



University Senate TRANSMITTAL FORM

Senate Document #:	09-10-47
PCC ID #:	NA
Title:	Proposal to Increase Access to Public Records
Presenter:	Gene Ferrick, Chair, Campus Affairs Committee (CAC)
Date of SEC Review:	January 28, 2011
Date of Senate Review:	February 9, 2011
Voting (highlight one):	<ol style="list-style-type: none"> 1. On resolutions or recommendations one by one, or 2. In a single vote 3. To endorse entire report
Statement of Issue:	University policy prescribes that individuals must submit a Freedom of Information Act (FOIA) request via US mail for publicly available information. The standards for submission for many entities is changing to allow for requests to be sent via email or online form, which is more convenient and efficient for the person filing the request. University policy should be amended to accommodate FOIA requests via email or online form.
Relevant Policy # & URL:	VI-5.00(A) UMCP GUIDELINES AND PROCEDURES GOVERNING THE INSPECTION OF PUBLIC RECORDS http://www.president.umd.edu/policies/vi500a.html
Recommendation:	<p>The Campus Affairs Committee (CAC) recommends that the current policy (VI-5.00(A) UMCP GUIDELINES AND PROCEDURES GOVERNING THE INSPECTION OF PUBLIC RECORDS) be amended as follows:</p> <p>IV. Necessity for Written Request</p> <p>A. All requests for inspection of public records shall be in writing, via surface mail or email unless the custodian of the record being requested specifically waives the requirement.</p> <p>B. Requests shall contain the applicant's name, and address, and daytime telephone number or email shall be signed by the applicant in order that the</p>

	<p>custodian may be able to contact the applicant.</p> <p>C. The applicant shall reasonably identify by brief description the record sought.</p> <p>D. The custodian is entitled to seek clarification in writing whenever records are not identified with reasonable specificity, and is not obligated to respond until the request is sufficiently specific to permit identification of the requested record.</p> <p>E. The custodian may inquire as to the purpose of the request, among other reasons, in order to determine if a request is made for commercial purposes pursuant to §10-618(m); when considering whether fees should be waived pursuant to §10-621(e) of the Act; or to assist in identification of the requested record.</p> <p>V. Filing the Request</p> <p>A written request for inspection of a public record shall be sent by surface mail or email United States mail and addressed to the custodian having physical custody and control of the record.</p> <p>The CAC also recommends that a dedicated email address be established to avoid the loss of information requests.</p>
<p>Committee Work:</p>	<p>The CAC was charged by the Senate Executive Committee (SEC) on April 21, 2010 to review the proposal entitled, “Proposal to Increase Access to Public Records” and make recommendations on whether the current policy (VI-5.00(A) UMCP GUIDELINES AND PROCEDURES GOVERNING THE INSPECTION OF PUBLIC RECORDS) should be changed.</p> <p>On May 4, 2010, the CAC began discussion of the charge and current University policy and practices regarding FOIAs. The CAC continued the discussion in the fall at the September 13, 2010 meeting where it was decided to invite a representative from the University’s Legal Office to come speak to the committee.</p> <p>On October 12, 2010, the CAC met with a representative of the Legal Office to discuss the current policy, process for handling these types of requests, and the volume of requests that they receive each week. The committee also discussed the rationale</p>

	<p>for the current process of only allowing that written requests for information be mailed.</p> <p>In subsequent meetings on November 2, 2010 and December 7, 2010 the CAC considered the Legal Office position and the processes of other public institutions such as the University Of Michigan and the University of Virginia, as well as public agencies like the Federal Communications Commission (FCC) and the National Transportation Safety Board (NTSB).</p> <p>At the December 7, 2010 meeting, the CAC considered all the information presented during the fall meetings and agreed it is appropriate for the University to accept information requests in writing via surface mail <i>and</i> email as this is an ‘electronic age’. The recommended amendments to the existing policy VI-5.00(A) UMCP GUIDELINES AND PROCEDURES GOVERNING THE INSPECTION OF PUBLIC RECORDS were approved. The CAC also approved a recommendation that a dedicated email address be established to ease the transition to electronic request and to avoid the loss of requests.</p>
Alternatives:	The policy will remain unchanged.
Risks:	There are no risks.
Financial Implications:	Implementation of a dedicated email address/account will require staff time to develop.
Further Approvals Required: <i>(*Important for PCC Items)</i>	Senate and Presidential approvals are required.

Senate Campus Affairs Committee

Report on Proposal to Increase Access to Public Records

December 2010

Background:

University policy prescribes that individuals must submit a Freedom of Information Act (FOIA) request via US mail for publicly available information. The standards for submission for many entities is changing to allow for requests to be sent via email or online form, which is more convenient and efficient for the person filing the request.

On April 21, 2010 the Senate Executive Committee (SEC) requested that the Campus Affairs Committee (CAC) review the attached charge [Appendix 4] and proposal entitled, "Proposal to Increase Access to Public Records" [Appendix 5] and make recommendations on whether the current policy (VI-5.00(A) UMCP GUIDELINES AND PROCEDURES GOVERNING THE INSPECTION OF PUBLIC RECORDS) [Appendix 1] should be changed.

Committee Work:

The CAC began discussion of the charge and current University policy and practices regarding FOIAs at the May 4, 2010 meeting. The CAC continued the discussion in the fall at the September 13, 2010 meeting where it was decided to invite a representative from the University's Legal Office to come speak to the committee.

At the October 12, 2010 meeting, the CAC invited Jack T. Roach, Executive Assistant to the President for Legal Affairs and Chief Counsel of the University, to discuss the current policy, which derives from the Maryland Public Information Act (PIA) [Appendix 3]. The policy as it is written allows data custodians to permit requests in forms other than written if they wish. The Legal Office only allows written information requests because it is felt that the act of submitting a written request via ground mail will make the requestor develop and submit a more focused request. All requests are sent to the campus legal office to combat confusion and the requests getting lost on campus. Requests go to the Legal Office to verify if the information is privileged or can be made public. The University Legal Office receives around 6-7 requests a week. These requests are not often for one item, but rather multi-part requests and are generally for very specific documents or information. Maryland law provides that the requests be answered within 30 days, federal can allow for up to a year.

The Legal Office requires that written requests for information be mailed for several reasons:

- These requests are not a memo from one person to another,
- The Legal Office is administrating a statute or law
- There are civil penalties against the University if the requests are not handled correctly.
- It also makes the request "crisper" and does not allow for a request to become revolving as it is felt it can with an email due to the immediacy of responses.

Also, requests submitted by mail are an easier method of record keeping, noting when the request was made and when it was completed. Requests can be expensive and the requestor can be given the opportunity to look at documents in person instead of having them sent to avoid expense.

In subsequent meetings on November 2, 2010 and December 7, 2010 the CAC considered the Legal Office position and the processes of other public institutions such as the University of Michigan and the University of Virginia, as well as public agencies like the Federal Communications Commission (FCC) and the National Transportation Safety Board (NTSB). For these organizations, requests can be submitted by email or online form. In some cases very specific guidelines are available online including the costs to be paid by the requestor. (In all cases requestors can be required to pay the cost of obtaining information, which may include copying costs and hourly wages.)

At the December 7, 2010 meeting, the CAC considered all the information presented during its fall meetings and agreed it is appropriate for the University to accept information requests in writing via surface mail *and* email; as this is an ‘electronic age’ and to continue to be in line with other top Institutions the University needs to keep up with the ever advancing technologies made available. The recommended amendments to the existing policy VI-5.00(A) UMCP GUIDELINES AND PROCEDURES GOVERNING THE INSPECTION OF PUBLIC RECORDS were approved [Appendix 2]. Allowing email submission of requests may allow more requests to be submitted. Therefore the CAC also recommends that a dedicated email address be established to ease the transition to electronic request and to avoid the loss of requests. It should be noted that the requestor could be charged the cost of gathering and reporting information at the hourly wage rate of the employee(s) researching the information, as well as the cost of copies.

The CAC does not feel that recommending the development of an online form is appropriate at this time compared to email submissions. Developing such an online form would be an implementation issue and should be at the discretion of the Legal Office.

Recommendation:

The CAC recommends that the current policy (VI-5.00(A) UMCP GUIDELINES AND PROCEDURES GOVERNING THE INSPECTION OF PUBLIC RECORDS) be amended in the following way.

Original text:

IV. Necessity for Written Request

- A. All requests for inspection of public records shall be in writing, unless the custodian of the record being requested specifically waives the requirement.

- B. Requests shall contain the applicant's name and address and shall be signed by the applicant in order that the custodian may be able to contact the applicant.
 - C. The applicant shall reasonably identify by brief description the record sought.
 - D. The custodian is entitled to seek clarification in writing whenever records are not identified with reasonable specificity, and is not obligated to respond until the request is sufficiently specific to permit identification of the requested record.
 - E. The custodian may inquire as to the purpose of the request, among other reasons, in order to determine if a request is made for commercial purposes pursuant to §10-618(m); when considering whether fees should be waived pursuant to §10-621(e) of the Act; or to assist in identification of the requested record.
- V. Filing the Request
- A written request for inspection of a public record shall be sent by United States mail and addressed to the custodian having physical custody and control of the record.

Amended Text:

IV. Necessity for Written Request

- A. All requests for inspection of public records shall be in writing, **via surface mail or email** unless the custodian of the record being requested specifically waives the requirement.
- B. Requests shall contain the applicant's name, ~~and~~ address, and **daytime telephone number or email** ~~shall be signed by the applicant~~ in order that the custodian may be able to contact the applicant.
- C. The applicant shall reasonably identify by brief description the record sought.
- D. The custodian is entitled to seek clarification in writing whenever records are not identified with reasonable specificity, and is not obligated to respond until the request is sufficiently specific to permit identification of the requested record.

- E. The custodian may inquire as to the purpose of the request, among other reasons, in order to determine if a request is made for commercial purposes pursuant to §10-618(m); when considering whether fees should be waived pursuant to §10-621(e) of the Act; or to assist in identification of the requested record.

V. Filing the Request

A written request for inspection of a public record shall be sent by **surface mail or email** ~~United States mail~~ and addressed to the custodian having physical custody and control of the record.

The CAC additionally recommends that the Legal Office, in regards to the amended text of the policy VI-5.00(A), establish a dedicated email address/account for the purpose of receiving all Public Information requests to avoid the loss of any request made via email. The CAC understands that this will require administrative changes for the Legal Office.

Appendices:

- Appendix 1-Current Policy
- Appendix 2- Proposed Amendments to Policy
- Appendix 3- Maryland Public Information Act
- Appendix 4- Charge
- Appendix 5- Proposal

VI-5.00 (A) UNIVERSITY OF MARYLAND GUIDELINES AND PROCEDURES
GOVERNING THE INSPECTION OF PUBLIC RECORDS

APPROVED BY THE PRESIDENT 1 AUGUST 1990; TECHNICAL
AMENDMENTS DECEMBER 11, 2008

I. Policy

It is the policy of the University of Maryland, College Park ("University") to permit the inspection of public records at reasonable times and at a reasonable cost by any person in interest consistent with the Maryland Access to Public Records Act, State Government Article, §10-601 et seq., Annotated Code of Maryland.

II. Definitions

"Act" means the Public Information Act, State Government Article, Annotated Code of Maryland, §10-611 et seq. [1984].

"Applicant" means any person requesting disclosure of a public record.

"Custodian" means any authorized University employee who has physical custody and control of a public record.

"Official Custodian" means the person who is responsible for keeping the public record, whether or not that person has physical custody and control of the public record.

"Person" means any natural person, corporation, partnership, firm, or association, or governmental unit.

"Person in Interest" means:

1. a person, as defined above, who is the subject of a public record or the designee of the person; or
2. if the person has a legal disability, the parent or legal representative of the person.

"Public Record" means the original or any copy of documentary material that:

1. is made or received by the University in connection with the transaction of public business; and
2. is in any form, including a card, a computerized record, correspondence, a drawing, film or microfilm, a form, a map, a photograph or

photostat, a recording, or a tape; and

3. includes a document that lists the salary of an official or employee of the University.

"Personal Record" means any public record that names or with reasonable certainty otherwise identifies an individual by an identifying factor such as address, social security number or other identifying number, description, finger or voice print, or picture.

"Working Day" means any day between the hours of 8:30 a.m. and 4:30 p.m., except Saturday, Sunday, scheduled University holidays, and emergency closings.

III. Persons Entitled to Request Access

Subject to the limitations set forth below and except as otherwise provided by law, the University shall permit any person to inspect or copy any public record in its custody and control.

IV. Necessity for Written Request

- A. All requests for inspection of public records shall be in writing, unless the custodian of the record being requested specifically waives the requirement.
- B. Requests shall contain the applicant's name and address and shall be signed by the applicant in order that the custodian may be able to contact the applicant.
- C. The applicant shall reasonably identify by brief description the record sought.
- D. The custodian is entitled to seek clarification in writing whenever records are not identified with reasonable specificity, and is not obligated to respond until the request is sufficiently specific to permit identification of the requested record.
- E. The custodian may inquire as to the purpose of the request, among other reasons, in order to determine if a request is made for commercial purposes pursuant to §10-618(m); when considering whether fees should be waived pursuant to §10-621(e) of the Act; or to assist in identification of the requested record.

V. Filing the Request

A written request for inspection of a public record shall be sent by United States mail and addressed to the custodian having physical custody and control of the record.

VI. Response to a Request

- A. Upon receipt of a request to inspect or copy public records, the custodian shall make a search for potentially responsive public records, and grant or deny the request promptly within a reasonable period, not to exceed 30 days. The custodian should respond in accordance with the guidelines set forth below, and in consultation with the University's Office of Legal Affairs, as appropriate.
- B. If a requested public record is not in the custody and control of the person to whom the written application is made, that person shall notify the applicant of that fact within 10 working days of receipt of the request, and provide the name of the custodian and the location or possible location of the record, if known.
- C. If a requested public record does not exist or has been destroyed or lost, the custodian shall notify the applicant of that fact.
- D. In the event a request to inspect or copy a public record is denied, within 10 working days of the denial the custodian shall provide the applicant with a written statement that includes the following:
 - 1. the reasons for the denial;
 - 2. the legal authority for the denial; and
 - 3. notification of the right to seek judicial review in accordance with §10-623 of the Act.

This 10 day period is in addition to the maximum 30 day period for granting or denying a request.

- E. Inspection of any reasonably severable portion of a record shall be permitted after redaction of those portions that may be withheld from disclosure.
- F. With the consent of the applicant, any time period for response may be extended for up to 30 additional calendar days.
- G. The University has no obligation under the Act to

perform research or create records to satisfy a request for inspection and copying. Nor does the Act require the University to provide information in a format other than that which is, in fact, the existing record.

- H. Unless prohibited by law, the custodian may, in his or her discretion, notify any person in interest that a request for inspection of a public record has been made.

VII. Guidelines for Determining Access

A. Denial of Access

The custodian shall deny access to the following records as required by §10-615 through §10-617 of the Act:

1. letters of reference for employees and students;
2. library circulation records;
3. library, archival, or museum material given by a donor who limits disclosure as a condition of the gift;
4. sociological information if the custodian has adopted rules or regulations defining the term;
5. confidential commercial, financial, geological or geophysical information or trade secret provided by or obtained from another;
6. public employees' home addresses or telephone numbers, unless permission is given or inspection is deemed necessary to protect the public interest;
7. information about the security of an information system;
8. student educational records;

NOTE: Disclosure is restricted by the Federal Family Educational Rights and Privacy Act; the UNIVERSITY POLICY ON CONFIDENTIALITY AND DISCLOSURE OF STUDENT RECORDS should be consulted.

9. retirement records;

NOTE: Inspection is permitted by the person in

interest; the appointing authority of the individual; after the death of the individual by a beneficiary, or personal representative; and by any law enforcement agency in order to obtain the home address of a retired employee when contact with the retired employee is deemed necessary for official agency business.

10. personnel records.

NOTE: Inspection is permitted by the person in interest; or an elected or appointed official who supervises the work of the individual.

B. Permissible Denials

Unless otherwise provided by law, a custodian may deny inspection of part of the following public records if it is believed that inspection would be contrary to the public interest:

1. inter-agency and intra-agency documents that would not be available by law to a private party in litigation;
2. examinations including test questions, scoring keys;

NOTE: A person in interest may inspect an examination after it has been given and graded, but may not copy the document.

3. research projects, except the name, title, expenditures and date when the final project summary will be available;
4. appraisals of University owned real property;
5. records of investigations by the Attorney General, a State's Attorney, a city or county attorney, a police department or a sheriff.

C. Temporary Denials

If the custodian of a public record believes that inspection would cause substantial injury to the public interest, inspection may be denied temporarily even if the document is one which is authorized for inspection under the Act.

NOTE: The custodian should contact the President's

Legal Office for guidance.

VIII. Review of a Denial

Judicial Review

If the custodian denies an applicant's request, the applicant may file a complaint with the circuit court for the county where the applicant resides or has a principal place of business; or the public record is located.

IX. Inspection

A. Time of Inspection

Access is generally allowed during normal working hours at the University, as defined above. At the discretion of the custodian, a reasonable date and time may be specified to prevent undue interference with University business.

B. Place of Inspection

The record shall be inspected at the location where it is normally kept, unless the custodian determines that another place of inspection is more suitable.

C. Costs

1. The custodian may charge fees to compensate for the direct and indirect costs incurred by the University in making the documents available for inspection or copying, including reimbursement for labor, materials, and travel expenses incurred in searching, reviewing, preparing, copying and refiling documents. Labor cost shall be based on the hourly rate and associated benefits of the personnel involved. The custodian may not charge for the first two hours needed to search for a public record and prepare it for inspection or copying, provided, however, that in accounting for this time, serial requests from the same applicant for the same or related records shall be considered as one request.
2. In addition to charging fees for labor costs, when the applicant requests a copy of a public record, the University shall charge 25 cents a page to cover direct and indirect material costs of copying the document using a University photocopy machine.

3. If a copy of a record cannot be made using a University photocopy machine, the custodian shall make arrangements for reproduction to occur outside the institution, provided, however, at no time shall custody of the records be given to an applicant for this purpose. The applicant shall be charged the actual costs charged by the non-University copying service.
4. If the applicant requests that copies be mailed or delivered, the University shall charge the applicant the cost of postage or delivery.
5. An applicant should be informed of the estimated costs of search, preparation, and copying and shall be required to pay the estimated costs, unless de minimus, prior to the University taking further action to respond to the request. The applicant shall be refunded the difference, if any, between the estimated and actual costs.
6. The custodian may waive the fee for searching, preparation, or copying if: (i) the applicant requests a waiver and, (ii) after consideration of the ability of the applicant to pay the fee and other relevant factors, the custodian determines that the waiver would be in the public interest.

NOTE: THE PROCEDURES SET FORTH ABOVE DO NOT APPLY TO REQUESTS FOR INFORMATION CONTAINED IN SUBPOENAS OR SOUGHT BY GOVERNMENTAL AGENCIES PURSUANT TO INVESTIGATIONS OR AUDITS.

Proposed Amendments to Policy

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3. includes a document that lists the salary of an official or employee of the University.

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VI. Response to a Request

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- B. If a requested public record is not in the custody and control of the person to whom the written application is made, that person shall notify the applicant of that fact within 10 working days of receipt of the request, and provide the name of the custodian and the location or possible location of the record, if known.
- C. If a requested public record does not exist or has been destroyed or lost, the custodian shall notify the applicant of that fact.
- D. In the event a request to inspect or copy a public record is denied, within 10 working days of the denial the custodian shall provide the applicant with a written statement that includes the following:
1. the reasons for the denial;
 2. the legal authority for the denial; and
 3. notification of the right to seek judicial review in accordance with §10-623 of the Act.

This 10 day period is in addition to the maximum 30 day period for granting or denying a request.

- E. Inspection of any reasonably severable portion of a record shall be permitted after redaction of those portions that may be withheld from disclosure.
- F. With the consent of the applicant, any time period for response may be extended for up to 30 additional calendar days.
- G. The University has no obligation under the Act to perform research or create records to satisfy a request for inspection and copying. Nor does the Act require the University to provide information in a format other than that which is, in fact,

CHAPTER 4: REQUEST PROCEDURES

A. *Written Request*

The PIA envisions a written request. SG §10-614. However, types of records predesignated for immediate release under SG §10-613(c) are to be made available without need for a written request. SG §10-614(a)(2)(i). Furthermore, the agency may waive the requirement for a written application. SG §10-614(a)(2)(ii). An agency need not and should not demand written requests for inspection of agency documents when there is no question that the public has a right to inspect them. For example, an agency's annual report and the agency's quarterly statistics are clearly open to the public for inspection. In other instances, a written request or the completion of an agency request form may help expedite fulfillment of the request when less commonly requested records are sought. A request expressing a desire to inspect or copy agency records may be sufficient to trigger the PIA's requirements, even if it does not expressly mention the words "Public Information Act" or cite the applicable sections of the State Government Article.

In general, there is no requirement that the applicant give the reason for a request or identify him or herself, although he or she is certainly free to do so. The reasons that the information is sought are generally not relevant. *See Moberly v. Herboldsheimer*, 276 Md. at 227; 61 *Opinions of the Attorney General* 702, 709 (1976). These reasons might be pertinent, however, if the applicant seeks a waiver of fees. *See* Chapter II.G above. The identity of an applicant is relevant if he or she is seeking access in one of the particular situations where the PIA gives a "person in interest" special rights of access. Knowledge of the purpose of the request may sometimes assist a custodian who is required under SG §10-618 to make a "public interest" determination prior to releasing a record. *See* SG §10-614(c)(2)(i). In addition, a public institution of higher education has a right to know whether a requester seeking students' personal information is seeking records for a commercial purpose. SG §10-618(m).

The request must sufficiently identify the records that the applicant seeks. *See* Letter of advice to Deborah Byrd, Dorchester County Commissioner's Office, from Assistant

Attorney General Kimberly Smith Ward (May 7, 1996) (PIA request must sufficiently identify records so as to notify agency of records that the applicant wishes disclosed). *See also Sears v. Gottschalk*, 502 F.2d 122 (4th Cir. 1974), *cert. denied*, 422 U.S. 1056 (1975) (FOIA calls for reasonable description, enabling government employee to locate requested records). In some instances, applicants may have only limited knowledge of the types of records the agency has and may not be able to describe precisely the records they seek. An agency may appropriately assist an applicant to clarify a request when feasible.

Generally, an agency may not require the Legislative Auditor to submit a written request pursuant to the PIA. However, if an employee of the Legislative Auditor requests information from an agency that is not the subject of the audit without stating an organizational affiliation and without invoking the powers granted under the audit statute (SG §§2-1217 to 2-1227), the agency that receives the request should treat it as a request subject to all of the procedures of the PIA, including the requirement of a written application. *76 Opinions of the Attorney General* 287 (1991).

B. Time for Response

Under SG §10-614(b)(2), if a record is found to be responsive to a request and is recognized to be open to inspection, it must be produced “immediately” after receipt of the written request. An additional reasonable period “not to exceed 30 days” is available only where the additional period of time is required to retrieve the records and assess their status under the PIA. A custodian should not wait the full 30 days to allow or deny access to a record if that amount of time is not needed to respond. If access is to be granted, the record should be produced for inspection and copying promptly after the written request is evaluated. Similarly, when access to a record is denied, the custodian is to “immediately” notify the applicant. SG §10-614(b)(3)(i). Within ten working days after the denial, the custodian must provide the applicant with a written statement in accordance with SG §10-614(b)(3)(ii). This 10-day period is in addition to the maximum 30-day or (with an agreed extension) 60-day periods for granting or denying a request. *Stromberg Metal Works, Inc. v. University of Maryland*, 382 Md. 151, 158-59, 854 A.2d 1220 (2004). However, in practice, the denial and explanation generally are provided as part of a single response.

There appears to be some conflict between the “immediate” access requirement of SG §10-614(b)(2) and the 30 days allowed to grant or deny a request by SG §10-614(b)(1). This conflict is resolved, however, if the custodian immediately grants access where the right to access is clear. If the custodian, after an initial review of the records, determines that there is a question about the applicant’s right to inspect them, then a period of up to 30 days may

be used to determine whether a denial is authorized and appropriate. If the problem is that the request is unclear or unreasonably broad, the custodian should promptly ask the applicant to clarify or narrow the request. The custodian should not wait the full 30 days and deny the request only because it is unclear or unreasonably broad.

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

A troubling question is presented where the custodian, acting in good faith, is unable to comply with the time limits set by the PIA. For example, a custodian may have trouble retrieving old records and then, after retrieval, may find that portions of the records must be deleted to protect confidential material from disclosure. Even with due diligence, the custodian may be unable to comply with the request within the time limits set by the PIA. If an extension is not obtainable under SG §10-614(b)(4), the custodian should make the best good faith response possible by: (1) allowing inspection of any portion of the records that are currently available; and (2) informing the applicant, within the imposed time limit, of the reasons for the delay and an estimated date when the agency's review will be complete.

This course should be followed only when it is impracticable for the custodian to comply with the PIA's time limits. Every effort should be made to follow the PIA's time limits. Under FOIA, if an agency can show that exceptional circumstances exist and that it is exercising due diligence in responding to a request, courts have allowed the agency additional time. *See Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976) (court allowed FBI to handle large volume of requests for information by fulfilling requests on a first-in, first-out basis even though statutory time limits were exceeded). *See also Exner v. FBI*, 542 F.2d 1121 (9th Cir. 1976); *Hayden v. Department of Justice*, 413 F. Supp. 1285 (D.D.C. 1976). Other courts have resisted agency efforts to maintain a routine backlog of FOIA requests. *See Ray v. Department of Justice*, 770 F. Supp. 1544 (S.D. Fla. 1990) (routine administrative backlog of requests for records did not constitute "exceptional circumstances" allowing agency to respond outside FOIA's 10-day requirement). *Accord, Mayoock v. INS*, 714 F. Supp. 1588 (N.D. Cal. 1989), *rev'd*, 938 F.2d 1006 (9th Cir. 1990).

While the time limits in the PIA are important and an agency or custodian may be sanctioned in a variety of ways under the statute for a failure to comply, an agency's failure to respond within the statutory deadlines does not waive applicable exemptions under the

Act. “[T]he custodian [is not] required to disgorge records that the Legislature has declared should not be disclosed simply because the custodian did not communicate his/her decision in a timely manner.” *Stromberg Metal Works Inc. v. University of Maryland*, 382 Md. 151, 161, 854 A.2d 1220 (2004).

C. *Records Not in Custodian’s Custody or Control*

If a written request for access to a record is made to a person who is not the custodian, that person must, within 10 working days of the receipt of the request, notify the applicant of this fact and, if known, the actual custodian of the record and the location or possible location of the record. SG §10-614(a)(2).

D. *Written Denial*

When a request is denied, the custodian must provide, within 10 working days, a written statement of the reasons for the denial, the legal authority for the denial, and notice of the remedies for review of the denial. SG §10-614(b)(3)(ii); *City of Frederick v. Randall Family, LLC*, 154 Md. App. 543, 841 A.2d 10 (2004) (denial letter was legally deficient as it that failed to explain reason for denying access under SG §10-618(f)(1) in connection with closed investigation). A sample denial letter is contained in Appendix B. An index of withheld documents is not required at the administrative denial stage, so long as the letter complies with SG §10-614(b)(3)(ii). Generally, a denial letter should be reviewed by the agency’s legal counsel before it is sent out to ensure that the denial is correct as a matter of law and to ensure that the three elements in SG §10-614(b)(3)(ii) are adequately and correctly stated in the letter.

Before sending a denial letter and after consulting with counsel, a custodian may consider negotiating with the applicant or the applicant’s attorney. The applicant may wish to withdraw or limit the part of the request that is giving the agency difficulty and thus avoid the need for a formal denial.

E. *Administrative Review*

If an agency is subject to the “contested case” provisions of the Administrative Procedure Act, Title 10, Subtitle 2 of the State Government Article, the agency must provide the applicant with the opportunity for an administrative review in accordance with contested case hearing procedures. The PIA requires that any applicant who makes a request be given an APA hearing, despite the fact that it often makes little sense to have such a hearing.

Adjudicatory hearings of this type are most appropriate for factual disputes, whereas the issue in a PIA denial is usually one of law (*e.g.* the scope of a statutory exception) that the agency should have fully considered prior to the denial. Nevertheless, the PIA is explicit, and denial letters from agencies subject to APA contested case provisions should indicate this procedure as an available remedy for review.

By the express terms of SG §10-622(c), however, the applicant does not have to exhaust administrative remedies under the APA before seeking judicial review under SG §10-623. Similarly, a prisoner need not exhaust administrative remedies under Prisoner Litigation Act before filing civil action in circuit court in connection with PIA request relating to conditions of confinement. *Massey v. Galley*, 392 Md. 634, 898 A.2d 951 (2006).

F. Judicial Enforcement

The PIA provides for judicial enforcement of the rights provided under the Act. SG §10-623. It calls for a suit in the circuit court to “enjoin” an entity, official, or employee from withholding records and order the production of records improperly withheld. Literally, SG §10-623 refers only to persons denied “the right to inspect” a record. It does not explicitly refer to the right to obtain copies. Despite this oversight, it is likely that a court would construe SG §10-623 to provide for judicial scrutiny of an agency’s refusal to provide copies.

1. Limitations

The Court of Special Appeals has held that actions for judicial review under SG §10-623 of the PIA are controlled by §5-110 of the Courts and Judicial Proceedings Article, which has a two-year limitations period, rather than by former Rule B4, which would require the action to be brought within 30 days. The Court did not decide whether proceedings under SG §10-623 are subject to any other rules governing administrative appeals. *Kline v. Fuller*, 56 Md. App. 294, 467 A.2d 786 (1983). Given that a requester may make a new PIA request after a period of limitations has expired concerning the denial of a prior request, the Court of Special Appeals has characterized the two-year limitations period as of “minuscule significance.” *Blythe v. State*, 161 Md. App 492, 512, 870 A.2d 1246, (2005).

2. Procedural Issues

- **Venue.** Venue is proper where the complainant resides or has a principal place of business or where the records are located. SG §10-623(a)(1). *See Attorney Grievance Commission v. A.S. Abell*, 294 Md. 680, 452 A.2d 656 (1982).
- **Answer.** The defendant must answer or otherwise plead within 30 days after service, unless the time period is expanded for good cause shown. SG §10-623(b).
- **Expedited hearing.** SG §10-623(c)(1) provides for expedited court proceedings in PIA cases. The agency and counsel should cooperate if the plaintiff seeks a quick judicial determination.
- **Intervention.** In some cases, it may be appropriate for a third party to intervene in an action for disclosure. For example, if the issue is the release of investigatory, financial, or similar records, the person who is the subject of the records may wish to intervene under Maryland Rule 2-214. In an appropriate case, particularly one involving confidential business records, the agency should consider inviting affected persons to intervene. An affected person's failure to seek intervention may itself be an indication that the records are not truly confidential.

3. Agency Burden

The burden is on the entity or official withholding a record to sustain its action. SG §10-623(b)(2)(i). If the custodian invokes the agency memoranda exception, however, and the trial court determines that one of the privileges embraced within that exemption applies, the custodian will have met the burden of showing that disclosure would be contrary to the public interest. *Cranford v. Montgomery County*, 300 Md. 759, 776, 481 A.2d 229 (1984). The PIA specifically provides that the defendant custodian may submit a memorandum to the court justifying the denial. SG §10-623(b)(2)(ii). *Cranford* discusses the level of detail necessary to support a denial of access.

To satisfy the statutory burden, an entity or official withholding a record must put forth evidence sufficient to justify the decision. In some circumstances, a court may require the agency to file a *Vaughn* index (named after the *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973)) detailing each record withheld or redacted by author, date, and recipient, stating the

particular exemption claimed, and providing enough information about the subject matter to permit the requester and court to test the justification of the withholding. *See Blythe v. State*, 161 Md. App. 492, 521, 870 A.2d 1246, *cert. granted*, 388 Md. 97, 879 A.2d 42 (2005).

A regulatory agency that denies a person in interest access to an investigatory file under SG §10-618(f)(1)(ii) must establish first, that the file was compiled for a law enforcement purpose and second, that disclosure would have a prejudicial effect under SG §10-618(f)(2). *Fioretti v. State Board of Dental Examiners*, 351 Md. 66, 716 A. 2d 258 (1998) (holding in plaintiff's favor because the agency failed to support its motion to dismiss with affidavits, a summary of the file, or other relevant evidence).


In contrast, a law enforcement agency enumerated under SG §10-618(f)(1)(i) is presumed to have compiled an investigatory file for law enforcement purposes. *Blythe v. State*, 161 Md. App. 492, 525-26, n.6, 870 A.2d 1246, *cert. granted*, 388 Md. 97, 879 A.2d 42 (2005). Because a generic determination of interference with a pending investigation can be made, a “*Vaughn* index” listing each document, its author, date, and general subject matter, and the basis for withholding the document, is not required. *See Office of the State Prosecutor v. Judicial Watch, Inc.*, 356 Md. 118, 737 A.2d 592 (1999).

However, the custodian nevertheless bears the burden of “demonstrating, with particularity and not in purely conclusory terms, precisely why the disclosure [of an investigatory record] ‘would be contrary to the public interest’” and exploring the feasibility of severing a record “into disclosable and non-disclosable parts.” *Blythe v. State*, 161 Md. App. 492, 527, 870 A.2d 1246, *cert. granted*, 388 Md. 97, 879 A.2d 42 (2005).

The court may examine the questioned records *in camera* to determine whether an exception applies. SG §10-623(c)(2). *See Equitable Trust Co. v. State Comm’n on Human Relations*, 42 Md. App. 53, 399 A.2d 908 (1979), *rev’d on other grounds*, 287 Md. 80, 411 A.2d 86 (1980). SG §10-623(c)(2), allowing *in camera* inspection, is discretionary, not mandatory. Whether an *in camera* inspection will be made ultimately depends on whether the trial judge believes that it is needed to make a responsible determination on claims of exemption. *Cranford v. Montgomery County*, 300 Md. 759, 779, 481 A.2d 221, 231 (1984). *See also Zaal v. State*, 326 Md. 54, 602 A.2d 1247 (1992), where the Court discussed alternative approaches to protect sensitive records.



University Senate CHARGE

Date:	April 21, 2010
To:	Edward Walters Chair, Campus Affairs
From:	Elise Miller-Hooks Chair, University Senate 
Subject:	Proposal to Increase Access to Public Records
Senate Document #:	09-10-47
Deadline:	December 1, 2010

The Senate Executive Committee (SEC) requests that the Campus Affairs Committee review the attached proposal entitled, "Proposal to Increase Access to Public Records" and make recommendations on whether the current policy (VI-5.00(A) UMCP GUIDELINES AND PROCEDURES GOVERNING THE INSPECTION OF PUBLIC RECORDS) should be changed.

The SEC would like the Campus Affairs Committee to review the relevant policy and comment on whether the process for submission of Freedom of Information Act (FOIA) requests should be changed. Specifically, the committee should note whether the policy should be amended to accommodate FOIA requests via email or online form submissions. In the course of your review, we ask that you compare our current process for such requests to those at our peer institutions. In addition, we request that the committee consult with the University's Legal Office before making any recommendations.

We ask that you submit your report and recommendations to the Senate Office no later than December 1, 2010. If you have questions or need assistance, please contact Reka Montfort in the Senate Office, extension 5-5804.



University Senate PROPOSAL FORM

Name:	Jonathan Sachs
Date:	April 6, 2010
Title of Proposal:	Proposal to Increase Access to Public Records
Phone Number:	301-244-8320
Email Address:	ajsachs@umd.edu
Campus Address:	Commons 1407C
Unit/Department/College:	BSOS
Constituency (faculty, staff, undergraduate, graduate):	Undergraduate
Description of issue/concern/policy in question:	<p>Currently, University policy prescribes that individuals must submit a Freedom of Information Act (FOIA) request via US mail. The standards for submission for many entities is changing to allow for requests to be sent via e-mail or online form, which is more convenient and efficient for the person filing the request. I believe that University policy should be amended to accommodate FOIA requests via e-mail.</p>
Description of action/changes you would like to see implemented and why:	<p>Section V, "Filing the Request" of the University's FOIA policy (http://www.president.umd.edu/policies/vi500a.html) needs to be changed to allow for e-mail requests or requests via online form to be accepted. Online submissions have many advantages including cost, speed, and convenience for the requestor.</p> <p>After speaking to the President's Chief of Staff, Sally Koblinsky, it is clear that a system must be developed to accept requests online that will finalize the request, and verifies the requestor's identity. It is my goal to reform the policy, while not bringing unreasonable burden on the University's Chief Council.</p>

Suggestions for how your proposal could be put into practice:	Many government agencies including the NTSB (http://www.nts.gov/pubmail/pubmail.asp) and the FCC (http://www.fcc.gov/foia/) have online forms that can accommodate FOIA requests, as examples. The University could implement a similar system to these agencies or simply allow e-mail requests to be accepted.
Additional Information:	None.

Please send your completed form and any supporting documents to senate-admin@umd.edu or University of Maryland Senate Office, 1100 Marie Mount Hall, College Park, MD 20742-7541. Thank you!