IN THE CIRCUIT COURT FOR
BALTIMORE CITY, MARYLAND

INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION 600 New Jersey Ave. N.W. Washington, D.C. 20001 *Plaintiff*,	:	
vs.	:	Civil Case No. 24C21000162
BALTIMORE POLICE DEPARTMENT 601 East Fayette Street Baltimore, MD 21202 *Defendant*.	:	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

INTRODUCTION

The Baltimore Police Department (BPD) routinely charges fees under the Public Information Act (PIA) that are so high as to render the agency's records functionally inaccessible to much of the press and the public. Although BPD may sometimes waive those fees (as the PIA authorizes it do when in the "public interest"), its process for determining who is eligible for such a fee waiver remains opaque. As a result, members of the public have no way of knowing why some people receive fee waivers but others do not.

To shed light on BPD's process for determining who qualifies for a fee waiver, the Georgetown Institute for Constitutional Advocacy and Protection (ICAP)—a group whose mission is to promote government transparency—filed a PIA request for records related to that process. ICAP's request was straightforward: it sought records "sufficient to show" under what circumstances BPD had granted and denied fee waivers since 2018. Yet, despite the simplicity of that request, BPD refused to produce any records and declined ICAP's repeated offers to narrow the request. ICAP was therefore forced to bring this lawsuit to compel production.

BPD's motion to dismiss borders on frivolous. Although BPD claims that it does not possess any responsive records, it also admits that the information ICAP requested is contained "in the government['s] files"—namely, in old PIA requests and BPD's responses to them, which would provide the exact information ICAP seeks. *See* BPD Mot. at 8. In short, BPD concedes that it possesses records "sufficient to

show" what ICAP requested. That admission alone establishes that BPD has failed to fulfill (or even attempt to fulfill) ICAP's request. Accordingly, BPD's motion should be denied.

BACKGROUND

Like many police departments in Maryland, BPD often charges the public very high fees for processing requests for public records. *See generally* Andrew Schotz, *'Reasonable' Access: Md. Police Agencies Charge More for Public Records Fees Than Other Government Agencies*, CAPITAL GAZETTE (Mar. 10, 2019 6:00 a.m.) ("While many governments across Maryland charge 25 or 50 cents a page for copies of public documents, police departments' fees are several times as much."), https://www.capitalgazette.com/news/crime/ac-cn-mddc-sunshine-0310-story.html. Because the fees BPD charges have frequently prevented requesters from actually obtaining the records they seek, ICAP submitted a PIA request to BPD to better understand how BPD processes fee waiver requests. Pl.'s Compl. ¶¶ 3-4. Specifically, ICAP sought 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 MPIA 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 Id. ¶ 9; Ex. A to Pl.'s Compl. After two and a half months, BPD eventually responded to the request by providing a copy of its publicly-available fee-waiver policy. It provided no other information and made no attempt to comply with the second and third categories of records that ICAP requested. Pl.'s Compl. ¶ 11. Instead, BPD stated that it did not need to provide anything in response to those requests because it does not maintain a "data base in which fee waivers are maintained" and would need to "manually pull[]" old fee-waiver requests from its files to fulfill the request. *Id.* ¶ 12; Ex. B to Pl.'s Compl.

ICAP responded to explain that it was not asking BPD to create new records and that "hand pulling" individual files for production would be sufficient—and necessary—to satisfy under BPD's obligations under the PIA. Pl.'s Compl. ¶ 13. ICAP also offered to narrow its request by limiting the applicable time period if BPD could approximate the number of fee waiver requests it receives each month. *Id.* ¶ 14. BPD responded one week later, simply stating that it does not "track such information." *Id.* ¶ 15. The following month, ICAP again asked for a monthly estimate to avoid a lawsuit:

> In a final attempt to avoid litigation, [ICAP is] writing to reiterate that our request can be processed by producing (1) records of past MPIA requests that sought fee waivers and (2) BPD's responses granting or

> denying those fee waivers. As previously stated, although this may involve "hand pulling," it does not involve the creation of any record. And [] again, we are willing to narrow the date range if that would enable us to avoid litigation. If you provide a rough estimate of the number of fee waiver requests you get on a monthly basis, [ICAP] can use that to narrow the date range.

See Jan. 4, 2021 Email from R. Friedman to K. Hurst; Pl.'s Compl. ¶¶ 15-17.

When that overture proved fruitless, ICAP filed a complaint in this Court seeking relief under G.P. § 4-101, *et seq.*, in order to gain access to the fee waiver information to which it is entitled. In response, BPD moved to dismiss or, in the alternative, for summary judgment.

ARGUMENT

Subject to a few narrow exemptions, the PIA requires government agencies to allow the public "to inspect any public record at any reasonable time." G.P. § 4-201(a)(1). The PIA's expansive language "reflect[s] the legislative intent that citizens of the State of Maryland be accorded wide-ranging access to public information concerning the operation of their government." *Fioretti v. Maryland State Bd. of Dental Examiners*, 351 Md. 66, 73 (1998) (internal citations and quotations omitted).

In moving to dismiss, BPD does not argue that the records ICAP requested are subject to one of the PIA's statutory exemptions. Nor does it argue that ICAP failed to submit its request to the proper custodian. Instead, BPD asserts that it "does not have records responsive to [ICAP's] request" and argues that ICAP's request would require BPD to "create" new records or databases. Mot. at 6-8. Both of those

arguments rest on a willful misreading of ICAP's request and, more importantly, are belied by BPD's own admission that it possesses responsive records.

I. ICAP's request does not require BPD to "create" any new records or databases.

ICAP's request sought three categories of information: the identity of individuals and entities who sought fee waivers from BPD since January 1, 2018; the subject matter of their PIA requests; and the amount of fees waived or denied a fee waiver. BPD could easily satisfy that request by producing all of the PIA requests that included a fee-waiver request from the relevant time period, as well as BPD's responses to those requests. *There is no dispute on this point.* BPD's own motion acknowledges that ICAP's request can be satisfied through the production of "each and every record from the government files." BPD Mot. at 8. And even before this litigation, BPD's initial response to ICAP's request acknowledged that BPD could satisfy it by "manually pull[ing]" all public-records requests and responses from the relevant time period.[1]

[1] BPD tries to reframe its reference to "manually pulling" or "hand pulling" as merely a "short-hand way of expressing that no government custodian is required to gather, aggregate and analyze existing records." BPD Mot. at 8. That implausible and unnatural interpretation is contradicted in the next paragraph, where BPD states that ICAP's recourse is to "request each and every record from the government files," which would "require a lot of manual labor ('hand-pulling')." *Id.* It is also contradicted in BPD's initial response to ICAP's request, where BPD stated that it "does not track this information and it would have to be manually pulled for each request." *See* Compl., Ex. 2. Thus, BPD contrasted, not equated, "manually pull[ing]" individual files with "tracking" the information in a database.

Nevertheless, despite acknowledging that production of these files would be sufficient, BPD maintains it lacks records responsive to ICAP's request. BPD Mot. at 6. This internally inconsistent position rests on a tortured reading of ICAP's request for records "sufficient to show" the three categories of information. Rather than give this phrase its plain and commonly understood meaning, BPD appears to interpret the request to ask for the production of all of the relevant information in a single document, and nothing more. And, BPD concludes, because it does not already maintain the information in that distilled form, it is not required to create a new record or, in BPD's phrasing, a "database." *Id.* a 7.

Notably, BPD never explains the basis for this contorted interpretation, and it cannot be reconciled with a plain reading of the request. The phrase "sufficient to show" is routinely used to request that the producing party provide a single set of documents that would disclose the relevant information and to avoid duplicative productions. *See, e.g.*, *The Sedona Conference Federal Rule of Civil Procedure 34(b)(2) Primer: Practice Pointers for Responding to Discovery Requests*, 19 Sedona Conf. J. 447, 467–68 (2018) ("'Sufficient to show' requests: These requests seek documents on a topic for which you need information, but you do not need the responding party to find and produce every document that contains or relates to that information."). For example, if a requesting party sought the number of PIA requests an agency received in a year, the agency would have the choice of producing every single request or an annual report that contained the information (if one existed), but it need not produce both.

In this way, "sufficient to show" requests are more narrowly tailored than "any and all" requests. They impose less of a burden on the producing party and allow the requesting party to avoid sifting through redundant documents. This formulation commonly used in discovery requests and public records requests. *See, e.g.*, *United States v. Fitzgerald*, No. 1:17-CV-00506, 2021 WL 1206556, at *6 (D. Md. Mar. 31, 2021); *Citizens for Resp. & Ethics in Washington v. United States Gen. Servs. Admin.*, No. 18-CV-377 (CRC), 2018 WL 6605862, at *2 (D.D.C. Dec. 17, 2018). And ICAP chose to use the formulation here because of its lack of knowledge about whether BPD had records akin to an annual report or only maintained the original requests and responses. *See Glass v. Anne Arundel Cty.*, 453 Md. 201, 232 (2017) (explaining that records requests should be processed in light of the reality that "[i]t is often true that a requestor is at a disadvantage in formulating a PIA request because the requestor does not know what records the agency keeps or how it keeps them").

In light of this settled meaning and the phrase's common usage, ICAP's request leaves no room for confusion: ICAP sought records, in any form, that contained the requested categories of information. *See Pinson v. U.S. Dep't of Justice*, 70 F. Supp. 3d 111, 121 (D.D.C. 2014) ("[T]he government must use some semblance of common sense in interpreting FOIA requests.") (citation omitted).[2] As BPD acknowledges, the individual PIA requests and BPD's responses provide that information. As a result,

[2] The Court of Appeals has "frequently relied on case law under FOIA in deciding similar issues under the PIA." *Glass v. Anne Arundel Cty.*, 453 Md. 201, 208, 160 A.3d 658, 662 (2017).

those files are "sufficient to show" what ICAP seeks and must be produced. There is no need to create any new records—much less a new "database"—to fulfill that request. BPD's argument to the contrary appears to rest on a deliberate misreading of ICAP's straightforward request.

II. ICAP has repeatedly explained what it is seeking and offered to narrow its request to accommodate BPD.

Even if ICAP's original request was somehow ambiguous (which it was not), ICAP's subsequent communications with BPD removed any possible confusion about the records it was seeking. ICAP explicitly told BPD that it could fulfill the request by producing individual files, and ICAP even offered to narrow the date range of its requests if BPD could provide even a rough estimate of how many requests it receives on a monthly basis. *See* Ex. 1, Jan. 4, 2021 Email from R. Friedman to K. Hurst; Pl.'s Compl. ¶¶ 13-16. Thus, BPD knew—well before ICAP filed this suit—exactly what it needed to do to satisfy ICAP's request. Yet, BPD nonetheless refused to provide those records.[3]

BPD relies heavily on *Glass v. Anne Arundel County*, 453 Md. 201 (2017), *see* Mot. at 8, but the language it cites only strengthens ICAP's case here. In *Glass*, the Court of Appeals explained,

[3] ICAP's complaint seeks statutory damages based on BPD's knowing and willful refusal to produce these records. *See* G.P. § 4-362(d)(1)(i); Pl.'s Compl. at 7. Plaintiff intends to file its own motion for summary judgment that will address production of records, Plaintiff's request for a fee waiver, and this claim for statutory damages.

> [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.

453 Md. at 233. ICAP repeatedly attempted to engage BPD in this "iterative process" to avoid litigation, explicitly identifying the types of records that would satisfy its request and inviting BPD to provide information that would allow ICAP to narrow the request.

Instead, BPD ignored those overtures by denying the existence of any responsive records, only to later admit that it does, in fact, possess such records. That contradicted the Court of Appeals other instruction in *Glass*: specifically, that "[i]t is part of every agency's mission to be as transparent as the State's sunshine laws, including the PIA, require it to be. A public records request is not an occasion for a game of hide and seek." *Id.* at 232.

* * *

At bottom, BPD's refusal to produce records appears to rest on a misplaced concern that production would involve burdensome "manual labor (i.e. hand-pulling)." Mot. at 8. Tellingly, BPD does not raise this as a ground for dismissal; nor could it, as the collection and production of records is exactly what the PIA requires. But BPD also overstates the amount of work involved. These records can be easily identified because BPD uses a sequential numbering system to identify each PIA request it receives—for example, the subject of this lawsuit is "MPIA 2020 1690." *See*

Ex. B to Pl.'s Compl. And production will be uncomplicated because it is highly unlikely that any statutory exemptions could apply to these requests.

Moreover, ICAP is not merely willing to narrow its request, but plans to do so on its own initiative when moving for summary judgment. *See supra* note 3. Despite telling ICAP prior to litigation that BPD had no way of providing a rough estimate of the number fee waiver requests it receives, BPD has now informed ICAP that it received 863 PIA requests across six months in 2018, 2019, and 2020. ICAP will use this information (which it requested before the lawsuit) to narrow its request when moving for summary judgment.

CONCLUSION

For the foregoing reasons, this Court should deny Defendant's motion to dismiss, or in the alternative, for summary judgment.

Dated: April 7, 2021

/s/ Matthew Zernhelt
Matthew Zernhelt, Esq.
Baltimore Action Legal Team
1601 Guilford Avenue, 2 South
Baltimore, MD 21202
Ph.: (443) 690-0870
mzernhelt@baltimoreactionlegal.org

Robert D. Friedman*
Institute for Constitutional Advocacy
and Protection
Georgetown University Law Center
600 New Jersey Ave. NW
Washington, D.C. 20001
Tel: 202-662-9042

Fax: 202-661-6730
rdf34@georgetown.edu

Attorneys for Plaintiff
**Admitted pro hac vice*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of April 2021, a copy of this Memorandum in Opposition of Defendant's Motion to Dismiss or in the Alternative for Summary Judgment, and all supporting documents, was directed by first-class mail, postage prepaid, to:

Kay Harding, Esq.
Assistant City Solicitor
Baltimore City Law Department
Office of Legal Affairs
100 N. Holliday Street, Room 101
Baltimore, MD 21202

_____
Matthew Zernhelt, Esq.