IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

September Term, 2011

No. 01078

TELETA S. DASHIELL,
Appellant

vs.

MARYLAND STATE POLICE DEPARTMENT,
Appellee.

On Appeal from the Circuit Court for Baltimore County, Maryland
(The Honorable Patrick Cavanaugh, Judge)

BRIEF OF APPELLANT TELETA S. DASHIELL

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STATEMENT OF THE CASE

This case concerns a critically important current theme in public interest litigation: the scope of the public's right to information about investigations of misconduct by police officers interacting with the public in the exercise of their official duties, so that police departments can be held accountable to the citizens they serve. The specific question before the Court is whether a person who has filed a complaint of racial misconduct by an on-duty police officer may, pursuant to the Maryland Public Information Act ("MPIA"), secure information about the police department's investigation and response to her substantiated complaint.

In November 2009, Somerset County resident Teleta S. Dashiell checked her voicemail messages and discovered a message in which a Maryland State Trooper, who believed Ms. Dashiell might be a witness in a case he was investigating, referred to her as "some God dang nigger." (E. 6). She filed a complaint with the Maryland State Police ("MSP"), cooperated in the agency's investigation, and several months later received a letter stating that her complaint had been sustained and appropriate action taken. (E. 6). Ms. Dashiell then submitted an MPIA request seeking to inspect all documents pertaining to her complaint, its investigation, and handling by the MSP. MSP denied her request, claiming that several different exemptions to the MPIA precluded disclosure of any of the requested documents. (E. 6). Ms. Dashiell then filed suit in the Circuit Court for Baltimore County seeking vindication of her rights under the MPIA.

This appeal arises from an order granting summary judgment to MSP on the agency's claim that all documents related to Ms. Dashiell's citizen complaint must be withheld pursuant to the MPIA's "personnel records" exemption.

QUESTIONS PRESENTED

1. Did the trial court err when it granted summary judgment in favor of the MSP's refusal to disclose any documents responsive to an MPIA request seeking information pertaining to the MSP's investigation and handling of a citizen complaint of race discrimination by trooper who was on-duty and engaged in his public service?

2. Did the trial court err in failing to order the production of those portions of the documents that are reasonably severable, even if portions of the documents were properly withheld?

3. Did the trial court err when it failed to require a detailed index of the withheld documents, conduct an *in camera* review, or allow discovery regarding the existence or contents of the withheld documents?

STATUTES

The citation and verbatim text of all pertinent portions of all relevant statutes appear in the appendix to this brief.

STATEMENT OF FACTS

On November 3, 2009, Maryland State Police Sergeant John Maiello telephoned Ms. Dashiell, a potential witness in a case he was investigating; Maiello left a message identifying himself and asking her to call him back. (E. 6). He then continued speaking, apparently continuing a conversation with another MSP trooper, and disparaged Ms. Dashiell as "some God dang nigger." (E. 6). His statements were recorded as a message in Ms. Dashiell's voicemail:

> *"Why, that's what I think about it, and I need to hear shit like that … That's when I say to myself, 'Oh my God' … I'm listening to some God dang nigger's voicemail play for 20 minutes."* (E. 6).

After she heard the voicemail that night, Ms. Dashiell was uncertain how to proceed. She contacted MSP's Princess Anne barracks, inquiring about the complaint process. (E. 6). Lieutenant Krah Plunkert, the barracks commander, directed Ms. Dashiell to come to the barracks and give a statement. (E. 6). Although intimidated at the prospect, Ms. Dashiell did as she was directed.

Nearly four months later, Ms. Dashiell received a letter from MSP Captain Kristina Nelson stating that her complaint had been assigned to Detective Sergeant Kristi Meakin of the MSP Internal Affairs Section for investigation, and that Meakin's investigation had confirmed Ms. Dashiell's allegations. (E. 6 – E. 7; E. 244). Nelson's letter also stated that she had "reviewed Detective Sergeant Meakin's investigative file

and concur[red] with her sustained findings. As a result of these findings the appropriate disciplinary action was taken against Sergeant Maiello and documented in his personnel file." (E. 7; E. 244). No additional information was provided in the letter regarding how the investigation had been conducted, or reforms resulting from the incident. Captain Nelson invited Ms. Dashiell to contact the MSP with any questions or concerns if she needed "further explanation." (E. 7; E. 244).

Ms. Dashiell did want more information, but, in light of her experience with Sgt. Maiello, she had little confidence that she could trust what MSP had told her. She felt it was necessary to review all documents pertaining to the investigation so that she could form her own opinion about the MSP's investigation of and response to her complaint. (E. 7). Ms. Dashiell submitted an MPIA request to MSP seeking documents relating to her complaint and the agency's handling of the complaint. (E. 7; E. 245 – E. 247). Specifically, she sought any documents including, but not limited to, those created or obtained during the investigation, incident reports, witness statements, charging documents, complaint control card, results of the internal investigation, and results of the review of findings of the internal investigation. (E. 7; E. 245 – E. 247). Additionally, Ms. Dashiell requested any reasonably severable portion of the records, if the custodian claimed that any were exempt under the MPIA. (E. 247).

The MSP rejected Ms. Dashiell's request in its entirety. (E. 8; E. 49 – E. 52). In its response, MSP contended that every record sought by Ms. Dashiell was exempt from disclosure, because (1) the Law Enforcement Officers' Bill of Rights ("LEOBR") prohibited their disclosure, (2) the records were personnel records, (3) records were intra-agency memoranda, and their release was contrary to the public interest, and (4) the records were investigatory records and disclosure was contrary to the public interest. (E. 49).

Ms. Dashiell disputed the MSP's contentions, asserting instead that records created pursuant to her complaint are investigatory records whose disclosure directly benefits the public interest, and arguing that any actual exempt records are severable from those that are not exempt. (E. 8 – E. 9; E. 249 – E. 250). She further requested an index

of the records as to which MSP was denying her inspection. (E. 249). MSP responded by again refusing to produce the records, and refusing even to compile an index of the records being withheld. (E. 234 – E. 235). Given no other option, Ms. Dashiell filed a complaint in the Circuit Court for Baltimore County contending that MSP was wrongly withholding public records. (E. 3 – E. 11).

Before discovery opened, MSP filed a Motion to Dismiss or in the Alternative a Motion for Summary Judgment. (E. 15 – E. 40). After briefing and upon hearing oral argument -- but without requiring the MSP to create an index of the withheld documents and without reviewing any of the documents *in camera* -- the Court ruled from the bench, granting summary judgment to MSP on the grounds that the entirety of records sought by Ms. Dashiell were contained in Sgt. Maiello's personnel file, and thus qualified as personnel records exempt from disclosure under the MPIA. (E. 438 – E. 439). The trial court made no findings regarding severability and did not address any of the alternate justifications offered by MSP. (E. 437 – E. 440). Ms. Dashiell filed this appeal. (E. 441).

To date, Ms. Dashiell does not know which of the documents she requested actually exist, and she has not received a single document relating to her own complaint, not even a copy of her own statement.

SUMMARY OF ARGUMENT

At issue in this case is the age-old question, "*quis custodiet ipsos custodes?"* - who shall guard the guardians? The specific issue before the court is the public's right to information about how our police departments police themselves when dealing with citizen complaints of discriminatory practices. This case falls against the backdrop of twenty years of litigation addressing longstanding and persistent violations of civil rights by the MSP, including racial profiling of African-American motorists and spying on political activists, as well as the agency's efforts to shield itself from public scrutiny by seeking criminal prosecution of individuals recording MSP officers performing their on-

the-job-duties.[1] The case also follows years of MPIA litigation seeking information from the MSP to determine whether the agency is taking adequate steps to make good on its commitments to remedy its failures, after it was revealed that out of 100 citizen complaints alleging racial profiling, not a single complaint had been sustained.[2]

Yet, even as the litigation challenging MSP secrecy in its handling of racial profiling was winding its way through the courts, Teleta Dashiell, the appellant in this case, became another victim of race discrimination by MSP. In her case, the allegations of misconduct against her have been proven true, the complaint sustained, and the officer reportedly disciplined. Ms. Dashiell herself was the object of the officer's misconduct, but due to MSP's contention that all records pertaining to her complaint and its investigation are exempt from disclosure under the MPIA, Ms. Dashiell knows almost nothing about how the investigation was handled, what, if any reforms resulted, and which documents even exist.

Ms. Dashiell's interest in knowing what became of her complaint is obvious. She is a young African-American woman in a county with a long history of racial violence and oppression, the legacy of which persists today. As such, it was no small thing for her to walk into the Princess Anne barracks and file an official complaint against a white

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[1] These violations, and the resulting litigation, have been widely covered by the press, and generally have an impact the public's view of the police. (E. 338 – E. 370); *See also State of Maryland v. Graber*, No. 12-K-10-647, (Md. Cir. Ct. Hartford Cnty) (slip op Sept. 27, 2010) (E. 352 – E. 370).

[2] This Court decided *Maryland Department of State Police v. Maryland State Conference of NAACP Branches*, sitting *en banc* in 2010. 190 Md. App. 359 (2010), *cert. granted* 451 Md. 38 (2010) ("*NAACP*"). At issue in the case was whether the MPIA required MSP to disclose to the NAACP its internal files regarding citizen complaints of racial profiling, or whether such records were personnel records exempt from disclosure. *Id*. at 361. This Court held that the records were not personnel records, but rather investigatory records, and that it was in the public interest for MSP to disclose them to NAACP in the manner ordered by the trial court. *Id*. at 378. Review is now pending in the Court of Appeals. *Id*.

Maryland State Police Official.[3] MSP asserts it investigated and sustained her complaint, and took "appropriate" action. (E. 244). But MSP has refused to reveal what any of that means, remarkably contending that all seven categories of records sought by Ms. Dashiell, including a copy of her own statement, are properly withheld because every document falls within four mandatory or permissive exclusions to the MPIA. (E. 49 – E. 52). Thus, if MSP's argument stands, no one outside of the agency can ever know the outcome of Ms. Dashiell's complaint, or any other citizen complaint. This level of official secrecy undermines public policy and the public's right to know that official misconduct is properly addressed. "Trust us" is simply not an adequate response to the public's questions, especially when uttered by perpetrators of misconduct to a victim of misconduct.

As is explained below, the great weight of controlling and persuasive authority, as well as logic and common sense, dictate that MSP's arguments must fail. Over 2000 years ago, a Latin poet captured the logical paradox of the MSP's central argument: "Who shall guard the guardians?" The weight of two millennia has answered that the public interest is unequivocally better served when the guardians are not permitted *carte blanche* to guard themselves. MSP carries a great burden when it seeks to prove otherwise.

Rather than the blanket prohibition against disclosure sought by MSP, the MPIA and cases applying it engage in careful analyses of the competing interests when considering claims that records are exempt. The requested records are not, as MSP contends and the trial court erroneously found, personnel records simply because some portion might have been placed, or noted, in a trooper's personnel file. The starting point for analysis of the MPIA's application to the withheld records is that they are

[3] In fact, Ms. Dashiell was so uncomfortable about undertaking this process on her own that she asked Somerset County NAACP Branch President Kirkland J. Hall to accompany her. When the two arrived at the barrack, however, MSP officials refused to permit Mr. Hall to sit in with Ms. Dashiell while she provided her statement, in violation of the MSP policy, which guarantees citizens making complaints the right to be accompanied by a person of their choosing.

investigatory records of a law enforcement agency. To be personnel records, they must enjoy protection against unwarranted intrusion of a reasonable expectation of privacy, something MSP cannot show in this case. Rather, all of the documents that were sought relate to a completed, sustained investigation proving on-duty misconduct arising out of a citizen complaint.

Nor does the Law Enforcement Officers' Bill of Rights ("LEOBR") provide the protection MSP seeks. The LEOBR addresses the rights of law enforcement officers with respect to proceedings inquiring into unproven allegations of misconduct. The LEOBR protects potentially sensitive files from careless or harmful disclosure by officers *during* the investigative process; it does not create a general rule about the confidentiality or status of investigation records once an investigation has been completed.

The MPIA's permissive exemptions for investigatory files and intra-agency memoranda are equally unavailing. MSP simply cannot carry its burden to demonstrate that it is contrary to the public good to provide a citizen complainant like Ms. Dashiell with records arising out of her substantiated claim of police misconduct. Police wield unique power in their authority to initiate criminal investigations, detain, search, and use force. Transparency, through disclosure of records, regarding how a police agency has handled proven cases of misconduct furthers the compelling public interest in police accountability, especially where, as here, there is strong evidence of past or ongoing misconduct.

In addition, MSP's contention that no part of the records sought is severable or subject to production under the MPIA is both inaccurate and improbable. The law is clear that Ms. Dashiell is entitled to those portions of the records that are subject to inspection and can be reasonably severed. Given that the requested records include Ms. Dashiell's own statement, MSP's contention that none of the documents or their contents are severable and subject to inspection strains credulity.

Finally, the trial court erred by ruling on the MSP's motion in blind reliance on the MSP's characterizations of the documents it was withholding. (E. 438 – E. 439). Rather than accepting MSP's self-serving blanket representations, the court should have required

something more, as other courts routinely do, such as an index of withheld documents, *in camera* inspection of the withheld documents, and/or discovery regarding the nature of the documents that were withheld.

In sum, MSP's claim that it is entitled to withhold records pertaining to how it handled a citizen complaint of misconduct by a police officer acting in the scope of his official duties fails to protect the rights guaranteed to the public by the MPIA: "All persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees." Md. Code Ann., State Gov't § 10-612(a).

STANDARD OF REVIEW

In an appeal from the grant of summary judgment, this Court reviews the matter *de novo* and seeks to determine whether the trial court's decision was legally correct. *O'Connor v. Baltimore County*, 382 Md. 102, 110 (2004) ("*O'Connor*"). Summary judgment is only appropriate when the motion and response show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Md. Rule 2-501(e); *O'Connor*, 382 Md. at 110. Questions concerning statutory construction are similarly reviewed *de novo*. *Md. Nat'l Capital Park & Planning Comm'n v. Anderson*, 164 Md. App. 540, 568 (2005), *aff'd*, 395 Md. 172 (2006) ("*Anderson*").

ARGUMENT

I. THE TRIAL COURT ERRED IN DECLARING THAT ALL MSP RECORDS ARISING OUT OF MS. DASHIELL'S CITIZEN COMPLAINT ARE "PERSONNEL" RECORDS SUBJECT TO MANDATORY NON-DISCLOSURE, RATHER THAN "INVESTIGATIVE" RECORDS, WHICH SHOULD BE DISCLOSED UNLESS CERTAIN CRITERIA ARE MET.

The overwhelming weight of the law, public policy, and common sense dictate that the records sought by Ms. Dashiell regarding MSP's *investigation* and handling of her sustained complaint that a state trooper used a racial slur against her in the course of official police business are properly characterized as *investigative*, rather than personnel, records. The Circuit Court erred in blindly assuming that any record which might be placed in a trooper's personnel file would fall within the definition of personnel records

under the MPIA, rather than analyzing whether troopers enjoyed a reasonable expectation of privacy in each record at issue, as required by the statutory language and legal precedent. If permitted to stand, the Circuit Court's ruling will mean that the public has virtually no mechanism by which to assess the sufficiency of departmental investigation and response to sustained complaints of police misconduct. Such a rule, particularly in light of the MPIA's presumption in favor of disclosure and the MSP's poor track record in investigating allegations of racial profiling, would substantially undermine the fairness of the citizen complaint process, and thus flies in the face of the public good.

A. The Court Below Erred in Assuming that Simply Because Records Pertaining to MSP's Investigation and Handling of Ms. Dashiell's Complaint Might Have Been Placed in a Trooper's Personnel File, Such Records Must Be Exempt from Disclosure.

It is well-established that the intent of the MPIA is to guarantee "that citizens of the State of Maryland be accorded wide-ranging access to public information concerning the operation of their government." *A.S. Abell Publishing Co. v. Mezzanote,* 297 Md. 26, 32 (1983) *("Abell"); see also Kirwan v. The Diamondback et al.,* 352 Md. 74, 81 (1998) ("*Kirwan*"). In furtherance of those objectives, the MPIA explicitly states that "[a]ll persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees," and mandates that its text be "construed in favor of permitting inspection." Md. Code Ann., State Gov't §10-612(a), §10-612 (b), and §10-613(a); *see also Abell*, 297 Md. at 32 (stating the MPIA should "be broadly construed in every instance with the view towards public access."). Nonetheless, the MPIA permits non-disclosure of certain narrow categories of public records.

In enacting the MPIA, "[t]he General Assembly was attempting to balance the right of the public to unfettered access to government records against 'the unwarranted invasion of privacy" that unrestricted disclosure might cause. *University System of Maryland v. Baltimore Sun Co.*, 381 Md. 79, 95 (2004) ("*Baltimore Sun*"). But, in light of the MPIA's overarching goal of open government, "[t]he public agency involved bears the burden in sustaining its denial of the inspection of public records." *Fioretti v.*

Maryland State Board Of Dental Examiners, 351 Md. 66, 78 (1998) ("*Fioretti*"); *see also Cranford v. Montgomery County,* 300 Md. 759, 771 (1984) ("*Cranford*") ("The custodian who withholds public documents carries the burden of justifying nondisclosure"). The state must establish this by either proving that a mandatory exemption applies to a record, or that the record falls into the MPIA's permissible denial provisions *and* disclosure would be contrary to a public interest. *See, e.g.*, *Prince George's County v. The Washington Post Co.*, 149 Md. App. 289, 310-313 (2003) ("*Prince George's County*") (discussing Md. Code Ann., State Gov't §10-616, §10-618 among other sections); *Cranford,* 300 Md. at 777-78 (The MPIA "imposes the burden on the records custodian to make a careful and thoughtful examination of each document . . . to determine whether the document or any severable portion of the document meets all of the elements of an exemption."). In other words, it is the state's burden to prove it is properly categorizing the withheld records.

Here, Ms. Dashiell sought all records pertaining to the "investigation conducted by the Maryland State Police" into her complaint, including but not limited to, documents such as witness statements and her own statement. (E. 7 – E. 8; E. 245 – E. 247). MSP claims that every responsive record falls within the MPIA's exemption for "personnel records" embodied Section 10-616(i), and is therefore prohibited from disclosure. In the alternative, MSP claims that the records are exempt because of the interaction between the LEOBR and Section 10-615, the exemption barring disclosure when forbidden by other sources of law. Still further in the alternative, MSP claims that the records sought are either Section 10-618(f) "investigative files," and/or legally privileged Section 10-618(b) "intra-agency memoranda," and that it is contrary to the public interest to disclose such files.

But, contrary to clear precedent, MSP did not make, nor did the Circuit Court require MSP to make, any showing that the records were appropriately categorized. Instead, MSP moved for summary judgment without producing even an index describing the documents it was withholding. The sole basis for the Circuit Court's determination that the documents Ms. Dashiell requested were all personnel records exempt from

disclosure, in their entirety, was the MSP's characterization of the records as personnel records, the Court's acceptance of that characterization, and the Court's unsupported assumption that all the requested records were contained in the offending trooper's personnel file. By this logic, virtually any document could be insulated from public review simply by placing a copy into an employee's personnel file. Such a categorical rule does not comport with the MPIA's presumption in favor of disclosure, nor court admonitions that exemptions should be narrowly construed, and severable portions of exempt records disclosed. *See* Md. Code Ann., State Gov't §10-612(b), § 10-613(a); *see also Abell*, 297 Md. at 32.

B. The Complaint Investigation Records Sought by Ms. Dashiell are Properly Analyzed as Investigatory Files.

The investigation records sought by Ms. Dashiell should have been analyzed not under the personnel records exemption at Section 10-616(i), but rather under Section 10-618(f), which governs law enforcement investigations.[4] In her MPIA request, Ms. Dashiell sought all records pertaining to the "investigation conducted by the Maryland State Police" pursuant to her complaint, including, but not limited to, documents like any

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[4] Section 10-618 (f) provides:

(f) Investigations. --

(1) Subject to paragraph (2) of this subsection, a custodian may deny inspection of:

(i) records of investigations conducted by the Attorney General, a State's Attorney, a city or county attorney, a police department, or a sheriff;

(ii) an investigatory file compiled for any other law enforcement, judicial, correctional, or prosecution purpose; or

(iii) records that contain intelligence information or security procedures of the Attorney General, a State's Attorney, a city or county attorney, a police department, a State or local correctional facility, or a sheriff.

(2) A custodian may deny inspection by a person in interest only to the extent that the inspection would:

(i) interfere with a valid and proper law enforcement proceeding;

(ii) deprive another person of a right to a fair trial or an impartial adjudication;

(iii) constitute an unwarranted invasion of personal privacy;

(iv) disclose the identity of a confidential source;

(v) disclose an investigative technique or procedure;

(vi) prejudice an investigation; or

(vii) endanger the life or physical safety of an individual.

"incident reports" or "witness statements." (E. 7 – E. 8; E. 245 – E. 247). These records are plainly "records of investigations conducted by . . . a police department," (f)(1)(i), including "an investigatory file compiled for . . . [a] law enforcement" purpose," (f)(1)(ii), as the text for the exemption reads. *See also Prince George's County*, 149 Md. App. at 332 (analyzing whether it was proper to release, as investigatory records, Prince George's County Police Criminal Investigations Division internal investigative files); *Mayor and City Council of Baltimore v. Maryland Committee Against the Gun Ban*, 329 Md. 78, 94 - 95 (1993) ("*Mayor and City Council of Baltimore*") (analyzing whether withholding of police internal investigative division files were properly analyzed under the investigatory records exemption); *See Maryland Department of State Police v. Maryland State Conference of NAACP Branches*, 190 Md. App. 359, 369-370 (2010), *cert. granted*, 451 Md. 38 (2010) ("*NAACP*") (stating that MSP internal investigation records of citizen complaints related to racial profiling "fit precisely within the class of records governed by section 10-618(f)"). By contrast, no such reference is made to records of law enforcement investigations or any analogous records in the text of the personnel records exemption. Md. Code Ann., State Gov't § 10-616(i).

In fact, in *NAACP*, this Court highlighted that it was MSP's burden to prove that records similar to those sought here regarding investigation of citizen complaints of misconduct while troopers are carrying out their official duties, are not investigatory files, and that the agency had failed to meet this burden. *NAACP*, 190 Md. App. at 374-75. As was recognized there, MSP itself plainly considers internal investigative records as different from personnel records, inasmuch as the agency keeps the two types of records physically separate. *Id*. 374; *see also* (E. 161). MSP's practice is apparently identical in this case, as Capt. Nelson's letter responding to Ms. Dashiell's complaint described two separate files, an "investigative file," and a "personnel file." (E. 244).

In this case, treating all investigative files as personnel records without further inquiry flouts basic principles of statutory construction that a law should be construed as a whole, *Anderson*, 164 Md. App. at 570, and that a "specific statutory provision takes precedence over the more general one." *See NAACP*, 190 Md. App. at 371; *see also*

Anderson, 164 Md. App. at 570. In *NAACP*, the court found it "illogical" that the General Assembly would "set forth detailed provisions governing when [investigative] records could be withheld," pursuant to the permissive exemption, and also expect such records to be mandatorily exempt "under the much more general" personnel records exemption. *NAACP*, 190 Md. at 370 (internal citation omitted).

MSP disregards these rules and its own practices, making instead the extraordinary assertion that any and all "[r]ecords of an individual employee's conduct related to a specific incident are personnel records" pursuant to the MPIA. (E. 230). But such a broad, blanket rule would prohibit the public from access to records involving "events occurring while the trooper is on-duty and engaged in public service[,] . . . which are exactly the types of material the Act was designed to allow the public to see." *NAACP*, 190 Md. App. at 368 (citing *Abell*, 297 Md. at 32). Such an approach would permit an exception to disclosure, which must be construed narrowly, to swallow rule that "[a]ll persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees." Md. Code Ann., State Gov't § 10-612(a); *see also Fioretti*, 351 Md. at 77.

Instead, Maryland cases governing MPIA requests for internal police investigations suggest that determinations about any overlap between investigatory and personnel records should consider the context and facts of each case. For example, in *NAACP,* records of MSP investigations into citizen complaints of racial profiling were found to be investigatory, rather than personnel, records. *NAACP*, 190 Md. App. at 378. However, in *Montgomery County Maryland, et al. v. Shropshire*, the Court of Appeals found that records of internal investigation pertaining to unsustained allegations of administrative rule violations were personnel, rather than investigatory, records. 420 Md. 362, 366, 377-78 (2011) ("*Shropshire*") ("The 'Rubik's Cube' of [*Shropshire*] involves whether the records of the internal affairs investigation in issue are deemed 'personnel records' and not disclosable or are records of 'investigations' and the subject of discretionary disclosure.") (Footnote omitted). Furthermore, in *Prince George's County,* this Court affirmed the trial court's release of police internal investigation records to a

newspaper, while observing the individualized nature of the determination. *See Prince George's County*, 149 Md. App. at 333, 335.

As explained more fully below, whether or not some documents among the investigative files are also personnel records requires additional inquiry into whether a person who is their subject has a reasonable expectation of privacy in those documents, and whether intrusion upon that expectation of privacy would be "unwarranted" in light of the competing interests at stake. *See, e.g.*, *Baltimore Sun*, 381 Md. 79 at 105 (explaining that critical factor in determination of potential personnel records was privacy analysis). No such analysis was conducted by the trial court.

II. THE CORRECT STANDARD FOR DETERMINING WHETHER THE INVESTIGATIVE RECORDS HERE ARE PERSONNEL RECORDS IS WHETHER EACH RECORD AT ISSUE BOTH DIRECTLY PERTAINS TO EMPLOYMENT AND IMPLICATES AN INDIVIDUAL'S REASONABLE EXPECTATION OF PRIVACY.

The MPIA does not define the term "personnel records." Rather, the language in the exemption denies "inspection of a personnel record of an individual, including an application, performance rating, or scholastic achievement information." Md. Code Ann., St. Gov't § 10-616(i)(1). Cases interpreting the exemption establish that it was not the legislature's intent that "*any* record identifying an employee would be exempt from disclosure as a personnel record," but rather that "the term 'personnel records' retain its common sense meaning." *Kirwan*, 352 Md. at 84 (emphasis in original).

A. MSP Has Not Shown, and Cannot Show, that Every Requested Record Pertains to Employment and an Employee's Ability to Perform a Job, As Required Under Proper MPIA Analysis.

Maryland courts have essentially adopted a two-pronged inquiry to determine whether records are "personnel records" within the meaning of Section 10-616(i)(1). First, courts examine whether the documents "directly pertain to employment and an employee's ability to perform a job," for example because they "relate to [the employee's] hiring, discipline, promotion, dismissal, or . . . status as an employee." *Kirwan*, 352 Md. at 83-4 (concluding that parking tickets were not personnel records

because they could not be said to relate to hiring, discipline, promotion, dismissal or status as employee).[5] Essentially, this aspect of the inquiry relates to how attenuated, or not, the relationship is between the record sought and the employment relationship.

But Maryland courts have not held that <u>every</u> record that could be said to pertain to "hiring, discipline, promotion, dismissal, or any matter involving his status as an employee" is a personnel record. Indeed, even employment contracts, which plainly and directly pertain to employment status and would certainly be placed in the employee's personnel file, have been excluded from the personnel records exemption. *See Baltimore Sun*, 381 Md. at 103 (holding that employment contracts of UMD basketball coaches were not personnel records within the meaning of Section 10-616(i)). Rather, whether the documents requested are closely intertwined with the employment relationship is a *necessary*, but not *sufficient*, predicate to the conclusion that a particular document is a personnel record.

B. The Requested Records are not of the "Same Class" as Those Contemplated as Personnel Records under the MPIA, Because They are not Records to Which A Reasonable Expectation of Privacy Attaches.

The second part of the inquiry, which is undertaken only if a determination first

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[5] *See also Office of the Governor v. Washington Post Co.*, 360 Md. 520, 548 (2000) ("*Office of the Governor*") (telephone and scheduling records from Governor's Office were not personnel records because they were unrelated to "the discipline, promotion, dismissal, status, job performance, or achievement of an existing or former employee"); *Prince George's County*, 149 Md. App. at 323-334 (generally discussing whether Commander's Information Reports, Police Rosters, Human Relations Commission Records, and Criminal Investigation Division investigative reports were excluded from disclosure based on a number of exemptions including whether they were "personnel records" related to hiring, discipline, promotion, dismissal, or status as employee); *Baltimore Sun*, 381 Md. at 104 (whether third-party contracts of Maryland basketball coaches were personnel records required analyzing connection between contracts and public employment); *NAACP*, 190 Md. App. at 371-375 (applying previous cases and evaluating whether records sought "'*directly* pertain[ed] to employment and an employee's ability to perform a job.'") (emphasis in original) (*quoting Kirwan*, 352 Md. at 83); *Shropshire*, 420 Md. at 378 (relevant to personnel records inquiry was whether records related to hiring, discipline, promotion, dismissal, or status as employee).

confirms that each document relates to the employment relationship, is whether release of each document would result in an unwarranted invasion of privacy of state officials. *See, e.g.*, *Shropshire*, 420 Md. at 381 (describing harm to privacy of officers if records revealing unfounded allegations of rules violations were released); *NAACP*, 190 Md. App. at 368 (inquiring into privacy interest implicated by unsubstantiated citizen complaints of racial profiling to determine whether records were personnel records); *Baltimore Sun*, 381 Md. at 102-03 (distinguishing information in employment contract from information protected by personnel records exemption based on reasonable expectation of privacy).

This inquiry into the expectation of privacy is critical because "it is the threat of, and protection against, an unwarranted invasion of privacy that led to the exclusions found in Section 10-616." *Baltimore Sun*, 381 Md. at 99-100; *Shropshire*, 420 Md. at 381 (noting that where an investigation clears officers of alleged administrative rule violations there is a significant public interest in maintaining confidentiality). The examples of "personnel records" in the statute, all of which reflect intrinsically private personal history, reflect this intent. The records sought in this case, regarding *sustained* allegations of misconduct against a state official in the course of his transaction of public business, reflect no such privacy interest, and cannot be said to be of the "same class" as "an application, performance rating, or scholastic achievement information." Md. Code Ann., State Gov't § 10-616(i); *see also In re Wallace*, 333 Md. 186, 190 (1993) (when "general words in a statute follow the designation of particular things or classes of subjects or persons. … the general words will usually be construed to include only those things or persons of the same class or general nature as those specifically mentioned.").

Courts have adopted such an approach with good reason: There will be many records that bear on personnel matters or which might be placed in a personnel file that reflect no reasonable expectation of privacy, and which provide vital information about how state officials are carrying out the functions of government. This is particularly true with respect to records that pertain to sustained allegations of misconduct. Obviously, records relating to citizen complaints about misconduct by state officials will sometimes

bear on personnel matters like discipline or dismissal and employment status. Treating *all* such records as personnel records, regardless of privacy interest or context, would lead to the perverse result that the public could never inspect records regarding sustained complaints of misconduct by state actors, regardless of how extreme, egregious or pervasive the misconduct. If the documents at issue can be withheld from Ms. Dashiell, then every document pertaining to the MSP's investigation of any allegation of misconduct by state troopers regarding their on-duty, official interactions with the public, will be forever shielded from disclosure, regardless of the complaint's merit.

C. Neither the Law nor Public Policy Supports a Finding that a State Trooper Enjoys a Reasonable Expectation of Privacy in the Records Sought.

1. The Request Does Not Seek Private Information.

Ms. Dashiell's interest is not in what the trooper in this case did. She knows what he did, because she was the victim, with his comments captured on tape. Her interest is in how the MSP responded. Did the investigation take four months because it was not a priority, or because it was thorough? Was her complaint the only reason the MSP knew about the misconduct, and was it sustained solely because the misconduct was incontrovertible in that it was recorded? Finally -- and perhaps most importantly to Ms. Dashiell and the ACLU -- other than taking some unspecified action against Sgt. Maiello, did the MSP take any additional steps to address an office culture in which an investigating officer feels free to use racial slurs against the public while on-duty?

Records such as these -- pertaining to proven mistreatment of a member of the public by the government -- are a far cry from the types of records described in § 10-616(i) and in which state officials have been found to enjoy a reasonable expectation of privacy weighing against the compelling public interest in disclosure. Prior decisions specifically ruling that internal investigation records of police conduct may be disclosed pursuant to the MPIA, as in *Prince George's County*, 149 Md. App. at 333, and to defendants in criminal cases, as in *Robinson v. State*, 354 Md. 287 (1999), render such an expectation of privacy unreasonable.

The reasoning of this Court in *NAACP* considering internal investigation records

nearly identical to those sought here is particularly instructive:

> Racial profiling complaints against Maryland State Troopers do not involve private matters concerning intimate details of the trooper's private life. Instead, such complaints involve events occurring while the trooper is on duty and engaged in public service. As such, the files at issue concern public actions by agents of the State concerning affairs of government, which are exactly the types of material the Act was designed to allow the public to see. A State Trooper does not have a reasonable expectation of privacy as to such records.

NAACP, 190 Md. App. at 368 (internal citations omitted); *see also Office of the Governor v. Washington Post Co.*, 360 Md. 520, 537-38 (2000) (records of calls from Governor's house, rather than office, were "private" and not subject to disclosure, "[i]n light of one's reasonable expectation of privacy in his or her own home."); *Baltimore Sun*, 318 Md. at 105-05 (whether or not release of records relating to basketball coaches' financial dealings with third parties was unwarranted invasion of privacy turned on extent to which such dealings were "related to his activities as coach").

A different result is not warranted simply because Ms. Dashiell seeks records pertaining to one incident of misconduct, rather than one hundred. (E. 7). In this case, Ms. Dashiell seeks records pertaining to a specific incident precisely because *she was the subject* of the trooper's misconduct in that incident. (E. 7). The trooper cannot be said to enjoy a reasonable expectation of privacy in records pertaining to his misconduct directed against a member of the public, particularly where the allegations of misconduct have been sustained. Even in *Kirwan*, where the conduct was not directed against any person and the facts had not been proven, the Court of Appeals rejected the University of Maryland's claim that its basketball coaches and players enjoyed a privacy interest in the parking tickets they had been issued. *Kirwan*, 352 Md. 74, 88-89 (1998). Similarly, in *Shropshire*, where the Court of Appeals considered whether internal investigation records regarding unsustained allegations of administrative rule violations by Montgomery County police officers were subject to the personnel records exemption and disclosure to the County Office of Inspector General, the Court emphasized repeatedly that the records sought pertained to administrative rule violations and had not been sustained, noting that

the reasonable expectation of privacy and confidentiality of police officers in internal investigation records justifies non-disclosure of baseless complaints. *Shropshire*, 420 Md. at 381-383. The Court expressly declined to reach whether the same outcome applied to sustained complaints, and was not there faced with a request from a citizen complainant seeking records about handling of her own complaint. *Id*. at n. 12.

2. The LEOBR Does Not Render Confidential the Documents Withheld by MSP.

To the extent that MSP argues that the LEOBR somehow creates or heightens a trooper's expectation of privacy in internal investigation records, any such expectation is limited by the boundaries built into the LEOBR itself, which offers police no general promise of confidentiality as to misconduct, but rather affords them certain procedural protections when they are subject to potential adverse action. *See generally* Md. Code Ann., Public Safety § 3-104. Any such expectation of privacy, therefore, is extinguished when, as here, the proceedings are over and the allegations have been proven true. Furthermore, the MSP itself routinely releases information about the disciplinary action imposed on its law enforcement officers, severely diminishing any claim its troopers retain an expectation of privacy in records pertaining to proven misconduct.[6]

In sum, Maryland law does not recognize an expectation of privacy in records pertaining to proven allegations of misconduct by state officials, including law enforcement officials, when they are conducting government business. Accordingly, disclosure of the records sought by Ms. Dashiell simply does not intrude upon any trooper's or other official's reasonable expectation of privacy.

3. Disclosure Would Not Be "Unwarranted" in this Circumstance Even if There Was a Privacy Interest Established.

Even assuming, for the sake of argument, that the trooper retains a privacy interest in records concerning his proven misconduct against Ms. Dashiell, no intrusion upon that

[6] MSP issues press releases regarding officer misconduct, including where the allegations have not been proven true. *See, e.g.*, (E. 333; E. 344). Press accounts also include purported discipline against officers and information pertaining to the investigative reports. *See, e.g.*, (E. 237 – E. 241).

interest could be said to be "unwarranted." *See, e.g., Kirwan*, 352 Md. at 88-89 ("When an adult commits or is formally charged with committing a criminal offense, even a petty one, it is doubtful that any 'invasion of privacy' occasioned by an accurate newspaper report of the matter is 'unwarranted.'").

One cannot ignore that Ms. Dashiell is a subject of the records in her request. She has a special interest, therefore, in the requested records. By contrast, for example, to the Office of the Investigator General in *Shropshire*, Ms. Dashiell has no independent investigatory authority upon which she can rely to obtain the requested information. *See Shropshire* at n. 17 (pointing out that, notwithstanding the OIG's claim of a "special need" for records, his office could obtain the information it sought "by culling primary sources.").

This case also implicates other, equally weighty interests. Due to the strong public interest in extinguishing race-based mistreatment of Marylanders by the MSP, the legacy of such discrimination, and MSP's failure to vindicate citizen complaints of race-based mistreatment in the past, any privacy interest asserted by Sgt. Maiello cannot be said to be subject to "unwarranted intrusion" by disclosure of the requested records to Ms. Dashiell.

For all of these reasons, the Circuit Court erred in concluding that the records sought by Ms. Dashiell were, in their entirety, personnel records exempt from disclosure. To the extent that any portions of the documents she requested might reveal information whose disclosure would constitute an unwarranted invasion of privacy, those records should have been examined by the court, the exempt portions severed, and the remainder disclosed.

III. THE LAW ENFORCEMENT OFFICERS' BILL OF RIGHTS DOES NOT JUSTIFY WITHHOLDING EVERY DOCUMENT RELATING TO A COMPLETED INVESTIGATION OF A SUSTAINED CITIZEN COMPLAINT.

A. The Procedural Safeguards in the LEOBR Protect Officers Facing Potential Disciplinary Action, Not Records of Proven Misconduct.

One of the justifications offered by MSP in denying Ms. Dashiell's MPIA request

was that investigation records -- which MSP here interprets to include every record arising from Ms. Dashiell's complaint, including the complaint itself -- are made confidential by the LEOBR and its interaction with MPIA Section 10-615(1), which prohibits the release "of a public record or any part of a public record if . . . by law, the public record is privileged or confidential." MSP contends that Section 3-104(n) of the LEOBR, which describes the conditions under which MSP releases its investigative file to the accused officer during the course of an inquiry, establishes that all the documents sought in this case are "confidential by law," and could only be disclosed to Sgt. Maiello.

Such an expansive reading of the LEOBR proves too much. It would lead to the absurd result that the public would *never* be able to inspect records or gain access to information about misconduct by law enforcement officers in their interactions with the public, even when the allegations of misconduct are proven true. Fortunately, MSP's argument is wholly without merit, because neither the LEOBR nor caselaw establishes the blanket rule that citizen complaint investigation files cannot be disclosed except to the accused officer in disciplinary proceedings.[7] To the extent the LEOBR addresses disclosure of citizen complaint investigations, it is to ensure that law enforcement officers have appropriate access to that information, much like rules of discovery in court proceedings. The fact that the LEOBR may limit some of the *police officer's* access *during* the course of disciplinary proceedings does not establish a categorical rule that the investigation records cannot be disclosed, regardless of context.[8] Furthermore, although

[7] Indeed, Appellant's counsel have been unable to find any case in which a Maryland court has applied the LEOBR in this way in the context of an MPIA case, and no such case has been cited by the MSP. Perhaps this is because, despite the longstanding LEOBR and decades of litigation regarding the MPIA, it is only recently that MSP and other law enforcement agencies have started to claim that LEOBR creates such a rule.

[8] This whole line of argument is foreclosed if Sgt. Maiello waived his rights under the LEOBR, as permitted in the Maryland State Police Administrative Manual. (E. 160). Because MSP has not provided an index of withheld documents, and the trial court did not make any inquiry regarding waiver, there is no basis from which to determine whether Sgt. Maiello waived his LEOBR rights.

the LEOBR may recognize that the contents of certain portions of internal investigation files are sensitive, the LEOBR does not, as MSP contends, establish that all records pertaining to a complaint of misconduct are forever secret.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature." *Magnetti v. University of Maryland,* 402 Md. 548, 564 (2007). First, the Court must look to the plain language of the statute. If the language "is unambiguous when construed according to its ordinary and every day meaning," then a court must "give effect to the statute as it is written." *Id*. at 565. A straightforward reading of the LEOBR suggests that the statute's foremost concern is the process afforded when police officers are the subject of inquiries that might lead to disciplinary action against them. *Fraternal Order of Police Montgomery County Lodge 35 Inc. v. Manger*, 175 Md. App. 476, 496 (2007) ("The procedural safeguards afforded to the officer during the official inquiry into his conduct constitute the heart of the [LEOBR]'s protections."). LEOBR section 3-104, titled "[i]nvestigation or interrogation of law enforcement officer," describes its own scope in a similarly straightforward manner: "[t]he investigation or interrogation by a law enforcement agency of a law enforcement officer for a reason that may lead to disciplinary action, demotion, or dismissal shall be conducted in accordance with this section." Md. Code Ann., Public Safety § 3-104(a). Section 3-104 then lays out various procedural safeguards governing these investigations.

B. The LEOBR's Provisions Regarding Records Establish An Officer's Right to Examine Records Pertaining to Allegations Against Him, Not A Blanket Prohibition Against Disclosure.

One procedural safeguard – under §3-104(n) – is the right of a law enforcement officer to obtain access to a copy of the investigatory file *before* an administrative hearing. In order to obtain access to the file, however, the officer must sign an agreement committing not to disclose its contents except for his own defense. MSP contends that this provision renders all files pertaining to Ms. Dashiell's sustained complaint of misconduct "confidential by law" and subject to mandatory withholding. MSP misreads

the LEOBR.[9] A plain reading of those portions of Section 3-104 that describe access to records, Section 3-104(k) (records of interrogation) and Section 3-104(n) (information provided on completion of investigation), is that their purpose is to ensure that police officers obtain records before hearings so that they may properly prepare a defense. They are analogous to rules of discovery.

That the LEOBR requires officers to sign a confidentiality agreement before receiving copies of internal investigation files, and before the agency has determined whether it will be necessary to discipline the officer, suggests only that these files *may* contain sensitive information, and that police agencies have an interest in protecting potentially sensitive files from careless, premature, or harmful disclosure. It does not create a general or permanent rule about the confidentiality or status of internal investigation records. *Cf. Prince George's County*, 149 Md. App. at 333 (releasing internal investigation files of Prince George's County police to newspaper pursuant to MPIA).

If the Maryland legislature intended that records of citizen complaints against law enforcement officers and the resulting investigations be confidential for all purposes, it presumably would have included such language in the LEOBR. *See, e.g.*, *Anderson*, 164 Md. App. at 577-78 (legislature knows how to craft provision for judicial review in LEOBR and, had it wanted to do so, could have included right to appeal of not guilty determinations; the fact that it did not shows no such right was intended). Nothing in the statute evinces an intent to eliminate access to citizen complaint investigation records or records pertaining to misconduct generally. Notably, Section 3-103, which describes the "[r]ights of law enforcement officers generally," and lays out privacy protections for certain types of information such as income or debts, makes no reference to a general right of confidentiality or privacy in records pertaining to misconduct. Md. Code Ann.,

[9] In fact, the provision MSP relies on applies during the period when the officer is preparing to defend against allegations made following an initial investigation. So, even if MSP's contentions were valid, the protections would not extend to records created *after* the file has been turned over to the officer.

Public Safety § 3-103(c).

To the extent that Maryland, through the LEOBR or case law interpreting it, recognizes or creates any interest in non-disclosure of records pertaining to allegations of misconduct, that interest is limited to instances where the matter is ongoing, or where an officer has been exonerated. Md. Code Ann., Public Safety § 3-110(a) (providing for expungement of records of unproven allegations after three years have passed, upon the written request of the police officer); *Mayor and City Council of Baltimore*, 329 Md. at 95 (distinguishing between confidentiality interest of investigation records where officers have been exonerated and records where disciplinary proceedings were conducted); *Shropshire*, 420 Md. at 380-81 (emphasizing interest in protecting officers when they have been exonerated of administrative rule violations).

The LEOBR's purpose is "to guarantee law enforcement officers certain procedural safeguards *during* any investigation and subsequent hearing which could lead to disciplinary action, demotion, or dismissal." *Ocean City Police Department v. Marshall*, 158 Md. App. 115, 123, (2004) (emphasis added). Its provisions pertaining to how those proceedings are conducted are simply not relevant or applicable once the officer is no longer under the threat of adverse action. *See, e.g.*, *Robinson v. State*, 354 Md. 287, 313 (1999) ("*Robinson*"). Here, Ms. Dashiell's request for the records pertaining to her complaint came *after* the investigation into misconduct had concluded. By that point, any procedural protections the LEOBR provided the trooper as to that investigation's records had ceased to apply.

The LEOBR simply does not confer a general prohibition against disclosure, nor any right of confidentiality, in records pertaining to investigations of citizen complaints, particularly where, as here, the files are sought pursuant to an MPIA request, the inquiry is closed, and the allegations of misconduct have been proven true. Even if the LEOBR did somehow control whether the investigative files could be disclosed, confidentiality under the LEOBR "does not guarantee insulation of the confidential matter from disclosure," and analysis of whether LEOBR permits disclosure would require weighing the competing interests. *Robinson*, 354 Md. at 309.

IV. THE REMAINING EXEMPTIONS ASSERTED BY THE MSP, BUT NOT ADDRESSED BY THE CIRCUIT COURT, DO NOT PROVIDE AN INDEPENDENT BASIS FOR WITHHOLDING RECORDS PERTAINING TO MS. DASHIELL'S CITIZEN COMPLAINT.

A. The Investigatory Files Exemption, MPIA Section 10-618(f), Plainly Does Not Justify the MSP's Refusal To Produce The Requested Records.

In the court below, the MSP, relying on section 10-618(f), also sought to justify its withholding of the records sought by Ms. Dashiell on the grounds that they were "investigatory records and it would not be in the public interest to inhibit the candor of witnesses or to invade the personal privacy of individuals involved in the investigation." (E. 20).

As a threshold matter, Section 10-618 requires that the custodian disclose files within its ambit unless that inspection "would be contrary to the public interest." Subsection 10-618(f) specifically addresses police investigations and thus governs the records sought by Ms. Dashiell. However, subsection 10-618(f) contains its own exception: where a "person in interest" seeks access to investigatory records, a custodian can withhold those records *only* if one of seven specific circumstances exists. *See* Md. Code Ann., State Gov't § 10-618(f)(2).

Under this exemption, and in light of the MPIA's strong presumptions in favor of open government and disclosure of public records, it is MSP's burden to prove that the records are properly withheld. *See, e.g.*, *Office of the Governor*, 360 Md. at 545 (2000). Here, this means MSP must show both that disclosure of the withheld records "would be contrary to the public interest," *and* that Ms. Dashiell is not a "person in interest" for whom inspection would implicate one of the seven circumstances that might justify withholding. MSP cannot make such a showing for either requirement.

1. Disclosure to Ms. Dashiell is not "contrary to the public interest."

MSP contends that disclosure of the requested records is contrary to the public interest because it might have a "chilling effect" on future witnesses to misconduct and because it would "invade [the] personal privacy" of troopers because the records

"contain intimate details about individual Troopers' employment," as well as the privacy of "witnesses involved in the investigation." (E. 230 – E. 233). Yet, MSP has not informed Ms. Dashiell or the Court whether the agency even interviewed any witnesses other than Ms. Dashiell.

Disclosing the records sought by Ms. Dashiell is *in* the public interest, not contrary to it. The records sought by Ms. Dashiell here relate to her own substantiated complaint of police misconduct. The public has a strong interest in ensuring that when citizens like Ms. Dashiell are wronged by the government, they are able to review the proof that the government it has remedied the wrong, rather than rely on assurances that action has been taken. This is especially true with respect to law enforcement officials. For the same reasons that the State of Maryland has recognized that police deserve specific protections through the LEOBR – that is, the nature of their interactions with the public – the state must recognize the great responsibility it bears to ensure transparent justice when allegations of misconduct by police are sustained.

MSP fails to acknowledge crucial public interests in vindicating the rights of victims of police misconduct and ensuring that police agencies thoroughly investigate misconduct in their own ranks. The public has a right to know who is 'guarding the guardians.' MSP's claim that the public interest is undermined because records regarding proven misconduct could also somehow compromise the offending trooper's privacy misses the point of the MPIA and the value of open government much more broadly. Similarly, any "chilling effect" on witnesses – if there were any -- through release of records in this case is outweighed by the strong countervailing public interests in disclosure.

2. MSP cannot show that Ms. Dashiell should not be regarded as a person in interest as to the documents pertaining to her own complaint.

Even assuming, *arguendo,* that MSP could somehow articulate a credible argument that it would be contrary to the public interest to release the investigation records pertaining to Ms. Dashiell's complaint, it would still need to demonstrate that

Ms. Dashiell was not a "person in interest" and that permitting her to inspect the records would threaten the interests described in Section 10-618(f)(2). MSP cannot make this showing. *See Mayor and City Council of Baltimore*, 329 Md. at 90. MSP also contends that "Ms. Dashiell was not the subject of the investigation; therefore, she is not the person in interest for these records." The only reason that the investigation was initiated was, at least as far as Ms. Dashiell knows, *her own complaint*. The MPIA defines a "person in interest" to be the subject of the public records being sought, and as the complaining party here, Ms. Dashiell certainly must be considered an interested party. Md. Code Ann., State Gov't §10-612(b). The citizen complaint procedure would be rendered useless if a police agency could refuse to disclose to the complainant all records related to its investigation of her complaint, even when the complaint was sustained. The MSP's implicit position that a citizen should simply "trust" that the MSP has acted appropriately in investigating a police complaint disregards its own history of misconduct. Indeed, the very nature of Ms. Dashiell's complaint raises concern about the *untrustworthiness* of MSP, given Sgt. Maiello's use of racial slurs to denigrate a witness, apparently because he thought no one – except possibly another MSP employee – was listening. When, as here, a citizen's complaint forms the basis for an internal law enforcement investigation, and the complaint is sustained, the law should regard that citizen as a person in interest with respect to the records of the investigation of her complaint. The limitations provided in Section 10-618(f)(2)(i)-(vii) provide ample additional protections.

As applied to this case, six of the seven bases for withholding are plainly inapplicable. Disclosure could not be said to interfere with any law enforcement proceeding, pursuant to Section 10-618(f)(2)(i), deprive another of a fair adjudication, pursuant to Section 10-618(f)(2)(ii), or prejudice an investigation, pursuant to Section 10-618(f)(2)(vi). There is no suggestion that releasing the records would endanger anyone's safety, pursuant to Section 10-618(f)(2)(vii), identify a confidential informant, pursuant to Section 10-618(f)(2)(iv), or disclose some kind of investigative technique, pursuant to Section 10-618(f)(2)(v). And, with respect to the final

consideration, as explained in detail in Section II.C.3. of this brief, it is simply not plausible to suggest that disclosure would constitute "an unwarranted invasion of privacy" for Sgt. Maiello.

For the above reasons, MSP must disclose the requested documents to Ms. Dashiell.

B. The Intra-Agency Document Exemption – Under Section 10-618(b) – Does Not Justify the MSP's Denial of Ms. Dashiell's Requests.

Lastly, MSP argued to the Circuit Court that every record pertaining to Ms. Dashiell's complaint is both legally privileged and contrary to the public interest to disclose, pursuant to Section 10-618(b), which permits a custodian to withhold any part of an intra-agency memorandum "that would not be available by law to a private party in litigation with the unit" when disclosure would be contrary to the public interest. Md. Code Ann., State Gov't § 10-618(a)-(b). This exemption reflects that part of the executive privilege doctrine encompassing internal government documents containing confidential opinions, deliberations, advice or recommendations from one governmental official to another for the purpose of assisting the latter official in the decision-making function with respect to a particular policy decision. *Office of the Governor*, 360 Md. at 551. Its protections do not extend to "compiled factual material," *id*. at 558 (quoting *Hamilton v. Verdow*, 287 Md. 544, 564, (1980). In light of the MPIA's "general, but explicit, disposition favoring disclosure," it is the government's burden to establish that the disclosure of factual material in the requested records, subject to an item-by-item balancing test, would reveal the content of confidential deliberations. *Id*. at 561-62 (citation omitted). Conclusory claims will not satisfy this burden. *See Cranford,* 300 Md. at 771; *see also Fioretti,* 351 Md. at 83.

MSP cannot carry its burden because the MSP cannot show that the requested records are "communications 'of an advisory or deliberative nature.'" *Office of the Governor,* 360 Md. at 561 (quoting *Hamilton v. Verdow*, 287 Md. 544, 563 (1980)). Indeed, according to MSP's own manual, many documents in an investigation file, such

as the complaint and witness statements, are plainly factual in nature. (E. 158 – E. 161). The fact that MSP may have relied upon them to determine whether to sustain Ms. Dashiell's complaint or to discipline Sgt. Maiello does not transform these statements into privileged deliberative documents. *See Cranford*, 300 Md. at 786 (noting that "reports on matters observed and on matters perceived" do not constitute "predecisional advice to the decision maker.").

V. EVEN IF THE MSP PROPERLY WITHHELD SOME PORTION OF THE REQUESTED RECORDS, THE MSP HAS FAILED TO ADHERE TO ITS OBLIGATION TO PRODUCE REASONABLY SEVERABLE PORTIONS.

Assuming, for the sake of argument, that the MSP has rightfully withheld some portion of the records requested by Ms. Dashiell, the MSP must still produce any "reasonably severable" portion of those records that are "subject to inspection." Md. Code Ann., State Gov't § 10-614(b)(3)(iii). Courts have routinely encouraged severing, including through redaction, and disclosing records, in instances precisely like the case at bar. *See, e.g.*, *Prince George's County*, 149 Md. App. at 320, 322 (explaining that, to the extent that records to be disclosed contained protected information such as personnel information, they could be redacted); *Office of the Governor*. 360 Md. at 542. (suggesting redaction might be appropriate for some contents of records to be disclosed).

Here, MSP contends that it cannot provide any portion of the requested records, claiming that there is no reasonably severable portion subject to inspection. (E. 379 - E. 383). Since MSP refused to provide an index of withheld records, neither Ms. Dashiell nor the court even know which of the withheld records exist. This lack of basic information compromises Ms. Dashiell's ability to develop detailed arguments responding to MSP's contentions regarding severability. Presuming, however, that MSP adhered to its own Administrative Manual in investigating Ms. Dashiell's complaint, its contention that none of the information she seeks is severable rings hollow. For example, pursuant to the manual MSP will take "formal taped statement[s] from the complainant and witness," and Ms. Dashiell believes she provided just such a statement when she reported her complaint. (E. 158). Similarly, one would expect that a recording

or a transcription of Sgt. Maiello's telephone message containing the racial slur would be among the withheld documents. It strains credulity for MSP to claim that these documents are neither subject to inspection nor reasonably severable.

MSP's contention that no portion of the withheld records is reasonably severable defies common sense and flouts the unambiguous rule that the MPIA is to be construed in favor of disclosure. Following the plain language and purpose of the MPIA, and the overwhelming weight of precedents in cases like *Prince George's County* and *Baltimore Sun*, MSP must redact any protected information in the documents it has withheld from Ms. Dashiell and disclose the remainder.

VI. THE CIRCUIT COURT'S FAILURE TO REQUIRE AND REVIEW AN INDEX OF THE DOCUMENTS, TO CONDUCT AN *IN CAMERA* REVIEW, OR TO ALLOW ANY DISCOVERY REGARDING THE NATURE OF THE WITHHELD DOCUMENTS IS AN INDEPENDENT BASIS FOR REVERSAL AND REMAND.

At the very least, this Court should reverse and remand the case to the trial court to permit Ms. Dashiell to develop additional information about the nature of the records withheld. MSP's response to Ms. Dashiell's MPIA request for all records arising out of her complaint was a blanket denial that claimed multiple exemptions prohibited disclosure of every single record sought. (E. 230 - E. 233). In other words, MSP claimed, and continues to claim, that each exemption, alone, independently provides a basis for withholding at least seven categories of documents. When Ms. Dashiell sought an index of the documents MSP claimed were exempt from disclosure, MSP denied that request. (E. 235). After Ms. Dashiell filed suit, the MSP filed its motion for summary judgment before any discovery. (E. 235; E. 15 - E. 40).

Rather than accept MSP's general assurances that it properly characterized the requested records, the Circuit Court should have tested MSP's contention that its characterization of records comports with the requirements of the MPIA.[10] Ms. Dashiell

[10] By contrast, for example, in the *NAACP* case, the plaintiffs had the benefit of discovery, and records were also delivered to the trial court and reviewed *in camera*. *NAACP*, 190 Md. App. at 364.

offered strong objections that the records were withheld improperly, and that non-protected information could be reasonably severed and disclosed. It was error for the Circuit Court to grant MSP's motion for summary judgment without knowing which records existed, without reviewing any index of the withheld records, without reviewing the records in camera, and without permitting Ms. Dashiell to conduct any discovery. The MPIA's explicit language contemplates *in camera* determinations where exemptions are disputed. Md. Code Ann., State Gov't § 10-623(c)(2). The consistent practice of Maryland appellate courts has been to encourage trial courts to inspect records *in camera* or to require a detailed description of withheld documents to aid them in making "responsible determination[s]" about claims of exemption. *See, e.g.*, *Office of the Governor*, 360 Md. at 545 (*in camera* inspection may be necessary for a trial court to make a "responsible determination on claims of *exemption."); Prince George's County,* 149 Md. App. at 314*; Baltimore Sun*, 381 Md. 79, 105-06 (2004) (ordering lower court to conduct an *in camera* review of withheld documents).

Here, the trial court simply did not have enough information to make a "responsible determination" as to whether there was a sufficient nexus between the records and the claimed exemptions, or to whether portions of the records were reasonably severable. Granting summary judgment in MPIA cases "on the basis of government affidavits or declarations that explain why requested information falls within a claimed exemption" is only appropriate "as long as the affidavits or declarations are sufficiently detailed, non-conclusory, and submitted in good faith, and as long as a plaintiff has no significant basis for questioning their reliability." *Prince George's County*, 149 Md. App. at 305 (quoting *Center for Nat'l Sec. Studies v. United States Department of Justice*, 215 F. Supp.2d 94, 99 (D.D.C. 2002). No such conditions exist in the present case. Because the Circuit Court did not subject the MSP's statements to any review, nor permit Ms. Dashiell to develop contrary evidence through discovery, it was plain error for the Circuit Court to grant summary judgment against Ms. Dashiell.

CONCLUSION

For the foregoing reasons, this Court should vacate the order of the Circuit Court and order the MSP to disclose the requested documents, or any reasonably severable portions. In the alternative, this Court should remand the case to the Circuit Court for further proceedings consistent with its opinion.

Respectfully Submitted,

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May 23, 2012

Pursuant to Md. Rules 8-112(c) and 8-504(a)(9), this brief has been printed with proportionally spaced Times New Roman – 13 point type.

APPENDIX

Relevant portions of cited statutes are included herein.

MARYLAND PUBLIC INFORMATION ACT

General Right to Information
MD Code Ann., State Gov't, § 10-612

Public access to information

(a) All persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees.

General construction

(b) To carry out the right set forth in subsection (a) of this section, unless an unwarranted invasion of the privacy of a person in interest would result, this Part III of this subtitle shall be construed in favor of permitting inspection of a public record, with the least cost and least delay to the person or governmental unit that requests the inspection.

Inspection of Public Records
MD Code Ann., State Gov't, § 10-613 (a)

In general

(a)(1) Except as otherwise provided by law, a custodian shall permit a person or governmental unit to inspect any public record at any reasonable time.

(2) Inspection or copying of a public record may be denied only to the extent provided under this Part III of this subtitle.

Application; Processing
MD Code Ann., State Gov't, § 10-614(b)(3)(iii)

(3) A custodian who denies the application shall:

(i) immediately notify the applicant;

(ii) within 10 working days, give the applicant a written statement that gives:

1. the reasons for the denial;

2. the legal authority for the denial; and

3. notice of the remedies under this Part III of this subtitle for review of the denial; and

(iii) permit inspection of any part of the record that is subject to inspection and is reasonably severable.

Required Denials—In general
MD Code Ann., State Gov't, § 10-615

A custodian shall deny inspection of a public record or any part of a public record if:

(1) by law, the public record is privileged or confidential; or

(2) the inspection would be contrary to:

(i) a State statute;

(ii) a federal statute or a regulation that is issued under the statute and has the force of law;

(iii) the rules adopted by the Court of Appeals; or

(iv) an order of a court of record.

Required Denials—Specific records
MD Code Ann., State Gov't, § 10-616(i)

Personnel records

(i)(1) Subject to paragraph (2) of this subsection, a custodian shall deny inspection of a personnel record of an individual, including an application, performance rating, or scholastic achievement information.

(2) A custodian shall permit inspection by:

(i) the person in interest; or

(ii) an elected or appointed official who supervises the work of the individual.

Permissible Denials
MD Code Ann., State Gov't, § 10-618(a), (b), (f)

In General

(a) Unless otherwise provided by law, if a custodian believes that inspection of a part of a public record by the applicant would be contrary to the public interest, the custodian may deny inspection by the applicant of that part, as provided in this section.

Interagency and intra-agency documents

(b) A custodian may deny inspection of any part of an interagency or intra-agency letter or memorandum that would not be available by law to a private party in litigation with the unit.

Investigations

(f)(1) Subject to paragraph (2) of this subsection, a custodian may deny inspection of:

(i) records of investigations conducted by the Attorney General, a State's Attorney, a city or county attorney, a police department, or a sheriff;

(ii) an investigatory file compiled for any other law enforcement, judicial, correctional, or prosecution purpose; or

(iii) records that contain intelligence information or security procedures of the Attorney General, a State's Attorney, a city or county attorney, a police department, a State or local correctional facility, or a sheriff.

(2) A custodian may deny inspection by a person in interest only to the extent that the inspection would:

(i) interfere with a valid and proper law enforcement proceeding;

(ii) deprive another person of a right to a fair trial or an impartial adjudication;

(iii) constitute an unwarranted invasion of personal privacy;

(iv) disclose the identity of a confidential source;

(v) disclose an investigative technique or procedure;

(vi) prejudice an investigation; or

(vii) endanger the life or physical safety of an individual.

Judicial Review
Md. Code Ann., State Gov't § 10-623(c)(2).

The court may examine the public record in camera to determine whether any part of it may be withheld under this Part III of this subtitle.

LAW ENFORCEMENT OFFICERS' BILL OF RIGHTS

Investigation or Interrogation of Law Enforcement Officer
MD Code Ann., Public Safety, § 3-104(a); (k); (n)

In general

(a) The investigation or interrogation by a law enforcement agency of a law enforcement officer for a reason that may lead to disciplinary action, demotion, or dismissal shall be conducted in accordance with this section.

Record of interrogation

(k)(1) A complete record shall be kept of the entire interrogation, including all recess periods, of the law enforcement officer.

(2) The record may be written, taped, or transcribed.

(3) On completion of the investigation, and on request of the law enforcement officer under investigation or the law enforcement officer's counsel or representative, a copy of the record of the interrogation shall be made available at least 10 days before a hearing.

Information provided on completion of investigation

(n)(1) On completion of an investigation and at least 10 days before a hearing, the law enforcement officer under investigation shall be:

(i) notified of the name of each witness and of each charge and specification against the law enforcement officer; and

(ii) provided with a copy of the investigatory file and any exculpatory information, if the law enforcement officer and the law enforcement officer's representative agree to:

1. execute a confidentiality agreement with the law enforcement agency not to disclose any material contained in the investigatory file and exculpatory information for any purpose other than to defend the law enforcement officer; and

2. pay a reasonable charge for the cost of reproducing the material.

(2) The law enforcement agency may exclude from the exculpatory information provided to a law enforcement officer under this subsection:

(i) the identity of confidential sources;

(ii) nonexculpatory information; and

(iii) recommendations as to charges, disposition, or punishment.

Rights of Law Enforcement Officers Generally
MD Code Ann., Public Safety, § 3-103

Right to engage in political activity

(a)(1) Subject to paragraph (2) of this subsection, a law enforcement officer has the same rights to engage in political activity as a State employee.

(2) This right to engage in political activity does not apply when the law enforcement officer is on duty or acting in an official capacity.

Regulation of secondary employment

(b) A law enforcement agency:

(1) may not prohibit secondary employment by law enforcement officers; but

(2) may adopt reasonable regulations that relate to secondary employment by law enforcement officers.

Disclosure of property, income, and other information

(c) A law enforcement officer may not be required or requested to disclose an item of the law enforcement officer's property, income, assets, source of income, debts, or personal or domestic expenditures, including those of a member of the law enforcement officer's family or household, unless:

(1) the information is necessary to investigate a possible conflict of interest with respect to the performance of the law enforcement officer's official duties; or

(2) the disclosure is required by federal or State law.

Retaliation

(d) A law enforcement officer may not be discharged, disciplined, demoted, or denied promotion, transfer, or reassignment, or otherwise discriminated against in regard to the

law enforcement officer's employment or be threatened with that treatment because the law enforcement officer:

(1) has exercised or demanded the rights granted by this subtitle; or

(2) has lawfully exercised constitutional rights.

Right to sue

(e) A statute may not abridge and a law enforcement agency may not adopt a regulation that prohibits the right of a law enforcement officer to bring suit that arises out of the law enforcement officer's duties as a law enforcement officer.

Waiver of rights

(f) A law enforcement officer may waive in writing any or all rights granted by this subtitle.

Expungement of Record of Formal Complaint
MD Code Ann., Public Safety, § 3-110(a)

(a) On written request, a law enforcement officer may have expunged from any file the record of a formal complaint made against the law enforcement officer if:

(1)(i) the law enforcement agency that investigated the complaint:

1. exonerated the law enforcement officer of all charges in the complaint; or

2. determined that the charges were unsustained or unfounded; or

(ii) a hearing board acquitted the law enforcement officer, dismissed the action, or made a finding of not guilty; and

(2) at least 3 years have passed since the final disposition by the law enforcement agency or hearing board.

(b) Evidence of a formal complaint against a law enforcement officer is not admissible in an administrative or judicial proceeding if the complaint resulted in an outcome listed in subsection (a)(1) of this section.

CERTIFICATE OF SERVICE

I CERTIFY THAT on this ____ day of May, 2012, two copies of the foregoing Brief, Appendix and Record Extract were served by mailing first class, postage prepaid to:

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_____
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IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

September Term, 2011

No. 01078

TELETA S. DASHIELL,
Appellant

vs.

MARYLAND STATE POLICE DEPARTMENT,
Appellee

On Appeal from the Circuit Court for Baltimore County, Maryland
(The Honorable Patrick Cavanaugh, Judge)

RECORD EXTRACT

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