

INSTITUTE FOR CONSTITUTIONAL  
ADVOCACY AND PROTECTION  
Plaintiff

v.

BALTIMORE CITY POLICE.

Defendant

\* IN THE  
\* CIRCUIT COURT  
\* FOR  
\* BALTIMORE CITY

\* CASE No.: 24-C-21-000162

\* \* \* \* \*

**DEFENDANT BALTIMORE POLICE DEPARTMENT MOTION TO DISMISS OR IN  
THE ALTERNATIVE FOR SUMMARY JUDGMENT**

The Defendant, Baltimore Police Department (hereinafter “BPD” or “Defendant”), by undersigned counsel, pursuant to Maryland Rules 2-311, 2-322, 2-501, and the Maryland Public Information Act, Annotated Code of Maryland, General Provisions Article (“GP”) § 4-101 *et seq.*, respectfully request that this Honorable Court dismiss the above-captioned Complaint (“Comp.”) for Injunctive and Other Relief as the Plaintiff fails to state a claim upon which relief can be granted and there exists no genuine issue of material fact. Thus, the Defendant are entitled to judgment as a matter of law and submit this motion in support of its Motion to Dismiss or in the Alternative for Summary Judgment.

Respectfully submitted,

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*Attorney for Defendant*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 23<sup>rd</sup> day of Marh, 2021, a copy of the foregoing was sent electronically to Mathew Zernhelt, Esquire, *Attorney for Plaintiff*, [mzernhelt@baltimoreactionlegal.org](mailto:mzernhelt@baltimoreactionlegal.org).



Kay N. Harding, Esq. 

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**ORDER**

Upon consideration of the Defendant's Motion to Dismiss or, in the alternative for Summary Judgment, and all matters of record; it is by the Court this \_\_\_\_\_ day of \_\_\_\_\_, 2021,

**ORDERED**, that the BPD's Motion to Dismiss, or in the alternative for Summary Judgment is hereby **GRANTED** in its entirety.

**ORDERED**, that the Plaintiff's Complaint is **DISMISSED** with prejudice.

**ORDERED**, that the Plaintiff's request for damages, costs, and/or attorney fees is hereby **DENIED**.

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Judge, Circuit Court for Baltimore City

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**FACTS AND INTRODUCTORY STATEMENT**

The Plaintiff filed this lawsuit against the Defendant for injunctive relief and damages under the Maryland Public Information Act, Annotated Code of Maryland, General Provisions Article (“GP”) §4-101 *et seq.* If the agency denies the request, the custodian must provide an explanation for the denial. GP §4-203(b)(2).

In the instant case, on September 18, 2020, the Plaintiff requested the following:

1. Any policy, rule, directive, guideline, or similar record governing under what circumstances BPD grants a fee waiver to individuals and/or entities who submit an MPIA request;
2. Records sufficient to show, for every MPIA request for which BPD



- has granted a fee waiver since January 1, 2018, the (a) identity of the requester, (b) the subject matter of the request, and (c) the amount of the fees that were waived; and
3. Records sufficient to show, for every MPIO request for which BPD has denied a fee waiver since January 1, 2018, the (a) identity of the requester, (b) the subject matter of the request, and (c) the amount of the fees that were not waived.

*See*, Exhibit A of Compl., contained in Court file and incorporated herein by reference.

On December 2, 2020, the Plaintiff was provided with BPD Policy 603. *See*, Exhibit B of Compl., contained in Court file and incorporated herein by reference. Plaintiff was further informed of the following:

the BPD does not have a data base in which fee waivers are maintained. This would be the process of hand pulling the request to verify if a fee waiver was granted or not. We would have to create a new data base for this, if you look on page five (5) of the policy it states that there is no duty to create records, only to provide what is available at the time of the request.

*Id.*

On December 15, 2021, the Plaintiff was informed by Ken Hurst, Contract Specialist in the Document Compliance Unit that the Defendant “does not track such [fee waiver requests] information. The PIA does not impose an obligation on a custodian to create a document that is responsive to a request. *See* MPIO Manual 13th Ed. October 2014, 3 (citing *Yeager v. DEA*, 678 F.2d 315, 324 (D.C. Cir. 1982)) (“[City] has no obligation to create records to satisfy a[n] [M]PIO request.”); *see also MacPhail v. Comptroller of Maryland*, 178 Md. App. 115, 119 (2008) (explaining that pertinent Federal Freedom of Information Act (“FOIA”) cases are “persuasive” authority in Maryland because the MPIO and the FOIA share “virtually identical” purposes.”).” *See*, Compl. ¶15.

Despite being informed that the Defendant does not have records responsive to its requests, the Plaintiff filed this lawsuit.

## **ARGUMENT**

### **THE STANDARD OF REVIEW**

Maryland Rule 2-322 states in pertinent part that “[t]he following defenses may be made by motion to dismiss filed before the answer, if an answer is required: ... (2) failure to state a claim upon which relief can be granted ....” Md. Rule 2-322(b)(2). “In order to withstand a motion to dismiss for failure to state a cause of action, the plaintiff must allege facts that, if proved, would entitle him or her to relief.” *Pittway Corp. v. Collins*, 409 Md. 218, 238-239 (2009). Further, “the facts comprising the cause of action must be pleaded with sufficient specificity. Bald assertions and conclusory statements by the pleader will not suffice.” *Ruffin Hotel Corp. of Md. v. Gasper*, 418 Md. 594, 614 (2011) (quoting *Adamson v. Corr. Med. Servs.*, 359 Md. 238, 246 (2000)). And, although a Court must “assume the truth of all well-pleaded facts and allegations in the complaint,” dismissal is proper “if the allegations and permissible inferences, if true, would not afford relief to the plaintiff.” *Pittway*, 409 Md. at 239.

Summary judgment is appropriate in an action where there is no genuine dispute of any material fact and the party is entitled to judgment as a matter of law. Md. Rule 2-501(a). At a summary judgment proceeding the court’s role is to determine if disputed facts exist and if there are none, to enter judgment accordingly. *Tellez v. Canton Railway*, 212 Md. 423, 129 A. 2d 809 (1957). A grant of summary judgment should not be disfavored and should be granted unless the party opposing the motion can identify with particularity each material fact in genuine dispute. *Collins v. Li*, 176 Md. App. 502, 591(2007), *cert. granted*, 403 Md. 304 (2008). *See, also*



*Educational Testing Service v. Hildebrant*, 399 Md. 128, 139 (2007). Defendant's Motion for Summary Judgment should be granted and the lawsuit dismissed for the reasons discussed below.

**I. DEFENDANT IS NOT OBLIGATED TO CREATE NEW RECORDS TO FULFILL THE PLAINTIFF'S MPIA REQUEST.**

Plaintiff requests that Defendant provide fee waiver information and/or documentation. Defendants explained to the Plaintiff, in its December 2, 2020 and December 15, 2020 correspondences that it could not fulfil the Plaintiff's request as no responsive documents exist. Plaintiff was referred to GP § 4-205(c)(4)(iii) (custodian is not required to "create, compile, or program a new public record. *See, Yeager v. DEA*, 678 F.2d 315, 324 (D.C. Cir. 1982)) ("[City] has no obligation to *create* records to satisfy a[n] [M]PIA request."); *MacPhail v. Comptroller of Maryland*, 178 Md. App. 115, 119 (2008) (explaining that pertinent Federal Freedom of Information Act ("FOIA") cases are "persuasive" authority in Maryland because the MPIA and the FOIA share "virtually identical" purposes.): *accord Blythe v. State*, 161 Md.App. 492, 513 (2005)("The purpose of the Maryland Public Information Act ... is virtually identical to that of the FOIA." Following from that symmetry between the two acts, the Court of Appeals further observed that "[w]here the purpose and language of a federal statute are substantially the same as that of a later state statute, interpretations of the federal statute are ordinarily persuasive.") (citations omitted); *accord* Maryland Public Information Act Manual (15th ed., November 2020, 2-3); *Action Committee for Transit, Inc. v. Town of Chevy Chase*, 229 Md. App. 540, 557 n. 20 (2016) ("Although the [MPIA] Manual may not rise to the dignity of a formal opinion of the Attorney General, it is nonetheless a useful, although not binding, resource for courts.").

BPD does not track the number of fee waiver requests it receives in a separate database. The Defendant is not obligated to create such a database to satisfy the Plaintiffs' MPIA request.

## **II. THE PLAINTIFF COULD MAKE ITS OWN DATABASE OR DRAW ITS OWN CONCLUSIONS BY REQUESTING ALL RELEVANT EXISTING RECORDS.**

Plaintiff makes much of BPD's explanation that to create a database would require BPD to "hand pull" each MPIA request and review each one to determine if a fee waiver was requested and if so, whether it was granted or denied and then compile that information into a record that does not currently exist. Plaintiff characterizes this as some sort of "hand-pulling exemption" to the MPIA. Plaintiff misses the point.

This "hand pulling exception" is not an exception at all, but a short-hand way of expressing that no government custodian is required to gather, aggregate and analyze existing records into a filing system or other database that is not kept in the ordinary course of the Plaintiff's work as a government. Here, the Defendant can lawfully answer MPIA requests without needing to know, for its own government work, how many of those requests resulted in a fee waiver. This is not information that the government Defendant has decided to track.

This does not leave the Plaintiff without recourse. It can request each and every record from the government files and analyze those records itself. In anticipation of such a follow-up request, the Defendant in this case was merely stating that to do so would require a lot of manual labor ("hand-pulling"), for which there would likely be costs. Md. Code, Gen. Prov., § 4-206. As Maryland Courts recognize:

It is also sometimes the case that a requestor, suspicious of the particular agency or of government in general, submits a broadly-worded request, intending to afford the agency no excuse for not producing for the records the requestor really wants. Literal compliance with such a request, however, would often require such a diversion of resources and agency time as to amount to a huge expense. In practice, a productive response to a PIA request is often an iterative process in which the agency reports on the type and scope of the files it holds that may include responsive records, and the requestor refines the request to reduce the labor (and expense) of searching those records.



*Glass v. Anne Arundel County*, 453 Md. 201, 232-33 (2017).

**CONCLUSION**

The Defendant correctly denied the Plaintiff's requests for records that do not exist. Since none of these facts are disputed, and these facts fail to state a claim upon which relief can be granted, the Plaintiff's Complaint must be dismissed, or in the alternative Defendants are entitled to judgment as a matter of law. The Court should deny Plaintiff's request for attorney fees and dismiss the lawsuit.

Respectfully submitted,



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