IN THE
COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 2022

NO. 20

BALTIMORE POLICE DEPARTMENT, *et al*.,

Appellants,

v.

OPEN JUSTICE BALTIMORE,

Appellee.

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF OF *AMICI CURIAE* PUBLIC INTEREST ORGANIZATIONS IN SUPPORT OF APPELLEE, BY WRITTEN CONSENT

Adam B. Abelson | Samantha A. Miller
ZUCKERMAN SPAEDER LLP
100 East Pratt Street, Suite 2440
Baltimore, MD 21202
(410) 332-0444

Attorneys for Amici Curiae ACLU of Maryland, The Public Justice Center, and Washington Lawyers' Committee for Civil Rights and Urban Affairs

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTERESTS OF AMICI 1

INTRODUCTION 4

BACKGROUND 5

ARGUMENT 10

I. Public Interest Organizations' Access To Public Records Is Critical to Government Accountability. 10

II. Agencies' Demands That Public Interest Organizations Pay Onerous Fees As A Condition For Access To Public Records Undermine the PIA And Government Accountability. 12

III. The Lower Courts Have Erred In Applying Arbitrary-And-Capricious Review To Agencies' Denials of Public Interest Organizations' Waiver Requests. 18

CONCLUSION 26

PERTINENT AUTHORITIES 28

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112 32

TABLE OF AUTHORITIES

CASES

A.S. Abell Publishing Co. v. Mezzanote,
297 Md. 26, 464 A.2d 1068 (1983). 4, 14

ACLU of Maryland v. Sheriff of Calvert County,
Case No. 24-C-22-001125 OG (Balt. City Circuit Court) 16

Action Comm. For Transit, Inc. v. Town of Chevy Chase,
229 Md. App. 540, 145 A.3d 640 (2016) 19, 20, 23, 24

Am. Civil Liberties Union of N. Calif. v. U.S. Dep't of Def.,
No. C 06-01698 WHA, 2006 WL 1469418 (N.D. Cal. May 25, 2006) 11

Baltimore Action Legal Team v. Off. of State's Att'y of Baltimore City,
253 Md. App. 360, 265 A.3d 1187 (2021) (*amicus*) 2

Blythe v. State,
161 Md. App. 492, 870 A.2d 1246 (2005). 6

Cause of Action v. FTC,
799 F.3d 1108 (D.C. Cir. 2015). 9, 10, 22, 25

City of Balt. Dev't Corp. v. Carmel Realty Assocs.,
395 Md. 299, 910 A.2d 406 (2006) (*amicus*) 2, 13-14

Dep't of Air Force v. Rose,
425 U.S. 352 (1976 10

Fioretti v. Maryland State Bd. of Dental Examiners,
351 Md. 66, 716 A.2d 258 (1998) 6

Harvey v. Marshall,
389 Md. 243 (2005) 21, 23

Heaps v. Cobb,
185 Md. 372, 45 A.2d 73(1945) 22

Hurl v. Bd. of Educ. of Howard Cnty.,
107 Md. App. 286, 667 A.2d 970 (1995) 23

Immanuel v. Comptroller of Md.,
449 Md. 76 (2016) 9, 13

Ireland v. Shearin,
417 Md. 401, 10 A.3d 754 (2010) 2

Jud. Watch, Inc. v. Rossotti,
326 F.3d 1309 (D.C. Cir. 2003) 22

Kirwan v. The Diamondback,
352 Md. 74, 721 A.2d 196 (1998) 5-6

Massey v. Galley,
392 Md. 634, 898 A.2d 951 (2006). 2

Mayor & City Council of Baltimore v. Burke,
67 Md. App. 147, 506 A.2d 683 (1986) 8

Md. Dep't of State Police v. Dashiell,
443 Md. 435, 117 A.3d 1 (2015) (*amicus*) 2

Md. Dep't of the Env't v. Cnty. Commissioners of Carroll Cnty.,
465 Md. 169, 214 A.3d 61 (2019) 22

People for the Ethical Treatment of Animals v. Nat'l Institutes of Health,
Dep't of Health & Hum. Servs.,
745 F.3d 535 (D.C. Cir. 2014) 11

Spencer v. Board of Pharmacy,
380 Md. 515, 846 A.2d 341 (2004) 21

STATUTES

5 U.S.C. § 552(a)(4)(A)(iii) 12, 13

5 U.S.C. § 552(a)(4)(A)(vii) 22, 23, 24

Md. Code Ann., G. P. § 4-101 4

Md. Code Ann., G. P. § 4-103(a) 4

Md. Code Ann., G.P. § 4-103(b) 6

Md. Code Ann., G.P. § 4-206(b)(1) 6

Md. Code Ann., G.P. § 4-206(e). 7

Md. Code Ann., G.P. § 4-206(e)(2)(ii). 4, 6, 7, 12, 13, 18, 25

Md. Code Ann., G. P. § 4-362 19

Md. Code Ann., G. P. § 4-362(a)(1) 19

Md. Code Ann., G. P. § 4-362(a)(3) 19

Md. Code Ann., G. P. § 4-362(b)(2)(i) 19

Md. Code Ann., G. P. § 4-362(d) 19

Md. Code Ann., G. P. § 4-362(e) 20

OTHER AUTHORITIES

Cory Schouten,
Who files the most FOIA requests? It's not who you think, Columbia Journalism Review (March 17, 2017) 11

Alexis de Tocqueville,
Democracy In America 489–492 (1840), Harvey C. Mansfield and Delba Winthrop eds. and trans. University of Chicago Press (2000) 10

Appendix F, Public Comments on Report on the Public Information Act: Preliminary Findings and Recommendations, December 2019 18

Final Report of the Office of the Attorney General on the Implementation of the Public Information Act (Dec. 2017) 13, 17

FOIA Update: New Fee Waiver Policy Guidance (Jan. 1, 1987) 13

John R. Grimm,
How Federal and Maryland Courts Review Administrative Agency Actions, 81 Md. L. Rev. 1224 (2022) 21-22

Maryland Attorney General, *Maryland Public Information Act Manual*, 17th Ed. (July 2022) 4-5, 7, 8, 12, 13

Mick Dumke,
The Laquan McDonald Shooting Keeps Exposing Critical Flaws in Illinois' Freedom of Information Act, ProPublica (Dec. 19, 2018) 11

Public Access Ombudsman, Annual Report FY2022...11

Public Information Act Compliance Board and Public Access Ombudsman,
Final Report on the Public Information Act (Dec. 27, 2019), ... 15, 16, 17

U.S. Department of Justice Office of Information Policy,
Summary of Annual FOIA Reports for Fiscal Year 2021 14

U.S. Department of Education Freedom of Information Act Fee Regulations 15

U.S. Department of Justice Civil Rights Division and United States Attorney's Office Northern District of Illinois,
Investigation of the Chicago Police Department (Jan. 13, 2017)........................11

INTERESTS OF AMICI

The American Civil Liberties Union of Maryland ("ACLU of Maryland") is the state affiliate of the ACLU, a nationwide nonprofit organization dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Its mission includes to "empower Marylanders to exercise their rights so that the law values and uplifts their humanity." Since its founding in 1931, the ACLU of Maryland has appeared before courts and administrative bodies in numerous civil rights cases, including dozens of cases concerning police practices, voting rights, education, employment and the justice system. As part of this mission, the ACLU gathers information and authors reports about issues important to the lives of Marylanders.

Public records requests under the MPIA are a key part of the ACLU's information-gathering process. Using documents obtained through MPIA requests, the ACLU has issued reports on myriad subjects, including certain counties' proposals related to Amazon's search for a second headquarters; the Anne Arundel County State's Attorney's abuse of the grand jury process; and the privacy implications of police uses of license plate readers. The ACLU also uses FOIA requests for public educational purposes. Documents obtained through FOIA requests have contributed to the ACLU's reports on, for example, the FBI's use of infrared and night-vision cameras to surveil protesters in Baltimore.

The Public Justice Center is a non-profit civil rights and anti-poverty legal organization established in 1985. PJC uses impact litigation, public education, and legislative advocacy through a race equity lens to accomplish law reform for its clients. Its Appellate Advocacy Project expands and improves representation of disadvantaged persons and civil rights issues before the Maryland and federal appellate courts. The PJC has a demonstrated commitment to ensuring that the purpose of the PIA is realized. *See, e.g., Baltimore Action Legal Team v. Off. of State's Att'y of Baltimore City*, 253 Md. App. 360, 265 A.3d 1187 (2021) (*amicus*); *Md. Dep't of State Police v. Dashiell,* 443 Md. 435, 117 A.3d 1 (2015) (*amicus*); *Ireland v. Shearin,* 417 Md. 401, 10 A.3d 754 (2010); *City of Balt. Dev't Corp. v. Carmel Realty Assocs.,* 395 Md. 299, 910 A.2d 406 (2006) (*amicus*); *Massey v. Galley,* 392 Md. 634, 898 A.2d 951 (2006).

The Washington Lawyers' Committee for Civil Rights and Urban Affairs (the "Washington Lawyers' Committee") is a nonprofit civil rights organization established to eradicate racial discrimination and poverty by enforcing civil rights laws through litigation and public policy advocacy in the District of Columbia, Virginia, and Maryland. A significant component of the Committee's docket is to address discrimination and misconduct by public agencies, including litigation in Maryland regarding police conduct. Thus, the Committee relies on access to public

records to pursue its litigation and public policy agenda and has pending PIA requests regarding law enforcement practices in Prince Georges County.

INTRODUCTION

Under the Maryland Public Information Act (the "PIA"), "[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., Gen. Provisions ("G.P.") § 4-103(a), subject only to enumerated exceptions, *id.* §§ 4-101, *et seq*. "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." *A.S. Abell Publishing Co. v. Mezzanote*, 297 Md. 26, 32, 464 A.2d 1068, 1071 (1983).

In recognition of the importance of public access, the General Assembly instructed state and local agencies that they should not impose fees for access—and hold public records hostage until the agencies are paid—when waiver of such fees "would be in the public interest." G.P. § 4-206(e)(2)(ii).

A core mission of organizations like Amici—the ACLU of Maryland, the Public Justice Center, and the Washington Lawyers' Committee—is to hold agencies accountable through public records requests, public education, and advocacy campaigns. In recent years, however, a disturbing pattern has emerged. Although agencies are permitted to charge fees where disclosure is "primarily in the commercial interest of the requester," Office of the Attorney General, *Maryland*

Public Information Act Manual, 17th ed. (July 2022) ("*PIA Manual*"), at 7-7,[1] agencies are increasingly demanding that *public interest* organizations like Amici pay thousands or even hundreds of thousands of dollars to access records about the operations and activities of the government. But compliance with public records laws is a core function of public agencies. Under the federal Freedom of Information Act ("FOIA"), for example, federal agencies rarely charge fees; less than 0.4% of the costs related to the federal government FOIA activities are covered by fees. *See* p. 14, *infra*.

The General Assembly enacted the PIA, with FOIA as the model, to create the transparency necessary to ensure accountability of public agencies. That entire legal structure begins to crumble if government agencies are permitted to erect barrier after barrier when nonprofit public interest organizations, like Amici and Appellee, seek access to public records in furtherance of their missions. For the reasons stated herein, Amici urge the Court to affirm the Court of Special Appeals' judgment, but also to clarify that courts reviewing challenges to fee waiver determinations must adjudicate such challenges de novo.

BACKGROUND

The PIA "establishes a public policy and a general presumption in favor of disclosure of government or public documents." *Kirwan v. The Diamondback*, 352

[1] https://www.marylandattorneygeneral.gov/Pages/OpenGov/piamanual.aspx.

Md. 74, 80, 721 A.2d 196, 199 (1998). The General Assembly has instructed that "unless an unwarranted invasion of the privacy of a person in interest would result," the PIA "shall 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." G.P. § 4-103(b).[2]

As part of this framework, the PIA permits the official custodian of a record to charge "a reasonable fee" for disclosing records. G.P. § 4-206(b)(1). But the PIA also provides that fees should be waived where, "after consideration of the ability of the applicant to pay the fee and other relevant factors, the official custodian determines that the waiver would be in the public interest." G.P. § 4-206(e)(2)(ii).

As Appellant explains, the PIA did not originally address the circumstances in which fees should be waived; it neither required nor prohibited fees, and did not specify when fees should be charged. That changed in 1982, when the General Assembly—following Congress's lead through FOIA—pegged that question to whether waiver was in "the public interest." *See* Appellants' Br. at 8-9 (quoting Chapter 431, 1982 Laws of Maryland); App. 57-58. The context in which that

---

[2] The PIA was enacted in 1970, four years after Congress enacted the federal Freedom of Information Act, often referred to as the "archetype of public information acts." *Blythe v. State*, 161 Md. App. 492, 513, 870 A.2d 1246 (2005). The public policies advanced by the FOIA and the MPIA are virtually identical. *Id*. *See also Fioretti v. Maryland State Bd. of Dental Examiners*, 351 Md. 66, 76, 716 A.2d 258, 263 (1998).

standard arose is important, and illustrative. As then-Governor Harry Hughes's Information Practices Commission explained, at that time, "most State agencies" did not charge *any* fees for access to public records. Appellants' App. 57. But that created a "problem" for agencies that "maintain[ed] record systems *containing corporate financial data*." *Id.* (emphasis added). "[C]ompetitors" of companies that submitted such corporate financial data were lodging frequent requests under the PIA for their competitors' data, which imposed significant burdens on those agencies—with no public interest furthered from disclosure. *Id.* The only reason such information was sought was, as the Attorney General later put it, because of the "narrow . . . commercial interest[s]" of those business competitors. *PIA Manual* at 7-5.

In contrast to such "commercial" requests, and even before the 1982 amendment, the Attorney General had "encouraged most State agencies to waive fees if they determine[d] such action to be in the public interest." Appellants' App. 58. That direction became explicit and direct when the PIA was amended. From then on, the PIA has instructed that requesters should not be charged fees where "waiver would be in the public interest." G.P. § 4-206(e). This context reveals that by "in the public interest" the General Assembly meant, essentially, "not for commercial purposes."

Consistent with the statute, the Attorney General instructs that the "public interest" standard is satisfied where disclosure of the requested documents will "shed light on a 'public controversy about official actions' or an 'agency's performance of its public duties,'" "is likely to contribute significantly to public understanding of the operations or activities of the government," and "is not primarily in the commercial interest of the requester." *PIA Manual* at 7-6 to -7 (citations omitted). In other words, agencies should waive fees "when a requestor seeks information for a public purpose, *rather than a narrow personal or commercial interest*, because a public purpose justifies the expenditure of public funds to comply with the request." *PIA Manual* at 7-5 (emphasis added). The key distinction is between instances where a request seeks primarily to further a "narrow personal or commercial interest"—such as the corporate financial data requests that prompted the 1982 amendment—as opposed to public record requests that are sought for a "public purpose." Indeed, the Attorney General has instructed that even if a request is *in part* "in the commercial interest of the requester" a waiver should be granted. *PIA Manual* at 7-7 (referring to requests that are "*primarily* in the commercial interest of the requester") (emphasis added).

As the Court of Special Appeals has explained, it is the nature of the requestor, and the requested information, that drives the analysis. *See, e.g.*, *Mayor & City Council of Baltimore v. Burke*, 67 Md. App. 147, 157, 506 A.2d 683, 688 (1986)

(explaining that regardless of the "perceived ability of the [requestor] to pay the City's projected fee," the "determination of whether the waiver would be in the public interest" was supported by, among other things, the health hazard created by the discharge of inadequately treated sewage into the Patapsco River, and the danger that imposing a fee for information upon a newspaper publisher might have a chilling effect on free exercise of freedom of the press").

When the PIA was enacted in 1970, it was fashioned as the state equivalent of FOIA. *See Immanuel v. Comptroller of Md.*, 449 Md. 76, 89–90 (2016) ("Although the text and history of the MPIA differ from the FOIA, the Maryland Act was . . . modeled after the [FOIA] and the purpose of the MPIA is virtually identical to that of the FOIA.") (internal quotations and citations omitted). FOIA sets the same standard for whether fees should be imposed for a government agency's compliance with a public records request, namely whether the request "(1) shed[s] light on 'the operations or activities of the government'; (2) is 'likely to contribute significantly to public understanding' of those operations or activities'; and (3) is not be 'primarily in the commercial interest of the requestor.'" *Cause of Action v. FTC*, 799 F.3d 1108, 1115 (D.C. Cir. 2015).

ARGUMENT

I. PUBLIC INTEREST ORGANIZATIONS' ACCESS TO PUBLIC RECORDS IS CRITICAL TO GOVERNMENT ACCOUNTABILITY.

The purpose of public records statutes like FOIA and PIA is "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose,* 425 U.S. 352, 361 (1976). That is also a pillar of the missions of many public interest organizations, including Amici: the ACLU of Maryland, the Public Justice Center, and the Washington Lawyers' Committee. *See* pp. 1-3, *supra* (describing Amici's missions).

It is no surprise that public records laws dovetail with many public interest organizations' missions. Nonprofit organizations have long played a critical role in our democracy in "shed[ing] light on 'the operations or activities of the government.'" *Cause of Action*, 799 F.3d at 1115. One of Alexis de Tocqueville most enduring observations of early nineteenth century American society was our proclivity toward "associations [of] a thousand . . . kinds." Alexis de Tocqueville, *Democracy In America* 489–492 (1840), Harvey C. Mansfield and Delba Winthrop eds. and trans. University of Chicago Press (2000).[3] Nonprofits frequently use for public education and advocacy the records of government activity they obtain through FOIA and other public records laws. *See* pp. 1-3, *supra* (Interests of Amici).

---

[3] Excerpt available at https://press.uchicago.edu/Misc/Chicago/805328.html.

See also, e.g., United States Department of Justice Civil Rights Division and United States Attorney's Office Northern District of Illinois, *Investigation of the Chicago Police Department* (Jan. 13, 2017), at 1, https://www.justice.gov/opa/file/925846/download (investigation prompted by release of video of fatal shooting of Laquan McDonald); Mick Dumke, *The Laquan McDonald Shooting Keeps Exposing Critical Flaws in Illinois' Freedom of Information Act*, ProPublica (Dec. 19, 2018), https://www.propublica.org/article/illinois-foia-flaws-freedom-of-information-act-public-records-laquan-mcdonald-chicago (explaining that video was only released following contested Illinois Freedom of Information Act request); *People for the Ethical Treatment of Animals v. Nat'l Institutes of Health*, *Dep't of Health & Hum. Servs.*, 745 F.3d 535 (D.C. Cir. 2014) (requests by animal rights advocacy group for records about animal experimentation); *Am. Civil Liberties Union of N. Calif. v. U.S. Dep't of Def.*, No. C 06-01698 WHA, 2006 WL 1469418, at *1 (N.D. Cal. May 25, 2006) (request by ACLU affiliate for information about Department of Defense investigation of anti-war gatherings).[4]

[4] At the federal level, nonprofits lodge approximately 7.5 percent of all FOIA requests in 2017. Cory Schouten, *Who files the most FOIA requests? It's not who you think*, Columbia Journalism Review (March 17, 2017), https://www.cjr.org/analysis/foia-report-media-journalists-business-mapper.php. In Maryland, the reported proportion is lower: approximately 2 percent, according to the Public Access Ombudsman. *See, e.g.*, Public Access Ombudsman, Annual Report FY2022.

The alignment of purpose between public records laws and public interest organizations is why those laws provide that fees should *not* be charged where public interest organizations seek information in furtherance of their missions (as opposed to requests "primarily" motivated by the "commercial interest of the requester"), and where disclosure is "likely to contribute significantly to public understanding of the operations or activities of the government." *PIA Manual* at 7-7 (quoting FOIA, 5 U.S.C. § 552(a)(4)(A)(iii)). Such contributions to public understanding of government operations is the core purpose of the PIA.

II. AGENCIES' DEMANDS THAT PUBLIC INTEREST ORGANIZATIONS PAY ONEROUS FEES AS A CONDITION FOR ACCESS TO PUBLIC RECORDS UNDERMINE THE PIA AND GOVERNMENT ACCOUNTABILITY.

When the General Assembly specified the types of requests as to which fees could be charged (such as competitors seeking corporate financial data), and decreed that fees should not be charged when "waiver would be in the public interest," G.P. § 4-206(e)(2)(ii), it was not only drawing a line about fees. It was enacting a policy that agencies should not use fees to obstruct the public from accessing government records. As the Attorney General has explained, the General Assembly was adopting the FOIA standard, under which fees are waived where disclosure is likely to "significantly contribute" to a "public understanding" of "government operations or

---

https://www.marylandattorneygeneral.gov/OpenGov%20Documents/PIACB/AnnualReportFY2022.pdf.

activities," and where disclosure "is not primarily in the commercial interest of the requester." *Final Report of the Office of the Attorney General on the Implementation of the Public Information Act* (Dec. 2017), https://www.marylandattorneygeneral.gov/OpenGov%20Documents/PIA_IR/Final_PIA_Report.pdf ("*Final OAG Report*), at 20-21 (citing *FOIA Update: New Fee Waiver Policy Guidance* (Jan. 1, 1987), https://www.justice.gov/oip/blog/foia-update-new-fee-waiver-policy-guidance). *See also PIA Manual* at 7-6 to -7.[5]

As this Court has emphasized, the PIA is a remedial statute that should be liberally construed in order to effectuate its broad, remedial purpose. *Immanuel*, 449 Md. at 88, 141 A.3d 181, at 188 (2016); *City of Baltimore Dev. Corp. v. Carmel*

[5] The only distinction between FOIA and the PIA with respect to fees is that FOIA's waiver language is mandatory, whereas the PIA's is permissive. The standards under federal and state law for whether waiver would be in the "public interest," however, are substantively the same. 5 U.S.C. § 552(a)(4)(A)(iii) ("Documents **shall** be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."); G.P. § 4-206(e)(2)(ii) ("The official custodian **may** waive a fee under this section if . . . after consideration of the ability of the applicant to pay the fee and other relevant factors, the official custodian determines that the waiver would be in the public interest."). Because the substantive standards are the same, Maryland agencies' approaches to PIA fee waivers should be the same as under FOIA, as should the frequency of grants. As discussed herein, however, neither is the case—highlighting the need for this Court to realign agencies' approaches with a faithful interpretation of the statute.

Realty Assocs., 395 Md. 299, 332, 910 A.2d 406, 426 (2006); *A.S. Abell Pub. Co.*, 297 Md. at 32., 464 A.2d 1068, at 1071.

The core purpose of the PIA is severely undermined when agencies use exorbitant fees—fees that many organizations cannot afford, and even if technically affordable, fees that require redirecting funds from other mission-furthering purposes. Imposing such fees also deters public interest organizations from making such requests in the first place. Making and pursuing FOIA and PIA requests is already complicated and time-consuming.[6] Organizations are likely to give up altogether if agencies are permitted to routinely reject fee waivers from public interest organizations seeking public records for public purposes. Many agencies count on this, too.

Federal agencies rarely charge fees. Less than 0.4 percent of the federal government's FOIA activities are covered by FOIA fees.[7] Where agencies charge for access to public records, any such charges are almost entirely limited to *costs*—such as photocopy costs, at low per-page rates. Where they do charge search or

---

[6] Often, in Amici's experience, the delays occasioned by having to litigate over such issues renders the public records themselves useless. Many agencies know and capitalize on this. The Court should not countenance such conduct.

[7] *See* U.S. Department of Justice Office of Information Policy, *Summary of Annual FOIA Reports for Fiscal Year 2021*, https://www.justice.gov/oip/page/file/1521211/download#:~:text=In%20FY%202021%2C%20the%20federal,requests%20received%20in%20FY%202020.

review fees, they are almost always limited to commercial business requesters. Take for instance the U.S. Department of Education, which charges "review fees" only for "Commercial Business Requesters":[8]

Requester Category	Duplication Cost	Search Fees	Review Fees
Commercial Business Requesters	20cents per page, or the $3.00 cost of each computer disk. No duplication fees if records are released as email attachment.	Based on the duration of the search and the salary of the agency employee who performed the search, plus 16%.	Based on the duration of the review and the salary of the agency employee who reviewed the records, plus 16%.
Educational Institutions/ Media	20cents per page (first 100 pages free), or the $3.00 cost of each computer disk. No duplication fees if records are released as email attachment.	None.	None.
All others (private individuals, etc.)	20cents per page (first 100 pages free), or the $3.00 cost of each computer disk. No duplication fees if records are released as an email attachment.	First 2 hours free. Based on the duration of the search and the salary of the agency employee who performed the search, plus 16%.	None.

In contrast to federal agencies, Maryland agencies increasingly and routinely demand fees from PIA requesters. A 2019 joint report of the Public Access Ombudsman and the Public Information Act Compliance Board collected data on agencies' compliance with the PIA, including the PIA's fee provisions. *See* Public Information Act Compliance Board and Public Access Ombudsman, *Final Report on the Public Information Act* (Dec. 27, 2019), https://www.marylandattorneygeneral.gov/OpenGov%20Documents/PIACB/122719_Final_Report_on_the_PIA.pdf ("*PIACB/Ombudsman Report*"). It found that

[8] U.S. Department of Education Freedom of Information Act Fee Regulations, https://www2.ed.gov/policy/gen/leg/foia/fees.html.

agencies grant fee waiver requests only infrequently. Of the approximately 250 waiver requests that were reported to the Ombudsman during the reporting period (several agencies reported no data at all), agencies denied waivers almost *eighty percent* of the time. *Id.* at 31.[9] Some of the agencies, including those with the highest number of PIA requests—the Maryland State Police and the Department of the Environment—denied waiver requests *90 and 96 percent* of the time, respectively. *Id.* The Department of Natural Resources' statistics are even more egregious: 72 percent of its PIA requests were accompanied by a fee waiver request, and DNR *denied all of them*. *Id.* Yet these are state agencies represented by the Office of the Attorney General, whose advice recorded in the PIA Manual cuts directly against such charges.

And that report was limited to *state* agencies. Based on Amici's experience, a shift has occurred in recent years, with local governments and law enforcement agencies, like Appellant, granting fee waivers even less frequently—and the fees imposed by such agencies can be especially high. *See, e.g.*, *ACLU of Maryland v. Sheriff of Calvert County*, Case No. 24-C-22-001125 OG (Balt. City Circuit Court) (challenging fee demand of over $12,000 to produce records of strip searches and body cavity searches).

---

[9] Those figures are calculated from the figures reported in the PIACB/Ombudsman Report, using the total request, waiver and grant percentages reported at page 31 of the report, as to the agencies that reported data.

As reflected in the data above, the federal government recognizes that compliance with public records laws is a core function of public agencies: less than 0.4 percent of the federal government's FOIA activities are covered by FOIA fees. *See* p. 14, *supra*. That means federal agencies recognize that *part of their job* is to produce public records when FOIA requires. The focus is *not* on whether employees of a requested agency would rather spend their time on other parts of their jobs. If that were relevant, agencies would almost never waive fees.

As reflected in the PIACB and OAG reports, the story in Maryland is very different. The PIACB criticized Maryland agencies' low waiver rates, attributing it to "agencies' misunderstanding of the PIA's fee waiver provisions." *PIACB/Ombudsman Report* at 32 n.44. It also criticized agencies for adopting a "default unwillingness to grant fee waivers," *id.*—which is not surprising, given that fees charged and collected constitute revenue for the agency from which public records are sought. The Attorney General also criticized this default refusal to grant fee waivers, while not seeing it as an issue of "misunderstanding," but rather as an inherent bias against public interest organizations. The Attorney General observed that agency employees "tend to believe that the work *they* do is in the public interest," and thus that they may incorrectly view the "requests by community activists and advocacy groups—who might be critical of governmental policies—as not being in the public interest." *Final OAG Report* at 13 (emphasis in original).

Similarly, among the scant reasons agencies frequently give for a fee waiver denial are the lack of staffing and resources to afford grant of a fee waiver, although nothing in the PIA, the Attorney General's explanatory guidance, or the case law support such perceptions as a basis for denying fee waivers.[10]

The low rates of compliance, and counter-productive attitudes among some agency custodians, undermine the undisputed purpose of the PIA to provide public access to government records to facilitate an open government and are contrary to the agencies' clear obligations under the PIA.

III. THE LOWER COURTS HAVE ERRED IN APPLYING ARBITRARY-AND-CAPRICIOUS REVIEW TO AGENCIES' DENIALS OF PUBLIC INTEREST ORGANIZATIONS' WAIVER REQUESTS.

Just as important as clarifying the legal standard for public interest waivers, this Court should resolve a question of first impression that has percolated in the courts below and one this Court has never addressed: the legal standard for adjudicating challenges to agencies' denials of PIA fee waiver requests. When a government agency has denied a request for a fee waiver, based on a determination that the agency believes waiver would not "be in the public interest," G.P. § 4-

[10] *Appendix F, Public Comments on Report on the Public Information Act: Preliminary Findings and Recommendations,* December 2019, https://news.maryland.gov/mpiaombuds/wp-content/uploads/sites/20/2019/12/AppendixF.pdf, at 36.

206(e)(2)(ii), the courts should review that determination *de novo*, just as the federal courts do in adjudicating challenges to fee waiver denials under FOIA.

The Court of Special Appeals has held that a fee waiver denial should be upheld as long as it was not "arbitrary and capricious." *Action Comm. For Transit, Inc. v. Town of Chevy Chase*, 229 Md. App. 540, 559, 145 A.3d 640, 651 (2016). But in fact, the legislative history, the FOIA analog, and principles of judicial review all counsel against granting deference to agencies that wish to charge public interest organizations like Amici for access to public records.

The PIA itself does not address the standard of review for fee waiver denials. But the evidence of legislative intent points decisively in favor of a *de novo* standard. The only reference in the statute to a standard of review appears in the "Denials of Inspection" subtitle, specifically G.P. § 4-362, governing "Judicial Review." That section addresses denials of requests for inspection of a public records (not fee waiver denials), *id.* § 4-362(a)(1), and authorizes requesters to challenge such denials in circuit court. *Id.* § 4-362(a)(3). It then imposes *on the defendant*—i.e. the agency that denied a request—the "burden of sustaining a decision" to deny access to the requested records. *Id.* § 4-362(b)(2)(i). It goes on to impose on "defendant governmental unit[s]" statutory and actual *damages* for knowing and willful denials of requests for inspection in violation of the statute. *Id.* § 4-362(d). And it even

provides as follows; the bold emphasis is the only reference in the statute to a standard of review:

> (1) Whenever the court orders the production of a public record or a copy, printout, or photograph of a public record that was withheld from the applicant and, **in addition**, **finds that the custodian acted arbitrarily or capriciously** in withholding the public record or the copy, printout, or photograph of the public record, the court shall send a certified copy of its finding to the appointing authority of the custodian.
>
> (2) On receipt of the statement of the court and after an appropriate investigation, the appointing authority shall take the disciplinary action that the circumstances warrant.

Id. § 4-362(e). That is, the statute expressly *distinguishes* between (a) whether the court has "order[ed] production of a public record," and (b) whether "*in addition*" the custodian has acted "arbitrarily or capriciously in withholding the public record." A court only reaches the latter question—whether a defendant agency has acted "arbitrarily or capriciously"—if the court is considering referring the custodian for disciplinary proceedings.

It is incompatible with these PIA provisions to grant deference to agencies that deny public interest waivers, for three reasons.[11] First, the General Assembly instructed that the burden of defending a denial of access falls on a custodian. The General Assembly would not have done so if it desired to give custodians the

[11] As far as Amici can tell, these statutory provisions were not brought to the Court of Special Appeals' attention in the *Action Committee* case.

benefit of the doubt on such matters. Second, it provided that whether a custodian has erred on whether to produce a requested record is a separate question from whether the custodian acted "arbitrarily or capriciously." If the question of whether records *are disclosable* under the PIA is not subject to arbitrary and capricious review, there is no conceivable basis that a decision to impose fees on public interest organizations should be. Third, the *context* in which the "arbitrar[y] or capricious[]" standard appears in the PIA—only as to whether a custodian should face disciplinary proceedings—speaks volumes. It is one thing to give custodians the benefit of the doubt before subjecting them to disciplinary proceedings. It is something else entirely to grant that type of deference on the very different question of whether the PIA's fee waiver provision permits an agency to charge a public interest organization tens of thousands of dollars before granting it access to public records.

As a matter of logic and policy, a *de novo* standard in this context simply makes sense—and an "arbitrary and capricious" standard does not. The "arbitrary and capricious" standard is "extremely deferential," and it exists for a narrow and specific purpose: as a tool of deference to review decisions that a legislature has "committed to the agency's discretion." *Harvey v. Marshall*, 389 Md. 243, 296, 884 A.2d 1171, 1203 (2005) (quoting *Spencer v. Board of Pharmacy*, 380 Md. 515, 529–30, 846 A.2d 341, 349 (2004)). *See also* John R. Grimm, *How Federal and Maryland*

Courts Review Administrative Agency Actions, 81 Md. L. Rev. 1224, 1241-42, 1251 (2022) (explaining how deferential the "arbitrary and capricious" standard is). A given class of decisions is "committed to [an] agency's discretion"—and thus challengeable only if arbitrary and capricious—only where those types of decisions fall squarely within the agency's specialized expertise as recognized by the legislature. *See, e.g.*, *Maryland Dep't of the Env't v. Cnty. Commissioners of Carroll Cnty.*, 465 Md. 169, 202, 214 A.3d 61, 81 (2019) (deferring to the Maryland Department of the Environment through arbitrary and capricious review in its permitting decisions with respect to municipal stormwater systems). *See also Heaps v. Cobb*, 185 Md. 372, 379-80, 45 A.2d 73, 76 (1945) ("Courts have the inherent power . . . to correct abuses of discretion and arbitrary, illegal, capricious or unreasonable acts; but in exercising that power care must be taken not to interfere with the legislative prerogative, or with the exercise of sound administrative discretion, where discretion is clearly conferred.").

These reasons are also why federal courts reviewing fee waiver denials under FOIA apply *de novo* review. *See, e.g.*, *Cause of Action v. F.T.C.*, 799 F.3d 1108 (Garland, J.) ("FOIA . . . requires the court 'to determine the matter de novo,' 5 U.S.C. § 552(a)(4)(A)(vii), and courts 'owe no particular deference to [an agency's] interpretation of FOIA.'") (quoting *Jud. Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1313 (D.C. Cir. 2003)). Indeed, Congress considered it so clear that courts should *not*

grant deference to agencies' fee waiver decisions that it has codified the *de novo* standard into FOIA itself. 5 U.S.C. § 552(a)(4)(vii) ("In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo."). *See also Harvey v. Marshall*, 389 Md. 243, 296, 884 A.2d 1171, 1203 (2005) ("[I]t is appropriate for this Court to examine and rely upon cases decided under the APA for guidance regarding the appropriate standard of review of [an agency's] decision.") (quoting *Hurl v. Bd. of Educ. of Howard Cnty.*, 107 Md. App. 286, 305, 667 A.2d 970, 979 (1995)).

The Court of Special Appeals' election in *Action Committee* of the "arbitrary and capricious" standard was the product of minimal and erroneous reasoning—and it was dicta, but has nonetheless been followed since. In that case, a group (called "ACT") that advocated for public transit projects sought records from the Town of Chevy Chase related to its opposition to the Purple Line. 229 Md. App. at 545, 145 A.3d at 642-43. ACT sought a waiver of fees, which the Town denied. *Id.* at 548-49, 145 A.3d at 645. The Court of Special Appeals held that the Town's denial *was* arbitrary and capricious. That was because "a significant factor . . . in the Town's decision to deny ACT's request for a waiver was that the organization had previously criticized the Town officials for their opposition to the Purple Line," but that violated ACT's "First Amendment guarantee of free expression," and "[a] decision based

upon such unconstitutional considerations is clearly arbitrary and capricious." *Id.* at 563-64, 145 A.3d at 653-54.

Because the Town's fee waiver denial was arbitrary and capricious, it would have been vacated *regardless* of the standard of review, and so the court did not need to decide whether fee waiver denials should be reviewed *de novo*. It reasoned that even though FOIA fee waiver denials are reviewed *de novo*, that standard "is statutory" and, "[i]n contrast, generally when a Maryland court addresses an MPIA dispute, the court considers not only the agency record, but also facts generated 'by pleadings, affidavit, deposition, answers to interrogatories, admission of facts, stipulations and concessions.'" *Id.* at 559, 145 A.3d at 651. "Were we to limit our review solely to the record before the agency, we would burden government units with the obligation of generating a record against the possibility that a dispute will end up in court."

But the *standard* by which to review an agency's decision to impose fees (arbitrary and capricious vs. *de novo*) is a separate question from *what documents* to consider in answering that question (*i.e.*, to "limit . . . review solely to the record before the agency" or to permit parties to supplement the contemporaneous record). The FOIA review provision happens to address both, *see* 5 U.S.C. § 552(a)(4)(A)(vii), but they are still separate questions. And recognizing that there is no basis under the PIA or otherwise to grant deference to agencies on their

determinations whether to grant "public interest" fee waivers does not mean courts must limit their review to the record before the agency at the time of the waiver denial. Although Amici submit that FOIA's policy of limiting the record in that way is wise policy, it was that issue that appears to have driven the Court of Special Appeals to reject a *de novo* standard. But it does not follow from a decision that parties should be able to expand the record that courts must affirm any imposition of fees that is not "arbitrary and capricious." As explained above, there is no place for such deference when it comes to local and state agencies demanding exorbitant fees before permitting access to public records. The PIA is a statute, including its instruction that fees be waived when "waiver would be in the public interest." G.P. § 4-206(e)(2)(ii). Just as "courts 'owe no particular deference to [an agency's] interpretation of FOIA,'" *Cause of Action*, 799 F.3d at 1115, they owe no particular deference to agencies' interpretation of the PIA.

Courts' imposition of an "arbitrary and capricious" standard in this context has a particularly detrimental effect on public interest organizations like Amici. As discussed above, a critical pillar of Amici's missions is to research and shed light on government activities—including through PIA requests—and to conduct research and advocacy based on the information obtained. Until very recently, many government agencies have readily acknowledged that, and granted fee waivers. As reflected in the 2019 Report of the PIA Ombudsman, several state agencies never

demand fees for public records. *See* pp. 17-18, *supra*. But especially more recently, many in Maryland have begun to refuse public interest waivers, and indeed state and local agencies in Maryland impose fees far more frequently than federal agencies, *see id.*, even though the substantive standard—that waiver would be in the "public interest"—is the same.

There likely are multiple reasons for Maryland's relatively regressive approach. But Amici submit that the adoption and perpetuation of the "arbitrary and capricious" standard is a significant reason why. Amici perceive that the deferential standard has emboldened agencies like Appellant and others to impose high fees—and to hold public records hostage until those fees are paid—because agency custodians can assure themselves that fee waiver denials will likely be upheld so long as they give lip service to certain relevant factors.

The Court should restore the only defensible standard for reviewing agencies' fee waiver decisions under the PIA: *de novo* review.

CONCLUSION

The question of when an agency may impose fees for access to public records—especially fees into the thousands or tens of thousands of dollars—goes to the heart of the purpose of public records laws like the PIA and FOIA. The Court should stem the tide of state and local agencies subverting the PIA's standard for public interest waivers, and thereby obstructing access to public records. The Court

should restore the General Assembly's intention that fees only be charged where disclosure is primarily in the commercial interest of the requester. Public interest organizations seeking public records for public purposes are entitled to fee waivers. And when courts review denials of fee waivers, those denials should be reviewed de novo.

DATED: December 2, 2022

Respectfully submitted,

/s/ Adam B. Abelson

Adam B. Abelson (CPF # 1012140004)
Samantha A. Miller (CPF # 1912180059)
Zuckerman Spaeder LLP
100 East Pratt Street, Suite 2440
Baltimore, MD 21202-1031
(410) 332-0444
aabelson@zuckerman.com
samiller@zuckerman.com

PERTINENT AUTHORITIES

Md. Code Ann., G.P. § 4-103. General right to information

In general

(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 title shall 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.

General Assembly

(c) This title does not preclude a member of the General Assembly from acquiring the names and addresses of and statistical information about individuals who are licensed or, as required by a State law, registered.

Md. Code Ann., G.P. § 4-206. Fees

Definitions

(a)(1) In this section the following words have the meanings indicated.

(2) "Indigent" means an individual's family household income is less than 50% of the median family income for the State as reported in the Federal Register.

(3) "Reasonable fee" means a fee bearing a reasonable relationship to the recovery of actual costs incurred by a governmental unit.

Charging reasonable fee

(b)(1) Subject to the limitations in this section, the official custodian may charge an applicant a reasonable fee for:

(i) the search for, preparation of, and reproduction of a public record prepared, on request of the applicant, in a customized format; and

(ii) the actual costs of the search for, preparation of, and reproduction of a public record in standard format, including media and mechanical processing costs.

(2) The staff and attorney review costs included in the calculation of actual costs incurred under this section shall be prorated for each individual's salary and actual time attributable to the search for and preparation of a public record under this section.

Limitation on search and preparation fee

(c) The official custodian may not charge a fee for the first 2 hours that are needed to search for a public record and prepare it for inspection.

Limitation on reproduction fee
(d)(1) If another law sets a fee for a copy, an electronic copy, a printout, or a photograph of a public record, that law applies.
(2) The official custodian may charge for the cost of providing facilities for the reproduction of the public record if the custodian did not have the facilities.
Waiver
(e) The official custodian may waive a fee under this section if:
(1) the applicant asks for a waiver; and
(2)(i) the applicant is indigent and files an affidavit of indigency; or
(ii) after consideration of the ability of the applicant to pay the fee and other relevant factors, the official custodian determines that the waiver would be in the public interest.
Written notice that applicant may contest fee
(f) If the custodian of a public record for a local school system charges an applicant a fee under subsection (b) of this section, the custodian shall provide written notice to the applicant that the applicant may file a complaint with the Board to contest the fee.

Md. Code Ann., G.P. § 4-362. Judicial review
Complaint filed with circuit court
(a)(1) Subject to paragraph (3) of this subsection, whenever a person or governmental unit is denied inspection of a public record or is not provided with a copy, printout, or photograph of a public record as requested, the person or governmental unit may file a complaint with the circuit court.
(2) Except as otherwise provided in Subtitle 1A of this title and subject to paragraph (3) of this subsection, a complainant or custodian may appeal to the circuit court a decision issued by the State Public Information Act Compliance Board as provided under § 4-1A-10 of this title.
(3) A complaint or an appeal under this subsection shall be filed with the circuit court for the county where:
(i) the complainant resides or has a principal place of business; or
(ii) the public record is located.
Defendant
(b)(1) Unless, for good cause shown, the court otherwise directs, and notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to the complaint within 30 days after service of the complaint.
(2) The defendant:
(i) has the burden of sustaining a decision to:
1. deny inspection of a public record; or

2. deny the person or governmental unit a copy, printout, or photograph of a public record; and
(ii) in support of the decision, may submit a memorandum to the court.

Authority of court

(c)(1) Except for cases that the court considers of greater importance, a proceeding under this section, including an appeal, shall:
(i) take precedence on the docket;
(ii) be heard at the earliest practicable date; and
(iii) be expedited in every way.
(2) The court may examine the public record in camera to determine whether any part of the public record may be withheld under this title.
(3) The court may:
(i) enjoin the State, a political subdivision, or a unit, an official, or an employee of the State or of a political subdivision from:
1. withholding the public record; or
2. withholding a copy, printout, or photograph of the public record;
(ii) issue an order for the production of the public record or a copy, printout, or photograph of the public record that was withheld from the complainant; and
(iii) for noncompliance with the order, punish the responsible employee for contempt.

Damages

(d)(1) 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:
(i) disclose or fully to disclose a public record that the complainant was entitled to inspect under this title; or
(ii) provide a copy, printout, or photograph of a public record that the complainant requested under § 4-205 of this title.
(2) An official custodian is liable for actual damages that the court considers appropriate if the court finds that, after temporarily denying inspection of a public record, the official custodian failed to petition a court for an order to continue the denial.
(3) Statutory damages imposed by the court under paragraph (1) of this subsection may not exceed $1,000.

Disciplinary action

(e)(1) Whenever the court orders the production of a public record or a copy, printout, or photograph of a public record that was withheld from the applicant and, in addition, finds that the custodian acted arbitrarily or capriciously in withholding the public record or the copy, printout, or photograph of the public

record, the court shall send a certified copy of its finding to the appointing authority of the custodian.
(2) On receipt of the statement of the court and after an appropriate investigation, the appointing authority shall take the disciplinary action that the circumstances warrant.

Costs

(f) If the court determines that the complainant has substantially prevailed, the court may assess against a defendant governmental unit reasonable counsel fees and other litigation costs that the complainant reasonably incurred.

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 5,893 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/ Adam B. Abelson
Adam B. Abelson

CERTIFICATE OF SERVICE

I hereby certify that on December 2nd, 2022, the foregoing *Amici Curiae* Brief of ACLU of Maryland, The Public Justice Center, and Washington Lawyers' Committee for Civil Rights and Urban Affairs was served electronically on all counsel via MDEC and two paper copies mailed by first class mail, postage prepaid to:

James L. Shea, City Solicitor
Michael Redmond, Director, Appellate Practice Group
Matthew O. Bradford, Chief Solicitor, Appellate Practice Group
Baltimore City Department of Law
100 Holliday Street
Baltimore, Maryland 21202

Counsel for Petitioners

Matthew Zernhelt, Esquire
Baltimore Action Legal Team
1601 Guilford Avenue, 2 South
Baltimore, Maryland 21202

Counsel for Respondent

/s/ Adam B. Abelson
Adam B. Abelson