



## INTRODUCTION

The Maryland Public Information Act (PIA) promotes values of transparency and good governance. Plaintiff Institute for Constitutional Advocacy and Protection (ICAP) heard from community members that the Baltimore Police Department (BPD or Department) often charges unreasonably high fees to produce public records under the PIA and makes seemingly arbitrary decisions about whether to grant a requester's fee waiver—thereby undermining these core principles of the PIA. To better understand Defendant BPD's process for reviewing fee-waiver requests, ICAP submitted a straightforward request for documents sufficient to show who had been granted or denied a PIA fee waiver. BPD can readily obtain this information from two corresponding sets of archived documents—a petitioner's initial PIA request and the Department's response to the request. Instead, it has refused to produce any of this information, forcing ICAP to file this suit.

BPD has now filed its second motion to dismiss ICAP's complaint under the PIA, staking out a conflicting position from its earlier motion. In its first motion to dismiss, BPD denied that it has any responsive records other than a single, publicly available policy. Now, in an abrupt about-face, BPD seeks to charge \$28,364 to compile, review, and produce documents it once claimed did not exist.

In its current motion, BPD asks this Court to put its stamp of approval on this outlandish fee. But these costs were improperly imposed for at least two reasons. First, BPD's proposed costs are unreasonable and unsupported by any evidence in the record.

Second, BPD failed to give any meaningful consideration to whether ICAP was entitled to a fee waiver, in violation of clear precedent demanding more. Simply put, BPD's newfound position is untenable under the PIA and existing case law.

## **BACKGROUND**

ICAP is a non-profit legal institute whose mission includes, among other things, working to promote government transparency and accountability. Compl. ¶ 6. In September 2020, ICAP submitted a PIA request to BPD for "records sufficient to show to whom BPD had granted or denied fee waivers since January 1, 2018." *Id.* at ¶ 4. In its request, ICAP sought a fee waiver because its petition was "in the public interest." *Id.* at ¶ 9. ICAP explained that it would make the records it obtained accessible to the community and share what it learned about how "members of the public with limited financial resources can obtain access to government records" through writing op-eds, social media, or a report on the organization's public website. *Id.* Ex. A, at 1.

BPD failed to respond to ICAP's request for seventy-five days, far in excess of the PIA's 30-day response window. Then, after ten weeks of silence, the Department produced a single, already publicly available document. *Id.* at ¶ 11. In its accompanying letter, BPD suggested there were no other responsive records, citing the absence of a PIA database and declining to "create" any new document in response to the request. Compl. Ex. 2; Def.'s First Motion to Dismiss, at 7. In response, ICAP offered to make things easier on BPD by limiting the production period, explaining how BPD could satisfy the request, and requesting a cost estimate to avoid litigation. Compl. at ¶ 13

(Dec. 8, 2020); ¶ 16 (Jan. 4, 2021). Despite those offers, however, BPD did not provide the documents or an estimate. *Id.* at ¶ 14. Accordingly, ICAP filed this suit in January 2020 to compel BPD to comply with the PIA. *Id.* at 7.

BPD has now filed two conflicting motions to dismiss. The first motion, filed in March 2021, argued that the Department did not possess any records responsive to ICAP’s request. ICAP responded to that motion in April 2021. The Department then filed a *second* motion to dismiss two weeks later, asserting (without any supporting evidence) that ICAP must pay nearly \$30,000 to produce the records that it previously argued did not exist. As explained below, BPD’s latest motion should be denied, as well.

## **ARGUMENT**

The PIA recognizes that providing citizens with “wide-ranging access to public information concerning the operation of their government” is essential to promoting transparency and accountability in public services. *Md. Dep’t of State Police v. Md. State Conference of NAACP Branches*, 430 Md. 179, 190 (2013). The statute’s provisions must therefore be “liberally construed” in favor of disclosure. *Kirwan v. The Diamondback*, 352 Md. 74, 80 (1998) (internal quotation marks omitted).

The PIA directs government agencies to allow “inspection of a public record, with the least cost and least delay to the person . . . that requests the inspection.” Md. Code Gen. Prov. § 4-103. The PIA allows custodians to charge “a reasonable fee” for the cost of searching for, preparing, and copying the requested public records, but that

fee must bear “a reasonable relationship to the recovery of actual costs” for providing the records at issue. *Id.* § 4-206. However, a custodian “may waive [the] fee” if, “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.” *Id.* § 4-206(e).

As explained further below, the fees that BPD seeks to collect here are unreasonable. BPD provides no sworn evidence to support its cost assertions, and the limited information it has provided cannot justify the exorbitant fees it seeks to charge, particularly in light of the limited nature of ICAP’s underlying request. To the extent BPD seeks to rely on unsupported assertions of its costs, ICAP should be entitled to take discovery of BPD in order to probe the basis for those assertions.

Furthermore, ICAP is entitled to a fee waiver. BPD’s failure to provide *any* explanation of its decision to deny ICAP’s fee-waiver request is a violation of blackletter PIA law. ICAP is a non-profit organization that cannot afford the fees BPD seeks to charge, and the records ICAP seeks would further the public interest. These factors plainly counsel in favor of a fee waiver, and BPD makes no effort to justify its refusal to provide one here.

For all of these reasons, this Court should deny BPD’s Second Motion to Dismiss or for Summary Judgment.

**I. BPD’s estimate of fees is unreasonable.**

The costs BPD seeks here are excessive and unsubstantiated. Under the PIA, Maryland agencies may assess fees only for “actual cost[s] incurred,” and “the connection between a particular cost and the response must be clear.” Office of the Attorney General, *Maryland Public Information Act Manual (PIA Manual)* 7-1 (15th ed.) (Nov. 2020) (citation omitted). BPD’s cost estimate of \$28,364 fails to satisfy that basic standard.

ICAP requested documents sufficient to show who had been granted or denied a PIA fee waiver by the BPD over six months in the past three years. BPD can satisfy that request by simply identifying and producing two documents for each PIA submission: the initial fee-waiver request made by the member of the public and BPD’s response to that request.

Despite the straightforward and limited nature of this request, BPD estimates it will take *672 hours* to fulfill the request based on the following estimates:

- 10 hours - Paralegal time to assist in identifying files, instructing, and/or training Contract Attorney on files: (\$24/hr. x 10 hours) = \$240.00.
- 432 hours - Vendor/Contract Attorney’s time: (\$45/hr. x 432 hrs.) = \$19,444.00.
- 150 hours - eDiscovery Professional time - Collection/evidence repository/Production/Project Management: (\$36/hr x 150 hrs): \$5,400.00
- 80 hours Reviewing Lawyer’s time- (\$41/hr. x 80) = \$3,280.00

**Total: \$ 28,364.00**

Def.’s Second Motion to Dismiss, Ex. 1, at 4. Because BPD has provided insufficient

evidence to support this fee, and because the fee is patently excessive under PIA precedents, BPD's motion should be denied.

**A. BPD fails to provide sufficient evidence in support of its fee estimate.**

As an initial matter, BPD's motion must be denied because BPD has not produced any sworn evidence to support its cost estimate. BPD's brief clearly fails as a motion to dismiss: the complaint contains no facts regarding BPD's cost estimate—indeed, BPD did not provide a cost estimate until three months *after* the complaint was filed—and a motion to dismiss concerns only matters within the four corners of the complaint. *See Worsham v. Ebrlich*, 181 Md. App. 711, 723 (2008) (“Generally the introduction of affidavits of fact will operate to convert a motion to dismiss into a motion for summary judgment.”). And BPD's brief fails as a motion for summary judgment because, at the summary judgment stage, facts must be established by “affidavits, depositions, or other sworn testimony.” *Castiglione v. Johns Hopkins Hosp.*, 69 Md. App. 325, 334 (1986); *see also* Md. R. Civ. P. Cir. Ct. 2-501(a) (requiring a motion for summary judgment to “be supported by affidavit if it is . . . based on facts not contained in the record”).

BPD's only support for its motion is the letter it sent ICAP setting out its original cost estimate. But “the unsworn statement of a witness is not . . . [an] appropriate[] form of placing evidence before the court” on a motion for summary judgment. *Imbraguglio v. Great Atl. & Pac. Tea Co.*, 358 Md. 194, 204 (2000). Because BPD has

failed to set forth any sworn evidence to support its cost analysis, its letter is an insufficient basis on which to grant BPD's motion for summary judgment.

BPD's letter also fails to provide an adequate evidentiary basis to allow the Court to evaluate whether its asserted costs comply with the PIA's requirements. *See Lamson 2016*, at 3 (explaining that custodians should provide "details on the tasks performed by" particular employees to facilitate review). Unlike custodians in other cases, BPD has not provided any underlying documentation to support its purported expenses included in its perfunctory cost estimate. *See, e.g., Lamson 2019*, at 1 (providing affidavit, logs, and other records); PIA Compliance Board 21-05, *Shalleck v. Montgomery City Council*, at 2 (Dec. 1, 2020) (custodian "attached seven exhibits, including Complainant's original requests, an affidavit from the legislative attorney explaining her estimate, screen shots of the initial searches indicating the number of potentially responsive emails, documentation of the legislative attorney's annual salary, and a letter containing an estimate" in support of its fee assessment). BPD's motion should be denied for this reason as well.

**B. BPD's cost assessment is unsupported.**

While BPD's failure to provide appropriate evidence is sufficient to deny its motion, it also leaves unanswered many questions about its asserted costs. Critically, BPD's cost estimate far exceeds costs imposed in cases it asserts to be comparable, and it appears to inappropriately inflate its costs in a number of ways that violate the PIA.

## 1. BPD's cost estimate cannot be reconciled with comparable cases.

BPD's estimate of costs is as unrealistic as it is prohibitive. The total costs of production, notably the number of hours for the number of pages produced, are unreasonable. BPD attached to its motion decisions of the Public Information Act Compliance Board (PIACB or Compliance Board) that provide guidance for fee assessments. But BPD's estimate is a total aberration when compared to those fee amounts. Here, BPD will provide fewer and less sensitive documents at nearly *ten times* the costs approved in those cases. For instance, in *Redding*, "the complainant requested from the County PD his entire investigative file, which comprises approximately 927 pages of paper records, and electronic records on 26 Compact Discs." PIACB 20-05, *Redding v. Baltimore Cnty. v. Police Dep't*, at 1 (Nov. 7, 2019) (Def.'s Second Motion to Dismiss, Ex. 2). Yet the county police estimated a fee range of only "\$2,665 to \$3,315." *Id.* In another matter, the Compliance Board found that \$3,648.75 was a reasonable fee to produce 1,085 pages in records. PIACB 20-04, *Lamson v. Montgomery Cnty.*, at 1 (Nov. 25, 2019) (Def.'s Second Motion to Dismiss, Ex. 2) (*Lamson 2019*). And in another, the Compliance Board upheld costs for attorney review of 800 pages totaling \$1,275. PIACB 19-08, *Blackwell v. Baltimore City State's Atty's Office*, at 2 (Jan. 17, 2019) (Def.'s Second Motion to Dismiss, Ex. 2).

There is no reasonable explanation for this asymmetry. ICAP's request is not more complex or expansive than other petitions that have been assessed a far lower fee estimate. See PIACB 20-11, *Flatten v. Montgomery Cnty. Pub. Sch.*, at 1 (Mar. 30, 2020)

(estimating \$442.96 for personnel costs to “pull the raw data for 23,000+ employees, then export, review, analyze and reformat the” information); PIACB 19-01, *Ramirez v. Montgomery Cnty. Dep’t of Transp.*, at 1 (Sept. 14, 2018) (charging \$2,500 for a request that “encompass[e] 22 separate roads” for “the years 1950-2018,” included records in both digital format and “paper form,” and required materials “to be pulled, researched, and processed from the County’s archival system”). The six months of records ICAP currently seeks—or even the three years of data originally sought—are relatively limited in time and scope. Compare with PIACB 21-08, *Holder v. Washington Cnty.*, at 3 (Dec. 1, 2020) (finding \$1,500 estimate was reasonable when “Complainant’s request [wa]s *not* limited in time” and he sought “*all* evidence in the County’s possession that might bear on whether the County owns or has abandoned a particular road,” which would “require searching records dating as far back as 1936 and quite possibly even further” (emphasis added)). Nor should ICAP’s request require more intensive review, scrutiny, or redaction than other PIA request, as the records that ICAP seeks should generally be correspondence with the public that does not fall within any PIA exceptions from disclosure.<sup>1</sup> See, e.g., *Redding*, at 1 (anticipating that “of 927 responsive paper records, . . . 219 pages were privileged or confidential”); *Blackwell*, at 2 (upholding only five hours of attorney time to review prosecutorial case files that “often contain information that

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<sup>1</sup> See *Police Patrol Security Systems v. Prince George’s Cnty.*, 378 Md. 702, 716-17 (2003) (“[T]here are no discrete public interest, personal information, or unwarranted invasion of privacy exceptions to the [PIA.]” (internal quotation marks omitted) (citing *Office of the Governor v. Washington Post Co.*, 360 Md. 520 (2000))).

must be withheld or redacted under various PIA exemptions”).

In sum, as a baseline measure, BPD’s fee estimate far exceeds what has been found reasonable in past cases without any justification for this drastic departure.

**2. The 432-hour estimate for the contract attorney is unjustified.**

BPD has estimated that it will take a contract attorney 432 hours to review 863 PIA request files. Beyond suggesting in its summary-judgment brief that “each file *may* contain several pdfs or outlook emails,” **BPD has not explained why it estimates that it will take an attorney approximately 30 minutes to review each file.** Def.’s Second Motion to Dismiss, at 11 (emphasis added). This is especially surprising where the documents needed to fulfill ICAP’s request—the initial PIA request and any denial of a fee waiver—should be fairly straightforward to identify within any files. Such an estimate is facially exorbitant. *See* PIACB 19-14, *Constantino v. Bd. of Educ. of Baltimore Cnty.*, at 1 (Aug. 19, 2019) (“[C]ounsel estimated it would take him 10 hours to review the more than 3,000 email messages that resulted from the first search,” a rate of less than 15 *seconds* per email). Even assuming that finding relevant documents within the files could take a few minutes, it is also unclear why an attorney must complete this work, when it would seem a paralegal could readily process these tasks at a lower cost. PIACB 17-12, *Patterson v. Baltimore State’s Atty’s Office* (May 18, 2017) (allocating six hours of clerical staff time at \$25/hour for the “review, redaction, and copying” of records and three hours of attorney review at \$75/hours for 1,500 pages). BPD’s estimate of 432 hours of contract attorney time is thus wholly unsupported.

### 3. BPD's estimate impermissibly charges for duplicate work.

PIA guidance makes clear that custodians should not charge requesters for duplicate work by multiple employees. *See* PIACB 18-08, *Sharp v. Univ. of Md.*, at 3 (Mar. 7, 2018) (“[A]ny duplication of effort should not be charged to the requester.” (citing PIACB 16-05, *Lamson v. Montgomery Cnty.*, at 3 (June 1, 2016) (*Lamson 2016*))); *PIA Manual* at 7-2 (“[T]he applicant generally should not be charged for duplicative employee efforts.”). Thus, “where multiple employees review the same material, only one person’s time should be part of the fee charged to the applicant.” PIACB 17-06, *Tanner v. Baltimore Cnty. Police Dep’t*, at 4 (Nov. 28, 2016) (citing *Lamson 2016*, at 3).

Despite this mandate, there are several replicated tasks in BPD’s estimate that significantly add to the projected costs. For example, 80 hours of a “Reviewing Attorney’s” time is allotted to review the contract attorney’s work. Def.’s Second Motion to Dismiss, Ex. 1, at 3. This duplicate task alone adds \$3,280 to the estimate. Especially where there is little concern that the requested materials should be redacted for privileged material, such duplication is wholly unwarranted and should not be charged to ICAP.

In addition, there appears to be overlapping work between the eDiscovery Project Manager and the Paralegal in compiling and organizing files. *See* Def.’s Second Motion to Dismiss, at 11 (“e-Discovery Professional would have to forensically collect the data from BPD’s electronic drive then cull with evidence software”); Ex. 1, at 3 (including 10 hours of paralegal time to, inter alia, “assist in identifying files”). Not only

are these efforts likely duplicative of each other, but BPD's PIA policy suggests that the eDiscovery Professional's work may well duplicate its existing databases. BPD, Policy 603, at 4.<sup>2</sup>

#### **4. BPD has not made a good-faith effort to reduce the costs to ICAP.**

The PIA “require[s] good faith efforts by the custodian to make reasonable options available to the requester.” PIACB 17-07, *Ely v. Montgomery Cnty. Police Dep’t*, at 2 (Feb. 28, 2017); *see also* Md. Code Gen. Prov. § 4-103 (requiring custodians to provide records at “the least cost and least delay to the” requester). Rather than seek to accommodate ICAP's request at a reasonable cost, BPD moved for summary judgment immediately after it informed ICAP of its fee calculation. Even assuming BPD's fee calculation is accurate (a dubious assumption for the reasons already outlined), BPD had a responsibility to consider less onerous options, such as trying “to minimize the expense” to ICAP by allowing it “to view the documents in person and copy only what it deemed important.” *Mayor & City Council of Baltimore v. Burke*, 67 Md. App. 147, 157 (1986). Or the Department could have asked a paralegal to identify only the initial PIA requests from each file in the six requested months and allowed ICAP to solicit follow-

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<sup>2</sup> Although BPD asserts that identifying the relevant months' worth of requests will be time-consuming because it has no database for PIA requests, BPD's own PIA policy explicitly instructs officers to “[l]og all requests into the DCU Database for tracking and to ensure timely responses to all requests.” BPD, Policy 603, at 4. BPD has not explained this discrepancy between its policy and its current, unsworn description of its actual practice. In any case, BPD does not justify why it would take nearly four full work weeks for an eDiscovery Professional to create and manage a database of fewer than 900 files.

up information for those records that contained a fee waiver request. Either of these approaches likely would take the BPD less time than its current estimate demands.

No such reasonable alternatives were offered here. Although BPD did offer to pull 50 files selected at random from the three-year period of ICAP's initial request, *see* Compl., Ex. A, at 1, that offer was obviously insufficient: A sampling of that size is far too small to meaningfully provide the kind of information that ICAP sought.<sup>3</sup> Def.'s Second Motion to Dismiss, Ex. 1, at 2 (calculating "2300 PIA requests" sent in 2020 and "over 550 requests" submitted between January and April 2021). BPD therefore did not fulfill its duty to try to reduce ICAP's costs with such an insufficient offer.

Ultimately, BPD's estimate of costs, both in terms of total expense and in relation to the number and type of documents produced, does not align with the Compliance Board's guidance. BPD's motion therefore should be denied.

## **II. BPD's estimate of charges is unreasonable because ICAP is entitled to a fee waiver.**

When a requestor asks for a fee waiver because their request is in the public interest, a custodian is obligated to consider "not only the ability of the applicant to pay" and the cost to the agency, "but also other relevant factors," including the potential benefit to the public. *Action Comm. for Transit, Inc. v. Town of Chevy Chase (ACT)*, 229 Md.

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<sup>3</sup> Notably, BPD also failed to explain why it would be significantly less burdensome for it to identify a random sampling of files. Even under a random-sampling approach, BPD would still have to identify *all* of the responsive records in its possession order to ensure that the sample was truly random and not colored by any selection bias.

App. 540, 561 (2016); *see also* *Burke*, 67 Md. App. at 157. Here, BPD failed to consider *any* of these factors in denying ICAP’s fee waiver request. Its decision was therefore arbitrary and capricious.

**A. BPD’s denial of a fee waiver was arbitrary and capricious because it failed to identify any factors it considered.**

Although a custodian has some discretion to decide whether to grant or deny a fee waiver, “the court must have sufficient information before it to satisfy itself that the custodian’s decision was not arbitrary or capricious.” *ACT*, 229 Md. App. 540, 561 (2016). Where a custodian entirely fails “to identify what relevant factors he or she considered” in denying a public-interest fee waiver, that decision is necessarily arbitrary and capricious. *Id.* at 563, 565 (“The judgment will further provide the Town is obligated to respond to . . . [the] requests without charge to the appellants.”); *Burke*, 67 Md. App. at 151 (“It is further ordered that all reasonable costs connected with the retrieval, inspection and copying of the documents be waived.” (emphasis omitted)).

Here, the full extent of BPD’s analysis, as provided in its April 12 cost estimate, is this: “Your fee waiver request was reviewed and is denied.” Def.’s Second Motion to Dismiss, Ex. 1, at 4. Because this response does not identify any reason for denying the fee waiver, BPD’s decision is arbitrary and capricious, and its motion for summary judgment on the amount of fees to be charged should be denied.

The Department’s inadequate response is almost identical to the deficient denial that appeared in *ACT v. Town of Chevy Chase*, 229 Md. App. 540 (2016). There, a non-

profit organization sought information about public transportation and requested a fee waiver. *Id.* at 545. The town’s response to the fee-waiver petition stated: “In your request, you outline your arguments in support of a waiver of all fees associated with the request. Please be advised the request for a waiver has been considered and is denied.” *Id.* at 563. The *ACT* court explained that the town’s “bald and conclusory statement” provided “no insight whatsoever as to the actual considerations that motivated” the decision to deny a fee waiver. *Id.* Because courts “must necessarily consider the *actual* decision-making process by the custodian in order to decide whether the custodian gave appropriate consideration to ‘other relevant factors,’” the court held that a custodian must “identify what relevant factors he or she considered” in approving or denying a fee waiver request. *Id.* (emphasis added). BPD’s denial, like the town’s response in *ACT*, “fails comprehensively in this regard,” because it gives absolutely no information about the factors the Department considered in making its determination.<sup>4</sup> *Id.* Therefore, just as in *ACT*, BPD’s fee waiver denial was arbitrary and capricious.

**B. BPD’s failure to consider whether ICAP’s fee waiver was in the public interest was arbitrary and capricious.**

Given BPD’s bald denial of a fee waiver, it is impossible to know what factors, if any, BPD considered in declining to grant ICAP’s request. However, assuming

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<sup>4</sup> Although the *ACT* court suggests that a custodian can cure a deficient statement of the factors considered through the development of the factual record in court, 229 Md. App. at 563, BPD has failed to provide any further basis for its waiver in conjunction with its motion for summary judgment and has therefore waived that opportunity.

*arguendo* that the Department would justify its fee waiver based on the costs it asserts it would incur, that is an insufficient basis for denying a fee waiver. A proper analysis would have considered other factors, including the significant benefit of the disclosure of information to the public and ICAP's ability to pay.

The Court of Special Appeals made clear in *Mayor & City Council of Baltimore v. Burke* that it is insufficient for a custodian to consider “no more than the expense . . . of locating and duplicating the documents” in denying a fee waiver. 67 Md. App. 147, 157 (1986); *see also PLA Manual*, 7-6 (“[A] custodian who denies a waiver request based solely on the expense to the agency has not considered ‘other relevant factors’ as required by § 4-206(e).”).

Both *Burke* and *ACT* instruct that a custodian must consider the potential for a request to contribute to the public interest in deciding whether to grant a fee waiver. In *ACT*, the court commented that the custodian should consider “whether disclosure of records will shed light on ‘a public controversy about official actions,’ or on ‘an agency’s performance of its public duties.” 229 Md. App. at 557 (quoting 81 Op. Att’y Gen. 154, 157–58 (Md. 1996)). And in *Burke*, the court stated that “relevant considerations would include” the seriousness of the underlying public health problem at issue, “the importance of public exposure of” the issues in governmental administration, “and the danger that imposing a fee for information upon a newspaper publisher might have a chilling effect on [the] free exercise of freedom of the press.” 67 Md. App. at 157. Moreover, the Attorney General’s *PLA Manual* reiterates the

importance of considering the public interest: “A waiver may be appropriate, for example, when a requester seeks information for a public purpose, rather than a narrow personal or commercial interest, because the public purpose might justify the expenditure of public funds to comply with the request.” *PIA Manual*, 7-5. And even BPD’s own PIA policy indicates that BPD should have done more: it directs that fee waivers “*must be considered and granted* if the documents and/or information requested are in the general interest of the public.”<sup>5</sup> BPD, Policy 603: Document Compliance Unit (DCU) (May 7, 2017), *available at* <https://perma.cc/EUC9-L9CJ> (emphasis in original). A failure to consider such public-interest factors renders a fee-waiver denial arbitrary and capricious.

Here, BPD failed to assess the public value of the requested information. There is broad interest in the records ICAP requested because they are critical to furthering the public’s understanding of BPD’s operations, activities, and commitment to transparency and accountability.<sup>6</sup> The disclosure of the Department’s history of fee-

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<sup>5</sup> The federal Freedom of Information Act’s (FOIA) fee-waiver provision is similar to the PIA’s. *See* 5 U.S.C.A. § 552(a)(4)(A)(iii) (allowing for fee waivers in the public interest where disclosure “is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester”). FOIA’s fee-waiver provision favors “the media or other requesters who will provide broad public dissemination of the information sought,” and it is “persuasive” in interpreting the PIA’s fee-waiver provision. *Burke*, 67 Md. App. at 156.

<sup>6</sup> *See, e.g.*, Measuring What Matters: Addressing Police Reform Must Start with Accurate Data, USA Facts, <https://usafacts.org/articles/measuring-what-matters-addressing-police-reform-must-start-accurate-data/> (last updated Sept. 23, 2020)

waiver determinations and the amounts charged would undoubtedly “shed light on . . . [the] agency’s performance of its public duties.” *ACT*, 229 Md. App. at 557. There can be no doubt as to the value of this data, as state legislators have sought similar information in their policymaking functions. Most notably, the Senate Budget and Taxation Committee and House Appropriations Committee requested a report regarding the PIA “caseloads, dispositions, and practices” of 23 cabinet-level agencies over a 15-month period “to make recommendations relating to PIA enforcement and compliance monitoring.”<sup>7</sup> The fact that BPD did not participate in that study only underscores the public value and import of ICAP’s request.

ICAP also seeks the records solely to further public discussion of this important issue, not to further its own commercial interests. ICAP indicated in its request that it would release publicly the information it obtained—through an op-ed, report on its website, or other appropriate means—at no cost to the public. Compl., Ex. A, at 1; *see Burke*, 67 Md. App. at 156 (indicating that a commitment to “provide broad public dissemination of the information sought” is relevant to the public-interest analysis).<sup>8</sup>

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(underscoring the “need [for] clear, comprehensive, contextual numbers to help advise decisions on policing” reform and “ground public debates in facts”).

<sup>7</sup> Final Report on the Public Information Act (Dec. 27, 2019), [http://dlslibrary.state.md.us/publications/JCR/2019/2019\\_9.pdf](http://dlslibrary.state.md.us/publications/JCR/2019/2019_9.pdf) (collecting the number of requests for which a fee waiver was requested, a fee was charged, or the waiver was granted).

<sup>8</sup> To the extent BPD may claim that it lacked any information about the public interest served by ICAP’s request, that failure falls at its own feet. BPD policy requires that the Department provide “a fee waiver application” when a waiver is requested.

Moreover, BPD failed to assess and consider ICAP's ability to pay—an express statutory consideration, *see* Md. Code Gen. Prov. § 4-206(e)(2)(ii). ICAP is a non-profit legal institute that primarily entirely on charitable donations to fund its operations, including personnel, litigation expenses, and other costs. *See ACT*, 229 Md. App. at 545 (noting requesting entity “was a grassroots, public interest organization run by volunteers” whose assets would be “donated to a 501(c)(3) charitable organization upon dissolution”). The fee that BPD seeks to charge would be far more than a non-profit could justify spending on obtaining a relatively limited set of records.

In sum, BPD's refusal to consider other factors in its decision-making, including the public value of the information requested and ICAP's ability to pay, renders its denial of a fee waiver arbitrary and capricious. It is therefore not entitled to dismissal or summary judgment as to the amount of fees to be charged to ICAP.

### **CONCLUSION**

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

Respectfully submitted,

Dated: June 4, 2021

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

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BPD, Policy 603, at 6. ICAP never received this form, and BPD did not solicit additional fee waiver information by another means.

mzernhelt@baltimoreactionlegal.org

Jennifer Safstrom\*

Nicolas Y. Riley\*

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

jsafstrom@georgetown.edu

nr537@georgetown.edu

*Attorneys for Plaintiff*

*\* Pro hac vice application pending.*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 4th day of June 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

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Matthew Zernhelt, Esq.