Circuit Court for Prince George's County
Case No. CAL12-19598

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1073

September Term, 2018

JAYSON AMSTER

v.

PRINCE GEORGE'S COUNTY,

MARYLAND, *et al.*

Arthur,
Leahy,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: September 13, 2019

In 2011, Calvert Tract, LLC ("Calvert Tract") entered into a lease with Whole Foods (the "Lease") for a grocery store to join Calvert Tract's new development. In April 2012, appellant Jayson Amster, a member of a group opposing the development, sought access to the Lease and various communications related to the development. He delivered a request for this information to Prince George's County Executive Rushern L. Baker under the Maryland Public Information Act ("MPIA"), now codified at Maryland Code (2014, 2018 Supp.), General Provisions ("GP") § 4-201.[1] This request was denied.

On July 3, 2012, Amster filed an MPIA complaint in the Circuit Court for Prince George's County requesting a copy of the Lease. Calvert Tract successfully intervened as a defendant and both Baker and Calvert Tract filed motions for summary judgment on the basis that the Lease was exempt from disclosure as confidential commercial information. The trial court concluded that the Lease was indeed confidential information and granted summary judgment. The court also substituted Prince George's County (the "County") in as a defendant and dismissed the suit against Baker individually.[2]

[1] At the time Amster demanded the Lease, requests for information from governmental bodies and their custodians were made under Section 10-613 of the State Government Article ("SG"). Effective October 1, 2014, the MPIA was recodified as Title 4 of the General Provisions Article of the Maryland Code. *See* GP § 4-101 *et seq*. The recodification reorganized the MPIA extensively but did not substantively change the language. *See* 2014 Md. Laws, ch. 94 (H.B. 270) (indicating through comments that the recodification of the MPIA under House Bill 270 resulted in style changes only). Inspection of documents is now allowed under GP § 4-201, which is substantively the same as SG § 10-613. We shall refer to this section and other sections of the MPIA under the current statute.

[2] We have changed the caption to reflect the substitution.

Amster then appealed to this Court, where we affirmed the trial court's grant of summary judgment. Amster appealed again, and the Court of Appeals granted certiorari. The Court of Appeals vacated the grant of summary judgment, holding the County and Calvert Tract (collectively, "Appellees") had not met their burden of showing that the Lease was protected in its entirely from disclosure. The Court explained that the MPIA protects only specific confidential commercial information within a document, not the entire document within which the information is contained. The Court therefore remanded the case back to the circuit court to "direct Respondents to provide a *Vaughn* index,[3] review the lease *in camera*, or conduct other proceedings consistent with this opinion." *Amster v. Baker*, 453 Md. 68, 88 (2017).

Following the remand, the County sent a heavily redacted copy of the Lease to Amster. Amster subsequently made several discovery requests of Calvert Tract, which resisted and filed two motions for protective orders. The circuit court granted both motions. Amster also filed motions seeking fees, damages, and sanctions, in which he argued that the requested Lease did not in fact contain confidential information and that the Appellees' bad faith in withholding it had led to protracted, unnecessary litigation. The court also denied these motions. Amster appealed, presenting three questions for our review, which we have re-ordered:

[3] "[A] 'Vaughn index' is a list of documents in the government's possession, setting forth the date, author, general subject matter, and claim of privilege for each document claimed to be exempt from disclosure. The name is derived from *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973)." *Glass v. Anne Arundel Cty.*, 453 Md. 201, 213 n.11 (2017) (internal quotations, citations, and alterations omitted).

I. "Was it clearly erroneous and an abuse of discretion for the court to deny sanctions (MD Rule 1-341) where the Appellees' defense was in bad faith or without any reasonable justification?"

II. "Was it clearly erroneous and an abuse of discretion to deny an award of expenses (GP 4-362(d), (f)) where appellant prevailed in his MPIA suit despite appellees' baseless defense?"

III. "Was it an erroneous application of law and an abuse of discretion for the court to deny all discovery regarding damages and sanctions in this MPIA suit?"

We discern no error in the circuit court's finding that the Lease was not withheld in bad faith and, consequently, we cannot say the court abused its discretion denying sanctions and costs under Md. Rule 1-341. We also hold that the circuit court did not abuse its discretion in denying costs under GP § 4-362(f) because Amster's suit was not maintained in the public interest, his request was largely self-interested, and Appellees' refusal to disclose the lease was reasonable and fairly arguable. Furthermore, the court did not abuse its discretion in denying Amster's motion for statutory damages under GP § 4-362(d) because the court was not obligated to consider the motion filed alongside his motion to reconsider, alter, and amend. Finally, because the circuit court made no finding of bad faith to warrant an award of sanctions, we hold that the denial of discovery was not an abuse of discretion. We therefore affirm the circuit court's decision on all counts.

BACKGROUND

The relevant background concerning Amster, Calvert Tract, and the County was set out by Judge Woodward in this Court's opinion affirming the summary judgment awarded in the initial circuit court action:

Calvert Tract owns approximately thirty-six acres of land near the intersection of Baltimore Avenue (U.S. 1) and East-West Highway (Maryland Route 410) in Prince George's County. In October 2011, Calvert Tract sought a zoning change from R-55 (Single-Family Detached Residential) to MUTC (Mixed-Use Town Center) in order to develop the land into "a mix of office, commercial, and residential use." As part of the development process, Calvert Tract entered into confidential negotiations and executed a commercial lease with Whole Foods as the anchor store. Calvert Tract provided a redacted copy of the lease to the County "as part of the ongoing discussions of the development of the property." County officials acknowledged the lease's existence in communications with constituents.

[Amster], a member of the Maryland bar and a Prince George's County resident, submitted an MPIA request to the County Executive on April 19, 2012, seeking, among other items, "[a]ny lease for a Whole Foods store . . . located in Prince George's County." The County Office of Law responded to the request on May 7, 2012, informing [Amster] that the lease was not subject to disclosure under the MPIA because the lease was "confidential commercial information." On July 3, 2012, [Amster] filed a *pro se* Complaint for Disclosure of Public Record against the County Executive in the circuit court, seeking, among other items, "a certain lease for a Whole Foods grocery store to be located in Prince George's County which is a prominent part of pending Zoning Application A-10018." Calvert Tract filed a motion to intervene, which the court granted.

Calvert Tract and the County Executive filed separate motions for summary judgment, arguing that the lease was exempt from disclosure under GP § 4-335(2), because the lease is a private document containing confidential commercial information that Calvert Tract voluntarily provided to the government and would not ordinarily release to the public. Calvert Tract attached an affidavit to its motion, which stated, among other things, that (1) Calvert Tract entered into a lease with Whole Foods to open a store at the intersection of U.S. 1 and Maryland Route 410; (2) the lease "was the product of extensive confidential negotiations;" (3) a redacted version of the lease was provided to the County with the intention of the lease remaining private; (4) Calvert Tract "does not customarily publicly disclose its commercial leases"; (5) the lease contains financial information; (6) Calvert Tract "intends to pursue negotiations with other businesses to enter into" leases at the property; and (7) disclosure of the lease "would place Calvert [Tract] at a disadvantage when negotiating future commercial leases for the property." [Amster] filed an opposition to the motions for summary judgment, in which he argued that summary judgment should be denied, because the movants did not meet their burden of showing that "the document or *a severable portion* meets all elements of exemption."

Amster v. Baker, 229 Md. App. 209, 215-18 (2016) (footnotes omitted), *vacated*, 453 Md. 68 (2017).

A hearing on the motions for summary judgment was held on June 4, 2013, before Judge Leo E. Green of the Circuit Court for Prince George's County. *Id.* at 217. Judge Green granted the motions in an oral ruling delivered at the conclusion of the hearing after determining that the lease was exempt from disclosure under GP § 4-335(2) and that Amster was not entitled to an *in camera* review of the lease. *Id.*

Following a timely appeal to this Court, we affirmed the trial court's grant of summary judgment based on the *Critical Mass* test.[4] *Id.* at 228. We held that Calvert Tract had "satisfied the three elements of the Critical Mass test" because the Lease contained "confidential commercial or financial information that was (1) voluntarily provided to the government and (2) not customarily released to the public by the private party." *Id.* We also held that the release of certain information to the public by Calvert Tract, including small details such as "the trigger date, the grading date, and the opening date," did not waive the confidential commercial information exemption, which applied to "the detailed, technical, or specific information that appellant was requesting." *Id*. at 131-32. Further,

[4] In *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, the D.C. Circuit Court devised a new test for determining whether information provided voluntarily to the government could be withheld under the confidential commercial information exemption in the Freedom of Information Act. 975 F.2d 871, 878 (D.C. Cir 1992). The Court in *Critical Mass* "recognize[d] a private interest in preserving the confidentiality of information that is provided to the Government on a voluntary basis" and therefore determined that "financial or commercial information provided to the Government on a voluntary basis is "confidential" . . . if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." *Id.* at 879.

we determined that, because it was Calvert Tract and not the County that disclosed information, "such disclosure does not constitute a valid waiver of the confidential commercial information exemption" because the County "had the responsibility to protect Calvert Tract's confidential commercial information, and thus only the County could waive this responsibility." *Id*. at 232. We stated that the only information regarding the Lease disclosed by the County "was its existence [and] such conclusory, summary disclosure does not constitute a valid waiver of the confidential commercial information exemption." *Id*. Finally, we held that disclosure under the MPIA of any severable portions of the lease was not appropriate because it would discourage "other commercial developers [from] . . . voluntarily providing their leases to the County" in order to "avoid any risk of disclosure." *Id*. at 239. This, we reasoned, would "contravene the legislature's intent to encourage private parties to voluntarily share the information that the government does not have a mechanism to compel." *Id*.

The Court of Appeals disagreed with this Court, vacated the grant of summary judgment, and remanded the case to the circuit court for further proceedings. *Amster*, 453 Md. at 88. Judge Adkins delivered the holding for a unanimous Court:

> [We] hold that the commercial information is "confidential"—and therefore exempt from MPIA disclosure—if it "would customarily not be released to the public by the person from whom it was obtained…
>
> We hold that the trial court applied the correct test—*Critical Mass*—to determine whether commercial information is "confidential" under the MPIA's confidential commercial information exemption. Respondents did not carry their burden of proof, however, to demonstrate that the entire Whole Foods lease was confidential. Thus, we vacate the grant of summary judgment and remand the case for the judge to direct Respondents to provide

> a *Vaughn* index, review the lease *in camera*, **or** conduct other proceedings consistent with this opinion.

Id. at 81, 88 (bold emphasis added).

Amster's Motions

Following the Court of Appeals' decision, the County released a copy of the redacted Lease to Amster. On October 12 and 24, 2017, respectively, Amster filed a motion for appropriate relief and an amended motion for appropriate relief, requesting that the original redacted Lease be examined *in camera*; that Calvert Tract and the County provide a *Vaughn* index; that all portions of the redacted Lease be provided to him; and that he be awarded damages and sanctions "pursuant to the MPIA and the fact that [the County] and [Calvert Tract's] relentless defense and refusal to disclose the subject public record were in bad faith and without any justification in law." Calvert Tract opposed the amended motion.

Amster also "propounded interrogatories and other discovery matters on Calvert Tract." Calvert Tract requested that Amster withdraw the interrogatories, reasoning that the MPIA does not permit discovery. When Amster refused, they filed a motion for a protective order, which Amster opposed.

January 12 Memorandum and Order of the Court

On January 12, 2018, Judge Green issued an order in response to various motions filed by Amster, stating that the redacted Lease provided to Amster did not meet the "*Vaughn* Index" standard. Judge Green ordered Appellees to produce a proper *Vaughn* Index and a confidential envelope copy of the subject lease for bench review.

Calvert Tract filed a motion to reconsider. The County also issued a reply stating that they could not produce a *Vaughn* Index given that they had "never possessed the contents of the redactions to the Whole Foods Lease."

February 28 Memorandum and Order of the Court

On February 28, 2018, Judge Green issued a second order denying Amster's amended motion for appropriate relief. Judge Green explained that he had been under the "mistaken belief" that "the entire lease or at least a large portion of the subject lease was given to the county." Recognizing that the County provided Amster with the redacted Lease, the County was not the custodian of the un-redacted lease within the meaning of MPIA § 4-101(d)(2), and the County never possessed a copy of that un-redacted lease, Judge Green determined that the County was not obligated to produce a Vaughn Index. Judge Green further denied Amster's requests for expenses, fees and losses, on several grounds: (1) Amster's requests for expenses did not include any proof or documentation of the claimed expenses; (2) Amster represented himself *pro se* and was therefore not entitled to attorney's fees (citing *Frison v. Mathis*, 188 Md. App. 97, 106 (2009)); (3) Amster did not prove his fees to be reasonable as per Md. Rule 19-301.5, and; (4) the County and Calvert Tract did not resist the release of the Lease in bad faith.

Judge Green also issued the protective orders requested by Calvert Tract following Amster's service of interrogatories, explaining that because Calvert Tract is "a private entity" attempting to protect "their proprietary rights in the non-disclosure of a lease provided to a governmental entity," they are entitled to a protective order under Maryland

Rule 2-403.[5] Judge Green noted that the Court of Appeals had not instructed the circuit court to conduct discovery and that Amster was, therefore, not entitled to his discovery requests. The order provided that the case was to be closed statistically.

June 8 Motions Hearing

On March 9, 2018, Amster filed a motion to reconsider, alter, and amend alongside a motion for statutory damages, pursuant to Maryland Rule 1-341 and GP § 4-362(d),[6] seeking $1000 in statutory damages and $3,535,67 in out-of-pocket expenses. He also requested a hearing**.** Appellees opposed these motions. Amster then sent a second set of interrogatories to Calvert Tract, which caused Calvert Tract to file for another protective order.

[5] Maryland Rule 2-403(a) states in relevant part: "On motion of a party, a person from whom discovery is sought, or a person named or depicted in an item sought to be discovered, and for good cause shown, the court may enter any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had . . . (8) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way."

[6] Maryland Rule 1-341(a) states that "in any civil action, if the court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification, the court, on motion by an adverse party, may require the offending party or the attorney advising the conduct or both of them to pay to the adverse party the costs of the proceeding and the reasonable expenses, including reasonable attorneys' fees, incurred by the adverse party in opposing it."

GP § 4-362(d) provides that "[a] defendant governmental unit is liable to the complainant for statutory damages and actual damages that the court considers appropriate if the court finds that any defendant knowingly and wilfully failed to: (i) disclose or fully to disclose a public record that the complainant was entitled to inspect under this title; or (ii) provide a copy, printout, or photograph of a public record that the complainant requested under § 4-205 of this title."

The circuit court held a motions hearing on June 8, 2018. Although he conceded that there is generally no discovery in MPIA cases, Amster urged that discovery for the purposes of damages is a different matter and argued that he was entitled to discovery on the basis that facts are required to prove a defendant's bad faith under Maryland Rule 1-341. The County responded by asserting that the discovery Amster sought was in an MPIA proceeding, that the MPIA is a self-contained statute, and that the legislature would have written the statute to provide for discovery if the "legislature wanted discovery to be provided in an MPIA proceeding." Further, the County insisted, there is no separate standard for costs. Calvert Tract joined in the County's arguments.

As to costs and sanctions, Amster admitted that he had received his costs for his appeal in the Court of Appeals from Appellees. Amster argued, however, he incurred a further $3,535.68 in costs due to the initial court action and the appeal to the Court of Special Appeals. Amster argued that the County knew that the redacted lease in their possession contained no confidential commercial information. Therefore, he purported, the decision to withhold the lease was disingenuous and in bad faith, entitling him to costs on this basis. The County responded that Rule 1-341 is a bad-faith standard for civil actions that does not apply in MPIA proceedings. Further, the County stated that the MPIA is clear at GP § 4-362(f) that, in order to be awarded costs, Amster would need to have substantially prevailed in his case. While Amster won his appeal and received his costs for that particular action, the County explained, Amster should receive further costs only if he can show a benefit to the public of the withheld information, the nature of his interest in the information and whether the County withheld the documents without a reasonable basis in

law. The County stated that there was no indication that Amster was seeking the information for public benefit; that his interest in the lease was self-interest and that there was a reasonable basis in law for the County to withhold the lease because the issue was novel and there was no Maryland precedent on point. Calvert Tract again joined in the County's arguments.

Amster also insisted that he was entitled to damages under GP § 4-362(d) because the County wilfully withheld the lease despite knowing that it contained no trade secrets or confidential commercial information. Additionally, Amster propounded that there was no novel issue of law in his request for the redacted lease because he was not asking for any confidential commercial information; rather, he simply wanted a copy of the redacted Lease held by the County. The County insisted that they did not knowingly or wilfully fail to disclose the Lease because there was no Maryland precedent on whether a document that a private party provided voluntarily to the government was confidential commercial information under the MPIA. Therefore, the County concluded, it had a reasonable basis to withhold the Lease, and Amster was not entitled to damages.

At the hearing, Judge Green granted a second protective order to Calvert Tract, adopting his reasoning contained in the February 28 order and reiterated that the Court of Appeals did not instruct the circuit court to conduct discovery. He also denied Amster's motion for statutory damages, finding that Amster was not entitled to damages because he had not requested them prior to the case closing statistically. Additionally, Judge Green found that Amster had failed to establish that he was entitled to costs or damages under either Rule 1-341 or GP § 4-362 because, *inter alia*, he found no special benefit to the

public of the withheld information and determined that the County withheld the documents with a reasonable basis in law. He highlighted that the County had a reasonable basis in law to withhold the Lease given that there was no Maryland precedent on whether a document voluntarily provided by a private party to the government was confidential commercial information under the MPIA.

This timely appeal followed on July 18, 2018.

DISCUSSION

I.

Sanctions

Amster argues that the circuit court abused its discretion when it denied him sanctions under Md. Rule 1-341 because Appellees' refusal to disclose the Lease was in bad faith and without reasonable justification. Amster contends that Appellees fabricated their claims of exempt material and knew that there was no confidential content in the redacted Lease. He asserts that an MPIA case is not exempt from claims under Rule 1-341 when the conduct of the Appellees was in bad faith or without substantial justification. He further asserts that Appellees provided no law supporting their arguments of exemption; in fact, he insists, Appellees' legal argument was directly contrary to GP § 4-335[7] and

[7] GP § 4-335 states that "[a] custodian shall deny inspection of the part of a public record that contains any of the following information provided by or obtained from any person or governmental unit: (1) a trade secret; (2) confidential commercial information; (3) confidential financial information; or (4) confidential geological or geophysical information." Amster is referring to the fact that this section states that a custodian will deny inspection of "the part" of a public document containing confidential commercial information.

"decades of consistent decisions regarding non-exempt content." Amster finally notes that Judge Green admitted to not realizing that the Lease in the County's possession was redacted, and that Judge Green agreed with Appellees' opposition to disclosure only because he believed that the Lease contained trade secrets and confidential commercial information, which Amster claims it did not.

The County responds that the circuit court concluded properly that it had not withheld the redacted Lease in bad faith. According to the County, Amster cannot seek costs under Rule 1-341 because the MPIA is a comprehensive statutory scheme that contains adequate remedies and "specific guidelines for an award of damages or costs to an MPIA complainant." Also, the County avers, Amster's action presented a novel issue that Maryland courts had never before considered: the scope of the exemption for "confidential commercial information" provided *to* the government. The novelty of the issue, insists the County, means that they had a colorable claim. Therefore, the County contends, sanctions were inappropriate. Finally, the County argues that both the circuit court and this Court agreed with their position that the entire redacted Lease was confidential commercial information exempt from disclosure, further proving that they did not withhold the Lease in bad faith and should not be subject to sanctions.

Calvert Tract adds that Amster's allegations of fabrications and objectively untrue statements about the contents of the redacted Lease are inaccurate. Calvert Tract argues that sanctions are an extraordinary remedy that should be used sparingly. Accordingly, the circuit court did not abuse its discretion in denying sanctions because the litigation involved a novel issue and the circuit court made a finding that there was no bad faith.

To impose "sanctions in the form of costs" under Rule 1-341, "the judge must make two separate findings that are subject to scrutiny under two related standards of appellate review." *Inlet Assocs. v. Harrison Inlet, Inc.*, 324 Md. 254, 267 (1991). The Court of Appeals explained the predicate factual findings as follows:

> First, the judge must find that the proceeding was maintained or defended in bad faith and/or without substantial justification. This finding will be affirmed unless it is clearly erroneous or involves an erroneous application of law. Second, the judge must find that the bad faith and/or lack of substantial justification merits the assessment of costs and/or attorney's fees. This finding will be affirmed unless it was an abuse of discretion.

Id. at 267-68. In this case, Judge Green found that there was no bad faith, so we review that finding for clear error or an erroneous application of law, and whether his consequent decision not to impose sanctions for abuse of discretion.

Maryland Rule 1-341(a) provides,

> In any civil action, if the court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification, the court, on motion by an adverse party, may require the offending party or the attorney advising the conduct or both of them to pay to the adverse party the costs of the proceeding and the reasonable expenses, including reasonable attorneys' fees, incurred by the adverse party in opposing it.

Maryland Rule 1-101 states that Title 1 "applies to all matters in all courts of [Maryland], except the Orphans' Courts and except as otherwise specifically provided." Neither the MPIA nor the Maryland Rules specifically preclude the application of Title 1, Chapter 300 of the Maryland Rules to MPIA matters. We have found no Maryland case law specifically addressing whether Rule 1-341 applies in litigation concerning MPIA

claims.[8] We will assume without deciding, therefore, that Rule 1-341 can apply in litigation concerning MPIA claims.

In the context of Md. Rule 1-341, "bad faith exists when a party litigates with the purpose of intentional harassment or unreasonable delay." *Barnes v. Rosenthal Toyota, Inc*., 126 Md. App. 97, 105 (1999). For there to be substantial justification for an action, the litigant's position must be "fairly debatable and within the realm of legitimate advocacy." *Id*. at 105-06.

Our decision in *Toliver v. Waicker*, 210 Md. App. 52 (2013), is instructive here. The plaintiffs in *Toliver* alleged they were exposed to chipping lead paint when they lived in or frequented a residential property owned, controlled, and managed by the defendants. *Id*. at 55-56. Plaintiffs sued Investment Realty Specialists, Inc. ("IRS") and four other defendants alleging negligence and a violation of the Maryland Consumer Protection Act. *Id*. at 55. One of the defendants, Mr. Waicker, filed a motion for summary judgment, claiming that he could not be held liable under the Maryland Consumer Protection Act or for any of the alleged torts because he had no "day-to-day operational duties with regard to rentals or maintenance, . . . did not actively participate in, specifically direct or cooperate

[8] When interpreting the MPIA, we "generally give significant weight to the federal courts' interpretation of similar FOIA provisions." *Amster*, 453 Md. at 79. Federal courts have applied the concept of bad faith in the context of the Federal Rules of Civil Procedure to Freedom of Information Act cases. *See Misegades, Douglas & Levy v. Sonnenberg*, 76 F.R.D. 384 (D. Va. 1976) (finding bad faith when an attorney included private individuals unconnected with any government agency in a Freedom of Information Act claim); *see also Pub. Citizen v. Dep't of State*, 276 F.3d 634 (D.C. Cir. 2002) (discussing grants of summary judgment as long as there is no evidence of an agency's bad faith in its refusal to release documents).

in the rental or maintenance of" the Property and was "not the landlord of the Property and made no representations about the condition of the Property to anyone." *Id*. at 56. It transpired that, although Mr. Waicker was "President and sole stockholder of IRS," he was not an employee of IRS and did not own any portion of the Property. *Id*. at 57-58. Therefore, Mr. Waicker insisted that he was not an "owner" or "operator" of the Property who could be held liable for failing to comply with statutory duties in the housing code. *Id*. at 59. He also argued that plaintiffs' attempt to impose personal liability on him was in bad faith. *Id*. He filed a motion for sanctions stating that plaintiffs' counsel knew that, in related actions, circuit courts had ruled that he had "no personal liability in lead paint cases in his position as President of IRS where he had no personal involvement in the rental, repair or maintenance of the property at which the alleged lead paint injuries occurred." *Id*. Although Mr. Waicker was granted summary judgment, he was denied his request for sanctions. *Id.* at 59-60.

On appeal, we affirmed both the grant of summary judgment and the denial sanctions. *Id.* at 72. We explained that, when considering whether claims were made in bad faith or without substantial justification, the issue is "whether [the attorney] had a reasonable basis for believing that the claims would generate an issue of fact." *Id*. at 71 (citation omitted). We observed that the circuit court obviously regarded the law as applied to the "question of whether a corporate officer in general, and Mr. Waicker in particular, could be found liable as an 'operator'" as unclear or uncertain. *Id*. at 72. Therefore, we held that the circuit court did not err when it "did not consider the filing of the Complaint to be unreasonable and worthy of the extraordinary remedy of sanctions." *Id*. at 72.

In the present case, Judge Green found that Appellees did not pursue this matter in bad faith. Like the circuit court in *Toliver*, Judge Green cited the novelty of the issue presented as a reason for finding that the case was not maintained in bad faith. Appellees believed that the Lease, even in its redacted form, was "exempt under the confidential commercial information exemption of the MPIA, because the [L]ease (1) is commercial in nature, (2) was submitted to the government voluntarily, and (3) would not ordinarily be subject to public disclosure." *Amster*, 229 Md. App. at 219. They therefore argued that, "although the '*existence* of the [L]ease' [had] been made public, 'at no point [did] the contents of the [L]ease [become] [] public,'" meaning that the Lease "cannot be transformed into a public record simply because a redacted version [had] been provided to the relevant County and not disclosed further." *Id*. As we noted in our opinion, no case in Maryland law had ever "appl[ied] the confidential commercial information exemption in GP § 4-335(2)" to "private records voluntarily provided to the government." *Id*. at 225. Indeed, the Court of Appeals also observed that Amster's case "provide[d] our first opportunity to interpret the MPIA's confidential commercial information exemption in the context of information **provided to** the government." *Amster*, 453 Md. at 77.

The case thus presented the Maryland courts with an issue for which there was no settled or certain answer. Because an action must be "viewed at the time it was taken, [and] not from judicial hindsight," *Garcia v. Foulger Pratt Dev., Inc.*, 155 Md. App. 634, 676-77 (2003), Appellees' position during the initial actions was fairly debatable. After all, as Judge Green noted, they prevailed in the first two actions. In any case, "simply because a party does not prevail at trial does not necessitate a finding that a claim was brought in bad

faith or without substantial justification." *Garcia*, 155 Md. at 684. Accordingly, we hold that the circuit court did not abuse its discretion in denying Amster's motion for sanctions because the circuit court did not err in finding that Appellees did not behave in bad faith in withholding the redacted Lease.

II.

Statutory Costs

Amster contends that it was clearly erroneous and an abuse of discretion to deny him an award of costs pursuant GP § 4-362(f). He acknowledges the three criteria in *Stromberg Metal Works, Inc. v. Univ. of Md.*, 395 Md. 120, 128 (2006), cited by Appellees, that help determine whether an award of expenses, including costs, are appropriate: (1) the benefit to the public derived from the suit; (2) the nature of complainant's interest; and, (3) whether the agency had a reasonable basis in law to withhold information. He argues, however, that these criteria are not exhaustive and that the trial court adopted the arguments of Appellees regarding each limb of the test without considering any evidence proving the Appellees' contentions. Amster claims that there is no requirement to prove a public benefit or any other reason to request a public document because government transparency, in and of itself, is a public benefit. He maintains that refusing costs to those seeking disclosure of public records would act as a deterrent to such persons. Amster also claims that he unequivocally prevailed in his MPIA suit when he won his appeal and received the redacted Lease, entitling him to costs under GP § 4-362(f).

The County responds that Judge Green applied the standard governing the award of costs under GP § 4-362(f) properly. The County explains that Amster is not entitled to

costs because, considering the *Stromberg* criteria, he was not requesting the Lease for the benefit of the public; his self-interest in obtaining the Lease vindicated only his own interest; and the refusal to release the redacted Lease was reasonable because the scope of the exemption for confidential commercial information voluntarily provided to the government had not yet been decided in Maryland.

Calvert Tract elaborates that the County's refusal to release the redacted Lease was reasonable, not only because the issue was novel, but also because the case law interpreting the MPIA and what constitutes commercial information is broadly construed. Further, Calvert Tract adds that, because they are a private entity and not a governmental unit, GP § 4-362 does not apply to them.

We review the circuit court's denial of costs under GP § 4-362(f) for abuse of discretion. *Stromberg*, 395 Md. at 131.

A. MPIA: Calvert Tract

We first address Calvert Tract's assertion that the provisions of the MPIA do not apply to it. GP § 4-103(a) states that all persons are entitled to "have access to information about the affairs of government and the official acts of public officials and employees." If a person is denied access to such information, he or she can seek judicial review of any refusals. GP § 4-362. Sections 4-362(d) and (f) also provide that a complainant may have access to damages or costs in the following circumstances:

> (d) Damages—
> (1) A defendant **governmental unit** is liable to the complainant for statutory damages and actual damages that the court considers appropriate if the court finds that any defendant knowingly and willfully failed to:

> (i) disclose or fully to disclose a public record that the complainant was entitled to inspect under this title; or
> (ii) provide a copy, printout, or photograph of a public record that the complainant requested under § 4-205 of this title.
> (2) An **official custodian** is liable for actual damages that the court considers appropriate if the court finds that, after temporarily denying inspection of a public record, the official custodian failed to petition a court for an order to continue the denial.
> (3) Statutory damages imposed by the court under paragraph (1) of this subsection may not exceed $1,000.
> * * *
> (f) Costs— If the court determines that the complainant has substantially prevailed, the court may assess against a **defendant governmental unit** reasonable counsel fees and other litigation costs that the complainant reasonably incurred.

(Emphasis added). A custodian is defined under GP § 4-101(d)(1)-(2) as "the official custodian" or "any other authorized individual who has physical custody and control of a public record." Section § 4-101(f) defines "official custodian" as "an officer or employee of the State or of a political subdivision who is responsible for keeping a public record, whether or not the officer or employee has physical custody and control of the public record."

Calvert Tract is a private company with no affiliation to the government and therefore cannot be described as either a governmental unit or an official custodian. Additionally, although the redacted Lease is a public record under GP § 4-101(j), because it is documentary material "received by the [government] in connection with the transaction of public business," *Amster,* 229 Md. App. at 223-24, it became a public document only when Calvert Tract voluntarily provided it to the County, and not because of Calvert Tract's status as a "unit or instrumentality of the State or of a political subdivision." GP § 4-101(j); *see also City of Balt. Dev. Corp. v. Carmel Realty Assocs.,*

395 Md. 299, 331-37 (2006) (holding that the MPIA applies to an NGO formed to plan and implement development strategies for the City of Baltimore because it is an instrumentality of the state). The County, therefore, is the custodian of the public record, not Calvert Tract. We agree with Calvert Tract that neither damages nor costs can be assessed against it under GP § 4-362 (d) and (f).

B. Statutory Costs: The County

In assessing whether the circuit court abused its discretion in denying Amster's requests for costs under GP § 4-362(f),[9] we start by determining whether Amster "substantially prevailed." GP § 4-362(f). When "determining whether the threshold of substantial prevailance has been met," an "actual judgment in claimant's favor is not required." *Kline v. Fuller*, 64 Md. App. 375, 385 (1985). It must, however, be "demonstrated that prosecution of the lawsuit could reasonably be regarded as having been necessary in order to gain release of the information and that there was a causal nexus between the prosecution of the suit and the agency's surrender of the requested information." *Id*. Once the court "determines that the complainant has substantially prevailed, that litigant becomes "eligible" but not "entitled" to an award of reasonable attorney fees and costs." *Id*.

In the present case, Appellees released the redacted Lease to Amster after he prevailed in his appeal to the Court of Appeals and the case was remanded to the circuit

[9] Amster admits that he has already received the costs due to him from his success in the Court of Appeals but appears to be requesting his costs from his prior actions in the circuit court and the Court of Special Appeals.

court. We can conclude, then, that the lawsuit was reasonably necessary in order for Amster to gain release of the redacted Lease. This means that Amster is eligible for, though not entitled to, an award of costs pursuant to GP § 4-362(f). *Id.*

Once it is determined that a complainant has substantially prevailed, a court *may* award costs and attorney fees under GP § 4-362(f).[10] In *Kline*, we articulated criteria to guide the court in its exercise of discretion when considering awarding costs under GP § 4-362(f). 64 Md. App. at 386. We stated that, among other considerations, a court should consider: "(1) the benefit to the public, if any, derived from the suit; (2) the nature of the complainant's interest in the released information; and (3) whether the agency's withholding of the information had a reasonable basis in law." 64 Md. App. at 386.

The Court of Appeals applied these criteria in *Stromberg*, 395 Md. at 123. In *Stromberg*, a sub-contractor involved in the renovation of the Student Union at the University of Maryland made three MPIA requests seeking various documents relating to the project, which was significantly behind, over budget, and the subject of a lawsuit between the University and the general contractor. *Id.* The University complied with the initial MPIA requests but sent heavily redacted reports when plaintiff requested additional documents. *Id.* Plaintiff filed an MPIA suit to "enjoin the university from denying access to that information." *Id.*

[10] Amster does not seem to be contesting Judge Green's February 28 denial of attorney's fees. In any case, attorney's fees for a *pro se* litigant bringing an action on his or her own behalf are generally not recoverable. *See Frison v. Mathis*, 188 Md. App. 97, 106-07 (2009).

Plaintiff eventually prevailed in getting access to one of its requested items and then promptly filed a "motion for an award of over $62,000 in counsel fees and costs incurred in pursuing the action to enjoin the university from denying access to the redacted information." *Id*. at 124-25. Plaintiff argued that it had "prevailed in its quest for the information, that the public benefitted from the release of the information which… 'addressed the general public's interest and concern over the fiscal management on a public construction project that was spiraling out of control,' and that the University's redactions 'were not reasonably based on the law.'" *Id.* at 125-26. The University did not quibble with plaintiff's success in its action but averred that there was no public benefit to the suit; that the "the action to obtain the redacted information was solely for Stromberg's pecuniary benefit, in that it was then a participant in a multi-million dollar claim against the University;" and that, "although [the] Court required that the redacted information be supplied, the University had a reasonable basis in law for initially withholding it." *Id*. at 126.

The Court of Appeals held that, to show public benefit, plaintiff could not rely on the fact that "there is *always some* public benefit from judicial enforcement of the [M]PIA, from requiring government agencies to comply with the law." *Id*. at 131. Instead, the focus of the "public benefit" criterion is "on the nature of the information requested and, to some extent . . . what use the requester intends to and does make of it." *Id*. at 132. In that case, the Court said that, although there was "public interest in the delays and cost overruns with respect to the Student Union renovation project," there was no evidence that plaintiff or anyone else ever disseminated or intended to disseminate the information obtained from

the MPIA request. *Id*. Second, the Court held that the nature of plaintiff's interest in the information was for its "own pecuniary benefit, to assure itself that there would be sufficient funds to complete the project and pay its invoices for the work it performed," and not for public dissemination. *Id*. at 133. Finally, the Court held that, although they were eventually required to produce the requested information, the University had a reasonable basis in law for withholding the information. *Id*. at 134. The Court reasoned that, to determine whether the requested information had to be released, it was necessary "to borrow heavily from Federal cases interpreting FOIA to resolve the more precise question of whether the redacted information on the AEC Reports was properly shielded" under the MPIA. *Id*. Because there were "no clear precedential rulings from this Court" specifically addressing the key issue in the case, there was good reason that the University might consider the information "lawfully subject to shield." *Id*.

Amster is correct in asserting that there is no requirement to show public benefit in order to obtain a public document from a governmental body. To assess costs against a defendant governmental unit, however, a court will consider the three factors set out in *Kline*, 64 Md. App. at 386. Although these considerations are not exhaustive, Amster has not offered alternative considerations. As a result, we have only the record on which to base our decision. Amster argues that "transparency of government alone is a public benefit, especially when the government willfully and wrongfully withholds the information." But the Court in *Stromberg* specifically rejected this contention and required that actual public interest and investment in the information be shown. *See* 395 Md. at 131. We have no indication of any public interest, in the form of newspaper articles, other media,

or otherwise, in the Lease. We also have no indication that Amster intended to disseminate the information obtained from his MPIA request.

Further, with regard to the nature of Amster's interest in the redacted Lease, we have no information that an award of expenses would ameliorate the cost of a suit pursued in the public interest rather than in Amster's own economic interest. *Stromberg*, 395 Md. at 133. As the Court in *Stromberg* observed, "fee-shifting will seldom be warranted 'when the suit is to advance the private commercial interests of the complainant,' because the self-interest of the complainant in that setting will suffice 'to insure the vindication of the rights given in the FOIA.'" *Id*. While it is not clear that the underlying suit was based on Amster's private commercial interest, there is no evidence that it was civic-minded.

Finally, as we have discussed, like the issue in *Stromberg*, this case presented a novel issue on which there was no clear Maryland precedent. *Amster*, 229 Md. App. at 225. No prior Maryland case interpreted the confidential commercial information exemption under GP § 4-335(2) in the context of private records voluntarily provided to the government. *Id*. Accordingly, we conclude that, although Appellees did not succeed in withholding the Lease, their initial reluctance to release it was not unreasonable. We hold that the circuit court did not abuse its discretion in denying Amster costs pursuant to GP § 4-362(f).

C. Statutory Damages

Amster's arguments contained on pages 11-13 of his brief reference only costs, although he assigns error to the court's denial of his motion filed below, in which he also contended that it was clearly erroneous and an abuse of discretion to deny him an award of

damages pursuant to GP § 4-362(d). He argued (below) that he was entitled to statutory damages of $1,000 based on Appellees' "knowing and wilful failure" to disclose the redacted Lease, a public document, knowing that there was no highly sensitive financial or proprietary information in the redacted Lease. The County argues in its brief on appeal that the circuit court's denial of damages was proper because the motion for statutory damages was not made until after the court had rendered its February 28memorandum opinion and closed the case statistically. Alternatively**,** the County states that the circuit court correctly determined that withholding the Lease did not meet the "knowing and wilful" standard required for an award of damages, because the case presented a novel issue. Calvert Tract purports in its brief that, after filing his initial complaint in 2013, Amster voluntary non-suited all portions of his complaint except for his request that the Lease be made public, and never amended his complaint to include a demand for statutory damages. They claim, therefore, that the circuit court did not abuse its discretion in denying Amster's request for damages under GP § 4-362(d).

Although it is not clear that Amster has articulated a damages argument on appeal, we will nevertheless consider his argument only as it relates the County's liability for damages under GP § 4-362(d), having established that the MPIA provision does not apply to Calvert Tract. The circuit court denied Amster's request for statutory damages because Amster did not request them in time. As in the case of an award of costs, *Kline*, 64 Md. App. at 386, an award of damages under the MPIA is discretionary. A governmental unit will be liable for statutory and actual damages "that the court considers appropriate." GP § 4-362(d)(1).

Amster requested "an award of damages and sanctions pursuant to the MPIA" in his Amended Motion for Appropriate Relief, filed October 24, 2017. In his motion, he asked for "losses incurred by the Defendant [County] and Intervenor's [Calvert Tract] bad faith." As noted by the circuit court, and required by Maryland Rule 2-311(d), the motion did not include an affidavit or any other proof detailing his expenditures and losses.[11] Although Amster eventually included an affidavit in his response to Calvert Tract's motion for protective order, claiming expenses of approximately $2,825.77, he never requested any amount of statutory damages. As Judge Green noted, Amster was "less than specific in his request" and did not comply with procedural rules when requesting damages.

It was not until after Judge Green statistically closed the case that Amster filed a separate motion for statutory damages on March 9, 2018, alongside his motion to reconsider, alter, and amend. The March 9 motion specifically requested expenses in the amount of $3,535.68 and "statutory damages of $1,000 from the Defendant and Intervenor individually and severally."

Maryland Rule 2-534 states that

> [i]n an action decided by the court, on motion of any party filed within ten days after entry of judgment, the court may open the judgment to receive additional evidence, may amend its findings or its statement of reasons for the decision, may set forth additional findings or reasons, may enter new findings or new reasons, may amend the judgment, or may enter a new judgment.

[11] Maryland Rule 2-311(d) requires that any motion "based on facts not contained in the record shall be supported by affidavit and accompanied by any papers on which it is based."

Under this rule, the court clearly has discretion to consider new evidence or arguments should the court wish to do so. However, "[w]hen a party requests that a court reconsider a ruling solely because of new arguments that the party could have raised before the court ruled, the court has almost limitless discretion not to consider those arguments." *Schlotzhauer v. Morton*, 224 Md. App. 72, 85 (2015). The County produced the redacted copy of the Lease to Amster by October 24, 2017. Amster therefore had ample opportunity to amend his motion for relief to request statutory damages under the MPIA specifically and properly prior to March 9, 2018. Accordingly, we hold that the circuit court did not abuse its discretion in refusing to consider Amster's motion for statutory damages.

III.

Discovery

Amster argues that the circuit court abused its discretion when it denied him all discovery regarding damages and sanctions in his MPIA suit. He explains that to impose sanctions under Rule 1-341, the trial judge must find that the proceeding was maintained or defended in bad faith or without substantial justification. The trial judge then must find that the bad faith or absence of justification merits an assessment of costs and/or fees. Amster seems to argue that, for a judge to make such findings, she needs access to facts and therefore must allow discovery.

Amster refutes Judge Green's rationale for denying Amster's discovery requests. First, Amster explains that he did not raise the issue of discovery or statutory damages prior to the present matter because no issues of damages, bad faith, or discovery were contemplated in the original trial. This, Amster elaborates, is because relief pursuant to

Rule 1-341 and GP § 4-362 was contemplated only after he discovered that the copy of the Lease in the County's possession was redacted heavily and devoid of confidential commercial information.

Second, Amster implies that, although discovery is generally not allowed in an MPIA suit, he rejects the notion that the MPIA and the primary precedent on which the County relies, *Hammen v. Balt. Cty. Police Dept*., 373 Md. 440 (2003), bar all discovery. According to Amseter, the Court in *Hammen* did not decide that discovery of facts regarding a claim of bad faith and/or lack of substantial justification is prohibited.

Finally, Amster states that Appellees' defense was in bad faith because it was not under "color of law." He contends that, although the definition of confidential commercial information in relation to documents voluntarily provided to the government had not yet been decided in Maryland, the MPIA has always applied only to content and not documents. Amster argues that he never asked for any confidential commercial information; he simply wanted access to the Lease, which Appellees knew contained no confidential information.

The County maintains that no provisions of the MPIA allow Amster to propound discovery requests upon a custodian**.** Calvert Tract adds that the circuit court did not abuse its discretion when it issued two protective orders in response to Amster's two sets of interrogatories, because interrogatories and requests for admission were outside the scope of the mandate on remand, which was for the circuit court to direct Appellees to "provide a Vaughn index, review the lease in camera or conduct other proceedings consistent with this opinion." *Amster*, 453 Md. at 88. Once Amster received the redacted Lease, they

argue, he received all the relief that he requested in his MPIA complaint. Calvert Tract also reiterates that Maryland precedent is clear that judicial review of an agency decision denying a request under MPIA does not include discovery. Finally, the County argues that Amster's claim that bad faith justified discovery is unfounded, because the circuit court found that there was no bad faith. Calvert Tract adds that there was no bad faith because Amster was aware that the Lease was redacted, and they made no representations to the contrary.

We review discovery matters under an abuse of discretion standard. *Erlich v. Grove*, 396 Md. 550, 560 (2007). Although Maryland's discovery rules are "to be liberally construed" and trial judges are "vested with a reasonable, sound discretion in applying them," there are limits to this proposition. *Id*. (citation omitted). Generally, though, "absent a showing that a court acted in a harsh, unjust, capricious and arbitrary way, we will not find an abuse of discretion." *Id*. (citation omitted).

A finding of bad faith and a subsequent award of sanctions is "within the discretion of the court." *Christian v. Maternal-Fetal Med. Assocs. of Md., LLC*, 459 Md. 1, 30 (2018). Similarly, the award of a protective order under Md. Rule 2-403 is at the court's discretion. *See Tanis v. Crocker* 110 Md. App. 559, 573 (1996). Because we affirm the circuit court's predicate determination that there was no bad faith in Appellees' refusal to disclose the redacted Lease, there is no need examine Amster's entitlement to discovery on the issue of sanctions any further. We therefore hold that the circuit court did not abuse its discretion in denying discovery and awarding protective orders to Calvert Tract.

Similarly, because we have affirmed the decision of the circuit court to refuse to consider damages, there is no need to determine whether Amster is entitled to discovery in order to prove his entitlement to damages.

Accordingly, we affirm the judgment of the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS ASSESSED TO APPELLANT.