

INSTITUTE FOR CONSTITUTIONAL  
ADVOCACY AND PROTECTION

Plaintiff

v.

BALTIMORE CITY POLICE  
DEPARTMENT

Defendant

IN THE

CIRCUIT COURT

FOR

BALTIMORE CITY

CASE No.: 24-C-21-000162

2021 JUN 10 AM 8:52

\* \* \* \* \*

**DEFENDANTS BALTIMORE POLICE DEPARTMENT AND COMMISSIONER  
MICHAEL HARRISON'S SUPPLEMENTAL MOTION IN SUPPORT OF THEIR  
MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT**

The Defendants, Baltimore Police Department and Commissioner Michael Harrison (hereinafter "BPD" or "Defendants"), by undersigned counsel, pursuant to Maryland Rules 2-311, 2-322, and 2-501, 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 because there exists no genuine issue of material fact. Thus, the Defendants are entitled to judgment as a matter of law and submit this supplemental motion in support of its Motion to Dismiss, or in the Alternative for Summary Judgment, previously filed with the Court.

**FACTS AND INTRODUCTORY STATEMENT**

The Defendants incorporate by reference the Facts and Introductory Statement identified in its previous filings, which is in the Court's file.

## **ARGUMENT**

### **THE STANDARD OF REVIEW**

The Defendants incorporate by reference the Standards of Review identified in its previous filings, which is in the Court's file.

## **ARGUMENT**

### **I. The Defendant Did Not Arbitrarily or Capriciously Deny the Plaintiff's Fee Waiver Request**

Md. Code Ann., Gen. Prov. ("GP") §4-206 (e), states that "[t]he official custodian may waive a fee under this section if: (1) the applicant asks for a waiver; and (2)(i) the applicant is indigent and files an affidavit of indigency; or (ii) after consideration of the ability of the applicant to pay the fee and other relevant factors, the official custodian determines that the waiver would be in the public interest."

This wording negates any argument that poverty alone entitles a requester to a fee waiver; poverty is but one of the "relevant factors" that ultimately lead to a discretionary judgment about the public interest. Conversely, a decision on a fee waiver request may not be based solely on the expense that would be incurred if the waiver were granted; a fee waiver request must be considered in light of the ability of the requester to pay the fee and "other relevant factors." *See* Burke, 67 Md. App. at 157 (finding Baltimore City's denial of fee waiver request arbitrary and capricious because the City only considered the expense it would incur and did not consider the public interest). Burden on the office is surely not irrelevant, and might tip the public interest assessment, but it cannot be the only consideration.

81 Op. Att'y Gen. 154 (1996).

When a requester seeks a fee waiver, the requester must establish that the information sought (1) "is in the public interest because it is likely to contribute significantly to public

The Plaintiff seems to think that because it is a non-profit that it should be automatically granted a fee waiver. To the contrary, federal courts have held that a requester's "[n]onprofit status does not yield free access to facts." *Durham v. DOJ*, 829 F.Supp. 428, 435 n. 10 (D.D.C.1993) (indigent requestors must meet statutory test in order to merit fee waiver); *Rizzo v. Tyler*, 438 F.Supp. 895, 900-901 (S.D.N.Y.1977) (indigency alone "does not *ipso facto* require the waiver of search fees"). Notably, the Plaintiff did not provide any supporting documentation of its inability to pay. *See*, Exhibit 1. Thus, Defendants used its discretionary authority to deny the Plaintiff's fee waiver request because the Plaintiff did not provide any supporting documentation regarding its inability to pay for the reasonable cost and production of its request. *Id.*

Further, Defendants thoroughly considered the Plaintiff's fee waiver request and determined that the articulated purpose of the request and the documents that the Plaintiff sought "likely [would not] contribute significantly to public understanding of the operations and activities of the government" for the following, non-exhaustive reasons. *See*, Exhibit 1.

First, the disclosure of the Plaintiff's requested documents would not provide any additional or significant insight in the "operations or activities of the government." To the contrary, the Defendants have already stated in its policy that a fee waiver will be considered when a fee waiver application is received and/or where there is a detailed request for a fee waiver. *See*, Exhibit 1. Plaintiff's request for fee waiver was simply not detailed.

Second, the Plaintiff's request lacks specificity regarding its public interest and public purpose. *Id.* *See*, Exhibit 1.

In reviewing Plaintiff's fee waiver request, Defendants believed that the Plaintiff's reasoning was extremely vague and general. *Id.* The Plaintiff never articulated the purpose or mission of its alleged public interest request. *Id.* Moreover, ICAP has not articulated to the Defendants how the disclosure of the documents would serve to enlighten public understanding of BPD's operating procedures. Members of the public, with limited resources, *may simply* request a fee waiver for PIA documents or BPD's Document Compliance Unit may on its own provide fee waiver applications to requesters.

BPD's operating procedure is not hidden from the public. Plaintiff indicates in its Complaint that it will share "... what it has learned with the public ... blog, Twitter, an op-ed, and/or other available means." Comp. ¶6. Plaintiff has only made general statements, which continue to illustrate its lack of specificity. Plaintiff's broad and wide-reaching requests appear to be nothing more than a fishing expedition. Certainly, the Plaintiff may desire to "fish," but the local government should not be required to fit the Plaintiff's "fishing" bill. The Plaintiff is essentially asking this Court to "aid ... on a fishing expedition that no one, other than the [Plaintiff,] knows for which fish the expedition is being mounted." *Office of Governor v. Washington Post Co.*, 360 Md. 520, 584, (2000); *see, also, State v. Griffen*, 241 Kan. 68, 71, (1987) Further, "[t]he Supreme Court has noted that courts also "must be mindful ... that the FOIA was not intended to supplement or displace rules of discovery." *John Doe Agency*, 493 U.S. at 153, 110 S.Ct. at 475, 107 L.Ed.2d 462. *See also Faulk*, 299 Md. at 509, 474 A.2d at 889" (quoted in *Fioretti v. Maryland State Bd. of Dental Examiners*, 351 Md. 66, 78, (1998)).

It is BPD's position that the time, effort, and expense to pull and cull responsive records will be entirely useless to the public, but the Defendants have no problem producing the requested records at a reasonable cost that conforms to applicable law. Finally, the Defendants did consider

the cost of production, but that was not the deciding factor in its analysis. *See*, Exhibit 1. More importantly, the Plaintiff failed to demonstrate an inability to pay for the production and failed to meet the other factors outlined by the law. *Id.*

For the reasons set forth above, it is clear the Defendants considered and complied with the factors outlined in *Burke* and denied the Plaintiff's fee waiver request after careful consideration. The Defendants' decision was not arbitrary or capricious, and thus should not be disturbed.

### CONCLUSION

The Defendants correctly denied the Plaintiff's requests for records as BPD does not track fee waiver request and BPD has no obligation to create records to satisfy the Plaintiff's request. 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.

Additionally, if the Plaintiff would like to receive the responsive files, it needs to pay \$28,364.00. Further, the Court should deny Plaintiff's request for attorney fees and dismiss the lawsuit.

Respectfully submitted,



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*Attorney for Defendant*

# EXHIBIT 1

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**AFFIDAVIT OF ANDREW SMULLIAN**

I, Andrew Smullian, do hereby depose and swear as follows:

1. I am over 21 years of age. I have personal knowledge of the matters stated herein, and am competent to testify to the same. I am the Deputy Chief of Staff for current Police Commissioner Michael Harrison of the Baltimore City Police Department (the "BPD").
2. One of my duties in the absence of the Chief of Staff, Eric Melancon is to respond to administrative requests, including, but limited to, reviewing Maryland Public Information Act ("MPIA") fee waiver requests to determine if a fee waiver should be granted or denied.
3. BPD is committed to transparency and is committed to granting fee waivers where such a request would be in the public interest and after the requester has demonstrated an inability to pay along with other factors based on applicable laws.
4. The Institute for constitutional Advocacy and Protection (ICAP) requested a fee waiver for the production of fee waiver records. BPD does not track fee waivers and the production would require the pulling and culling of all records to obtain responsive documents.
5. In order to fulfill, ICAP's request, as BPD does not track fee waiver records, BPD would have to hire outside counsel to assist in reviewing, analyzing, extracting responsive documents to prepare for production. The City Law Department, on behalf of the BPD, obtained several cost estimates. The lowest cost estimate was \$45.00 an hour for 432 hours

of work. The cost would be \$19,444.00 for 863 files. The vendor estimated that it would take approximately 11 weeks to produce the documents to BPD working 35 – 40 hours per week solely on the Plaintiff's request. The vendor and contract attorney would be required to provide accurate recording keeping to the parties. Notably, the \$19,444.00, once received from the Plaintiff would be sent to the vendor to cover the contract attorney's fees.

6. Additionally, the remaining estimated cost of \$8,920.00 (paralegal- \$240.00; \$5,400.00 E-Discovery Professional; \$3,280.00 - Reviewing Attorney) for employees working on the project would also have to keep accurate logs of work. Any unused funds would be refunded to the Plaintiff.
7. I carefully reviewed the fee waiver request, consulted with legal counsel, and ultimately denied ICAP's fee waiver request.
8. I reached this decision, in part, because ICAP did not provide sufficient information to establish its need for a fee waiver and due consideration was made regarding ICAP's association with Georgetown Law School. Further, ICAP articulated public interest purpose for the records was extremely general and vague, specifically it stated "[t]his request, and the disclosure of the information requested, is in the public interest because it addresses how members of the public with limited financial resources can obtain access to government records made available by statute. The requested records will be used by staff at the Institute to inform the public about access to Maryland public records." The reasons ICAP provided for its request did not explain its public interest purpose or how the disclosure would achieve its purpose. Moreover, as indicated in BPD Policy 603, members of the public can request fee waivers by requesting a fee waiver application or providing a detailed explanation of the reason for the fee waiver.



9. Much thought was given to ICAP's request, but it was determined that ICAP's fee waiver request did not meet the public interest standard or factors. In reaching this conclusion, BPD did consider the overall cost of production, budgetary constraints, and manpower shortages in the Document Compliance Unit, but these consideration did not drive the decision.
10. BPD did not arbitrarily or capriciously deny the Plaintiff's fee waiver request. Rather, BPD thoughtfully and carefully considered all of the available information and legal guidance and, based on the information provided, concluded that a fee waiver would not be appropriate for ICAP's request.

I DO SOLEMNLY DECLARE AND AFFIRM under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true.



Signature of Affiant  
Andrew Smullian  
Deputy Chief of Staff  
Baltimore Police Department  
Legal Affairs  
Document Compliance Unit  
242 W. 29<sup>th</sup> Street  
Baltimore Maryland, 21211

6/9/91  
Date

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\* \* \* \* \*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 10<sup>th</sup> day of June, 2021, a copy of the foregoing was sent electronically to Mathew Zernhelt, Esquire, *Attorney for Plaintiff*, [mzernhelt@baltimoreactionlegal.org](mailto:mzernhelt@baltimoreactionlegal.org). A courtesy copy was sent electronically to Judge Christopher Panos' chambers to: Charles Lane, Esquire [charles.lane@mdcourts.gov](mailto:charles.lane@mdcourts.gov) and Tracey Tilghman [Tracy.Tilghman@mdcourts.gov](mailto:Tracy.Tilghman@mdcourts.gov).



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