Circuit Court for Montgomery County
Case No. 415227

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 892

September Term, 2016

BERNADETTE FOWLER LAMSON

v.

MONTGOMERY COUNTY

Nazarian,
Arthur,
Friedman,

JJ.

Opinion by Nazarian, J.

Filed: August 25, 2017

Bernadette Fowler Lamson appeals a June 28, 2016 order of the Circuit Court for Montgomery County dismissing her Maryland Public Information Act ("MPIA") claims against her employer, Montgomery County (the "County"). She contends that the circuit court erred in finding that the County was entitled to withhold her supervisor's notes from disclosure, and abused its discretion by failing to conduct an *in camera* review to determine whether the documents she requested or severable parts of them could have been disclosed. We affirm the circuit court's decision upholding the County's response to most of her MPIA request, but vacate the court's dismissal of her request for her supervisor's notes and remand for further proceedings.

I. BACKGROUND

This dispute began as a workplace conflict between Ms. Lamson and her supervisors in the Montgomery County Office of the County Attorney ("the OCA"). Ms. Lamson had worked in the OCA for around 20 years, had consistently received "highly successful" performance ratings, and twice been rated "exceptional." In 2015, a supervisor new to the office, Silvia Kinch, downgraded Ms. Lamson's performance rating to "successful," which, she says, effectively prohibited her from receiving a 20-year, 2% performance bonus. Ms. Lamson was also asked to move offices, work part-time instead of full-time, and move from her long-standing positions on the OCA's labor law team and as general counsel to the Montgomery County Fire and Rescue Service to cover the Animal Matters Hearing Board, a position normally assigned to newer attorneys.

In the wake of these personnel decisions, Ms. Lamson filed a grievance against the County and her two supervisors, and around September 1, 2015, requested her "supervisory file" from Ms. Kinch. Ms. Kinch produced the file, but told Ms. Lamson that she had removed three pages of supervisory notes from the file first. Ms. Lamson was not satisfied with this production, so on October 8, 2015, she filed an MPIA request that sought sixteen categories of information relating to her and to the then-recent personnel decisions:

> . . . [A]ll notes, e-mails, correspondence, discussions, document photographs, memoranda, files, citations, electronically stored materials, and any other data and materials in any format which refers to, references, remarks about, and/or comments on Bernadette Fowler Lamson, including but not limited to the following subject matter areas:
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> > 1. Any and all supervisory notes or other materials written, authored, or prepared by Silvia Kinch, John Markovs, and Marc Hansen;
> >
> > 2. Supervisory notes removed from Ms. Lamson's supervisory file by Ms. Kinch on or about September 1, 2015, including all notes removed by Ms. Kinch prior to providing Ms. Lamson a copy of her supervisory file;
> >
> > 3. Any and all investigatory files, inquires, negative statements, or complaints in which Ms. Lamson is the subject and/or is discussed therein;
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> > 4. Ms. Lamson's proposed transfer from full time status to part time status;
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> > 5. Ms. Lamson's move from her 4th floor office to a 3rd floor office in the EOB;
> >
> > 6. Ms. Lamson's transfer from the OCA Division of Human Resources to the Division of Finance and Procurement or any other OCA division;

7. Ms. Lamson's removal as counsel to the Montgomery County Fire and Rescue Service (MCFRS);

8. Placement of Jodi Schultz or other OCA staff attorney assigned to MCFRS matters – except workers' compensation cases;

9. Ms. Lamson's proposed change in duty assignment from MCFRS to the Animal Matters Hearing Board;

10. Ms. Lamson's FY 2015 performance appraisal;

11. Copy of Statements from William "Bill" Scott complaining about Ms. Lamson and all records discussing Mr. Scott's complaints about Ms. Lamson;

12. Any and all e-mails or documents discussing Ms. Lamson between and/or among Marc Hansen, John Markovs, Silvia Kinch, Karen Federman-Henry and Ed Lattner from February 1, 2015 to the present;

13. Any and all e-mails or documents between and/or among Marc Hansen, John Markovs, Silvia Kinch, Ed Lattner, and Assistant Chief Ed Radcliff related to Ms. Lamson's MCFRS representation and/or agency assignment, duties, and/or responsibilities;

14. Requests, discussions and or inquiries to conduct electronic surveillance and/or tracking on Ms. Lamson or other OCA staff members;

15. Any and all data gathered as a result of conducting electronic surveillance and/or tracking of Lamson or other OCA staff members; and

16. Communications with any other agency concerning Bernadette Lamson or any other person including, but not limited to, the Board of Investment Trustees, Montgomery County Department of Corrections and Rehabilitation, Montgomery County Revenue Authority, Montgomery County Fire and Rescue

> Service, Montgomery County Office of Human Resources, and retirement agency.

The County responded on January 27, 2016, 111 days later. The County responded to items 3 through 16 of Ms. Lamson's request by disclosing some documents (items 3, 4, 5, 10, 11, 12, 13, 14, 15, 16), and by claiming that documents did not exist for other categories of information requested (items 6, 7, 8, 9). The County charged Ms. Lamson a fee of $2,216.67 for the production it made. But the County refused to disclose two sets of supervisory notes:

> The first set of supervisory notes contains three pages of personal, handwritten notations within [Ms. Lamson]'s supervisory file. [] Two pages of notes concern issues regarding a pending OCA legal matter. [] On a third page is the notation of a comment made by [Ms. Lamson] during a conference call on October 9, 2015. [] The second set of supervisory notes is personal, handwritten notations within a moleskin journal kept by Kinch.

The County offered a number of justifications for withholding the supervisory notes: that they are excludable from employee records under the Montgomery County Personnel Regulations; are "interagency or intra-agency letters or memoranda under GP § 4-344;" are shielded by "executive privilege and the *Morgan* doctrine," because the notes also contained attorney work product; and that it would be "contrary to the public interest and inimical to the integrity of the supervisory process."[1]

[1] At the end of its response, the County included boilerplate language stating that the custodian had redacted information from the enclosed records to the extent it revealed personal information about other employees, "[i]nformation about the security of an information system," "[i]nformation protected by the attorney-client, work product, or executive privileges, and information constituting 'interagency or intra-agency letters or

On February 24, 2016, Ms. Lamson filed a complaint in the circuit court alleging violations of the MPIA and asked the court to order disclosure of "all documents she requested." The County moved to dismiss or, in the alternative, for summary judgment. On May 10, Ms. Lamson filed a motion for a *Vaughn* index,[2] to which the County responded by proposing *in camera* review, contending that a *Vaughn* index should only be used when "the materials withheld are voluminous and an *in camera* review is impracticable."

The circuit court heard arguments on these motions on June 22, 2016. Ruling from the bench, the court granted the County's motion to dismiss and denied Ms. Lamson's motion for a *Vaughn* index. The court found that the supervisory notes were not included in Ms. Lamson's personnel file and were excluded by the County Code's definition of personnel records:

> I find that all of these notes kept by Ms. Kinch that have been, the way it's been argued to me and briefed to me, are not public records and that they're supervisory notes. And they are not included in a personnel file. And they are exempted under the Montgomery County Code, which talks about supervisory notes that are excluded. And they're not governmental.

The circuit court filed a written order on June 28, 2016, and Ms. Lamson appealed.

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memoranda," "work product created in anticipation of litigation," and "internal discussion, deliberations, and recommendations the disclosure of which would be contrary to the public interest." At oral argument in this Court, the County confirmed that it was not asserting any of those privileges as a basis for withholding the supervisory notes.

[2] The term "*Vaughn* index" comes from *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), a federal Freedom of Information Act case in which the court directed the responding agency to produce an index containing certain fields of information, akin to a privilege log in civil cases, so that the requesting party and the court could evaluate claims of privilege.

II. DISCUSSION

Ms. Lamson raises three arguments on appeal that we have re-framed into two.[3] *First*, she contends that the circuit court failed to address the County's response to the categories of information she requested other than the supervisory notes. *Second*, Ms. Lamson argues that the circuit court erred when it held that Ms. Kinch's supervisory notes fell outside of the reach of a MPIA request.

We review the circuit court's decision to grant the motion to dismiss for legal correctness. *See McHale v. DCW Dutchship Island, LLC*, 415 Md. 145, 156 (2010). "The standard of review for a circuit court's decision on a government's response to an MPIA request is whether that court had an adequate factual basis for the decision it rendered and whether the decision the court reached was clearly erroneous." *Action Comm. for Transit, Inc. v. Town of Chevy Chase*, 229 Md. App. 540, 558 (2016). But "[t]o the extent the

[3] Ms. Lamson phrased the Questions Presented in her brief as follows:

> 1. Whether the circuit court erred in failing to find that Appellee had not sustained its burden under G.P. § 4-362(b)(2) in denying Appellant access to 16 categories of documents requested in Appellant's MPIA request?
>
> 2. Whether the circuit court erred in failing to conduct an *in camera* review of the public records withheld by Appellee, pursuant to G.P. § 4-362(c)(2), to determine whether Appellee's assertions of privilege were appropriate?
>
> 3. Whether the circuit court erred, in the absence of conducting an *in camera* review, in failing to require Appellee to prepare a *Vaughn* index of documents that Appellee withheld from disclosure to Appellant on the grounds of privilege?

[c]ircuit [c]ourt's exercise of discretion is based on an interpretation of law, that aspect of the ruling below is reviewed *de novo*." *Lamone v. Schlakman*, 451 Md. 468, 479 (2017). We review discretionary decisions, such as whether to grant *in camera* review, for abuse of discretion. *See Ehrlich v. Grove*, 396 Md. 550, 560–61 (2007). We have defined "abuse of discretion" as a decision "where no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles. It has also been said to exist when the ruling under consideration appears to have been made on untenable grounds." *North v. North*, 102 Md. App. 1, 13–14 (1994) (internal citations and quotations omitted).

The MPIA "provide[s] the public the right to inspect the records of the State government or of a political subdivision within the State." *Glenn v. Maryland Dept. of Health and Mental Hygiene*, 446 Md. 378, 384 (2016) (quotation omitted). The Act "shall be construed in favor of allowing inspection of a public record." Md. Code (2014), § 4-103(b) of the General Provisions Article ("GP"); *see Kirwan v. The Diamondback*, 352 Md. 74, 81 (1998) (the MPIA "must be liberally construed in order to effectuate the Public Information Act's broad remedial purpose." (citations and internal quotation marks omitted)). The Act doesn't promote inspection for the sake of inspection, but rather in the interest of transparency:

> [w]hile the public policy of the MPIA favors disclosure, the purpose of the Act reveals a legislative goal other than complete *carte blanche*, unrestricted disclosure of all public records. The legislative purpose underpinning the MPIA is that "citizens of the State of Maryland be accorded wide-ranging

> access to public information *concerning the operation of their government*."

Immanuel v. Comptroller of Maryland, 449 Md. 76, 88 (2016) (emphasis in original) (citations and internal quotation marks omitted).

The MPIA contains three broad categories of exceptions to disclosure. *First*, the statute requires a custodian to deny inspection if disclosure would be contrary to "a State statute," "a federal statute or a regulation that is under the statute and has the force of law," "rules adopted by the Court of Appeals," or a court order. GP § 4-301(a)(2). *Second*, the MPIA grants custodians the discretion to deny inspection if they "believ[e] that inspection of a part of public record by the applicant would be contrary to the public interest . . . as provided in this part." The statute then lists categories of information for which disclosure would be against the public interest. GP §§ 4-343 to 355. *Third*, the MPIA prohibits requesters from obtaining certain sensitive, private records regarding private citizens. *See* GP §§ 4-304 to 327.

In most instances, though, the MPIA *does* allow people to obtain otherwise sensitive or private records about themselves, particularly their personnel records. GP § 4-311(b)(1). This makes sense, since a blanket MPIA exemption from production of employee personnel or employment application files would prevent government employees or job applicants from pursuing employment claims:

> (a) *In general*. – Subject to subsection (b) of this section, a custodian shall deny inspection of a personnel record of an individual, including an application, a performance rating, or scholastic achievement information.

> (b) *Required inspections*. – A custodian shall allow inspection by:
>
> (1) The person in interest; or
> (2) An elected or appointed official who supervises the work of an individual.

GP § 4-311. The definition of "person in interest" includes "a person or governmental unit that is the subject of a public record or a designee of the person or government unit," GP § 4-101(e)(1), and indisputably includes Ms. Lamson in this instance.

A. The County Responded Sufficiently As To Categories Three Through Sixteen.

First, Ms. Lamson contends that the circuit court erred in dismissing her claims as to items 3 through 16 of her MPIA request, and that the court "failed to consider the scope of [her] MPIA request." She argues that the County "did not address whether any responsive documents even exist . . . or otherwise attempt to justify the wholesale withholding of such documents from [Ms. Lamson] other than through a conclusory assertion of privilege." We disagree.

Ms. Lamson is right that the MPIA places on the responding agency the burden of justifying a decision to deny inspection of a public record. GP § 4-362(b). Even more, the custodian must both "explor[e] the feasibility of severability [of excludable parts from disclosable parts]" and "justif[y] non-disclosure generally." *Blythe v. State*, 161 Md. App. 492, 522 (2005). "[A] mere bald assertion that a particular exemption applies will not suffice to satisfy this burden of justification." *Id.* at 23 (citing *Fioretti v. Board of Dental Examiners*, 351 Md. 66, 78 (1998)). And "[b]ecause 'courts will simply no longer accept

conclusory and generalized allegations of exemptions' the first burden on an agency which seeks judicial approval of a claim of exemption is to provide 'a relatively detailed analysis in manageable segments.'" *Cranford v. Montgomery Cty*, 300 Md. 759, 778 (1984) (*quoting Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973)).

Ms. Lamson doubts the veracity or completeness of the County's response to requests 3 through 16, but she alleged no facts or other bases on which the court could find that additional responsive documents exist and are being withheld. And we disagree that the County "did not address whether any responsive documents even exist"—the County *did* respond to each category of information in the request by producing documents it had that were responsive to some categories (items 3, 4, 5, 10, 11, 12, 13, 14, 15, 16) and denying the existence of responsive documents in others (items 6, 7, 8, 9). The County conceded at oral argument that it has not withheld documents pursuant to the boilerplate privileges asserted at the end of its response, and the record reveals no other reason to believe that the County withheld documents in those categories. Accordingly, we discern no error in the circuit court's decision to dismiss Ms. Lamson's claim that the County violated the MPIA in its response to categories 3 through 16 of her request.

B. The Circuit Court Erred By Dismissing Ms. Lamson's Claims With Respect To The Supervisory Notes.

Second, Ms. Lamson contends that the supervisory notes do not fit within the definition of excludable "supervisory notes" under the Montgomery County Personnel Regulations, and that the circuit court abused its discretion by failing to review them *in*

camera to determine whether non-disclosure was justified on other grounds. We agree with her that the County Code did not entitle the County to withhold the supervisory notes.

1. The MPIA preempts the Montgomery County Personnel Regulations.

The County hinges its decision to withhold the supervisory notes on the County Code's definition of "employee record," which is narrower than the definition recognized in State law. County Personnel Regulations § 4-8 allows supervisors to exclude informal notes about an employee from that employee's "employee record":

> **4-8. Supervisory notes.** A supervisor may maintain informal notes regarding performance or other information about an employee under the supervision of that supervisor. Supervisory notes are not considered official employee records and are not subject to review by the employee or others.

MONTGOMERY COUNTY, MD., MONTGOMERY COUNTY PERSONNEL REGULATIONS § 4-8 (2001) ("MCPR"). As the custodian, the County argues, its regulations should govern whether these supervisory notes should be considered "personnel records" for purposes of MPIA requests by County employees. Although it doesn't phrase its argument quite this way, the County contends that the "employee records" under county law serves as the operative definition of "personnel records" for MPIA requests by County employees.

But when Ms. Lamson filed her MPIA request, she didn't request her Montgomery County "employee record." She requested her "personnel record." Under the MPIA, a "personnel record" is a type of "public record." *See* § 4-101 to 601. Public records include *any* documentary material (in any form) "made by a unit or an instrumentality of the State." GP § 4-101 (h)(1)(i). In *Kirwan*, the Court of Appeals held that the definition of personnel

records, now GP § 4-311,[4] "reflect[s] a legislative intent that 'personnel records' means those documents that directly pertain to employment and an employee's ability to perform a job," or records relating to "hiring, discipline, promotion, dismissal, or any matter involving [the person of interest's] status as an employee." 352 Md. at 83.

The MCPR cannot operate to narrow the universe of records subject to disclosure under the MPIA. To the contrary, the MPIA preempts other laws that purport to alter the scope of an agency's disclosure obligations:

> (a) *In general*. – (1) Except as otherwise provided by law, a custodian shall allow a person or governmental unit to inspect any public record at any reasonable time.
>
> 2) *Inspection or copying of a public record may be denied only to the extent provided under this title*.
>
> (b) *Rules or regulations.* – To protect public records and to prevent unnecessary interference with official business, each official custodian *shall adopt reasonable rules or regulations that, subject to this title, govern timely production and inspection of a public record.*

GP § 4-201 (emphasis added). Agencies can promulgate regulations to help "govern timely production and inspection of a public record," but may not deny requests for production beyond the authority to deny granted to them by the MPIA. GP §§ 4-201(a)(2), (b). And "[a] local government ordinance or charter that conflicts with a public general law enacted by the General Assembly is preempted." *Police Patrol Sec. Sys. v. Prince George's Cty.*, 378 Md. 702, 712 (2003) (citing *Caffrey v. Dep't of Liquor Control*, 370 Md. 272, 302 (2002)). In *Police Patrol Sec. Sys. v. Prince George's Cty*, a Virginia security systems

[4] The "Personnel Records" provision of the MPIA was formerly codified at Md. Code (1984, 1993 Repl. Vol.) § 10-616 of the State Government Article, as referenced in *Kirwan*.

company filed an MPIA request in Prince George's County seeking information about county residents and businesses that had alarm systems. *Id.* at 707–08. The County refused to produce the records, citing the Prince George's County Code. *Id*. at 709. The Circuit Court for Prince George's County agreed with the custodian's justification for non-disclosure. *Id.* at 710. The Court of Appeals vacated and remanded, holding that "the General Assembly never intended to give counties the right to create additional or new non-disclosure exceptions not contemplated within the MPIA by declaring information 'confidential' in local laws." *Id.* at 714.

The County's personnel laws similarly have no effect on Ms. Lamson's right, under the MPIA to gain access to documents falling within the MPIA's definition of her "personnel records." If the supervisory notes contain any information about Ms. Lamson's "status as an employee," and are otherwise "public records" according to GP § 4-101, they are disclosable personnel records under *Kirwan*. 352 Md. at 83. Accordingly, we vacate the circuit court's decision dismissing Ms. Lamson's claim for the supervisor's notes, and remand for further proceedings.

2. One set of supervisory notes requires further scrutiny if the County seeks to withhold them, and the other doesn't.

From there, Ms. Lamson argued in her brief that the circuit court abused its discretion by failing to conduct an *in camera* review of the supervisory notes or ordering the County to produce a *Vaughn* index justifying its decision to withhold them. But the court premised its decision to uphold the County's withholding decision on the County's definition of "personnel records," leaving no independent basis for the court to review the

notes *in camera* or to require an index. Our analysis of the definition of personnel records under the MPIA reopens the question of whether the County is required to produce them. That question will require further proceedings as to one set of supervisory documents at issue, but not the other.

By the County's own description, one of the two sets of supervisory notes—the three pages of notes—may fit within *Kirwan*'s definition of "personnel records." The notes were kept "within [Ms. Lamson's] supervisory file." The set includes "[t]wo pages of notes concern[ing] issues regarding a pending OCA legal matter," and "a third page [with] notation of a comment made by [Ms. Lamson] during a conference call." These notes were kept in Ms. Lamson's supervisory file and discuss Ms. Lamson in relation to matters on which Ms. Lamson worked, so they "directly pertain to employment," and may bear on her "ability to perform a job" or her "status as an employee." *Kirwan*, 352 Md. at 83. The County's assertions of privilege as to these notes was highly "conclusory," *Cranford*, 300 Md. at 779, and on remand the court should evaluate the county's objections against the MPIA's general presumption of disclosure. And to the extent that the contents of the documents themselves bear on the applicability of an MPIA exemption or privilege, these three pages would seem to be candidate for *in camera* review in advance of any decision to permit the County to withhold them. *See Cranford*, 300 Md. at 779 (the standard "for determining whether an *in camera* inspection is to be made is whether the trial judge believes that it is needed in order to make a responsible determination on claims of exemptions."); *see also id*. ("[A] number of factors [] may be involved in such a decision.

These are judicial economy, the conclusory nature of the agency affidavits, bad faith on the part of the agency, disputes concerning the contents of the document, whether the agency has proposed *in camera* inspection and the strength of the public interest in disclosure." (citing *Allen v. CIA*, 636 F.2d 1287, 1298–99 (D.C. Cir. 1980))).

The "journal" set of undisclosed supervisory notes are a different story. These notes are "personal, handwritten notations within a moleskin journal kept by Kinch," were kept "outside of [Ms. Lamson's] supervisory file," and unlike the three-page set, were never included in that file. These notes are not "public records" because they were not made by Ms. Kinch in her capacity as "an instrumentality of the State." GP § 4-101(h)(1). And because they are not "public records," they are also not "personnel records," and thus not subject to disclosure.

ORDER OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED IN PART, VACATED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY.