



## MEMORANDUM

TO: MLDS Governing Board

FROM: Ross Goldstein

DATE: May 22, 2017

SUBJECT: Proposed Regulations

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### Purpose

The purpose of this agenda item is to propose amendments to existing regulations (COMAR 14.36.01 and .04) governing the Center's implementation of Public Information Act requests and longitudinal data requests.

### Background

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 rational 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 (14<sup>th</sup> 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. Page 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. Page 8 – 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. Page 9 –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. Page 6 –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 approval of the proposed regulations is requested. If Board approval is received, the changes will be reviewed by the General Assembly's AELR Committee and then published in the Maryland Register for a public comment period. After the public comment period, the regulations will be brought back to the Governing Board for final approval.

# Title 14 - Independent Agencies

## Subtitle 36 - Maryland Longitudinal Data System Center

### Chapter 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, §§4-101, 4-103, 4-201(b), 4-301(2)(i), 4-206, and 4-502*; Annotated Code of Maryland

#### **.01 Purpose.**

This chapter sets forth procedures for the disclosure, inspection, or copying of public records maintained by the Maryland Longitudinal Data System Center. The procedures for data requests by the public from data maintained by the Maryland Longitudinal Data System Center are set forth in COMAR 14.36.04.

#### **.02 Policy.**

It is the policy of the Maryland Longitudinal Data System Center to facilitate public access to the Center's public records when access is authorized by law.

#### **.03 Definitions.**

A. In this chapter, the following terms have the meanings indicated.

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) "Center" means the Maryland Longitudinal Data System Center, its advisory councils, its committees, any other public bodies under the authority and acting on behalf of the Maryland Longitudinal Data System Center, and any employees, agents, or contractors acting on behalf of the Maryland Longitudinal Data System Center.

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

(5) "Executive Director" means the Executive Director of the Maryland Longitudinal Data System Center.

(6) "Governing Board" has the meaning stated in Education Article, §24-701, Annotated Code of Maryland.

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

(8) “Person in interest” means:

(a) A person or governmental unit that is the subject of a public record;

(b) An authorized designee of the person or governmental unit that is the subject of a public record; or

(c) If the person has a legal disability, a parent or legal representative of the person that is the subject of a public record.

(9) [Public Record.

(a)] “Public record” has the meaning stated in [State Government Article, §10-611(g),] *General Provisions Article, §4-101(h)*, 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) “Working day” means a day other than Saturday, Sunday, or a State holiday or service reduction day.

#### **.04 Official Custodian.**

A. The Executive Director shall designate an official custodian of public records for the Center.

B. The website for the Center shall provide the name and contact information for the custodian of public records.

#### **.05 Who May Request Public Records.**

Any person may request to inspect or copy public records of the Center.

#### **.06 Necessity for Written Request.**

A. Inspection.

(1) Except as otherwise provided in this chapter, the custodian shall make public records of the Center available for inspection by an applicant without demanding a written request.

(2) The custodian shall require a written request if the custodian reasonably believes that:

(a) The Act or any other law may prohibit the disclosure of the public record to the applicant; or

(b) A written request will materially assist the Center in responding.

B. Copies. If the applicant requests a copy of any public record of the Center, the custodian may require a written request.

**.07 Contents of Written Request.**

A written request shall:

A. Contain the applicant's name and address;

B. Be signed by the applicant; and

C. Reasonably identify, by brief description, the public record sought.

**.08 Addressee.**

A request to inspect or copy a public record shall be addressed to the custodian of the record. If the custodian is unknown, the request may be addressed to the Executive Director.

**.09 Response to Request.**

A. If the custodian decides to grant a request for inspection, the custodian shall produce the public record for inspection, without unreasonable delay, as follows:

(1) Immediately for records designated by the Center for inspection, as set forth in §B of this regulation; or

(2) If additional time is needed to retrieve the public record and conduct any necessary review, within a reasonable time period, not to exceed 30 days after the date of the request.

B. The custodian shall designate the following public records for immediate inspection:

(1) Bylaws of the Governing Board;

(2) Minutes of the Governing Board;

(3) Data sharing agreements entered into by the Center and the Maryland State Department of Education, the Maryland Higher Education Commission, and the Maryland Department of Labor, Licensing, and Regulation; and

(4) The Data Safeguarding and Security Plan.

C. If the custodian decides to deny a request for inspection, the custodian shall:

- (1) Do so within 30 days after the request; and
- (2) Immediately notify the applicant of the denial.

D. If a request is denied, the custodian shall provide the applicant, at the time of the denial or within 10 working days, a written statement that gives:

- (1) The reason for the denial;
- (2) The legal authority for the denial; and
- (3) Notice of the remedies available for review of the denial.

E. If a requested public record is not in the custody or control of the custodian to whom application is made, the custodian shall, within 10 working days after receipt of the request, notify the applicant:

- (1) That the custodian does not have custody or control of the requested public record; and
- (2) If the custodian knows:
  - (a) The name of the custodian of the public record; and
  - (b) The location or possible location of the public record.

F. With the consent of the applicant, any time limit imposed by §§A—C of this regulation may be extended for an additional period of up to 30 days.

**.10 Notice to Person Possibly Affected by Disclosure.**

A. Unless prohibited by law, the custodian may provide notice of a request for inspection or copying of any public record of the Center to any person who, in the judgment of the custodian, could be adversely affected by disclosure of the public record.

B. The custodian may consider the views of the possibly affected person before deciding whether to disclose the public record to an applicant.

**.11 Public Record Temporarily Unavailable.**

If a requested public record of the Center is in the custody and control of the person to whom the application is made but is not immediately available for inspection or copying, the custodian shall promptly:

- A. Notify the applicant that the public record is not immediately available; and
- B. Schedule a date within a reasonable time for inspection or copying.

**.12 Public Record Destroyed or Lost.**

If the custodian knows that a requested public record of the Center has been destroyed or lost, the custodian shall promptly:

- A. Notify the applicant that the public record is not available; and
- B. Explain the reasons why the public record cannot be produced.

**.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.

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] *General Provisions Article*, §4-362, 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] *General Provisions Article*, §4-362, 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] *General Provisions Article*, §4-358, Annotated Code of Maryland.

**.14 Disclosure Against Public Interest.**

A. Denial Pending Court Order.

(1) If, in the opinion of the Executive Director, disclosure of a public record of the Center otherwise subject to disclosure under the Act would do substantial injury to the public interest,

the Executive Director may temporarily deny the request to obtain a court order allowing nondisclosure.

- (2) A temporary denial shall be in writing.

B. Circuit Court Review.

(1) Within 10 working days after the denial, the Executive Director shall apply to the appropriate circuit court for an order permitting continued denial or restriction of access.

(2) Notice of the Executive Director's complaint, on behalf of the Center, shall be served on the applicant in the manner provided for service of process under the Maryland Rules.

**.15 Fees.**

A. Except as provided in §§B and C of this regulation, the fee schedule for copying and certifying copies of public records of the Center is as follows:

- (1) For each copy made by a photocopying machine within the Center, 25 cents per page;
- (2) For each copy made other than by a photocopying machine within the Center, the actual cost of reproduction; and
- (3) For certification as a true copy of a public record, an additional fee of \$1 per page, or if appropriate, per item.

B. Minimum Fee. A charge may not be made if the total fee is \$1 or less.

C. If the fee for copies or certified copies of any public record of the Center is specifically set by a law other than the Act or this regulation, the custodian shall charge the prescribed fee.

D. If the custodian cannot copy a public record within the Center, the custodian shall make arrangements for the prompt reproduction of the record at public or private facilities outside the Center. The custodian shall:

- (1) Collect from the applicant a fee to cover the actual cost of reproduction; or
- (2) Direct the applicant to pay the cost of reproduction directly to the facility making the copy.

E. Before copying a public record of the Center, the custodian shall estimate the cost of reproduction and either:

- (1) Obtain the agreement of the applicant to pay the cost; or
- (2) Require prepayment of the cost.

F. Except as provided in §G of this regulation the custodian may charge a reasonable fee for time that an official or employee of the Center spends to:

- (1) Search for requested public records; or
- (2) Prepare public records for inspection and copying.

G. The custodian may not charge a search or preparation fee for the first 2 hours that an official or employee of the Center spends to respond to a request for public records.

H. The Center may charge a reasonable hourly fee based upon the actual cost to the Center for staff services for additional time required to search for or prepare public records for inspection or copying.

I. Waiver or Reduction of Fee.

- (1) The custodian may waive or reduce any fee under this regulation if:
  - (a) The applicant requests a waiver; and
  - (b) The custodian determines that the waiver or reduction is in the public interest.
- (2) In making a decision under this section, the custodian shall consider, among other relevant factors, the ability of the applicant to pay the fee.

J. If the applicant requests that copies of a public record be mailed or delivered to the applicant or to a third party, the custodian may charge the applicant for the actual cost of postage or delivery, and the cost of any electronic media used to provide the copies.

#### **.16 Time and Place of Inspection.**

A. An applicant may inspect any public record of the Center that the applicant is entitled to inspect during the normal working hours of the Center.

B. The inspection shall occur where the public record is located, unless the custodian, after taking into account the applicant's expressed wish, determines that another place is more suitable and convenient.

## **Title 14 - Independent Agencies**

### **Subtitle 36 - Maryland Longitudinal Data System Center**

#### **Chapter 04 – Longitudinal Data Requests**

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

##### **.01 Scope.**

###### **A. Generally.**

(1) This chapter governs data requests received by the Maryland Longitudinal Data System Center under Education Article, §24-703(f)(6) and (7), Annotated Code of Maryland.

(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. The Maryland Longitudinal Data System Center was created to provide analytical information to policy makers, researchers, parents, and students to guide education and workforce policy decisions and programs.

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

##### **.02 Definition.**

In this chapter, “Center” means the Maryland Longitudinal Data System Center.

##### **.03 Applications — General.**

A. Application Form. The application shall be made in writing, in the form required by the Executive Director of the Maryland Longitudinal Data System Center.

B. The application form shall be made available to the public on the Center website.

C. Options. The application form shall require at a minimum:

(1) The name, title, mailing address, phone number, and email address for each requestor;

(2) The names, titles, mailing addresses, phone numbers, and email addresses for any researchers working with the requestor;

(3) Disclosure of the title of the research project for which the data request is being made;

- (4) Disclosure of whether or not the applicable research project is funded;
- (5) A summary of the research project, including but not limited to the research questions presented for evaluation by the project; and
- (6) The target dates for data collection, data analysis, report writing, and report publication for the applicable research project.

**.04 [Applications — Required Affidavit.]**

The application shall contain an affidavit, signed by the applicant, in substantially the following form: Under the penalties of perjury, I declare that no part of any data set requested by this application will be used for commercial solicitation, marketing, or any form of financial gain.]

**.05] Time for Applying, Responding.**

- A. An application for a data request from the Center may be made at any time by any member of the public, or any State agency.
- B. The Executive Director of the Center, or staff member delegated by the Executive Director, shall provide the applicant with an acknowledgement of the receipt of the data request within 10 business days of receiving the application, and shall advise the applicant of the estimated time for completion of fulfillment of the data request and the estimated costs associated therewith within 30 days of receipt of the application.

**[.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. The Center receives data from the Maryland State Department of Education, Maryland Higher Education Commission, and Department of Labor, Licensing, and Regulation in accordance with its mandated responsibilities as set forth in Education Article, §24-701, et seq., Annotated Code of Maryland.

B. Individual Student Records.

(1) The Center shall maintain education records that are incorporated into the Maryland Longitudinal Data System consistent with the protections established by the Family Educational Rights and Privacy Act, 20 U.S.C. §1232g, as amended, and its accompanying regulations, located at 34 CFR §99, as amended, which are incorporated by reference.

(2) The Center shall use only de-identified aggregate data in its research and reporting as set forth in Education Article, §24-703(f)(3) and (g)(3), Annotated Code of Maryland.

(3) The Center shall restrict direct access to the data in the Maryland Longitudinal Data System to authorized staff of the Center as set forth in Education Article, §24-703(g), Annotated Code of Maryland.

(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) The Center shall recognize that workforce records incorporated into the Maryland Longitudinal Data System are protected under Labor and Employment Article, §8-625, Annotated Code of Maryland, and 20 CFR part 603, which are incorporated by reference, and other State and federal privacy laws.

(2) The Center shall ensure that workforce data is de-identified by removing or not disclosing any and all information that:

(a) Reveals the name, address, social security number, or any other identifying particular of an individual or employer; or

(b) Could foreseeably be combined with other publicly available information to reveal such particulars.

(3) The Center shall use only de-identified aggregate data in its research and reporting as set forth in Education Article, §24-703(f)(3) and (g)(3), Annotated Code of Maryland.

(4) The Center shall restrict direct access to the data in the Maryland Longitudinal Data System to authorized staff of the Center as set forth in Education Article, §24-703(g), Annotated Code of Maryland.

(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. The Center shall fulfill data requests made pursuant to Education Article, §24-703(f)(6) and (7), Annotated Code of Maryland:

(1) Using de-identified aggregate data only, as set forth in Education Article, §24-703(g)(2) and (3), Annotated Code of Maryland; and

(2) In compliance with:

(a) The privacy and confidentiality provisions of the Family Educational Rights and Privacy Act, 20 U.S.C. §1232g, as amended, and its accompanying regulations, located at 34 CFR §99, as amended;

(b) The Federal-State Unemployment Compensation Program (UC), 20 CFR part 603, and Labor and Employment Article, §8-625, Annotated Code of Maryland; and

(c) Any other applicable State or federal data privacy or confidentiality provisions.

E. The Center shall deny a data request if the data provided may be identifiable based on the size or uniqueness of the population under consideration, as required under Education Article, §24-703(a)(4), and Labor and Employment Article, §8-625, Annotated Code of Maryland, and 20 CFR Part 603.

#### **[.08] .07 Requests for Nonlongitudinal Data Sets.**

A. For purposes of this regulation, a data set is non-longitudinal if it contains data provided by only one of the following agencies that contribute data to the Center:

(1) Maryland State Department of Education;

(2) Maryland Department of Labor, Licensing, and Regulation; or

(3) Maryland Higher Education Commission.

B. The Center shall deny a request for a nonlongitudinal data set and refer the requestor to the appropriate agency.