IN THE
APPELLATE COURT OF MARYLAND

No. 956
September Term 2023

SHERIFF RICKY COX,

Appellant,

v.

AMERICAN CIVIL LIBERTIES UNION OF MARYLAND,

Appellee.

On Appeal from the Circuit Court for Baltimore City,
No. 24-C-22-001125 OG
(Hon. Martin H. Schreiber)

BRIEF OF APPELLEE

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INTRODUCTION

The Maryland Public Information Act (the "MPIA") is the vehicle by which members of the public can access the records of public agencies, including law enforcement agencies. Md. Code Ann., Gen. Provis. §§ 4-301, *et seq*. While the MPIA allows a record custodian to charge a "reasonable fee" for access to public records, the law also provides that the fee should be waived when "waiver would be in the public interest." Md. Code Ann., Gen. Provis. § 4-206(e). Since 1986, this Court has consistently held that record custodians may not arbitrarily and capriciously deny requests for public interest fee waivers. *Mayor & City Council of Baltimore v. Burke*, 67 Md. App. 147, 157 (1986); *Action Comm. for Transit, Inc. v. Town of Chevy Chase*, 229 Md. App. 540, 561 (2016); *Baltimore Action Legal Team v. Off. of State's Att'y of Baltimore City*, 253 Md. App. 360, 265 A.3d 1187, 1212 (2021).

Appellee, the American Civil Liberties Union of Maryland ("ACLU") issued an MPIA request to Appellant, the Sheriff of Calvert County, seeking records related to Calvert County police officers' use of highly invasive search techniques. E.28. The ACLU also sought a public interest fee waiver, which the Sheriff[1] twice denied. E.150-51, 164. In reliance on this Court's prior decisions, the Circuit Court below granted summary judgment in favor of the ACLU after finding that the

[1] This brief refers to the "Sheriff" when discussing the acts and statements of his agents.

Sheriff did not consider the relevant public interest factors and thus acted arbitrarily and capriciously in denying the request for a fee waiver. E.471, 474.

Four months after the Circuit Court decided this case, the Supreme Court of Maryland issued its decision in *Baltimore Police Dep't v. Open Justice Baltimore*, in which it addressed the limits of a record custodian's discretion under the MPIA to grant or deny requests for public interest fee waivers. 485 Md. 605, 656 (2023). The Supreme Court's decision in *Open Justice* embraces the analytical framework of this Court's prior decisions and vindicates the Circuit Court's finding that the Sheriff acted arbitrarily and capriciously. For the reasons explained below, the Court should affirm.

STATEMENT OF THE CASE

On July 22, 2021, the ACLU issued an MPIA request to the Calvert County Sheriff seeking documents related to his officers' use of body searches, strip searches, and manual body cavity searches, from 2017 through the present. E.28-29. In its request, the ACLU explained why production of the requested documents would be in the public interest and requested a public interest fee waiver pursuant to Md. Code Ann., Gen Provis. § 4-206(e). *Id.* Following a series of communications with the Sheriff's Office in which the ACLU clarified and narrowed its MPIA request, E.129-39, the Sheriff twice denied ACLU's request for a fee waiver, citing the expense to the agency and ACLU's perceived ability to pay, E.150-51, 164.

The ACLU filed suit in the Circuit Court for Baltimore City, E.20, alleging that the Sheriff improperly denied the ACLU's fee waiver request. The Circuit Court denied the Sheriff's motion to dismiss, E.3, and the parties engaged in discovery. At the close of discovery, the ACLU and the Sheriff both moved for summary judgment. E.48, 266. Following oral argument, the Circuit Court granted summary judgment in favor of the ACLU and reversed the Sheriff's denial of the fee waiver request. E.387-473, 474. This appeal followed.

QUESTIONS PRESENTED

1. Whether the Circuit Court correctly concluded that the Sheriff acted arbitrarily and capriciously in denying the ACLU's request for a public interest fee waiver, where the Sheriff considered only the expense to the agency and the ACLU's perceived ability to pay.

2. Whether remand to the Sheriff for a third opportunity to consider the ACLU's request for a fee waiver would prejudice the ACLU given the lapse of time and the Sherriff's prior failures to give any meaningful consideration to the public interest factors.

STATEMENT OF THE FACTS

A. Factual Background

The ACLU of Maryland is a non-profit organization dedicated to protecting the civil rights and civil liberties of Marylanders. E.81-82, 84. In furtherance of its mission, the ACLU focuses on several key areas, including police practices and government transparency. E.84. The ACLU's work often involves public records

requests pursuant to the MPIA and its federal counterpart, the Freedom of Information Act ("FOIA"). E.88-123. Using documents obtained through public records requests, the ACLU authors reports on issues important to Marylanders and disseminates information on its website. E.88-106. The ACLU has also used public records requests to uncover and report on abuses of power within government agencies. E.91-94. Given the public interest nature of its work, the ACLU routinely asks that government agencies waive the fees associated with their MPIA requests. E.114-18. The agencies—including law enforcement agencies—typically grant the ACLU's requests for public interest fee waivers. *Id*.

At the heart of this case is an MPIA request that the ACLU issued to the Calvert County Sheriff's Office on July 22, 2021. E.28-29. In it, the ACLU requested records relating to the Sheriff's use of body searches, strip searches, and manual body cavity searches from 2017 to present. *Id*. The ACLU also requested a public interest fee waiver, explaining that:

> The fee waiver would be in the public interest as: (1) the information sought would significantly contribute to the public understanding of the sheriff's office [*sic*] operations and activities; (2) there is a strong public interest in having the requested information available as there is a genuine public concern regarding policing; and (3) the waiver would primarily benefit the public[.]

E.28.

On a September 9, 2021 phone call with the ACLU, Assistant Sheriff Lt. Colonel Dave McDowell confirmed that Calvert County Sheriff's Office policy permitted officers to perform strip and body cavity searches. E.138, 140. McDowell

stated that such searches were not "typically" performed, and that "we don't do cavity searches on the street or anything like that." E.138, 133. When strip and body cavity searches were performed, however, McDowell stated that "they are conducted by our deputies assigned to the Calvert County Detention Center within the facility." E.138.

Internally, the ACLU was skeptical of the Sheriff Office's insistence that strip and body cavity searches were rare, and suspected that the Sheriff was "really reluctant to actually produce any documents." E.132-34. The ACLU had received complaints about such searches and believed that an internal affairs investigation had documented one as well. *Id.*; *see also* E.132, 155. "[W]e know they're doing it, but they're just saying they take them to the jail or the hospital, so we can't know the scale." E.132. Despite its suspicions, the ACLU attempted to work with the Sheriff's Office and, with respect to strip and body cavity searches performed at the Calvert County Detention Center, agreed to narrow its request: "As we discussed by phone, it makes sense to limit these records to the pre-trial population at the facility." E.137.

Before formally responding to the ACLU's request, the Sheriff conducted two analyses aimed at assessing the fee he wished to charge for the search and production of responsive documents. E.142, 144. To do so, the Sheriff estimated the number of hours needed to review and produce documents, multiplied that figure by the applicable staff members' hourly pay, and arrived at a fee of $12,271.50. *Id.*, E.31. The analyses revealed that the Sheriff's Office did not

formally keep track of the instances in which officers performed strip and body cavity searches, necessitating manual review of records that may contain evidence of such searches within the relevant timeframe. E.142, 144. As a result, the fee was driven largely by the estimated staff time. The record contains no evidence that the Sheriff conducted an analysis of any aspect of the ACLU's request *other* than of the fee it wished to charge.

The Sheriff, through Lt. Colonel McDowell, formally responded to the MPIA request in a letter dated November 8, 2021. E.30-31. In it, McDowell noted that he had "asked that if you seek records of some specific incident to please specify the incident," and that the ACLU "declined." *Id.* (Of course, based on the clear language of the MPIA request, the ACLU did *not* simply seek records related to one specific incident. E.28.) McDowell then stated that the Sheriff's Office had identified approximately 240 cases where records responsive to the MPIA request may exist, and that the Calvert County Detention Center "likely possesses video and/or audio recordings of strip searches performed." E.31. He then revealed that the Patrol Bureau had one "known report" of a strip search that resulted in the recovery of illicit drugs from a body cavity. *Id.* The relevant case report, attached to the November 8 letter, detailed a February 2021 incident where a police officer performed a strip search in the bathroom of the Calvert County Sheriff's Office. E.32-33. Though McDowell did not acknowledge it in the letter, this incident contradicted his earlier assertion that all strip and body cavity searches were

performed by "deputies assigned to the Calvert County Detention Center within the facility." E.138.

As for additional potentially responsive records, McDowell informed the ACLU that the Sheriff would "not begin the search and review of these records until receipt of" a $12,271.50 fee. E.31. He denied the request for a fee waiver in a single, conclusory line: "Because your organization has the ability to pay and there is no apparent public interest served by your request, your request for a waiver of fees is denied." *Id*. McDowell then invited the ACLU to seek judicial review of the Sheriff's decision if it was dissatisfied. *Id*.

Rather than immediately seek judicial review, however, the ACLU responded to the Sheriff's fee waiver denial with a request for reconsideration. E.34. In a December 21, 2021 letter, the ACLU expanded upon the public interest nature of its request. It first explained that:

> The ACLU relies on MPIA requests to gather information necessary for it to defend the civil rights and liberties of all Marylanders, to promote public accountability, to uncover and address unlawful practices by government agencies, and to educate the public about Maryland programs and policies. In keeping with this mission, the records identified in the July 22 request would contribute to public understanding of the activities of Maryland's law enforcement agencies by revealing the circumstances surrounding the use of the types of searches that are the subject of our request.

E.36. Second, the ACLU asserted that "the public has an interest in reviewing the performance of the government actors who serve their communities," an interest that is "particularly acute when it comes to records of police interactions with

members of the public, including the records of the use of police searches identified in the July 22 request." E.36-37. Third, the ACLU pointed out that "the request for records goes directly to an issue of substantial public controversy: the use of searches by police officers, particularly the types of searches of individuals that are the subject of our request." E.37. The ACLU cited to the recent passage of the Maryland Police Accountability Act of 2021—a package of statewide police reform legislation that included a provision expanding public access to police use-of-force reports, known as Anton's Law—as evidence that "[t]he General Assembly recently acknowledged the overwhelming public interest served by disclosure of police records[.]" E.37.

The ACLU argued that, due to these public interest considerations, its MPIA request was precisely the type of request that government agencies are encouraged to fulfill without charging a fee. E.34-38. The ACLU's letter directed the Sheriff to the Attorney General's Maryland Public Information Act Manual, and also to several decisions of this Court holding that an agency acts arbitrarily and capriciously when it denies a fee waiver request without considering the relevant public interest factors. *Id*. The ACLU pointed out that the Sheriff engaged in insufficient process by denying the fee waiver request based solely on the expense to the agency and the ACLU's perceived ability to pay. E.37. Finally, while maintaining its claim to a full waiver of fees, the ACLU alternatively argued that it was entitled to a partial waiver due to its status as a member of the news media. E.38.

Two weeks later, the Sheriff (again through Lt. Colonel McDowell) responded with a three sentence letter. E.39. As to the request for reconsideration, the Sheriff's position remained the same: "Given the Sheriff's Office resources needed to satisfy the request, your request for a waiver of fees is denied." *Id.*

B. Procedural Background

On March 2, 2022, the ACLU filed suit against the Sheriff of Calvert County, alleging one count of Improper Denial of Waiver of Fees. E.20-42. In its Prayer for Relief, the ACLU asked the Court to:

> (1) Enter judgment in favor of Plaintiff ACLU declaring that Defendants [2] have violated the MPIA;
> (2) Order Defendants to waive all fees associated with the July 22 request;
> (3) Order Defendants to produce all documents associated with the July 22 request; and
> (4) Award Plaintiff ACLU its costs, including attorneys' fees, it has incurred in maintaining this action, as authorized by Md. Code, G.P. § 4-362(f).

E.26-27. The Sheriff filed a motion to dismiss, which the Circuit Court denied. E.3. Thereafter, the parties engaged in discovery. One of the ACLU's discovery requests to the Sheriff was for "[a]ll documents related to Plaintiff's request for a fee waiver, including all documents reviewed, referred to, or relied upon in connection with Plaintiff's fee waiver request." E.250. The Sheriff agreed to produce "[a]ll existing

[2] The ACLU initially sued two entities: The Office of the Sheriff of Calvert County, MD; and Mike Evans, Sheriff of Calvert County, MD. E.20. The Circuit Court dismissed the suit as to the Office of the Sheriff of Calvert County, MD on the same day it granted summary judgment against the Sheriff. E.4.

non-privileged responsive documents." *Id*. The Sheriff produced just twelve pages in response to all of the ACLU's discovery requests, E.71, including the aforementioned cost analyses, E.142, 144. The Sheriff identified and produced no documents pertaining to any analysis of the public interest factors. E.71-72, 410.

After the close of discovery, the ACLU moved for summary judgment. E.48-265. The ACLU argued that the Sheriff acted arbitrarily and capriciously in denying the request for a fee waiver because he did not consider any factors other than the expense to the agency and the ACLU's perceived ability to pay the fee. E.70-72. The ACLU explained that its MPIA request was plainly in the public interest under the standards set by the Attorney General and relevant caselaw, and provided evidence to that effect. E. 64-70.[3] In addition, the ACLU suggested that the Sheriff's attempt to charge the ACLU a fee for public records was a perversion of the intent behind MPIA's fee provision, as "the legislative history of the MPIA's fee provision suggests that the General Assembly never intended discretionary fees to apply to a requester like the ACLU." E.69.

The Sheriff cross-moved for summary judgment. E.266-334. He argued that the denial of the fee waiver was not arbitrary and capricious because "the relevant public interest factors were brought to the Sheriff's attention and *by implication*

[3] The ACLU also preserved the argument that denials of MPIA fee waivers should be reviewed *de novo*, as they are in the FOIA context, rather than under an arbitrary and capricious standard. E.54. The ACLU maintains this view but acknowledges that this Court is bound by *Baltimore Police Dep't v. Open Justice Baltimore*, 485 Md. at 659–60, in which the Supreme Court of Maryland rejected the respondent's arguments on this issue.

he rejected [them]" in denying the fee waiver request. E.274 (emphasis added). The Sheriff also argued that a fee waiver is never in the public interest when the MPIA request is "extremely broad" and the requester "withhold[s] information." E.275. The Sheriff incorrectly asserted that the ACLU refused to work with his office or narrow its request, and argued that the ACLU left the Sheriff with "no choice" but to deny the fee waiver request because the ACLU declined to narrow its MPIA request to the Sheriff's chosen specifications. E.277. Moreover, the Sheriff contended, "since there was no known recent complaints or news media coverage about strip searches by law enforcement, the Sheriff acted within his discretion under the MPIA and was not arbitrary and capricious in concluding that there was no apparent interest served by the request." E.277. Finally, the Sheriff asked the Circuit Court to rule in his favor because to do otherwise would "open floodgates for broad, open-ended records requests" that agencies would have to "subsidize." E.282.

The Circuit Court held oral argument on April 14, 2023. E.387-473. The Court rejected out of hand the Sheriff's contention that the MPIA request was too broad to qualify for a public interest fee waiver:

> The problem I think with your argument is it wasn't an over-broad request. . . . I'm not buying your argument, because I think it was a fairly narrow search to begin with, and then you're saying well, they wouldn't narrow it further. It's almost like penalizing them for being reasonable from the get-go.
>
> [. . .]

> [T]hey came in with a pretty narrow request, in my opinion. You guys asked them to narrow it, and they said no, and they had good reasons to say no, and I just -- I don't think that then *ipso facto* you can deny their fee request.

E.433-34, 440. The Circuit Court also stated that the public interest nature of the ACLU's MPIA request was "patently obvious." E.419-20; *see also* E.442, 445. While the Circuit Court appeared sympathetic to the Sheriff's assertion that responding to MPIA requests is burdensome for government agencies, the Court noted that under the law, agencies "can't only consider cost." E.441-42. The Court "agree[d]" that the Sheriff was required "to come up with a reason other than money," E.412, and found that "the only written documentary evidence of what [the Sheriff] considered is how much it was going to cost," E.410. Near the end of the hearing, the Court asked the Sheriff the central question: "[W]here is there any indication you guys considered the public interest?" E.466. The Sheriff's answer was nonresponsive. E.466-67.

The Circuit Court granted summary judgment in the ACLU's favor, finding the Sheriff's denial of the fee waiver was arbitrary and capricious and that the case was controlled by *The Mayor and City Council of Baltimore v. Burke*, 67 Md. App. 147 (1985), *Action Committee for Transit, Inc. v. Town of Chevy Chase*, 229 Md. App. 540 (2016), and *Baltimore Action Legal Team v. Off. of State's Att'y of Baltimore City*, 253 Md. App. 360 (2021). E.471. The Circuit Court ordered the reversal of the Sheriff's denial of the public interest fee waiver. E.474. This appeal followed.

C. *Baltimore Police Department v. Open Justice Baltimore*

Following the Circuit Court's ruling in this case, the Supreme Court of Maryland decided *Baltimore Police Dep't v. Open Justice Baltimore*, 485 Md. 605 (2023). *Open Justice* was the first case in which Maryland's highest court addressed the limits of a record custodian's discretion under the MPIA to grant or deny requests for public interest fee waivers. *Id.* at 656. The Supreme Court's decision amounted to a near-total embrace of the analytical framework established by prior decisions of this Court, diverging only with respect to remedy.

In *Open Justice*, the requester, the nonprofit organization Open Justice Baltimore ("OJB"), issued several MPIA requests to the Baltimore Police Department ("BPD") seeking, *inter alia*, records related to citizen and administrative complaints against BPD and records related to internal investigations of officers' use of force against civilians. 485 Md. at 628-29. BPD informed OJB that, due to the breadth of its requests, the fee for search and production of responsive documents would be nearly $250,000. *Id.* at 637. BPD twice asked whether OJB would consider narrowing its requests to lessen the cost. *See Open Justice Baltimore v. Baltimore City Police Dep't*, No. 122, Sept. Term 2021, 2022 WL 354486, at *4 (Md. Ct. Spec. App. Feb. 7, 2022) (unreported) ("*Open Justice I*"). BPD also asked whether OJB would accept summaries of use-of-force files in lieu of the entire files, which could each be hundreds of pages long. *Id.* at *3. OJB refused to narrow its requests. *Id.*

OJB requested a public interest fee waiver, which BPD denied. *Open Justice*, 485 Md. at 635-39. BPD explained its denial as follows:

> 6. I reached this decision, in part, because OJB did not provide sufficient information to establish its need for a fee waiver. OJB's articulated public interest purpose for the records was extremely general and vague. The reasons OJB provided for its request did not explain its public interest purpose or how disclosure would achieve its purpose.
>
> 7. Additionally, I determined that the materials sought would not likely "contribute significantly to public understanding of the operations and activities of the [BPD]" and therefore the request was not in the public interest so as to justify a fee waiver.
>
> * * *
>
> The documents sought would likely be heavily redacted and thus not understandable to the public.
>
> 9. Much thought was given to OJB's request, but it was determined that OJB's fee waiver request did not meet the public interest standard or factors. In reaching this conclusion, BPD did consider the overall cost of production, budgetary constraints, and manpower shortages in the Public Integrity Bureau, but these considerations did not drive the decision.
>
> 10. BPD did not willfully, knowingly, or deliberately ignore the Plaintiff's fee waiver request. Rather, BPD thoughtfully and carefully considered all of the available information and legal guidance and, based on the information provided, concluded that a fee waiver would not be appropriate for OJB's requests.

Open Justice I, 2022 WL 354486, at *8 (Md. App. 2022) (unreported).

OJB sued in the Circuit Court for Baltimore City, and the Circuit Court granted summary judgment in favor of BPD. *Open Justice*, 485 Md. at 642. This Court reversed, finding that BPD acted arbitrarily and capriciously in denying the request for a fee waiver. *Id*. at 643. Thereafter, the Supreme Court of Maryland granted certiorari. *Id*.

The Supreme Court agreed with this Court that BPD acted arbitrarily and capriciously in denying OJB's request for a public interest fee waiver, and affirmed on that basis. *Open Justice*, 485 Md. at 671. In its briefs, BPD had asserted four "rationales" for denying the fee waiver:

> (1) the asserted public interest purpose was too vague and general; (2) the records were unlikely to contribute significantly to public understanding of government operations because they would be either redundant or unclear; (3) OJB either did not prove its inability to pay or BPD determined OJB could afford to pay; and (4) the cost and burden of the request.

Id. at 663. The Supreme Court rejected rationales (1) and (2) because they were unsupported by the evidence. *Id*. at 663-65. It rejected rationale (3) because "[t]he MPIA imposes no affirmative burden on requestors to demonstrate their inability to pay unless they are indigent and submit an affidavit of indigency," and because BPD's conclusion that OJB could afford the fee was itself arbitrary and capricious. *Id*. at 666-67. With respect to rationale (4), the Court found as follows:

> It was appropriate for BPD to consider the monetary cost of compliance and the burden on its personnel to fulfill OJB's request as factors in the public interest determination. However, given BPD's erroneous application of the other factors upon which it relied – and

> its failure to consider other relevant factors, as discussed below – BPD's consideration of the cost of production and personnel shortages does not render its determination to deny the fee waiver reasonable.

Id. at 667-68 (citing *Burke*, 67 Md. App. at 157). Finally, the Supreme Court found that BPD was required to consider how production of the requested records would benefit the public, and it failed to do so. *Id.* at 668-69.

In determining an appropriate remedy, the Supreme Court remanded to BPD for "for reconsideration of the public interest determination." *Open Justice*, 485 Md. at 672. The Supreme Court declined to order BPD to waive the fee, as OJB had requested, because there was no indication of "bad faith on the part of an agency decision maker or prejudice to OJB." *Id.* at 671-72. In this case, by contrast, the record reflects that the Sheriff has acted in bad faith, and that further delay will prejudice the ACLU.

STANDARD OF REVIEW

A custodian's denial of an MPIA fee waiver request is reviewed under an arbitrary and capricious standard. *Open Justice*, 485 Md. at 644. The Court reviews the Circuit Court's grant of summary judgment *de novo*. *Chevy Chase*, 229 Md. App. at 558. The Court also reviews the Circuit Court's choice of remedy *de novo*. *Open Justice*, 485 Md. at 644.

ARGUMENT

A. The Circuit Court correctly determined that the Sheriff's denial of the ACLU's request for a fee waiver was arbitrary and capricious.

1. The MPIA requires record custodians to consider the relevant public interest factors.

The MPIA provides that members of the public have a "[g]eneral right to information" "about the affairs of government and the official acts of public officials and employees." Md. Code Ann., Gen. Provis. § 4-103(a). "Consistent with this broad remedial purpose, the General Assembly requires that we construe the MPIA 'in favor of allowing inspection of a public record, with the least cost and least delay to the person or governmental unit that requests the inspection.'" *Open Justice*, 485 Md. at 621 (quoting Md. Code Ann., Gen. Provis. § 4-103(b)).

The MPIA allows official document custodians to charge "a reasonable fee" for disclosing public records. Md. Code Ann., Gen. Provis. § 4-206(b)(1). The MPIA also provides, however, that the custodian should waive this fee when, "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." *Id.* § 4-206(e)(2)(ii). The custodian's decision to grant or deny a fee waiver is discretionary, but their discretion "is not boundless." *Open Justice,* 485 Md. at 620. Custodians are empowered to decide, on a case-by-case basis, what some of the "other relevant factors" to the public interest determination are. *Id.* at 650-51. "However, in every case where a custodian is considering a public interest waiver under subsection (e)(2)(ii), the custodian *must* at least consider whether

there would be any public benefit to disclosure of the requested records." *Id*. at 651 (emphasis added).

Custodians are not without guidance in determining which factors are relevant to the public interest determination. The Maryland Attorney General publishes the Maryland Public Information Act Manual ("*MPIA Manual*")[4] to provide custodians with guidance about how to interpret the MPIA's provisions, including the treatment of fee waiver requests. The Attorney General advises custodians to waive fees "when a requester seeks information for a public purpose, rather than a narrow personal or commercial interest, because the public purpose might justify the expenditure of public funds to comply with the request." *MPIA Manual* at 7-5(D). A request is in the public interest where, for example, disclosure of the documents will "shed light on 'a public controversy about official actions,' or on 'an agency's performance of its public duties.'" *Id*. at 7-7 (quoting *Action Comm. for Transit v. Town of Chevy Chase*, 229 Md. App. 540, 557 (2016)).

The Attorney General also advises custodians to consult the "helpful" case law interpreting FOIA's fee waiver provision. *MPIA Manual* at 7-7, 7-8; *see also Open Justice*, 485 Md. at 653 n.25 ("[T]he Maryland Attorney General's Public Information Act Manual provides commentary and citations to federal Freedom of

[4] Maryland Public Information Act Manual, 18th Ed. (October 2023), available at https://www.marylandattorneygeneral.gov/Pages/OpenGov/piamanual.aspx. The version of the Manual in effect at the time the Sheriff rendered his decision in this case was substantively similar to the current one in relevant respects. The current version has been updated to include the Supreme Court of Maryland's decision in *Baltimore Police Dep't v. Open Justice Baltimore*, 485 Md. 605 (2023).

Information Act ("FOIA") cases concerning factors that may be relevant to the determination of whether a fee waiver would be in the public interest."). Under FOIA, a waiver must be granted where disclosure will: "(1) shed light on the operations or activities of the government; (2) be likely to contribute significantly to public understanding of those operations or activities; and (3) not be primarily in the commercial interest of the requester." *Cause of Action v. F.T.C.*, 799 F.3d 1108, 1115 (D.C. Cir. 2015) (citing 5 U.S.C. § 552(a)(4)(A)(iii)) (internal quotation marks omitted).

In making the public interest determination, a custodian may consider, as relevant factors, "the cost to the agency and the burden on the agency's personnel to comply with the request." *Open Justice*, 485 Md. at 653. The custodian may not, however, consider *only* those factors. *Burke*, 67 Md. App. at 157 (denial of fee waiver request was arbitrary and capricious because the custodian "considered no more than the expense to the City of locating and duplicating the documents" and "the perceived ability of the [requester] . . . to pay the City's projected fee"); *see also Open Justice*, 485 Md. at 653 ("We agree with *Burke*'s holding."). In other words, a custodian's deliberative process is deficient if he or she considers only the expense to the agency and the requester's ability to pay. *Id.*

2. The record establishes that the Sheriff considered only the expense to his office and the ACLU's perceived ability to pay a fee.

The record in this case reveals, and the Circuit Court found, that the Sheriff denied the ACLU's request for a fee waiver based solely on the costs associated with

the search for and production of responsive records, and on his assumptions about the ACLU's ability to pay the assessed fee. His decision was thus arbitrary and capricious. The Sheriff explained his first denial to the ACLU as follows: "Because [the ACLU] has the ability to pay and there is no apparent public interest served by your request, your request for a waiver of fees is denied." E.150-51. In response to the ACLU's request for reconsideration, which included an expanded explanation of the public interest served by its request, the Sheriff responded only that "[g]iven the Sheriff's Office resources needed to satisfy the request, your request for a waiver of fees is denied." E.39.

The Sheriff's "failure to explain the reasons for its decisions" in its letter to the ACLU was "not necessarily fatal because the factual record [could have been] further developed in the circuit court." *See Chevy Chase*, 229 Md. App. at 563. But further factual development during the court proceedings here only confirmed that the Sheriff's letters accurately reflected a deficient deliberative process. In response to a discovery request seeking "[a]ll documents related to [the ACLU's] request for a fee waiver," the Sheriff produced very little, and produced no evidence that he considered any public interest factor at all. E.71, 250, 410. He did, however, produce two detailed analyses of the cost associated with fulfilling the ACLU's MPIA request. E.142, 144.[5] Tellingly, when asked point-blank by the Circuit Court

[5] The fee waiver came up only once in the Sheriff's emails, when on January 26, 2022, Lt. Colonel McDowell belatedly asked another Calvert County police officer whether they had addressed the ACLU's request for reconsideration of the fee

to provide "*any indication* [that] you guys considered the public interest," the Sheriff was unable to do so. E.466-67 (emphasis added).

"[A] court must necessarily consider the actual decision-making process by the custodian in order to decide whether the custodian gave appropriate consideration to 'other relevant factors.'" *Chevy Chase*, 229 Md. App. at 563. "This necessarily calls for [the] custodian to identify what relevant factors he or she considered." *Id.* The Sheriff argues *now* that he denied the ACLU's request for a fee waiver for a third reason: "the mismatch between the breadth of the request" and "the lack of any indication that strip searches and body cavity searches are a problem in Calvert County." Brief of Appellant at 14. There is no evidence that this "mismatch" was a factor the Sheriff considered, at the time, as part of the public interest determination. Notwithstanding the Sheriff's belated attempt at revisionist history, his "actual decision-making process" failed to include consideration of anything other than the expense to his office and the ACLU's perceived ability to pay a fee, rendering his denial of the fee waiver arbitrary and capricious. *Burke*, 67 Md. App. at 157. The Circuit Court's findings in this regard should be affirmed.

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waiver denial. The response, in full, was: "Yes. You told me to send them a letter denying the Fee Waiver. You signed it and I put it in the mail on January 6th." E.262. That McDowell apparently had no memory of his second fee waiver denial is telling.

3. The ACLU's request was not too broad, nor was the ACLU required to prove misconduct by Calvert County police officers.

The Court is not required to credit rationales for the denial of a fee waiver request that are belied by the evidence. *See Open Justice*, 485 Md. at 663 (rejecting BPD's rationale that it denied the fee waiver request because the public interest purpose was "too vague and general" where the purpose was, in fact, "plainly apparent"). Accordingly, the Court should reject the Sheriff's contention that he was permitted to deny the fee waiver request because the ACLU's MPIA request was overbroad, and because of the Sheriff's biased contention "that strip searches and body cavity searches are [not] a problem in Calvert County." Brief of Appellant at 14.

First, the Sheriff's insistence that the ACLU's MPIA request was too broad does not make it so. Rather, as the Circuit Court found, the request is limited—both in subject matter (specific types of invasive searches) and in temporal scope (from 2017 through the present). E.434, 28-29. The ACLU's targeted request was issued in response to complaints from community members and aimed at gathering information about Calvert County police officers' use of invasive search techniques. E.155. Even still, the ACLU was open to reasonable adjustments to the scope of the request and, following conversations with the Sheriff, agreed to narrow it. E.137. It is true that the Sheriff asked the ACLU to whittle its request down to a "specific incident." E.30. But the ACLU declined that request for principled reasons related to the strict confidentiality it owes those who seek its assistance with their

complaints, whose identities might be revealed if the request was narrowed in the way demanded by the Sheriff. E.155. That certainly does not make its request too broad. To the contrary, the Circuit Court found, "it was a fairly narrow search to begin with[.]" E.434. And, importantly, the point of the request was not to seek evidence concerning a specific incident but rather to examine the broader use of invasive search techniques by the Calvert County Sheriff's Office.

Second, the ACLU was not required to *prove* that Calvert County police officers had engaged in misconduct in order to show a public interest. *Cf. Physician's Comm. For Responsible Med. v. Dep't of Health & Human Servs.*, 480 F. Supp. 2d 119, 123 n.5 (D.D.C. 2007) (in the FOIA context, "a requester is not required to provide evidence of the government failure it alleges in order to prevail on a fee waiver request"). The ACLU issued its request after receiving complaints about the use of invasive search techniques in Calvert County. E.155. The ACLU received these complaints in the context of a statewide public controversy about police misconduct in general and the inappropriate use of force in particular. E.169-93. It is "plainly apparent" that records relating to Calvert County police officers' use of strip and body cavity searches will "contain insight into the activities of . . . police officers and would indicate whether a certain officer's actions were proper." *See Open Justice*, 485 Md. at 664 (quoting *Baltimore Action Legal Team*, 263 Md. App. at 399).

The Sheriff insists that, from its perspective, there is no "indication that strip and body cavity searches are a problem in Calvert County." Brief of Appellant at

14. For this reason alone, the Sheriff suggests, the ACLU's request has no public interest value. But the Sheriff's purported certainty that there is no "problem" in Calvert County is curious given the record in this case. The Sheriff's own cost analyses reveal that his office does not, in fact, keep track of instances in which police officers employ these types of invasive search techniques. E.142, 144. And the one responsive record that the Sheriff produced involved a strip search conducted in a manner inconsistent with the assurances Lt. Colonel McDowell previously provided to the ACLU. E.152-53, E.138-39. This search occurred just five months prior to the ACLU's issuance of its MPIA request. E.152.[6] Regardless of whether or not there is a "problem" in Calvert County, however, the ACLU was not required to first *prove* that there is in order to qualify for a public interest fee waiver. *Cf. Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310, 1313-14 (D.C. Cir. 2003) ("Contrary to the implications of the government's argument, the American

[6] In its motion for summary judgment in the Circuit Court, the ACLU pointed out that the Sheriff and several of his officers were defending a lawsuit in the U.S. District Court for the District of Maryland alleging, *inter alia*, the unlawful use of a strip search. E.65-66 (citing *Collington v. Calvert County*, Case No. 8:20-cv-00966-GJH (D. Md., filed April 14, 2020)). The Sheriff suggests in his opening brief that the federal district court's subsequent dismissal of the strip search claims exculpates his office from any wrongdoing related to that incident. *See* Brief of Appellant at 19. But that simply is not so. The federal district court dismissed the strip search claims because, by the time the plaintiff sought to substitute "John Doe Defendants" with the identified officers, the three-year statute of limitations had expired, and the amended complaint did not relate back to the original filings. *Collington v. Calvert County*, No. GJH-20-00966, 2023 WL 1415626, at *5 (D. Md. Jan. 31, 2023). The district court expressed no opinion as to the merits of the underlying allegations.

people have as much interest in knowing that key IRS decisions are free from the taint of conflict of interest as they have in discovering that they are not.").

The Circuit Court correctly rejected fee waiver denial rationales from the Sheriff that were plainly unsupportable. This Court should do the same and affirm the judgment below.

4. The Sheriff was required to "at least consider whether there would be any public benefit to disclosure of the requested records," and he failed to do so.

The Supreme Court of Maryland recently clarified the bare minimum that an agency must do in weighing whether to grant or deny a public interest fee waiver. "[I]n every case where a custodian is considering a public interest waiver under subsection (e)(2)(ii), the custodian *must at least* consider whether there would be any public benefit to disclosure of the requested records." *Open Justice*, 485 Md. at 651 (emphasis added). The Sheriff failed to meet this basic requirement, rendering his denial of the fee waiver arbitrary and capricious.

As discussed above, the record contains no evidence that the Sheriff considered any factors other than the expense to his office and the ACLU's perceived ability to pay a fee. *See supra* part II.A.2. At the time he denied the ACLU's request for a fee waiver, the Sheriff failed to consider the public benefit that disclosure of the requested records would provide. Even now, the Sheriff fails to acknowledge that the public would benefit from learning more about the ways in which Calvert County police officers use invasive search techniques. This is nonsensical. Strip and body cavity searches are, unquestionably, some of the most

invasive law enforcement practices. *Cf. Bell v. Wolfish*, 441 U.S. 520, 576-77 (1979) ("[B]ody cavity searches . . . represent one of the most grievous offenses against personal dignity and common decency.") (Marshall, J., dissenting). When done needlessly or improperly, invasive search techniques may traumatize those subjected to them. *See, e.g.*, Daphne Ha, *Blanket Policies for Strip Searching Pretrial Detainees: An Interdisciplinary Argument for Reasonableness*, 79 Fordham L. Rev. 2721, 2740 (2011). The indignity of strip or body cavity searches may also be exacerbated if police officers disproportionately employ them against members of a minority group. E.422-25.

The clear public benefit of production of the requested documents is underscored by the context in which the ALCU made its request. The Maryland Police Accountability Act of 2021 included "Anton's Law" and a new, statewide standard for when officers may use force. E.169-77. Anton's Law, which expanded public access to records of police misconduct investigations, indicates a legislative preference for increased public oversight into police activity. *See* Md. Code Ann., Gen. Provis. § 4-311(c)(1); *see also Baltimore Action Legal Team*, 253 Md. App. 360, 265 A.3d at 1201 n.12. The "Maryland Use of Force Statute," which requires that all police uses of force must be "necessary and proportional" to prevent imminent threat of injury or effectuate a legitimate law enforcement objective, evinces that same legislative preference. *See* Md. Code Ann., Pub. Safety § 3-524(d)(1).

Calvert County is not immune from the statewide controversy over police abuses of power. Take, for example, community reaction when Calvert County began setting up its police accountability board, which was another requirement of the Maryland Police Accountability Act of 2021. *See* Md. Code Ann., Pub. Safety § 3-102. After Calvert County commissioners released their proposal for the board, community groups complained that the proposed composition of the board included too many former police officers and pro-police representatives. E.212-15. One community group issued a statement that the police accountability board needed to prioritize transparency and civilian oversight; another decried the "'good ole boy' system" that "runs deep through Calvert" and was reflected in the police accountability board proposal. *Id.*

The Sheriff's efforts to distance the Calvert County Sheriff's Office from the statewide controversy over policing are unavailing. Unsurprisingly, the Circuit Court concluded that it is "patently obvious" that the public would benefit from information about Calvert County police officers' employment of strip and body cavity searches. E.419-20; *see also* E.140 (Sheriff's Office policy permitting use of force during strip and manual body cavity searches); E.421 (the Sheriff was "splitting hairs" by trying to differentiate between invasive searches and general uses of force). Despite the "obvious" nature of the public benefit, however, the Sheriff failed to consider it then and fails to acknowledge it even now. This failure to consider the public benefit, by itself, renders the Sheriff's denial of the public interest fee waiver arbitrary and capricious. *See Open Justice*, 485 Md. at 651, 668.

B. Remand to the Sheriff for reconsideration of the public interest is an inadequate remedy.

The Sheriff acted arbitrarily and capriciously in denying the ACLU's request for a fee waiver, and the ACLU is entitled to relief. In *Open Justice*, the Supreme Court of Maryland found that remand to BPD for reconsideration of the public interest determination was the appropriate remedy because (1) "BPD acted in good faith in the course of considering OJB's MPIA requests"; (2) the Court did not "perceive any prejudice to OJB if we remand to BPD for a proper exercise of its discretion"; and (3) the Court "trust[ed] that, on remand, BPD [would] consider in good faith all relevant factors that go into the public interest determination[.]"485 Md. at 671-72.

Here, however, a remand to the Sheriff for a third opportunity to consider the ACLU's request for a public interest fee waiver would be a woefully inadequate remedy. Given the Sheriff's contentions on appeal, there is little doubt that the ACLU would receive anything more than a third arbitrary and capricious denial. In response to the first request for a fee waiver, the Sheriff refused to consider that the public had an interest in learning more about Calvert County police officers' use of highly invasive search techniques. E.31 ("[T]here is no apparent public interest served by your request[.]"). In response to the request for reconsideration, in which the ACLU directed the Sheriff to the MPIA Manual and to the decisions from this Court outlining the relevant public interest factors, the Sheriff refused to consider those as well. E.39 ("Given the Sheriff's Office resources needed to satisfy the request, your request for a waiver of fees is denied."). *Id.* In this respect, the

Sheriff's deliberative process was even worse than BPD's— in its fee waiver denial, BPD at least recognized the *existence* of the public interest factors that were supposed to guide its decision. *Open Justice I*, 2022 WL 354486, at *8.

Even now, the Sheriff refuses to acknowledge the baseline, "obvious" fact that the public would benefit from increased information about strip and body cavity searches performed by Calvert County police officers. Brief of Appellant at 14.[7] Perhaps, if given a third chance, the Sheriff could craft a written fee waiver denial that tracks the language of *Open Justice* but fails again to adequately consider the public interest inherent in the ACLU's request. In this case it is apparent that the Sheriff has long been aware of his obligations under the MPIA and has thus far chosen not to abide by them. Unlike in *Open Justice*, there is no reason for this Court to "trust" that the Sheriff will finally engage in a good faith consideration of the public benefit factors. *See* 485 Md. at 671-72.

Moreover, remand to the Sheriff for reconsideration of the public interest determination will prejudice the ACLU. The ACLU issued its MPIA request two-and-a-half years ago, and remand would result in yet further delay. Because the Sheriff has refused to waive the fee and produce the requested documents, the ACLU's work on behalf of Marylanders has been stymied. Every day that passes is another day that Calvert County residents are kept in the dark about how police officers in their community employ some of the most invasive police tactics. And,

[7] Notwithstanding the change in leadership at the Calvert County Sheriff's Office, the Sheriff's position appears unchanged, as evidenced by his opening brief.

if remand were to result in a third arbitrary and capricious denial of the public interest fee waiver (as it likely would), this litigation—and the delay—would continue.

The proper remedy here, on this record, is for this Court to affirm the Circuit Court's reversal of the Sheriff's public interest fee waiver denial. E.474. Allowing the reversal to stand will require the Sheriff to produce the requested records free of charge. While BPD may have been entitled to a "second bite at the apple" in *Open Justice*, 485 Md. at 671, the Sheriff here should not be permitted a third.

CONCLUSION

The judgment below should be affirmed in full.

ORAL ARGUMENT REQUEST

Appellee respectfully requests oral argument.

Dated: January 9, 2024

Respectfully submitted,

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CERTIFICATE OF WORD COUNT AND R. 8-112 COMPLIANCE

I hereby certify that the foregoing paper was prepared in 13 point proportionally spaced Georgia font and contains 7,845 words, excluding the items set forth in Rule 8-503, and therefore it complies with the 9100-word limit set forth in Rule 8-503(d)(1). This brief further complies with the requirements stated in Rule 8-112.

/s/ William J. Murphy
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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of January, 2024, I caused two copies of the foregoing Brief for Appellee to be sent by MDEC email and first-class, postage-prepaid mail to:

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