Circuit Court for Baltimore City
Case No. 24-C-20-001269

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 122

September Term, 2021

OPEN JUSTICE BALTIMORE

v.

BALTIMORE CITY POLICE DEPARTMENT, ET AL.

Nazarian,
Shaw,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw, J.

Filed: February 7, 2022

This appeal arises from unfulfilled Maryland Public Information Act ("MPIA") requests, submitted on behalf of Open Justice Baltimore ("appellant" or "OJB"), to the Baltimore City Police Department ("BPD"), seeking records of complaints against BPD officers and its internal investigations. In those requests, appellant asked the BPD to waive any costs and fees associated with reproducing those records. When the BPD failed timely to respond to its MPIA applications, appellant filed suit in the Circuit Court for Baltimore City against BPD and the City of Baltimore (collectively, "appellees"), as well as Michael Harrison in his official capacity as Police Commissioner. In its complaint, appellant asked, *inter alia*, that the court compel BPD to promptly disclose the records it had requested.

After suit had been filed, BPD advised appellant that it was amenable to producing records of closed criminal investigations but denied appellant's requests for open investigatory files. BPD also denied appellant's fee waiver requests. On August 19, 2020, appellees moved to dismiss, or in the alternative, for summary judgment. Appellant filed an opposition as well as a cross-motion for summary judgment on September 9th.

Following oral argument, the court concluded that BPD had properly withheld records of ongoing investigations. It did, however, order that BPD release "its closed investigations of citizen and administrative complaints with any identifying information redacted."[1] The court affirmed BPD's denial of appellant's fee waiver requests, reasoning,

[1] Although the circuit court initially deemed these records exempt from disclosure pursuant to the personnel records exception to the MPIA, it ultimately determined that the redaction of identifying information would "remove them from the category of personnel records[.]"

in part: "Given the volume of records sought by [appellant] and the time and cost necessary to produce the records, BPD did not arbitrarily or capriciously deny the fee waiver."

Appellant timely appealed and presents three questions for our review, which we have consolidated and rephrased:[2]

1. Did the circuit court err in granting partial summary judgment in appellees' favor with respect to records of open internal investigations?

2. Did the circuit court err in ruling that BPD's denial of appellant's fee waiver requests was neither arbitrary nor capricious?

We answer the first question in the negative, the second in the affirmative, and shall therefore affirm the former portion of the court's judgment and reverse the latter.

BACKGROUND

On December 20, 2019, Baltimore Action Legal Team ("BALT") submitted two MPIA applications to BPD on appellant's behalf. The first requested records of the Special Investigation Response Team's ("SIRT") use-of-force investigations that BPD had closed

[2] In its brief, appellant framed the questions presented as follows:

1. Was the court below incorrect in holding Appellees' fee waiver determination was not arbitrary and capricious when Appellees only considered cost to themselves?

2. Was Appellees' declaration that disclosure was not in the public interest an improper response so as to make Appellees' fee waiver denial arbitrary and capricious?

3. Was Appellees' blanket denial of open and closed records in violation of the [M]PIA?

between July 1, 2018, and December 19, 2019.[3] The second sought "the entire file and all related documents" pertaining to administrative and civilian complaints, as well as corresponding internal investigations that had been closed between January 1, 2019, and December 19, 2019. Rather than demand that BPD disclose the names and badge numbers of the officers against whom those complaints had been made, appellant invited BPD to redact and replace such identifying information with traceable but non-identifiable numerical designations "so that an officer's assigned number appears repeatedly if they have multiple citizen and/or administrative complaints."

Again acting on appellant's behalf, on January 10, 2020, BALT submitted two additional MPIA applications to BPD. The first requested records related to SIRT investigations that had been open in excess of 12 months. The second sought records of civilian and administrative complaints against BPD officers which also had been ongoing for more than 12 months and corresponding investigatory files.

In all four MPIA applications, BALT requested that BPD waive any costs and fees related to reproducing the sought-after records, writing:

> We are prepared to pay reasonable copying costs for reproducing the requested materials but request that you waive any such fees under the GP § 4–206(e), which authorizes you to waive copying fees when doing so would be "in the public interest." Being a program of a non-profit organization the requestor has been deemed a public interest organization, classified tax-exempt, not generating any beneficiary income. Additionally, the requestor

[3] SIRT is a "multidisciplinary BPD unit tasked with conducting investigations of … [u]se of [f]orce, in-custody deaths, any fatal motor vehicle crash in which the actions of a BPD member were a contributing cause, and investigations specially assigned to SIRT by the Police Commissioner or designee."

> seeks the information for a public purpose and concern, as it regards official actions and the agency's performance of its public duty. As it regards the public safety, welfare, and legal rights of the general public, and because it bears implications on the interests of Maryland taxpayers, the request further aligns with the public interest. Furthermore, this request is not for commercial benefit as it is not made by for-profit news media.
>
> In the event that there are fees, please inform BALT of the total charges in advance of fulfilling this request.

As of March 1, 2020, BPD had neither fulfilled nor denied appellant's record requests within thirty days of its receipt thereof as is required by Maryland Code (2014, 2019 Repl. Vol.), § 4–203 of the General Provisions Article ("GP"). Accordingly, appellant filed suit in the circuit court the following day. Appellees denied appellant's requests for open investigatory records in a letter dated March 17, 2020. In that letter, Wayne Brooks, a BPD claims investigator, wrote, in pertinent part:

> At this time, your request for open cases is denied. However, BPD can release the initial police reports for open and pending criminal investigation/prosecution. Please let us know if you'd like to obtain the initial police reports for open and pending criminal investigations/prosecutions, we can then obtain, at your request.
>
> As requested in your previous correspondences, BPD will inform you of the total estimated cost, in advance of fulfilling any future searches to respond to your requests. . . Because, BPD does not know the files that you will request nor the size of the file[s], at this time, BPD is unable to tell you the cost associated with the production of the requested files. Please note waiver and/or reduction of fees are granted on a case by case basis.
>
> To summarize, the Baltimore Police Department is providing the statistical data of SIRT, internal and (external) citizen complaints. The Baltimore Police Department will not create a new record by interchanging officer names with police "ID" numbers or non-police department numbers.

On March 20, 2020, Kay Harding, an Assistant Solicitor with BPD's Office of Legal Affairs, sent Matt Zernhelt, Esquire, the BALT Legal Director, an e-mail informing him that she had been assigned to appellant's MPIA request and inviting any inquiries regarding Mr. Brooks's partial denial of the request. In a reply sent later that day, Mr. Zernhelt challenged, *inter alia*, the "blanket denial" of "'records of . . . open and pending criminal investigation[s].'" Relying on the Court of Appeals's decision in *Maryland Dep't of State Police v. Maryland State Conference of NAACP Branches*, 430 Md. 179 (2013), Mr. Zernhelt asserted that "the Maryland Court of Appeals has affirmed a request to redact and replace names with numbers in the exact manner as was requested." The letter concluded with a renewed fee waiver request, stating: "[W]e are requesting a fee waiver for production of all records. We find benefit in disclosing internal operations, the actions of officers, and the thoroughness of investigations, as transparency can improve community trust."

In an e-mail dated March 24th, Ms. Harding advised Mr. Zernhelt that "open criminal investigations, pending criminal trials, internal and external complaints and/or pending administrative cases would be withheld for the reasons outline[d] in Mr. Brook's March 17, 2020, correspondence." She did, however, agree to release 19 closed SIRT investigatory files, estimating that each could contain between 400 and 600 pages. Given the voluminous nature of those records, Ms. Harding asked whether appellant would be "willing to accept only the 'summary of the investigation.'" If appellant neither narrowed nor reduced its requests, Ms. Harding estimated that the Public Integrity Bureau ("PIB")

would require at least 45 days to retrieve those files and approximated that it would take BPD's Document Compliance Unit ("DCU") at least 30 days to process them for release.

With respect to 13,439 closed use-of-force files, Ms. Harding advised Mr. Zernhelt that although BPD would withhold portions pertaining to administrative disciplinary investigations conducted by the PIB, it could disclose redacted criminal investigatory records. She again asked that appellant consider narrowing the scope of its requests. Finally, rather than granting or denying appellant's fee waiver requests, Ms. Harding merely stated that "waiver and/or reduction of fees are granted on a case by case basis." Mr. Zernhelt declined Ms. Harding's invitation to reduce the scope of its request, responding: "We would like to move forward with this request in its entirety." He further reiterated appellant's public interest fee waiver request. In support thereof, Mr. Zernhelt wrote:

> We believe transparency would be in BPD's and the public's interest. BPD owes the community insight into its operations, particularly how it handles force on the public, as officers have caused disruption and harm throughout the City. The transparency would allow trust to grow. The entirety of the request is necessary for this effect.

In an e-mail sent on April 7, 2020, Ms. Harding demanded prepayment in the amount of $1,421,082.50 for costs associated with the review, redaction, and reproduction of the use-of-force files. After having been apprised of an apparent computational inconsistency underlying that estimate, Ms. Harding reduced that amount to $245,123.00 on April 15, 2020. Later that day, Mr. Zernhelt reiterated appellant's request that appellees disclose the identities of those officers named in the SIRT files that appellees had agreed to disclose.

In a reply sent the following day, Ms. Harding again asked whether appellant would consider narrowing the scope of its request so as to minimize costs. Should it decline to do so, she asked Mr. Zernhelt to "articulate any other reasonable factors that can help BPD in considering [appellant's] request to waive all of these fees[.]" In response, Mr. Zernhelt reiterated the public interest theory that appellant had previously advanced, writing, in part: "BPD owes the community insight into its operations and accountability of its officers, as officers have caused disruption and harm throughout the City. The transparency would allow trust to grow. The entirety of the request is necessary for this effect."

The BPD denied appellant's fee waiver request in an email sent on April 13, 2020. Mr. Zernhelt sent Ms. Harding an e-mail on May 14, 2020, writing, in pertinent part:

> We would again request a fee waiver in the public interest for these records. . . . As we have stated on numerous occasions, starting with each initial request, it is in the public interest that these records be disclosed. Due to the history of corruption and violence within and imposed by the BPD, documented by the 2016 Department of Justice Report, operation of the Gun Trace Task Force and statements from its prosecution, . . . recent BPD shootings, and other events, there is compromised trust between the community and BPD[.] Ongoing secrecy continues suspicion.
>
> Opening transparency in matters of internal investigations and accountability will be a step towards trust, allowing Baltimore to build a stronger relationship with its police department. Transparency can conquer false narratives that currently circulate. The community will have faith to turn to BPD for protection as they will have reason to believe individual officers are held to a high standard. The word of BPD will not be looked upon with skepticism.
>
> However, you have locked out this opportunity. The funds you have imposed have created a mountain to prevent access. The requestor is a program under nonprofit status, with extremely restricted funds. All of Open Justice

> Baltimore's funds are put into its community programing and no excess funds exist. (Moreover, this request is not being made to draw profit).

Appellees summarily responded: "BPD stands by its decision."

In anticipation of a hearing on the parties' vying motions for summary judgment, Dana Saboor, a DCU paralegal, signed an affidavit on June 15, 2020, in which she attributed the untimely responses to BALT's requests to her "pre-planned vacation, staffing shortages, the complexity of the requests, and an inadvertent oversight due to the voluminous backlog."[4]

We will include additional facts as necessary to our resolution of the issues.

STANDARD OF REVIEW

Maryland Rule 2–501 governs motions for summary judgment and provides, in pertinent part: "The court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2–501(f). When reviewing the grant of summary judgment, "we independently review the record to determine whether the parties properly generated a dispute of material fact, and, if not, whether the moving party is entitled to judgment as a matter of law." *Livesay v. Baltimore County*, 384 Md. 1, 10 (2004) (citation omitted). *See*

[4] According to her affidavit, Ms. Saboor "was on vacation from December 25, 2019 to January 3, 2020." She further averred that the DCU had received 66 MPIA requests between December 20, 20[19,] and January 6, 2020, and a total of 395 MPIA requests between January 1, 2020, and February 28, 2020.

also Tyler v. City of College Park, 415 Md. 475, 498 (2010) ("Whether a circuit court's grant of summary judgment is proper in a particular case is a question of law, subject to a non-deferential review on appeal.") (citations omitted). When reviewing that record, "'we construe the facts properly before the court, and any reasonable inferences that may be drawn from them, in the light most favorable to the non-moving party.'" *Appiah v. Hall*, 416 Md. 533, 546 (2010) (quoting *O'Connor v. Baltimore County*, 382 Md. 102, 111 (2004)) (cleaned up).

On review of the grant of summary judgment, we must first determine whether there exists a genuine dispute of material fact—a fact that if found would "somehow affect the outcome of the case." *Miller v. Bay City Prop. Owners Ass'n, Inc.*, 393 Md. 620, 631 (2006) (citation omitted); *see also Collins v. Li*, 176 Md. App. 502, 591 (2007) ("When the moving party has set forth grounds sufficient for the grant of summary judgment, the opposing party must show with 'some precision' that there is a genuine dispute of a material fact.") (citations omitted), *aff'd, Pittway Corp. v. Collins*, 403 Md. 304 (2008). If the parties did not generate a genuine dispute of material fact, we then review the court's decision for legal correctness. *See Appiah*, 416 Md. at 546 ("We review for legal correctness a trial court's application of this standard.").

DISCUSSION

I.

Appellant does not claim that there exists a genuine dispute of material fact that precluded the proper entry of summary judgment. Rather, it contends that the court erred

in ruling that the records relating to open investigations were exempt from disclosure as a matter of law. Specifically, appellant asserts that "a blanket invocation that disclosure would 'interfere with a valid and proper law enforcement proceeding' cannot be made under GP § 4–351(b)(1)[.]" The proper course of action, it maintains, was for BPD first to review the records then to determine whether "disclosure would actually interfere with the investigation and then whether any portion of the record may be disclosed."

Appellees respond that appellant's focus on GP § 4–351(b)(1) is misplaced, arguing that the limitations imposed thereby only apply "to requests made 'by a person in interest,'" which appellant is not. Given that appellant "is not the subject of the investigatory files that it seeks," appellees assert that "it does not have such a 'special right of access' as a 'person in interest,' and the requests for the open investigatory files were properly denied." We agree.

The MPIA

The General Assembly enacted the MPIA in order to "'provide the public the right to inspect the records of the State government or of a political subdivision within the State.'" *Glenn v. Maryland Dep't of Health and Mental Hygiene*, 446 Md. 378, 384 (2016) (quoting *Haigley v. Dep't of Health and Mental Hygiene*, 128 Md. App. 194, 207 (1999)). Consistent with that "broad remedial purpose," the Court of Appeals has repeatedly emphasized that "the provisions of the [MPIA] are to be liberally construed" so as to maximize transparency and minimize the delay and cost incurred by an MPIA applicant. *Id*. (internal quotation marks and citations omitted); *see also Kirwan v. Diamondback*, 352

Md. 74, 81 (1998) ("[T]he provisions of the Public Information Act reflect the legislative intent that citizens of the State of Maryland be accorded wide-ranging access to public information concerning the operation of their government.") (quotation marks and citations omitted); *Action Comm. for Transit, Inc. v. Town of Chevy Chase*, 229 Md. App. 540, 555 (2016) ("The provisions of the MPIA 'shall be construed in favor of allowing inspection of a public record, with the least cost and least delay to the person . . . that requests the inspection.'" (quoting GP § 4–103(b))). Accordingly, the MPIA creates a rebuttable "'presumption in favor of disclosure of government or public documents.'" *Maryland State Conference of NAACP Branches*, 430 Md. at 190 (quoting *Governor v. Washington Post*, 360 Md. 520, 544 (2000)). *See also Glenn*, 446 Md. at 385 ("Although, the presumption skews heavily the calculus toward disclosure, it may be rebutted.") (footnote omitted).

"[W]henever a person or governmental unit is denied inspection of a public record . . . the person or governmental unit may file a complaint with the circuit court[.]" GP § 4–362(a). Should an applicant file such a complaint, the defendant bears "the burden of sustaining a decision to . . . deny inspection of a public record . . . or . . . deny the person or governmental unit a copy, printout, or photograph of a public record[.]" GP § 4–362(b)(2)(i). *See also Fioretti v. Md. State Bd. of Dental Examiners*, 351 Md. 66, 78 (1998) ("Under . . . the [M]PIA . . . , the public agency involved bears the burden in sustaining its denial of the inspection of public records."). That burden may be met by the agency's demonstrating that the requested record or records fall within one or more statutory

exceptions to the general rule favoring disclosure, which exceptions the circuit court must narrowly construe. *See id.* at 77 ("[C]ourts must interpret the exemptions narrowly and in favor of disclosure.") (citations omitted).

The Investigatory Records Exception

The investigatory records exception to the MPIA is set forth in GP § 4–351, which provides:

> *(a) In general.*—Subject to subsection (b) of this section, a custodian may deny inspection of:
>
> (1) records of investigations conducted by the Attorney General, a State's Attorney, a municipal or county attorney, a police department, or a sheriff;
>
> (2) an investigatory file compiled for any other law enforcement, judicial, correctional, or prosecution purpose; or
>
> (3) records that contain intelligence information or security procedures of the Attorney General, a State's Attorney, a municipal or county attorney, a police department, a State or local correctional facility, or a sheriff.
>
> (b) *Circumstances under which denial permissible.*—A custodian may deny inspection by **a person in interest** only to the extent that the inspection would:
>
> (1) interfere with a valid and proper law enforcement proceeding;
>
> (2) deprive another person of a right to a fair trial or an impartial adjudication;
>
> (3) constitute an unwarranted invasion of personal privacy;
>
> (4) disclose the identity of a confidential source;
>
> (5) disclose an investigative technique or procedure;

(6) prejudice an investigation; or

(7) endanger the life or physical safety of an individual.

(emphasis added). When contrasting the plain language of subsection (a) with that of subsection (b), it is clear that the latter entitles a "person in interest" to more favorable treatment. *City of Frederick v. Randall Family, LLC*, 154 Md. App. 543, 561 (2004). While a custodian has discretion to deny inspection of investigatory files pursuant to GP § 4–351(a) upon demonstrating that doing so would frustrate a public interest, GP § 4–351(b) only allows a custodian to "deny inspection by a person in interest only to the extent that" one of seven enumerated harms would ensue. *Office of the State Prosecutor v. Judicial Watch, Inc.*, 356 Md. 118, 136 (1999); *Mayor and City Council of Baltimore v. Maryland Comm. Against the Gun Ban*, 329 Md. 78, 82 (1993). Moreover, although a denial pursuant to subsection (b) requires a "particularized showing as to *every document* withheld," no such showing is necessary when a custodian denies inspection under subsection (a). *Randall Family, LLC*, 154 Md. App. at 562. Finally, while the plain language of subsection (b) permits a custodian to deny inspection "'only to the extent' that [it] would give rise to one of the seven enumerated circumstances," a denial pursuant to subsection (a) "applies to the entire record, to the extent that inspection would be contrary to the public interest." *Maryland Comm. Against the Gun Ban*, 329 Md. at 96–97.

A "person of interest" is defined as "a person or governmental unit that is the subject of a public record or a designee of the person or governmental unit." GP § 4–101(e)(1).

The Court of Appeals has narrowly construed that definition, holding that the MPIA's "history covering reports of police investigations . . . makes clear that the 'person in interest' referred to in [GP § 4–351(b)] is the person who is investigated." *Maryland Comm. Against the Gun Ban*, 329 Md at 92. Assuming without deciding that appellant is a "person" for purposes of GP § 4–351(b), it was not the subject of those investigations and was not, therefore, "in interest." Accordingly, appellees were not required to make a particularized showing as to each document withheld and could properly withhold those documents in their entirety.

Although appellant was not entitled to the "special right of access" afforded to a person in interest pursuant to GP § 4–351(b), appellees still bore the burden of showing that inspection of the investigatory records at issue would likely have been contrary to the public interest. *Blythe v. State*, 161 Md. App. 492, 536 (2005). The degree of detail required of a custodian's explanation for refusing to permit public access to such records depends on whether the underlying investigations are open or closed. "In cases where . . . criminal investigations are ongoing, the reason why it is in the public interest to withhold the contents of an investigative file are obvious, *i.e.*, disclosure almost always would 'interfere with law enforcement proceedings.'" *Randall Family*, *LLC*, 154 Md. App. at 566 (quoting *Faulk v. State's Attorney for Harford County*, 299 Md. 493, 508 (1984)). Accordingly, in such cases, a generic denial will generally suffice. *See id.* When investigations are closed, by contrast, "there is no danger that disclosure will interfere with ongoing law enforcement proceedings, [and] a particularized factual basis for the 'public

interest' denial must be put forth in order for the custodian of records to meet his/her burden of proof." *Id*. at 567; *see also Blythe*, 161 Md. App. at 561 ("Because the criminal case against the appellant was no longer pending, the appellee was not entitled to rely upon a generic showing that disclosure would interfere with a valid law enforcement proceeding under [GP § 4–351].").

Appellant neither contends that it was a "person in interest" for purposes of GP § 4–351, nor denies that it sought records of open investigations. It asserts that the court erred by permitting appellees to "blanketly deny open records." It claims that appellees should have been required to provide a "particularized justification for withholding each portion of [the] public record[s]." *Prince George's Cnty. v. Wash. Post Co.*, 149 Md. App. 289, 310 (2003). We disagree.

As the Court of Appeals recognized in *Judicial Watch, Inc.*, 356 Md. at 139, for purposes of the investigatory records exception, "[t]here is a distinction between records of investigations conducted by agencies enumerated in the exception and investigatory files compiled for any other law enforcement or prosecution purposes by non-enumerated agencies." When compiled by one of the agencies enumerated in GP § 4–351(a)(1), those records are presumed to have been compiled for "law enforcement, judicial, correctional, or prosecution purpose," and "there need not be an actual showing" to that effect. *Id.* at 140 (citation omitted). Records compiled by non-enumerated agencies, by contrast, "'might or might not be for such purposes,'" and therefore require such a showing. *Id*. (quoting *Superintendent v. Henschen*, 279 Md. 468, 475 (1977)).

Given that the documents sought in this case were indisputably compiled by the BPD, appellees were not required to demonstrate that they were compiled for law enforcement or prosecutorial purposes. Nor were they obligated to articulate how disclosure might adversely affect the public interest. As addressed *supra*, where, as here, a criminal investigation is ongoing, inspection of records relating thereto is presumptively contrary to the public interest because of the likelihood that such inspection would interfere with law enforcement proceedings.

Given that appellant did not enjoy the favorable status afforded to a person in interest and the presumption that disclosure of such information would interfere with ongoing investigations, the BPD's denial of appellant's requests for those records was neither arbitrary nor capricious.

II.

Appellant also challenges appellees' denial of its fee waiver request. In affirming the appellees' decision, appellant argues, the court relied "exclusively . . . on the cost to the custodian," while erroneously disregarding appellees' failure meaningfully to consider the public's interest in obtaining insight into "a public controversy about official actions," to wit, the investigation of police misconduct and officers' alleged excessive use of force.

Appellees respond that appellant "did not provide any specifics about how they planned to use the records that they requested, nor even explain how these records would be useful to anyone for much of anything in their highly redacted form." Relying on federal jurisprudence interpreting the Freedom of Information Act ("FOIA"), they conclude that

such "vague generalities" provided an insufficient basis from which the BPD could reasonably conclude that a fee waiver "would 'contribute significantly' to the public understanding of government operations and activities[.]"

BALT's Fee Waiver Considerations

In neither their initial motion to dismiss, or in the alternative, for summary judgment, nor the supplement thereto did appellees address the public interest factors underlying appellant's repeated fee waiver requests. Rather, they faulted appellant for not having narrowed the scope of its requests so as to reduce reproduction costs. The first such motion was, however, accompanied by an affidavit executed by Eric Melancon, the Chief of Staff to Commissioner Harrison. In that affidavit, Chief of Staff Melancon touted the BPD's purported commitment to transparency, citing its having posted to its publicly available website "the policies and procedures that guide the conduct of all police personnel, as well as information about officer-involved shootings, use of force, and citizen complaints." After detailing information available on its website, Chief of Staff Melancon provided the following explanation for the BPD's decision to deny appellant's fee waiver request:

> 6. I reached this decision, in part, because OJB did not provide sufficient information to establish its need for a fee waiver. OJB's articulated public interest purpose for the records was extremely general and vague. The reasons OJB provided for its request did not explain its public interest purpose or how disclosure would achieve its purpose.
>
> 7. Additionally, I determined that the materials sought would not likely "contribute significantly to public understanding of the operations and

> activities of the [BPD]" and therefore the request was not in the public interest so as to justify a fee waiver.
>
> * * *
>
> The documents sought would likely be heavily redacted and thus not understandable to the public.
>
> 9. Much thought was given to OJB's request, but it was determined that OJB's fee waiver request did not meet the public interest standard or factors. In reaching this conclusion, BPD did consider the overall cost of production, budgetary constraints, and manpower shortages in the Public Integrity Bureau, but these considerations did not drive the decision.
>
> 10. BPD did not willfully, knowingly, or deliberately ignore the Plaintiff's fee waiver request. Rather, BPD thoughtfully and carefully considered all of the available information and legal guidance and, based on the information provided, concluded that a fee waiver would not be appropriate for OJB's requests.

Analysis

A reviewing court may not disturb an agency's denial of an MPIA fee waiver request unless that decision is arbitrary and capricious. *Action Comm. for Transit*, *Inc.*, 229 Md. App. at 559. "An agency's actions will be classified as arbitrary and capricious if they are 'unreasonabl[e] or without a rational basis,'" *Dep't of Human Res. v. Hayward*, 426 Md. 638, 647 (2012) (quoting *Harvey v. Marshall*, 389 Md. 243, 297 (2005)), or if they are "'contrary to law or unsupported by substantial evidence[.]'" *Homes Oil Co., Inc. v. Md. Dep't of the Env't*, 135 Md. App. 442, 457 n.3 (2000) (citation omitted), *cert. denied*, 363 Md. 660 (2001).

GP § 4–206 permits the official custodian of agency records to charge reasonable fees and the actual costs incurred in the course of fulfilling an MPIA request, provided that

such expenses "bear a reasonable relationship 'to the recovery of actual costs incurred by a governmental unit' for the search, preparation, and reproduction of requested public records." *Glass v. Anne Arundel Cty.*, 453 Md. 201, 212 (2017) (quoting GP § 4–206). *See also Action Comm. for Transit*, 229 Md. App. at 543–44 ("The Maryland Public Information Act . . . permits government agencies to charge a reasonable fee for expenses incurred in the course of responding to a request to inspect public records."). While generally permitted to charge an applicant for costs and fees, GP § 4–206 affords the official custodian discretion to waive such charges if:

> (1) the applicant asks for a waiver; and
>
> (2)(i) the applicant is indigent and files an affidavit of indigency; or
>
> (ii) after consideration of the ability of the applicant to pay the fee and other relevant factors, the official custodian determines that the waiver would be in the public interest.

GP § 4–206(e).

Upon denying a fee waiver request, a custodian need not convey to an applicant the reasons underlying that denial. *Action Comm. for Transit*, *Inc.*, 229 Md. App. at 561. In order for a reviewing court properly to affirm an agency's denial of a fee waiver request the record must, however, contain "sufficient information . . . to satisfy [the court] that the custodian's decision was not arbitrary or capricious." *Id.* When conducting such a review, the court's consideration is not limited to the record before the agency. Rather, it extends to "facts generated 'by pleadings, affidavit, deposition, answers to interrogatories,

admission of facts, stipulations and concessions.'" *Id.* at 449 (quoting *Wash. Post Co.*, 149 Md. App. at 304).

In *Baltimore Action Legal Team v. Office of State's Attorney of Baltimore, et al.*, ___ Md. App. ___, No. 1251, Sept. Term, 2020, slip op. at 32 (filed December 17, 2021), we articulated the following two-prong test for reviewing the trial court's grant of summary judgment on the ground that a custodian's MPIA fee waiver denial was neither arbitrary nor capricious:

> [T]he first step is to determine whether there were sufficient facts before the circuit court to determine what considerations went into the SAO's decision to deny both fee waiver requests. If that record is sufficiently developed, we next ask whether those considerations include BALT's ability to pay, and any other relevant factors that show whether the disclosure of the requested material would be in the public interest.

The underlying facts in *Baltimore Action Legal Team* and the arguments presented on appeal are nearly identical to those in this case. In *Baltimore Action Legal Team*, BALT submitted MPIA requests to the Baltimore City State's Attorney's Office ("SAO"), seeking, *inter alia*, "information about investigations of City police officers that were closed during 2019, and any similar cases that had been open for over sixteen months." *Id.* slip op. at 4. "[C]iting its status as a non-profit organization and that this information 'was a matter of public concern and public safety,'" BALT asked the SAO to waive the fees associated with the reproduction of public use-of-force records that it had requested. *Id.* slip op. at 6. In an untimely response to that request, the SAO approximated that the fulfillment thereof would "take approximately '438 hours of clerical and attorney time to

locate, prepare, and reproduce the records,'" estimated that the total cost to comply with the request would amount to approximately $15,330.00, and asked that BALT tender payment in advance of its commencing the review, redaction, and reproduction of the requested records. *Id.* slip op. at 7. The SAO did not otherwise address BALT's fee waiver request.

On March 2, 2020, BALT and OJB filed suit in the Circuit Court for Baltimore City, alleging, *inter alia*, that the SAO had "arbitrarily den[ied] BALT's request for a fee waiver." *Id*. slip op. at 9. The SAO responded with a motion to dismiss, or in the alternative, for summary judgment, wherein it articulated the following reasons for denying the plaintiffs' fee waiver request:

> (1) it believed BALT could pay for the requested records; (2) it did not believe the requested disclosures would contribute significantly to the public's understanding of government operations, namely the operations of the State's Attorney, and (3) the SAO did not know how the fee waiver will benefit the public as the resources needed to respond to this request (438 hours) reduce the ability of the members of the State's Attorney to handle their primary job functions—the pursuit of justice and the prosecution of crime in Baltimore City.

Id. slip op. at 33–34 (quotation marks and footnote omitted). The SAO's motion incorporated by reference an affidavit in which the Deputy State's Attorney for Baltimore City testified that "disclosing the records would not contribute to the public's understanding of how the SAO operates, nor would disclosure be in the public interest." *Id*. slip op. at 9. She further averred that fulfilling BALT's requests "would detract from

the SAO's primary job function" and claimed that BALT had failed to meet its purported burden of "establishing that disclosure was in the public interest." *Id*.

Following a hearing, the circuit court issued a memorandum opinion in which it concluded that the SAO had properly denied BALT's fee waiver requests. The court reasoned that "the record lacked evidence from BALT regarding its inability to pay, as well as any indication of how BALT would disseminate the requested information[.]" *Id*. slip op. at 32.

On appeal, we held that the record contained insufficient information to sustain the SAO's denial of the plaintiff's fee waiver request. Although the SAO properly considered the plaintiff's (in)ability to pay and whether disclosure was "likely to contribute significantly to public understanding of the operations or activities of the government," the SAO did not inquire as to "whether disclosure of records w[ould] shed light on a public controversy about official actions." *Id*. slip op. at 31–32 (quotation marks and citation omitted). We identified that latter public interest factor as "particularly germane in the context of a request seeking criminal investigatory records of City police officers, including those concerning use of force." *Id*. slip op. at 38. In the wake of the "well-documented public controversy surrounding use of force by City police officers," we concluded that it was incumbent upon the SAO to demonstrate that it had meaningfully considered the way in which such records "may have aided the public's understanding of how the SAO was addressing allegations of police misconduct[.]" *Id*. slip op. at 38–39.

The instant issue and arguments are virtually identical to those raised in *Baltimore Action Legal Team*. On the record before us, we are unable to conclude that the court had sufficient facts from which it could reasonably conclude that appellees had meaningfully considered the very same infamous allegations and publicized controversy as were at issue in *Baltimore Action Legal Team*. Consistent with our holding in that case and in accordance with the rule of stare decisis, we therefore hold that appellees arbitrarily and capriciously denied appellant's fee waiver requests associated with reproducing those records to which it was entitled.

For the foregoing reasons, we shall affirm the decision of the circuit court with respect to open and pending investigatory files and reverse with respect to the fee waiver issue.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED IN PART AND REVERSED IN PART. COSTS TO BE DIVIDED EQUALLY BETWEEN APPELLANT AND APPELLEES.