



MEMORANDUM

TO: MLDS Governing Board

FROM: Ross Goldstein

DATE: November 20, 2017

SUBJECT:

Purpose

The purpose of this agenda item is the final adoption of the amendments to COMAR 14.36.01 and .04 governing the Center's implementation of Public Information Act requests and longitudinal data requests.

Background

These proposed regulations were unanimously approved at the June 2017 Governing Board meeting. The regulations were submitted to the Division of State Documents, reviewed by the Administrative, Executive and Legislative Review (AELR) Committee, and published in the Maryland Register for public comment. No public comments were received. Below is a repeat of the explanation of the effect of the amendments and the reason they are needed.

These proposed amendments to the regulations are necessary for the Center to be in compliance with the Public Information Act (PIA). The current version of the regulations state that a longitudinal data request under COMAR 14.36.04 are separate from and are not subject to PIA. The rationale for this conclusion is based on the fact that PIA does not obligate an agency to create a record in response to a request if the record does not already exist. In the case of a longitudinal data request, the requested aggregate data set does not exist prior to the request and therefore requires the Center to compile the requested data. The issue is whether this compilation constitutes "creating a record" for purposes of PIA. According to Dawn O'Croinin, Assistant Attorney General and counsel to the Governing Board and the Center, compiling an electronic record does not constitute creating a new public record. Ms. O'Croinin's view is supported by state law, a 2014 opinion of the Maryland Court of Appeals, and the recently revised *Maryland Public Information Act Manual (14th Ed. – October 2015)*. The Manual includes the following discussion of the issue of compiling electronic records in response to a PIA request.

In the past, agencies sometimes declined to fulfill such requests on the basis of authority from other jurisdictions that public records acts do not require an agency to "reprogram" its computers to respond to a request. See *Yeager v. DEA*, 678 F.2d 315, 324 (D.C. Cir. 1982). In 2011, the General Assembly addressed this question in legislation concerning access to electronic records under the PIA. 2011 Md. Laws, ch. 536; see pp. 6-2 through 6-4 below. In a provision obligating a custodian of records to provide a copy

of an electronic record in a “searchable and analyzable electronic format,” the General Assembly indicated that the custodian was not required to “create, compile, or program a new public record.” GP § 4-205(c)(4)(i). The 2011 law also provided that, “if a public record exists in a searchable and analyzable electronic format, the act of a custodian providing a portion of the public record in a searchable and analyzable electronic format does not constitute creating a new public record.” GP § 4-205(c)(5). Application of this provision will depend on the nature and characteristics of particular databases, but generally speaking, an agency is obligated to extract data from an existing database if it has the capacity to do so “within [its] existing functionality and in the normal course.” *Comptroller of the Treasury v. Immanuel*, 216 Md. App. 259, 271 (2014). So, an agency should comply with a request if it has staff available who routinely perform the type of data extraction requested, but need not do so if it would call for expertise outside the agency’s existing capabilities. Nor must the agency comply with requests that call for it to generate new data or analyze or summarize data. 216 Md. App. at 271-72 (requiring Comptroller to extract data from database of unclaimed property). (page 2-3 – 2-4)

Applying the above standards to the longitudinal data requests explains why the longitudinal data requests are subject to PIA.

1. An agency is obligated to extract data from an existing database if it has the capacity to do so within its existing functionality and in the normal course. The Center’s system has the existing functionality to extract data in response to longitudinal data requests in the normal course of its operations.
2. Is there staff available who routinely perform the type of data extraction requested. The Center employs staff who perform the type of data extraction necessary for a longitudinal data requests.
3. Does the electronic request call for the agency to generate new data or analyze or summarize data. The longitudinal data requests do not require new data or the analysis of data. State law does require all output from the Center to be aggregate data sets. Aggregating data does not constitute summarizing the data. A summary is a brief statement or account of the main points of something, which entails some degree of analysis and discretion. In comparison, an aggregation is the formation of a number of things into a group or cluster. Aggregating data in response to a longitudinal data request does not require analysis or discretion on the part of the Center in response to the request.

A similar set of proposed amendments were approved by the Board over a year ago. Final action was never taken on those regulations. Instead of seeking final adoption at this time, the decision was made to restart the process to give the Board and its new members the opportunity to fully review, consider, and comment on these changes.

Proposed Changes

The following is a list of the proposed amendments to COMAR 14.36.01 and .04.

1. Authority – As a result of code revision, the provisions of the Public Information Act were moved from the State Government Article to the new General Provisions Article and were renumbered and reorganized. The statutory citations to the PIA throughout Chapters 01 and 04 of the regulations have been updated accordingly.

2. The definition of public record in COMAR 14.36.01.03B(9) included the statement that a public record does not include longitudinal data sets. That statement is being deleted because, as discussed above, longitudinal data sets are public records and are subject to PIA.
3. COMAR 14.36.04.01C states that longitudinal data requests should be for a specific purpose. Under PIA, requests are not required to satisfy a particular purpose or goal and therefore the provision is being deleted.
4. COMAR 14.36.04.04., requires an individual seeking a longitudinal data set to complete an affidavit agreeing not to use the information for commercial solicitation, marketing, or any form of financial gain. That regulation is being deleted. Since longitudinal data requests fall under PIA, the Center cannot place conditions or limitations on the use of the information.
5. COMAR 14.36.04.05 removes the detailed fee information and replaces it with the requirement that the Executive Director assess fees for data requests in accordance with COMAR 14.36.01.15. Referring to the PIA fee provisions provides consistency and removes repetition.

Requested Action

Governing Board final approval to adopt the proposed regulations is requested.

Maryland Register



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Pursuant to State Government Article, §7-206, Annotated Code of Maryland, this issue contains all previously unpublished documents required to be published, and filed on or before July 31, 2017 5 p.m.

Pursuant to State Government Article, §7-206, Annotated Code of Maryland, I hereby certify that this issue contains all documents required to be codified as of July 31, 2017.

Gail S. Klakring
Acting Administrator, Division of State Documents
Office of the Secretary of State



Information About the Maryland Register and COMAR

MARYLAND REGISTER

The Maryland Register is an official State publication published every other week throughout the year. A cumulative index is published quarterly.

The Maryland Register is the temporary supplement to the Code of Maryland Regulations. Any change to the text of regulations published in COMAR, whether by adoption, amendment, repeal, or emergency action, must first be published in the Register.

The following information is also published regularly in the Register:

- Governor's Executive Orders
- Attorney General's Opinions in full text
- Open Meetings Compliance Board Opinions in full text
- State Ethics Commission Opinions in full text
- Court Rules
- District Court Administrative Memoranda
- Courts of Appeal Hearing Calendars
- Agency Hearing and Meeting Notices
- Synopses of Bills Introduced and Enacted by the General Assembly
- Other documents considered to be in the public interest

CITATION TO THE MARYLAND REGISTER

The Maryland Register is cited by volume, issue, page number, and date. Example:

- 19:8 Md. R. 815—817 (April 17, 1992) refers to Volume 19, Issue 8, pages 815—817 of the Maryland Register issued on April 17, 1992.

CODE OF MARYLAND REGULATIONS (COMAR)

COMAR is the official compilation of all regulations issued by agencies of the State of Maryland. The Maryland Register is COMAR's temporary supplement, printing all changes to regulations as soon as they occur. At least once annually, the changes to regulations printed in the Maryland Register are incorporated into COMAR by means of permanent supplements.

CITATION TO COMAR REGULATIONS

(ii) Witnessed by the individual's counsel.

E. Findings and Conclusions. After the evidence and testimony are presented, and following summation and argument by the parties, the ALJ shall:

- (1) Consider all evidence and testimony of record;
- (2) Rule on issues raised by the individual that relate to the admission of the individual into the program;
- (3) Order the individual released into the program if the inpatient facility has met its burden of proof establishing that the individual meets the program admission criteria under Regulation .05 of this chapter; and
- (4) State on the record the:
 - (a) Findings, including whether the individual waived the right to attend the hearing;
 - (b) Conclusions of law on any issue presented; and
 - (c) Right of the individual to judicial review of the decision of the ALJ under State Government Article, §10-222, Annotated Code of Maryland, and the procedure for requesting judicial review.

.10 Orders.

A. An order shall:

- (1) Specify that each of the admission criteria has been met;
- (2) Order the individual to adhere to program recommendations including a treatment plan or support services, or both, as needed by the individual; and
- (3) Specify the date on which the order shall expire.

B. An order issued under this chapter shall expire at the end of the 180-day period beginning with the individual's initial inpatient commitment under Health-General Article, §10-632, Annotated Code of Maryland.

.11 Settlement Conference.

A. Before the hearing, if the individual elects to participate in the program voluntarily, the ALJ shall convene a settlement conference at the time, date, and place designated for the hearing.

B. The settlement conference shall include the individual, the legal service provider, and a representative of the inpatient facility.

C. In order for the individual to be voluntarily admitted to the program, the individual shall sign the settlement agreement and agree to adhere to program recommendations including a treatment plan or support services, or both, as needed by the individual.

D. The settlement agreement shall be witnessed by the ALJ.

.12 Discharge from the Program.

A. Before Discharge. Before the expiration of the program order, the Administration shall ensure that a transition plan is in place which provides the outpatient services necessary to support the individual in the community.

B. Early Discharge. The Administration may discharge an individual from the program prior to the expiration of the program order upon finding that the individual is:

- (1) Not likely a danger to self or others without the order; and
- (2) Compliant with the treatment plan and is likely to remain compliant in the future without the order.

C. After Discharge. Following the discharge of a patient from the program, the Administration shall monitor the transition of the individual from the program to voluntary community services for 60 days.

.13 Relation to Other Admission Provisions.

A. Nothing in this chapter prevents the admission to a hospital pursuant Health-General Article, §10-601 et seq., Annotated Code of Maryland, of an individual participating in the Program.

B. An individual's participation in the program does not prohibit the individual's evaluation and involuntary admission under Health-General Article, §10-601 et seq., Annotated Code of Maryland.

.14 Effective Date.

This chapter is effective July 1, 2017.

DENNIS SCHRADER
Secretary of Health

Title 14 INDEPENDENT AGENCIES

Subtitle 36 MARYLAND LONGITUDINAL DATA SYSTEM CENTER

Notice of Proposed Action

[17-218-P]

The Maryland Longitudinal Data System Governing Board proposes to:

- (1) Amend Regulations .03 and .13 under **COMAR 14.36.01 Inspection and Copying of Public Records**; and
- (2) Amend Regulation .01, repeal Regulation .04, recodify existing Regulations .05 and .08 to be Regulations .04 and .07, respectively, and amend and recodify Regulations .06 and .07 to be Regulations .05 and .06, respectively, under **COMAR 14.36.04 Longitudinal Data Requests**.

This action was considered at the June 9, 2017, meeting of the Maryland Longitudinal Data System Governing Board.

Statement of Purpose

The purpose of this action is to amend the Center's regulations to be in compliance with the Public Information Act (PIA). Specifically, the regulations currently state that a longitudinal data request is separate from and not subject to PIA. However, compiling electronic records in response to a longitudinal data request has been determined to fall under PIA and therefore provisions that treat the longitudinal data requests in a manner inconsistent with PIA are removed.

Comparison to Federal Standards

There is no corresponding federal standard to this proposed action.

Estimate of Economic Impact

The proposed action has no economic impact.

Economic Impact on Small Businesses

The proposed action has minimal or no economic impact on small businesses.

Impact on Individuals with Disabilities

The proposed action has no impact on individuals with disabilities.

Opportunity for Public Comment

Comments may be sent to Ross Goldstein, Executive Director, Maryland Longitudinal Data System Center, 525 West Redwood Street, Baltimore, MD 20201, or call 410-706-2085, or email to ross.goldstein@maryland.gov. Comments will be accepted through September, 18, 2017. A public hearing has not been scheduled.

Open Meeting

Final action on the proposal will be considered by Maryland Longitudinal Data System Governing Board during a public meeting to be held on September 8, 2017, 9a.m. to 12 p.m., at Nancy S. Grasmick Building, MSDE Board Room, 7th Floor, Baltimore, MD 21201.

14.36.01 Inspection and Copying of Public Records

Authority: Education Article, §§24-703 and 24-706; [State Government Article, §§10-611, 10-612, 10-613(b), 10-615(2)(i), 10-621, and 10-625] *General Provisions Article, Title 4*; Annotated Code of Maryland

.03 Definitions.

A. (proposed text unchanged)

B. Terms Defined.

(1) "Act" means the Public Information Act, [State Government Article, §§10-611—10-628] *General Provisions Article, Title 4*, Annotated Code of Maryland.

(2) "Applicant" has the meaning stated in [State Government Article, §10-611(b),] *General Provisions Article, §4-101(b)*, Annotated Code of Maryland.

(3) (proposed text unchanged)

(4) "Custodian" has the meaning stated in [State Government Article, §10-611(c),] *General Provisions Article, §4-101(d)*, Annotated Code of Maryland.

(5) — (6) (proposed text unchanged)

(7) "Official custodian" has the meaning stated in [State Government Article, §10-611(d),] *General Provisions Article, §4-101(f)*, Annotated Code of Maryland.

(8) (proposed text unchanged)

(9) [Public Record.

(a) "Public record" has the meaning stated in [State Government Article, §10-611(g),] *General Provisions Article, §4-101(j)*, Annotated Code of Maryland.

[(b) "Public record" does not include data sets that are created and generated by the Center to respond to a longitudinal data request pursuant to Education Article, §24-703(f)(6), Annotated Code of Maryland.]

(10) (proposed text unchanged)

.13 Review of Denial.

A. If the custodian denies a request to inspect or copy a public record of the Office, the applicant may [, within 30 days after receipt of the notice of denial request administrative review] *file an action for judicial enforcement under General Provisions Article, §4-362, Annotated Code of Maryland, without pursuing the remedies set forth in §§B and C of this regulation.*

[B. If the applicant requests administrative review:

(1) The review shall be governed by State Government Article, Title 10, Subtitle 2, Annotated Code of Maryland; and

(2) The Executive Director shall issue the final decision of the Center unless the Executive Director delegates the final decision authority.

C. If the review results in a total or partial denial of the request, the applicant may file an appropriate action in the circuit court under State Government Article, §10-623, Annotated Code of Maryland.

D. If the applicant does not request administrative review, the applicant may file an action for judicial enforcement under State Government Article, §10-623, Annotated Code of Maryland, without exhausting the administrative remedy.

E. This regulation does not apply if the Center denies inspection under State Government Article, §10-619, Annotated Code of Maryland.]

B. If the custodian charges a fee of more than \$350 under Regulation .15 of this chapter, the applicant may, within 90 days after the date the fee is imposed, file a written complaint with the State Public Information Act Compliance Board under General Provisions Article, § 4-1A-05(a), Annotated Code of Maryland.

C. The applicant and the custodian each may contact the Public Access Ombudsman to resolve, under General Provisions Article, Title 4, Subtitle 1B, Annotated Code of Maryland, a dispute relating to requests for public records.

14.36.04 Longitudinal Data Requests

Authority: Education Article, §§24-701, 24-703, and 24-706; *General Provisions Article, Title 4*; Labor and Employment Article, §8-625; [State Government Article, Title 10, Subtitle 6;] *Annotated Code of Maryland*

.01 Scope.

A. Generally.

(1) (proposed text unchanged)

(2) All other public information requests shall be processed in accordance with [State Government Article, Title 10, Subtitle 6] *General Provisions Article, Title 4*, Annotated Code of Maryland, and COMAR 14.36.01.

B. (proposed text unchanged)

[C. Requests for longitudinal data from the Center should satisfy a similar purpose.]

[.06] .05 Fees.

[A. By Whom Set. Reasonable fees for responding to data requests shall be set by the Executive Director and shall take into consideration the volume of requests, the complexity of responding to the request, the hourly staff time spent responding to the request, and other associated expenses.

B. Deposit or Prepayment. The Executive Director, or a designated staff member, may require that an applicant provide a deposit or prepayment of all or part of the charges estimated for satisfying the data request prior to fulfillment of the request.

C. Waiver or Reduction. On an applicant's request, the Executive Director may waive or reduce any fee imposed under this chapter if the Executive Director, after considering the applicant's ability to pay and other relevant factors, including but not limited to the purpose specified for the data request, determines that a waiver or reduction of fees is in the public interest.]

The Executive Director shall assess fees for data requests in accordance with COMAR 14.36.01.15.

[.07] .06 Individual Records.

A. (proposed text unchanged)

B. Individual Student Records.

(1) — (3) (proposed text unchanged)

(4) The Center shall direct requests for access to individual student records to the agency supplying the records to the Center for consideration under the Maryland Public Information Act, [State Government, Title 10, Subtitle 6] *General Provisions Article, Title 4*, Annotated Code of Maryland, and any and all applicable State and federal statutes and regulations.

C. Individual Workforce Records.

(1) — (4) (proposed text unchanged)

(5) Requests for access to individual workforce records shall be directed to the Maryland Department of Labor, Licensing, and Regulation for that agency's consideration under the Maryland Public Information Act, [State Government Article, Title 10, Subtitle 6] *General Provisions Article, Title 4*, Annotated Code of Maryland, and any and all applicable State and federal statutes and regulations.

D. — E. (proposed text unchanged)

ROSS GOLDSTEIN
Executive Director

Title 31

MARYLAND INSURANCE ADMINISTRATION

Subtitle 03 INSURANCE PRODUCERS AND OTHER INSURANCE PROFESSIONALS

31.03.02 Insurance Producers — Continuing Education Requirements

Authority: Insurance Article, §§2-109, 10-115, and 10-116, Annotated Code of Maryland

Notice of Proposed Action

[17-220-P]

The Insurance Commissioner proposes to amend Regulations .02 and .03 under **COMAR 31.03.02 Insurance Producers — Continuing Education Requirements**.

Statement of Purpose

The purpose of this action is to amend COMAR 31.03.02.02 and .03 to be consistent with amendments made during the 2017 legislative session to Insurance Article, §10-116, Annotated Code of Maryland, regarding continuing education requirements for insurance producers. Chs.185 and 186, Acts of 2017, added a requirement that insurance producers who are involved in bail bonds insurance must now receive continuing education that directly relates to bail bonds. Therefore a definition of bail bondsman services is being added to Regulation .02 and an amendment regarding the continuing education of producers that provide bail bondsman services is being added to Regulation .03.

Comparison to Federal Standards

There is no corresponding federal standard to this proposed action.

Estimate of Economic Impact