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*,	:	
v.	:	Civil Case No. 24C21000162
BALTIMORE POLICE DEPARTMENT 601 East Fayette Street Baltimore, MD 21202 *Defendant*.	:	

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This is a case about the public's right to know how and whether Defendant Baltimore Police Department ("BPD," "Department," or "Defendant") complies with the Maryland Public Information Act ("MPIA" or "PIA"). The Institute for Constitutional Advocacy and Protection ("ICAP" or "Plaintiff") brings this litigation to challenge BPD's refusal to provide public records within a reasonable time and at a reasonable cost, and its denial of ICAP's request for a fee waiver.

Over the 18 months that BPD has been resisting ICAP's MPIA request, it has demonstrated a remarkable range of MPIA violations. ICAP made its request to BPD in September 2020, seeking records related to BPD's process for responding to MPIA requests and issuing fee waivers. After first failing to respond properly within the statutory deadline, BPD denied that responsive records existed at all. Then, after ICAP sued, BPD reversed course but had a new rationale: It would cost tens of thousands of dollars to provide these records that it previously denied even existed. And without the decisionmaker even reviewing ICAP's submission firsthand, BPD denied ICAP's fee waiver request, speculating about ICAP's ability to pay and ignoring the public interest in disclosure. These shifting and incomplete rationales are the hallmark of arbitrary decision-making and willful noncompliance with MPIA's mandate for open records.

BPD's arbitrary decision-making in its application of the MPIA has not only harmed ICAP; if unchecked, it presents a risk to future requesters and threatens to undermine the legislation's fundamental purpose to enhance transparency. The MPIA promotes access to information about government operations that is critical to the public. BPD's obstruction in responding to records requests and assessing fee waivers, as in ICAP's case, has the potential to undermine public trust. There are no factual issues that bar summary judgment on the legal issues, which strike at the cornerstone of the MPIA's public access protections. Plaintiff respectfully asks this Court to grant this motion and issue the requested relief.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

ICAP's mission is to defend constitutional rights and values while working to restore confidence in the integrity of our governmental institutions. A vital part of ICAP's work involves promoting government transparency and accountability, including enforcing the people's right to access public records. Compl., at ¶ 6 (noting ICAP seeks to "increas[e] government transparency at the local, state, and federal level" and "litigated cases involving government records in Maryland"). In an effort to learn more about BPD's records-production process and how BPD makes fee waiver decisions in light of existing public controversy,[1] ICAP filed an MPIA request on September 18, 2020, asking for 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;
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> 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 fees that were not waived.

Ex. A, ICAP's MPIA Request, at 1.

ICAP requested that BPD grant a fee waiver for the costs associated with producing these documents because they would serve the public interest by "address[ing] how members of the public with limited financial resources c[ould] obtain access to government records made available by statute." *Id.* ICAP further explained that the records would be used "to inform the public about access to Maryland public records" and to broaden the community's understanding of open records laws. *Id.*

[1] *See, e.g.*, *'Reasonable' Access: Md. Police Agencies Charge More for Public Records Fees Than Other Government Agencies*, Capital Gazette (Mar. 10, 2019, 6:00 AM), https://www.capitalgazette.com/news/crime/ac-cn-mddc-sunshine-0310-story.html ("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.").

For nearly two and half months, BPD provided only cursory acknowledgements that it had received ICAP's request. *See, e.g.*, Ex. B, Emails Between BPD and ICAP, at 6–11 (confirming BPD's receipt of ICAP's request and providing rote updates on the status of ICAP's request, dated between Sept. 21, 2020 to Dec. 1, 2020). BPD did not provide a substantive response to ICAP's request until December 2, 2020—75 days after ICAP's submission of the request. Ex. C, BPD's Initial Response and Denial, at 1. Despite this extensive delay, BPD produced just a single document: In response to ICAP's first request for documents governing its implementation of the MPIA, BPD produced Policy 603, which was already available on BPD's website, and which was solely in response to ICAP's first request. *Id.* at 1–2. In response to ICAP's second and third requests, BPD did not produce anything; it claimed that because it "d[id] not have a database in which fee waivers [were] maintained," and because without a database the request would require "hand pulling" the requested records from individual MPIA files, it was not obligated to produce anything. *Id.*

Despite the delay and scant response, ICAP continued correspondence with BPD to help the Department understand what documents would be responsive to ICAP's request,[2] and to narrow the request. *See* Ex. B, Emails Between BPD and ICAP, at 2–3; Compl. ¶¶ 13–16. ICAP explained: (1) ICAP's request did not require creation of a database or any other record because production of the MPIA request letters and BPD response letters would be sufficient; and (2) ICAP was willing to narrow the scope of its request by limiting the date range. *Id.* at 3. However, BPD repeated the same justification offered in the December denial letter: BPD does not track fee waiver requests, so it would not be able to produce responsive documents. *Id.* at 2; *see also* Compl. ¶ 15. ICAP then filed suit on January 15, 2021.

[2] From this point forward, references to "ICAP's request," or similar language, will refer primarily to the second and third requests in ICAP's September 2020 MPIA request, which are the focus of this litigation.

On March 23, 2021, Defendant filed a Motion to Dismiss or in the Alternative for Summary Judgment. BPD represented that it "d[id] not have records responsive to [ICAP's] request" and repeated its assertion that ICAP's request would require BPD to "create" new records or databases. Def.'s Mot. to Dismiss, at 6–8. However, two days later, BPD abruptly changed course and acknowledged its ability to produce documents responsive to ICAP's request. *See* Ex. D, Emails Between Robert Friedman and Kay Harding, at 3; Def.'s Mot. to Dismiss, at 4 (confirming receipt of over 2300 public information act requests in 2020); *see also* Ex. B, Emails Between BPD and ICAP, at 2–3 (showing ICAP previously offered to limit the production period and requested a cost estimate for this limited production period to attempt to avoid litigation in December). In the spirit of accommodation, on March 30, 2021, ICAP narrowed its request to the months of June and July, between 2018 and 2020. Ex. D, Emails Between Robert Friedman and Kay Harding, at 2–3 (reducing ICAP's requests to six months of requests—two months in each of three years).

On April 12, 2021, BPD sent ICAP a fee estimate of the costs associated with producing records responsive to ICAP's narrowed request. BPD claimed that there were 863 files responsive to ICAP's request; sought to charge nearly $30,000 to compile, review, and produce these files; and demanded that it be paid in full prior to BPD beginning any work. Ex. E, Original Cost Estimate and Fee Waiver Denial Letter, at 2–4. This estimate included time for a contract attorney, a reviewing attorney, an e-discovery professional, and a paralegal. *Id.* at 3. The fee estimate also rejected ICAP's request for fee waiver without explanation: "Your fee waiver request was reviewed and is denied." *Id.* at 4.

Citing this new fee estimate, BPD filed its first supplement to its original motion to dismiss. Def.'s 1st Suppl. Mot. to Dismiss, at 10 (arguing that BPD's fee estimate was reasonable). In response, ICAP challenged BPD's denial of ICAP's fee-waiver request and the reasonableness of BPD's cost estimate, highlighting that BPD provided no sworn evidence to support its cost assertions and failed

to adequately provide justification for the exorbitant fees it sought given the limited nature of ICAP's underlying request. *See generally* Pl.'s Mem. in Opp'n to Def.'s Mot. to Dismiss, at 4–10.

Over a month after filing its supplemental brief, and four days prior to the hearing on the motion and its supplement, BPD filed a *second* supplement to its motion that included an affidavit from BPD's Deputy Chief of Staff, Andrew Smullian, substantively addressing ICAP's fee-waiver request for the first time. Smullian stated:

> 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.

Ex. F, Smullian Aff., at ¶ 8 (appearing as Exhibit 1 to Def.'s 2d Suppl. Mot. to Dismiss).

Smullian later contradicted these post-hoc assertions in his deposition. Despite attesting that he "carefully reviewed the fee waiver request" and "consulted with legal counsel" in making his decision, *id.* at ¶ 7, Mr. Smullian later admitted that he likely did not even read ICAP's original MPIA request. Ex. G, Smullian Dep., at 122:2–14, 126:5–22. He was unable to define "public interest," explain how the nature of ICAP's request neglected to advance the public interest, or say "how much weight [he] accorded each" factor in his analysis. *See, e.g.*, *id.* at 168:22–169:22 ("As I keep saying, I took them as a whole and I made a decision."). He even acknowledged that it "is not relevant to me about why anyone is requesting this information or what they're going to use it for or what the content is aside from the fact it's something that I can go and get." *Id.* at 91:10–91:13.

The court denied Defendant's motion to dismiss, and the case proceeded to discovery.[3] On November 9, 2021, ten days before discovery was originally set to close, Kenneth ("Ken") Hurst, the Document Compliance Coordinator for BPD's Document Compliance Unit ("DCU") sent ICAP a letter with a new cost estimate for the production of records: $21,640. Ex. H, Adjusted Cost Estimate, at 1. Mr. Hurst explained that the new cost estimate reduced the hourly rate for the contract attorneys and the total hours estimated for the eDiscovery professional's work. *Id.* BPD partially based this cost estimate on its claim that there were 863 files responsive to ICAP's request and its estimate that there were 50 to 200 pages in each file. BPD did not explain how it made this estimate, which was later contradicted by a sampling of 6 MPIA files, all of which were under 20 pages. BPD partially based this cost estimate on its claim that there were 863 files responsive to ICAP's request and its estimate that there were 50 to 200 pages in each file. BPD did not explain how it made this estimate, which was later contradicted by a sampling of 6 MPIA files, all of which were under 20 pages.

In summary, BPD excessively delayed in responding to ICAP's request and denied the existence of responsive records. After the commencement of litigation and BPD's ultimate acknowledgement of responsive files, BPD then summarily denied ICAP's request for a fee waiver and provided an unreasonably high cost estimate. ICAP now moves for summary judgment.

STANDARD OF REVIEW

Summary judgment is appropriate when "there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law." *Piscatelli v. Smith*, 197 Md. App. 23, 36 (2011);

[3] On January 31, 2022, ICAP filed a Motion to Compel Discovery that remains pending. *See* Pl.'s Mot. to Compel Disc. (Jan. 31, 2022). The motion argues that BPD improperly withheld important evidence during the discovery process. ICAP maintains that BPD continues to withhold this evidence and that such evidence would be helpful to ICAP in making its case for summary judgment. However, ICAP believes it is entitled to summary judgment even without the evidence it seeks in the Motion to Compel. Plaintiff respectfully reserves its right to supplement this Motion for Summary Judgment or seek other appropriate relief if its Motion to Compel is granted after this instant Motion is filed.

see Md. Rule 2-501. "Once the moving party provides the trial court with a *prima facie* basis in support of the motion for summary judgment, the non-moving party is obliged to produce sufficient facts admissible in evidence, if it can, demonstrating that a genuine dispute as to a material fact or facts exists." *Thomas v. Shear*, 247 Md. App. 430, 447 (2020) (quoting *Thomas v. Bozick*, 217 Md. App. 332, 340 (2014)) (emphasis in original). "In other words, '[o]nce the movant makes [t]his showing, *the burden shifts to the nonmoving party* to 'identify with particularity the material facts that are disputed.'" *Id.* (quoting *Nerenberg v. RICA of S. Md.*, 131 Md. App. 646, 660 (2000)) (emphasis in original). Moreover, "when a movant has carried its burden, the party opposing summary judgment 'must do more than simply show there is some metaphysical doubt as to the material facts.'" *Nerenberg*, 131 Md. App. at 660 (quoting *Beatty v. Trailmaster Prod., Inc.*, 330 Md. 726, 738 (1993)). In a case brought pursuant to the MPIA, it is appropriate to grant summary judgment to the requester where the requester meets the standard set out in Maryland Rule 2-501(f). *See Admin. Off. of the Cts. v. Abell Found.*, 252 Md. App. 261, 258 A.3d 998, 999–1000 (2021) (affirming Circuit Court for Baltimore City's grant of summary judgment to MPIA requester); *accord, e.g.*, *World Publ'g Co. v. Dep't of Just.*, 672 F.3d 825, 832 (10th Cir. 2012) ("In general [federal Freedom of Information Act] cases are resolved on summary judgment.").

Maryland law guarantees that "[a]ll persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees," and directs that the MPIA "shall be construed in favor of allowing inspection of a public record, with the least cost and least delay to the person or governmental unit that requests the inspection." Md. Code Gen. Prov. § 4-103. The government has "the burden of sustaining a decision" to deny access to public information. Md. Code Gen. Prov. § 4-362(b)(2). An agency's decision to deny a fee waiver will be overturned "if

its decision was arbitrary and capricious." *Action Comm. for Transit, Inc. v. Town of Chevy Chase*, 229 Md. App. 540, 559 (2016).[4]

ARGUMENT

BPD violated the MPIA in four independent ways. First, BPD breached the MPIA by failing to timely respond or provide records. Second, it violated the MPIA when it denied elements of ICAP's MPIA request on the basis that no responsive records existed even though BPD knew at the time that responsive records did exist. Third, it violated the MPIA when it arbitrarily and capriciously denied ICAP's request for an MPIA fee waiver, ignoring the public-interest factors that decades of Maryland case law have established as required elements of a fee-waiver determination. Finally, it violated the MPIA by providing ICAP with an unreasonably high cost estimate for producing the requested records. Therefore, Plaintiff respectfully requests that this Court enter a declaratory judgment that BPD violated the MPIA, award ICAP statutory damages of $1,000[5] for each of BPD's MPIA violations, award ICAP attorneys' fees and litigation costs, and issue an injunction directing BPD to produce records responsive to ICAP's request and grant a fee waiver.

I. BPD violated the MPIA by failing to satisfy the MPIA's timeliness requirements.

BPD's delayed response to ICAP's request violated several MPIA time-limit requirements. Timeliness requirements are important to public-information laws because "stale information is of little value."[6] *See Brennan Ctr. for Just. at N.Y. Univ. Sch. of L. v. Dep't of Com.*, 498 F. Supp. 3d 87, 101

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[4] Although the Court of Special Appeals has held the appropriate standard of review is arbitrary and capricious, Plaintiff contends that the more appropriate standard is de novo, *see* 5 U.S.C. § 552(a)(4)(A)(vii); *Mayor & City Council of Baltimore v. Burke*, 67 Md. App. 147, 156 (1986) (looking to federal Freedom of Information Act for guidance on fee waiver decisions). De novo review is particularly appropriate where, as here, the agency did not respond timely to the request or provide an initial explanation for its denial.

[5] *See* Md. Code Gen. Prov. § 4-362(d)(3).

[6] *See* Ex. I, Woods Aff., at ¶ 11 ("[A]lthough I have made dozens of MPIA requests to BPD, I cannot recall when BPD has ever produced responsive records to one of my individual requests within the statutory thirty-day deadline."); *id.*, at ¶ 15 ("BPD's delays and demands for excessive fees have caused me to publish stories lacking in important context that would help Baltimore residents make better

(D.D.C. 2020) (interpreting the federal Freedom of Information Act ("FOIA")).[7] Subject to specific exceptions, MPIA requires agencies to act "promptly, but not more than 30 days after receiving the application." Md. Code Gen. Prov. § 4-203(a)(1). When a records custodian grants an MPIA request, the respondent has 30 days from the receipt of the request to produce the requested documents. Md. Code Gen. Prov. § 4-203(b)(1); *Stromberg Metal Works, Inc. v. Univ. of Md.*, 382 Md. 151, 155 (2004). If a custodian believes it will take longer than 10 working days to produce documents responsive to an MPIA request, it must notify the requester, provide a reason for the delay, and offer a "range of fees that may be charged to comply with the request." Md. Code Gen. Prov. § 4-203(b)(2)(i)–(iii). BPD violated these and other statutory deadlines at multiple steps in responding to ICAP's request.

First, BPD did not include a cost estimate in its 10-day notice. Ex. J, BPD 10-Day Notice, at 1. Additionally, BPD did not seek any clarification of ICAP's request on the basis that it was unclear or unreasonably broad (or on any basis) within 30 days, nor did it make any effort to clarify or narrow the request within that time period. *See* Office of the Attorney General, *Maryland Public Information Act Manual*, 4-3 (16th ed.) (Sept. 2021) (hereinafter "MPIA Manual")[8] (stating that custodians should ask applicants within 30 days to clarify or narrow unclear or unreasonably broad requests).[9]

Second, BPD also violated MPIA's timeliness requirements when it belatedly produced one responsive document. There is no justification for BPD waiting 75 days to produce a single,

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informed decisions. . . . Such delays and demands have also caused me to have to wait to publish important stories.").

[7] Federal FOIA cases are persuasive authority for Maryland courts interpreting the MPIA. *Faulk v. State's Att'y*, 299 Md. 493, 506 (1984) ("The purpose of the Maryland Public Information Act . . . is virtually identical to that of the FOIA.").

[8] Available online at https://www.marylandattorneygeneral.gov/Pages/OpenGov/piamanual.aspx.

[9] BPD thus flouted its obligation to "provide some reasonable assistance to the requestor in refining the records the requestor seeks." *Glass v. Anne Arundel Cnty.*, 453 Md. 201, 232–33 (2017) (requiring "iterative process" under the MPIA 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"); *see also* MPIA Manual 2–6 (quoting *Glass*).

unredacted document responsive to ICAP's request, well past the 30 days provided for by statute. Ex. C, BPD's Initial Response and Denial, at 1–2. There is no basis to conclude that BPD needed more than 30 days to turn over a single document that was already public.[10] Even though BPD acknowledged its possession of this document 54 days after ICAP's initial request, Ex. B, Emails Between BPD and ICAP, at 8–9 (stating "I have the policy for DCU"), it inexplicably held onto it for another three weeks before producing it to ICAP. BPD's decision to wait 75 days to produce this document to ICAP flouts the plain statutory command to turn over responsive records within 30 days. *see also* Ex. K, Hurst Org. Dep., 65:9–13 (Q: "Could you tell me why BPD did not reply until December 2nd?"; A: "Honestly, no, [] I can't.").

Third, BPD also violated the timeliness requirements when it partially denied ICAP's request. The MPIA requires that a custodian provide notice of denial to the MPIA requester within 30 days of receiving the request and provide an explanation for the denial of the request within 10 days of that notice. Md. Code Gen. Prov. § 4-203(b)(1), (c)(2); MPIA Manual 4-3. Yet BPD did neither. BPD waited 75 days to provide notice of and an explanation for its denial of ICAP's request—over one month past the statutory deadline for notice and over three weeks past the statutory deadline for an explanation. Ex. C, BPD's Initial Response and Denial, at 1–2.[11] There is no justification for why BPD needed 75 days to produce this denial, which was cursory, conclusory, and, as BPD has now conceded, factually incorrect.

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[10] *Policy 603: Document Compliance Unit*, Balt. Police Dep't, https://www.baltimorepolice.org/sites/default/files/Policies/603_Document_Compliance_Unit.pdf (last visited Mar. 2, 2022).

[11] BPD also failed to provide adequate notice of remedies. When a custodian denies an MPIA request, the MPIA requires the custodian to notify the requester of the recourse available for review of the denial. Md. Code Gen. Prov. § 4-203(c)(1)(i). BPD's denial letter did not include this notice. *See* Ex. C, BPD's Initial Response and Denial, at 1–2.

II. BPD violated the MPIA by claiming that there were no records responsive to ICAP's MPIA request when it knew at the time that responsive records existed.

When BPD denied the existence of responsive records, it contravened the MPIA's requirement to allow the public access to "any public record at any reasonable time." Md. Code. Gen. Prov. § 4-201(a)(1); *see, e.g.*, *id.* § 4-103(b) (setting out a limited exemption for unwarranted invasion of privacy). ICAP's request sought "records sufficient to show" the identities of MPIA requesters, the subjects of their requests, and the amount of fees assessed (where fee-waivers were denied) or waived, but BPD provided only one policy that was already publicly available and claimed that no further responsive records existed. Ex. A, ICAP's MPIA Request, at 1; Ex. C, BPD's Initial Response and Denial, at 1–2.

Even after ICAP brought this litigation, BPD repeatedly but falsely asserted that no responsive records existed. Def.'s Mot. to Dismiss, at 6 ("Despite being informed that the Defendant does not have records responsive to its requests, the Plaintiff filed this lawsuit."); *id.* at 7 ("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."); Ex. B, Emails Between BPD and ICAP, at 2 ("[I]t is my understanding that the Baltimore Police Department (BPD) does not track the information that you requests. [*sic*] BPD does not track fee waiver requests . . . . Therefore, BPD will not be able to fulfil your current MPIA request."); *id.* at 3 ("The BPD does not track such information."); Ex. C, BPD's Initial Response and Denial, at 1–2 ("BPD does not track this information.").

These assertions were wrong, and BPD knew it. Even before this litigation began, BPD's response to ICAP's request acknowledged that BPD could satisfy it by "hand pulling" all public-records requests and responses from the relevant time period—yet it refused to provide a cost estimate, let alone produce such documents. Ex. C, BPD's Initial Response and Denial, at 2. Moreover,

ICAP's communications with BPD—after the Department's initial claim that no responsive records existed, but before the commencement of this lawsuit—explicitly informed BPD that it could fulfill the request by producing existing files *without* creating a new file or database. Ex. B, Emails Between BPD and ICAP, at 2–3. In the same motion to dismiss in which it disclaimed the existence of responsive records, BPD acknowledged that ICAP's request could be satisfied through the production of "each and every record from the government files." Def.'s Mot. to Dismiss, at 8. It simply refused to do so.

The deposition testimony of BPD Document Compliance Unit official Ken Hurst, who supervises the division of BPD responsible for responding to MPIA requests, has also made clear that at the time BPD declined to produce documents pursuant to ICAP's MPIA request, BPD knew it possessed responsive records. Mr. Hurst acknowledged that there were responsive documents in BPD's possession at the time the request was received and that the BPD actually denied ICAP's request because it was "overburdensome." Ex. L, Hurst Dep., at 58:1–14; 61:20–62:11; 99:3–6; 103:9–12; *see also* Def.'s Mot. to Dismiss, at 8 (noting ICAP's request would "require a lot of manual labor ('hand-pulling')").[12] Accordingly, BPD's assertion that fulfilling ICAP's request would have required it to create new documents was knowingly false and violated the MPIA. It took seven months from the date of ICAP's request and three months from the filing of this lawsuit for BPD to unambiguously acknowledge that it did in fact possess responsive records. *See generally* Def.'s 1st Supp. Mot. to Dismiss; Ex. E, Original Cost Estimate and Fee Waiver Denial Letter, at 1–4 (stating that records requested in September 2020 lawsuit could be produced). This Court should make clear that a public agency cannot discourage the public from requesting public records by denying the existence of those

[12] Mr. Hurst also declined to say whether he agreed with the contents of the letter he signed (but did not write) that informed ICAP that no responsive documents existed. Ex. L, Hurst Dep., at 100:21–101:21.

records until the agency is sued. *See Glass v. Anne Arundel Cnty.*, 453 Md. 201, 232 (2017) ("A public records request is not an occasion for a game of hide and seek.").

III. BPD violated the MPIA by arbitrarily and capriciously denying ICAP's request for a fee waiver.

BPD independently violated the MPIA for a third reason: Once it reversed course and acknowledged that there *were* records in its possession responsive to ICAP's MPIA request, BPD arbitrarily and capriciously denied ICAP's request for a fee waiver. Although MPIA allows a custodian to charge a reasonable fee for copies, the fee should be waived 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." Md. Code Gen. Prov. § 4-206(e)(2); *Balt. Action Legal Team v. Off. of State's Att'y*, 253 Md. App. 360, 265 A.3d 1187, 1206 (2021). "A government agency's denial of a fee waiver may not be arbitrary and capricious." *Balt. Action Legal Team*, 265 A.3d at 1206.[13]

BPD summarily and without explanation denied ICAP's fee-waiver request on April 12, 2021—stating only that ICAP's "fee waiver request was reviewed and is denied"—months after the start of this litigation.[14] Ex. E, Original Cost Estimate and Fee Waiver Denial Letter, at 4. The Department also failed to explain its decision in its first supplement to its motion to dismiss. Only in its second supplement to its motion to dismiss did BPD finally address the fee waiver, providing a post-hoc explanation through Mr. Smullian's affidavit. Ex. F, Smullian Aff. In addition to conclusory statements claiming compliance with the MPIA, *e.g.*, *id.* at ¶ 10 ("BPD did not arbitrarily or capriciously deny Plaintiff's fee waiver."), Mr. Smullian cited "ICAP's association with Georgetown Law School," and contended that Plaintiff "did not explain its public interest purpose or how the disclosure would

[13] At the time this motion was filed, the pagination of the Maryland Appellate Reports version of the *Baltimore Action Legal Team* case was unavailable via Westlaw, Lexis, or Bloomberg Law. This motion will thus use the Atlantic Reporter pagination when citing to that case.

[14] As explained *supra*, this letter was the same document in which BPD first unambiguously acknowledged the existence of records responsive to ICAP's MPIA request, reversing course from its earlier strategy of denying the records' existence. This letter also contained BPD's first cost estimate.

achieve its purpose." *Id.* at ¶ 8. Mr. Smullian also contended that "BPD did consider the14 overall cost of production, budgetary constraints, and manpower shortages in the Document Compliance Unit, but [that] these consideration[s] did not drive the decision." *Id.* at ¶ 9.

At his deposition, Mr. Smullian contradicted these assertions. Despite attesting that he "carefully reviewed the fee waiver request" and "consulted with legal counsel" in making his decision, *id.* at ¶ 7. Mr. Smullian later admitted that he likely did not even read ICAP's original MPIA request. Ex. G, Smullian Dep., at 122:2–14, 126:5–22. He was unable to define "public interest," explain how the nature of ICAP's request neglected to advance the public interest, or say "how much weight [he] accorded each" factor in his analysis. *See, e.g.*, *id.* at 168:22–169:22 ("As I keep saying, I took them as a whole and I made a decision."); *see also infra* Part III.A. Moreover, although Mr. Smullian's denied that the cost to BPD was a significant factor in his affidavit, Mr. Smullian repeatedly referenced the potential impact on BPD's budget during his deposition. *Id.*

A court will find a fee waiver denial to be arbitrary and capricious if the government fails either part of a two-prong test. *See Balt. Action Legal Team*, 265 A.3d at 1208; *Chevy Chase*, 229 Md. App. at 563–64; *City of Baltimore v. Burke*, 67 Md. App. 147, 157 (1986). First, because the court must assess "the actual considerations that motivated the [government]," the Department must provide the court with "sufficient information . . . to satisfy [the court] that the custodian's decision was not arbitrary or capricious." *Chevy Chase*, 229 Md. App. at 561, 563. Second, the government must "consider the ability of the applicant to pay the fee and other relevant factors to decide whether the waiver would be in the public interest." *Id.* at 561. A denial is arbitrary and capricious if it was based on an improper consideration, *see id.* at 563–64, or was based only on the cost to the agency and the ability of the requester to pay, without considering other public interest factors, *Burke*, 67 Md. App. at 157. BPD fails both prongs, and its denial of ICAP's fee waiver is arbitrary and capricious.

A. BPD has not provided facts sufficient for this Court to determine what considerations went into BPD's decision to deny ICAP's fee waiver request.

BPD has not provided sufficient information for the Court to determine the actual considerations BPD used in denying ICAP's fee waiver request. First, its unsubstantiated denial of ICAP's request for a fee waiver is evidence that the denial was arbitrary and capricious. Second, the BPD official with sole responsibility for the denial of ICAP's fee-waiver request could not explain with any specificity how he made the decision to deny the fee-waiver request.

To begin, BPD denied ICAP's request for a fee waiver by simply saying: "Your fee waiver request was reviewed and is denied." Ex. E, Original Cost Estimate and Fee Waiver Denial Letter, at 4. "This bald and conclusory statement provides no insight whatsoever as to the actual considerations that motivated [BPD] to deny the request." *Chevy Chase*, 229 Md. App. at 563.

When an agency does not communicate its reasons for denying a request at the time of the denial, the denial may be upheld only "if facts generated by pleadings, affidavits, and other documents" provide the Court with sufficient information to discern those reasons. *Balt. Action Legal Team*, 265 A.3d at 1207. BPD cannot carry this burden by submitting post-hoc explanations that do not actually describe the decision-making process (or lack thereof) that BPD used. Mr. Smullian, the BPD official solely responsible for denying ICAP's fee waiver request,[15] could not explain during depositions how the factors he supposedly considered weighed on his decision to deny the request and could not define "public interest." For example, Mr. Smullian claimed to rely on "factors" such as "public interest" and "ability . . . to pay," *see, e.g.*, Ex. G, Smullian Dep., at 24:10–25:6, but was unable to say "how much weight [he] accorded each," *id.* at 168:16–169:22 ("As I keep saying, I took them as a whole and I made a decision."). Moreover, Mr. Smullian could not define "public interest." *Id.* At his first deposition, in his personal capacity, he said, "I don't know the definition of public interest. I would

[15] *See* Ex. G, Smullian Dep., at 31:14 (stating that the fee waiver "decision is mine").

have to consult with counsel offhand."[16] Ex. G, Smullian Dep., at 44:3–5. Two days later, at his second deposition, in his organizational capacity, he said, "I would define [public interest] the way that the Supreme Court defined obscenity or pornography is that I know it when I see it."[17] Ex. M, Smullian Org. Dep., at 49:7–9. These statements are not only in tension with each other, but also demonstrate that the analytical process Mr. Smullian used in assessing ICAP's fee-waiver request was devoid of any ascertainable criteria. Mr. Smullian was thus unable to provide "sufficient information . . . to satisfy [the Court] that [BPD's fee-waiver] decision was not arbitrary or capricious" as a matter of law. *Chevy Chase*, 229 Md. App. at 561.

Moreover, Mr. Smullian's affidavit is poor evidence of the actual decision-making process Mr. Smullian used and is contradicted by later testimony. Mr. Smullian was unable to recall whether he had ever even read the materials the affidavit referenced. For instance, Mr. Smullian admitted at his deposition that he likely did not even read ICAP's original MPIA request, yet purported in his affidavit

[16] BPD has hidden much of its decision-making process behind an asserted attorney-client privilege. This strategy leaves the Court without any significant insight into BPD's decision to deny ICAP an MPIA fee waiver. Moreover, it renders any other purported evidence BPD *has* provided about its decision-making process suspect at best. Mr. Smullian repeatedly indicated that he relied almost entirely on the advice of counsel in making his fee-waiver decision, allowing him to avoid full disclosure of the decision-making process he applied to ICAP's fee-waiver request. *See, e.g.*, Ex. G, Smullian Dep., at 21:14–19 ("On any one [MPIA request] that actually comes across my desk, I always confer with counsel."). Throughout his depositions, he responded to questions about how he makes decisions on fee waivers and where he gets the information he uses to do so by saying that he relies on counsel. *See, e.g.*, *id.* at 95:1–8; *see also id.* at 124:3–125:8 (noting BPD counsel's objection on the basis of attorney-client privilege). But even if BPD is correct that such information is privileged, Maryland law still provides that "the court must have sufficient information before it to satisfy itself that the custodian's decision was not arbitrary or capricious," *Chevy Chase*, 229 Md. App. at 561, and privileged information, by definition, cannot be before the Court. BPD's fee-waiver denial is thus arbitrary and capricious as a matter of law because the limited information before the Court makes it impossible for the Court to determine the considerations that went into BPD's decision to issue the fee-waiver denial.

[17] Contrary to Mr. Smullian's statement, the Supreme Court has never defined obscenity or pornography in this way. The phrase Mr. Smullian used appeared in a concurring opinion that was not joined by any other Justice. *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (Stewart, J., concurring) (declining to define "hard-core pornography" but stating, "I know it when I see it").

to discount ICAP's explanation of why its request was in the public interest. Ex. G, Smullian Dep., at 122:2–14, 126:5–22 (relying on others' second-hand descriptions of ICAP's request). Thus, BPD fails the first prong because the evidence fails to provide this Court with sufficient information about why BPD denied ICAP's fee-waiver request, making that decision arbitrary and capricious. *See Balt. Action Legal Team*, 265 A.3d at 1208.

B. The reasons proffered for BPD's fee-waiver denial are insufficient.

BPD also fails—for three independent reasons—the second prong of the *Baltimore Action Legal Team* test. *Balt. Action Legal Team*, 265 A.3d at 1208. Under this second prong, BPD must show that it considered both ICAP's "ability to pay, and any other relevant factors that show whether the disclosure of the requested material would be in the public interest,"[18] and it also must show that it did not rest its decision "exclusively [on] what the expense to the agency would be and the ability of the requester to pay for the requested information." *Balt. Action Legal Team*, 265 A.3d at 1208. "The reviewing court assesses the actual decision-making process of the agency—not merely the bases it could rely on in deciding to deny the waiver." *Id.* at 1206.

BPD fails this prong on three fronts. First, BPD's analysis of ICAP's ability to pay was gravely incomplete and relied on false assumptions. Second, its analysis, if any, of the required public-interest factors was wholly deficient because it ignored both ICAP's explanation for why its request is in the public interest and other court-approved factors that show why ICAP's request is in the public interest, even going so far as to say the purpose of an MPIA request does not matter to the fee-waiver determination. Third, it focused too heavily on the potential expense to BPD of fulfilling ICAP's MPIA request. *See Balt. Action Legal Team*, 265 A.3d at 1208. Thus, even if it can satisfy the first prong

[18] Thus, two separate inquiries are required: an inquiry into the requester's ability to pay, and an inquiry into public-interest factors.

of the *Baltimore Action Legal Team* test, BPD's fee-waiver denial was arbitrary and capricious under the test's second prong.

1. BPD's assessment of ICAP's ability to pay was deficient.

BPD's fee-waiver denial was arbitrary and capricious as a matter of law because it did not meaningfully consider ICAP's ability to pay the fee, which it was required to do under the *Baltimore Action Legal Team* test. *See* 265 A.3d at 1208. As a general matter, BPD has not clearly identified the information it finds useful in determining an MPIA requester's ability to pay a fee. *See* Ex. M, Smullian Org. Dep., at 57:9 ("[W]e take this on a case-by-case basis."). In this case, BPD rested its ability-to-pay calculus exclusively on the fact that ICAP is affiliated with the Georgetown University Law Center and on the erroneous assumption—which BPD made no effort to confirm—that such affiliation means ICAP has an ability to pay BPD's fee. Such speculation does not provide a reasonable basis for BPD's determination and cannot adequately support BPD's rationale, making the Department's determination arbitrary and capricious. Not only did BPD fail to affirmatively inquire regarding ICAP's ability to pay, but actively ignored facts that challenged its erroneous assumptions about ICAP's relationship to Georgetown University. Official Tr. of Proceedings (Hr'g), at M-42–M-43 (June 14, 2021).[19]

[19] As a threshold matter, BPD's decision not to disclose to ICAP its estimate for how much it would cost to obtain responsive records before denying the fee-waiver request demonstrates that BPD did not engage in a "productive response" to an MPIA request. *Glass*, 453 Md. at 223 (describing "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 [requester] refines the request to reduce the labor (and expense) of searching those records"). Mr. Smullian testified that he likely knew the estimated cost when he denied ICAP's fee-waiver request. Ex. G, Smullian Dep., at 82:12–83:6. But BPD, before denying ICAP's fee-waiver request, never asked ICAP whether it would be able to pay the estimated fee or asked ICAP how much it would be willing to pay for responsive records. This information would have been useful to BPD in performing the fee-waiver analysis, which requires an evaluation of ICAP's ability to pay.

Moreover, BPD's analysis of ICAP's ability to pay relied solely—and thus fatally—on ICAP's affiliation with Georgetown's law school. Mr. Smullian's affidavit dedicated only one sentence to ICAP's "need for a fee waiver," stating only that "ICAP did not provide sufficient information" to establish such a need and that "due consideration was made regarding ICAP's association with Georgetown Law School." Ex. F, Smullian Aff., at ¶ 8. Moreover, Mr. Smullian explained at his deposition that he found ICAP's use of Georgetown University Law Center letterhead, apparently only relayed to him via counsel, to be pertinent to his fee-waiver decision, despite the fact that he "do[es] n[o]t have much of an understanding" of the relationship between ICAP and Georgetown. Ex. G, Smullian Dep., at 114:4–14. As a result, he continued to rely on the idea that ICAP has access to "a vast amount of sums" through its affiliation with Georgetown, *id.* at 90:12–91:5—a conclusion he reached based on "a basic internet search on Georgetown['s] endowment" that he made "just because [he] was curious" and without considering "any other information that [he] found on Georgetown Law's website." *Id.* at 108:6–109:16.

Mr. Smullian's analysis was built on his unsupported assumption that one institute within one school—a law school that is itself just one component of an entire university—would have unfettered access to the university's entire endowment. The analysis was especially baseless because Mr. Smullian "never looked" for "any information about the funding of ICAP as an organization" or made efforts to engage in the iterative process. Ex. G, Smullian Dep., at 110:12–17. Indeed, at the motions hearing, ICAP's counsel indicated that ICAP does not "receive any financial support from Georgetown" and "would have been happy to provide" BPD with additional information had it "actually wanted to engage with [ICAP] on this question of the fee waiver." Official Tr. of Proceedings (Hr'g), at M-42–M-43 (June 14, 2021).

In addition, BPD did not consider ICAP's status as a noncommercial requester. Noncommercial requests are favored under Maryland's fee-waiver precedents. *See Balt. Action Legal*

Team, 265 A.3d at 1208 (noting that waiver is appropriate under FOIA if disclosure of the information sought "is not primarily in the commercial interest of the requester"). Such requesters are also favored under analogous federal FOIA authority, which is persuasive authority for courts interpreting the MPIA.[20] *See McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (stating that FOIA should be "liberally construed in favor of waivers for noncommercial requesters" (citation omitted)). Indeed, far from being suspect, educational institutions enjoy a special fee status under the federal FOIA. The law recognizes the presumptive public benefits that flow from university requests. 5 U.S.C. § 552(a)(4)(A)(ii)(II); *Campbell v. Dep't of Just.*, 164 F.3d 20, 35 (D.C. Cir. 1998) (noting "the underlying purpose of the fee waiver provisions, which afford 'special solicitude' to scholars whose archival research advances public understanding of government operations"); *Diamond v. Fed. Bureau of Investigation*, 548 F. Supp. 1158, 1160 (S.D.N.Y. 1982) (holding agency "should have concluded that release to [professor] would benefit the public" when professor claimed he would use records as part of lectures and publications), *cited in* MPIA Manual 7-8. But Mr. Smullian did not consider ICAP's nonprofit status or that the request was noncommercial. *Cf.* Ex. G, Smullian Dep., at 110:18–21 (confirming that he "did not" consider Georgetown's nonprofit status). Nor is there any plausible commercial use for the records that ICAP sought in its MPIA request. BPD's determination rested solely on faulty and uninterrogated assumptions about ICAP's affiliation with Georgetown. BPD's fee-waiver denial was therefore arbitrary and capricious.

2. BPD failed to adequately assess required public interest factors in ICAP's case, impermissibly focusing too heavily on what a fee waiver would cost BPD.

[20] *See Balt. Action Legal Team*, 265 A.3d at 1208 (noting FOIA's relevance); *Burke*, 67 Md. App. 147, 156 ("[T]he federal Freedom of Information Act contains a similar fee waiver provision . . . which has been liberally construed in favor of the media or other requesters who will provide broad public dissemination of the information sought. . . . These interpretations are persuasive in our interpretation of the MPIA.").

BPD's fee-waiver denial was also arbitrary and capricious because the Department neglected to assess "other relevant factors that show whether disclosure of the requested material would be in the public interest." *Balt. Action Legal Team*, 265 A.3d at 1208. Although "no single 'relevant' factor is required," factors such as "how the requester will disseminate the information" and whether the information "is likely to contribute significantly to public understanding of the operations or activities of the government," are "examples of considerations that may be relevant." *Id.* (quoting from the FOIA provision codified at 5 U.S.C. § 552(a)(4)(A)(iii)). Here, BPD ignored these and other public interest factors such as whether the request would provide insight into a public controversy, *see id.* at 1207 (quoting *Chevy Chase*, 229 Md. App. at 557), even though they were implicated by ICAP's original fee-waiver request and the purposes of ICAP's request to further transparency and to provide insight into the public controversy over Maryland police agencies' compliance with MPIA. *See Cause of Action v. Fed. Trade Comm'n*, 799 F.3d 1108, 1117 (D.C. Cir. 2015) (applying federal public interest fee-waiver test to request for documents concerning agency's granting of public-interest fee waivers). Its fee-waiver decision was thus arbitrary and capricious.

i. BPD ignored ICAP's explanation for why its request is in the public interest.

BPD's fee-waiver decision was arbitrary and capricious because the Department failed to consider factors provided by ICAP that were relevant to the public interest inquiry.

In its initial MPIA request, ICAP explained how the disclosure of the fee-waiver information sought was "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." Ex. A, ICAP's MPIA Request, at 1. Although it is self-evident that a request regarding the process BPD uses to respond to MPIA requests and how it issues fee waivers has significance to other prospective requesters (and, by extension, the important value of public transparency), ICAP's fee-waiver request specified how the information it was seeking would "likely [] contribute significantly to public

understanding of the operations or activities of the government." *Balt. Action Legal Team*, 265 A.3d at 1208 (quoting from the FOIA provision codified at 5 U.S.C. § 552(a)(4)(A)(iii)). ICAP also clearly stated in the request that the records it sought "will be used by staff at [ICAP] to inform the public about access to Maryland public records," Ex. A, ICAP's MPIA Request, at 1, thus providing BPD with information about "how the requester will disseminate the information," *Balt. Action Legal Team*, 265 A.3d at 1208.[21]

However, Mr. Smullian explained at deposition that he had likely *not even read* ICAP's original MPIA request before denying ICAP's request for a fee waiver, relying exclusively on counsel's second-hand explanation. Ex. G, Smullian Dep., at 112:12–113:15 (explaining that he got his "understanding" of ICAP's "public interest argument . . . from counsel"); *id.* at 113:10–15. By declining to even read the request on which he was ruling, BPD's principal decision-maker acted arbitrarily and capriciously. Mr. Smullian's deposition testimony makes clear that he ignored the public interest factors put forward by ICAP and that he does not find such factors relevant. BPD wholly failed to engage with the public interest rationale put forward by ICAP. Thus, BPD's conclusion that "Plaintiff never articulated the purpose or mission of its alleged public interest request" was simply wrong. Def.'s 2d Suppl. Mot. to Dismiss, at 4.

Mr. Smullian also testified at deposition that, when considering a fee waiver, it "is not relevant to me about why anyone is requesting this information or what they're going to use it for or what the content is aside from the fact it's something that I can go and get." Ex. F, Smullian Dep., at 91:10–

[21] ICAP could develop public communications related to BPD's operations if it successfully obtained the records it seeks in this case. ICAP engages in a range of public education efforts and has developed many community resources, including legal guides, fact sheets, and op-eds, among others. *See, e.g.*, Protests & Public Safety: A Guide for Cities & Citizens, https://constitutionalprotestguide.org/; Voter Intimidation Fact Sheet (Oct. 2020), https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/10/Voter-Intimidation-Fact-Sheet.pdf; Mary McCord, Op-Ed: What it will take to fight the threat of violent right-wing militias, LA Times (Jan. 26, 2021), https://www.latimes.com/opinion/story/2021-01-26/capitol-attack-militias-oath-keepers.

91:13. This, too, is at odds with the requirements of Maryland case law, which requires government entities to consider the use of information when deciding whether to grant a fee waiver. *See Balt. Action Legal Team*, 265 A.3d at 1211; *Chevy Chase*, 229 Md. App. at 561–62 (quoting *Burke*, 67 Md. App. at 157)).

Further contradicting his affidavit, Mr. Smullian's deposition confirmed the public benefit that would flow from disclosure of the requested records. During his deposition, Mr. Smullian was presented (perhaps for the first time) with the public interest rationale offered by ICAP in its original request, and asked what he thought it meant. Mr. Smullian responded, "I'm making an inference that you are meaning transparency by how we operate." Ex. G, Smullian Dep., at 121:13–14. When asked if he thought transparency into how the government operates is in the public interest, he replied "I would think so." *Id.* at 121:22.

In sum, the evidence establishes that BPD's decisionmaker rejected ICAP's request for a fee waiver, possibly without even reading it. When finally confronted with the request, he acknowledged that government transparency is in the public interest. "It is part of every agency's mission to be as transparent as the State's sunshine laws, including the PIA, require." *Glass*, 453 Md. 201 at 232. BPD contravened this obligation when it failed to meaningfully consider ICAP's request for a fee waiver. The agency's actual decision-making process reflects that it failed to adequately assess the fee waiver considerations that ICAP proffered.

ii. BPD failed to consider other factors relevant to the required public interest inquiry.

Moreover, BPD failed to consider other public interest factors that weigh in favor of granting ICAP a fee waiver. The Maryland Attorney General has said a fee waiver could be justified under the public interest analysis if disclosure would "shed light on a 'public controversy about official actions.'" *Balt. Action Legal Team*, 265 A.3d at 1207 (quoting *Chevy Chase*, 229 Md. App. at 557). The fees charged by Maryland police agencies under the MPIA and those agencies' general approach to transparency

concerns have been the subject of public controversy in recent years.[22] Answering the question of whether Maryland's largest city's police department complies with Maryland law is axiomatically in the public interest. Finally, information about how BPD grants fee waivers is in the public interest because it will help future public records requesters determine what criteria BPD uses in granting fee waivers and thus craft their requests so as to make it more likely that they will obtain a fee waiver.[23] *See Cause of Action*, 799 F.3d at 1118. It is also in BPD's interest to receive better-crafted requests.[24] BPD failed to take any of these considerations into account, and its fee-waiver decision was thus arbitrary and capricious.[25]

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[22] *See, e.g.*, Andrew Schotz, *Maryland Police Departments Charge More Than Other Agencies for Documents—and Sykesville Is Steepest*, Balt. Sun (Mar. 15, 2019), https://www.baltimoresun.com/news/investigations/bs-md-sunshine-week-mddc-20190313-story.html; Justin Fenton & Lilly Price, *Anton's Law Promised to Make Maryland Police Disciplinary Records Public, but in Reality Transparency Has Been Slow or Nonexistent*, Balt. Sun (Dec. 30, 2021), https://www.baltimoresun.com/news/crime/bs-md-cr-antons-law-compliance-20211230-fhkt5dcznbd5phdnbm2plwwrse-story.html.

[23] *See* Ex. N, Electronic Frontier Foundation ("EFF") Aff., at ¶ 12 ("BPD's fee waiver decisions for EFF's requests have been inconsistent, which has been a barrier to EFF's ability to access BPD's documents . . . . Clarity on the considerations used in the fee waiver decision-making process would allow EFF to provide the appropriate information to BPD in requesting fee waivers—now and in the future.")

[24] *See* Ex. N, EFF Aff., at ¶ 12 ("Thus, this clarity in the fee waiver process would not only benefit EFF, it would also benefit BPD, as requests could follow a more streamlined, consistent form, making them easier to read and review."); Ex. O, Am. Civil Liberties Union of Md. Aff., at ¶ 14 ("An improvement in BPD's practices when responding to the MPIA requests would better enable an accurate and thorough collection of information to 1) inform the public about the inner workings of government activity, 2) encourage consistency and transparency in government decision making, 3) educate the public about their rights to access information and secure a fee waiver, and 4) provide access to public data that informs policy and enhances the protection of rights.").

[25] BPD's failure to consider required public-interest factors not only violated the MPIA but also violated the strong language of its own internal MPIA policy, which directs that fee waivers "*must* be *considered* and *granted* if the documents and/or information requested are in the general interest of the public." *Policy 603: Document Compliance Unit*, Balt. Police Dep't (emphasis in original), https://www.baltimorepolice.org/sites/default/files/Policies/603_Document_Compliance_Unit.pdf (last visited Mar. 2, 2022).

3. BPD impermissibly focused too heavily on the financial burden that a fee waiver would place on BPD.

BPD not only failed to properly consider ICAP's ability to pay and the required public-interest factors; its decision also wrongly prioritized consideration of the financial burden that a fee waiver would place on BPD. Under Maryland law, the considerations that go into an agency's denial of an MPIA fee-waiver request "cannot consist exclusively of what the expense to the agency would be and the ability of the requester to pay for the requested information." *Balt. Action Legal Team*, 265 A.3d at 1208; *see also Burke*, 67. Md. App. at 157 (holding that it was arbitrary and capricious to "consider[] no more than the expense to the City of locating and duplicating the documents . . . , and the perceived ability of the appellee, as an employee of a Baltimore newspaper, to pay the City's projected fee"). Although Smullian's affidavit contains the bald assertion that cost to BPD "did not drive the decision," Ex. F, Smullian Aff., at ¶ 9, but even assuming such a conclusory statement were entitled to any weight, it is refuted by BPD's failure to perform an adequate public-interest analysis and its failure to adequately assess ICAP's ability to pay. *See supra* Part III.B.1–2. That leaves the cost of fulfilling ICAP's MPIA request as the likely primary concern. *See, e.g.*, Ex. G, Smullian Dep., at 68:10–70:15, 165:15–166:21 (making repeated references to BPD's internal budgetary concerns). Indeed, Mr. Smullian made repeated references to BPD's budgetary concerns at deposition. *See, e.g.*, *id.* at 68:10–70:15, 165:15–166:21. BPD's fee-waiver denial was therefore arbitrary and capricious because it was based too heavily on ICAP's ability to pay and the financial impact of the request on BPD. *See* Ex. L, Hurst Dep., at 58:1–14, 61:20–62:11, 99:3–6, 103:9–12 (suggesting the real reason for denying ICAP's request was because it was perceived to be "overburdensome"). For all of these reasons, BPD's fee-waiver decision in ICAP's case was arbitrary and capricious under both prongs of the Court of Appeals' test.

IV. BPD violated the MPIA by seeking an unreasonable fee from ICAP.

Even if ICAP had never sought a fee waiver, the fee estimate that BPD provided to ICAP is unreasonable because it does not "bear a reasonable relationship to the recovery of actual costs

incurred by a governmental unit." Md. Code Gen. Prov. §4-26(a)(3). The Maryland Public Information Act Compliance Board[26] ("PIACB") has found fee estimates to be unreasonable where the evidence submitted by the custodian "show[s] that [the] estimate is not reasonably related to the anticipated actual costs of a response." PIACB 21-14, *Rifka v. Montgomery Cnty. Pub. Schs.*, at 5 (Jul. 23, 2021); s*ee also* MPIA Manual 7-1 ("[T]he connection between a particular cost and the response must be clear.") During the course of this litigation, BPD has provided evidence indicating that the costs included in the fee estimate it provided to ICAP are not "reasonably related" to the costs it will actually incur in responding to ICAP's request.[27]

When finally forced to admit that it had responsive records, BPD claimed it would cost $28,364 to provide these records. *See* Ex. E, Original Cost Estimate and Fee Waiver Denial Letter, at 3. BPD later lowered this cost estimate to $21,640 by reducing the contract attorney's hourly rate and the e-Discovery specialist's total hours, but the rest of its estimate remained unchanged. Ex. H, Adjusted Cost Estimate, at 1. The details of the updated fee estimate are as follows:

	Hours	**Rate**	**Cost**
Paralegal	10 hours	$24/hour	$240
Vendor/Contract Attorney	432 hours	$40/hour	$17,280

[26] The MPIA established the PIACB as an adjudicatory body "charged with resolving complaints that a custodian has charged an unreasonable fee of more than $350." MPIA Manual 5-6. Given its adjudicatory role, the PIACB has been the primary body to interpret and explain the provisions of the MPIA related to the reasonableness of fees. *See id.* at 7-1–7-5. Thus, although they are not binding on this Court, PIACB opinions can be instructive on how to interpret the MPIA. They are available at https://www.marylandattorneygeneral.gov/Pages/OpenGov/piaindex.aspx.

[27] Ex. N, EFF Aff., at ¶ 7 ("Public records laws allow EFF to identify privacy gaps in government programs and advocate for legislation that enhances the rights of individuals and communities. Public records laws also allow EFF to identify areas where government conduct is out of compliance with existing local, state, or federal laws."); Ex. I, Woods Aff., at ¶ 15 ("BPD charged $575 for the files I sought about Mr. Woodson's case. I obtained these files because my employer at the time, The Guardian, had the resources to pay. However, this fee would have been prohibitive to many outlets, such as the Baltimore City Paper, where I also worked.").

eDiscovery Professional	30 hours	$36/hour	$1,080
Reviewing Attorney	80 hours	$41/ hour	$3,280
		Total Cost Estimate	$21,640

Id. BPD did not originally explain the computation of its estimate of the number of pages in each file (50 to 200 pages) or why it would take a contract attorney 432 hours to go through 863 files.

The estimate was facially excessive, and the numbers do not withstand scrutiny. Defendants produced a spreadsheet containing the name, request type, amount paid, and other details about the MPIA request files responsive to ICAP's request. *See generally* Ex. P, MPIA Request June–July 2018–2020. Of the requests where an amount paid is listed, less than 1% are $500 or above, and none are in excess of $1,200. The fee BPD is asking ICAP to pay, $21,640, eclipses these by more than an order of magnitude. Further the charges to ICAP do not withstand scrutiny. For example, BPD calculated that there were 50-200 pages per file. But this figure is much more than would be suggested by 6 sample MPIA files that BPD agreed to provide ICAP in the hope of coming up with an informal resolution of the case,[28] all of which were under 20 pages.

BPD's cost estimate is excessive for several reasons. First, BPD impermissibly included costs for duplicate work, such as assigning multiple attorneys to review the same documents. Second, BPD erroneously included costs for training its contract attorneys in its fee estimate. Third, BPD unreasonably included unnecessarily expensive professional staff in its cost calculations. Fourth, BPD calculated the total cost using faulty assumptions regarding the size of the files responsive to ICAP's

[28] Although these samples were produced during settlement discussions between the parties, they are still admissible, as Rule 5-408 does not insulate pre-existing information from admissibility simply because it was shared in the course of a settlement discussion. Md. Rule 5-408(a)–(b); s*ee also* Fed. R. Evid. 408 (Advisory committee notes to 2006 amendments) (analogous Federal Rule 408 "cannot be read to protect pre-existing information simply because it was presented to the adversary in compromise negotiations").

request.[29] The inclusion of these inappropriate costs resulted in an excessively high fee estimate that is not "reasonably related" to the actual costs of responding to ICAP's request.

A. BPD's estimate impermissibly charges for duplicate work.

BPD's fee estimate violates the PIACB's prohibition on charging requesters for duplicate work. *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." (internal citations omitted)); PIACB 17-06, *Tanner v. Balt. Cnty. Police Dep't*, at 4 (Nov. 28, 2016); PIACB 21-14, *Rifka*, at 5 (holding that the document custodian's fee estimate was unreasonable to the extent it included costs for "duties performed in furtherance of . . . oversight"); MPIA Manual 7-2 ("[W]here multiple employees review the same materials, only one person's time should be part of the fee charged to the applicant.").

BPD's fee estimate includes costs for contract attorneys and a reviewing attorney, but their responsibilities are duplicative. BPD stated that contract attorneys would review each file, mark each file as responsive or unresponsive, and redact each responsive file according to BPD-provided guidelines. *See infra* Part IV.C (contesting contract attorney redactions); Ex. M, Smullian Org. Dep., at 37:17-19 ("The contract attorneys would be going through each of the files to do the redaction work and Bates stamping."); *id.* at 83:9-14 ("My understanding is that they are reviewing the PIA request and performing the redactions necessary to – so that we can be responsive to the PIA request."). Similarly, BPD stated that the "Reviewing Lawyer" would conduct a "quality assurance review" of the contract attorneys' work to assure that they complied with "parameters that [the contract attorneys]

[29] BPD might argue that the fee estimate should not be reviewable at this stage because it is only an estimate, and BPD will refund any money that is not used in responding to the request. Official Tr. of Proceedings (Hr'g) at M-18:5–9 (June 14, 2021) (BPD will "refund any difference between the fee estimated and actual fee."). However, the PIACB has determined that an estimate of costs is reviewable "where the custodian has asked for prepayment of a precise figure based on a breakdown of anticipated actual costs." PIACB 21-14, *Rifka* at 3. Because BPD provided precise costs in its fee estimate, and because BPD is demanding prepayment from ICAP in order to fulfill its request, BPD's fee estimate is reviewable. *See* BPD's Fee-Waiver Denial and 1st Cost Estimate; BPD's 2d Cost Estimate.

were working under." *See* Ex. E, Original Cost Estimate and Fee Waiver Denial Letter, at 3.; Ex. M, Smullian Org. Dep., at 36:7-19, 86:1-88:7 ("[R]eviewing lawyer specifically is reviewing a third-party or non-BPD contract attorney's work."). The "Reviewing Lawyer's time" adds $3,280.00 to the cost estimate. *See* Ex. E, Original Cost Estimate and Fee Waiver Denial Letter, at 3 (reviewing attorney "is billed for 80 hours - ($41/hr. x 80)"). The reviewing attorney's oversight of the contract attorneys' work to assure compliance with BPD's guidelines constitutes an impermissible charge, as ICAP cannot be billed for duplicative work. PIACB, *Hauck v. The Housing Opp. Comm'n of Montgomery Cnty.*, at 5 (June 3, 2021) ("[P]ut differently, the General Counsel would be duplicating the review already performed by the Associate General Counsel to ensure that she made no errors. . . . Thus, while the HOC is certainly free to review work already performed in response to a PIA request, it cannot assess the requester the cost of that secondary review."). The reviewing attorney's oversight of the contract attorneys' work to assure compliance with BPD's guidelines constitutes an execution of tasks not done in the most efficient or cost reductive way to the requester and thus stands as an impermissible charge.

Additionally, the work of BPD's "eDiscovery professional" is partially duplicative of the paralegal's work. The eDiscovery professional is tasked with "forensically collecting the data from BPD's electronic drive." Ex. M, Smullian Org. Dep., at 37:20-38:2. Similarly, the paralegal is tasked with "assist[ing] in identifying files." *Id.* This duplication of work between the eDiscovery professional and paralegal adds as much as $1,080 to the current estimate. Ex. H, Adjusted Cost Estimate, at 1; *see* Ex. E, Original Cost Estimate and Fee Waiver Denial Letter, at 3. BPD's plan to charge ICAP for the reviewing attorney's duplicative work of the contract attorney, and the paralegal's duplicative work of the eDiscovery professional, which resulted in an unreasonable cost estimate.

B. BPD's estimate impermissibly charges for training.

BPD includes costs for contract attorney training in the fee estimate, in conflict with the PIACB's instruction that there be no charge for "duties performed in furtherance of training . . .

and/or more general PIA compliance." PIACB 21-14, *Rifka* at 5 (explaining that training and PIA compliance are not part of the "actual cost" of responding to a PIA request under Md. Code Gen. Prov. § 4-206(b)(1)(ii)). Costs that are attributed to training and general MPIA compliance do not constitute "actual costs" incurred by document custodians; accordingly, these charges cannot be passed on to MPIA requesters. *Id.*; *see* Md. Code Gen. Prov. § 4-206(b)(1)(ii). However, in its fee estimate for ICAP's request, BPD allotted ten hours for the paralegal to provide training to the contract attorneys. Ex. H, Adjusted Cost Estimate, at 1, n.1 ("Paralegal time to assist in identifying files, instructing, and/or training Contract Attorney on files[.]"); Ex. M, Smullian Org. Dep., at 84:5–7 ("[T]he paralegal would be sort of giving guidance about – and training to the contract attorneys about what to look for and what they should be redacting."); *id.* at 101:15–17 ("[T]he paralegal will provide some level of training about what parameters are that they're – the work that needed to be done."). Because the paralegal's work constitutes "training," it cannot be included in the fee estimate. *See* PIACB 21-14, *Rifka* at 5.

C. BPD needlessly tasked more expensive personnel to conduct tasks that could have been handled more cost-efficiently by other professional staff.

BPD's cost estimate tasks attorneys with basic review and redaction work that could be performed by non-attorney (or even other non-legal) professional staff, and thus at a lower expense. This is a violation of the MPIA's requirement that document custodians "allow inspection of a public record with the least cost" to the requester. Md. Code Gen. Prov. § 4-103(b). The PIACB has instructed that document custodians must allocate work to the "lowest compensated staff that is available and that is competent" to perform each task. PIACB 21-14, *Rifka*, at 5. The PIACB has specifically restricted attorney involvement in two tasks related to responding to MPIA requests: marking documents as responsive and making redactions. *Id.* However, when soliciting bids from vendors to perform these two tasks, BPD only solicited bids from contract attorneys rather than other types of less expensive, but equally capable, professionals. *See generally* Ex. Q, BPD Bid Solicitations.

First, the PIACB has required that, where cheaper staff are available and competent, attorneys should not be tasked with "winnowing out . . . clearly non-responsive records," PIACB 21-14, *Rifka*, at 7. Yet, BPD has tasked contract attorneys with doing exactly that. BPD chose to contract with attorneys, as opposed to lesser-credentialed and cheaper personnel, to identify responsive documents. Official Tr. of Proceedings (Hr'g) at M-48:22–M-49:1 (June 14, 2021) ("Once the e-discovery professional pulls those files, then they will be able to send those files to the contract attorney's office to then extract and pull the responsive documents. So they'll tag them, they'll say this is responsive."). Responding to ICAP's request would require marking as little as one document as "responsive," as evidenced by BPD's response to ICAP's own request where all of the information requested was contained within one file. Ex. E, Original Cost Estimate and Fee Waiver Denial Letter, at 1–4. This document includes the names of the requester, *id.* at 1, the subject matter of the request, *id.*, the fee estimate for the production, *id.* at 3, and BPD's decision on the fee waiver request, *id.* at 4. *See also* Official Tr. of Proceedings (Hr'g) at M-25:21–24 (June 14, 2021) (confirming ICAP does not "need any of the records that were produced . . . [for] those MPIA requests"). A law degree is not necessary to identify records that contain MPIA requester and fee waiver information, and BPD's choice to utilize attorneys to conduct this work resulted in an unreasonable fee.

Second, the PIACB has stated that attorneys should not be responsible for "making any necessary redactions of clearly privileged or exempt material from otherwise-disclosable records," unless there is a "genuine question of whether a privilege or exemption applies." PIACB 21-14, *Rifka*, at 5. Given that these documents are correspondence with the public (the requesters), the content of the requests is disclosable. *See* MPIA Manual 1-5. However, BPD has tasked attorneys with making all redactions to the responsive files. *See* Ex. M, Smullian Org. Dep., at 37:17–19 (noting contract attorney's "redaction work and Bates stamping"). However, its only explanation for the types of redactions that would be necessary for ICAP's request are redactions for personal identifying

information, such as "address of the requestor, Social Security number . . ., [and] phone number." Ex. K, Hurst Org. Dep., at 74:2–10. BPD has *failed to explain* why an MPIA requester's response would contain information that presents a "genuine question of whether a privilege exemption applies" that would require an attorney to review every single file. PIACB 21-14, *Rifka*, at 5; *see also* Ex. K, Hurst Org. Dep., at 74:2–10.

Further, BPD has acknowledged that non-attorneys, including its own non-attorney staff, are capable of performing redactions and have previously done so. Ex. K, Hurst Org. Dep., at 51:7–22 (suggesting that DCU staff do redactions of basic personal information such as "address, phone number, Social Security number, date of birth, things of that nature"); Ex. G, Smullian Org. Dep., at 79:17–80:1 ("I do know that Mr. Hurst as well as some of the [non-attorney] officers that worked there will do on a more basic level. I've been told that they do redactions of things like personal identification information like dates of birth or Social Security numbers or things of that nature."); *id.* at 81:12–15 ("Q: You mentioned that when there is a paralegal in the DCU, they perform redactions, correct? A: That's my understanding[.]"); *id.* at 84:1–2 (stating that a "paralegal can do redactions"). Given that any privileged information within the relevant records would be evident to a layperson, non-attorney staff could conduct such review more cost-effectively, in compliance with the MPIA. *See, e.g.*, Ex. K, Hurst Org. Dep., at 74:2–8 ("Social Security number").

BPD's fee estimate designates attorneys to perform tasks, including marking documents as responsive and making redactions to obviously confidential information, that could have been performed by less costly professionals. BPD's estimate is thus unreasonably high.

D. BPD overestimated the number of pages in the files relevant to ICAP's request, generating excessive costs.

BPD overestimated the number of pages in the files relevant to ICAP's request and thus overestimated the number of hours required for the contract attorneys and the reviewing attorney to complete their review of these files. BPD posited that there were 863 files potentially responsive to

ICAP's request and estimated that each of these files was between 50 and 200 pages long (an average of 125 pages per file). *See* Ex. M, Smullian Org. Dep., at 82:9–15; Ex. E, Original Cost Estimate and Fee Waiver Denial Letter, at 2–4. BPD used this page estimate to calculate the number of hours that would be necessary for the contract attorneys and reviewing attorney to review all 863 files. *See* Ex. M, Smullian Org. Dep., at 82:9–15 (stating that estimate for review time for contract attorneys came from "the average number of pages"); Ex. Q, BPD Bid Solicitations, at 1–5; *see also* Official Tr. of Proceedings (Hr'g) at M-57:12–13 (June 14, 2021) (fee estimate "depends on the number of pages that are responsive to a request"). However, BPD did not provide any concrete evidence to substantiate this estimate.[30] Rather, BPD provided two pieces of evidence that significantly undermine this estimate: (1) sample files from the 863 files that range between 5 and 19 pages in length (not 50 and 200 pages), and (2) a spreadsheet that suggests that these types of shorter files make up a significant portion of the 863 files.

First, in the course of attempting to resolve this matter, BPD provided ICAP with six sample files from the 863 files.[31] Ex. R, Hall and White MPIA, BPD 6 MPIA Files (hereinafter "Hall and White MPIA"); Ex. S, Hall MPIA, BPD 6 MPIA Files (hereinafter "Hall MPIA"); Ex. T, Lindell MPIA, BPD 6 MPIA Files (hereinafter "Lindell MPIA"); Ex. U, Reeves MPIA, BPD 6 MPIA Files (hereinafter "Reeves MPIA"); Ex. V, Smith MPIA, BPD 6 MPIA Files (hereinafter "Smith MPIA");

[30] The 50-to-200 page estimate may not have any relation to ICAP's request. For example, a BPD spokesperson provided this same 50-to-200 page estimate for the file sizes of MPIA requests for police disciplinary records. Fenton & Price, *supra* note 22.

[31] Although these samples were produced during settlement discussions between the parties, they are still admissible. First, these files constitute a partial disclosure of files responsive to ICAP's MPIA request. Second, these files constitute public records that could be solicited by any member of the public. Finally, ICAP is not using the fact that BPD "furnish[ed] or offer[ed] to furnish" these samples as evidence. Rather, ICAP is using the substance of these files as evidence, and Maryland rules do "not require the exclusion of any evidence otherwise obtained merely because it is also presented in the course of compromise negotiations or mediation." Md. Rule 5-408(a)–(b); s*ee also* Fed. R. Evid. 408 (Advisory committee notes to 2006 amendments) (Federal Rule 408 "cannot be read to protect pre-existing information simply because it was presented to the adversary in compromise negotiations").

Ex. W, Davis MPIA, BPD 6 MPIA Files (hereinafter "Davis MPIA"). The six sample files ranged between 5 pages and 19 pages, for an average of 12 pages. *See* Ex. R, Hall and White MPIA (6 pages); Ex. S, Hall MPIA (19 pages); Ex. T, Lindell MPIA (6 pages); Ex. U, Reeves MPIA (17 pages); Ex. V, Smith MPIA (5 pages); Ex. W, Davis MPIA (16 pages). Thus, the average length of the sample files, 12 pages, was less than one-tenth of BPD's estimated average length of 125 pages. The significant disparity between the average length of the sample files and the average length of BPD's estimate for these same files demonstrates that the estimated length is unreasonable, resulting in an excessive fee estimate. Further, these shorter sample files are not anomalies. Mr. Hurst, a BPD employee who works in MPIA request folders "[e]very day, eight hours a day," viewed two of these sample files during his deposition. Ex. L, Hurst Dep., at 119:7–9.[32] Upon viewing these two samples, one of which was 19 pages, Ex. S, Hall MPIA (19 pages), and the other of which was 6 pages, Ex. R, Hall and White MPIA (6 pages), Mr. Hurst confirmed that the documents in these files were "generally representative" of the documents that would be in an MPIA folder for these types of requests. Ex. L, Hurst Dep., at 123:19–124:1, 128:19–130:11.

Second, during discovery, BPD produced a spreadsheet that suggests that the files in the samples that were five and six pages were not outliers among the 863 files and that these types of files in fact make up a significant portion of the 863 files. The spreadsheet listed all of the MPIA requests that BPD received during the time period relevant to ICAP's request: a total of 965 requests. Ex. P, PIA Requests June–July 2018–2020 (including the 863 files discussed earlier, in addition to other potentially responsive documents). For each request, the spreadsheet categorized the type of information sought by the request (*e.g.*, MPIA request for a police report, MPIA request for body-

[32] As mentioned above, Mr. Hurst is the Document Compliance Coordinator and supervisor of BPD's Document Compliance Unit. Mr. Hurst began working on MPIA requests at the Document Compliance Unit in November 2017 and estimated that he had worked in over 2,000 MPIA folders during that time. Ex. L, Hurst Dep., at 119:7–120:11.

worn camera footage, etc.). MPIA requests for body-worn camera footage made up 650 out of the 965 requests, approximately 67 percent of all requests. Two of the six sample files discussed above were MPIA requests for body-worn camera footage, and these files were five and six pages long, respectively. *See* Hall and White MPIA (6 pages); Smith MPIA (5 pages). During the course of his deposition, Mr. Hurst viewed the six-page file for body-worn camera footage, and he confirmed that the documents in that file were generally representative of the documents that would be in the file for an MPIA request for body-worn camera footage. Ex. L, Hurst Dep., at 123:19–124:1, 128:19–130:11 If a body-worn camera footage request that is six pages is generally representative of those types of requests, and those types of requests make up over 67 percent of all files responsive to ICAP's request, BPD's 50- to 200- page estimate drastically overestimated the length of responsive files, which resulted in an unreasonable cost estimate.

This overestimation significantly inflated BPD's calculation of the number of hours required for the contract attorneys and the reviewing lawyer to complete their reviews of the files, and thus it also significantly inflated the total amount of the fee estimate BPD provided to ICAP. BPD tasked the contract attorneys with determining which documents in each file were responsive to ICAP's request and making the necessary redactions of the responsive documents. Official Tr. of Proceedings (Hr'g) at M-48:22–M-49:1 (June 14, 2021). The estimate provides 30 minutes for the contract attorney to assess each file and that the entire review would take 432 hours. Smullian Org. Dep. 82:9–15. They based this estimate of time on an excessive estimate: 50 to 200 pages for each file. *See id.*; Ex. Q, BPD Bid Solicitations, at 1–2; Official Tr. of Proceedings (Hr'g) at M-57:12–13 (June 14, 2021) (fee estimate "depends on the number of pages that are responsive to a request"). The inflated page-number estimate led to a slower rate of review (relative to each file) for the contract attorneys, an excessive amount of time allotted for that review, and ultimately an unreasonable cost estimate for the contract attorneys' work. This compounding error led to an absurd demand for $17,280 for the contract

attorney (the largest cost in BPD's $21,640 estimate), far in excess of what could be considered a reasonable fee. And even if the reviewing lawyer's time was not duplicative and appropriately charged to ICAP, which it was not, BPD's overestimation of time also resulted in an excessive allocation of time for the reviewing attorney. *See supra* Part IV.A.

BPD's cost estimate thus violated the MPIA. The cost estimate's effectively functions to keep members of the public, as a practical matter, from ever actually seeing public documents to which the MPIA entitles them as a formal legal matter.[33] This should be unacceptable, as the MPIA favors disclosure and requires that public agencies disclose documents as quickly as possible and at the lowest achievable cost. *See Faulk v. State's Att'y*, 299 Md. 493, 506 (1984) ("The Maryland Public Information Act['s] . . . purpose was to provide the public the right to inspect the records of the State government or of a political subdivision. Its basic policy was in favor of disclosure.") (internal citation omitted).

CONCLUSION

The Baltimore Police Department failed to timely respond to ICAP's request within the statutorily required period and originally denied the existence of responsive records. Subsequently, the Department did not meaningfully review ICAP's fee waiver request and provided an unreasonably high cost estimate to fulfill the narrowed request. In doing so, BPD failed to comply with the MPIA's provisions and the legislation's commitment to transparency. Given that no issue of material fact precludes summary judgment and that Plaintiff is entitled to judgment as a matter of law, Plaintiff respectfully requests that this Court grant this motion, issue a declaratory judgment that BPD violated the MPIA, award statutory damages of $1,000 for each violation, and issue an injunction directing

[33] *See* Ex. I, Woods Aff., at ¶ 14 ("BPD informed me that it would cost between $2,800 and $40,000 for the records…I do not believe the maximum $40,000 figure represented the true cost of complying with the MPIA and fulfilling my request; rather I believe the $40,000 demand represented an effort to penalize me for seeking records that BPD did not want to release.").

BPD to produce records responsive to ICAP's request and grant a fee waiver. Plaintiff also seeks attorneys' fees and litigation costs, and any other relief the Court deems just and proper.

Respectfully submitted,

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REQUEST FOR HEARING

Plaintiff respectfully requests a hearing on this Motion to aid in the resolution of these issues before the Court. *See* Md. Rule 2-311(f). Plaintiff seeks resolution of its claim, as no genuine or material dispute of facts precludes legal judgment, and seeks to provide additional explanation of the factual circumstances and legal arguments set forth in the accompanying Motion.

Respectfully submitted,

/s/ Matthew Zernhelt
Matthew Zernhelt, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March 2022 a copy was directed by electronic mail to:

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