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| **AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MARYLAND, *et al*.** | * | **IN THE CIRCUIT COURT** |
| **Plaintiffs** | * | **FOR WICOMICO COUNTY** |
| **v.** | * | **STATE OF MARYLAND** |
| **CITY OF SALISBURY, *et al*.** | * | **Case No.: C-22-CV-17-000440** |
| **Defendants** | * | |

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**OPINION AND ORDER OF COURT**

The City of Salisbury, *et al*. ("Defendants") filed a Motion to Dismiss or, in the Alternative, Motion for Summary Judgment pursuant to Maryland Rule 2-322 and Maryland Rule 2-501, seeking disposition of the Amended Complaint made by the American Civil Liberties Union Foundation of Maryland, *et al*. ("Plaintiffs"), brought pursuant to the Maryland Public Information Act ("MPIA"), section 4-101 *et seq.*, of the General Provisions Article of the Annotated Code of Maryland.

STATEMENT OF FACTS

On September 3, 2014, four Salisbury University students filed a Complaint in the United States District Court for the District of Maryland alleging police brutality, excessive force, illegal seizure, detention, and arrest against a Salisbury Police Department officer and the City of Salisbury, the case of *Curtis Adams, et al. v. Justin Aita, et al*. *See* Amended Complaint ¶16. On September 26, 2016, the *Adams* court issued an order declaring that the parties to that litigation had settled all claims, and consequently the case was dismissed. *Id*. at ¶19. Thereafter, it came to light that the substance of the *Adams* settlement was to be confidential. *Id*. at ¶21. As a result, on November 1, 2016, Plaintiffs submitted an application, pursuant to the MPIA, seeking disclosure

of the following information: the settlement agreement, correspondence between the parties in the *Adams* litigation and City of Salisbury officials approving settlement terms, documents related to budgetary approval of any monetary settlement amount, documents related to the terms of the settlement agreement, documents issued to defendant SPD members and/or the community at large explaining the settlement, and documents related to any reforms or changes in policy that may have been a condition or result of the *Adams* settlement. *Id*. at ¶25.

In response to Plaintiffs' MPIA application, Defendants sent a missive averring that the City of Salisbury did not have the requested documentation in their possession. *See* Amended Complaint ¶26-27. Following that rebuff, Plaintiffs replied seeking clarification, to which Defendants reiterated that they did not have any documents related to the *Adams* litigation. *Id*. at ¶29. On December 9, 2016, Defendants sent another MPIA request for records to Salisbury Mayor Jacob Day and Salisbury Police Department Chief Barbara Duncan. Neither responded.

PROCEDURAL HISTORY

On June 29, 2017, Plaintiffs, through counsel, filed a Complaint in the Circuit Court for Baltimore City seeking disclosure of the aforementioned documents and records. In that Complaint, they joined the City of Salisbury, the Salisbury Police Department, and Christopher M. Demone as Defendants. On October 6, 2017, Plaintiffs filed an Amended Complaint. Thereafter, Defendants filed a Motion to Dismiss, as well as a Motion to Transfer for *Forum Non Conveniens*. And Plaintiffs filed responses thereto, respectively. On October 13, 2017, a hearing was held in the Circuit Court for Baltimore City, addressing both of those motions. Whereupon, that court granted Defendants' Motion to Dismiss in part and only as it related to the Salisbury Police Department. The Salisbury Police Department was subsequently dismissed from the instant

suit, but all other parties remained in the case. Concurrently, the Baltimore City Court granted Defendants' Motion to Transfer, based on *forum non conveniens*, the case to this Court.

Once the case was within this Court's jurisdiction, on December 15, 2017, Defendants filed the instant Motion to Dismiss, or in the Alternative, Motion for Summary Judgment. On January 16, 2018, Plaintiffs responded, filing their Opposition to Defendants' Motion to Dismiss or in the Alternative, for Summary Judgment. On May 14, 2018, Defendants filed a Reply to Plaintiffs' Opposition to Defendants' Motion to Dismiss the Amended Complaint or, in the Alternative, Motion for Summary Judgment. The Court then held a hearing on May 24, 2018.

STANDARD OF REVIEW

Substantive issues cannot be considered until they are properly framed. In ruling on a motion to dismiss, the Court typically may not rely upon evidence outside the scope of the pleadings, because a motion to dismiss necessarily challenges the sufficiency of the pleadings themselves and nothing more. *See Heneberry v. Paharoan*, 232 Md. App. 468 (2017), wherein the Court of Special Appeals stated that:

> If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, *matters outside the pleading are presented to and not excluded by the court*, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 2-501, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 2-501.

*Id*. at 475 (quoting Maryland Rule 2-322(c)).

In the case at bar, because both parties have attached extrinsic documents to their filings, the Court is precluded from rendering a ruling in the form of a dismissal, but rather, will treat Defendants' motion as one for summary judgment. The rule governing summary judgment provides that, "The Court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in

whose favor judgment is entered is entitled to judgment as a matter of law." Maryland Rule 2-501(f).

The Court of Special Appeals of Maryland in *Lowman v. Consolidated Rail Corp.*, 68 Md. App. 64, 69 (1986), held that for the purpose of summary judgment, a material fact is one "the resolution of which will somehow affect the outcome of the case." Moreover, in order to proceed to trial, the party opposing summary judgment must first produce evidence of a disputed "material fact," which would aid the fact-finder in resolving the dispute. *Ragin v. Porter Hayden Co.*, 133 Md. App. 116, 133 (2000). In order to survive a motion for summary judgment, a claim must be supported by more than a scintilla of evidence, because there must be evidence upon which a jury could reasonably find for the plaintiff. *Blackburn Ltd. Partnership v. Paul*, 438 Md. 100, 108 (2014).

When deciding a motion for summary judgment, the Court's function is not to weigh the evidence and determine the truth of the matter, but rather, to determine whether there is a genuine issue for trial upon which a trier of fact could reasonably decide. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Furthermore, when analyzing the instant matter, this Court considers the record "in the light most favorable to the nonmoving party and construe[s] any reasonable inferences that may be drawn from the facts against the moving party." *Blackburn*, 438 Md. at 108 (quoting *Myers v. Kayhoe*, 391 Md. 188, 203 (2006)).

DISCUSSION

The gravamen of Plaintiffs' Complaint stems from Defendants' refusal to produce documents related to the *Adams* settlement following Plaintiffs' MPIA request. The underlying facts of the case are not in dispute. Both parties are in agreement that there exists a settlement agreement and related documents that were produced as a result of the *Adams* litigation. First,

Defendants claim that, because Plaintiffs have not included the *Adams* plaintiffs as parties to the instant action, they have failed to join necessary parties, and that omission requires dismissal. Next, they argue that, "This action must be dismissed in light of the dispositive fact that the City does not have the records that Plaintiffs requested." Within that claim, they assert that, because the settlement agreement was contemplated, created, and retained by the City of Salisbury's insurers, the Local Government Insurance Trust ("LGIT"), Defendants are not in actual or legal possession of the requested documents, and therefore they have no ability to produce them. Finally, Defendants contend that, even were they in possession of the requested documents, they would necessarily be protected from disclosure by various privileges. Defendants also contend, as an ancillary matter, that Plaintiffs' request for fees, costs, and damages should be denied as they are "inappropriate under the circumstances."

The Maryland Public Information Act was enacted by "Chapter 698 of the Maryland Laws of 1970, and was originally codified as Sections 1-5A of Article 76A of the Code of Maryland." *Maryland Dept. of State Police v. Dashiell*, 443 Md. 435, 452 (2015). "Upon enactment of the State Government Article in 1984, the Public Information Act was 'transferred without amendment' to Sections 10-611 *et seq.* of the State Government Article . . . ." *Id.* The transition of the MPIA from Article 76A to the State Government Article heralded no substantive change to the MPIA. Commenting on this statutory migration, the Court of Appeals held that:

> There is no indication in the legislative history that the separate sections of Title 10, subtitle 6, of the State Government Article were to be interpreted differently from the separate subsections of former Article 76A, § 3. As pointed out above, the transfer was described in the Title of Ch. 284 was being "without amendment." Moreover, the revisor's notes to new §§ 10-615, 10-617, and 10-618 stated that they were all "derived without substantive change" from Article 76A, § 3. *See II Laws of Maryland 1984* at 1357-1364.

*Office of Attorney Gen. v. Gallagher*, 359 Md. 341, 353 (2000).

The MPIA now finds its home in section 4-101 *et seq.*, of the General Provisions Article of the Annotated Code of Maryland. Hearkening to the MPIA's roots, it "was to some extent modeled after the Federal Freedom of Information Act, 5 U.S.C. § 552, enacted in 1966." *Office of Governor v. Washington Post Co.*, 360 Md. 520, 533 (2000). In enacting the Freedom of Information Act, it was structured and shaped by Congress to reflect "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Department of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976). Further, "To make crystal clear the congressional objective in the words of the Court of Appeals, 'to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny,' 495 F.2d, at 263 Congress provided . . . that nothing in the Act should be read to 'authorize withholding of information or limit the availability of records to the public, except as specifically stated . . . .'" *Id*. at 361. In interpreting the Freedom of Information Act, the Supreme Court of the United States held that, "But these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Id*. The statutory exemptions specifically delineated within the text of the Freedom of Information Act, the Supreme Court held, were "explicitly made exclusive . . . and must be narrowly construed." *Id*.

Because the MPIA was modeled after the Freedom of Information Act, the legislative intent undergirding the MPIA is similar to its federal counterpart. The Court of Appeals in *Kirwan v. The Diamondback*, 352 Md. 74 (1998), stated that " 'the provisions of the Public Information Act reflect the legislative intent that citizens of the State of Maryland be accorded wide-ranging access to public information concerning the operation of their government.'" *Id*. at 81 (quoting *Fioretti v. Maryland State Board of Dental Examiners*, 351 Md. 66, 73 (1998)). That Court went on to say that, "We have on several occasions explained that the provisions of the statute 'must be

liberally construed . . . in order to effectuate the Public Information Act's broad remedial purpose.'" *Id*. (quoting *A.S. Abell Publishing Co. v. Mezzanote*, 297 Md. 26, 32 (1983)). As such, the MPIA must be "construed in favor of allowing inspection of a public record, with the least cost and least delay to the person or governmental unit that requests the inspection." § 4-103(b) of the General Provisions Article of the Annotated Code of Maryland.

Regarding Defendants' second contention concerning possession of the requested records, Defendants aver that Plaintiffs' claim should fail "as a matter of law" because the City is not in actual possession of the requested records. In support of that notion, Defendants state that the settlement agreement has never been generated by the City, or received by it in any capacity, but instead the settlement agreement was prepared and executed by attorneys for LGIT, acting as attorneys for the City of Salisbury and indeed, the same attorneys currently represent Defendants. As previously mentioned, the Act contemplates disclosure of public records, "unless an unwarranted invasion of the privacy of a person in interest would result . . . ." § 4-103(b) of the General Provisions Article of the Annotated Code of Maryland. Under the MPIA, public records are defined as "any documentary material that is made by a unit or an instrumentality of the State . . . or received by the unit or instrumentality in connection with the transaction of public business." § 4-101(j)(1) of the General Provisions Article of the Annotated Code of Maryland. The crux of Defendants' claim is that LGIT is not a "unit or an instrumentality of the State."

The Court of Appeals undertook the task of defining the meaning of "unit or instrumentality" in *City of Baltimore Development Corp. v. Carmel Realty Associates*, 395 Md. 299 (2006), wherein the Court stated that:

> The ordinary and popular meaning of the plain language of the statute does not require that an entity be established by a statute for it to be subject to the provisions of the MPIA. The statute only requires that the entity be a "unit or instrumentality" of the City for its provisions to apply. Instrumentality is defined as "the quality or

> state of being instrumental" and instrumental is defined as "serving as a means, agent, or tool." *Merriam Webster's Collegiate Dictionary* 607 (10th ed.1998). Instrumentality is also defined as: "1. A thing used to achieve an end or purpose. 2. A means or agency through which a function of another entity is accomplished, such as a branch of a governing body." *Black's Law Dictionary* 814 (8th ed.2004).

*Id*. at 333.

With this definition in hand, it becomes apparent that LGIT is an instrumentality of the City of Salisbury because LGIT is an agent of the City. Although LGIT is an insurer, it also operates as the City's legal counsel in certain circumstances. As previously mentioned, when the City was entangled in the *Adams* litigation, LGIT provided the attorney of record for the City. LGIT ended that litigation by preparing the *Adams* settlement agreement that is the subject of the instant MPIA request. It is well-settled law that an attorney-client relationship is an agency relationship. In *Skeens v. Miller*, 331 Md. 331 (1993), the Court of Appeals held that, "An attorney-client relationship is an agency relationship, and is governed by principles of agency law." *Id*. at 349. Because LGIT is an agent of the City, it is likewise an instrumentality of the City. Were this Court to accept Defendants' argument, then any government entity could shield public records from the public's sight by transacting through their insurer or attorney. For these reasons, Defendants' motion for summary judgment is denied as to this assertion.

Defendants also claim that the Complaint must be dismissed because Plaintiffs have failed to join a necessary party, namely, the plaintiffs to the *Adams* litigation. Though Plaintiffs claim that this issue has "already been heard and rejected by the Circuit Court for Baltimore City," due to the fact that the Baltimore Court granted Defendants' prior motion to dismiss only as to the Salisbury Police Department, our records indicate otherwise. Within the Court's file, there is a hearing sheet from the October 13, 2017 motion hearing, which was held in the Circuit Court for Baltimore City. Therein, it is annotated that although the Baltimore Court granted the motion to

dismiss as to the Salisbury Police Department, the Court did not render a ruling on the issue of joinder, which was initially raised in Defendants' first motion to dismiss, and of which has been reiterated in the instant motion. The joinder issue has therefore not been adjudicated.

Maryland Rule 2-211 holds that a person "shall be joined as a party in the action if in the person's absence (1) complete relief cannot be accorded to the parties, or (2) disposition of the action may impair or impede the person's ability to protect a claimed interest relating to the subject of the action or may leave persons already parties subject to a substantial risk of incurring multiple or inconsistent obligations by reason of the person's claimed interest." In the instant case, complete relief can be accorded in the absence of the *Adams* plaintiffs. The instant action involves a failure to fulfill an application pursuant to the MPIA. If, after the litigation of this action, and Plaintiffs are successful, then Defendants will have the apparent ability and authority to obligate LGIT to fulfill Plaintiffs' MPIA request. Thus, the *Adams* plaintiffs have no part to play in the MPIA request. Assuming *arguendo* that these parties are required to be joined, dismissal is not a proper form of relief. Maryland Rule 2-211(a) states that, "The court shall order that the person be made a party if not joined as required by this section." Dismissal is only contemplated if a party required to be joined legally cannot be made a party to the action. Maryland Rule 2-211(c).

In response to Defendants' assertion that, because the *Adams* settlement bears a confidentiality clause between the parties, Defendants run the risk of "incurring multiple or inconsistent obligations," the Court is unpersuaded. A party must adhere to a Court's ruling even if that ruling violates a privately-made contract provision subject to the provisions of Section 4-103(b) of the MPIA which states that "unless an unwarranted invasion of the privacy of a person in interest would result, this title shall be construed in favor of allowing inspection of a public record . . . ." A person in interest is defined as "a person or governmental unit that is the subject

of a public record or a designee of the person or governmental unit . . . ." § 4-101(g)(1) of the General Provisions Article of the Annotated Code of Maryland. In interpreting the "unwarranted invasion of privacy" clause of the MPIA, the Court of Appeals has stated the following:

> As we have previously expressed, and as we reiterate today, there are no discrete "public interest," "personal information," or "unwarranted invasion of privacy" exceptions to the MPIA. *See Washington Post*, 360 Md. at 554, 759 A.2d at 268 ("the Maryland Public Information Act does not contain a general 'catchall' public interest exemption. Instead, for a record to be exempt from disclosure because of the 'public interest,' it must fall within one of the specific categories set forth in [§ 4-304]."); *Kirwan v. The Diamondback*, 352 Md. 74, 88-89, 721 A.2d 196, 203 (1998) ("the Maryland Public Information Act does not contain an exemption for particular cases whenever the disclosure of a record might cause an 'unwarranted invasion of privacy.'").

*Police Patrol Sec. Systems, Inc. v. Prince George's County*, 378 Md. 702, 716-17 (2003).

Following this inquiry into case history, the Court of Appeals went on to cite the relevant statute, which has been provided above in its current incarnation as section 4-103(b) of the General Provisions Article of the Annotated Code of Maryland. After which, the Court of Appeals held that:

> The County claims that the highlighted language creates a general catchall power on the part of custodians to deny requests that would create an "unwarranted invasion of the privacy of a person in interest." In fact, the highlighted language is part of an internal statutory construction provision having no independent effect. The language directs that the MPIA be construed more narrowly, and its exemptions more broadly, when privacy issues are at stake. Nonetheless, a records custodian still must find some basis in law for the denial of a request before choosing to withhold public records.

*Police Patrol Sec. Systems, Inc.*, 378 Md. at 717.

There exists no "general catchall power" inherent in the MPIA to deny requests for public records based upon an "unwarranted invasion of the privacy of a person in interest." *Id*. There needs to be some basis in law for the denial of the request. Therefore, a bare allegation that the privacy interests of the *Adams* plaintiffs need to be protected will not suffice to deliver Defendants

summary judgment. At the outset, the names of the *Adams* plaintiffs have already been publically disclosed as the settlement agreement has been publically reported upon. Thus, any privacy interest the *Adams* plaintiffs have in the disclosure of their names is moot. *See Immanuel v. Comptroller of Maryland*, 449 Md. 76 (2016). Moreover, even if the *Adams* plaintiffs' names were not publically disclosed, disclosure would be proper in this case when weighed against the public's right to evaluate "information of this sort." *City of Frederick v. Randall Family, LLC*, 154 Md. App. 543, 571 (2004) ("But the invasion of their privacy in this way cannot be characterized as 'unwarranted' when balanced against the public's right to know and evaluate information of this sort.").

No particularized privacy exemption has been cited by Defendants, and indeed, none of the statutory exemptions within the MPIA would apply to the instant case. The most applicable exemption would be the exemption regarding financial information. Section 4-336(b) of the MPIA provides that "a custodian shall deny inspection of the part of a public record that contains information about the finances of an individual, including assets, income, liabilities, net worth, bank balances, financial history or activities, or creditworthiness." As was previously stated, the Court has not reviewed the contents of the settlement agreement, therefore we are not in a position to decide whether the settlement agreement may fall within an exemption. However, if that settlement agreement contains information denoting the amount of payment the *Adams* plaintiffs received to settle the litigation, it would not be of the type of financial information envisioned above as to exist within that MPIA exemption to disclosure. Rather, that exemption deals with financial information of a more personalized nature that, if disclosed, would shed light on the financial footprint of an individual. *See Immanuel*, 449 Md. 76 (2016). As such, Defendants' motion is denied as to the issue of joinder.

Next, though not presented in their motion-in-chief, but, rather, supplemented in their Reply to Plaintiffs' Opposition, Defendants assert that the confidentiality clause of the settlement agreement *ipso facto* will preclude disclosure. In support of that notion, Defendants point to section 4-301(a)(1) of the MPIA. There, the MPIA holds that "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 . . . ." This contention need not be addressed in much detail as Defendants necessarily misconstrue the statute. In their Reply, Defendants state that, "The MPIA requires the denial of 'public records,' where the record is 'privileged or confidential.' *See* MPIA § 4-301." Defendants' Reply to Plaintiffs' Opposition, p. 21. However, in their recitation of the statute, Defendants omit the key phrase of that exemption. Directly preceding that proclamation of confidentiality, is the phrase, "by law." Thus, just as above, there is no "general catchall power on the part of custodians to deny requests" based upon confidentiality. *Police Patrol Sec. Systems, Inc.*, 378 Md. at 717. Rather, there must be some basis in law to render a document, or a part thereof, confidential. In the instant case, the fact that the settlement agreement contains a confidentiality agreement thus binding the parties to secrecy is of no relevance, here. The provisions of a private contract are not valid, or recognized, legal bases that would generate an air of confidentiality. Defendants further opine that the public policy surrounding settlement agreements requires preemption of disclosure.

Defendants claim that a multitude of privileges and protections will serve to cloak the records from sight. Namely, Defendants assert that the requested records are "protected by the attorney-client, work product, and executive privileges." Defendants' Motion to Dismiss, or in the Alternative, Motion for Summary Judgment, p. 20. Taking the work product privilege first, it cannot stand as a bulwark to the disclosure of a settlement agreement, as a settlement agreement is not work product. "The work product doctrine protects from discovery the work of an attorney

done in anticipation of litigation or in readiness for trial." *E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc.*, 351 Md. 396, 407 (1998). There, the Court of Appeals further stated that "the touchstone of the work product doctrine" is "that the materials must have been created in preparation for trial." *Id*. Thus, by its very nature, for a document or writing to be considered work product it must have been prepared "in anticipation of litigation or in readiness for trial." *Id*. It follows that a settlement agreement cannot be considered work product as it is not prepared in anticipation of trial or litigation. To the contrary, a settlement agreement is prepared for the express purpose of preventing litigation. Its sole reason for existence is to end litigation and ensure an action never reaches the trial stage. For that reason, settlement agreements are not work product, and the privilege does not apply. This concept has been affirmed in the courts of other states. *See Yakima Newspapers, Inc. v. City of Yakima*, 77 Wash. App. 319 (1995).

Regarding the attorney-client and executive privileges, Plaintiffs are correct in asserting that these claims are premature at this stage of the proceedings. The burden is on Defendants to "establish that the records [are] privileged." *See Office of Governor v. Washington Post Co.*, 360 Md. 520, 561 (2000). Consequently, bald assertions that documents may or may not be exempt from disclosure due to a privilege held by the government entity are not sufficient bases for a grant of summary judgment. At this stage in the proceedings, Defendants have not asserted which documents may hold a privilege, the scope of that privilege, and, indeed, which portions of the documents should be exempt from disclosure. As such, Defendants' motion for summary judgment is denied as to this claim.

Finally, Defendants claim that costs cannot be awarded in this action. Section 4-362(d) of the General Provisions Article of the Annotated Code of Maryland provides that, "A defendant governmental unit is liable to the complainant for statutory damages and actual damages that the

court considers appropriate if the court finds that any defendant knowingly and willfully failed to: disclose a public record that the complainant was entitled to inspect, or provide a copy of a public record that the complainant requested . . . Statutory damages imposed by the court of this subsection may not exceed $1,000" As such, costs and damages are envisioned and wholly permissible under the MPIA. With regard to attorney's fees, the Court of Appeals has held that, "Generally, the decision whether to award counsel fees to an eligible party under the MPIA rests within the sound exercise of discretion by the trial judge." *Caffrey v. Department of Liquor Control for Montgomery County*, 370 Md. 272, 289 (2002). Therefore, both attorney's fees and damages are permissible under the MPIA.

**CONCLUSION**

For the foregoing reasons, it is this _____, by the Circuit Court for Wicomico County, State of Maryland, hereby

**ORDERED**, that Defendants' Motion to Dismiss, or in the Alternative, Motion for Summary Judgment is **DENIED**.

05/31/2018 03:27:20 PM
W. Newton Jackson III

JUDGE