

OFFICER JOHN DOE,

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IN THE

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CIRCUIT COURT FOR

FRATERNAL ORDER OF POLICE,
MONTGOMERY COUNTY,
LODGE 35, INC.,
610 Professional Drive, Suite 104
Gaithersburg, Maryland 20879,

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MONTGOMERY COUNTY,

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MARYLAND

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Plaintiffs,

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Case No.: C-15-CV-22-002523

v.

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MONTGOMERY COUNTY,
MARYLAND,
100 Monroe Street, 2nd Floor
Rockville, Maryland 20850

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Serve:

Marc P. Hansen, Resident Agent
101 Monroe Street, 3rd Floor
Rockville, Maryland 20850

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Defendant.

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AMENDED COMPLAINT

Plaintiffs Officer John Doe and the Fraternal Order of Police, Montgomery County, Lodge 35, Inc., (“FOP”) by and through their undersigned counsel and the law firm of CONTI FENN LLC, and pursuant to MD. CODE ANN., CTS. & JUD. PROC. § 3-401, *et seq.*, and MD. CODE ANN., GEN. PROV. § 4-301, *et seq.*, hereby brings this lawsuit against Defendant Montgomery County, Maryland, to obtain declaratory and injunctive relief. Specifically, the Plaintiffs request the Court to declare that MD. CODE ANN., GEN PROV., § 4-311, as amended by the Maryland Police Accountability Act of 2021 (“MPAA”), violates the Due Process and Equal Protection guarantees of the Fourteenth Amendments to the United States Constitution and Articles 5 and 24 of the

Maryland Declaration of Rights; that the Defendant is prohibited from releasing certain records sought under the Maryland Public Information Act and issue a permanent injunction enjoining the Defendant from releasing the records. In the alternative, the Plaintiffs seek appropriate redactions to the records. In support of this Amended Complaint, the Plaintiffs state the following:

I.
Parties

1. Plaintiff Officer John Doe is a decorated sworn police officer, medal of valor award recipient and longstanding veteran employed for over 20 years by the Montgomery County Police Department (“MCPD”). Plaintiff is a police officer as defined by MD. CODE ANN., GEN. PROV. § 4-101. Contemporaneous with the filing of this Complaint, Plaintiff has filed a Motion to Protect the Identity of John Doe.

2. The Plaintiff FOP is a labor union and the recognized exclusive bargaining representative for approximately 1,150 police officers classified as a sergeant, master police officer I, master police officer II, police officer I, police officer II, police officer III, or police officer candidate employed with the Montgomery County Police Department (“MCPD”). The FOP’s principal place of business is located at 610 Professional Drive, Gaithersburg, Maryland 20879.

3. Defendant is the corporate entity of “Montgomery County, Maryland,” as set forth in the Montgomery County Charter, and in which the MCPD operates and by whom the Plaintiff Doe is employed. Pursuant to MD. CODE ANN., CTS. & JUD. PROC. § 3-405(b), Montgomery County is a proper and necessary party to this action.

II.
Jurisdiction and Venue

4. Pursuant to MD. CODE ANN., CTS. & JUD. PROC. § 3-403(a), MD. CODE ANN., GEN. PROV. § 4-301, *et seq.*, this Court has subject matter jurisdiction to hear this action. In addition,

by agreement between the FOP and the County, the parties have agreed to the jurisdiction of this Court to resolve all disputes involving the subject matter of this action through a reverse Maryland Public Information Act Complaint.

5. This Court may exercise personal jurisdiction over Defendant because it is a corporate entity within the jurisdiction of this Court, and which has consented to this Court's jurisdiction for the subject matter of this action.

6. Venue is proper in this Court because the events giving rise to Plaintiffs' suit occurred within the legal jurisdiction and geographical confines of Montgomery County, Maryland.

III. **Legislative History**

7. The Maryland Police Accountability Act of 2021 – Search Warrants and Inspection of Records Relating to Police Misconduct (“MPAA”) was introduced in the 2021 regular session of the Maryland General Assembly. On October 1, 2021, the MPAA became effective and has since been implemented across the State of Maryland. Specifically, the MPAA allows for the release of certain police department personnel records upon the filing of an application by any member of the public under the Maryland Public Information Act (“MPIA”). *See* MD. CODE ANN., CTS. & JUD. PROC. § 4-101 *et seq.* The identity of the requestor is permitted by the legislation to be withheld and was withheld by the County from the Plaintiffs.

8. The intent of the MPIA is to recognize that the public is entitled to access of information about the affairs of the government and the official acts of the government. *See id.* at § 4-103(b). The MPIA was not expressly intended to allow for the disclosure of all actions and the identification of all government employees. *Cf.* § 4-101(h)(2). The MPIA is construed in favor of allowing inspection of public records “unless an unwarranted invasion of the privacy of a person

in interest would result[.]” *See id.* at § 4-103(b). To that end, the MPIA requires custodians of records to deny the inspection of certain categories of records. *See id.* at § 4-304. Specifically, the MPIA requires that “a custodian shall deny inspection of a personnel record of an individual.” *Id.* At § 4-311(a).

9. When the General Assembly enacted legislation to expand the scope of personnel records subject to disclosure for police officers, it allowed for the release of limited investigatory “records,” but did not expressly authorize the release of the names of the officers involved or the identification of any of the other employees, witnesses, victims or suspects. *See id.* at § 4-311. Even where a police investigatory “record” is permitted to be disclosed, the MPIA has several mandatory exceptions that prohibit the disclosure or require redaction before a disclosure is made.

10. Recognizing that under the new law there would be significant uncertainty as to what was required to be disclosed and what remained protected, the County and the FOP entered into a Memorandum of Agreement (“MOA”) governing how police disciplinary records would be handled in order to afford an officer who was the subject of the request to take steps to obtain a ruling from this Court before a production would be made that could impact the officer. The parties’ MOA allows an officer to promptly raise any issue with this Court in order to obtain a ruling before an improper production is made that could cause irreversible and irreparable harm to the officer.

IV. **Factual Background**

11. For decades, the bargaining process between the County and the FOP has provided substantive due process protections to officers. The FOP and officers were ensured that investigations and personnel records would remain confidential.

12. These protections guaranteed to officers security and privacy in knowing their names and personal information would remain private. This was also a right and expectation of all government employees who, with the recent exception of police officers, continue to enjoy this right to privacy.

13. The MPAA retroactively eliminates these privacy guarantees for police officers.

14. The public disclosure of unsustained charges, unfounded allegations, and other matters for which officers were exonerated serves no public benefit, nor does the retroactive production of personnel records spanning decades.

15. Officers, on the other hand, risk economic, professional, and personal harm from this invasion of privacy.

16. On June 22, 2022, Plaintiff Officer John Doe was notified that Defendant had received an MPIA request seeking all of the Plaintiff John Doe's police disciplinary records.

17. Thereafter, Defendant provided the Plaintiffs with a copy of the investigatory records that it intended to produce in response to the MPIA request. These records included the identification of Officer John Doe by the officer's actual name and related to matters that, among other things, were investigated almost two decades ago, included many unsubstantiated allegations that were not sustained, included an investigation for which the officer was cleared of any wrongdoing, and contained confidential information and allegations of technical infractions exempt from disclosure under the MPIA and MPAA.

18. On June 29, 2022, in accordance with the parties' MOA, counsel for the Plaintiffs provided written notice to the Defendant of Plaintiffs' objection to the production of the identified investigatory records. Counsel for the Plaintiffs further advised the Defendant of the Plaintiffs'

intention to seek an order from this Court precluding the release of the investigatory records and has promptly filed this action in accordance with the parties' MOA.

19. The investigatory records identified by the Defendant as responsive to the MPIO Request include records of investigations involving Officer John Doe that contain allegations that were not sustained, but for which their mere disclosure would cause harm to Officer John Doe based upon the sensational nature of the subject matter of the investigations. The Court of Appeals has consistently held that investigatory records of police officers concerning allegations that are not sustained are properly precluded from disclosure as follows:

[W]here, as here, the investigation concludes with a determination that the allegations are not sustained, fairness to the investigated officers and the avoidance of needless publicity to the cooperating witnesses, with possible inhibiting effects on future investigations, justify on public interest grounds the custodian's denial of inspection to one other than a person in interest.

Mayor and City of Baltimore v. Maryland Committee Against the Gun Ban, 329 Md. 78, 95 (1993); *see also Montgomery County Maryland v. Shropshire*, 420 Md. 362, 380-81 (2011) (stating that the Court of Appeals "further emphasized the significant public interest in preserving the confidentiality of internal police investigations both in promoting cooperation by civilian witnesses and police officers.").

20. The records at issue contain allegations that were not sustained, that involve traumatic incidents, and for some relate to incidents that occurred almost two decades ago. If released in connection with the identification of Officer John Doe by name, these records would constitute an unwarranted invasion of Plaintiff John Doe's privacy that will cause substantial harm to the Plaintiff. *See id.* at § 4-103(b)

21. Some of the investigatory records contain allegations of mere technical infractions, which are exempt from disclosure. The MPIO states that "[a] record of a technical infraction

[committed by a police officer] is a personnel record” that is precluded from public inspection. *Id.* at § 4-311(c)(2). A technical infraction is defined by the MPIA as follows:

“Technical infraction” means a minor violation by an individual solely related to the enforcement of administrative rules that:

- (1) does not involve an interaction between a member of the public and the individual;
- (2) does not relate to the individual’s investigative, enforcement, training, supervision, or reporting responsibilities; and
- (3) is not otherwise a matter of public concern.

See id. at § 4-101(1). The investigatory records identified by the Defendant as responsive to the MPIA Request include records of technical infractions, which are personnel records that are precluded from production under the MPIA. *See MD. CODE ANN., GEN. PROV § 4-311(c)(2).*

22. The MPIA further permits the denial of inspection of a record if it “would be contrary to the public interest.” *See id.* at § 4-343. The subject records include the identification of cooperating witnesses. These witnesses, along with Officer John Doe, would have either been assured that the matter was a confidential personnel matter not subject to disclosure or would have been correct to assume the matters were confidential personnel matters not subject to disclosure at the time of the investigations. In fact, certain correspondence within the anticipated production includes denials of the production of the materials because they are confidential personnel records. To allow the subject production would be unfair to cooperating parties who operated under the assumption that a matter would not be disclosed because it was confidential under the existing law at the time. In some instances, the records contain references to medical conditions of the subjects. The records also contain detailed arrest information relating to criminal suspects, some of which may have been convicted, some of which may not. Allowing a criminal arrest record from almost two decades ago to be released to the public, particularly if the arrestee had the record expunged,

would be unjust and could expose Officer John Doe to more claims. Allowing the release of unsubstantiated claims against an officer spanning two decades, the identification of witnesses and witness statements, the medical conditions of parties involved, and the identification of criminal suspects under these circumstances would be contrary to the public interest.

Count I
Request for Declaratory Judgment and Injunctive Relief

23. Paragraphs 1-22 of this Complaint are fully incorporated herein.
24. Plaintiffs have a cognizable interest in preventing the release of Plaintiff John Doe's investigatory files. Officer John Doe will suffer personal harm if the records and wrongfully disclosed. The FOP has an interest in enforcing the proper administration of the new MPIA laws as they relate to its members.
25. The MPIA requires that "a custodian shall deny inspection of a personnel record of an individual," which includes "[a] record of a technical infraction" committed by a police officer. *See* MD. CODE ANN., GEN. PROV. § 4-311(a), (c)(2). The investigatory files compiled by the Defendant include records of technical infractions, which are precluded from being produced under the MPIA.
26. The MPIA requires the denial of the subject production because it would constitute "an unwarranted invasion of the privacy" of the Plaintiff. *See id.* § 4-103(b).
27. The MPIA further permits the denial of inspection of a record if it "would be contrary to the public interest." *See id.* at § 4-343. The investigatory files compiled by the Defendant include records involving allegations that were not sustained and the production would be contrary to the public interest. It would also be contrary to the public interest in promoting cooperation by civilian witnesses and police officers in internal police investigations to produce investigatory records when they were promised or assured of the confidential

treatment of the investigation or to produce otherwise confidential information from these files. *See id.* at § 4-343; see also § 4-301(a)(1). In addition, these cooperating witnesses may be considered a confidential source based on assurances they received, for which their disclosure would be prohibited under the MPIA. *See* § 4-351(b)(4).

28. The MPIA does not authorize the disclosure of the name of any police officer who is the subject of a personnel record being produced to be disclosed. *Cf.* § 4-311(a); 4-311(c)(1).
29. The MPIA requires the denial of the subject production because it includes references to medications, medical conditions or medical treatment of a witness or suspect. *See id.* § 4-329(1).
30. Unless Defendant is enjoined by the Court from releasing Officer John Doe’s disciplinary records, Officer John Doe will suffer an unwarranted invasion of privacy that will result in substantial injury and both Plaintiffs will suffer additional harms as a result.

Count II

Request for Declaratory and Injunctive Relief that the MPAA Violates the Substantive Due Process and Equal Protection Rights Arising under the Fourteenth Amendment to the Constitution of the United States and Articles 5 and 24 of the Maryland Declaration of Rights

31. Paragraphs 1-30 are fully incorporated herein.
32. The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States provides, in relevant part, that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law” U.S. CONST. amend XIV. Similarly, Article 24 of the Maryland Declaration of Rights guarantees that “no man ought to be . . . deprived of his life, liberty or property” MD. CONST. Art. 24. Article 5 of the Maryland Declaration of Rights has also been found to incorporate a right of privacy. MD. CONST. ART. 5.

33. The Due Process Clause protects these fundamental privacy and liberty interests from legislation and requires legislation of privacy and liberty interests be narrowly tailored to satisfy compelling government interests.
34. Police officers have a particular, cognizable privacy and liberty interest in not being publicly identified or having their personnel files or disciplinary records made publicly available. Even if their names are redacted, police officers still risk an invasion of their privacy when such records are published because they can often be identified through other, disclosed information and identifying details.
35. Further, when an investigation clears the officers of wrongdoing, there is a significant public interest in maintaining confidentiality, both in fairness to the investigated officers and cooperating witnesses.
36. The MPAA's amendments to MD. CODE ANN., GEN. PROV. § 4-311, particularly the retroactive effect, are not backed by any compelling or legitimate state interest, nor are they narrowly tailored or reasonable. Instead, the MPAA sweepingly targets and violates officers' fundamental privacy rights without a justifiable state interest.
37. By singling out police officers as the only public servants subject to such invasion of privacy and liberty interests, the MPAA's amendments violate police officers' Equal Protection rights under the Fourteenth Amendment to the United States Constitution and Article 24 of the Maryland Declaration of Rights.
38. WHEREFORE, Plaintiffs request that this Court declare as violative of the Fourteenth Amendment to the United States Constitution and Articles 5 and 14 of the Maryland Declaration of Rights all provisions in the Maryland Police Accountability Act and the Maryland Public Information Act that require the production of any police officer's

personnel, disciplinary or investigative files, including all of the records sought that relate to Officer John Doe in this matter.

WHEREFORE, Plaintiffs further request that, to the extent the MPAA and proposed production are not enjoined as unconstitutional, that the Court conduct an *in camera* review of the subject records that the Defendant intends to produce in accordance with MD. CODE ANN., GEN. PROV. § 4-362(c)(2), as well as an *in camera* or under seal review of the memoranda and arguments of the parties related to these records, in accordance with MD. CODE ANN., GEN. PROV. § 4-362(b)(2)(ii), and enter an Order:

1. Declaring that the Plaintiff Officer John Doe's disciplinary records shall not be subject to inspection or production; or
2. Declaring that the Plaintiff Officer John Doe's disciplinary records shall not be subject to inspection or production without proper redaction; and
3. Permanently enjoining Defendant from producing, releasing, or subjecting to inspection any of the Plaintiff Officer John Doe's disciplinary records not otherwise authorized; and
4. Granting any other relief the Court deems just and proper.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October, 2022, a copy of the foregoing Amended

Complaint was served via MDEC to:

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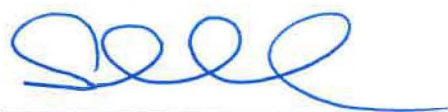
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October, 2022, pursuant to MD. CODE ANN., CTS.

AND JUD. PROCS. § 3-405, a copy of the foregoing Amended Complaint was served via electronic mail and will be hand delivered on October 14, 2022 to:

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