IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

American Civil Liberties Union Foundation of Maryland, *et al.*, Plaintiffs, v. John R. Leopold *et al.*, Defendants.	No. 02-C-12-174465

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

(HEARING REQESTED)

Plaintiffs, 11 individuals and the American Civil Liberties Union Foundation of Maryland, sued now-former County Executive John Leopold, the Anne Arundel County Office of the County Executive, and the Anne Arundel County Police Department for violating several provisions of the State Government Article of the Maryland Code Annotated, including § 10-602 and the Maryland Public Information Act (MPIA), §§ 10-611 to 10-630.[1]

Plaintiffs allege that Defendants violated their obligations under Maryland law in two overarching ways. First, in Counts One and Two, Plaintiffs allege that the defendants violated the MPIA's provisions prohibiting the improper creation, use, compilation and dissemination of government records containing private personal information. Second, in Count Three, Plaintiffs

[1] Unless otherwise indicated, Code citations refer to the State Government Article.

allege that the defendants again violated the MPIA when they unlawfully withheld records that would reveal the extent of their misconduct, even though Plaintiffs were entitled to the records under the MPIA. Plaintiffs seek declaratory and injunctive relief, as well as monetary damages to remedy these unlawful actions.

On March 15, 2013, defendant Leopold moved to dismiss the action as against him on all three counts. Defendants Anne Arundel County Office of the County Executive and the Police Department ("the County defendants") filed an Answer to the Complaint on February 20, 2013. Thereafter, however, on April 8, 2013, they joined Leopold's motion to dismiss Counts One and Two, adopting Leopold's arguments as their own.

Because Plaintiffs' Complaint clearly and unambiguously sets forth sufficient facts to support the MPIA violations alleged in Counts One and Three against each of the Defendants, the Motions to Dismiss should be denied with respect to these counts.[2]

STANDARD OF REVIEW

In reviewing the sufficiency of a Complaint under Rule 2-322(b)(2), a court "must presume the truth of all well-pleaded facts and any reasonable inferences deriving from them." *Ireland v. Shearin*, 417 Md. 401, 406 (2010). Dismissal is not proper unless "'the alleged facts and permissible inferences . . . would, if proven, nonetheless fail to afford relief to the plaintiff.'" *Adamson v. Corr. Med. Servs., Inc.*, 359 Md. 238, 246 (2000) (quoting *Bobo v. State*, 346 Md. 706, 709 (1997)).

[2] Plaintiffs voluntarily dismiss Count Two because under the facts of this case it warrants no additional relief distinct from that available pursuant to Counts One and Three. In any case, plaintiffs are currently seeking leave to amend their Complaint in order to address the significant factual developments that have occurred since the case was originally filed, to clarify and amend the claims being pursued, and to add and substitute appropriate defendants on these claims.

ARGUMENT

Quite simply, Defendants offer no plausible basis for dismissal of any of the claims made against them. Plaintiffs have alleged a widespread pattern of abuse of the public trust that extended to the very highest reaches of Anne Arundel County government. Access to highly sensitive and confidential information about individual citizens is part of a compact that government officials make with the public: The public trusts and empowers government officials to collect and maintain confidential personal information with the understanding that such information will be carefully guarded and used only for legitimate government purposes. When government officials violate that trust by pillaging sensitive records for their personal gain, as occurred here, they harm not only the individuals whose personal information was misused, but also the integrity of this public compact. Even worse, in this case, government officials violated the public compact yet again when they withheld from Plaintiffs the public records to which they are entitled and which would reveal the extent of Defendants' misconduct.

These are the very harms against which the MPIA is intended to protect. But, to this day, Defendants minimize the seriousness of the allegations Plaintiffs have asserted in this case. They move for dismissal on several distinct grounds, all of which flow from their refusal to acknowledge the plain text and spirit of the MPIA.

Defendants first argue that Plaintiffs fail to state a claim in Count One because there is no cause of action for violations of § 10-624 of the MPIA, which prohibits the creation of personal records without a clearly established official need. Defendants argue, in the alternative, that Plaintiffs have failed to allege sufficient facts to support a claim, on the grounds that Plaintiffs do not allege that Defendants disclosed or used public records. These contentions are without merit, as § 10-626 provides a general cause of action for violations of the MPIA and Plaintiffs have

clearly and explicitly alleged that Defendants improperly used and permitted inspection of public records.

In addition, Defendant Leopold argues that, even if the Court should find that liability exists, he is immune as to Count One, either under the doctrine of public official immunity, or, absurdly, because his actions rose to the level of criminal misconduct.[3] But public official immunity cannot shield Leopold from MPIA liability because the acts complained of here are intentional acts, and this type of immunity applies only to negligent conduct. Moreover, Defendant Leopold cannot escape liability under the MPIA by arguing that, because his conduct was criminal, he was acting as a private citizen and not a public official. Such an approach would mean government officials would be immune from civil liability for the most egregious misconduct committed in office. This simply is not the law.

Finally, as to Count Three, involving the unlawful withholding of public records, Leopold argues that he should be dismissed from this case because he is not the official custodian of the records sought.[4] But, at the time of the incidents at issue, Leopold was an official custodian as head of the County's executive branch. In addition, he was a *de facto* custodian as someone with actual custody of the requested documents. His departure from office does not permit him to evade responsibility for production of documents that came into his possession due only to his position as custodian, and Leopold's interpretation of the law would permit just such an unacceptable outcome.

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[3] Although the County defendants purport to adopt Leopold's reasoning on all points as their own, the immunity defenses asserted by Leopold attach only to individual public officials, not to governmental entities, and thus cannot properly be asserted by County defendants.

[4] The County defendants made no motion to dismiss as to Count Three.

I. Plaintiffs Have Stated Claims Against Each of the Defendants with Respect to Count One

Defendants erroneously contend that Plaintiffs fail to state a claim in Count One, which alleges that Defendants improperly created, compiled, used, and disseminated government records containing plaintiffs' personal information. Defendants claim no cause of action exists for violations of § 10-624, which prohibits government officials from creating public records that contain personal information in the absence of a "clearly established" official need for the records. They argue – without basis in any actual authority – that § 10-626, which creates a general cause of action for "inspection or use" of government records in violation of the MPIA, does not apply to violations of § 10-624. In the alternative, Defendants argue that even if there is a cause of action, Plaintiffs do not allege sufficient facts to show that the defendants "permit[ted] inspection or use of a public record" as is required by § 10-626. Finally, Leopold argues that he is immune from any liability due to the doctrine of public official immunity.

As explained below, these contentions are wholly without merit.

A. Section 10-626 of the MPIA Provides a General Cause of Action for Violations of the MPIA, Including Violations of § 10-624.

Section 10-626(a) imposes liability for damages on a governmental officer who "willfully and knowingly permits inspection or use of a public record in violation of [the MPIA]." Thus, to survive a motion to dismiss, Plaintiffs must have alleged that the defendants (1) willfully and knowingly "permit[ted] inspection or use of a public record" and (2) this conduct violated the MPIA. *See, e.g.*, *Police Patrol Sec. Sys., Inc. v. Prince George's Cnty.*, 378 Md. 702, 718 (2003) ("[L]iability under § 10-626 is contingent on a finding of a violation of a separate provision of the MPIA."). As shown below, Plaintiffs easily meet this threshold.

1. Defendants Concede that Plaintiffs Plead Sufficient Facts to Show a Violation of § 10-624.

Nowhere in their motions do Defendants contest that the facts alleged by Plaintiffs constitute a violation of § 10-624(b)(2), which forbids the improper creation of "personal records." Nor could they, as Plaintiffs repeatedly allege that Defendants had "no legitimate" reason, purpose, or need for collecting Plaintiffs' personal information and compiling it into new records.[5] (Compl. ¶¶ 4, 69, 73, 75, 80, 87). Thus, with respect to the requirement that plaintiffs must allege a violation of the MPIA to sustain a claim under § 10-626, they plainly have done so.

2. Section 10-624 is Enforced Through § 10-626

Defendants contend that there is no cause of action for a violation of § 10-624 because the text of the sub-provision does not explicitly describe one. In their words, "[t]he fact that certain provisions within the MPIA contain express private rights of action, while others do not, indicates a lack of legislative intent to create private rights of action in those provisions with no express provision, such as section 10-624." (Def. Mot. 7).

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[5] In this regard, §10-602 helps define what would constitute a clearly established need for "personal records," namely that the information "(1) is needed by . . . the political subdivision, or the unit to accomplish a governmental purpose that is authorized or required to be accomplished under: (i) a statute or legislative mandate; (ii) an executive order of the Governor; (iii) an executive order of the chief executive of a local jurisdiction; or (iv) a judicial rule; and (2) is relevant to accomplishment of the purpose." Obviously the records at issue here were not needed for any such purposes. (The language in § 10-602 was originally added to what is now the Public Information Act in 1978, prior to the statute's recodification into the State Government Article. 1978 Md. Laws 2888 – 2896, at 2890, *available at* http://aomol.net/000001/000736/html/am736--2888.html.)

Defendants ignore the obvious. As is the case for numerous provisions within the MPIA, § 10-624 is enforced through a separate subsection, in this case § 10-626.[6] Section 10-626 expressly applies to the entirety of the MPIA, as is clear by the language "in violation of this Part III of this subtitle." It makes no exclusions. There is simply no basis upon which to infer that § 10-626 provides no remedy for violations involving § 10-624, provided that the other requirements of § 10-626 are met.

Defendants try to justify reading § 10-624 out of § 10-626 by arguing, in effect, that §10-624 is an unimportant provision that the Court should simply disregard:

> "The mere collection of personal information, while perhaps creating a risk that a disclosure might occur, does not in and of itself harm individuals, so long as the information is kept secure and confidential – the government regularly stores all types of personal information, such as tax returns containing social security numbers and other such data, and it would be beyond the bounds of credulity to suggest that this mere compilation and retention of information causes an individual particularized harm which is monetarily redressable." (Def. Mot. 10).

What is "beyond the bounds of credulity" is that Defendants adopt a position that reflects such a fundamental and basic misunderstanding of what is at the heart of this litigation and the privacy protections embodied in the MPIA. It is patently false for Defendants to claim that the information about Plaintiffs was kept "secure and confidential" when, in fact, the defendants raided government databases in order to review Plaintiffs' personal information and compile dossiers for purposes totally unrelated to the needs of government. What Defendants seem to

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[6] Like § 10-624, every other substantive provision in the MPIA similarly contains no enforcement clause or cause of action in the same subsection. Thus, for example, §§ 10-613 (right of inspection), 10-614 (duty to name custodian, time limits for response and prohibited bases for denials), 10-619 (requirement that custodian petition a court to continue a temporary denial) and 10-621 (reasonable fees, and fee waivers) have no cause of action provided in the respective subsections. Instead, violations of those subsections are remedied through the cause of action created by § 10-623.

argue is that the information about Plaintiffs was not disclosed to persons outside of Anne Arundel County government and, thus, no harm occurred that would give rise to liability. Defendants are in error in several respects.

First, Defendants' argument disregards their obligation at this stage of the case, prior to any discovery, to treat the Complaint's allegations as true and draw all inferences in Plaintiffs' favor. Plaintiffs have clearly alleged that Defendants "disseminat[ed]" records. (Compl. ¶45, n3 and ¶62) And, notably, in convicting Defendant Leopold of criminal misconduct, Judge Dennis Sweeney's ruling specifically found, based upon evidence presented at trial, that information was compiled about Plaintiffs Snowden and Redmond for use in political campaigns, strongly suggesting its release outside of government. *State v. Leopold*, No. K-12-415, memorandum opinion and verdict at 22 (Anne Arundel Co. Cir. Ct. Jan. 29, 2013), *available at* http://www.baltimoresun.com/news/maryland/crime/blog/bal-judge-rules-leopold-violated-law-document-20130129,0,4592615.htmlpage (attached as Exhibit One and hereafter cited as "Sweeney op.")

Second, nothing in the text or structure of the MPIA suggests that disclosure to persons outside of government is a necessary prerequisite for liability under the Act. Rather, in addition to disclosure of information to the general public, the Act regulates the information that government entities share within government. *See Office of the Attorney General, Maryland Public Information Act* Manual § II.B, p. 2-4 (12th ed. Oct. 2011) *available at* http://www.oag.state.md.us/Opengov/pia.htm (noting that Act regulates sharing of information between different governmental units). Normally, this internal sharing of information poses no problems, because the information is properly created and disseminated only for lawful purposes. Here, however, as Defendants acknowledge, the information about Plaintiffs' activities was

compiled by Anne Arundel County police officers without any legitimate governmental need, and without any lawful purpose, in part from statutorily improper sources. This unlawfully-compiled personal information was then disseminated outside the police department to Defendant Leopold, his political campaign officials, and perhaps others, at Leopold's direction.

In fact, the conduct complained of here is precisely the sort that the MPIA provisions that Plaintiffs rely on were intended to prevent. The prohibition on creating "personal records" without a "clearly established" need contained in § 10-624 is plainly intended to prevent government actors from creating records just such as those at issue here, which had no legitimate governmental purpose, and were instead intended for use in political campaigns.

Finally, contrary to what the Defendants imply, the MPIA requires no additional showing of harm because the harms are intrinsic to the violation: the nature of a person's interest in protecting private information (such as the information in criminal history databases) is to keep it from being known to others, regardless of whether or not those others are government officials. Indeed, there is a heightened interest in protecting against improper discovery of personal information by government officials – who are uniquely situated to discover private information and to use it. And the harm inherent in government compilation of information not needed for official purposes is equally clear. It is to prevent the vast machinery of government from being co-opted to private, personal, and political ends, which is exactly what happened here. When it becomes known that police may have compiled information about political opponents of incumbent officials, those so-called opponents immediately want to know what information was collected, whether it is accurate or not, damaging or not, and they want to know what government officials did with it. The uncertainty about what information was collected and what was done with it inevitably causes emotional distress. In addition, the knowledge that being

perceived as a political opponent of a government official could mean that police would start investigating opponents' background has a chilling effect on political activity, because opponents cannot know what information will be compiled or disseminated, or if the investigation will extend beyond compiling public record information (as it did here).

The enforcement provision in § 10-626 protects against precisely these harms and supplies the cause of action for violations of § 10-624.

3. Contrary to Defendants' Assertions, Plaintiffs Allege in the Complaint that Defendants Permitted Inspection and Use of Public Records.

Defendants further argue that, even if there is a cause of action for a violation of § 10-624, Plaintiffs do not allege sufficient facts to show that the defendants "permit[ted] inspection or use of a public record" as is required by § 10-626. Defendants' argument ignores the plain language of the Complaint – as well as their obligation to draw all inferences in Plaintiffs' favor.[7]

a. Plaintiffs Allege that Defendants "Permitted Inspection" of Public Records

First, Defendants boldly assert that "[t]here is no allegation in this lawsuit that any personal information which was supposedly collected was improperly disclosed." (Def.'s Mot. 10.) In fact, such wrongful inspection and disclosure of personal information is exactly what is at issue in Plaintiffs' suit. Plaintiffs original Complaint and Proposed Amended Complaint clearly allege improper "inspection" by or dissemination to Leopold of records concerning Plaintiffs. The fact that Leopold was both the person who directed that the records be compiled and disclosed, as well as one of the recipients of the records, does not make the inspection or

[7] In any case, Plaintiffs' Proposed Amended Complaint cures any deficiencies in pleading.

disclosure any more proper. Quite the contrary. Since none of the responsive records should have existed in the first place, pursuant to § 10-624, any transmittal by police officers to Leopold was inherently improper under § 10-626.[8]

More specifically, Plaintiffs allege (and Judge Sweeney found) that Leopold ordered the EPOs to create dossiers on Plaintiffs Carl Snowden and Thomas Redmond, and that those dossiers were disseminated by and to Leopold and his political campaign officials for use in the campaign. (Comp. ¶¶ 3, 41, 45 n.3, 62; Am. Compl. ¶¶ 58, 88, 89, 90.) Consistent with this finding, the Police Department's March 13, 2012 response to the ACLU-MD included records pertaining to Plaintiff Redmond that contained the handwritten annotation, 'copy to JRL 10/15/08'; thus indicating that the records had been copied to County Executive John R. Leopold." (Comp. ¶¶ 67, 68; Am. Comp. ¶¶ 58, 72.)

In their Proposed Amended Complaint, which includes additional information discovered since filing of the original Complaint, Plaintiffs also allege that Leopold specifically directed members of his Executive Protection Detail to compile information about Plaintiff Hamner after she filed her employment discrimination lawsuit against him. (Am. Compl. ¶¶ 25, 99) They further allege that Erik Robey, Leopold's Chief of Staff, participated in the investigation of Ms. Hamner, and talked about having another police officer who was personal friends with Hamner use his access to her postings on social media sites to further compile information about her. (Am. Compl. ¶¶ 25, 99) Additionally, Plaintiffs allege that Defendant Teare is liable for improper dissemination of personal records to Leopold, both because his instructions to his

[8] While the individual officers who transmitted the information Leopold are also potentially liable under the same statutes, it is evident that the officers did not act on their own in creating and transmitting the records, and thus Plaintiffs have chosen to sue the parties that they feel are most culpable, as is their right.

officers were "to keep Leopold happy," (Am. Compl. ¶ 96) and because he was specifically aware of and approved the officers' compilation of information about Plaintiffs and the transmittal of the information to Leopold. (Am. Compl. ¶¶ 96-100.) Indeed, Teare instructed Executive Protection Officers to give him an advance copy of every file they created for Leopold. (Am. Compl. ¶ 97.)

b. Plaintiffs Allege that Defendants "Used" Public Records Compiled with Plaintiffs' Personal Information.

Second, Defendants argue that Plaintiffs do not allege sufficient facts to show that Defendants "used" public records, on the grounds that "'permitting use' means allowing someone or something to take an extant public record and do something with it—such as to use personal information to take out a fraudulent line of credit." (Def. Mot. 11).

But the plaintiffs explicitly allege that Defendants used public records in order to compile the improper dossiers when they, among other things, searched for information contained in Maryland's Criminal Justice Information System ("CJIS") and databases housed by the National Crime Information Center ("NCIC"). (Compl. ¶¶ 12, 15, 17, 45, 46, 65–80.)

Plaintiffs have also clearly alleged that Leopold used the compiled records for his own personal and political gain. For example, as noted earlier, Plaintiffs allege, and Judge Sweeney found, that information was compiled about Plaintiffs Snowden and Redmond for use in political campaigns (Am. Compl. ¶ 89) Plaintiff Redmond specifically avers, in the Proposed Amended Complaint, that information from his dossier was leaked by Leopold and his campaign officials to prominent Anne Arundel County residents in an effort to damage his Redmond's 2010 campaign for County Council. (Am. Compl. ¶ 16) Similarly, Plaintiffs allege that defendants compiled information about plaintiff Hamner in order to bolster Leopold's defense against her lawsuit alleging employment discrimination. (Am. Compl. ¶¶ 99, 100, 101)

Plaintiffs' allegations of dissemination and use, and the inferences necessarily drawn therefrom, are more than sufficient to state a claim under §10-626. Defendants' arguments to the contrary fail.

4. Public Official Immunity Does Not Apply and Leopold Cannot Claim He Acted as a Private Citizen to Defeat Liability.

Defendant Leopold argues that if his actions occurred in the performance of his official duties, he is immune from liability under the doctrine of 'public official immunity,' reflecting a fundamental misunderstanding of doctrine. Alternatively, he argues that his criminal misconduct in directing subordinates to compile information about Plaintiffs means he was not acting within the scope of his official duties, and thus cannot be liable under the MPIA. Needless to say, this tautological assertion is not the law.

5. Public Official Immunity Does Not Apply to Intentional Conduct and Thus Cannot Immunize Defendant Leopold from Liability in this Case Alleging Intentional Wrongdoing.

Defendant Leopold relies on *Houghton v. Forrest*, 412 Md. 578, 586 (2010), to argue that he enjoys public official immunity and thus should be dismissed from Count One. However, as *Houghton* itself discusses at great length, public official immunity is not a defense for *intentional* conduct, but rather only *negligent* conduct. "For more than twenty years, [the Maryland Court of Appeals] has held that common law public official immunity does not apply to intentional torts." *Houghton v. Forrest*, 412 Md. 578, 586 (2010); *accord Lee v. Cline*, 384 Md. 245, 259 (2004) ("The Maryland public official immunity doctrine is quite limited and is generally applicable only in negligence actions or defamation actions based on allegedly negligent conduct.").

Because Plaintiffs have alleged *intentional*, rather than *negligent*, conduct – that Leopold purposefully and improperly directed subordinates to compile records on political challengers and perceived enemies (Compl. ¶¶ 3–5), directed his subordinates to investigate citizens with no

law-enforcement purpose (*id.* ¶¶ 62–80), and disseminated personal records (*id.* ¶¶ 45 n.3, 62), public official immunity is inapposite and it makes no sense for Defendant Leopold to go through the exercise of purporting to apply the elements of the immunity to his conduct in this case. Indeed, Judge Sweeney specifically found that Defendant Leopold engaged in criminal misconduct, including with respect to the records at issue here, "knowingly, willfully, and intentionally.'" Sweeney op. at 6.

B. Leopold Cannot Claim that He Acted as a "Private Citizen" and is Thus Immune from Liability Under the MPIA.

Notwithstanding the above, Defendant Leopold contends that "the Plaintiffs are left with a conundrum—either Mr. Leopold was acting within the scope of his official duties, in which case he has satisfied all of the criteria for 'public official immunity' or, if he was acting outside of the scope of his official duties, then there is no basis for liability, because the MPIA would not apply to Mr. Leopold if he was acting as a private citizen in requesting certain files." (Def.'s Mot. 5.)

No such "conundrum" exists, first, because public official immunity is not available. But, equally importantly, Defendant Leopold cannot shrug off liability by claiming that, *because his misconduct was so egregious that it violated criminal law as well as the Plaintiffs' privacy rights*, he therefore was "acting as a private citizen" and could not possibly be civilly liable. (Def. Mot. 5-6). He was convicted of "Misconduct *In Office*," as he himself points out. *Id.* (emphasis added). An element of the crime is that he abused his authority as a public official. Or, as Judge Sweeney put it: Leopold is guilty of "'corrupt behavior by a public officer in the exercise of the duties of his office or while acting under the color of his office.'" Sweeney op. at 6, *quoting Duncan v. State,* 282 Md. 385, 387 (1978). In no sense was Leopold "acting as a private citizen" when he abused the powers of his office by directing his subordinates to create

and disseminate the records at issue in this case. (Compl. Ex. 1 ¶ 24; Def.'s Mot. 5–6.) As Defendant himself acknowledges, if his position is correct, a public official's illegal conduct would never give rise to civil liability. The law simply does not work this way. *C.f., e.g.*, *In re Allen*, 106 F.3d 582, 593 (4th Cir. 1997) ("A government official . . . cannot claim qualified immunity when he acts totally beyond the scope of his authority."). Indeed, the MPIA itself provides for criminal penalties for persons who violate its terms. *See* § 10-627.

II. Leopold's Claim that He is Not a Custodian of the Records Improperly Withheld from Plaintiffs is Without Merit Because He was Both an Official and De Facto Custodian at the Time of Plaintiffs' Requests

The MPIA recognizes both *de facto* and official custodians, *see* § 10-611(c), requiring either kind of custodian to allow persons to inspect public records. § 10-613(a)(1). Plaintiffs alleged sufficient facts to establish that Leopold is both an official and a *de facto* custodian of the records that were improperly withheld from them.

A. Plaintiffs Alleged Sufficient Facts to Establish Leopold was an Official Custodian

An official custodian is someone "responsible for keeping [a] public record" regardless of "physical custody and control." § 10-611(e). The Court of Appeals has found that this responsibility goes to the top of a given governmental unit. *See Ireland v. Shearin*, 417 Md. 401, 409 (2010) (determining that a prison warden was an official custodian of prison records under a plain-meaning analysis of § 10-611(e)). In *Ireland*, the Court explained:

> Rowley served as warden of [the prison] at the time of Ireland's request. The term "warden" falls within the definition of "managing official" in the Correctional Services Article. It follows, then, that as the individual responsible for managing [the prison] and therefore maintaining records at the institution, Rowley qualified as the official custodian of records under the [MPIA].

Id. (citation omitted).

As a warden is to a prison, so was Leopold to the County. *See* Anne Arundel Cnty. Charter § 401 ("County Executive … [is] … the official head of the County Government."). The Anne Arundel County Charter imposes on the county executive the responsibility "for the proper and efficient administration of such affairs of the County as are placed in the charge or under the jurisdiction and control of the County Executive under this Charter or by law." *Id.* § 405. Leopold was thus "the individual responsible for managing [the County] and therefore maintaining [its] records." *Ireland*, 417 Md. at 409.

Tellingly, Leopold does not identify any other official custodian within the Office of the County Executive. Rather, he declares that the County Police Department's central records manager is the official custodian of records found in the office of the county executive. (Def. Mot. 3) But Plaintiffs' allegations go beyond Police-Department records: they include County-Executive records held in the County Executive's Office. (Compl. ¶¶ 46, 56.)

Plaintiffs have alleged that the withheld records were created by Leopold, or at his direction, and kept in Leopold's office. (Compl. ¶¶ 3, 4, 12, 15.) Judge Sweeney likewise ruled that the evidence in Defendant's criminal trial indicated that dossiers created at Leopold's direction were distributed both to Leopold and separately to his Chief of Staff, Erik Robey, suggesting there were multiple copies.

Plaintiffs sought, and were improperly denied, access to records maintained not only by the Police Department, but also by the Office of the County Executive and the County Executive himself. Leopold was the custodian of these records at the time of Plaintiffs' requests. That he has since left office, and perhaps taken the documents beyond the current custody of the Office of the County Executive does not relieve him of his legal obligation to produce any records he

has in his possession due to his past position as records custodian. Rather, it just shifts his role from that of official custodian to one of *de facto* custodian.

B. Plaintiffs Also Allege Facts to Show Leopold was a De Facto Custodian

A *de facto* custodian is an "authorized individual who has physical custody and control of a public record." § 10-611(c)(2). The Maryland attorney general, in a 1980 opinion, addressed whether an official with "apparent authority to obtain and possess . . . records" is a custodian under the MPIA. 65 Op. Att'y Gen. 365, 369 (1980). The attorney general concluded that an official, such as Leopold, who uses his public office to obtain a file does indeed become a custodian of that file. *See id.* at 366.

Plaintiffs have alleged sufficient facts to establish that Leopold is a *de facto* custodian. Paragraph 3 of the Complaint makes this clear by citing the State's indictment that Leopold used his public office to obtain information about Plaintiffs (and, indeed, Leopold was later convicted criminally of abusing his position in this way.) Further, Plaintiffs allege throughout the Complaint that Leopold had "possession, custody, and control" of information and documents that should have been produced in response to Plaintiffs' MPIA requests. (Compl. ¶¶ 46, 56, 91.) Paragraphs 46 and 56 of the Complaint describe documents "marked with the handwritten note 'copy to JRL,'" indicating that JRL — John R. Leopold — received the requested materials. Finally, paragraph 91 of the Complaint alleges that the requested documents are under the "possession, custody, and control" of the defendants, including Leopold.

Leopold was an official and de facto custodian of records sought by Plaintiffs and thus has provided no basis for dismissal of Count Three.

CONCLUSION

Defendants have failed to provide any reasonable basis for dismissal of Counts One and Three, and their Motions to Dismiss should be denied as to these counts.

REQUEST FOR HEARING

Pursuant to Md. R. 2-311(f), Plaintiffs hereby request a hearing on Defendants' Motions to Dismiss.

April 25, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 26, 2013, a true and correct copy of Opposition to Defendant Leopold's Motion to Dismiss and Request for Hearing was sent by electronic and first-class mail to the following parties:

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April 25, 2013

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