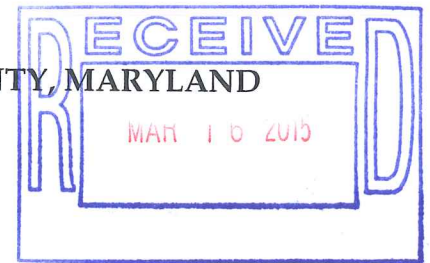


IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND



ACTION COMMITTEE FOR TRANSIT
and BENJAMIN ROSS

Plaintiffs

v.

TOWN OF CHEVY CHASE, MD
and TOWN COUNCIL OF CHEVY
CHASE, MD

Defendant

Civil No: 400312-V
Judge John W. Debelius, III
Track II

Next Event: Motion for Alternative
Service Deadline, 06/01/15

* * * * *

TOWN'S MOTION TO DISMISS OR,
IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

The Town of Chevy Chase, Maryland, by KARPINSKI, COLARESI & KARP, P.A., KEVIN KARPINSKI and VICTORIA M. SHEARER, its attorneys, moves pursuant to Maryland Rules 2-311 and 2-322(b) to Dismiss the Complaint or, in the alternative, pursuant to Maryland Rule 2-501 for summary judgment as a matter of law in its favor, for the reasons set forth in its Memorandum of Law filed herewith.

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of March 2015, a copy of the foregoing was sent
by first class mail, postage prepaid, to:

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* * * * *

**MEMORANDUM IN SUPPORT OF THE TOWN'S MOTION TO DISMISS OR,
IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

The Town of Chevy Chase, Maryland, by KARPINSKI, COLARESI & KARP, P.A., KEVIN KARPINSKI and VICTORIA M. SHEARER, its attorneys, submits the instant Memorandum of Law in Support of its Motion to Dismiss or, in the Alternative, for Summary Judgment.

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INTRODUCTION

This lawsuit asserts one Count of a Violation of Maryland's Public Information Act ("MPIA") by and against the Town of Chevy Chase, Maryland ("Town"). The suit follows a series of MPIA requests made by or on behalf of a group known as the Action Committee for Transit ("ACT") and one of its members, Benjamin Ross ("Ross"), in 2014.

FACTS ALLEGED IN THE COMPLAINT

Plaintiffs ACT and Ross allege that they bring the instant case to "challenge [] the actions of a public governing body that has denied its constituents and members of the media access to important public information concerning a public infrastructure project in an effort to keep the public in the dark regarding the expenditure of public resources and the establishment of public policy." Complaint, ¶1. The proposed project is the Purple Line, a proposed 16-mile east-west light rail that will connect New Carrollton to Bethesda. Complaint, ¶2. ACT supports construction of the project. Complaint, ¶3. Plaintiffs allege that the "Town Council has sided with opponents" of the proposed Purple Line project, and it seeks documents regarding the Town Council's hiring and/or consultation with law firms and consultants hired by the Council. Complaint, ¶¶5-6. Plaintiffs complain that the "Town has [] prohibited ACT from accessing public records unless it pays unjustified and excessive fees." Complaint, ¶6. The Complaint further alleges that the "Town has prohibited journalist Benjamin Ross from accessing public records related to the Purple Line by refusing to disclose this information unless he pays unjustified and excessive fees." Complaint, ¶7.

The Complaint asserts that on February 4, 2014, ACT Vice President Ronit Dancis

filed an MPIA request for “the Town’s agreements, contracts, invoices, bills, correspondence, and meeting minutes related to Buchanan Ingersoll & Rooney.” Complaint, ¶16, Ex. A.

On March 6, 2014, the Town “made the retention agreement, invoices, bills and non-privileged communications available for inspection.” Complaint, ¶16, Ex. B. However, the Town “denied the request for meeting minutes, in part, because the meeting between the Town Council and Buchanan Ingersoll & Rooney was held in a closed-executive session” and, thus, the documents were privileged under State law. Complaint, ¶16. The Town “allowed for inspection of an executive session summary that was included in the minutes” of the Town Council’s open meeting. Complaint, ¶16. “The Town did not charge” Plaintiffs at all for responding to this request, per Maryland Code, General Provisions Article, §4-206(c), as the Town provided the the two (2) hours of free research necessary to prepare the response. Complaint, ¶16. Documents were copied and produced to Plaintiffs in response to their PIA request.

On April 1, 2014, “Miriam Schoenbaum on behalf of ACT” made another MPIA request, this time seeking “the Town’s agreements, contracts, invoices, bills, correspondence, and meeting minutes related to Buchanan Ingersoll & Rooney, Chambers, Conlon & Hartwell, LLC and Alexander & Cleaver.” Complaint, ¶18, Ex. D. Plaintiffs allege in the Complaint that “the purpose of this request was to obtain information relevant to the new agreements and contracts entered into by the Town of Chevy Chase after the previously-submitted PIA request.” Complaint, ¶18, Exhibit D.

Also on April 1, 2014, Ms. Schoenbaum on behalf of ACT filed a PIA request for “records regarding the Town’s compliance with the training requirements in the Open Meetings Act.” Complaint, ¶18. This document is not attached to the Complaint.

On April 6, 2014, “Ms. Dancis on behalf of ACT” submitted another PIA request to the Town requesting “records about the public relations firm Xenophon Strategies, who upon information and belief was retained by the Town to work on issues regarding the Purple Line.” Complaint, ¶18, Ex. E. Thus, all of the various requests by ACT under the MPIA were for documents relating to the proposed Purple Line project. Each time, the requester asked for an estimate of the costs related to responding to the PIA requests.

On April 17, 2014, the Town responded to ACT’s two PIA requests. Complaint, ¶19, Exs. F and G. The Town’s first April 17, 2014 letter addressed Ms. Schoenbaum’s April 1, 2014 request on behalf of ACT for records “related to Outside Consultants.” Ex. F to Complaint. In this letter, the Town listed its fees for responding to the PIA request and noted that the Town would charge \$0.50 for photocopies. Id. The letter stated that:

It is anticipated that research within our office will be at least five (5) hours, which does not include the fee for review by the Town’s attorney. Accordingly, we would request that a deposit of \$700 be provided to the Town before research begins. Please note that your request will not be processed before the applicable deposit has been delivered. **Based on the previous request made by your organization relating to this same general topic, we will not provide the first two (2) hours of research free of charge.**

Ex. F to the Complaint (emphasis added). Since this was a repeat request, the fee for the first two (2) hours of research was not waived.

Also on April 17, 2014, the Town responded to Ms. Dancit’s/ACT’s April 6, 2014

request for documents regarding Xenophon Strategies. Complaint ¶19, Ex. G. The letter listed the fees associated with responding to ACT's request and stated that the Town would charge \$0.50 cents per page for photocopying. The letter further stated that:

It is anticipated that research within our office will be at least five (5) hours, which does not include the fee for review by the Town's attorney. **The first two (2) hours of research will be done free of charge.** Accordingly, we would request that a deposit of \$250.00 be provided to the Town before research begins. Please note that your request will not be processed before the applicable deposit has been delivered.

Ex. G to the Complaint (emphasis added). Because this was ACT's first PIA request for documents regarding Xenophon Strategies, the first two (2) hours of research were performed for free.

Plaintiff complains that "ACT, a non-profit volunteer organization, would have to pay these deposits." Complaint, ¶19. However, the statute permits the Town to impose fees for responding to PIA requests, and the PIA requests by ACT thus far had contained no requests for a fee waiver in any event.

On April 18, 2014, ACT sent the Town Manager, Todd Hoffman, two separate emails requesting fee waivers for its April 1 (Outside Contractors) and April 6, 2014 (Xenophon) MPIA requests, for which the Town had requested \$700 and \$250 deposits. The Complaint alleges that the fee waivers were warranted because ACT was seeking the information for public, not commercial purposes, and because the requested information would contribute to the public understanding of government operations regarding the proposed Purple Line project. Complaint, ¶21, Ex. H and I. ACT complained that as a non-profit it had a limited budget, ignoring that the Town also has a limited budget and receives many PIA requests.

Complaint, ¶21.

On April 23, 2014, the Town responded via letter to ACT's requests for fee waivers. Complaint, ¶22, Ex. J. The Town denied the requests, stating that "[i]t is anticipated that the town will expend a significant amount of time researching and processing your requests." Id.

Instead of making the fee deposits so that the Town could begin the research necessary to produce the requested documents, ACT instead chose to send the Town further repeated requests for the same documents and to fortify its fee waiver request arguments in those requests.

On May 21, 2014, Ms. Schoenbaum again requested, on behalf of ACT and herself as an individual, agreements, invoices, bills, correspondence and the minutes of all meetings between the Town and Buchanan Ingersoll & Rooney, Chambers Conlon & Harwell, Alexander & Cleaver, and Xenophon Strategies (and specific individuals associated with Xenophon Strategies). Complaint, ¶23, Ex. K. The letter again requested the waiver of **all** fees associated with the production of these comprehensive documents, on her behalf and on ACT's behalf. Complaint, ¶23-24. In support of the fee waiver request, Ms. Schoenbaum stated in her letter that the "purpose of our request is to contribute significantly to the public's understanding of the transaction of public business...related to a major public infrastructure project...by a government body...and public officials..., by making public the requested documents." Complaint, ¶24, Ex. K. Ms. Schoenbaum's letter also stated that she should have a fee waiver because she was a "representative of the news

media.” Ex. K to Complaint, p 3. The letter set forth a legal argument regarding the “six factors” in the Department of Justice’s guidance for waiver of fees under the FOIA (federal “Freedom of Information Act”). Ex. K, pp. 6-7.

On June 20, 2014, the Town responded to Ms. Schoenbaum’s May 21, 2014 PIA request. Complaint, ¶28, Ex. L. The Town denied Plaintiffs’ request for a fee waiver. The Town’s letter indicated that some of the records requested were available for inspection. The letter listed them as responsive to Plaintiffs’ request numbers 1, 2 and 4. Ex. L to Complaint (emphasis added). The Town’s letter also stated that the Minutes dated May 14, April 9, March 12, February 20 and February 12 were available for inspection; that the Contract with Buchanan Ingersoll & Rooney dated March 14, 2014 was available for inspection; and that the invoices of Buchanan Ingersoll & Rooney were available for inspection. However, the letter stated also that “your request for **correspondence** is extensive and will have to be researched by Town staff.” Ex. L to Complaint (emphasis added). Thus, the Town requested a deposit of \$1,345.00 to cover the estimated five (5) hours of research by Town employees and another three (3) hours of review by the Town Attorney at the rates charged by or for each. The letter also indicated that the Town would not provide another two (2) hours of free research inasmuch as ACT had already made previous requests for these documents. Ms. Schoenbaum visited the Town’s offices to inspect and copy the documents. Complaint, ¶28. Plaintiffs complain that the Town did not provide correspondence between the Town and the four law and public relations firms. Complaint, ¶29. However, as indicated in the Town’s letter, research of the Town’s

correspondence would not begin until ACT paid the deposit.

At this point, Plaintiffs decided to **withdraw** all of their previous MPIA requests (and fee waiver requests) to the Town. See Email dated June 23, 2014, from Ms. Schoenbaum to Todd Hoffman, Town Manager, attached hereto as **Defendant's Exhibit 1**.¹ Therefore, those requests are not the subject of the instant Petition for Judicial Review.

Instead, Plaintiffs hired a law firm to write a letter to the Town re-submitting Plaintiffs' previous MPIA requests. On October 15, 2014, the firm of Baker Hostetler sent the new MPIA request on behalf of ACT to the Town Attorney, Ron Bolt. Complaint, ¶31, Ex. M. The request sought public records relating to contracts, agreements, and communications between the Town and the "four firms that the Town retained to provide services in relation the [sic] Purple Line public transit project." Complaint, ¶31, Ex. M. ACT also sought the minutes of closed sessions held by the Town Council. Ex. M to Complaint. ACT sought a fee waiver again, stating that its purpose was to "promote the public's understanding of the Town and the conduct of its public officials in conducting public business relating [sic] a major public infrastructure project. ACT intends to contribute significantly to the public's understanding by making public the requested records and the information the records contain." Ex. M to Complaint. The letter also sought "notes of all meetings" between the Town and the four firms and correspondence between or among

¹ Attached hereto is the Affidavit of Todd Hoffman, Town Manager, as **Defendant's Exhibit 2**. Mr. Hoffman states in his Affidavit that the documents attached to this Motion as Exhibits 1, 3 and 4 are true and correct copies of the Town's business records.

the four firms and the Town. Ex. M to Complaint. The letter also stated that ACT was “entitled” to the waiver of all fees associated with the request because the “information requested will serve the public interest and contribute significantly to the public’s understanding of the business, activities, and public-money expenditures of a government body related to a major public infrastructure project.” Ex. M to Complaint, pp. 4-5. The letter claimed that “ACT is not seeking this information for any commercial purpose.” Id. The letter set forth legal arguments as to why ACT believed that it was entitled to a waiver of all fees. Id.

On October 27, 2014, the Town’s attorney responded to the October 15, 2014 PIA request. Complaint, ¶32, Ex. N. The letter noted that the PIA authorized the Town to charge a reasonable fee for making copies and a reasonable fee for researching its records. Id. The Town’s response stated that “you outline your arguments in support of a waiver of all fees associated with the request. Please be advised the request for a waiver has been considered and is denied.” Id. The letter went on to explain the Town’s charges for researching its records, and listed the five (5) categories of documents requested by ACT: (1) agreements and contracts; (2) invoices and bills; (3) correspondence; (4) minutes; and (5) waiver of costs for responding to requests. Complaint, ¶33, Ex. N to Complaint. The letter further stated that

[P]ursuant to §4-301(2)(I) of the Act, a custodian shall deny inspection of a public record or any part of a public record if disclosure would be contrary to a State statute. Accordingly, the request for closed session minutes is being denied pursuant to §3-306(3)(ii) of the General Provisions Article of the Annotated Code of Maryland, which prohibits disclosure of closed session minutes.

Ex. N to Complaint. The letter also explained that “[a]s for the remaining items in the extensive request, the Town Manager will have to conduct research to see if any records are responsive to the request.” Ex. N to Complaint. “Further, the undersigned will review any and all records potentially responsive to the request for possible confidential, privileged or exempted information.” Ex. N to Complaint. The letter further stated that “[i]t is anticipated that the research conducted by the Town Manager will be at least three (3) hours, which does not include my fee for review.” Ex. N to Complaint. “It is anticipated my review will be at least three (3) hours. Accordingly, we would request that a deposit of \$879.00 be provided to the Town before research begins.” Ex. N to Complaint. Based on ACT’s “previous request made” for records “relating to the same general topic,” the Town would “not provide the first two (2) hours of research free of charge.” Ex. N to Complaint. The letter informed Plaintiff of its right to judicial review under Maryland Code, General Provisions Article, §4-362. Ex. N to Complaint.

On the morning of November 10, 2014, Benjamin Ross hand delivered to the Town a PIA request that was identical to the previous one submitted by ACT, but which sought a fee waiver based upon Mr. Ross’s status as a member of the “media” due to his “blog.” Complaint, ¶34, Ex. O to Complaint.² This letter, in the “re:” subject line stated: “Maryland Public Information Act Request **on behalf of Action Committee for Transit.**” See Benjamin Ross’s first November 10, 2014 Letter request under the MPIA, attached hereto as

² The letter attached to the Complaint as Exhibit O is **not** the November 10, 2014 letter submitted by Mr. Ross. It is a letter dated December 17, 2014. This appears to be an error.

Defendant's Exhibit 3 (emphasis added). In his letter, Mr. Ross stated that "the purpose of this blog is to provide information about elected officials, development, traffic, and other matters impacting Montgomery County, Maryland."

Later in the morning of November 10, 2014, Mr. Ross returned to the Town's office and withdrew his first letter. He replaced it with a second letter also dated November 10, 2014, except this time the "re:" line was altered to read "Maryland Public Information Act Request," no longer stating that it was submitted on behalf of ACT. See Benjamin Ross's second November 10, 2014 Letter request under the MPIA, attached as **Defendant's Exhibit 4**. The letter stated "I am withdrawing the request letter I submitted earlier this morning." Def's Ex. 4. The only other change in the substance of the letter was that Mr. Ross altered the "purpose" of his blog. He now stated that the "purpose of this blog is to provide information about elected officials, development, traffic, and other matters impacting the Greater Washington area, including Montgomery County, Maryland." Def's. Ex. 4. The letter claimed that a fee waiver was "warranted" because it would be in the "public interest" to grant one. Mr. Ross argued that "my status as a member of the media supports a fee waiver." Def's. Ex. 4, p. 5. He claimed that his work included writing about developments regarding the proposed Purple Line project. Id.

On or about November 21, 2014, the Town sent a response letter to Mr. Ross's November 10, 2014 second letter. The Complaint claims that the Town "denied Mr. Ross's request for a waiver of the fees on the basis that it did not believe his request was made in his capacity as a member of the media." Complaint, ¶¶36, Ex. P to Complaint. However,

what the Town's letter actually stated was that "[w]e do not believe this request is being made in your capacity as a member of the media." Ex. P to Complaint. Thus, it was not necessarily that the Town did not believe Mr. Ross might be a member of the media. Rather, it was that the Town believed, based on his submitting then withdrawing his request and replacing it with another one (altering the alleged "purpose" of his blog), that he was not being forthright. The Town believed that Mr. Ross represented ACT and was merely duplicating ACT's October 15, 2014 letter (Ex. M) request for the exact same documents, for which the Town had already denied a fee waiver, and that he was not actually seeking a fee waiver as a member of the news media. The Town's letter stated that "[t]his belief is based on the first request you submitted and **then immediately withdrew** on November 10, 2014, which clearly indicated it was being submitted on behalf of the Action Committee for Transit (ACT), along with your known affiliation with ACT." Ex. P to Complaint.³ The Town's letter then explained, again, that the requested closed session minutes could not be produced per statute, and that the fees associated with research and legal review of the requested records would require a deposit of \$879.00. Complaint, ¶36, Ex. P to Complaint. The Town's letter also stated that based on "the previous requests made by an organization you are affiliated with relating to the same general topic, we will not provide the first two (2) hours of research free of charge." Id. Mr. Ross was informed of his right to judicial review under the statute.

³ With regard to Mr. Ross's "known affiliation" with ACT, attached hereto as **Defendant's Exhibit 5** is a print out from ACT's website showing that Mr. Ross is an ex-officio Board Member. Mr. Ross does not deny his affiliation with ACT.

PLAINTIFFS' LEGAL CLAIMS

The Complaint asserts one Count of violation of the MPIO by the Town. Specifically, the Complaint alleges three particular statutory violations by the Town:

- (1) The Town violated the Public Information Act by denying Plaintiffs' requests for the minutes of a closed session;
- (2) The Town violated the Public Information Act by denying Plaintiffs' request for a waiver of a fee (\$879.00) associated with the October 15, 2014 letter from ACT and the November 10, 2014 (second) letter from Mr. Ross; and
- (3) The Town violated the Public Information Act by denying Plaintiffs two hours of free research.

The Complaint seeks a Court Order that the Town be required to "provide the documents requested in Plaintiffs' public information requests," grant Plaintiffs' request for a fee waiver, enjoin the Town from requesting further fees to respond to Plaintiffs' public information requests, and to grant Plaintiffs' attorneys' fees and costs.

Because Plaintiffs withdrew all previous MPIO requests prior to the letter dated October 15, 2014 (see Ex. 1 hereto and Ex. M to the Complaint) and Mr. Ross's second letter of November 10, 2014, none of those requests are at issue here upon judicial review under the MPIO. Nevertheless, they provide relevant context with respect to the requests for fee waivers that are at issue.

STANDARD OF JUDICIAL REVIEW

In an action for judicial review brought pursuant to the MPIO, the Court is required to possess an adequate factual basis for the decision it renders and to accurately apply the law to those facts. Comptroller of the Treasury v. Immanuel, 216 Md. App. 259, 266, 85

A.3d 878, 883 (2014)(citing Haigley v. Dep't of Health & Mental Hygiene, 128 Md. App. 194, 210, 736 A.2d 1185, 1193 (1999)). Unless the decision reached is clearly erroneous, it will not be disturbed. Immanuel, 216 Md. App. at 266, 85 A.3d at 883. Pure legal errors in interpreting the MPIA; however, are reviewed de novo. Id.

The proper standard for judicial review of an agency denial of a fee waiver is whether that decision was arbitrary and capricious. Eudey v. Cent. Intelligence Agency, 478 F. Supp. 1175, 1176 (D.D.C. 1979). In Harvey v. Marshall, 389 Md. 243, 297, 884 A.2d 1171, 1203 (2005), the Court of Appeals acknowledged that “[a] review of Maryland case law demonstrates that this “arbitrary or capricious” standard is, perhaps intentionally, less than well-defined with respect to judicial review of discretionary actions. Id., 389 Md. at 297, 884 A.2d at 1203. However, the Court did offer some guidance:

In his Maryland Administrative Law treatise, Professor Arnold Rochvarg examines, in the context of the APA, the ‘arbitrary or capricious’ standard, concluding that it

... is best understood as a reasonableness standard. If the agency has acted unreasonably or without a rational basis, it has acted in an arbitrary or capricious manner.... [U]nlike a court’s ‘substantial evidence’ review of an agency’s factual determinations, [u]nder arbitrary or capricious review, the court’s reasonableness review goes beyond factual findings and goes beyond a review of the agency record. Under arbitrary or capricious reasonableness review, the court will consider any argument that the agency acted unreasonably regardless of whether it appears within the agency record.

* * *

It is impossible to catalogue every circumstance when an agency acts in an arbitrary or capricious manner. Attorneys and judges should merely understand that the standard requires rational conduct by the agency in all respects. Each

case must be evaluated on an individual basis.

Arnold Rochvarg, Maryland Administrative Law, §4.38 at 128 (2001, 2004 Supp.).

We also find, as Professor Rochvarg observes, id., some guidance in the definitions found in Black's Law Dictionary. Black's defines 'arbitrary' as including those judicial decisions 'founded on prejudice or preference rather than on reason or fact.' Black's Law Dictionary 112 (8th ed. 2004). Black's defines 'capricious' as including those decisions 'characterized by or guided by unpredictable or impulsive behavior, ... contrary to the evidence or established rules of law.' Id. at 224. Merriam-Webster's Collegiate Dictionary, as another example, defines 'arbitrary' as

1: depending on individual discretion (as of a judge) and not fixed by law ... 2a: not restrained or limited in the exercise of power: ruling by absolute authority ... b: marked by or resulting from the unrestrained and often tyrannical exercise of power ... 3a: based on or determined by individual preference or convenience rather than by necessity or the intrinsic nature of something ... b: existing or coming about seemingly at random or by chance or as a capricious and unreasonable act of will....

Merriam-Webster's Collegiate Dictionary 59 (10th ed. 1999).

Webster's defines 'capricious' as 'governed or characterized by caprice,' which in turn is defined as '1 a: a sudden, impulsive, and seemingly unmotivated notion or action b: a sudden usu[ally] unpredictable condition, change, or series of changes ... 2: a disposition to do things impulsively....' Id. at 169.

These definitions echo Professor Rochvarg's explication that, **so long as the actions of administrative agencies are reasonable or rationally motivated, those decisions should not be struck down as 'arbitrary or capricious.'** 'Arbitrary or capricious' decision-making, rather, occurs when decisions are made impulsively, at random, or according to individual preference rather than motivated by a relevant or applicable set of norms.

Harvey, 389 Md. at 297-99, 884 A.2d at 1203-05 (emphasis added). The reasoning set forth in Harvey applies here in this action for judicial review of the Town's decisions.

STANDARD OF REVIEW OF MOTIONS

A. Standard of Review for Motion to Dismiss.

In deciding a motion to dismiss a complaint, the facts alleged in the complaint must be assumed to be true. Warner v. Lerner, 348 Md. 733, 735, 705 A.2d 1169, 1170 (1998). Documents attached to the complaint as exhibits are part of the Complaint for all purposes, so the exhibits are not matters “outside the pleadings” and may be considered without converting a motion to dismiss into one for summary judgment. Md. Rule 2-303(d)(“A copy of any written instrument that is an exhibit to a pleading is a part thereof for all purposes.”); Samuels v. Tschechtelin, 135 Md. App. 483, 521, 763 A.2d 209 (2000) (documents incorporated by reference in a complaint are part of the complaint); Skanska USA Bldg., Inc. v. Smith Mgmt. Constr., Inc., 184 Md. App. 659, 967 A.2d 827 (2009)(same). Thus, the Court should also accept as true the facts set forth in the exhibits attached to the Complaint.

The Court need not accept as true any legal conclusions asserted in a complaint, particularly if they are incorrect legal assertions. Yousef v. Trustbank, 81 Md. App. 527, 536, 568 A.2d 1134, 1138 (1990); Berman v. Karvounis, 308 Md. 259, 265, 518 A.2d 726, 729 (1987). Similarly, the Court need not accept as true unwarranted inferences, unreasonable conclusions, or arguments. See 5A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure §1357 (2d ed. 1990 & 1998 Supp.). “Bald assertions and conclusory statements by the pleader will not suffice.” Bobo v. State, 346 Md. 706, 708-09, 697 A.2d 1371, 1372 (1997). A court is not bound by the legal conclusions drawn in a complaint, and

“self-serving, inaccurate legal conclusions cannot rescue a factually deficient complaint.” Faulkner Adver. Assoc., Inc. v. Nissan Motor Corp., 945 F.2d 694, 695 (4th Cir. 1992). Moreover, the Court need not accept conclusory allegations in the complaint that are contradicted by the attachments to the complaint. “[I]n the event of conflict between the bare allegations of the complaint and any exhibit attached . . . the exhibit prevails.” E. Shore Mkts., Inc. v. J.D. Assocs. Ltd. P’ship, 213 F.3d 175, 180 (4th Cir. 2000).

B. Standard of Review for Motion for Summary Judgment.

In this case, the Town has attached documents to the instant Motion and, thus, it is filed as a Motion for Summary Judgment in the alternative. The issues, however, are ones of law and there are no material facts in genuine dispute.

A trial court shall grant a motion for summary judgment “if the motion and response show that there is no genuine dispute as to any material fact and that the [moving] party . . . is entitled to judgment as a matter of law.” Md. Rule 2-501(f). A material fact is a relevant fact that, depending on how it is resolved, will somehow affect the outcome of the case. King v. Bankerd, 303 Md. 98, 111, 492 A.2d 608 (1985). In other words, a material fact is one which is “necessary to the determination of the case.” Reiter v. Pneumo Abex, LLC, 417 Md. 57, 68, 8 A.3d 725 (2010).

RELEVANT MPIA STATUTORY PROVISIONS

The “judicial review” provision of the MPIA is found in the Maryland Code, General Provisions Article, §4-362, “Judicial Review.” The statute provides, in relevant part, as follows:

Complaint filed with Circuit Court

(a) 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 for the county where:

- (1) the complainant resides or has a principal place of business; or
- (2) 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, official, or employee of the State or of a political subdivision from

1. withholding the public record; or

2. withholding a copy, print-out, or photograph of a public record

(ii) issue an order for the production of the public record or a copy, printout, or photograph of a public record that was withheld from the complainant; and

(iii) for noncompliance with the order, punish the responsible employee for contempt.

Id.

ARGUMENT

I. THE TOWN DID NOT VIOLATE THE MPIA BY DENYING PLAINTIFFS' REQUEST FOR CLOSED SESSION MINUTES OF THE TOWN COUNCIL.

Plaintiff withdrew all MPIA requests to the Town by an email sent on June 23, 2014 from Miriam Schoenbaum on behalf of ACT to the Town. Def's Ex. 1. Thus, the right to judicial review with respect to those requests was abandoned and waived when Plaintiffs withdrew the requests.

The Town did not violate the MPIA by denying Plaintiff ACT's October 15, 2014 request or Mr. Ross's second November 10, 2014 request for Closed Session Meeting Minutes. The Maryland Code, General Provisions Article, Section 4-301(2)(I) requires that

a custodian shall deny inspection of a public record or any part of a public record if disclosure would be contrary to a State statute. General Provisions, Section 3-305, "Closed Sessions," provides for the closing of public meetings for the enumerated reasons in the statute. Section 3-306 addresses the minutes of such closed sessions. **Section 3-306(c), "Contents of minutes; tape recordings,"** provides in subsection (2) that "[i]f a public body meets in closed session, the written minutes for its next open session shall include:"

- (i) a statement of the time, place, and purpose of the closed session;
- (ii) a record of the vote of each member as to closing the session;
- (iii) a citation of the authority under §3-305 of this subtitle for closing the session; and
- (iv) a listing of the topics of discussion, persons present, and each action taken during the session.

In subsection (c)(3) of Section 3-306, the statute provides as follows:

- (3)(i) A session may be tape recorded by a public body.
- (ii) **Except as otherwise provided in paragraph (4) of this subsection, the written minutes and any tape recording of a closed session shall be sealed and may not be open to public inspection.**

(Emphasis added).

Section 3-306(c)(4) provides that "[t]he written minutes and any tape recording shall be unsealed and open to inspection as follows:"

- (i) for a meeting closed under §3-305(b)(5) of this subtitle, when the public body invests the funds;
- (ii) for a meeting closed under §3-305(b)(6) of this subtitle, when the public securities being discussed have been marketed; or

(iii) on request of a person or on the public body's own initiative, if a majority of the members of the public body present and voting vote in favor of unsealing the written minutes and any tape recording.

Access

(d) **Except as provided in subsection (c) of this section**, written minutes of a public body are public records and shall be open to public inspection during ordinary business hours.

(Emphasis added).

Therefore, it is clear under the statutory provisions that closed session minutes may not be disclosed under the PIA and that any such request **shall** be denied. The statute specifically **requires** that the written minutes and any tape recording of a closed session shall be sealed and may not be open to public inspection. This was correctly stated by the Town in its letter to Plaintiff's attorneys dated October 27, 2014 in response to ACT's October 15, 2014 PIA request. Complaint, ¶32, Ex. N. The Town's letter properly denied the request for closed session minutes by stating that:

Pursuant to §4-301(2)(I) of the Act, a custodian shall deny inspection of a public record or any part of a public record if disclosure would be contrary to a State statute. Accordingly, the request for closed session minutes is being **denied pursuant to §3-306[(c)](3)(ii)** of the General Provisions Article of the Annotated Code of Maryland, **which prohibits disclosure of closed session minutes.**

Ex. N to Complaint (emphasis added).

These unambiguous State statutes make it clear that the Town was not only entitled to, but required to, deny inspection of the Closed Meeting Minutes sought by Plaintiffs under the MPIA. Accordingly, the Town's denial of Plaintiffs' requests for inspection of closed meeting minutes did not violate the MPIA.

II. THE TOWN DID NOT VIOLATE THE MPIA BY DENYING PLAINTIFFS' REQUESTS FOR A FEE WAIVER.

The Complaint alleges that the Town violated the MPIA by denying Plaintiffs' requests for fee waivers. Plaintiff ACT stated it was "entitled" to such a fee waiver in Baker Hostetler's October 15, 2014 letter, a letter which repeated all of ACT and its members' previous MPIA requests. Ex. M to Complaint. Thereafter, Mr. Ross submitted two letters requesting the exact same documents that had been requested in Baker Hostetler's October 15, 2014 letter. His two November 10, 2014 letters have not been attached to the Complaint by Plaintiffs. In the first, he said his request was made on behalf of ACT. In the second, he said his request was on his personal behalf only. He sought a fee waiver as a member of the "media," altering the alleged purpose of his blog in his second November 10, 2014 letter. Def's Ex. 4. By the time these October and November letters were submitted, there existed a history between the Town and ACT and its members. This history included repeated misleading attacks by Plaintiffs against the Town for its opposition to the proposed Purple Line project. See, e.g., Press Releases from ACT's website, dated March 24, 2014 ("New Documents on Shuster Brother Lobbying Show Town of Chevy Chase Misinformed Residents Before Public Hearing"); March 31, 2014 ("Town of Chevy Chase Broke the Law Open Meetings Board Rules"); and February 18, 2015 ("Town of Chevy Chase Spending Tops Million Dollars to Fight Purple Line"), attached hereto as **Defendant's Exhibit 6.**⁴

⁴ The March 31, 2014 Press Release misrepresented the decision of the Open Meetings Compliance Board dated March 20, 2014, a copy of which is attached hereto as

A. The Town May Impose a Reasonable Fee Before Producing Documents in Response to an MPIA Request.

The Town did not violate the MPIA by denying Plaintiffs' requests for fee waivers. The Town is entitled to impose a "reasonable fee" under Maryland Code, General Provisions Article, Section 4-206. Section 4-206 defines a "reasonable fee" as "a fee bearing a reasonable relationship to the recovery of actual costs incurred by a government unit."

The Town listed in its letter the fees charged for research by the Town Manager (\$78.00 per hour) and for review of the documents by the Town Attorney (\$215.00 per hour). Ex. N to Complaint. The Town's requested fee for the documents that Plaintiffs sought was \$879.00. Id. At page 2 of the Town's letter, the Town's PIA attorney, Jason DeLoach, Esquire, provided the reasoning for the fee. The letter explained that Plaintiffs' request was "extensive," seeking several categories of documents, including correspondence. The letter stated:

It is anticipated that the research conducted by the Town Manager will be at least three (3) hours, which does not include my fee for review. It is anticipated my review will be at least three (3) hours. Accordingly, we would request that a deposit of \$879.00 be provided to the Town before research begins. Moreover, the letter noted that copies would be charged at \$0.50 cents per page.

Ex. N to Complaint.

Defendant's Exhibit 7. ACT had filed a complaint against the Town's holding a closed meeting. ACT stated that the Town broke the law, but the Board upheld the right of the Town to hold a closed meeting and only found a technical, procedural error. The March 24, 2014 Press Release accused the Town of falsely "misinforming" residents. The February 18, 2015 Press Release baselessly accused the Town of lobbying violations and failing to conduct open meetings when required by law.

Thus, the fee required by the Town plainly bore a “reasonable relationship” to the actual costs that would be incurred by the Town. Accordingly, there is no dispute that the fee was reasonable.

B. The Town Is Not Automatically Required to Waive the Fee Solely Because a Requester Claims That It Cannot Afford to Pay or Because The Requester Is An Alleged Member of The “Media.”

Maryland Code, General Provisions Article, Section 4-206, “Waiver,” provides that:

(e) The official custodian may waive a fee under this section if:

(1) the applicant asks for a waiver; and

(2) 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**.

The statute does not define the “other relevant factors” nor does it state what is meant by “the public interest.” Moreover, notably, while §4-362(b)(2)(I) provides that the defendant “has the burden of sustaining a decision to deny inspection of a public record,” there is no such statutory requirement that the defendant has the burden of sustaining a decision to deny a fee waiver request. Rather, the statute specifically identifies only one item, that is, the ability of an applicant to pay.

With respect to prepayment of fees, Chapter 7 of the MPIA Manual provides that:

Although the PIA does not address the issue of prepayment of fees, agency regulations may do so. The Court of Appeals has indicated that an agency may appropriately require prepayment of fees. Ireland v. Shearin, 417 Md. 401, 412 n.8 (2010)(agency may require inmate to prepay fees for copies when inmate is unable to inspect records personally due to incarceration). Following the model regulations in Appendix D, many agencies require prepayment or a commitment to pay fees prior to copying records to be disclosed. See, e.g., COMAR 08.01.06.11D(2)(Department of Natural

Resources); COMAR 09.01.04.14D (Department of Licensing and Regulation). Federal agencies typically have regulations requiring prepayment or an agreement to pay fees as a prerequisite to the processing of a request, at least when fees are expected to exceed a set amount. See, e.g., 16 C.F.R. § 4.8(d)(3) (Federal Trade Commission); 43 C.F.R. § 2.18 (Department of the Interior); see also Pollack v. Department of Justice, 49 F.3d 115 (4th Cir.), cert. denied, 516 U.S. 843 (1995)(when requester refused to commit to pay fees in accordance with agency's regulations, agency had authority to stop processing FOIA request); Stout v. United States Parole Comm'n, 40 F.3d 136 (6th Cir. 1994)(an agency's regulation requiring payment of fees before release of already processed records was proper and did not violate FOIA); Farrugia v. Executive Office for United States Attorneys, 366 F. Supp. 2d 56 (D.D.C. 2005) (agency may require payment of search fee before sending records to requester).

MPIA Manual, Chap. 7-2. Therefore, it was proper for the Town to require pre-payment of the fee of \$879.00 in response to Plaintiffs' MPIA requests.

Plaintiffs' fee waiver requests generally parroted language and phrases in requesting a fee waiver, and claimed that as a "non-profit" ACT could not afford to pay the fee, while Mr. Ross claimed he was a blogger. However, these general assertions and sole reliance upon the non-profit status of ACT or the blogging of Mr. Ross did not automatically exempt the applicants from paying fees, as other relevant factors must be considered.

Chapter 7 of the MPIA Manual, Section C, specifically addresses fee waiver requests and discusses the "public interest." It provides as follows:

C. Waiver of Fees.

An applicant may ask the agency for a total or partial waiver of fees. Under GP §4-206(e), the official custodian may waive any fee or cost assessed under the PIA if the applicant asks for a waiver and if the official custodian determines that a waiver would be in the **public interest**.

To determine whether a waiver is in the public interest, the official **custodian must consider not only the ability of the applicant to pay, but also other relevant factors**. A waiver may be appropriate, for example, when a requester 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. For example, in one case, the Court of Special Appeals found that Baltimore City's denial of a reporter's request to waive fees was arbitrary and capricious because the City only considered the expense to itself and the ability of the newspaper to pay and did not consider other relevant factors. The Court suggested that relevant factors included the public benefit in making available information concerning one of the City's major financial undertakings and the danger that imposing a fee for information upon a newspaper publisher might have a chilling effect on the full exercise of freedom of the press. City of Baltimore v. Burke, 67 Md. App. 147 cert. denied, 306 Md. 118 (1986); see also 81 Opinions of the Attorney General 154 (1996)(waiver of fee depends on a number of relevant factors and cannot be based solely on the poverty of the requester or the cost to the agency).

MPIA Manual, Chapter 7, 7-3 (emphasis added).

In Mayor and City Council of Baltimore v. Burke, 67 Md. App. 147, 506 A.2d 683, cert. denied, 306 Md. 118, 507 A.2d 631 (1986), the Court held that the City's denial of a newspaper reporter's request for a waiver of fees incurred in connection with the inspection of public records was arbitrary and capricious where the City considered only the expense to the City of locating and duplicating the documents and the perceived ability of the newspaper reporter to pay the projected fee. The Court disapproved the City's failure to consider "other relevant factors" in making its determination of whether a waiver would be in the public interest. In Burke, however, there was no issue of whether the City properly denied the request for a fee waiver as the City was the party moving the Court to limit disclosure. Further, the underlying controversy in Burke implicated an actual history of significant failure of a project that had a manifest effect on public health in the

form of raw sewage spilling into the Patapsco River, facts not present here, where Plaintiffs merely attack the Town for its opposition to a project supported by Plaintiffs. Third, the scope of the relief ordered by the trial court in Burke is remarkably narrower than the request Plaintiffs made here.

Burke adopted the federal courts' liberal construction of the federal FOIA fee waiver provision, which favors fee waivers for the media or "other requesters who will provide broad public dissemination of the information sought." Id., 67 Md. App. at 156, 506 A.2d at 688. However, the Court noted that the MPIA also provides that "other relevant factors" may be considered in determining whether the public interest justifies a waiver. Gen. Provs., §4-206(e)(2). The Court noted that the benefits of publicly disclosing the information requested is a relevant factor that the City should have, but did not, consider, but based that somewhat upon the fact that the requester was a member of the press. Here, Mr. Ross claimed only to be a blogger, and attempted to trick the Town by making the same request as ACT, and then by submitting and withdrawing and re-submitting a new letter dated November 10, 2014, in which Mr. Ross now claimed he was requesting the documents as an individual in the news media and altered the alleged purpose of his blog. These actions, considered together with the history of false accusations and smear tactics engaged in by ACT/ACT officers against the Town, lead the Town to distrust ACT and Mr. Ross. As noted above, the Town was entitled to consider these circumstances in denying the fee waiver request. See §4-204(b)(2).

In an opinion from the Attorney General, The Honorable Marna McLendon, 81 Md.

Op. Atty. Gen. 154 (1996), the Attorney General stated the following:

Pursuant to SG §10-621(a), the official custodian of public records ‘may charge an applicant a reasonable fee for the search for, preparation of, and reproduction of a public records.’ **This provision reflects a legislative judgment that the taxpayers need not subsidize PIA requesters** (except for the first two hours of search and preparation time, which are free to the requester under SG §10-621(b)).

When an applicant asks for a waiver, the official custodian may waive the fee 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.’ SG §10-621(d). **This wording negates any argument that poverty alone entitles a requester to a fee waiver; poverty is but one of the ‘relevant factors’ that ultimately leads to a discretionary judgment about the public interest.**

Conversely, a decision on a fee waiver request may not be based solely on the expense that would be incurred if the waiver were granted; a fee waiver request must be considered in light of the ability of the requester to pay the fee **and ‘other relevant factors.’** See Burke, 67 Md. App. at 157 (finding Baltimore City’s denial of fee waiver request arbitrary and capricious because the City only considered the expense it would incur and did not consider the public interest). **Burden on the office is surely not irrelevant, and might tip the public interest assessment, but it cannot be the only consideration.**

The broad term ‘public interest’ does not permit a precise listing of relevant factors. Cases have identified a ‘public interest’ in the disclosure of records shedding light on a public controversy about official actions, Harris Enterprises, Inc. v. Moore, 734 P.2d 1083, 1089 (Kan. 1987), and on an agency’s performance of its public duties, Massey v. FBI, 3 F.3d 620, 625 (2d Cir. 1993). ‘However, the mere possibility that information may aid an individual in the pursuit of litigation does not give rise to a public interest.’ Id.

The Honorable Marna McLendon, 81 Md. Op. Atty. Gen. 154 (1996)(emphasis added).

Here, ACT and Mr. Ross alleged “poverty” as a reason for a fee waiver, but failed to provide any proof that either or both of them could not afford to pay the \$879.00 fee.

Rather, ACT simply relied upon its status as a non-profit. However, a Town is also a “non-profit” entity, and it cannot be forced to bear financial responsibility every time a requestor parrots language consistent with the factors for receiving a fee waiver, as ACT and Mr. Ross did here. ACT had sufficient funds to file a lawsuit, thus it plainly had sufficient funds to pay the fee. Furthermore, Plaintiffs sought the fee waiver not in the “public interest,” but in furtherance of its attacks on the Town for its opposition to the proposed Purple Line project.

C. The Town Did Not Act Arbitrarily and Capriciously in Denying Plaintiffs’ Requests for Fee Waivers.

In ACT’s October 15, 2014 letter (from Baker Hostetler to Town Attorney, Ron Bolt), ACT’s attorney requested a fee waiver, beginning at page 4 of the letter. See Ex. M to Complaint. In the letter, ACT claimed to be “entitled” to a “waiver of all fees for this MPIA request.” Id. The letter stated that a fee waiver would serve the “public interest” and would contribute to the public’s understanding of the business, activities, and public-money expenditures of a government body related to major infrastructure project.” Id. The letter stated that act was “not seeking this information for any commercial purpose.” Id. The letter went on to argue several “factors” supporting the fee waiver request. Ex. M to Complaint, p. 5. First was ACT’s alleged inability to pay. However, this assertion was supported by nothing other than ACT noting that it is a non-profit run by volunteers. Id. Second, the letter argued other “relevant factors” under Maryland case law, citing Mayor & City Council of Baltimore v. Burke, 67 Md. App. 147, 506 A.2d 683 (1986), such as the fact that the topic interested the public and “the chilling effect setting prohibitively high fees

would have on the public dissemination of information through the press.” Id. However, ACT was not a member of the press, nor was Mr. Ross. The requester in Burke was a reporter for “The News American,” a Baltimore daily newspaper. In Burke, the Court held that the City acted arbitrarily and capriciously in denying the newspaper reporter’s request for a fee waiver because:

It is apparent from the record that the appellants considered no more than the expense to the City of locating and duplicating the documents (without trying to find ways to minimize the expense, such as allowing the appellee to view the documents in person and copy only what he deemed important), and the perceived ability of the appellee, as an employee of a Baltimore newspaper, to pay the City’s projected fee. The appellants did not abide by § 10-621(d)(2) which mandates consideration of ‘other relevant factors’ and making a determination of whether the waiver would be in the public interest.

Id., 67 Md. App. at 157, 506 A.2d at 688.

In footnote 2 of the letter from ACT, ACT’s attorney also referenced the federal case law interpreting FOIA’s fee waiver provision and the “factors” utilized in federal claims to determine “public interest.” Ex. M to Complaint, p. 5, n. 2.

On October 27, 2014, the Town responded by letter to ACT, stating that “[i]n your request, you outline your arguments in support of a waiver of all fees associated with the request. Please be advised **the request for a waiver has been considered** and is **denied**.” Ex. N to Complaint, p. 1 (emphasis added). Thus, unlike in Burke, here the Town reviewed ACT’s arguments and all of the “relevant factors” stated by ACT in support of its fee waiver request, **considered** those factors, and nevertheless decided that the request was denied. There is nothing that could remotely be described as “arbitrary and capricious”

with respect to the Town's decision.

ACT and Mr. Ross did not demonstrate a financial need for a fee waiver simply because ACT is a non-profit. ACT filed a lawsuit over an \$879.00 fee. ACT clearly appeared to have ample resources. Surely, filing the instant lawsuit has cost ACT much more than any fee(s) for research and copying costs requested or imposed by the Town. Moreover, Mr. Ross's request was duplicative of ACT's document request and fee waiver request and he had attempted to deceive the Town with his second November 10, 2014 letter. Thus, Mr. Ross did not have an independent basis for a fee waiver simply because he claimed to want to "blog" about the Town. The Town's denial letter to Mr. Ross stated his deception as a reason for denying his fee waiver request. Ex. P to Complaint.

The Town also did not agree that ACT or Mr. Ross's fee waiver requests were made in the "public interest," or even that the documents requested were sought for a public purpose. Rather, the history of attacks on the Town by ACT/its members, and previous requests made by ACT and its Officers demonstrated that Plaintiffs sought the fee waiver for their own personal interests in retaliating against the Town for its opposition to the proposed Purple Line project. ACT had posted false accusations against the Town on ACT's website (Def's Ex. 6) and had repeatedly attacked the Town because of the Town's opposition to the proposed Purple Line project, accusing the Town of acting illegally. The Town, like any private citizen, is entitled to take a position on a public issue. ACT and its members engaged in a smear campaign and utilized the Open Meetings Act Compliance Board and, now this Court, to retaliate against the Town for its position on the proposed

Purple Line project. Thus, the Town rightfully disbelieved ACT and Mr. Ross's claims that the request for the fee waiver was in the "public interest." If anything, ACT and Mr. Ross appeared to desire the documents without paying the fee for the "commercial" or proprietary purpose of attacking the Town for its opposition to a project supported by ACT. Thus, the Plaintiffs' fee waiver requests were carefully considered and all factors militated against a finding by the Town that a fee waiver was in the "public interest" or was warranted.

D. The Town Was Permitted to Consider The Identity and Purpose of the Requesters In Denying Plaintiffs' Fee Waiver Requests.

Plaintiffs assert that the fee should simply have been "waived," fully on the basis that ACT is a non-profit and that Mr. Ross claimed in his second November 10, 2014 letter to be a member of the news media, stating a different alleged "purpose" of his blog in the second letter.

The Town, however, was statutorily entitled to consider the history, identity and purposes of ACT and Mr. Ross, and Mr. Ross's affiliation with ACT, when considering the requests made for fee waivers. Section 4-204(b) of the MPIA states the following in this regard:

This section does not preclude an official custodian from considering the identity of the applicant, any organizational or other affiliation of the applicant, or the purpose for the application if . . . (2) the applicant has requested a waiver of fees under §4-206(e) of this subtitle; or (3) the identity of the applicant, any organizational or other affiliation of the applicant, or the purpose for the application is material to the determination of the official custodian in accordance with §4-206(e)(2) of this subtitle.

Id. (Emphasis added).

The Town therefore had the right to take into consideration the identity and affiliation of Mr. Ross with ACT, the history of Plaintiffs' attempts to request the same documents repeatedly without paying the fee, and Mr. Ross's "purpose for the application..." in considering and denying Plaintiffs' fee waiver requests. It is undisputed that throughout 2014, Mr. Ross and ACT were repeatedly submitting duplicative requests to the Town for the same category of documents and repeatedly attempting to avoid payment of the reasonable fees requested by the Town to comply with Plaintiffs' multiple requests, all the while also attacking the Town with online posts and statements that were false or misleading and filing multiple complaints with the Open Meetings Compliance Board regarding the Town's procedures in closing meetings and then misrepresenting the decision of the Board. See fn 4, supra, and Defendant's Exhibits 6-7.

The MPIA Manual, Chapter 7, "Fees," provides, in relevant part, that:

Under GP §4-206, an official custodian may charge reasonable fees for the search and preparation of records for inspection and copying. Search and preparation fees must be reasonably related to the actual cost to the governmental unit in processing the request. GP §4-206(a); **see also 71 Opinions of the Attorney General 318, 329 (1986)('The goal . . . should be . . . neither to make a profit nor to bear a loss on the cost of providing information to the public.')**

MPIA Manual, at Chapter 7-1 (emphasis added).

The Town was not required to automatically "waive" its reasonable fees for researching the records sought by Plaintiffs, as the Town would have suffered a loss on the cost of providing the information to the public, contrary to the intent and goal of the statute. Many individuals and non-profit organizations submit MPIA requests and fee

waiver requests to the Town. The Town cannot simply waive the fee every time a person or group requests a waiver, or claims to want to “blog” about the content of the records. That alone does not justify waiving the fees. There must be something “more” present for a fee waiver to be required and, in this case, the Town did not act “arbitrarily and capriciously” in determining that a fee waiver was not justified under the circumstances. As noted by the Attorney General in his letter opinion to Marna McClendon quoted above, the Town was not required to subsidize PIA requesters. 81 Md. Op. Atty. Gen. 154 (1996).

Moreover, in responding to Mr. Ross’s second November 10, 2014 letter, the Town specifically identified Mr. Ross’s deceptiveness as a reason for denial of his fee waiver request, stating:

In your request, you identify yourself as a member of the media as a basis for a waiver of all fees associated with the request. Please be advised that the request for a waiver has been considered and is denied. **We do not believe this request is being made in your capacity as a member of the media.** This belief is based on the first request you submitted and then immediately withdrew on November 10, 2014 which clearly indicated it was being submitted on behalf of the Action Committee for Transit (ACT), along with your known affiliation with ACT. Accordingly, the Town will expect payment in full for all fees associated with the request.

Ex. P to Complaint, p. 1 (emphasis added).

Inasmuch as the MPIA, §4-204(b), entitled the Town to consider as material to its decision the identity and affiliation of Mr. Ross with ACT, the history of Plaintiffs’ attempts to request the same documents repeatedly without paying the fee, and Mr. Ross’s “purpose for the application...,” the Town simply cannot be said to have acted “arbitrarily or capriciously” in considering and denying Mr. Ross’s fee waiver request.

For these reasons, the Defendant's denials of Plaintiffs' requests for fee waivers were not arbitrary or capricious and should be sustained by this Court.

III. THE TOWN DID NOT VIOLATE THE MPIA BY DENYING PLAINTIFFS TWO HOURS OF FREE RESEARCH.

General Provisions Article, §4-206(c), "Limitation on search and preparation fee," provides that:

(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.

First, the refusal to grant the first two (2) hours of research free to Plaintiffs is a non-issue with respect to pre-October 15, 2014 requests inasmuch as Plaintiffs withdrew all of those previous requests prior to submission by its attorneys of the letter dated October 15, 2014. See Email withdrawing previous PIA requests, Defendant's Ex. 1. Because the PIA requests before October 15, 2014 were withdrawn, they may not be the subject of the instant Petition for Judicial Review of the Town's actions.

Assuming, arguendo, that the pre-October 15, 2014 requests/denials of two free hours of research were at issue (and they are not), then the Town did not violate the statute or act arbitrarily or capriciously. The Town provided the first two hours of research free to ACT and Mr. Ross with respect to each of their first requests for a category of documents. For example, ACT first requested documents regarding the outside consultants utilized by the Town on February 4, 2014. Ex. A to Complaint. The Town provided two hours of free research to ACT with regard to this request. Ex B. To Complaint. On April 1, 2014, ACT again requested records regarding the same outside consultants hired by the

Town with respect to the proposed Purple Line project. Ex. D to Complaint. The Town responded on April 17, 2014 by letter, stating that “[b]ased on the previous request made by your organization relating to the same general topic, we will not provide the first two (2) hours of research free of charge.” Ex. F to Complaint. On April 6, 2014, ACT submitted another request under the PIA, but this time it was for records from Xenophon Strategies. Ex. D to Complaint. Because this was not a repeat request by ACT for the same category of documents, the Town performed the “first two (2) hours of research ... free of charge.” Ex. G to Complaint. On April 18, 2014, ACT again sought documents regarding the same outside consultants and same Xenophon Strategies categories of documents. Ex. H and I to Complaint. However, the Plaintiffs now sought complete fee waivers rather than the first two hours of research for free. On May 21, 2014, the Plaintiffs again requested the same categories of documents from the Town. Ex. K to Complaint. The letter again sought a complete fee waiver rather than two hours of free research. On June 20, 2014, the Town denied the fee waiver requests. Ex. L to Complaint. The Town produced documents for inspection, but requested a fee for researching all correspondence. Ex. L to Complaint. The Town’s letter stated that “[b]ased on the previous request made by you relating to the same general topic, we will not provide the first two (2) hours of research free of charge.” Id.

In Plaintiffs’ October 15, 2014 and Mr. Ross’s second November 10, 2014 letters, Plaintiffs again sought the same documents, thus the Town refused to provide two **more** hours of free research. The Town did nothing arbitrary or capricious in denying two free hours of research for each and every repeated request for the same category of documents

by Plaintiffs. The multiple requests for the same category of documents by ACT and/or its various representatives were an obvious ploy to repeatedly obtain two free hours of research and to avoid paying fees.

The MPIA Manual provides the following:

On a rare occasion, a requester (or group of requesters) may attempt to artificially break a large request into a series of smaller requests to obtain two free hours searching for each request in order to circumvent the assessment of fees. If the purpose is clear, it seems reasonable for the agency to aggregate those requests as a single request with the appropriate fee.

MPIA Manual, 7-1.

The purpose of ACT was clear to the Town, in that ACT sought to harass the Town with repeated requests for the same documents, through various officers of the group, in an effort to repeatedly obtain two free hours of research. When that tactic did not succeed, that is when ACT began requesting total fee waivers. Assuming that these requests were at issue before the Court, which they are not, the Court should sustain the actions of the Town in denying Plaintiffs' requests for two free hours of research for its duplicative document requests. With respect to the October 15, 2014 letter and correspondence thereafter, it involved only the Plaintiffs' requests for total fee waivers and, thus, there is no issue with respect to two free hours of research regarding the PIA requests before this Court upon judicial review. If there were such an issue before the Court, the Town did not act arbitrarily and capriciously in denying two additional free hours of research for each of Plaintiffs' repeated requests for the same category of documents to avoid paying fees.

IV. PLAINTIFFS DO NOT MEET THE CRITERIA FOR AN AWARD OF COUNSEL FEES OR COSTS UNDER THE MPIA.

The Complaint requests “attorneys’ fees and costs as permitted under the Maryland Public Information Act.” Complaint, p. 13.

The MPIA §4-362 regarding judicial review, states that:

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.

In order to be eligible for an award of attorneys fees, a complainant must substantially prevail in its judicial action seeking the release of information. Stromberg Metal Works, Inc. v. Univ. of Md., 395 Md. 120, 128, 909 A.2d 663, 668 (2006). Petitioner should not substantially prevail for the reasons already stated, *i.e.*, that the Town acted appropriately and in full compliance with the MPIA, and not arbitrarily and capriciously.

Even if Plaintiffs “substantially prevail” in this case, which they should not, the award of costs and attorney’s fees under the MPIA is not automatic; it is still left to the discretion of the trial court. Stromberg, 395 Md. at 128, 909 A.2d at 668. 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. Dept. of Liquor Control for Montgomery Cnty., 805 A.2d 268, 370 Md. 272 (2002). *See also* Kirwan v. The Diamondback, 721 A.2d 196, 352 Md. 74 (1998)(under MPIA, an award of attorney fees to a prevailing complainant is within the discretion of the trial court; Act itself contains no criteria for the exercise of this discretion).

The trial court must consider three factors before ordering any such award:

- (1) the benefit to the public, if any derived from the suit;
- (2) the nature of complainant's interest in the released information; and
- (3) whether the agency's withholding of the information had a reasonable basis in law.

Stromberg, 395 Md. at 128, 909 A.2d at 668.

In this case, the claimed "public benefit" of completely waiving all fees for ACT and its representatives for their repeated requests for the same documents was not for a public benefit at all. Rather, it was part of ACT's campaign to harass and smear the Town in retaliation for the Town's opposition to the proposed Purple Line Project, which ACT supports. The Town has the right to oppose the project. It is improper for ACT and/or its representatives to misuse statutes and boards and this Court to retaliate against and harass the Town. Similarly, for these reasons, the nature of the requesters' interest is self-serving. Further, the Town did not "withhold" any records from Plaintiffs. Rather, the Town simply refused to completely waive the fee. It was entirely reasonable and lawful for the Town to refuse the fee waiver requests by Plaintiffs under the circumstances. Therefore, Plaintiffs cannot meet the Court of Appeals' three-part test and should not be awarded attorney's fees or costs. Nor should this Court exercise its discretion to award such counsel fees or costs to Plaintiffs.

CONCLUSION

For all of the foregoing reasons, the Town of Chevy Chase, Maryland respectfully requests a ruling in its favor and that the Court deny the relief requested by Plaintiffs.

Respectfully submitted,

KARPINSKI, COLARESI & KARP, P.A.

BY: Kevin Karpinski/ks
KEVIN KARPINSKI

Victoria Shearer

VICTORIA M. SHEARER

Suite 1850

120 East Baltimore Street

Baltimore, Maryland 21202

410-727-5000

Kevin@bkcklaw.com

Vshearer@bkcklaw.com

Attorneys for Town of Chevy Chase, Maryland

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of March 2015, a copy of the foregoing was sent by first class mail, postage prepaid, to:

Baker Hostetler LLP
Elliot J. Feldman, Esquire
Laurie A. Babinski, Esquire
Peter C. Whitfield, Esquire
James F. Romoser, Esquire
1050 Connecticut Avenue, Suite 1100
Washington, D.C. 20036
Attorneys for Plaintiffs

Victoria Shearer
Counsel for Town of Chevy Chase, MD

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

ACTION COMMITTEE FOR TRANSIT
and BENJAMIN ROSS

Plaintiffs

v.

TOWN OF CHEVY CHASE, MD
and TOWN COUNCIL OF CHEVY
CHASE, MD

Defendants

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Civil No: 400312-V
Judge John W. Debelius, III
Track II

Next Event: Motion for Alternative
Service Deadline, 06/01/15

* * * * *

ORDER

Upon consideration of Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment, and any opposition filed thereto, it is this _____ day of _____, 2015, by the Circuit Court for Montgomery County, hereby

ORDERED that Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment, is hereby **GRANTED**.

Judge John W. Debelius, III
Montgomery County Circuit Court

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

ACTION COMMITTEE FOR TRANSIT
and BENJAMIN ROSS

Plaintiffs

v.

TOWN OF CHEVY CHASE, MD
and TOWN COUNCIL OF CHEVY
CHASE, MD

Defendant

Civil No: 400312-V

Judge John W. Debelius, III

Track II

Next Event: Motion for Alternative
Service Deadline, 06/01/15

* * * * *

EXHIBITS TO TOWN'S
MOTION TO DISMISS OR, IN THE ALTERNATIVE,
FOR SUMMARY JUDGMENT

1. Email dated June 23, 2014, from Miriam Schoenbaum on behalf of ACT to Todd Hoffman, Town Manager, withdrawing Plaintiffs' previous MPIA requests (and fee waiver requests) to the Town.
2. Affidavit of Todd Hoffman, Town Manager.
3. Benjamin Ross's first November 10, 2014 Letter request under the MPIA.
4. Benjamin Ross's second November 10, 2014 Letter request under the MPIA.
5. Print out from ACT's website showing that Benjamin Ross is an ACT ex-officio Board Member.
6. Press releases from ACT's website, dated March 24, 2014 ("New Documents on Shuster Brother Lobbying Show Town of Chevy Chase Misinformed Residents Before Public Hearing"); March 31, 2014 ("Town of Chevy Chase Broke the Law Open Meetings Board Rules"); and February 18, 2015 ("Town of Chevy Chase Spending Tops Million Dollars to Fight Purple Line").
7. The Open Meetings Compliance Board's decision dated March 20, 2014 (9 Official Opinions of the Compliance Board 99 (2014)).

Todd Hoffman

From: M Schoenbaum [mwschoenbaum@yahoo.com]
Sent: Monday, June 23, 2014 8:53 PM
To: Todd Hoffman
Subject: RE: PIA request for Xenophon

Dear Mr. Hoffman,

On behalf of ACT, I withdraw these three MPIA requests -- specifically, ACT's two MPIA requests dated April 1, 2014, and ACT's MPIA request dated April 7, 2014.

Miriam Schoenbaum
15004 Clopper Rd
Boyd's MD 20841

On Wed, 4/23/14, Todd Hoffman <thoffman@townofchevy Chase.org> wrote

Subject: RE: PIA request for Xenophon
To: "M Schoenbaum" <mwschoenbaum@yahoo.com>, "Patricia Burda" <pburda@townofchevy Chase.org>, "Kathy Strom" <kstrom@townofchevy Chase.org>, "Al Lang" <al.lang@townofchevy Chase.org>, "David Lublin" <dlublin@townofchevy Chase.org>
Date: Wednesday, April 23, 2014, 11:59 AM

Ms. Schoenbaum,
Please see attached letter in response to your requests for waiver of fees associated with your three MPIA requests.

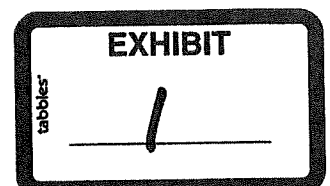
Todd
Hoffman
Town Manager
Town of
Chevy Chase, Maryland
4301 Willow Lane
Chevy Chase, MD 20815
301-654-7144 (P)
301-718-9631
(F)
thoffman@townofchevy Chase.org

-----Original Message-----

From: M Schoenbaum [<mailto:mwschoenbaum@yahoo.com>]
Sent: Friday, April 18, 2014 12:15 PM
To: Patricia Burda; Kathy Strom; Al Lang; David Lublin; Todd Hoffman
Subject: Fw: PIA
request for Xenophon

Dear
Mr. Hoffman,

The purpose of
this e-mail is to ask the Town of Chevy Chase to waive the fees and costs you are
assessing, per your e-mail below, for the request submitted by the Action Committee for



Transit, under the Maryland Public Information Act, for records related to the Town's dealings with the firm Xenophon Strategies.

A waiver is in the public interest. ACT is not seeking this information for a narrow personal or commercial interest. Rather, ACT is seeking this information for a public purpose -- namely, to obtain information about the Town's expenditure of public funds for legal advice, government lobbying, and public relations to support the Town's efforts related to the State of Maryland's Purple Line project. The requested disclosure will contribute to public understanding of government operations and activities.

Sincerely,

Miriam Schoenbaum
15004 Clopper
Rd
Boys MD 20841

>
> Ms. Dancit,
> Attached
please find a letter in
> response to
your MPIA request.
>
>
>
> _____
> Todd Hoffman
> Town
Manager
> Town of Chevy Chase,
> Maryland
> 4301 Willow
Lane
> Chevy Chase,
>
MD 20815
> 301-654-7144 (P)
> 301-718-9631 (F)
> thoffman@townofchevyCHASE.org
>
>
>
>
> From: Ronit Dancis
>
[<mailto:ronitadancis@yahoo.com>]
>
>
> Sent: Sunday, April 06, 2014 3:58 PM
>
> To: Patricia Burda;
Kathy Strom; Al Lang; David Lublin; John > Bickerman; Todd Hoffman > > Subject: PIA
request for Xenophon > > > > > Dear Mayor Burda, Councilmembers, > and Mr.

Hoffman, > > > > > > > > > > > > > Attached please find a Public >
Information Act request on behalf of the Action Committee for Transit > regarding Xenophon
Strategies.

>

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> Thank you very much,

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> Ronit Aviva Dancis

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> PO Box

> 7074

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> Silver Spring, MD

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20907-7074

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IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

ACTION COMMITTEE FOR TRANSIT
and BENJAMIN ROSS

Plaintiffs

v.

TOWN OF CHEVY CHASE, MD
and TOWN COUNCIL OF CHEVY
CHASE, MD

Defendant

Civil No: 400312-V
Judge John W. Debelius, III
Track II

Next Event: Motion for Alternative
Service Deadline, 06/01/15

* * * * *

AFFIDAVIT OF TODD HOFFMAN

I, Todd Hoffman, declare and affirm under the penalties of perjury that I am over the age of eighteen (18) years, am competent to testify to the matters set forth herein, and have personal knowledge of the following facts:

1. I am the Town Manager for the Town of Chevy Chase, Maryland.
2. The documents attached as Exhibits 1, 3 and 4 to the Town's Motion to Dismiss or, in the Alternative, for Summary Judgment are true and correct copies of business records of the Town of Chevy Chase, Maryland.

I hereby affirm and declare, under penalty of perjury, that the foregoing statements are true.

3/11/15
Date

Todd Hoffman
Todd Hoffman



Benjamin Ross
4710 Bethesda Ave. #819
Bethesda, MD 20814

November 10, 2014

VIA HAND DELIVERY

Ron Bolt, Esq.
Town Attorney
Town of Chevy Chase
4301 Willow Lane
Chevy Chase, MD 20815

Re: Maryland Public Information Act Request on behalf of Action Committee for Transit

Dear Mr. Bolt:

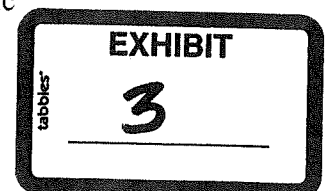
I am submitting the following request for public records under the Maryland Public Information Act. If you are not the custodian of the requested records, please forward this information request to the proper custodian.

I am submitting the following request as a member of the media. I am a published author who writes on issues of public interest, such as chemical pollution and urban development. I have written extensively on issues regarding the Purple Line in both print and electronic media. Currently, I am a contributing author for Dissent Magazine (dissentmagazine.org) and I write on issues regarding the Purple Line. The purpose of this blog is to provide information about elected officials, development, traffic, and other matters impacting Montgomery County, Maryland.

SUMMARY OF REQUEST

I am requesting copies of public records relating to contracts, agreements, and communications between the Town of Chevy Chase ("Town") and four firms that the Town retained to provide services in relation the Purple Line public transit project. I am also requesting full minutes of closed sessions held by the Town Council, pursuant to the Town's Charter, which provides that minutes of Town Council proceedings "shall be open to public inspection." Charter of the Town of Chevy Chase § 207. I am making this request as a member of the news media in order to promote the public's understanding of the Town and the actions of its public officials in conducting public business relating to a major public infrastructure project. I intend to distribute the requested information to the public through my blog in order to contribute to the public's understanding of the issues related to the Purple Line.

The Maryland Public Information Act ("MPIA") states that "[a]ll persons are entitled to have access to information about the affairs of government and the official acts of public



Benjamin Ross
4710 Bethesda Ave. #819
Bethesda, MD 20814

November 10, 2014

VIA HAND DELIVERY

Ron Bolt, Esq.
Town Attorney
Town of Chevy Chase
4301 Willow Lane
Chevy Chase, MD 20815

Re: Maryland Public Information Act Request

Dear Mr. Bolt:

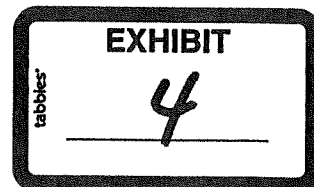
I am submitting the following request for public records under the Maryland Public Information Act. If you are not the custodian of the requested records, please forward this information request to the proper custodian.

I am withdrawing the request letter I submitted earlier this morning.

I am submitting the following request as a member of the media. I am a published author who writes on issues of public interest, such as chemical pollution and urban development. I have written extensively on issues regarding the Purple Line in both print and electronic media. For the last 14 years, I have regularly contributed articles and (in more recent years) blog posts to *Dissent* magazine and I have written there on issues regarding the Purple Line. I also write at Greater Greater Washington blog. The purpose of this blog is to provide information about elected officials, development, traffic, and other matters impacting the Greater Washington area, including Montgomery County, Maryland.

SUMMARY OF REQUEST

I am requesting copies of public records relating to contracts, agreements, and communications between the Town of Chevy Chase ("Town") and four firms that the Town retained to provide services in relation the Purple Line public transit project. I am also requesting full minutes of closed sessions held by the Town Council, pursuant to the Town's Charter, which provides that minutes of Town Council proceedings "shall be open to public inspection." Charter of the Town of Chevy Chase § 207. I am making this request as a member of the news media in order to promote the public's understanding of the Town and the actions of its public officials in conducting public business relating to a major public infrastructure project. I intend to distribute the requested information to the public through blogs and/or in print in order to contribute to the public's understanding of the issues related to the Purple Line.



The Maryland Public Information Act ("MPIA") states that "[a]ll persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees." Md. Code Gen. Provisions § 4-103(a). In reviewing this request, the Town should recognize that the MPIA mandates that the Act "shall be construed in favor of permitting inspection of a public record, with the least cost and least delay to the person . . . that requests the inspection." *Id.* § 4-103(b).

SPECIFIC RECORDS REQUESTED

I respectfully request copies of—or an opportunity to inspect—the following records:

Agreements and contracts

1. All agreements and contracts (including any drafts) between or among the Town of Chevy Chase and the firm of Buchanan Ingersoll & Rooney, from February 8, 2014 to present.
2. All agreements and contracts (including any drafts) between or among the Town of Chevy Chase and the firm of Chambers Conlon & Hartwell, from February 8, 2014 to present.
3. All agreements and contracts (including any drafts) between or among the Town of Chevy Chase and the firm of Alexander & Cleaver, from February 8, 2014 to present.
4. All agreements and contracts (including any drafts) between or among the Town of Chevy Chase and the firm of Xenophon Strategies, including representatives David A. Fuscus, Julie Chlopecki, or Mark Hazlin, from November 1, 2013 to present.
5. All agreements and contracts (including any drafts) between or among the Town of Chevy Chase and the firm of Sam Schwartz Engineering, from February 8, 2014 to present.

Invoices and bills

1. All invoices or bills (paid or unpaid) from the firm of Buchanan Ingersoll & Rooney to the Town of Chevy Chase, from January 16, 2014 to present.
2. All invoices or bills (paid or unpaid) from the firm of Chambers Conlon & Hartwell to the Town of Chevy Chase, from January 16, 2014 to present.
3. All invoices or bills (paid or unpaid) from the firm of Alexander & Cleaver to the Town of Chevy Chase, from January 16, 2014 to present.

4. All invoices or bills (paid or unpaid) from the firm of Xenophon Strategies, including representatives David A. Fuscus, Julie Chlopecki, or Mark Hazlin, from November 1, 2013 to present.
5. All invoices or bills (paid or unpaid) from the firm of Sam Schwartz Engineering to the Town of Chevy Chase, from January 16, 2014 to present.

Correspondence

1. All correspondence between or among the firm of Buchanan Ingersoll & Rooney (or its representatives) and the Town of Chevy Chase, the Town Council, or individual Town Council members from February 20, 2014 to present, as well any information predating February 20, 2014 that was not open to inspection under ACT's previous MPIA request dated February 4, 2014.
2. All correspondence between or among the firm of Chambers Conlon & Hartwell (or its representatives) and the Town of Chevy Chase, the Town Council, or individual Town Council members from February 20, 2014 to present, as well any information predating February 20, 2014 that was not open to inspection under ACT's previous MPIA request dated February 4, 2014.
3. All correspondence between or among the firm of Alexander & Cleaver (or its representatives) and the Town of Chevy Chase, the Town Council, and/or individual Town Council members from February 20, 2014 to present, as well any information predating February 20, 2014 that was not open to inspection under ACT's previous MPIA request dated February 4, 2014.
4. All correspondence between or among the Town of Chevy Chase, the Town Council, or individual Town Council members about or related to the firm of Xenophon Strategies, including representatives David A. Fuscus, Julie Chlopecki, or Mark Hazlin, from November 1, 2013 to present.
5. All correspondence between or among the firm of Xenophon Strategies, including representatives David A. Fuscus, Julie Chlopecki, or Mark Hazlin and the Town of Chevy Chase, the Town Council, or individual Town Council members, from November 1, 2013 to present.
6. All correspondence between or among the firm of Sam Schwartz Engineering (or its representatives) and the Town of Chevy Chase, the Town Council, and/or individual Town Council members from February 20, 2014 to present.

Meeting Records

1. All meeting minutes—including minutes not previously disclosed to the public—from all closed sessions held by the Town Council from November 1, 2013 to present.
2. All minutes and notes of all meetings between or among the firm of Buchanan Ingersoll & Rooney (or its representatives) and the Town of Chevy Chase, the Town Council, or individual Town Council members from February 20, 2014 to present, as well any information predating February 20, 2014 that was not open to inspection under ACT's previous MPIA request dated February 4, 2014.
3. All minutes and notes of all meetings between or among the firm of Chambers Conlon & Hartwell (or its representatives) and the Town of Chevy Chase, the Town Council, or individual Town Council members from February 20, 2014 present, as well any information predating February 20, 2014 that was not open to inspection under ACT's previous MPIA request dated February 4, 2014.
4. All minutes and notes of all meetings between or among the firm of Alexander & Cleaver or its representatives and the Town of Chevy Chase, the Town Council, or individual Town Council members from February 20, 2014 to present, as well any information predating February 20, 2014 that was not open to inspection under ACT's previous MPIA request dated February 4, 2014.
5. All minutes and notes of all meetings between or among the firm of Xenophon Strategies, including representatives David A. Fuscus, Julie Chlopecki, or Mark Hazlin, and the Town of Chevy Chase, the Town Council, or individual Town Council members from November 1, 2013 to present.
6. All minutes and notes of all meetings between or among the firm of Sam Schwartz Engineering (or its representatives) and the Town of Chevy Chase, the Town Council, or individual Town Council members from February 20, 2014 present.

REQUEST FOR WAIVER OF ALL FEES

I am requesting a waiver of all fees for this MPIA request. A fee waiver is warranted because the information requested will serve the public interest and contribute significantly to the public's understanding of the business, activities, and public-money expenditures of a government body related to a major public infrastructure project. I am not seeking this information for any commercial purpose.

The Town may waive the fees associated with this request if "(1) the applicant asks for a waiver; and (2) 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." Md. Code Gen. Provisions § 4-206(e). I am requesting a waiver.

As to the second factor, the consideration of “other relevant factors” merits a fee waiver. These factors include the fact that this information involves an area of public interest aspect and a request on behalf of a member of the media. The information requested is undoubtedly in the public interest because it concerns the expenditure of public funds in regards to a public transportation project.

Additionally, my status as a member of the media supports a fee waiver. I frequently write books and articles on issues impacting the public. The subject of my work includes developments regarding the Purple Line. Under an analogous fee waiver provision in the Freedom of Information Act, a “representative of the news media” is defined broadly, to include “a representative of the news media” means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.”¹ This is consistent with other federal case law, which has refused to draw lines between “traditional” press and those who distribute information on matters of public concern to the public via the internet.² The Purple Line debate—including, specifically, the Town’s expenditure of funds on lobbyists—*has* garnered coverage in mainstream news outlets, as well.³

While the “other relevant factors” are not set forth in the MPIA, Maryland case law indicates they include the importance of the topic to the well-being of the public, as well as the chilling effect setting prohibitively high fees would have on the public dissemination of information through the press. *See Mayor & City Council of Baltimore v. Burke*, 506 A.2d 683 (Md. Ct. Spec. App. 1986). In addition, the Maryland Attorney General’s Public Information Act Manual notes that a fee waiver is appropriate where information is sought “for a public purpose,” as opposed to a “narrow personal or commercial interest.”⁴⁵

¹ 5 U.S.C. § 552(a)(4)(A)(ii).

² *See, e.g., Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 352 (2010) (“With the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others who wish to comment on political and social issues becomes far more blurred.”); *Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284, 1291 (9th Cir. 2014) (noting, in defamation action against bloggers, that “[t]he protections of the First Amendment do not turn on whether the defendant was a trained journalist, formally affiliated with traditional news entities, engaged in conflict-of-interest disclosure, went beyond just assembling others’ writings, or tried to get both sides of a story.”).

³ *See, e.g., Katherine Shaver, Purple Line advocates question Town of Chevy Chase hiring congressman’s brother*, WASHINGTON POST (Jan. 23, 2014).

⁴ Office of the Attorney General (Maryland), *Maryland Public Information Act Manual*, at 7-1 (12th Ed. 2011).

⁵ Federal case law interpreting FOIA’s fee waiver provision similarly has pointed to several factors that indicate when a request is in the “public interest,” including: “the request must concern the operations or activities of government,” “the disclosure must be ‘likely to contribute’ to an understanding of government operations or activities,” “disclosure must contribute to an understanding of the subject by the public at large,” and “disclosure must be likely to contribute

I am not seeking the information for a commercial purpose. Instead, my purpose is to make public the requested records and the information they contain. The requested information is related to an ongoing public debate regarding the expenditure of significant amounts of public funds relating to a major public transportation project—a project that will impact residents' lives and well-being by providing faster, more reliable transportation to homes, businesses, and recreational spaces—and to the Town's conduct in opposing the same.⁶

REQUEST PROCEDURES

The MPPIA requires the custodian of the records to produce a requested record immediately upon receipt of a written request if the record is responsive to a request and is open to inspection. The Act provides for an additional reasonable period not to exceed 30 days only where the additional period of time is required to retrieve the records and assess their status under the Act. If access to the records in this request will take longer than 30 days, please contact me as soon as possible with information regarding when I can expect copies (paper or electronic) or the ability to inspect the requested records. If it is convenient for you to provide some or all of the records in an electronic format, that is acceptable.

If this request is unclear in any way, please contact me as soon as possible to clarify the request. If you deny any portion of this request, please provide a "*Vaughn* index" that sets forth the date, author, and general subject matter of any documents withheld, as well as the legal basis for your belief that the document should be shielded from disclosure.⁷ Additionally, if you deny the request for a fee waiver, please provide the legal grounds for the denial.

Thank you for your consideration of this request. Please do not hesitate to contact me if you have any questions regarding the foregoing.

Sincerely,

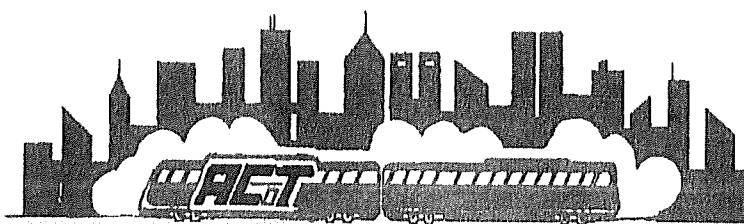
Benjamin Ross

cc: Todd Hoffman, Town Manager

significantly to such public understanding." *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004).

⁶ See, e.g., Katherine Shaver, *Purple Line Advocates Question Town of Chevy Chase Hiring Congressman's Brother*, WASHINGTON POST (Jan. 23, 2014).

⁷ *Office of Attorney Gen. v. Gallagher*, 359 Md. 341, 345, 753 A.2d 1036, 1038 (2000).



ACTION COMMITTEE FOR TRANSIT

Montgomery County's Advocates for Better Transportation

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What is the Action Committee for Transit?

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[I-270 Corridor](#)
[Corridor Cities Transitway](#)
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The Action Committee for Transit has a vision of better communities and better transit. We believe fundamental changes are needed in transportation and land use policies to give the people of Montgomery County and Maryland the quality of life we deserve.

Our broad membership and active volunteers give us the ability to make the voice of transit riders — and those who would like to ride transit if it were more available — heard in Rockville, Annapolis, and Washington. At the same time, we continue to educate the public about the needs of transit. Our organization is democratically governed and we are sustained financially by our members.

ACT was organized in 1986 by Harry Sanders and Ross Capon and incorporated in 2000 as a non-stock corporation with a board of directors elected by the members. ACT has no stockholders, and the corporation's charter requires any assets to be donated to a 501(c)(3) charity if the corporation is dissolved. ACT is not eligible for 501(c)(3) tax status because of our advocacy work. ACT is probably eligible for 501(c)(4) status, but has not applied for it because, for a local grass-roots organization, the legal and accounting costs involved far exceed the benefits.

2015 Officers

President: Nick Brand (Chevy Chase) n.brand@verizon.net

Vice President, campaigns: Ronit Dancis (Chevy Chase)

Vice President, land use: Dan Reed (Silver Spring), Land Use justupthepike@gmail.com [Dan's blog](#)

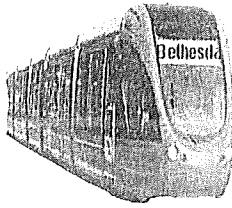
Vice President, legislative: Jim Clarke (Rockville) 301-340-8994

Secretary: Tracey Johnstone (Chevy Chase) 301-951-8963 [Tracey's blog posts](#)

tabbles®

5

EXHIBIT



Treasurer: David Anderson (Silver Spring)

daveridge216@gmail.com

Board member: Emily Shetty (Kensington) emily.shetty@gmail.com

Non-voting ex officio board members:

Ralph Bennett (Silver Spring), Purple Line Now!

Miriam Schoenbaum (Boys), Upcounty & MARC 301-528-6650

[Miriam's blog posts](#)

Ben Ross (Bethesda), meeting programs 301-913-2849 Ben's blog posts at [Greater Greater Washington](#) and [Dissent](#)

Wendy Leibowitz (Bethesda), Safe Walk to School

Sareana Kimia (North Bethesda), Student rep

Staff: Cindy Snow (Germantown), Kathy Jentz

admin@actfortransit.org

Editor Transit Times: Quon Kwan (Rockville) 301-460-7454

Webmaster: Jeri Roth Lande (Silver Spring)

Contact Us

ACT

PO BOX 7074

SILVER SPRING MD 20907-7074

admin@actfortransit.org

For media inquiries please contact officers directly.



ACTION COMMITTEE FOR TRANSIT

Montgomery County's Advocates for Better Transportation

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Purple Line

Silver Spring Transit Center

Purple Line Segments

Purple Line History

I-270 Corridor

Corridor Cities Transitway

MARC

Bus Service

Pedestrians

Land Use

Land Use Issues

Positions

Press Releases

About Us

Transit Times Newsletter

Allied Groups

Transit Services

New Documents on Shuster Brother Lobbying Show Town of Chevy Chase Misinformed Residents Before Public Hearing

Press release issued March 24, 2014

When the Town of Chevy Chase announced its Jan. 8 public hearing about whether to spend \$350,000 on "Purple Line legal assistance," it had already agreed in writing that it would receive "non-legal services only."

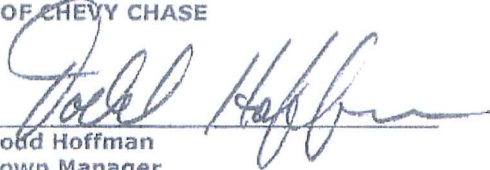
The agreement was contained in a contract signed December 9 between the town and the lobbying and law firm of Buchanan Ingersoll & Rooney. The contract has just come to light as a result of a Public Information Act request filed by the Action Committee for Transit.

Agreed and accepted this 9th day of December 20 13

The undersigned confirms that he is duly authorized to enter into this Agreement on behalf of the Town, that the Services undertaken involve solely the provision of non-legal services, that the Agreement and the Services do not establish an attorney-client relationship with the Town, that the confidentiality protections and conflict of interest restrictions of the Lawyers' Rules of Professional Conduct and the attorney-client privilege have no application to the Services, and that the Firm may provide legal representation to a client in a matter directly adverse to the Town including litigation.

TOWN OF CHEVY CHASE

By:


Todd Hoffman
Town Manager
Town of Chevy Chase, Maryland

The contract, which authorized payment of an initial \$20,000 plus expenses, also states that its terms may be extended pursuant to the January 8 public hearing. No public bidding invitation was provided to other potential contractors.

EXHIBIT

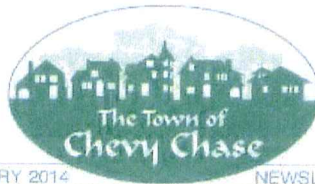
6

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On December 11, the town met with two lobbyists from Buchanan Ingersoll at the Woodmont Grill in Bethesda. One of the lobbyists was Robert Shuster, brother of House Transportation & Infrastructure Committee chair Bill Shuster.

The public was not informed of the January 8 hearing until the town newsletter was distributed on New Years' Eve. The newsletter told residents that the town planned to "engage a law firm" to provide "Purple Line legal assistance."



Forecast

JANUARY 2014

NEWSLETTER FOR THE TOWN OF CHEVY CHASE

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Public Hearings Scheduled for January 8

Purple Line Legal Assistance

At its Wednesday, January 8 meeting, the Town Council will hold a public hearing on a proposal to engage a law firm to assist the Town in continuing to respond to the proposed Purple Line project and its local impacts.

"Even if these actions complied with the letter of Maryland law concerning open meetings and procurement, they were contrary to its spirit," commented ACT vice-president Tina Slater. "Every government body should seek the maximum in openness and fairness."



ACTION COMMITTEE FOR TRANSIT

Montgomery County's Advocates for Better Transportation

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Town of Chevy Chase Broke the Law, Open Meetings Board Rules

Press release issued March 31, 2014

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The Town of Chevy Chase broke the law when its town council met in secret to hire an anti-Purple Line lobbyist. In a [newly issued opinion](#), the Maryland Open Meetings Compliance Board determined that the town acted illegally by failing to take a public vote to close the meeting and not disclosing in advance the topic to be discussed.

The council met on November 26 with lobbyist Robert Shuster, the brother of House Transportation and Infrastructure chair Bill Shuster. Two weeks later, Robert Shuster's firm was hired to lobby against the planned light rail line that will run along the town's northern border.

The Open Meetings Board acted in response to a [complaint](#) by Action Committee for Transit vice president Ronit Aviva Dancis. The board ruled that if the proper disclosures and public vote had been made, the law would not have been violated by closing portions of the meeting where selection of contractors and future legal action were discussed.

Dancis pointed out that the town has now selected its lobbyists and [agreed in writing](#) that they will not provide legal advice. "The two reasons given for closing the November meeting are now off the table, so there is no longer any excuse for secrecy," she said. "We welcome the Town Council's public acknowledgement that it has violated the law, as required by Section 10-502.5(i)(3) of the Open Meetings Law. Hopefully it will learn from this experience and take pains to communicate about lobbying only in open meetings."





ACTION COMMITTEE FOR TRANSIT

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Town of Chevy Chase Spending Tops Million Dollars to Fight Purple Line

Press release issued February 18, 2015

⊙ **ACT website**

○ **the web**

[Purple Line](#)

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[Purple Line Segments](#)

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At its monthly council meeting last week the Town of Chevy Chase committed an additional \$116,000 to its fight against the Purple Line, raising its total spending against the transit and trail improvements project to over one million dollars in the last six years.

The supplemental appropriation funds a four-month extension of a contract with the lobbying and law firm Buchanan, Ingersoll, and Rooney one of whose partners is Robert Shuster, brother of U.S. House Transportation Committee Chairman Bill Shuster (R, Pa.).

The town's outlays to fight the Purple Line are now larger than its residents' share of the cost of actually building the light rail line. With a population of approximately 2,900 in 2013, its share of the construction cost proportional to population comes to \$930,000.

"It seems a shame that so much has been spent on lobbyists, consultants, public relations, and fruitless searching for endangered shrimp-like creatures, when it could have contributed to large employment and economic benefits for all of us who live, work, or play in Montgomery and Prince George's counties," commented Action Committee for Transit president Nick Brand.

Town expenditures against the Purple Line break down as follows:

- Sam Schwartz Engineering - \$434,000
- Friends of the Capital Crescent Trail - \$40,388
- Buchanan Ingersoll & Rooney, to date - \$410,000
- Buchanan Ingersoll & Rooney, newly approved contract - \$116,000



9 Official Opinions of the Compliance Board 99 (2014)

- ◆ **CLOSED SESSION PROCEDURES – *VOTING – PRACTICES IN VIOLATION***
FAILURE TO VOTE, IN AN OPEN SESSION, TO MEET IN CLOSED
SESSION
- ◆ **CLOSED SESSION PROCEDURES – *WRITTEN STATEMENT – PRACTICES***
IN VIOLATION – FAILURE TO PREPARE STATEMENTS
- ◆ **NOTICE REQUIREMENTS – *CONTENT – VIOLATION***: NOTICE OF ONLY
AN “EXECUTIVE SESSION” WHEN PUBLIC BODY WAS REQUIRED TO
VOTE PUBLICLY ON HOLDING THAT SESSION
- ◆ **MINUTES OF OPEN SESSION – *CONTENTS –***
FAILURE TO INCLUDE CLOSED-SESSION SUMMARY IN OPEN
SESSION MINUTES
- ◆ **EXCEPTIONS PERMITTING CLOSED SESSIONS – *PROCUREMENT, §10-***
508(a)(14) – PRESENTATIONS OF PROPOSALS BY COMPETING LAW
FIRMS
- LITIGATION, §10-508(a)(8) – *WITHIN EXCEPTION***
DISCUSSION OF LEGAL OPTIONS FOR OPPOSING A PROJECT WHEN
POSITION HAD ALREADY BEEN REACHED

*Topic headings correspond to those in the Opinions Index (2010 edition) at
<http://www.oag.state.md.us/opengov/openmeetings/appf.pdf>

March 20, 2014

Re: Town Council of the Town of Chevy Chase
Ronit Aviva Dancis, Complainant

Ronit A. Dancis (“Complainant”) alleges that the Town Council of the Town of Chevy Chase violated the Open Meetings Act (the “Act”) by meeting behind closed doors with an attorney whom the Council was considering retaining to advocate the Town’s position on a proposed light-rail project. As we read the complaint, Complainant is specifically concerned by reports in the press that the attorney told the Council that the attorney would not lobby the attorney’s brother, a congressman. Questioning whether the statement should have been made in an open meeting and assuming that it was not, Complainant alleges that the



statement was “not legal advice” and that the attorney “waived any privilege that there might be.”

The Council’s response states that the attorney made the statement to the Council on November 26, 2013, when the Council met in closed session with one of its attorneys and the town manager to interview two law firms that were competing with each other to provide legal services regarding the light-rail project. During the meeting, the response states, the competing firms presented their proposals, and potential litigation was discussed.

The Council has provided us with its minutes of the closed session, which we keep confidential under State Government Article (“SG”) § 10-502.5(c), and its written notice of the date, time, and place of the meeting. The notice bears the heading “Executive Session” and states that the Council “will meet in closed session pursuant to [SG §] 10-508(a)(8) to discuss with staff and consultants about legal and government relations issues regarding the proposed Purple Line project.” The notice also stated that the meeting would be closed “pursuant to [SG §] 10-508(a)(14) to discuss a matter directly related to the contents of multiple, competing proposals for services because public discussion or disclosure would adversely affect the ability of the public body to participate in the competitive proposal process.” The closed-session minutes bear out the statements in the notice and in the Council’s response.

The Act imposes two broad sets of conditions on a public body that wishes to meet behind closed doors under the authority granted by SG § 10-508.¹ First, the public body must disclose, both before and after the closed session and in the ways set forth by the Act, information about the decision to close the session and the events of the session. Second, the topics to be discussed must fall within one or more of the 14 topics for which § 10-508(a) grants an exception to the Act’s openness mandate. We conclude that the Council did not meet the first set of conditions and violated the Act in that regard. As to the second set of conditions, we find that the topics that the Council discussed fell within the exceptions that the Council cited, and we therefore find that the Council did not violate the Act by claiming those two exceptions.

We begin with the set of conditions that relate to a public body’s disclosures about its decision to hold a closed meeting and the events of the meeting. We incorporate here, and refer the Council to, our recent summary of the Act’s requirements for closing a meeting under SG § 10-508, *see* 8 *OMCB Opinions* 182, 183-84 (2013) (providing “the rules

¹ The § 10-508 requirements do not apply when a public body is performing a judicial, quasi-judicial, or administrative function. SG § 10-503. The Council properly has not claimed that it was performing any of these functions at the November 26 meeting.

applicable to closed sessions”),² and to our explanation of how to apply the Act’s public notice requirements when a public body expects to hold such a closed session. See 8 *OMCB Opinions* 150, 155-58 (2013) (suggesting wording for such notices)³ The first rule we stated in 8 *OMCB Opinions* 182 was that the public body’s notice of a closed session must invite the public to an open meeting right before the anticipated closed session. That rule follows from several disclosure requirements: before a public body may meet in closed session, its members must decide to do so during an open session, by a recorded vote, and on the basis of a written statement that discloses the applicable statutory exception, the topics to be discussed, and the public body’s reasons for discussing those topics behind closed doors. See SG § 10-508(d); see also 8 *OMCB Opinions* at 183 and 8 *OMCB Opinions* 156-57.⁴ Additionally, after the closed meeting, the public body must disclose, in the minutes of its next open meeting, information about the events, attendees, and purpose, among other things, of the closed meeting. See SG § 10-509(c) (2); see also 8 *OMCB Opinions* at 184.

Here, the Council gave notice only of a closed meeting, did not hold an open meeting before the closed session, did not vote publicly on a motion to hold the closed session, and did not make the required disclosures on a written statement. The Council thereby violated the SG § 10-508(d) requirements for closing a meeting. As to the post-meeting disclosures required by SG § 10-509(c)(2), it appears that the Council adopted the minutes of the closed session during its next open session, but the open session minutes do not contain the required information. We therefore conclude also that the Council violated SG § 10-509(c) (2).

Even so, nothing suggests to us that the Council either kept the fact of the November 26 meeting secret or improperly discussed in that meeting matters that the public was entitled to hear. The “procurement” exception set forth in SG § 10-508(a)(14) indeed applies to a public body’s consideration of competing offerors’ proposals when disclosure of the proposals would work against competition, and the “pending or potential litigation” exception set forth in SG § 10-508(a)(8) indeed applies to a public body’s consultation with staff or others about its legal options in a particular matter. See, e.g., 9 *OMCB Opinions* 78, 80 (2013).⁵ The fact that one of the offerors later disclosed a statement he made during the meeting does not affect the applicability of either exception to this meeting.

² Available at <http://www.oag.state.md.us/Opinions/Open2012/8omcb182.pdf>.

³ Available at <http://www.oag.state.md.us/Opinions/Open2012/8omcb150.pdf>.

⁴ For a sample form of a written statement for closing a meeting, see <http://www.oag.state.md.us/Opengov/Openmeetings/AppC.pdf>.

⁵ Available at <http://www.oag.state.md.us/Opinions/Open2013/9omcb78.pdf>.

In closing, we encourage the Council to follow the disclosure measures that are stated in the Act and explained in the opinions that we have cited above. The Act's disclosure measures serve partly to enable a public body to assure its constituents that when the public body is meeting behind closed doors, it is doing so legally and for a reason. The Council's use of them for the November 26 meeting might have avoided this complaint, and its neglect of them violated the Act.

Open Meetings Compliance Board

Elizabeth L. Nilson, Esquire
Courtney J. McKeldin