024. That request asked for:

1. Before the appointment of Raquel Meyers as the Executive Director of the Maryland Real Estate Commission in February 2024, did the MREC Board Members (Commissioners) provide the Secretary of the Maryland Department of Labor, Portia Wu, with a list of any nominees, and/or a minimum of three nominees for the Maryland Real Estate Commission Executive Director position as required by law BOP §17–205 (see below).
2. If yes, provide the number of nominees presented to Secretary Wu, along with the day, month, and year they were given to her by the MREC Board Members (Commissioners) before the appointment of Raquel Meyers as the Executive Director of the Maryland Real Estate Commission in February 2024.
3. If no, please explain why the law, BOP §17–205 (a) (1), was circumvented and why a list of nominees was not presented to Secretary Wu.

DOL's PIA coordinator responded on March 26, 2024, stating that there were no responsive records. On March 27, 2024, DOL sent a more formal letter stating that the complainant's PIA request was "outside the scope of the PIA" because it did not seek public records but rather "posed a question followed by a request for data or explanation contingent upon the answer to [the] question." DOL took the position that the PIA "does not require an agency to answer informational questions or to create a record to satisfy a request."

The complainant disagreed with DOL's responses to her PIA requests and therefore contacted the Public Access Ombudsman for assistance with resolving her dispute.² On July 9, 2024, the Ombudsman issued a final determination stating that the dispute was not resolved. The complainant then filed this complaint with our Board in which she continues to challenge DOL's responses to her PIA requests. The complainant contends that DOL is "in violation of General Provisions § 4-362(d)(1)^[3] and should be fined."

² The Public Access Ombudsman is charged with making "reasonable attempts to resolve disputes between applicants and custodians relating to requests for public records." § 4-1B-04(a). Before filing a complaint with our Board, a complainant must attempt to resolve the dispute through the Ombudsman and receive a final determination stating that the dispute is not resolved. § 4-1A-05(a).

³ This provision governs damages in circuit court PIA actions and provides for statutory and actual damages when a custodian "knowingly and willfully failed to . . . disclose or fully to disclose a public record that the complainant was entitled to inspect." § 4-362(d)(1)(i). This section does not apply to complaints before our Board. However, we will take the complainant's reference to

In response, DOL urges that we dismiss this complaint. DOL characterizes the complainant's first PIA request as "a request for information—names—and not a records request." Even if it was a records request, DOL maintains that it "did not possess responsive records either at the time of the request or at the time of the Department's response to the [request]." Similarly, DOL contends that the second PIA request was "a series of questions." For both, DOL argues that, because it did not deny inspection of any records, the complaint should be dismissed because "there is nothing for the Board to review." DOL suggests that "[i]t is impossible for the Department to either allow or deny the inspection of a record that was not asked for or which did not exist."

Analysis

We are authorized to review and resolve complaints alleging certain violations of the PIA's provisions, including that a custodian improperly denied inspection of a public record. § 4-1A-04(a)(1)(i). We have interpreted § 4-1A-04(a)(1)(i) to include allegations that a custodian constructively denied inspection of public records by conducting an inadequate search that failed to locate responsive records, *see, e.g.*, PIACB 24-34, at 2 (Apr. 1, 2024), or by withholding responsive records without providing a reason, *see, e.g.*, PIACB 24-99, at 2 (June 14, 2024). If, after review of the submissions, we find that the alleged violation occurred, we must issue a written decision and order a remedy provided in the PIA. § 4-1A-04(a)(2) and (3). When we conclude that a custodian denied inspection of a public record in violation of the PIA's provisions, we must "order the custodian to . . . produce the public record for inspection." § 4-1A-04(a)(3)(i). In instances where we determine that the custodian constructively denied a PIA request by performing an insufficient search, we may direct the custodian to conduct another search and "produce an non-exempt responsive records to the complainant." PIACB 24-08, at 6 (Sept. 28, 2023).

Unless law provides otherwise, the PIA requires a custodian to "allow a person or governmental unit to inspect any public record at any reasonable time." § 4-201(a). Thus, after receiving 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) (quoting *Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)). A custodian is not required to create a new record to respond to a PIA request. § 4-205(c)(4)(iii). When a custodian receives a records request in the form of questions, their "only obligation under the PIA is to search for and provide any existing public records that may respond to those questions." PIACB 23-23, at 5 n.5 (June 20, 2023). A custodian is "not obligated to create new records that answer those questions to the [requester's] full satisfaction." *Id.* If a custodian "determines that the record does not exist," the PIA requires the custodian to notify the requester of that fact. § 4-202(d).

this section as an allegation that DOL has failed to permit inspection of public records in violation of the PIA.

Ordinarily the PIA must be “construed in favor of allowing inspection of a public record, with the least cost and least delay.” § 4-103(b). The PIA does not, however, provide for “complete *carte blanche*, unrestricted disclosure of all public records.” *Immanuel v. Comptroller*, 449 Md. 76, 88 (2016). Rather, the PIA contains provisions that exempt certain records or information from disclosure. Some of those exemptions are mandatory, meaning that inspection must be denied. The exemption referenced in DOL’s response letter, § 4-311, is one such exemption. Section 4-311 requires a custodian to deny inspection of “a personnel record of an individual, including an application, a performance rating, or scholastic achievement information.”⁴ § 4-311(a). The custodian bears the burden of justifying its decision to deny inspection of a public record. *Lamson v. Montgomery County*, 460 Md. 349, 367 (2018).

At the outset, we decline to dismiss the complaint as DOL has asked us to. Maryland’s Supreme Court has instructed that the PIA’s provisions be “liberally construed in order to effectuate the Public Information Act’s remedial purpose.” *Kirwan v. The Diamondback*, 352 Md. 74, 81 (1998) (cleaned up). The provisions governing our Board are part of the PIA. Thus, as explained above, we have construed § 4-1A-04 “liberally” in carrying out our duty to provide a faster, cost effective extra-judicial dispute resolution process for disagreements that arise under the PIA. This includes interpreting § 4-1A-04(a)(1)(i) broadly to include constructive denials that may arise from, e.g., an insufficient search, and not just more traditional denials that result from a custodian’s application of an exemption to withhold a public record. See PIACB 23-05, at 3-4 (Nov. 23, 2022).

Turning to the complainant’s allegations, we first note that, while the complainant’s second PIA request was framed as a series of questions, her first PIA request not. The complainant’s first PIA request sought a record—namely, a “list” containing “[t]he names of the three individuals selected” for the position of Executive Director of the Maryland Real Estate Commission (“MREC”) pursuant to BOP § 17-205.⁵ DOL’s response that it had “no responsive documents” was essentially a response under § 4-202(d) of the PIA. DOL defends that response, stating that on March 11, 2024, when DOL responded to the complainant’s first PIA request, it had “no documents or other records that would have been responsive to the request.” DOL stresses that the custodian is the head of DOL’s Division of Occupational and Professional Licensing and supervisor of the Executive Director of the MREC, and would thus have “first-hand knowledge of the existence of any such records.”

⁴ A custodian must allow inspection under certain circumstances, including when requested by a “person in interest”—i.e., the person who is the subject of the personnel file—or “an elected or appointed official who supervises the work of the individual.” § 4-311(b).

⁵ Section 17-205(a) of the Business Occupations and Professions Article requires the Secretary of Labor to “appoint the executive director of the [MREC] from a list of 3 nominees submitted by the [MREC].”

Based on the submissions, as well as publicly-available MREC meeting minutes, we cannot find that DOL's response to the complainant's first PIA request violated the PIA. The record she sought was discrete and likely would not have required extensive searching to find, assuming it existed. It makes sense that the custodian here would know whether there was a list of MREC executive director nominees, without having to conduct a wide-ranging search. Information in MREC meeting minutes tends to support DOL's assertion that there was no "list" of three MREC nominees for the Executive Director position—at least not in March when the complainant requested it.

The minutes from the MREC's November 2023 meeting indicate that the then-Executive Director's "departure from the agency was announced," and that "Mrs. Raquel Meyers was introduced as the *Interim* Executive Director." See MREC, Business Meeting, Meeting Minutes (Nov. 15, 2023)⁶ (emphasis added). The minutes from the March 2024 meeting state that "[t]he position for executive director will need to be posted" and that a "panel has been convened to work with Labor on that." MREC, Business Meeting, Meeting Minutes (Mar. 20, 2024). Finally, the minutes from the MREC's May 2024 meeting state that "[i]nterview of the Executive Director position begins next week," and that "[t]hree names will be selected and submitted to the Secretary by June." All of this suggests that Ms. Meyers was simply selected to serve as MREC's interim executive director while the more formal process outlined in the Business Occupations and Professions Article took place to select the permanent executive director, and that there was no list of three names selected pursuant to BOP § 17-205 when the complainant requested it in March.⁷ DOL thus responded appropriately under § 4-202(d) to the complainant's first PIA request.

⁶ The MREC's meeting minutes are available on its website. See Maryland Dep't Labor, Agendas and Minutes – Real Estate Comm'n (MREC), <https://labor.maryland.gov/license/min/mrecmin.shtml> (last visited Sept. 16, 2024).

⁷ DOL's response to this complaint appears to imply that the list of three nominees now exists as it states, in a footnote, that DOL is "under no obligation to provide records that did not exist at the time of a request but which may be created or obtained later." While it might be true that a custodian is not required to contact a requester after a PIA request is properly answered to alert them to new records that may be responsive, we would normally encourage a custodian to provide such records in the context of resolving a complaint. Here, however, it might be that § 4-311 operates to preclude disclosure of the list if the names on it are taken from the applications and interviews for the executive director position. See § 4-311 (requiring denial of a "personnel record," including "an application"); see also Letter from Assistant Attorney General Kathryn M. Rowe to Senator Leo E. Green (May 13, 2002) (concluding that the names of applicants for a Board of Education could not be disclosed because they came from "the resumes or applications submitted by those seeking the positions"). We note, as the Assistant Attorney General's letter did, that the Legislature has expressly provided for disclosure of applicant names when it determines it is appropriate to do so. See, e.g., Md. Code Ann., Pub. Util. § 17-103(a)(2) (requiring that the list of applicants for the Washington Suburban Sanitary Commission be "open to the public for inspection from the time the list is prepared until the appointment is made").

As for the complainant's second PIA request, we agree with DOL that it was not really a request for records so much as a series of questions about the appointment of Ms. Meyers to the interim executive director position. However, we think DOL's March 27, 2024, response—that the complainant's request fell “outside the scope of the PIA”—was not entirely correct. To the extent that DOL had public records that answered the questions the complainant posed in her request, DOL would have been obligated to provide them, assuming they were not exempt from disclosure. *See* PIACB 23-23, at 5 n.5 (June 20, 2023). For example, if there was a list of nominees for the executive director position sent by email to the Secretary of Labor, that email record would have been responsive to the complainant's request that DOL provide “the number of nominees . . . along with the day, month, and year they were given to her,” even if some of the information is ultimately exempt from disclosure, *see supra*, note 7. However, as discussed above, we have no reason to doubt DOL's assertion that such a list did not exist in March 2024, when the complainant requested it. A response under § 4-202(d) that no responsive records existed—which the PIA coordinator appears to have sent on March 26, 2024—was appropriate here as well.

Conclusion

After review of the submissions and information from the MREC meeting minutes available on the DOL website, we find that DOL did not improperly deny the complainant's PIA requests, constructively or otherwise. Instead, consistent with § 4-202(d), DOL advised that it had no responsive records.

Public Information Act Compliance Board

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