Circuit Court for Baltimore City
Case No. 24-C-20-001784

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1059

September Term, 2020

ENERGY POLICY ADVOCATES

v.

MAYOR AND CITY COUNCIL OF BALTIMORE

Nazarian,
Reed,
Shaw Geter

JJ.

Opinion by Shaw Geter, J.

Filed: July 15, 2021

This is an appeal from an order of the Circuit Court for Baltimore City, granting summary judgment. Appellant, Energy Policy Advocates, filed a complaint seeking judicial review of the denial of appellant's document request made to appellee, the Mayor and City Council of Baltimore, pursuant to the Maryland Public Information Act. Following a hearing on October 23, 2020, the court granted appellee's motion for summary judgment. Appellant timely appealed and presented three questions for our review, which we have condensed and rephrased:[1]

1. Did the circuit court err in granting summary judgment?

Preliminarily, we note that appellant's first question is not properly before us on review. As we shall explain in further detail below, in 2017, the Court of Appeals, in *Amster v. Baker*, explicitly rejected the two-step inquiry, propounded in *Comptroller of Treasury v. Immanuel*, 216 Md. App. 259, 266 (2014), that asks "whether (1) the [circuit] court had an *adequate factual basis* for the decision rendered and (2) whether upon this

[1] Appellant's questions were phrased as follows:

1. Whether the Circuit Court's opinion is supported by an "adequate factual basis," as this Court required in *Comptroller of Treasury v. Immanuel*, 216 Md. App. 259, 266 (2014) and as the Supreme Court required in *Haigley v. Dept. of Health*, 128 Md. App. 194, 736 A.2d 1185 (Md. App. 1999)?
2. Whether the Circuit Court properly required the City to meet its burden of proof under Md. Code GP § 4-362(b)(2)?
3. Whether the Circuit Court erred in granting summary judgment in light of serious factual discrepancies between the allegations of the Complaint and the Defendant's Motion to Dismiss, and in the Alternative, Motion for Summary Judgment?

basis the decision reached is clearly erroneous[,]" and adopted "the traditional *de novo* approach." 453 Md. 68, 74–75 (2017) (emphasis added). The Court explained, "[b]y definition, summary judgment may be granted only when there are no disputed issues of material fact, and thus no factfinding by the [circuit] court. Thus, where the [circuit] court has made a factual determination, summary judgment cannot be appropriate." *Id.* at 75 (citation and internal quotation marks omitted). In the case at bar, the circuit court did not make factual findings. Indeed, in its oral ruling, the circuit court stated: "The Court of Appeals has specifically endorsed the use of summary judgment in Maryland Public Information Act cases when there are no disputed issues of material fact and no fact finding to be done by this [c]ourt. Court [sic] need not make any findings of fact on this record."

For reasons set forth below, we affirm the judgment of the circuit court.

BACKGROUND

On July 20, 2018, appellee, the Mayor and City Council of Baltimore ("the City"), engaged outside counsel, Sher Edling LLP, for legal representation and filed a lawsuit against several fossil fuel companies for engaging in the "unrestricted production and use of their fossil fuel products [which] create[s] greenhouse gas pollution that warms the

planet and changes our climate" and concealing the potentially "catastrophic" environmental impact of their fossil fuels.[2] The lawsuit remains in the preliminary stages.[3]

On March 6, 2020, appellant, Energy Policy Advocates ("EP Advocates"), requested documents from the City pursuant to the Maryland Public Information Act ("MPIA")[4] regarding its litigation against the energy companies.[5] EP Advocates requested three categories of documents from the City. The first category requested all electronic correspondence and accompanying information sent to or from Suzanne Sangree[6] and/or Andre Davis,[7] that included "@ucsusa.org" and/or "@climateintegrity.org" and was dated

[2] The city advanced eight causes of action: public nuisance, private nuisance, strict liability for failure to warn, strict liability for design defect, negligent design defect, negligent failure to warn, trespass, and violation of the Consumer Protection Act.

[3] The Supreme Court, in *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1533 (2021), decided a jurisdictional issue and vacated and remanded the Fourth Circuit's ruling, concluding that the court "erred in holding that it lacked jurisdiction to consider all of the defendants' grounds for removal under § 1447(d)."

[4] The MPIA entitles persons "to have access to information about the affairs of government and the official acts of public officials and employees." Md. Code § 4-103(a) of the General Provisions Article.

[5] Appellant filed its first MPIA request on January 21,2020, but limited its suit to the March 6, 2020 request.

[6] At the time, Suzanne Sangree was the Director of Affirmative Litigation for the City's Law Department.

[7] At the time, Andre Davis was the City Solicitor.

October 1, 2017, through the date that the City processed the request.[8] The second category requested all electronic correspondence sent to or from Suzanne Sangree, Elena DiPietro,[9] Andre Davis, and/or Michael Schrock[10] or correspondence that included "@shredling.com" and was dated October 1, 2017, through July 19, 2018.[11] The third category requested "any common interest agreement, contingency fee or other fee agreement, and/or any retainer, representation and/or engagement agreements, entered into by the City of Baltimore, at any time in 2017 and/or 2018" with Sher Edling LLP.

On March 9, 2020, the City denied EP Advocates' document requests. The City responded that the correspondence requested, between the City's attorneys and outside counsel, "seek[s] legal advice in confidence and are therefore privileged attorney-client communication and the client ha[d] not waived that privilege." Additionally, the City explained that the "request for the agreement between the Law Department and outside counsel embodie[d] the 'legal theories of an attorney or other representative of' the City in active litigation as well as the 'analysis of pending or possible claims' making it attorney work product and deliberative material." The City added:

[8] "ucsusa.org" and "climateintegrity.org" are websites for non-profit organizations that provide information regarding climate change and the history of fossil fuels and their effects.

[9] At the time, Elena DiPietro was the head of the Law Department's General Counsel Group.

[10] At the time, Michael Schrock was the head of the Law Department's Contracts Practice Group.

[11] "@shredling.com" is the website for Sher Edling LLP.

> [s]elective redaction of the agreement sought by [EP Advocates'] request would undermine the deliberative and attorney work product privileges in that it would create an un-level playing field in any litigation by allowing the government's opposing parties to have access to information about government representation and strategy.

On March 31, 2020, EP Advocates filed a complaint in the Circuit Court for Baltimore City, alleging that the City failed to comply with obligations imposed by the MPIA."[12] The City filed a motion to dismiss, asserting that it "properly withheld the records responsive to [appellant's] request because all of the records [fell] under the aforementioned privileges outlined in MPIA Sections 4-301(1) and 4-344" and that EP Advocates "fail[ed] to state a claim upon which relief [could] be granted." Appellant filed a respective opposition motion. On July 21, 2020, after a hearing, the court entered an order granting the motion to dismiss without prejudice and gave appellant leave to amend.

On August 19, 2020, EP Advocates filed an amended complaint alleging that the City "failed to search for, identify, or review any responsive records" and "expressly declined to confirm that it had conducted a search or reviewed any particular record."[13] EP Advocates alleged, specifically, that "on information and belief" the City did not "search for responsive records," "review any potentially responsive record to determine whether any legal privilege or MPIA exemption applied to the relevant record," and "made no effort

[12] EP Advocates limited its lawsuit to the document requests made on March 6, 2020, excluding the document requests made on January 21, 2020.

[13] EP Advocates sent the document request Friday at 1:37 p.m. The City sent the denial at 10:18 a.m. the following Monday.

to review the record(s) or to determine whether any of the responsive record(s) could have been redacted or released in part."

On August 31, 2020, the City filed a motion to dismiss, or in the alternative, for summary judgment. The City argued that it "duly applied the MPIA's mandatory exemptions requiring the withholding of records under Section 4-301" and that it "properly withheld the records responsive to [appellant's] request because all of the records [fell] under aforementioned privileges outlined in MPIA Sections 4-301(1) and 4-344." The City, again, asserted that EP Advocates failed to state a claim upon which relief could be granted. EP Advocates opposed the City's motion, contending that "[b]efore the [c]ourt [could] make a determination whether any exemption properly applie[d] to record . . . the [c]ourt must first be satisfied that the City in fact conducted a search for responsive records and that it examined the content of such documents." EP Advocates added: "the City fail[ed] to submit any affidavit which would provide the [c]ourt a basis to rule on its bare assertions in the alternative Motion for Summary Judgment," and asserted that "the City did not individually examine discrete, requested records for the purpose of applying necessary legal privileges or exemptions to some or all of their content."

The City submitted an affidavit from Bryan Bartsch, an E-Discovery Specialist with the Baltimore City Law Department. His affidavit stated that he "performed a confirmatory search of the electronic mailboxes for Andre Davis and Suzanne Sangree for the key words 'ucsusa.org' and 'climateintegrity.org,' from the dates October 1, 2017 to March 9, 2020." He indicated that the search "took approximately 20 minutes, which [was] consistent with regards to searches and reviews for similar requests and similar amounts of documents."

On October 23, 2020, the court, after a hearing, issued an oral ruling, granting the City's motion. The court then entered an order to that effect on October 29, 2020. We shall discuss the court's oral ruling in further detail in our discussion below.

STANDARD OF REVIEW

In MPIA cases, we review a grant of summary judgment under "the traditional *de novo* approach." *Amster v. Baker*, 453 Md. 68, 75 (2017). Summary judgment is proper "only when there are no disputed issues of material fact, and thus no factfinding by the [circuit] court." *Id.* (quoting *Animal Legal Def. Fund v. U.S. FDA*, 836 F.3d 987, 989–90 (9th Cir. 2016)). "When reviewing the record to determine whether a genuine dispute of material fact exists, '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). "To avoid summary judgment, however, the non-moving party must present more than general allegations; the non-moving party must provide detailed and precise facts that are admissible in evidence." *Id.* (citing *Beatty v. Trailmaster Prods., Inc.*, 330 Md. 726, 737–38 (1993)). Accordingly, we review the trial court's grant of summary judgment without deference. *Rowhouses, Inc. v. Smith*, 446 Md. 611, 630 (2016).

DISCUSSION

Appellant argues that the circuit court failed to require appellee to meet its burden of proof. In their view, the circuit court "uncritically adopted" "the City's assertions of privilege over correspondence with activist organizations and individuals." They contend

that: "exemptions in the MPIA are to be narrowly construed. [MPIA] § 4-103(b) requires that in doubtful cases the Act 'shall be construed in favor of allowing inspection of a public record.'" They contend the circuit court failed to require appellee to submit evidence that the attorney client-privilege attached. They cite *Harrison v. State*, 276 Md. 122, 135 (1975), where the Court of Appeals described attorney-client privilege, stating:

> (1) Where legal advice of kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his insistence permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

According to them, even assuming the first seven *Harrison* factors were met, the court failed to require the City to prove the absence of any waiver of attorney-client privilege. They argue the circuit court also failed to require the City to prove that the records at issue were created in anticipation of litigation, rather than in the ordinary course of business, as required by *E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc.*, 351 Md. 396, 409 (1998). Finally, they claim that summary judgment was inappropriate because there were genuine disputes of material fact. However, we note that, in their brief, appellant did not indicate with specificity any factual discrepancies.

Appellee counters that appellant's argument "that a custodian's statutory 'burden of sustaining a decision' to deny disclosure in [MPIA] § 4-362(b)(i) somehow required the City to produce more evidence than existed in the record below . . . misunderstands the evidence available for consideration on summary judgment." They aver that the court's decision is discretionary as Maryland law does not require "the circuit court to employ the sort of detailed *Vaughn* index or *in camera* review that EP Advocates insists upon in order

for a custodian to meet its burden." [14] They assert that, although "EP Advocates seems to think that it can merely speculate its way out of summary judgment through unsupported allegations, the law says otherwise." Specifically, they argue that "EP Advocates pointed to no evidence in the record and provided no statement under oath providing any support for its allegations, nor did it request additional opportunity to provide such support at any point during the hearing before the circuit court."

Appellee notes that although EP Advocates made three separate categories of document requests, which the court explicitly ruled on, appellant's brief does not directly address each of these requests. According to them, in their brief, "EP Advocates did not mention [their] request for emails between the City's lawyers." They assert that appellant only addressed their request for the representation agreement in the first sentence of the Statement of the Case.[15] They claim that appellant's brief focuses exclusively on its request for emails between City lawyers and two environmental groups. Ultimately, they contend that because appellant did not adequately address each category of document requests in their brief, this Court should decline to address those requests.

[14] A "*Vaughn* index" is "a sufficiently detailed description and explanation [that] enable[s] the trial court to rule whether a given document, or portion thereof, is exempt without the necessity of an *in camera* inspection." *Cranford v. Montgomery County*, 300 Md. 759, 779 (1984) (citing *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977, 94 S. Ct. 1564 (1974)).

[15] The sentence reads: "[i]n this case, Plaintiff/Appellant Energy Policy Advocates sought agreements entered into by the City of Baltimore's Department of Law, and certain correspondence between the Department and activist groups, under the Maryland Public Information Act, GP § 4-301 ("MPIA").

Maryland Rule 8-504(a)(6) requires a brief include "[a]rgument in support of the party's position on each issue." Section 8-504(c) states: "[f]or noncompliance with this Rule, the appellate court may dismiss the appeal or make any other appropriate order with respect to the case . . . ." In *DiPino v. Davis*, the Court explained that "if a point germane to the appeal is not adequately raised in a party's brief, the court may, and ordinarily should, decline to address it." 354 Md. 18, 56 (1999) (citing *Health Serv. Cost Rev.*, 298 Md. at 664). The Court reiterated the requirement for appellants to argue all issues in *Oak Crest Village, Inc. v. Murphy*, stating: "[a]n appellant is required to articulate and adequately argue all issues the appellant desires the appellate court to consider in the appellant's initial brief." 379 Md. 229, 241 (2004).

EP Advocates argues, generally, that "[e]ffectively the court below improperly and categorically extended a blanket of attorney-client privilege (and apparently also a blanket of work product or 'consultant' privilege) to shield records without requiring the City to prove the factual prerequisites for such a privilege to attach." We conclude that although this contention may be considered inadequate, in our view, it encompasses all categories of documents requested by EP advocates because, as we shall discuss below, all documents requested fall under attorney-client privilege. Accordingly, we shall consider each category of documents requested.

The MPIA provides 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." Md. Code § 4-103(a) of the General Provisions Article. Access to such information, however, is not without exception. MPIA Section 4-301(a) provides that "a custodian shall

deny inspection of a public record or any part of a public record if . . . by law, the public record is privileged or confidential." MPIA Section 4-344 permits a custodian to "deny inspection of any part of an interagency or intra-agency letter or memorandum that would not be available by law to a private party in litigation with the unit." Judicial review of MPIA request denials is provided for in MPIA Section 4-362(a)-(b), which states: "whenever a person or governmental unit is denied inspection of a public record . . . the person or government unit may file a complaint with the circuit court" and the defendant "has the burden of sustaining a decision to: 1. deny inspection of a public record; or 2. deny the person or governmental unit a copy, printout, or photograph of a public record."

"[T]he attorney-client privilege 'prevents the disclosure of a confidential communication made by a client to his attorney for the purpose of obtaining legal advice.'" *CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 202 Md. App. 307, 363 (2011), *aff'd*, 429 Md. 387 (2012) (quoting *E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc.*, 351 Md. 396, 415 (1998)). "The party asserting the [attorney-client] privilege bears the burden of establishing whether it applies to evidence in the case." *Id.* (citing *E.I. du Pont de Nemours & Co.*, 351 Md. at 406)). "The attorney-client privilege withholds relevant information from the fact finder and should be narrowly construed. . . . The privilege should be applied only when necessary to achieve its limited purpose of encouraging full and frank disclosure by the client to his or her attorney." *CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 202 Md. App. 307, 363 (2011), *aff'd*, 429 Md. 387 (2012) (citations and quotation marks omitted). The Court of Appeals, in *Harrison v. State*, explained:

> When the privilege is invoked the existence of the attorney-client relationship and whether or not any such communication is privileged are questions in the first instance for the trial court. In order to make such determinations that court should make a preliminary inquiry and hear testimony relative thereto out of the presence of the jury, looking at all the surrounding facts and circumstances. The threshold question of the existence of the privilege must be determined without first requiring disclosure of the communication.

276 Md. 122, 136 (1975).

In *Action Comm. for Transit, Inc. v. Town of Chevy Chase*, we stated: "[i]n cases interpreting an MPIA request, facts necessary to the determination of a motion for summary judgment may be placed before the court by pleadings, affidavit, deposition, answers to interrogatories, admission of facts, stipulations and concessions." 229 Md. App. 540, 545 (2016) (citations omitted). The Court of Appeals, in *Lamson v. Montgomery County*, articulated:

> the trial court in reviewing the denial must be satisfied that the rationale offered by the agency supports the denial of the request. To make this determination, the trial court may require the presentation of evidence such as testimony or affidavits, order a *Vaughn* index, or conduct an *in camera* review. While the trial court is free to employ the method it deems appropriate under the circumstances there must be a showing that all the requirements of the asserted exception have been met.

460 Md. 349, 369 (2018). "[T]he ultimate standard under the [MPIA] for determining whether an *in camera* inspection is to be made is whether the trial judge believes that it is needed in order to make a responsible determination on claims of exemptions." *Cranford v. Montgomery County*, 300 Md. 759, 779 (1984). "If an agency has frustrated judicial review by presenting testimony or affidavits in conclusory form, the trial court may, depending upon all of the circumstances, appropriately exercise its discretion by ordering

more detailed affidavits or by conducting an *in camera* inspection or simply by ordering disclosure because of the agency's failure to meet its burden of satisfying the court that an exemption applies. *Id.* at 780.

The circuit court, in its oral ruling, stated:

> This dispute between the parties relate to several categories of records that are in the City's possession. First, correspondence between City attorneys or employees of the City Department of Planning and outside counsel retained by the City.
>
> It's well established that the attorney-client privilege applies in the government context. Under the Maryland Public Information Act, a custodian shall deny inspection of a public record or any part of a public record if the record is privileged or confidential. These are privileged attorney-client communications, the very nature of them. The [c]ourt will exercise its discretion and need not require a *Vaughn* index or an *in camera* review. [Appellee's counsel's] argument is a good one that the [c]ourt should be hesitant with attorney-client privileged communications to be doing *in camera* reviews of them. It is not necessary in this case. The City properly denied this request.
>
> As to the [appellant] seeking access to the City's agreement with outside counsel, the attorney work product privilege is embodied in General Provisions 4-344 as an exemption to the Public Information Act or the requirement that public records be disclosed. It allows a custodian to deny inspection of any part of an interagency or intra-agency letter or memo that would not be available by law to a private party in litigation with the unit.
>
> There's ongoing litigation in this case. That is not in dispute. The [c]ourt finds that the City's agreement with outside counsel constitutes protected attorney work product prepared in anticipation of litigation and is protected from disclosure under General Provisions 4-344.
>
> Finally, as the correspondence between attorneys and outside environmental groups, again, there's ongoing litigation here. This request involves communications between City attorneys and environmental groups.
>
> In connection with that active litigation, the [c]ourt need not undertake an *in camera* review or any other tools to review these documents. It's satisfied, based on this record, that the information is protected from

> disclosure pursuant to the attorney-work product and deliberative process privileges; it would not be available to a private party in litigation under the Maryland or federal discovery rules. The City correctly denied this request as well.

In our view, the court acted well-within its discretion in not conducting a *in camera* review or requiring a *Vaughn* index. The judge articulated his belief that, based on the record, such tools were not needed, because the information was protected from disclosure. Again, as stated above, "the ultimate standard under the [MPIA] for determining whether an *in camera* inspection is to be made is whether the trial judge believes that it is needed in order to make a responsible determination on claims of exemptions." *Cranford v. Montgomery County*, 300 Md. 759, 779 (1984). Here, it is undisputed that there was ongoing litigation involving the City. The court found that the City's agreement with outside counsel constituted attorney work product in anticipation of litigation and was, therefore, protected from disclosure under MPIA Section 4-344. The court, likewise, found that the requested correspondence between City attorneys and outside environmental groups, were also protected because of ongoing litigation. On this record, we conclude that the court did not abuse its discretion in granting the motion for summary judgment based on the City's pleadings and the affidavit provided. We, therefore, affirm.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.