In The
Court of Special Appeals of Maryland

September Term, 2015

No. 01204

ACTION COMMITTEE FOR TRANSIT, *et al.*,

Appellant,

v.

TOWN OF CHEVY CHASE, MARYLAND,

Appellee.

APPEAL FROM THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND
(Honorable Cheryl A. McCally)

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Action Committee for Transit ("ACT") and Benjamin Ross ("Ross"), appeal from the Circuit Court's grant of summary judgment in favor of the Town of Chevy Chase, Maryland ("Town"), with respect to ACT/Ross's request for a fee waiver under the Maryland Public Information Act ("MPIA").

On January 30, 2015, ACT/Ross filed a Complaint for judicial review in the Circuit Court for Montgomery County, asserting one Count of Violation of the MPIA by the Town. Attached to the Complaint were seventeen (17) Exhibits (labeled A-Q). E. 23-70.

Prior to answering, the Town moved to dismiss or, in the alternative, for summary judgment as a matter of law.[1] Attached to the Town's Motion were seven (7) additional Exhibits (1-7). E. 114-136. ACT/Ross opposed the Town's Motion and filed a Cross-motion for summary judgment. The Town filed an Opposition/Reply Memorandum.[2]

On June 30, 2015, the Circuit Court (McCally, J.) held a hearing. E. 137. Following argument, the Court issued its oral ruling from the bench granting the Town's motion for summary judgment as to all claims in the Complaint. E. 137. ACT/Ross quote from Judge McCally's comments, but only in part. Brief, at 8. While Judge McCally made a statement about "past negative comments," ACT/Ross offer her comment out of context and attempt

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[1] The Judicial Review statute in the MPIA (§4-362) does not contain any provision for "discovery," nor was any discovery required or appropriate in this case.

[2] Despite the Rule against doing so (8-501(c)) and the Town's objection, a copy of the Town's Memorandum of Law is included in the Record Extract. The Town's Reply Memorandum, however, is not included.

to contort the Town's arguments in that regard, as explained below.

An Order was entered on July 8, 2015. E. 163. ACT/Ross filed a timely Notice of Appeal. E. 164.

ACT/Ross's "Statement of the Case" improperly contains argument. For instance, ACT/Ross argues that this case involves a "discriminatory denial of fee waivers." Brief, at 1. That is demonstrably untrue. The denial of the fee waiver request for the estimated total of $879.00 was not discriminatory. As will be explained below, the denial was based upon the facts and circumstances, and the Town properly applied the statutory criteria in exercising its broad discretion to deny the fee waiver request.

ACT/Ross's Statement of the Case also accuses the Town of "repeatedly rebuff[ing] their requests by refusing to turn over the public documents or even begin to search for them unless Act and Mr. Ross agreed to pay initial fees of nearly $1,000." Brief, at 1. ACT/Ross also assert that the Town never provided an estimate of the cost of producing the records requested, "making the initial fees a down payment on an unknown sum with unpredictable results." Brief, at 1. However, these accusations are also untrue or contrary to the statute's requirements. First, the Town provided hundreds of pages of documents to ACT/Ross and/or the Town arranged for members of ACT to visit the Town's offices and personally review the requested documents. ACT/Ross acknowledge this in the Complaint. See, e.g., E. 13 and 16. Second, the Town was entitled under the statute to charge a reasonable fee for researching and reviewing the requested documents. Finally, the estimated fee is just that,

an estimate. It was based upon the expected number of hours to perform the work and the hourly rate charged for that work. It is permitted under the MPIA, and is the routine practice, for a custodian of public records to require pre-payment of the estimated fee prior to beginning the search. Thus, the Town's actions in estimating the fee and requiring the fee to be paid before the research was conducted is not the least bit indicative of "discrimination" against ACT/Ross.

The Town's actions cannot reasonably be described as "discriminatory" or unlawful. Rather, as explained fully below, the Town considered the ability of ACT/Ross to pay and all "other relevant factors," including the arguments set forth by ACT/Ross in their letters, but decided that waiver of the fee was not in the "public interest." ACT/Ross's assertion that the "Town did not deny that dissemination of the documents would be in the public interest..." is untrue. Brief, at 2. The Town's letters specifically stated that it had considered all of the statutory factors, which obviously includes whether the waiver would be in the "public interest," and the Town decided not to waive the fee under the circumstances (explained below).

ACT and Mr. Ross repeatedly state that the Town denied them "access" to public records and, indeed, that such "access" is what is at issue in this appeal. However, the Town did not deny ACT/Ross "access" to public documents. The Town gave ACT/Ross access to many documents. The Town merely denied their request for a fee waiver, a decision that was not "arbitrary or capricious" and which should be affirmed by this Court.

QUESTION PRESENTED

Whether the Town's exercise of its broad discretion in deciding to deny ACT/Ross's request for a fee waiver under the MPIA was arbitrary and capricious or otherwise illegal?

STATEMENT OF FACTS

A. Allegations of the Complaint.

ACT and Ross purported to bring the instant case in order to "challenge [] the actions of a public governing body that has denied its constituents and members of the media access to important public information concerning a public infrastructure project in an effort to keep the public in the dark regarding the expenditure of public resources and the establishment of public policy." E. 10 (¶1). The project is the Purple Line, a proposed 16-mile East-West light rail that would connect New Carrollton to Bethesda. E. 10 (¶2). ACT supports construction of the project. E. 10 (¶3). ACT alleged that the "Town Council has sided with opponents" of the proposed Purple Line project, and that it sought documents regarding the Town Council's hiring and/or consultation with law firms and consultants hired by the Council. E. 10-11 (¶¶5-6). ACT and Ross complained that the "Town has [] prohibited ACT from accessing public records unless it pays unjustified and excessive fees." E. 11 (¶6). The Complaint further alleged that the "Town has prohibited journalist Benjamin Ross from accessing public records related to the Purple Line by refusing to disclose this information unless he pays unjustified and excessive fees." E. 11 (¶7).

The Complaint asserted that on February 4, 2014, ACT Vice President Ronit Dancis

filed an MPIA request for "the Town's agreements, contracts, invoices, bills, correspondence, and meeting minutes related to Buchanan Ingersoll & Rooney." E. 13 (¶16, Ex. A). On March 6, 2014, the Town "made the retention agreement, invoices, bills and non-privileged communications available for inspection." E. 13 (¶16, Ex. B). However, the Town "denied the request for meeting minutes, in part, because the meeting between the Town Council and Buchanan Ingersoll & Rooney was held in a closed-executive session" and, thus, the documents were privileged under State law. E. 13 (¶16). The Town "allowed for inspection of an executive session summary that was included in the minutes" of the Town Council's open meeting. E. 13 (¶16). The Town did not charge ACT for responding to this request, per Maryland Code, General Provisions Article, §4-206(c), as the Town provided the two (2) hours of free research necessary to prepare the response. E. 13 (¶16). Documents were copied and produced to ACT in response to the request.

On April 1, 2014, "Miriam Schoenbaum on behalf of ACT" made another MPIA request, this time seeking "the Town's agreements, contracts, invoices, bills, correspondence, and meeting minutes related to Buchanan Ingersoll & Rooney, Chambers, Conlon & Hartwell, LLC and Alexander & Cleaver." E. 13-14 (¶18, Ex. D). ACT alleged that "the purpose of this request was to obtain information relevant to the new agreements and contracts entered into by the Town of Chevy Chase after the previously-submitted PIA request." E. 13-14 (¶18, Ex. D).

Also on April 1, 2014, Ms. Schoenbaum on behalf of ACT filed a PIA request for

"records regarding the Town's compliance with the training requirements in the Open Meetings Act." E. 13-14 (¶18). This document was not attached to the Complaint.

On April 6, 2014, "Ms. Dancis on behalf of ACT" submitted another PIA request to the Town requesting "records about the public relations firm Xenophon Strategies, who upon information and belief was retained by the Town to work on issues regarding the Purple Line." E. 14 (¶18, Ex. E). Thus, all of the various requests by ACT/Ms. Schoenbaum/Ms. Dancit under the MPIA were for documents relating to the proposed Purple Line project. Each time, the requester asked for an estimate of the costs related to responding to the PIA requests.

On April 17, 2014, the Town responded to ACT's two PIA requests. E. 14 (¶19, Exs. F and G). The Town's first April 17, 2014 letter addressed Ms. Schoenbaum's April 1, 2014 request on behalf of ACT for records "related to Outside Consultants." E. 35 (Ex. F). In this letter, the Town listed its fees for responding to the PIA request and noted that the Town would charge $0.50 for photocopies. Id. The letter stated that:

> It is anticipated that research within our office will be at least five (5) hours, which does not include the fee for review by the Town's attorney. Accordingly, we would request that a deposit of $700 be provided to the Town before research begins. Please note that your request will not be processed before the applicable deposit has been delivered. **Based on the previous request made by your organization relating to this same general topic, we will not provide the first two (2) hours of research free of charge.**

Id. (emphasis added). Since this was a repeat request, the fee for the first two (2) hours of research was not waived.

Also on April 17, 2014, the Town responded to Ms. Dancit's/ACT's April 6, 2014 request for documents regarding Xenophon Strategies. E. 14 (¶19, Ex. G). The letter listed the fees associated with responding to ACT's request and stated that the Town would charge $0.50 cents per page for photocopying. The letter further stated that:

> It is anticipated that research within our office will be at least five (5) hours, which does not include the fee for review by the Town's attorney. **The first two (2) hours of research will be done free of charge.** Accordingly, we would request that a deposit of $250.00 be provided to the Town before research begins. Please note that your request will not be processed before the applicable deposit has been delivered.

E. 36 (Ex. G)(emphasis added). Because this was ACT's first PIA request for documents regarding Xenophon Strategies, the first two (2) hours of research were performed for free.

On April 18, 2014, ACT sent the Town Manager two separate emails requesting fee waivers for its April 1 (Outside Contractors) and April 6, 2014 (Xenophon) MPIA requests, for which the Town had requested $700 and $250 deposits. E. 15 (¶21). ACT alleged that the fee waivers were warranted because ACT was seeking the information for public, not commercial purposes, and because the requested information would contribute to the public understanding of government operations regarding the proposed Purple Line project. E. 15 (¶21, Ex. H and I). ACT complained that as a non-profit it had a limited budget. E. 15 (¶21).

On April 23, 2014, the Town denied ACT's requests for fee waivers. E. 15 (¶22, Ex. J). Instead of paying the fee deposits so that the Town could begin the research necessary to produce the requested documents, ACT instead chose to send the Town further repeated requests for the same documents and to fortify its fee waiver request arguments in those

requests.

On May 21, 2014, Ms. Schoenbaum again requested, on behalf of ACT and herself as an individual, agreements, invoices, bills, correspondence and the minutes of all meetings between the Town and Buchanan Ingersoll & Rooney, Chambers Conlon & Harwell, Alexander & Cleaver, and Xenophon Strategies. E. 15 (¶23, Ex. K). The letter again requested the waiver of all fees associated with the production of these comprehensive documents, on her behalf and on ACT's behalf. E. 15 (¶¶23-24). In support of the fee waiver request, Ms. Schoenbaum stated in her letter that the "purpose of our request is to contribute significantly to the public's understanding of the transaction of public business...related to a major public infrastructure project...by a government body...and public officials..., by making public the requested documents." E. 15 (¶24, Ex. K). Ms. Schoenbaum's letter also stated that she should have a fee waiver because she was a "representative of the news media." E. 43 (Ex. K, p. 3). The letter set forth a legal argument regarding the "six factors" in the Department of Justice's guidance for waiver of fees under the FOIA. Id. (Ex. K, pp. 6-7).

On June 20, 2014, the Town denied Ms. Schoenbaum's May 21, 2014 PIA request for a fee waiver. E. 16 (¶28, Ex. L). The Town's letter indicated that some of the records requested were available for inspection. The letter listed them as responsive to ACT's request numbers 1, 2 and 4. E. 51 (Ex. L). The Town's letter also stated that the Minutes dated May 14, April 9, March 12, February 20 and February 12 were available for inspection; that the

Contract with Buchanan Ingersoll & Rooney dated March 14, 2014 was available for inspection; and that the invoices of Buchanan Ingersoll & Rooney were available for inspection. However, the letter stated also that "your request for correspondence is extensive and will have to be researched by Town staff." Id. Thus, the Town requested a deposit of $1,345.00 to cover the estimated five (5) hours of research by Town employees and another three (3) hours of review by the Town Attorney at the rates charged by or for each. The letter also indicated that the Town would not provide another two (2) hours of free research inasmuch as ACT had already made previous requests for these documents. Ms. Schoenbaum visited the Town's offices to inspect and copy the documents. E. 16 (¶28).

Not included in or attached to the Complaint is an email from Ms. Schoenbaum to Todd Hoffman dated June 23, 2014 (E. 114), which stated that "On behalf of ACT, I withdraw these three MPIA requests - - specifically, ACT's two MPIA requests dated April 1, 2014, and ACT's MPIA request dated April 7, 2014." E. 114 (emphasis added). Because these requests were withdrawn, they were not a subject of the Petition for Judicial Review in the Circuit Court and are not now at issue (although they provide relevant background).

On October 15, 2014, the Town's Attorney received a letter from the law firm of Baker Hostetler, which stated that the firm was now representing ACT. E. 53. The letter sought public records under the MPIA relating to contracts, agreements, and communications between the Town and the "four firms that the Town retained to provide services in relation the [sic] Purple Line public transit project." E. 17 (¶31); E. 53 (Ex. M). The letter also sought

the minutes of closed sessions held by the Town Council. E. 53 (Ex. M). The letter also sought a fee waiver, stating that ACT was "entitled" to the waiver of all fees associated with the request because the "information requested will serve the public interest and contribute significantly to the public's understanding of the business, activities, and public-money expenditures of a government body related to a major public infrastructure project." E. 56-57. The letter claimed that "ACT is not seeking this information for any commercial purpose." Id. The letter set forth legal arguments as to why ACT believed that it was entitled to a waiver of all fees. Id.

On October 27, 2014, the Town's attorney responded to the October 15, 2014 letter from ACT. E. 58A-59 (Ex. N). The letter noted that the PIA authorized the Town to charge a reasonable fee for making copies and a reasonable fee for researching its records. Id. The Town's response stated further that "you outline your arguments in support of a waiver of all fees associated with the request. Please be advised the request for a waiver has been considered and is denied." Id. The letter went on to explain the Town's charges for researching its records, and listed the five (5) categories of documents requested by ACT: (1) agreements and contracts; (2) invoices and bills; (3) correspondence; (4) minutes; and (5) waiver of costs for responding to requests. Id. The letter explained that "[a]s for the remaining items in the extensive request, the Town Manager will have to conduct research to see if any records are responsive to the request." Id. "Further, the undersigned will review any and all records potentially responsive to the request for possible confidential, privileged

or exempted information." Id. The letter further stated that "[i]t is anticipated that the research conducted by the Town Manager will be at least three (3) hours, which does not include my fee for review." Id. "It is anticipated my review will be at least three (3) hours. Accordingly, we would request that a deposit of $879.00 be provided to the Town before research begins." Id. The letter further stated that "your request will not be processed before the deposit disclosed herein has been delivered." Id.

ACT next attempted to obviate the Town's denial of its fee waiver request by having one of its members, Benjamin Ross, submit an MPIA request on November 10, 2014. The request was for the same documents and again sought a fee waiver. Specifically, on the morning of November 10, 2014, Benjamin Ross (of ACT) hand delivered to the Town an MPIA request that was identical to the previous one submitted by ACT, but which sought a fee waiver based upon Mr. Ross's status as a member of the "media" due to his "blog." E. 18 (¶34); E. 60 (Ex. O). However, the letter attached to the Complaint as Exhibit O was **not** the November 10, 2014 letter submitted by Mr. Ross. Instead, it was a letter dated December 17, 2014. This appeared to be an error. The Town therefore attached a copy of Mr. Ross's actual November 10, 2014 letter to its Motion as Exhibit 3 (first page of the letter only). E. 118. The letter, in the "re:" subject line, stated: "Maryland Public Information Act Request **on behalf of Action Committee for Transit.**" E. 118 (emphasis added). In his letter, Mr. Ross claimed that he was "a member of the media." Id. He stated that he was a blogger for "Dissent Magazine," and that "the purpose of this blog is to provide information about

elected officials, development, traffic, and other matters impacting Montgomery County, Maryland." E. 118. Mr. Ross sought a fee waiver for ACT on the basis that he was a member of the media. E. 118.

Left out of the Complaint entirely is the fact that, later in the morning on November 10, 2014, Mr. Ross returned to the Town's office and withdrew his first letter.[3] Mr. Ross withdrew the first letter and submitted a new letter, which stated "I am withdrawing the request letter I submitted earlier this morning." E. 119. Mr. Ross's new, second letter was also dated November 10, 2014, except that this time the "re:" line was altered to read "Maryland Public Information Act Request," no longer stating that it was submitted on behalf of ACT. E. 119. The other change in the substance of the letter was that Mr. Ross slightly altered the "purpose" of his blog in "Dissent" magazine. He now stated that the "purpose of this blog is to provide information about elected officials, development, traffic, and other matters impacting the Greater Washington area, including Montgomery County, Maryland." E. 118. The letter asserted that a fee waiver was "warranted" because it would be in the "public interest" to grant one. E. 122. Mr. Ross argued that "my status as a member of the media supports a fee waiver." E. 123.

On or about November 21, 2014, the Town sent a response letter to Mr. Ross's second letter of November 10, 2014. E. 66. The Town's letter stated that:

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[3] ACT/Ross's Complaint ignores and failed to attach a copy of either of Mr. Ross's letters of November 10, 2014.

> We do not believe this request is being made in your capacity as a member of the media. This belief is based on the first request you submitted and then immediately withdrew on November 10, 2014, which clearly indicated it was being submitted on behalf [of ACT], along with your known affiliation with ACT.

E. 66.

Thus, it was not necessarily that the Town did not believe Mr. Ross might be a member of the media. Rather, it was that the Town believed, based on his submitting then withdrawing his request and replacing it with another one, that he was not being forthright. The Town believed that Mr. Ross represented ACT and was merely duplicating ACT's October 15, 2014 letter (Ex. M) request for the exact same documents, for which the Town had already denied a fee waiver, and that he was not actually seeking a fee waiver as a member of the news media.[4] Disbelieving an individual based on the facts is not viewpoint discrimination. The Town's letter then explained, again, that the requested closed session minutes could not be produced per statute, and that the fees associated with research and legal review of the requested records would require a deposit of $879.00. E. 19 (¶36); E. 67 (Ex. P).

B. ACT/Ross's Legal Claims.

The Complaint asserted one Count of violation of the MPIA by the Town.

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[4] With regard to Mr. Ross's "known affiliation" with ACT, the Town submitted with its Motion a print out from ACT's website showing that Mr. Ross is an ex-officio Board Member of ACT. E. 126. Miriam Schoenbaum was also an ex-officio Board Member. Id. Mr. Ross did not contest his affiliation with ACT.

Specifically, the Complaint alleged three particular statutory violations by the Town:

(1) The Town violated the Public Information Act by denying requests for the minutes of a closed session;

(2) The Town violated the Public Information Act by denying request for a waiver of a fee ($879.00) associated with the October 15, 2014 letter from ACT and the November 10, 2014 (second) letter from Mr. Ross; and

(3) The Town violated the Public Information Act by denying two hours of free research.

Only number (2) above is at issue in this appeal. Much of ACT/Ross's brief takes issue with the right of "access" to public records. However, this appeal is not about such "access." It is undisputed that the Town provided ample access to public records to ACT, whose members personally inspected and copied requested documents. Rather, this appeal is solely regarding ACT/Ross's request that the $879.00 estimated fee be waived for the necessary research and review of the documents requested in ACT's October 15, 2014 letter and Mr. Ross's second November 10, 2014 letter.

STANDARD OF JUDICIAL REVIEW

ACT/Ross's standard of review is incorrect. The "judicial review" provision of the MPIA is found in the Maryland Code, General Provisions Article, §4-362, "Judicial Review." When this Court reviews administrative decisions, it "bypass[es] the judgment of the circuit court and look[s] directly at the administrative decision." Salisbury Univ. v. Joseph M. Zimmer, Inc., 199 Md. App. 163, 166, 20 A.3d 838 (2011)(citing White v. Workers' Comp. Comm'n, 161 Md. App. 483, 487, 870 A.2d 1241 (2005)).

Given the broad discretion afforded an agency, the proper standard for judicial review of an agency denial of a waiver of fees for document search and duplication, which is the only legal issue here, is whether the decision was arbitrary and capricious or not otherwise in accordance with law. Eudey v. Cent. Intelligence Agency, 478 F. Supp. 1175, 1176 (D.D.C. 1979). See also Mayor & City Council of Balt. v. Burke, 67 Md. App. 147, 157, 506 A.2d 683, 688, cert. denied, 306 Md. 118, 507 A.2d 631 (1986). The Circuit Court's reasoning and holding is therefore not germane in this appeal. Nevertheless, it was correct.

ARGUMENT

I. ACT'S OCTOBER 15, 2014 LETTER AND ROSS'S SECOND LETTER DATED NOVEMBER 10, 2014 ARE THE ONLY FEE WAIVER REQUESTS AT ISSUE IN THIS APPEAL.

ACT/Ross withdrew all of its previous MPIA requests to the Town by an email dated June 23, 2014, from Miriam Schoenbaum on behalf of ACT to the Town. E. 114. Thus, requests prior to that date are not at issue. The right to judicial review with respect to those prior requests was abandoned and waived. Nevertheless, the prior requests provide some relevant context with respect to the Town's decision to deny the fee waiver request of $879.00 at issue here.[5]

[5] ACT/Ross appear to have abandoned for purposes of appeal their assertion that they were entitled to the privileged closed session minutes of the Town Council.

II. THE TOWN STATED ITS REASONS FOR DENYING THE FEE WAIVER REQUESTS IN ITS LETTERS DATED OCTOBER 27, 2014 AND NOVEMBER 21, 2014.

ACT/Ross argue that the Town made a "blanket rejection." Brief, at 15. However, this is not the case. The Town considered and denied ACT/Ross's letter request(s) for a fee waiver, including the "other relevant factors" explicated in ACT/Ross's letters.

Act requested a fee waiver in its letter dated October 15, 2014. E. 53. This was a very long letter that made verbose arguments regarding waiver of the fee. The Town denied ACT's fee waiver request by letter dated October 27, 2014. E. 58A. That letter stated the Town's reasons for denying ACT's fee waiver request, as follows:

> In your request, you outline your arguments in support of a waiver of all fees associated with the request. Please be advised that the request for waiver has been considered and is denied.

E. 58A. By referencing the relevant factors and arguments set forth at length in ACT's letter, the Town's letter rendered it clear that those other factors were considered, but that the request was denied. The Town obviously made a determination that ACT had the ability to pay and that, upon consideration of other relevant factors, a waiver would not be in the public interest.

With respect to Mr. Ross's request for a fee waiver, which consisted of the two letters dated November 10, 2014 that parroted ACT's request, the Town's response letter dated November 21, 2014 stated:

> Please be advised **the request for a waiver has been considered** and is **denied**. We do not believe this request is being made in your capacity as a

> member of the media. This belief is based on the first request you submitted and then immediately withdrew on November 10, 2014, which clearly indicated it was being submitted on behalf of the Action Committee for Transit (ACT), along with your known affiliation with ACT.

E. 66 (emphasis added).

The Town believed that Mr. Ross was acting in his capacity as a member of the media but, rather, that he was acting on behalf of ACT.

Thus, the Town reviewed ACT's and Ross's arguments and all of the "relevant factors" stated by them in their letters seeking a fee waiver, and stated that it had considered those factors, and nevertheless decided that the request was denied. E. 58A, 66. The Town obviously determined that a fee waiver was not in the "public interest" nor was it warranted by ACT's/Ross's inability to pay the fee. ACT/Ross have no basis to assert that the Town did not do so in "good faith" (and there is no such requirement or language in the MPIA in any event). Brief, at 15.

ACT/Ross argue that the Town denied them "access" to public records by denying their request for a fee waiver. Brief, at 15. However, "access" was not denied by the Town. Rather, the Town simply refused to grant a waiver of the estimated fee.

ACT/Ross attempt to assimilate themselves with the newspaper reporter in Burke. In a similar vein, they cite case law involving the First Amendment. However, refusal to waive a fee for obtaining records requested under the MPIA, particularly in these circumstances, does not implicate the First Amendment. The Town did not believe that Mr. Ross was acting in his capacity as a member of the news media based on the facts. The statute requires

consideration of the ability to pay and "other relevant factors," and the record reveals that the Town did so. While some requesters, like the reporter in Burke, possess a First Amendment interest that may militate towards a grant of a fee waiver, those circumstances were not present here. ACT/Ross showed no inability to pay. They simply stated that ACT was a non-profit, but the Town is also a non-profit.

ACT/Ross assert that the Town "later admitted that it denied the fee waivers because Town officials felt distrust and hostility toward ACT and Mr. Ross based on the officials' interpretation of prior statements ascribed to ACT and Mr. Ross about the Purple Line and about the Town." Brief, at 1. This is assertion is untrue. It appears to be a reference to the Memorandum filed below by the Town, which ACT/Ross chose to include in the Record Extract over the Town's objection. See E. 73. This was not what was asserted and was not the basis for the Town's denial of the fee waiver request.[6] The Town considered the arguments and assertions (but no evidence) provided by ACT/Ross, and chose not to grant the fee waiver request. The reasons for the denial were given, and were not based on the "viewpoint" of ACT/Ross but, rather, were based on the statutorily permitted factors, including the identity, purpose and affiliation of the requesters. Md. Code, Gen. Provs. Art.,

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[6] Nevertheless, it is true that ACT's members falsely accused the Town of illegal behavior because ACT disagreed with the Town's position and/or speech and actions regarding the Purple Line project. The Town also has a First Amendment right to engage in government speech on a public issue and to expend funds for that governmental purpose. See Montgomery Cnty. v. Fraternal Order of Police, 222 Md. App. 278, 304-05, 112 A.3d 1052, 1068 (2015); Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005).

§4-204(b).

Inasmuch as the MPIA entitled the Town to consider as material to its decision the identity and affiliation of Mr. Ross with ACT, the history of ACT/Ross's attempts to request the same documents repeatedly without paying the fee, and Mr. Ross's "purpose for the application...," the Town simply cannot be said to have acted "arbitrarily or capriciously" in considering and denying the fee waiver request. For these reasons, the Town's denial of ACT/Ross's request for a fee waiver was not arbitrary or capricious and should be affirmed by this Court.

III. THE TOWN DID NOT DENY THE FEE WAIVER REQUESTS ON THE BASIS OF "PAST NEGATIVE COMMENTS."

ACT/Ross claim that the Circuit Court held that the Town based its decision on "past negative comments." In so doing, ACT/Ross incorrectly attack the Circuit Court's decision, though this Court is required to review the discretionary decision of the "agency" to determine whether it was arbitrary and capricious. Therefore, any comments made by the Circuit Court are not relevant.

Further, if the Circuit Court's decision were relevant, ACT/Ross cannot contort the Circuit Court's decision by selecting the slim reed of one phrase uttered by the Judge at the hearing on which to rest its entire argument. The Circuit Court did not base its decision upon "viewpoint discrimination," nor did the Circuit Court "hold" that the Town based its decision to deny the fee waiver request on "past negative comments" nor so-called "viewpoint discrimination." Rather, the trial court noted the "past abusive conduct" (not speech) by

ACT/Ross. E. 157. The trial court noted that the "other relevant factors" were considered by the Town in denying ACT/Ross's request for a fee waiver. E. 159. Judge McCally stated: "I think it is significant, and to this member of the bench it is a factor, that Mr. Ross has requested this information in a variety of capacities for the same issue, the same topic, the same purpose." E. 160. Thus, like the Town, the trial court also found Mr. Ross's actions to be significant. The Court also noted that neither the statute nor the Burke decision provided what factors were to be considered and provided no "formula" for an agency to do so. E. 158-59. Thus, the trial court concluded that the Town did not abuse its discretion in denying the fee waiver request. E. 160.

ACT/Ross assert that this "appeal is about a municipal government's discriminatory denial of fee waivers to prevent a nonprofit group and a journalist from accessing public documents under the Maryland Public Information Act ("MPIA")." Brief, at 1. However, this appeal is about whether the Town acted arbitrarily and capriciously in exercising its discretion to deny a fee waiver request under the circumstances. No "access" to the public records requested has been "denied" to ACT or Mr. Ross. Rather, they have simply been asked to pay the legally authorized fee for doing so.

ACT's October 14, 2015 letter repeated all of ACT and its members' previous MPIA requests. E. 53. Thereafter, Mr. Ross submitted his two letters dated November 10, 2014 requesting the exact same documents that had been requested in ACT's October 15, 2014 letter. His two November 10, 2014 letters were not attached to the Complaint. E. 118-124.

Similarly, ACT/Ross's brief in this Court simply ignores the circumstances surrounding Mr. Ross's submission of these two letters, even though those circumstances were the basis (in part) for the Town's denial of the fee waiver request. ACT/Ross cannot pretend that the reasons for denial were not given or were "wrong" (arbitrary and capricious) merely by ignoring them and making up some other alleged reason for the denial (i.e., "viewpoint discrimination").

Mr. Ross's first letter of November 10, 2014 stated that his request was made on behalf of ACT. E. 118. In the second letter he later submitted, Mr. Ross now stated that his request was on his personal behalf only. E. 119. He sought a fee waiver as an alleged member of the "media," altering the alleged purpose of his blog in his second letter. E. 119. ACT/Ross repeatedly claim in their brief that Mr. Ross was a "journalist," perhaps attempting to liken him to the newspaper reporter in the Burke case. However, the Town did not consider Mr. Ross to be acting in his capacity as a member of the media by his request, but instead, to be acting on behalf of ACT. Therefore, Mr. Ross cannot be assimilated with the plaintiff in Burke under the circumstances.[7]

The history of ACT's repeated requests did indeed include ACT's misleading attacks against the Town for its position opposing the proposed Purple Line project.[8] However, that

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[7] Nor is it a foregone conclusion that a "blogger" is a "journalist" or member of the "media."

[8] ACT accused the Town of violating the Open Meetings Act by holding a closed session. On March 20, 2014, the Open Meetings Compliance Board issued its decision, finding only a technical procedural error by the Town in closing the session, but upholding

was not the basis for the denial. The basis for denial of the fee waiver request was stated in the Town's letter dated November 21, 2014, which stated that the Town did not believe that Mr. Ross's request was actually being made as a member of the media. That reasonable belief was based on the first request Mr. Ross submitted and then immediately withdrew on November 10, 2014, which clearly indicated it was being submitted on behalf of ACT. E. 66. ACT/Ross cannot, on the one hand, ignore the very basis for the Town's decision, while on the other hand, claim that the Town engaged in so-called "viewpoint discrimination." The Town's decision is not rendered "arbitrary and capricious" merely because the Town's memorandum below explained the background leading up to the decision.

IV. THE MPIA ENTITLED THE TOWN TO IMPOSE A REASONABLE FEE AND TO REQUIRE A DEPOSIT BEFORE BEGINNING RESEARCH AND REVIEW OF THE REQUESTED DOCUMENTS.

ACT/Ross claim that: "the Town repeatedly abused the MPIA by using the prospect of indefinite and potentially exorbitant fees against those who were critical of the Town's policy to stymie access to public information." Brief, at 9. This assertion is meritless. First,

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the Town's right to close the session. Attached to the Town's Motion as Exhibit 6 was a Press Release from ACT's website, dated March 24, 2014 ("New Documents on Shuster Brother Lobbying Show Town of Chevy Chase Misinformed Residents Before Public Hearing"); March 31, 2014 ("Town of Chevy Chase Broke the Law Open Meetings Board Rules"); and February 18, 2015 ("Town of Chevy Chase Spending Tops Million Dollars to Fight Purple Line"). The March 24, 2014 Press Release accused the Town of falsely "misinforming" residents. The March 31, 2014 Press Release misrepresented the Board's decision. E. 129 (Town's Exhibit 7). ACT stated that the Town violated the law even though the Board upheld the right of the Town to hold a closed meeting and only found a technical, procedural error. The February 18, 2015 Press Release baselessly accused the Town of lobbying violations and failing to conduct open meetings when required by law.

there was no argument or evidence submitted by ACT/Ross below with respect to alleged unreasonableness of the requested fee of $879.00. Thus, it is undisputed and is not at issue in this appeal. Second, if the amount of the requested fee were at issue, it was reasonable and in full compliance with the provisions of the MPIA.

The Town was entitled to impose a "reasonable fee" under Maryland Code, General Provisions Article, §4-206, which defines a "reasonable fee" as "a fee bearing a reasonable relationship to the recovery of actual costs incurred by a government unit." The Town listed in its letter the fees charged for research by the Town Manager ($78.00 per hour) and for review of the documents by the Town Attorney ($215.00 per hour). E. 58A (Ex. N). The Town's estimated fee for the documents that ACT/Ross sought was $879.00. Id. At page 2 of the Town's letter, the Town's attorney provided the reasoning for the fee. The letter explained that ACT/Ross's request was "extensive," seeking several categories of documents, including correspondence. E. 58A (Ex. N). Thus, the fee required by the Town plainly bore a "reasonable relationship" to the actual costs that would be incurred by the Town. Accordingly, there is no dispute that the fee was reasonable.

ACT/Ross also may not complain regarding the Town's request for prepayment of the fee. It is well established that an agency may appropriately require prepayment of fees. Ireland v. Shearin, 417 Md. 401, 412 n.8 (2010)(agency may require inmate to prepay fees for copies when inmate is unable to inspect records personally due to incarceration). As indicated in Chapter 7 of the MPIA Manual, "[m]any agencies require prepayment or a

commitment to pay fees prior to copying records to be disclosed." Id. (citations omitted)(emphasis added). See MPIA Manual (14th Ed. Oct. 2015), Chap. 7-2, Apx. 8. See also Pollack v. Dep't of Justice, 49 F.3d 115 (4th Cir.), cert. denied, 516 U.S. 843 (1995)(when requester refused to commit to pay fees in accordance with agency's regulations, agency had authority to stop processing FOIA request); Stout v. United States Parole Comm'n, 40 F.3d 136 (6th Cir. 1994)(an agency's regulation requiring payment of fees before release of already processed records was proper and did not violate FOIA); Farrugia v. Exec. Office for United States Attorneys, 366 F. Supp. 2d 56 (D.D.C. 2005)(agency may require payment of search fee before sending records to requester). Therefore, it was proper for the Town to require pre-payment of the fee of $879.00 with respect to ACT/Ross's identical MPIA requests.

V. THE TOWN DID NOT ABUSE ITS BROAD DISCRETION BY DENYING THE FEE WAIVER REQUESTS, AS THE MPIA PERMITS AN AGENCY TO CONSIDER THE IDENTITY AND PURPOSE OF THE REQUESTER.

Maryland Code, General Provisions Article, §4-206, "Waiver," provides that:

(e) The official custodian may waive a fee under this section if:

(1) the applicant asks for a waiver; and

(2) 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.**

The statute does not define how the "ability of the applicant to pay" is determined, what the "other relevant factors" are, nor does the statute state what is meant by "the public

interest." Moreover, notably, while §4-362(b)(2)(i)(1) provides that the defendant "has the burden of sustaining a decision to deny inspection of a public record," there is no statutory requirement in the MPIA that the custodian has the burden of sustaining a decision to deny a fee waiver request.

The only identified factor in the MPIA itself is the requester's "ability to pay." Md. Code, Gen. Prov. Art., §4-206. Moreover, in Chapter 7-3, Section C, of the MPIA Manual, it explains that the custodian of records "may waive any fee or cost assessed under the PIA if the applicant asks for a waiver and if the official custodian determines that a waiver would be in the public interest." Apx. 9. Thus, a requester of documents who seeks a fee waiver must submit evidence to demonstrate that they do not have the "ability to pay," and thereafter the agency may apply the "other relevant factors" (which are not identified in the statute) to decide if a fee waiver would be in the "public interest." See Md. Code, Gen. Prov. Art., §4-206. The custodian from whom the fee waiver is requested, pursuant to §4-206(e)(2), possesses the discretion to decide after consideration of the "ability of the applicant to pay the fee and other relevant factors," whether the waiver would be in the "public interest." Id. The burden of proof for someone submitting that they are unable to pay and that they require a fee waiver is therefore upon the requester.

ACT/Ross's fee waiver request generally parroted the statutory phrases in requesting a fee waiver, and claimed that as a "non-profit" ACT could not afford to pay the fee, while Mr. Ross claimed he was a blogger and member of the media. However, these general

assertions and sole reliance upon the non-profit status of ACT or the blogging of Mr. Ross did not automatically exempt the applicants from paying fees, as the ability to pay and other relevant factors must be considered. Those other relevant factors included ACT/Ross's repeated requests for the same documents to attempt to repeatedly obtain two hours of free research under the statute, as well as Mr. Ross's actions in submitting the two letters on November 10, 2014, which the Town took as an attempt to deceive it into believing that he was a member of the media with respect to the exact same fee waiver request submitted by ACT and denied by the Town. Basically, when ACT was unable to obtain a waiver from the Town, they sent in Mr. Ross as a member of the "media" to request the exact same documents and to attempt to obtain the waiver sought by ACT that had already been considered and denied.

The MPIA Manual, Section 7-1, states that when a requester or group of requesters attempt to artificially break a large request into a series of smaller requests in order to obtain two free hours searching for each request in order to circumvent the assessment of fees, then the custodian of records or agency may aggregate those requests as one single request with the appropriate fees imposed. This lends credence to the position of the Town that the "purpose" of the requester can include consideration of attempts to mislead a custodian in order to avoid payment of the fee.

Moreover, Chapter 7 of the MPIA Manual, Section C, specifically addresses fee waiver requests and discusses the "public interest." It provides as follows:

> To determine whether a waiver is in the public interest, the official **custodian must consider not only the ability of the applicant to pay, but also other relevant factors**. A waiver may be appropriate, for example, when a requester seeks information **for a public purpose, rather than a narrow personal or commercial interest**, because a public purpose justifies the expenditure of public funds to comply with the request.

MPIA Manual, Chapter 7-3 (C)(14th ed., Oct. 2015), Apx. 9 (emphasis added).

ACT/Ross's actions were indicative of a personal or at least non-public purpose and, thus, the Town reasonably concluded that waiver of the fee was not in the public interest.

ACT/Ross's assertion that the Town denied the fee waiver request due to "unconstitutional viewpoint discrimination" is incorrect and is contrary to the MPIA's statutory provisions. The Town did not consider the content of previous publications or publicly expressed views when deciding whether to grant the fee waiver request. That is **not** what was asserted by the Town in its Memorandum of Law, nor is it what Judge McCally stated or held at the hearing (despite ACT/Ross's attempt to twist her words by citing selectively from the hearing transcript). E. 159. Rather, the Town relied upon its statutory ability to consider the identity and purpose of the requesters when determining whether to grant the fee waiver request. The Town was **statutorily entitled** to consider the history, identity and purposes of ACT and Mr. Ross, and Mr. Ross's affiliation with ACT, when considering the requests made for fee waivers. See §4-204(b)(2). Section 4-204(b) of the MPIA states the following in this regard:

> This section **does not preclude an official custodian from considering the identity of the applicant, any organizational or other affiliation of the applicant, or purpose for the application if** ... (2) the applicant has requested

> a waiver of fees under §4-206(e) of this subtitle; **or (3) the identity of the applicant, any organizational or other affiliation of the applicant, or the purpose for the application is material to the determination of the official custodian** in accordance with §4-206(e)(2) of this subtitle.

Id. (Emphasis added).

The Town had the statutory right to take into consideration the identity, purpose and affiliation of Mr. Ross with ACT, the history of ACT/Ross's requests for the same documents over and over in order to avoid paying the fee(s) and to attempt to obtain two (2) more hours of free research through repeated requests, as well as Mr. Ross's "purpose for the application" in considering and denying ACT/Ross's fee waiver request.

In Burke, supra, the Court of Special Appeals held that the City's denial of a newspaper reporter's request for a waiver of fees incurred in connection with the inspection of public records was arbitrary and capricious where the City considered only the expense to the City of locating and duplicating the documents and the perceived ability of the newspaper reporter to pay the projected fee. The Court disapproved the City's failure to consider "other relevant factors" in making its determination of whether a waiver would be in the public interest. In Burke, however, there was no issue of whether the City properly denied the request for a fee waiver as the City was the party moving the Court to limit disclosure. Further, the underlying controversy in Burke implicated an actual history of significant failure of a project that had a manifest effect on public health in the form of raw sewage spilling into the Patapsco River, facts not present here. Third, the scope of the relief ordered by the trial court in Burke is remarkably narrower than the request ACT/Ross made

here.

Burke adopted the federal courts' liberal construction of the federal FOIA fee waiver provision, which favors fee waivers for the media or "other requesters who will provide broad public dissemination of the information sought." Id., 67 Md. App. at 156, 506 A.2d at 688. However, the Court noted that the MPIA also provides that "other relevant factors" may be considered in determining whether the public interest justifies a waiver. Gen. Provs., §4-206(e)(2). The Court noted that the benefits of publicly disclosing the information requested is a relevant factor that the City should have considered, but based that upon the fact that the requester was a member of the press. Mr. Ross claimed to be a blogger or member of the media, not a member of the press. The Town did not believe Mr. Ross's second request was actually different than ACT's request because Mr. Ross submitted the same request for documents as ACT, and then withdrew his first letter on behalf of ACT, and then re-submitted a new letter in his individual capacity, as an alleged member of the "media" due to his blog. E. 118-19. The Town's denial letter also noted Mr. Ross's known affiliation with ACT. Because of the history and Mr. Ross's apparent duplicity, the Town obviously questioned the purpose of the fee waiver request, and whether it was for a public purpose and would be in the "public interest." Upon consideration of ACT/Ross's ability to pay and the "other relevant factors," the Town ultimately determined that the fee waiver would not be in the public interest and denied the request. As discussed, the Town was entitled to consider these circumstances in denying the fee waiver request and the decision was not "viewpoint

discrimination." See §4-204(b)(2).

In an opinion from the Attorney General to the Honorable Marna McLendon, 81 Md. Op. Atty. Gen. 154 (1996),[9] the Attorney General stated the following:

> Pursuant to SG §10-621(a), the official custodian of public records 'may charge an applicant a reasonable fee for the search for, preparation of, and reproduction of a public records.' **This provision reflects a legislative judgment that the taxpayers need not subsidize PIA requesters** (except for the first two hours of search and preparation time, which are free to the requester under SG §10-621(b)).
>
> When an applicant asks for a waiver, the official custodian may waive the fee if, 'after consideration of the ability of the applicant to pay the fee and other relevant factors, the official custodian determines that the waiver would be in the public interest.' SG §10-621(d). **This wording negates any argument that poverty alone entitles a requester to a fee waiver; poverty is but one of the 'relevant factors' that ultimately leads to a discretionary judgment about the public interest.**
>
> Conversely, a decision on a fee waiver request may not be based solely on the expense that would be incurred if the waiver were granted; a fee waiver request must be considered in light of the **ability of the requester to pay the fee and 'other relevant factors.'** See Burke, 67 Md. App. at 157 (finding Baltimore City's denial of fee waiver request arbitrary and capricious because the City only considered the expense it would incur and did not consider the public interest). **Burden on the office is surely not irrelevant, and might tip the public interest assessment, but it cannot be the only consideration.**
>
> **The broad term 'public interest' does not permit a precise listing of relevant factors.** Cases have identified a 'public interest' in the disclosure of records shedding light on a public controversy about official actions, Harris Enterprises, Inc. v. Moore, 734 P.2d 1083, 1089 (Kan. 1987), and on an agency's performance of its public duties, Massey v. FBI, 3 F.3d 620, 625 (2d Cir. 1993). 'However, **the mere possibility that information may aid an**

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[9] Opinions of the Attorney General, while not binding on the Court of Appeals, are considered for their persuasive value. Port v. Cowan, 426 Md. 435, 44 A.3d 970 (2012).

> **individual in the pursuit of litigation does not give rise to a public interest.'** Id.

81 Md. Op. Atty. Gen. 154 (Opinion No. 96-003)(1996)(emphasis added).

ACT and Mr. Ross alleged that they could not pay the reasonable fee because ACT is a non-profit, yet they failed to provide any proof that either or both of them could not afford to pay the $879.00 fee. Rather, ACT simply relied upon its status as a non-profit. However, a Town is also a "non-profit" entity, and it cannot be forced to bear financial responsibility every time a requester merely parrots language consistent with the factors for receiving a fee waiver, as ACT and Mr. Ross did here. The taxpayers need not subsidize PIA requesters, except for the first two hours of search and preparation time, which are free. 81 Md. Op. Atty. Gen. 154.

Furthermore, there was ample reason for the Town to conclude, based on ACT/Ross's conduct (not viewpoint), that ACT/Ross did not seek the fee waiver in the "public interest." Inasmuch as the statute specifically permits what the Town states that it did in denying the fee waiver requests, it does not constitute so-called "viewpoint discrimination." ACT/Ross alleged "poverty" as a reason for a fee waiver, but failed to provide any proof that either or both of them could not afford to pay the $879.00 fee. Respectfully, the Town submits that there was nothing "arbitrary or capricious" in the Town's decision to deny ACT/Ross's request for a fee waiver.

CONCLUSION

For all of the foregoing reasons, the Town of Chevy Chase, Maryland respectfully requests that this Court affirm the Town's decision denying the fee waiver request.

Respectfully submitted,

KARPINSKI, COLARESI & KARP, P.A.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of February 2016, a copy of the foregoing was sent by first class mail, postage prepaid, to:

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CITATIONS AND VERBATIM TEXT OF PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

West's Annotated Code of Maryland
Maryland Rules (Refs & Annos)
Title 8. Appellate Review in the Court of Appeals and Court of Special Appeals
Chapter 500. Record Extract, Briefs, and Argument

MD Rules, Rule 8-501

RULE 8-501. RECORD EXTRACT

Currentness

(a) Duty of Appellant. Unless otherwise ordered by the appellate court or provided by this Rule, the appellant shall prepare and file a record extract in every case in the Court of Appeals, subject to section (k) of this Rule, and in every civil case in the Court of Special Appeals. The record extract shall be included as an attachment to appellant's brief, or filed as a separate volume with the brief in the number of copies required by Rule 8-502(c).

(b) Exceptions. Unless otherwise ordered by the court, a record extract shall not be filed (1) when an agreed statement of the case is filed pursuant to Rule 8-207 or 8-413(b) or (2) in an appeal in the Court of Special Appeals from a criminal case or from child in need of assistance proceedings, extradition proceedings, inmate grievance proceedings, juvenile delinquency proceedings, permanency planning proceedings, or termination of parental rights proceedings.

Cross reference: See Rule 8-504(b) for the contents of a required appendix to appellant's brief in criminal cases in the Court of Special Appeals.

(c) Contents. The record extract shall contain all parts of the record that are reasonably necessary for the determination of the questions presented by the appeal and any cross-appeal. It shall include the circuit court docket entries, the judgment appealed from, and such other parts of the record as are designated by the parties pursuant to section (d) of this Rule. In agreeing on or designating parts of the record for inclusion in the record extract, the parties shall refrain from unnecessary designation. The record extract shall not include those parts of the record that support facts set forth in an agreed statement of facts or stipulation made pursuant to section (g) of this Rule nor any part of a memorandum of law in the trial court, unless it has independent relevance. The fact that a part of the record is not included in the record extract or an appendix to a brief shall not preclude an appellate court from considering it.

(d) Designation by Parties. Whenever possible, the parties shall agree on the parts of the record to be included in the record extract. If the parties are unable to agree:

(1) Within 15 days after the filing of the record in the appellate court, the appellant shall serve on the appellee a statement of those parts of the record that the appellant proposes to include in the record extract.

(2) Within ten days thereafter, the appellee shall serve on the appellant a statement of any additional parts of the record that the appellee desires to be included in the record extract.

(3) Within five days thereafter, the appellant shall serve on the appellee a statement of any additional parts of the record that the appellant proposes to include in view of the parts of the record designated by the appellee.

(4) If the appellant determines that a part of the record designated by the appellee is not material to the questions presented, the appellant may demand from appellee advance payment of the estimated cost of reproducing that part. Unless the appellee pays for or secures that cost within five days after receiving the appellant's demand, the appellant may omit that part from the record extract but shall state in the record extract the reason for the omission.

(e) Appendix in Appellee's Brief. If the record extract does not contain a part of the record that the appellee believes is material, the appellee may reproduce that part of the record as an appendix to the appellee's brief together with a statement of the reasons for the additional part. The cost of producing the appendix may be withheld or divided under section (b) of Rule 8-607.

(f) Appendix in Appellant's Reply Brief. The appellant may include as an appendix to a reply brief any additional part of the record that the appellant believes is material in view of the appellee's brief or appendix. The appendix to the appellant's reply brief shall be prefaced by a statement of the reasons for the additional part. The cost of producing the appendix may be withheld or divided under section (b) of Rule 8-607.

(g) Agreed Statement of Facts or Stipulation. The parties may agree on a statement of undisputed facts that may be included in a record extract or, if the parties agree, as all or part of the statement

of facts in the appellant's brief. As to disputed facts, the parties may include in the record extract, in place of any testimony or exhibit, a stipulation that summarizes the testimony or exhibit. The stipulation may state all or part of the testimony in narrative form. Any statement of facts or stipulation shall contain references to the page of the record and transcript. The parties are strongly encouraged to agree to such a statement of facts or stipulation.

(h) Table of Contents. If the record extract is produced as an appendix to a brief, the table of contents required under section (a) of Rule 8-504 shall include the contents of the appendix. If the record extract is produced as a separate volume, it shall be prefaced by its own table of contents. The table of contents shall (1) reference the first page of the initial examination, cross-examination, and redirect examination of each witness and of each pleading, exhibit, or other paper reproduced and (2) identify each document by a descriptive phrase including any exhibit number.

(i) Style and Format. The numbering of pages, binding, method of referencing, and covers of the record extract, whether an appendix to a brief or a separate volume, shall conform to sections (a) through (c) of Rule 8-503. Except as otherwise provided in this section and in section (g) of this Rule, the record extract shall reproduce verbatim the parts of the record that are included. Asterisks or other appropriate means shall be used to indicate omissions in the testimony or in exhibits. Reference shall be made to the pages of the record and transcript. The date of filing of each paper reproduced in the extract shall be stated at the head of the copy. If the transcript of testimony is reproduced, the pages shall be consecutively renumbered. Documents and excerpts of a transcript of testimony presented to the trial court more than once shall be reproduced in full only once in the record extract and may be referred to in whole or in part elsewhere in the record extract. Any photograph, document, or other paper filed as an exhibit and included in the record extract shall be included in all copies of the record extract and may be either folded to the appropriate size or photographically or mechanically reduced, so long as its legibility is not impaired.

(j) Correction of Inadvertent Errors. Material inadvertently omitted from the record extract may be included in an appendix to a brief, including a reply brief. Other inadvertent omissions or misstatements in the record extract or in any appendix may be corrected by direction of the appellate court on motion or on the Court's own initiative.

(k) Record Extract in Court of Appeals on Review of Case From Court of Special Appeals. When a writ of certiorari is issued to review a case pending in or decided by the Court of Special Appeals, unless the Court of Appeals orders otherwise, the appellant shall file in that Court 20 copies of any record extract that was filed in the Court of Special Appeals within the time the appellant's brief is due. If a record extract was not filed in the Court of Special Appeals or if the

Court of Appeals orders that a new record extract be filed, the appellant shall prepare and file a record extract pursuant to this Rule.

(l) Deferred Record Extract; Special Provisions Regarding Filing of Briefs.

(1) If the parties so agree in a written stipulation filed with the Clerk or if the appellate court so orders on motion or on its own initiative, the preparation and filing of the record extract may be deferred in accordance with this section. The provisions of section (d) of this Rule apply to a deferred record extract, except that the designations referred to therein shall be made by each party at the time that party serves the page-proof copies of its brief.

(2) If a deferred record extract authorized by this section is employed, the appellant, within 30 days after the filing of the record, shall file four page-proof copies of the brief if the case is in the Court of Special Appeals, or one copy if the case is in the Court of Appeals, and shall serve two copies on the appellee. Within 30 days after the filing of the page-proof copies of the appellant's brief, the appellee shall file one page-proof copy of the brief and shall serve two copies on the appellant. The page-proof copies shall contain appropriate references to the pages of the parts of the record involved.

(3) Within 25 days after the filing of the page-proof copy of the appellee's brief, the appellant shall file the deferred record extract, and the appellant's final briefs. Within five days after the filing of the deferred record extract, the appellee shall file its final briefs.

(4) The appellant may file a reply brief in final form within 20 days after the filing of the appellee's final brief, but not later than ten days before the date of scheduled argument.

(5) In a cross-appeal:

(A) within 30 days after the filing of the page-proof copies of the appellee/cross-appellant's brief, the appellant/cross-appellee shall file one page-proof copy of a brief in response to the issues and argument raised on the cross-appeal and shall include any reply to the appellee's response that the appellant wishes to file;

(B) within 25 days after the filing of the cross-appellee/appellant's reply brief, the appellant shall file the deferred record extract, the appellant's final briefs, and the final cross-appellee's/appellant's reply briefs;

(C) within five days after the filing of the deferred record extract, the appellee shall file its final appellee/cross-appellant's briefs; and

(D) the appellee/cross-appellant may file in final form a reply to the cross-appellee's response within 20 days after the filing of the cross-appellee's final brief, but not later than ten days before the date of scheduled argument.

(6) The deferred record extract and final briefs shall be filed in the number of copies required by Rules 8-502(c) and 8-501(a). The briefs shall contain appropriate references to the pages of the record extract. The deferred record extract shall contain only the items required by Rule 8-501(c), those parts of the record actually referred to in the briefs, and any material needed to put those references in context. No changes may be made in the briefs as initially served and filed except (A) to insert the references to the pages of the record extract, (B) to correct typographical errors, and (C) to take account of a change in the law occurring since the filing of the page-proof briefs.

(7) The time for filing page-proof copies of a brief or final briefs may be extended by stipulation of counsel filed with the clerk so long as the final briefs set out in subsections (3) and (5) of this section are filed at least 30 days, and any reply brief set out in subsections (4) and (5) of this section is filed at least ten days, before the scheduled argument.

(m) Sanctions for Noncompliance. Ordinarily, an appeal will not be dismissed for failure to file a record extract in compliance with this Rule. If a record extract is not filed within the time prescribed by Rule 8-502, or on its face fails to comply with this Rule, the appellate court may direct the filing of a proper record extract within a specified time and, subject to Rule 8-607, may require a non-complying attorney or unrepresented party to advance all or part of the cost of printing the extract. The appellate court may dismiss the appeal for non-compliance with an order entered under this section.

Source: This Rule is derived from former Rules 1028 and 828 with the exception of section (l) which is derived from former Rule 833.

Credits

[Adopted Nov. 19, 1987, eff. July 1, 1988. Amended Nov. 23, 1988, eff. Jan. 1, 1989; March 30, 1993, eff. July 1, 1993; Dec. 10, 1996, eff. July 1, 1997; March 5, 2001, eff. July 1, 2001; Nov. 12, 2003, eff. Jan. 1, 2004; April 5, 2005, eff. July 1, 2005; Sept. 10, 2009, eff. Oct. 1, 2009; March 2, 2015, eff. July 1, 2015.]

MD Rules, Rule 8-501, MD R A CT AND SPEC A Rule 8-501
Current with amendments received through August 1, 2015

End of Document

West's Annotated Code of Maryland
General Provisions (Refs & Annos)
Title 4. Public Information Act (Refs & Annos)
Subtitle 2. Inspection of Public Records (Refs & Annos)

MD Code, General Provisions, § 4-204
Formerly cited as MD CODE, SG, § 10-614

§ 4-204. Improper conditions on granting application

Effective: October 1, 2014
Currentness

In general

(a) Except to the extent that the grant of an application is related to the status of the applicant as a person in interest and except as required by other law or regulation, the custodian may not condition the grant of an application on:

(1) the identity of the applicant;

(2) any organizational or other affiliation of the applicant; or

(3) a disclosure by the applicant of the purpose for an application.

Exceptions

(b) This section does not preclude an official custodian from considering the identity of the applicant, any organizational or other affiliation of the applicant, or the purpose for the application if:

(1) the applicant chooses to provide this information for the custodian to consider in making a determination under Subtitle 3, Part IV of this title;

(2) the applicant has requested a waiver of fees under § 4-206(e) of this subtitle; or

(3) the identity of the applicant, any organizational or other affiliation of the applicant, or the purpose for the application is material to the determination of the official custodian in accordance with § 4-206(e)(2) of this subtitle.

Request for identity allowed

(c) Consistently with this section, an official may request the identity of an applicant for the purpose of contacting the applicant.

Credits

Added by Acts 2014, c. 94, § 2, eff. Oct. 1, 2014.

MD Code, General Provisions, § 4-204, MD GEN PROVIS § 4-204
Current through the 2015 Regular Session of the General Assembly

End of Document

West's Annotated Code of Maryland
General Provisions (Refs & Annos)
Title 4. Public Information Act (Refs & Annos)
Subtitle 2. Inspection of Public Records (Refs & Annos)

MD Code, General Provisions, § 4-206
Formerly cited as MD CODE, SG, § 10-621

§ 4-206. Fees

Effective: October 1, 2015
Currentness

Definitions

(a)(1) In this section the following words have the meanings indicated.

(2) "Indigent" means an individual's family household income is less than 50% of the median family income for the State as reported in the Federal Register.

(3) "Reasonable fee" means a fee bearing a reasonable relationship to the recovery of actual costs incurred by a governmental unit.

Charging reasonable fee

(b)(1) Subject to the limitations in this section, the official custodian may charge an applicant a reasonable fee for:

(i) the search for, preparation of, and reproduction of a public record prepared, on request of the applicant, in a customized format; and

(ii) the actual costs of the search for, preparation of, and reproduction of a public record in standard format, including media and mechanical processing costs.

(2) The staff and attorney review costs included in the calculation of actual costs incurred under this section shall be prorated for each individual's salary and actual time attributable to the search for and preparation of a public record under this section.

Limitation on search and preparation fee

(c) The official custodian may not charge a fee for the first 2 hours that are needed to search for a public record and prepare it for inspection.

Limitation on reproduction fee

(d)(1) If another law sets a fee for a copy, an electronic copy, a printout, or a photograph of a public record, that law applies.

(2) The official custodian may charge for the cost of providing facilities for the reproduction of the public record if the custodian did not have the facilities.

Waiver

(e) The official custodian may waive a fee under this section 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.

Credits

Added by Acts 2014, c. 94, § 2, eff. Oct. 1, 2014. Amended by Acts 2015, c. 135, § 1, eff. Oct. 1, 2015; Acts 2015, c. 136, § 1, eff. Oct. 1, 2015.

MD Code, General Provisions, § 4-206, MD GEN PROVIS § 4-206
Current through the 2015 Regular Session of the General Assembly

End of Document

West's Annotated Code of Maryland
General Provisions (Refs & Annos)
Title 4. Public Information Act (Refs & Annos)
Subtitle 3. Denials of Inspection (Refs & Annos)
Part VI. Judicial Review (Refs & Annos)

MD Code, General Provisions, § 4-362
Formerly cited as MD CODE, SG, § 10-623

§ 4-362. Judicial review

Effective: October 1, 2015
Currentness

Complaint filed with circuit court

(a)(1) Subject to paragraph (3) of this subsection, whenever a person or governmental unit is denied inspection of a public record or is not provided with a copy, printout, or photograph of a public record as requested, the person or governmental unit may file a complaint with the circuit court.

(2) Subject to paragraph (3) of this subsection, a complainant or custodian may appeal to the circuit court a decision issued by the State Public Information Act Compliance Board as provided under § 4-1A-10 of this title.

(3) A complaint or an appeal under this subsection shall be filed with the circuit court for the county where:

(i) the complainant resides or has a principal place of business; or

(ii) the public record is located.

Defendant

(b)(1) Unless, for good cause shown, the court otherwise directs, and notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to the complaint within 30 days after service of the complaint.

(2) The defendant:

(i) 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; and

(ii) in support of the decision, may submit a memorandum to the court.

Authority of court

(c)(1) Except for cases that the court considers of greater importance, a proceeding under this section, including an appeal, shall:

(i) take precedence on the docket;

(ii) be heard at the earliest practicable date; and

(iii) be expedited in every way.

(2) The court may examine the public record in camera to determine whether any part of the public record may be withheld under this title.

(3) The court may:

(i) enjoin the State, a political subdivision, or a unit, an official, or an employee of the State or of a political subdivision from:

1. withholding the public record; or

2. withholding a copy, printout, or photograph of the public record;

(ii) issue an order for the production of the public record or a copy, printout, or photograph of the public record that was withheld from the complainant; and

(iii) for noncompliance with the order, punish the responsible employee for contempt.

Damages

(d)(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.

Disciplinary action

(e)(1) Whenever the court orders the production of a public record or a copy, printout, or photograph of a public record that was withheld from the applicant and, in addition, finds that the custodian acted arbitrarily or capriciously in withholding the public record or the copy, printout, or photograph of the public record, the court shall send a certified copy of its finding to the appointing authority of the custodian.

(2) On receipt of the statement of the court and after an appropriate investigation, the appointing authority shall take the disciplinary action that the circumstances warrant.

Costs

(f) 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.

Credits

Added by Acts 2014, c. 94, § 2, eff. Oct. 1, 2014. Amended by Acts 2014, c. 584, § 1, eff. Oct. 1, 2014; Acts 2015, c. 135, § 1, eff. Oct. 1, 2015; Acts 2015, c. 136, § 1, eff. Oct. 1, 2015.

MD Code, General Provisions, § 4-362, MD GEN PROVIS § 4-362
Current through the 2015 Regular Session of the General Assembly

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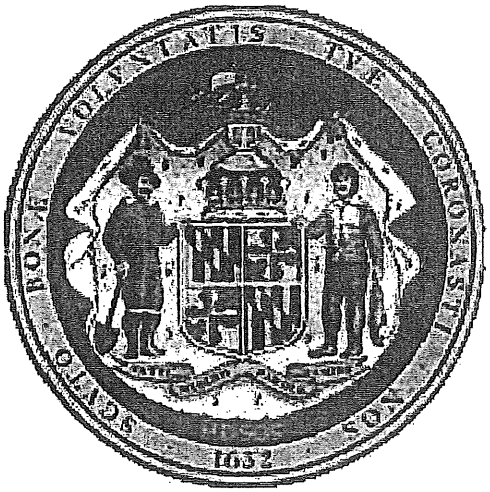
APPENDIX

Maryland
Public Information Act
Manual



Office of the Attorney General

Brian E. Frosh
Attorney General

Fourteenth Edition
2015

MARYLAND PUBLIC INFORMATION ACT MANUAL

OFFICE OF THE

MARYLAND ATTORNEY GENERAL

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ATTORNEY GENERAL

200 Saint Paul Place
Baltimore, Maryland 21202

Fourteenth Edition
2015

PREFACE

The Maryland Public Information Act is based on the enduring principle that public knowledge of government activities is critical to the functioning of a democratic society; that a Government of the people, by the people, and for the people must be *open* to the people. Members of the public need and deserve complete information as they make the decisions and form the opinions that determine our future path, and the Act ensures that those needs are met fairly and expeditiously while protecting important privacy rights and other public policy goals.

As Attorney General, I am committed to open access to information, and to promoting a consistent application of the Act throughout State and local government. The Office of the Attorney General has long worked toward ensuring the correct implementation of the Act, and I am continuing and expanding on that tradition.

This manual is designed to be a resource for a range of users, from members of the public and the media who request information, to the government officials who have the responsibility to implement the Act's requirements.

As technology advances, expectations about the speed and scope of access to information evolve, and policy-makers grapple with how best to accommodate those expectations in a manner that is both efficient and workable. The Fourteenth Edition of this manual reflects extensive changes enacted during the 2015 session of the Maryland General Assembly to move the law forward, as well as noteworthy developments in the case law and the opinions of the Office of the Attorney General.

The 14th edition of this manual, like those that precede it, is the work of many talented and committed individuals. Special credit goes to former Deputy Attorney General, later Judge, Dennis M. Sweeney for preparing the first several editions, and to former Assistant Attorneys General Jack Schwartz and Robert N. McDonald (now Judge McDonald) who assumed responsibility for subsequent editions. The most recent editions have been produced under the direction of Adam D. Snyder, Chief Counsel, Opinions and Advice. Deborah P. Spence deserves thanks for preparing and finalizing the manuscript.

I also wish to thank the local government officials, members of the private bar and representatives of the media and open-government advocacy groups for their many constructive suggestions about how best to implement the PIA.

In addition to being available in printed version, the Manual is on-line at http://www.oag.state.md.us/Opengov/pia.htm.

Please let me know if you have suggestions for further refinements.

Brian E. Frosh
Attorney General
October 2015

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Chapter 7:
Fees

A. Search and Preparation Fees

Under GP § 4-206, an official custodian may charge reasonable fees for the search and preparation of records for inspection and copying. Search and preparation fees must be reasonably related to the actual cost to the governmental unit in processing the request. GP § 4-206(a); *see also* 71 *Opinions of the Attorney General* 318, 329 (1986) ("The goal . . . should be . . . neither to make a profit nor to bear a loss on the cost of providing information to the public."). The custodian may charge a "reasonable fee" to search for, prepare, and reproduce a record in a customized format selected by the applicant, and may charge "the actual costs" of searching for, preparing, and producing a public record in standard format. GP § 4-206(b)(1). Fees may not be charged, however, for the first two hours of search and preparation time. GP § 4-206(c).

Search fees are the costs to an agency for locating requested records. Usually, this involves the cost of an employee's time spent in locating the requested records. Preparation fees are the costs to an agency to prepare a record for inspection or copying, including the time needed to assess whether any provision of law permits or requires material to be withheld. For example, where a document contains both information that the public is entitled to see and information that the custodian may not by law release, an employee's time will be needed to prepare and copy the record with the exempt information deleted. Redaction will often be necessary where records contain investigatory or confidential financial information.

The actual cost of a response must be calculated by prorating the salaries of the staff and attorneys involved in the response by the actual time they spent searching for and preparing the record for disclosure. GP § 4-206(b)(2).

On a rare occasion, a requester (or group of requesters) may attempt to artificially break a large request into a series of smaller requests to obtain two free hours searching

for each request in order to circumvent the assessment of fees. If the purpose is clear, it seems reasonable for the agency to aggregate those requests as a single request with the appropriate fee. On the other hand, nothing in the Act prohibits a requester from making multiple requests and an agency should not artificially aggregate separate requests to increase the fee to discourage those requests.

Although the PIA does not address the issue of prepayment of fees, agency regulations may do so. The Court of Appeals has indicated that an agency may appropriately require prepayment of fees. *Ireland v. Shearin*, 417 Md. 401, 412 n.8 (2010) (agency may require inmate to prepay fees for copies when inmate is unable to inspect records personally due to incarceration). Following the model regulations in Appendix F, many agencies require prepayment or a commitment to pay fees prior to copying records to be disclosed. *See, e.g.*, COMAR 08.01.06.11D(2) (Department of Natural Resources); COMAR 09.01.04.14D (Department of Licensing and Regulation). Federal agencies typically have regulations requiring prepayment or an agreement to pay fees as a prerequisite to the processing of a request, at least when fees are expected to exceed a set amount. *See, e.g.*, 16 C.F.R. § 4.8(d)(3) (Federal Trade Commission); 43 C.F.R. § 2.18 (Department of the Interior); *see also Pollack v. Department of Justice*, 49 F.3d 115 (4th Cir.), *cert. denied*, 516 U.S. 843 (1995) (when requester refused to commit to pay fees in accordance with agency's regulations, agency had authority to stop processing FOIA request); *Stout v. United States Parole Comm'n*, 40 F.3d 136 (6th Cir. 1994) (an agency's regulation requiring payment of fees before release of already processed records was proper and did not violate FOIA); *Farrugia v. Executive Office for United States Attorneys*, 366 F. Supp. 2d 56 (D.D.C. 2005) (agency may require payment of search fee before sending records to requester).

B. Reasonable Fees for Copies

An official custodian may charge a "reasonable fee" for copies. GP § 4-206(b). "Reasonable fee" is defined as "a fee bearing a reasonable relationship to the recovery of actual costs incurred by a governmental unit." GP § 4-206(a). Fees should not be set simply to deter requests to inspect records or get copies.

Many agencies have standard schedules of fees for copies. For example, the Department of Agriculture charges 15¢ per page for a copy of a record. COMAR 15.01.04.14. Agencies should adopt standard fee schedules so that the public and

agency employees know what charges will be made. Note that if another law sets a fee for a copy, printout, or photograph, that law applies. GP § 4-206(d)(1).

C. Waiver of Fees

An applicant may ask the agency for a total or partial waiver of fees. Under GP § 4-206(e), the official custodian may waive any fee or cost assessed under the PIA if the applicant asks for a waiver and if (1) the applicant is indigent, as that term is defined under the Act, or (2) the official custodian determines that a waiver would be in the public interest.

A requester is considered indigent for purposes of the Act if his or her family household income is less than 50% of the median family income for the state, as reported in the Federal Register. GP § 4-206(a)(2). To obtain a waiver on this basis, the applicant must submit an affidavit of indigency. GP § 4-206(e)(2). A form indigency affidavit is contained in Appendix D.

To determine whether a waiver is in the public interest, the official custodian must consider not only the ability of the applicant to pay, but also other relevant factors. A waiver may be appropriate, for example, when a requester seeks information for a public purpose, rather than a narrow personal or commercial interest, because a public purpose justifies the expenditure of public funds to comply with the request. For example, in one case, the Court of Special Appeals found that Baltimore City's denial of a reporter's request to waive fees was arbitrary and capricious because the City only considered the expense to itself and the ability of the newspaper to pay and did not consider other relevant factors. The Court suggested that relevant factors included the public benefit in making available information concerning one of the City's major financial undertakings and the danger that imposing a fee for information upon a newspaper publisher might have a chilling effect on the full exercise of freedom of the press. *City of Baltimore v. Burke*, 67 Md. App. 147 *cert. denied*, 306 Md. 118 (1986); *see also* 81 *Opinions of the Attorney General* 154 (1996) (waiver of fee depends on a number of relevant factors and cannot be based solely on the poverty of the requester or the cost to the agency).

In deciding whether to waive a fee, an official custodian may find it helpful to look at case law interpreting the comparable FOIA provision, 5 U.S.C. § 552(a)(4)(A). In one useful case, *Project on Military Procurement v. Dept. of Navy*, 710 F. Supp. 362

(D.D.C. 1989), the federal court identified as material factors the potential that the requested disclosure would contribute to public understanding and the significance of that contribution. *See also Larson v. CIA*, 843 F.2d 1481 (D.C. Cir. 1988) (requester of information under FOIA seeking fee waiver must not have commercial interest in disclosure of information sought and must show that disclosure of information would be likely to contribute significantly to public understanding of government operations or activities); *National Treasury Employees Union v. Griffin*, 811 F.2d 644 (D.C. Cir. 1987) (fee waiver requests under FOIA grounded on public interest theory must show connection between material sought and matter of genuine public concern and must also indicate that fee waiver or production will primarily benefit public); *Crooker v. Bureau of Alcohol, Tobacco and Firearms*, 882 F. Supp. 1158 (D. Mass. 1995) (agency justified in denying request for fee where disclosure was not likely to contribute significantly to public understanding of government operations); *cf. Diamond v. FBI*, 548 F. Supp. 1158 (S.D.N.Y. 1982) (overturning agency's decision denying fee waiver when university professor sought materials for academic lectures and articles).

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 8,940 words (9,100 words maximum are permitted), excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

Victoria Shearer
Signature