UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0496

September Term, 2015

KEVIN SHORT

v.

FRANK BISHOP, WARDEN

Woodward,
Friedman,
Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: March 9, 2016

In 2014, appellant Kevin Short, an inmate at the North Branch Correctional Institution ("NBCI"), submitted a request under the Maryland Public Information Act ("PIA"), at the time codified at § 10-604 *et seq.* of the State Government Article ("S.G."), Maryland Code (1984, 2009 Repl. Vol., 2014 Supp.), to Warden Frank Bishop for various records concerning the detention facility.[1] After receiving an unsatisfactory response, Short filed a petition for judicial review in the Circuit Court for Allegany County. The State filed a motion for summary judgment, which the court granted on March 23, 2015. Short now contends that the circuit court erred in granting the motion for summary judgment against him. For the reasons set forth below, we affirm the judgment of the circuit court in part, and remand without affirmance or reversal in part for reconsideration of certain issues.

BACKGROUND

In his request, received by NBCI on March 26, 2014, Short sought the following information:

> 1. Inmate Kevin Short - 299855 complete Basefile excluding any and all confidential portions unavailable to the public and inmate Kevin Short;

[1] The PIA currently appears as Title 4 to the General Provisions Article of the Maryland Code. *See* Md. Code (2014, 2015 Supp.), § 4-101 *et seq.* of the General Provisions Article ("G.P."). At the time of Short's request, the PIA was found in a different part of the Maryland Code. *See* Md. Code (1984, 2009 Repl. Vol.), § 10-604 *et seq.* of the State Government Article. The revision substantially reorganized the PIA, but did not change any of the relevant language. For the sake of consistency, we cite to the sections of the State Government Article where applicable. *See ACLU Found. of Maryland v. Leopold*, 223 Md. App. 97, 103 n.3 (2015).

2. Any and all correctional medical services contract records, including documents describing the name and number of the health care/mental health care providers at NBCI, the cost and availability of medical services and any complaints from prisoners against NBCI health care providers; to include all reports, documents, memo, statements, etc., from 2005 till present;

3. Any and all institutional operations records such as documents relating to any and all security restrictions, security violations, and complaints from inmates about their conditions of confinement to include letters, memos, reports, documents, statements, etc.;

4. Any and all records of the inmate welfare fund including documents describing the officials who manage the fund and any investments or expenditures made by NBCI from 2009 till present.

In a letter, dated April 24, 2014, the Warden's designee, Leslie Simpson, responded to Short's four requests. In response to his first request, she told Short that because his institutional base file is confidential, he must submit the appropriate form to his assigned case management specialist for review by the Warden's designee. In response to his second request, Simpson informed him that the Wexford Medical contract is available for review in the NBCI Support Services Building Library and instructed Short how to contact the NBCI librarian to inspect those records. Simpson informed Short that any additional requests included in his second request should be directed to Wexford Medical at the address provided.

Responding to the third request, Simpson determined that the application for institutional operation records of NBCI was unreasonably broad and asked Short to resubmit his request specifying the particular directives and policies he sought. She also noted that all institutional directives that are available for inmate distribution are

available for review in the NBCI library. Simpson determined that there were no documents responsive to his request for complaints ("letters, memos, reports, documents, statements, etc.") from inmates about their conditions of confinement.

Regarding the final request, records of the inmate welfare fund "including documents describing the officials who manage the fund and any investments or expenditures made by NBCI from 2009 till present," Simpson found responsive documents totaling 3,000 pages. She denied Short's fee waiver request and informed him that copies of the records were available at a cost of 15 cents per page and that it would take 22 hours to search for and prepare the records. The Warden charged $27.50 per hour for 20 hours, resulting in a total cost of $1,000 for the records. Short did not respond to the Warden with a clarification of his requests, and did not pay the fees for the responsive records.

On May 12, 2014, Short filed a petition for judicial review pursuant to S.G. § 10-623 in the circuit court alleging that the Warden and Simpson had improperly responded to his PIA request by directing him to other departments and by failing to disclose records he was entitled to inspect.[2] Short requested that he be able to obtain the

[2] Short also filed a request for administrative review on May 1 with the State Public Information Act Compliance Board, which hears complaints when a custodian has charged an unreasonable fee of more than $350. *See* Md. Code (2014, 2015 Supp.), G.P. §§ 4-1A-04(a)(1), 4-1A-05(a). However, one does not need to exhaust the administrative remedy before the Board before filing a petition for judicial review. G.P. § 4-1A-10(a). The record before us does not contain information about the resolution of Short's request for administrative review.

requested records at no charge due to indigence and that he be awarded punitive damages punitive damages of $300.[3]

On September 15, 2014, Warden Bishop filed an answer. Five months later, on February 25, 2015, the Warden filed a motion for summary judgment arguing that Short had not been denied access to any public records. Pursuant to Maryland Rules 1-203 and 2-311, Short had 18 days after the motion was mailed, until March 16, 2015, to respond to the motion. After receiving no response from Short, on March 23, 2015, the circuit court granted the warden's motion for summary judgment. On March 27, 2015, several days late, Short filed a response to the motion for summary judgment.[4]

Short filed an appeal to this Court on April 3, 2015, and presents several questions for our review, which we have rephrased and consolidated to the following[5]:

> Was the circuit court legally correct in granting Warden Bishop's motion for summary judgment?

[3] S.G. § 10-623(d)(1) allows damages to a complainant "if the court finds by clear and convincing evidence that any defendant knowingly and willfully failed to disclose ... a public record that the complainant was entitled to inspect[.]"

[4] The Warden argues that the circuit court did not err in failing to consider Short's untimely response. Short does not respond to this argument, and we discern no error in this regard. However, Short's pleadings contain arguments similar to those made in his opposition to summary judgment. Thus, we will address those arguments.

[5] Short also argues, relying on Maryland Rule 15-311, that the circuit court erred in granting summary judgment without stating its reasons in a memorandum opinion. However, this argument is incorrect because the provisions set out in Maryland Rules 15-301 *et seq.* apply only to habeas corpus proceedings. Md. Rule 15-301 ("The rules in this Chapter apply to all habeas corpus proceedings challenging the legality of the confinement or restraint of an individual").

DISCUSSION

The General Assembly enacted the PIA in 1970, four years after Congress's passage of the Freedom of Information Act ("FOIA"), now codified at 5 U.S.C. § 552 *et seq.* *See Blythe v. State*, 161 Md. App. 492, 513 (tracing the origins of the PIA), *cert. granted,* 388 Md. 97, and *appeal is dismissed as moot*, 390 Md. 323 (2005). "'The purpose of the Maryland Public Information Act . . . is virtually identical to that of the FOIA'; consequently, to the extent that the PIA is like the FOIA, the federal circuits' interpretation of the FOIA is persuasive." *MacPhail v. Comptroller of Maryland*, 178 Md. App. 115, 119 (2008) (citing *Faulk v. State's Attorney for Harford County,* 299 Md. 493, 506 (1984)). Therefore, this Court adopted the standard of review applied by federal courts of appeals involving claims under the FOIA, which is (1) whether the trial court had an adequate factual basis for the decision rendered and (2) whether upon this basis the decision reached was clearly erroneous. *Comptroller of Treasury v. Immanuel*, 216 Md. App. 259, 266 (2014) (citing *Haigley v. Dep't of Health & Mental Hygiene*, 128 Md. App. 194, 210 (1999)). "We review *de novo* any purported errors in interpreting the Act itself."

A. The Maryland Public Information Act

"The public's right to information about government activities lies at the heart of a democratic government. Maryland's [PIA] grants the people of this State a broad right of access to public records while protecting legitimate government interests and the privacy rights of individual citizens. *Leopold*, 223 Md. App. at 109 (quoting Office of the

Attorney General, Maryland Public Information Act Manual, Preface (13th ed., October 2014)).

The Court of Appeals outlined the procedure for requesting records under the PIA and for seeking judicial review of a request in *Ireland v. Shearin*:

> Maryland's PIA states that a "custodian shall permit a person ... to inspect any public record at any reasonable time" except as otherwise provided by law. Md. Code (1984, 2009 Repl. Vol.), § 10-613 of the State Government ("SG") Article.
>
> An individual asserts this right to access by submitting a written application to the custodian of records, unless an exception applies. *See* SG § 10-614(a)(1). The recipient of the application must verify (1) that he or she is in fact a custodian of the record, *see* SG § 10-614(a)(3), and (2) that the document in question exists, *see* SG § 10-614(a)(4). If these two requirements are met, the custodian of records must then either grant or deny the application within thirty days of receiving the initial application. *See* SG § 10-614(b). A grant of the application requires the custodian of records to produce the public record within 30 days of receipt of the application. *See* SG § 10-614(b)(2). On the other hand, a denial requires the custodian of records to immediately notify the applicant and, within ten business days, provide a written statement to the applicant giving the legal reasons for the agency's failure to disclose and advising the applicant of his or her right for review of the denial. *See* SG § 10-614(b)(3).
>
> The PIA permits applicants to broadly seek judicial review whenever they are denied inspection of a public record by filing a complaint in the appropriate circuit court jurisdiction. *See* SG § 10-623(a). We have reiterated on numerous occasions that the PIA reflects the need for wide-ranging access to public records, and therefore, the statute should be construed in favor of disclosure for the benefit of the requesting party. *See, e.g., Hammen v. Balt. County Police Dep't,* 373 Md. 440, 457, 818 A.2d 1125, 1135 (2003) ("[T]he provisions of the [PIA] reflect the legislative intent that citizens of the State of Maryland be accorded *wide-ranging access* to public information concerning the operation of their government.") (emphasis in original); *Kirwan v. The Diamondback,* 352 Md. 74, 81, 721 A.2d 196, 199 (1998) (same); *Fioretti,* 351 Md. at 73, 716 A.2d at 262 (same); *A.S. Abell Pub. Co. v. Mezzanote,* 297 Md. 26, 32, 464 A.2d 1068, 1071 (1983) (same).

417 Md. 401, 407-08 (2010) (Footnote omitted).

B. Disclosure of Institutional Base File

In response to Short's request for his institutional base file, Simpson directed him to fill out a request form because of the record's confidential nature. Short characterizes this response as a denial of his request. Even if we construe this as response as Short asks us to, the Warden was justified in denying Short access.

At the time of the request, § 10-615 of the PIA stated, "A custodian shall deny inspection of a public record or any part of a public record if . . . by law, the public record is privileged or confidential; or . . . the inspection would be contrary to [law]." A record that is confidential under state law may not be disclosed. *Police Patrol Sec. Sys., Inc. v. Prince George's County*, 378 Md. 702, 715 (2003). Section 3-602 of the Correctional Services Article, Md. Code (1999, 2008 Repl. Vol.), provides "Except as otherwise provided in this subtitle, the contents of [an inmate] case record maintained under § 3-601 of this subtitle may not be disclosed." The Division of Correction's regulations provide that in order for an inmate to access his or her case record, "the inmate shall submit a written request for records review to the warden," and that an "inmate shall be permitted to review the inmate's record once every 6 months[.]" COMAR 12.02.24.07E(1), (6). Because, state law deems Short's case file confidential, the Warden was not required to disclose the file under the PIA, except as specified in COMAR. We discern no error in granting summary judgment for the Warden on this ground.

C. Inspection of Records at the NBCI Support Services Building Library

Short argues that, under the Court of Appeals's decision in *Ireland v. Shearin*, the Warden effectively denied his request for medical services contracts by directing him to the NBCI Support Services Building Library to review the Wexford contract. The Warden argues that Simpson's response granted Short's request by directing him to a location where he could review the files. Simpson's response stated: "the Wexford Medical Contract is available for review in the NBCI Support Services Building Library. Please contact the intuitional Librarian for the allotted time your housing unit is scheduled for library services."

In *Ireland v. Shearin*, a prison inmate, sought records relating to correctional institution medical providers. In response, the warden erroneously directed him to make separate requests to each separate department where the records were kept. The circuit court dismissed the inmate's complaint, in which he alleged PIA violations and sought punitive damages, but the Court of Appeals reversed. The Court ruled that even if the warden believed that the inmate's requests were better directed elsewhere, it was incumbent upon the warden to "collect and assemble the requested records," rather than to pass that burden on to the requester. *Ireland,* 417 Md. at 410. The Court however, cautioned, that "this burden does not obligate the custodian of records to gather the requested documents so that they will be available for inspection at a centralized location, especially if doing so would 'interfere[] with official business.'" *Id.* at 411 (citing S.G. § 10-613(b)).

The Court's cautionary statement in *Ireland* indicates an understanding that the PIA allows each official custodian to "adopt reasonable rules or regulations that . . . govern timely production and inspection of a public record." S.G. § 10-613(b). The Secretary of the Department of Public Safety and Correctional Services has issued regulations, which provide that: "A custodian shall require that the public record be inspected or copied at the location where the public record is maintained, *unless the custodian determines that another location would better serve the needs of the individual inspecting or copying the public record or of the Department*." COMAR 12.11.02.06C (2014) (Emphasis added).

Here, Short requested the medical contract records, and the Warden made those records available for review at "another location [that] would better serve the needs of the individual inspecting or copying the public record or of the Department," i.e. the NBCI Support Services Building Library. Upon inspection, should Short find that the Library, in fact, does not contain the medical services documents responsive to his request, Short would then have a remedy to compel production of the records under the PIA. Nevertheless, on the facts before us here, because the Warden's response indicated that the Wexford contract was available for review in the NCBI Library, we hold that the Warden was entitled to judgment as a matter of law on this issue.

D. Scope of the Search for Records

Short argues that the circuit court erred in granting summary judgment because the Warden denied him inspection of records that likely exist, but that the Warden's designee

could not find.[6] We construe this as a contention that the Warden did not adequately search for records related to complaints about the institution. The Warden responds that he had no obligation to produce records that were not in his possession or that do not exist.[7]

[6] In Short's third request, he sought "institutional operations records such as documents relating to any and all security restrictions, security violations, and complaints from inmates about their conditions of confinement to include letters, memos, reports, documents, statements, etc." The Warden argues that Short "did not request complaints from inmates concerning their conditions of confinement; [instead] he requested NCBI operations records related to complaints from inmates about the conditions of their confinement." We acknowledge that Short's request is not the paragon of clarity, and may have been overly broad. However, this is not a reason to deny Short's request for information. *See* PIA Manual § 4-3 (directing a custodian to promptly ask the applicant to clarify or narrow the request and stating that "[u]nder no circumstances should the custodian wait the full 30 days and deny the initial request on the grounds that it is unclear or unreasonably broad.").

Although it is difficult to believe that the Warden did not have operations records that reference complaints from inmates, we cannot say for certain because the Warden provided no documentation attesting to the sufficiency of the search he conducted pursuant to Short's request. Nevertheless, in the future, Short should consider phrasing his requests more clearly and circumscribing their subject matter to narrower topics.

[7] The Warden cites to a Supreme Court case in which the Court concluded that "data generated by a privately controlled organization which has received grant funds from an agency. . ., but which data has not at any time been obtained by the agency, are not 'agency records' accessible under the FOIA." *Forsham v. Harris*, 445 U.S. 169, 178 (1980). We find this case distinguishable. At the time, the FOIA statute did not define the term, "agency records." 5 U.S.C. § 552 (1976). However, under Maryland's Public Information Act, a "public record" is defined as a document "made . . . or received by the unit or instrumentality in connection with the transaction of public business." S.G. § 10-611(g). Thus, if a complaint has been received by the Warden about the conditions of NBCI, it would constitute a public record available for inspection under the PIA.

The circuit court must have "an adequate factual basis for the decision it render[s]." *Comptroller of Treasury v. Immanuel*, *supra*, 216 Md. App. at 266. As documented in the Public Information Act Manual, "[t]he PIA does not address the issue of the adequacy of the agency's search for records." Office of the Attorney General, Maryland Public Information Act Manual, § 2-5 (14th ed., October 2015)). As The PIA Manual acknowledges, we turn to the case law under FOIA for guidance. *Id.*

In *Nation Magazine, Washington Bureau v. U.S. Customs Serv.*, the D.C. Circuit stated:

> To win summary judgment on the adequacy of a search, the agency must demonstrate beyond material doubt that its search was " 'reasonably calculated to uncover all relevant documents.' " The agency must make "a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested," and it "cannot limit its search to only one record system if there are others that are likely to turn up the information requested." To show reasonableness at the summary judgment phase, an agency must set forth sufficient information in its affidavits for a court to determine if the search was adequate. The affidavits must be "reasonably detailed ..., setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched."

71 F.3d 885, 890 (D.C. Cir. 1995) (Citations omitted); *see also Rozo v. U.S. Dep't of Justice*, 991 F. Supp. 2d 206, 208 (D.D.C. 2013). Thus, "[c]onclusory statements that the agency has reviewed relevant files are insufficient to support summary judgment." *Nation Magazine*, 71 F.3d at 890; *cf. Radcliffe v. I.R.S.*, 536 F. Supp. 2d 423, 434 (S.D.N.Y. 2008) (holding that the agency used methods "reasonably calculated" to produce documents responsive to the FOIA request where declaration described method

for searching files in detail, the actual file located as a result, the subject matter of the file searched, and the documents found) *aff'd,* 328 Fed. Appx. 699 (2d Cir. 2009).

At issue is whether there was an adequate basis for the circuit court to grant summary judgment solely on the basis of the Warden's motion and Simpson's affidavit. Here, Simpson did not describe the search terms or the methods and records searched in response to Short's request for complaints from inmates about the reasons for their confinement. Her affidavit simply relayed that, "there are no documents responsive to his request for complaints (letters, memos, reports, documents, statements, etc.)." Because neither the affidavit nor motion described the method for searching files or the subject matter of the files searched, the circuit court did not have an adequate basis from which it could grant the motion for summary judgment. We remand to the circuit court to reconsider this issue and determine if the Warden can provide sufficient documentation for the search conducted.

E. Reasonable Fees and Denial of Fee Waiver

In his last contention, Short argues that the court erred in granting summary judgment because the Warden charged $1,000 in fees without showing a proper basis for the fees and because the Warden determined a fee waiver would not be in the public interest.

Under S.G. § 10-621, an official custodian may charge reasonable fees for the search and preparation of records for inspection that are reasonably related to the actual

cost to the governmental unit in processing the request.[8] Search and preparation fees involve the cost of an employee's time spent locating the records and preparing them for inspection or copying. S.G. § 10-621(b)(1). The actual cost for staff time is calculated by prorating the salaries of the staff and attorneys involved in the response by the actual time they spent searching for and preparing the record for disclosure. S.G. § 10-621(b)(2).

Here, the Warden's designee determined that the search and preparation time for Short's request resulted in 20 billable hours of work. Simpson calculated fees for the search and preparation component to be $550 for 20 hours at $27.50 an hour. Short takes issue with the hourly rate charged; however, the rate of $27.50 per hour is equivalent to the prorated work of a correctional case management specialist with an annual salary of $57,200. With regard to the reproduction of the records, the Warden charged $0.15 per page for copies of the documents. This is substantially lower than the base fee set out in the Division of Correction's regulations, which set a rate of $0.50 per page if a photocopy machine is used. COMAR 12.11.02.06E(3)(a). For 3,000 pages, Simpson calculated the cost of the copies to be $450. Finally, Short produced no evidence concerning the salary of a records specialist or showing that the fees were unrelated to the actual cost of search and preparation. In our view, these costs are reasonably related to the actual costs of search and preparation. We find no error in the court's granting of summary judgment on

[8] Fees may not be charged for the first two hours of search and preparation time. S.G. § 10-621(c).

the issue of whether the fees were reasonable. We next turn to whether the Short should have been granted a waiver for these fees.

Under S.G. § 10-621(e), the official custodian may waive any fee or cost assessed under the PIA if the applicant asks for a waiver and if (1) the applicant is indigent, or (2) the official custodian determines that a waiver would be in the public interest. Simpson denied Short's request for a waiver in the public interest. Section 10-621(e)(2) provides that a waiver may be granted "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 denial of a waiver, however, may not be arbitrary or capricious. In *Mayor & City Council of Baltimore v. Burke*, 67 Md. App. 147 (1986), we held that Baltimore City's denial of a reporter's waiver request 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. *Id.* at 157. In that case, other relevant factors that the City failed to consider included public health hazards and the importance of exposing government expenditures to public review. *Id.* The PIA Manual suggests that "[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." PIA Manual, § 7-3.

Here, the affidavit supplied by the State did not indicate the factors used to determine that granting Short's fee waiver request would not be in the public interest.

Simpson's response stated in full: "I decline to grant your request to waive the fees associated with this request. After review and consideration of your request, your ability to pay the estimated fees, and other relevant factors, I have determined that such a waiver is not in the public interest." In Simpson's affidavit, she stated "His request for a waiver of fees was denied because it was determined that such a waiver was not in the public interest." These statements are the very definition of conclusory—they provide no description of why Short's request was denied. For this reason, the circuit court was without the ability to determine whether the denial of the waiver was arbitrary or capricious. We remand to the circuit court for a determination of this issue and the adequacy of the search.

JUDGMENT OF THE CIRCUIT COURT FOR ALLEGANY COUNTY AFFIRMED IN PART AND REMANDED IN PART WITHOUT AFFIRMANCE OR REVERSAL. COSTS TO BE PAID ½ BY APPELLANT AND ½ BY APPELLEE.