Circuit Court for Anne Arundel County
Case No. C-02-CV-19-003694

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0500

September Term, 2020

KANISHK SHARMA

v.

ANNE ARUNDEL COUNTY, MARYLAND

Fader, C.J.,
Wells,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, C.J.

Filed: December 15, 2021

This appeal arises out of two Maryland Public Information Act ("PIA") requests made by the appellant, Kanishk Sharma. Mr. Sharma requested records related to two complaints he made against Richard Napolitano, his direct supervisor at the Anne Arundel County Office of Information Technology, where Mr. Sharma previously was employed. The appellee, Anne Arundel County (the "County"), identified 52 documents that were responsive to Mr. Sharma's first request and five that were responsive to his second request. The County initially produced 31 of the 57 records without redactions and another nine with redactions.

Mr. Sharma filed a complaint in the Circuit Court for Anne Arundel County in which he sought an order requiring the County to disclose unredacted copies of all of the fully or partially withheld documents. The circuit court ordered the County to disclose four documents—three that had been previously disclosed with redactions and one that had been withheld—but otherwise declined to order further disclosure. The County thus continues to withhold 16 documents in their entirety and another six with redactions. The fully or partially withheld documents fall into three categories: (1) six documents related to a 2016 investigation conducted by County Assistant Personnel Officer Susan Herrold (the "Herrold Documents"); (2) 12 documents related to a 2018 investigation conducted by Senior Assistant County Attorney Genevieve Marshall (the "Marshall Documents"); and (3) four email correspondence chains among County officials (the "Internal Communications Documents").

Mr. Sharma contends that he is entitled to disclosure of the remaining records because: (1) neither the Herrold Documents nor the Marshall Documents satisfy the PIA's

requirements to permit discretionary withholding as investigatory records compiled for a law enforcement purpose; (2) Mr. Sharma is a person in interest with respect to the Herrold and Marshall Documents and so is entitled to greater access to the records; and (3) the deliberative process privilege does not apply to the low-level county officials who created the records at issue and, even if it does, the court did not correctly apply the privilege to the Internal Communications Documents.

We hold, first, that disclosure of the Herrold Documents may not be denied pursuant to the PIA's investigatory records exemption because those documents were not compiled by an enumerated agency and the County did not establish that they were compiled for a law enforcement purpose. Second, the circuit court did not err in determining that the Marshall Documents generally fall within the scope of the PIA's discretionary exemption for investigatory records and that the County articulated a valid public interest in preventing their disclosure. However, because Mr. Sharma may qualify as a person in interest with respect to some parts of the records, we will vacate the circuit court's ruling as to the Marshall Documents and remand for further proceedings. Finally, we will vacate the court's determination that the deliberative process applied to the Internal Communications Documents and remand so that the circuit court can conduct the required

balancing test. Accordingly, we will reverse in part and vacate in part the judgment of the circuit court and remand for further proceedings consistent with this opinion.

BACKGROUND

Mr. Sharma was hired as the County Office of Information Technology's first Chief of Project Management and Planning in February 2014. Over the course of his employment with the County, Mr. Sharma filed two complaints against his direct supervisor, Mr. Napolitano. The first complaint, filed in October 2016, alleged discrimination, hostile work environment, constructive demotion, and unethical hiring practices. The complaint was investigated by Assistant Personnel Officer Herrold. In October 2016, Ms. Herrold concluded in a written report that Mr. Napolitano had "created a hostile work environment, specifically for Mr. Sharma," and sustained Mr. Sharma's claim. The County informed Mr. Sharma that "certain" of his allegations had been sustained and that "remedial actions have been taken."

The second complaint, filed in December 2018, reiterated the allegations from the first complaint and also alleged that Mr. Napolitano had retaliated against Mr. Sharma following his first complaint. Days after the second complaint was filed, Mr. Napolitano terminated Mr. Sharma's employment. Senior Assistant County Attorney Marshall conducted the second investigation, which did not sustain any of Mr. Sharma's allegations.

Mr. Sharma subsequently appealed his termination, which was affirmed in a Step I proceeding. The Step II appeal is apparently being held in abeyance pending the outcome

of this appeal. Mr. Sharma filed the two PIA requests at issue in preparation of his Step II appeal.

Mr. Sharma's First PIA Request

On June 13, 2019, Mr. Sharma submitted his first PIA request, in which he sought records related to the County's investigation of his 2018 complaint. The County granted Mr. Sharma's request in part and denied it in part. Of 52 responsive documents identified, the County disclosed 40 records—31 unredacted and nine with redactions—and withheld 12. The County identified the withheld materials as "Ms. Marshall's interview notes, emails she sent/received with County employees, her Investigation Report dated April 8, 2019 containing her findings and summaries of interviews, and emails sent/received by attorney Jay Creech[.]"

Mr. Sharma's Second PIA Request

One of the documents the County produced in response to Mr. Sharma's first PIA request was a redacted copy of the report of Ms. Herrold's investigation of Mr. Sharma's 2016 complaint. On July 3, 2019, Mr. Sharma submitted a second PIA request, this time seeking summaries of witness statements taken by Ms. Herrold during that investigation. In response, the County identified five such summaries but refused to produce any of them on the grounds that they were both personnel records and investigatory records. The County's denial letter indicated that releasing the records would be contrary to the public interest because "[d]isclosure of the witness statements would disclose investigative

techniques and procedures, identities of confidential sources, jeopardize confidence in reporting incidents, and stifle future witness participation in investigations."

Procedural History

Mr. Sharma filed a complaint in the circuit court, pursuant to § 4-362 of the General Provisions Article,[1] in which he sought an order requiring the disclosure of the requested records. Before the hearing, the County produced two Vaughn indexes,[2] one for each of Mr. Sharma's PIA requests. The County also provided affidavits from Ms. Marshall and Ms. Herrold concerning the procedures used during their investigations and the statements they made to witnesses about confidentiality.

Ms. Herrold's affidavit stated that she was the County's Assistant Personnel Officer for Employee & Labor Relations and had been assigned to investigate Mr. Sharma's 2016 complaint against Mr. Napolitano. Ms. Herrold averred that she interviewed five witnesses in connection with the investigation and had "reviewed and acknowledged with each witness the importance of confidentiality so as to preserve the integrity of an impartial

[1] Pursuant to General Provisions § 4-362, a person who has been "denied inspection of a public record or is not provided with a copy . . . of a public record as requested . . . may file a complaint with the circuit court." Md. Code Ann., Gen. Provs. § 4-362(a)(1) (2019 Repl.; 2021 Supp.). The defendant in such a proceeding bears the burden of sustaining its denial. *Id.* § 4-362(b)(2). The circuit court has the authority to enjoin the defendant from withholding the record or issue an order requiring its production. *Id.* § 4-362(c)(3).

[2] A Vaughn index, which takes its name from *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), is a tabular representation of each record withheld or redacted, organized by author, date, and recipient, stating the particular exemption claimed, and providing enough information about the subject matter to permit the requester and court to test the justification of the denial.

process" in accord with County policy to "respect the privacy of all concerned and [] maintain confidentiality to the fullest extent possible." (Quoting the County's Non-Discrimination and Non-Harassment in Employment Policy (K-01)). Ms. Herrold further stated that her interview notes and investigation report contained "statements made in confidence to [her] by witnesses during [her] interviews" and that all of the witnesses "still currently work under Mr. Napolitano in OIT."

Ms. Marshall's affidavit stated that she was a Senior Assistant County Attorney in the County's Office of Law, working under the County Attorney, and had been assigned to investigate Mr. Sharma's 2018 complaint. Ms. Marshall averred that she had interviewed Mr. Sharma, Mr. Napolitano—whom she identified as the "subject/respondent" of the complaint—and nine other witnesses who worked with Mr. Napolitano and Mr. Sharma. Like Ms. Herrold, Ms. Marshall stated that she had reviewed the importance of confidentiality with each witness and took notes containing statements made to her in confidence by the witnesses she interviewed, all of whom (other than Mr. Sharma) still "work[ed] under Mr. Napolitano[.]"

At a hearing on Mr. Sharma's complaint, the County argued that it had properly denied disclosure of the Herrold and Marshall Documents under the PIA's discretionary exemptions for work product and investigatory records, which are contained, respectively, in §§ 4-344 and 4-351 of the General Provisions Article. The County defended its denial of disclosure of the Internal Communications Documents based on the deliberative process privilege, pursuant to General Provisions § 4-344.

Mr. Sharma responded that the investigations lacked a law enforcement purpose such that the documents related to them could not be withheld as investigatory records. Moreover, he argued, even if that exemption applied, he was a "person in interest" entitled to greater access under General Provisions § 4-351(b). Mr. Sharma also argued that the deliberative process privilege was a narrow exception that was intended to protect the deliberations of high-ranking government employees and not the type of internal email communications withheld by the County.

Following the hearing, the circuit court entered an order in which it held that the County was not required to disclose the Marshall Documents with the exception of four sets of emails between Ms. Marshall and witnesses, three of which had previously been produced in redacted form. The court required the County to turn those four documents over to Mr. Sharma within 15 days. After supplemental briefing and an additional hearing, the court entered an order in which it held that the County also was not required to disclose the Herrold Documents or the Internal Communications Documents. In its oral rulings, the court explained that (1) the Marshall Documents (other than those it ordered to be produced) and the Herrold Documents were properly withheld under the investigatory records exemption to the PIA; (2) Mr. Sharma was not a "person in interest" entitled to greater access to those records; (3) even if he were a "person in interest," the records still could be withheld on the ground that their production would constitute an "unwarranted invasion of personal privacy" under General Provisions § 4-351(b)(3); and (4) the Internal

Communications were "intra-agency letters or memoranda" protected by General Provisions § 4-344. Mr. Sharma timely appealed.

DISCUSSION

Underlying the PIA is the policy judgment 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." Gen. Provs. § 4-103(a).[3] Accordingly, "unless an unwarranted invasion of the privacy of a person in interest would result, this title shall be construed in favor of allowing inspection of a public record[.]" Gen. Provs. § 4-103(b). However, "[t]he general right of access to records granted by the PIA is limited by numerous exceptions to the disclosure requirement." Off. of the Md Att'y Gen., *Maryland Public Information Act Manual*, 3-1 (15th ed. 2020).

Further guiding our analysis, "[t]he purpose of the Maryland Public Information Act . . . is virtually identical to that of the [Freedom of Information Act ("FOIA").]" *Faulk v. State's Att'y for Harford County*, 299 Md. 493, 506 (1984). Although there are exceptions, one of which will play prominently in our analysis, generally "[t]he provisions of the [PIA] are almost verbatim those of the FOIA." *Blythe v. State*, 161 Md. App. 492, 513 (2005). Where that is the case, this Court has, in many circumstances, found

[3] Effective October 1, 2014, the PIA was recodified as Title 4 of the General Provisions Article. *See* Gen. Provs. §§ 4-101 – 4-601. Before this reorganization, the PIA could be found in Title 10 of the State Government Article. The recodification reorganized the PIA extensively but was not intended to effect substantive changes. *See* 2014 Md. Laws, ch. 94 (H.B. 270) (stating that the recodification of the PIA under House Bill 270 resulted in stylistic changes only). Where appropriate for clarity, alterations have been made to text quoted from pre-codification sources to refer to the current organization of the PIA. All such alterations are marked with brackets.

interpretations of FOIA to be persuasive in interpreting the PIA. *Id.* Where the General Assembly has chosen to depart from the language of FOIA, however, we presume it did so intentionally and that the departure is meaningful. *See Comm'r of Fin. Regul. v. Brown, Brown, & Brown, P.C.*, 449 Md. 345, 369 (2016) (holding that where the General Assembly "specifically added [an] additional restriction [to model legislation it otherwise adopted verbatim] . . . [w]e can understand this only as reflecting [the] intent" of the General Assembly to alter coverage under the PIA).

"The standard of review for a trial court's decision on a government's response to [a PIA] 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." *Lamson v. Montgomery County*, 460 Md. 349, 359-60 (2018) (quoting *Action Comm. for Transit, Inc. v. Town of Chevy Chase*, 229 Md. App. 540, 558 (2016)). "If any competent material evidence exists in support of the trial court's factual findings, those findings cannot be held to be clearly erroneous." *Webb v. Nowak*, 433 Md. 666, 678 (2013) (quoting *Figgins v. Cochrane*, 403 Md. 392, 409 (2008)). However, where the "[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).

I. THE COUNTY WAS NOT PERMITTED TO DENY DISCLOSURE OF THE HERROLD DOCUMENTS AS INVESTIGATORY RECORDS PURSUANT TO GENERAL PROVISIONS § 4-351(A).

We will first address whether the County properly withheld the Herrold Documents pursuant to the PIA's discretionary exemption permitting the denial of disclosure of certain

investigatory records.[4] The PIA sets forth four[5] categories of investigatory records that "a custodian may deny inspection of," only two of which are relevant to our inquiry here:

> (1) records of investigations conducted by the Attorney General, a State's Attorney, a municipal or county attorney, a police department, or a sheriff; [and]
>
> (2) an investigatory file compiled for any other law enforcement, judicial, correctional, or prosecution purpose[]

Gen. Provs. § 4-351(a).

By its plain terms, whether an investigatory record is covered by subsection (a)(1) depends on the identity of the entity that conducted the investigation and whether such a record is covered by subsection (a)(2) depends on the purpose of the investigation. Unsurprisingly, that is how the Court of Appeals has interpreted the scope of those subsections. Thus, in *Superintendent, Maryland State Police v. Henschen*, the Court held that "when the documents in question constitute records of an investigation by [an agency enumerated in § 4-351(a)(1)], there need not be an actual showing that the records were compiled for law enforcement or prosecution purposes for the exception to be applicable."

[4] Under the PIA, there are categories of records that a custodian is required to withhold, *see* Gen. Provs. §§ 4-304 – 4-327, types of information a custodian is required to protect, *see id.* §§ 4-328 – 4-342, and other categories of records that a custodian is permitted to withhold under certain circumstances, *see id.* §§ 4-343 – 4-356. The investigatory records and deliberative process exemptions at issue in this appeal fall into the last category of permissive exemptions.

[5] The third category of investigatory records concerns "intelligence information" not implicated by the records in this case. Gen. Provs. § 4-351(a)(3). The fourth category, which concerns "administrative or criminal investigation[s] of misconduct by a police officer," was recently added as part of the Maryland Police Accountability Act of 2021, ch. 62, S.B. 178 (codified at General Provisions Article § 4-351(a)(4)), effective October 1, 2021. None of the recent changes to General Provisions § 4-351 affect our analysis of subsections (a)(1) and (a)(2).

279 Md. 468, 475 (1977). "It is only with respect to the second category that there is an express requirement that the records be compiled for law enforcement or prosecution purposes." *Id.*

Notably for our purposes, and contrary to Mr. Sharma's proposed interpretation of the statute, the Court determined that the General Assembly's placement of the word "other" before "law enforcement . . . purposes" in what is now subsection (a)(2) did not indicate a need to prove that records compiled by an enumerated agency were compiled for a law enforcement purpose. To the contrary, the use of that word "suggests that the Legislature believed that investigatory records of one of the enumerated law enforcement agencies were presumptively for law enforcement or prosecution purposes, but that investigatory records compiled by other agencies might or might not be for such purposes."[6] *Id.* Thus, where investigatory records are sought from an enumerated agency, "the legislative presumption negate[s] the need for the agency to demonstrate that the files were compiled for a law enforcement purpose." *Fioretti v. Maryland State Bd. of Dental Exam'rs*, 351 Md. 66, 80 (1998). On the other hand, where records are sought from a nonenumerated agency, the agency must demonstrate that it "compiled its investigatory files for a law enforcement *purpose*." *Id.*

[6] Notably, at the time the Court of Appeals decided *Henschen*, what are currently separated as subsections (1) and (2) of § 4-351(a) were consolidated in a single provision, then § 3(b)(i) of Article 76A. *See* 279 Md. at 473. By subsequently separating those provisions into two different subsections, and not otherwise altering them, the General Assembly has further validated the Court of Appeals' interpretation in *Henschen*.

Here, as noted, Ms. Herrold conducted her investigation in her role as Assistant Personnel Officer in the County's Office of Personnel, which is not an agency enumerated under General Provisions § 4-351(a)(1). As a result, the County "b[o]r[e] the burden of showing on a case-by-case basis that any requested records were actually compiled for law-enforcement, rather than employment-supervision, purposes." *Bartko v. United States Dep't of Justice*, 898 F.3d 51, 65 (D.C. Cir. 2018). For purposes of FOIA, which we consider persuasive on this point,[7] "[t]he law-enforcement-purpose inquiry focuses 'on how and under what circumstances the requested files were compiled,' and 'whether the files sought relate to anything that can fairly be characterized as an enforcement proceeding[.]'" *Bartko,* 898 F.3d at 64 (citation omitted) (alteration in original). "[T]o qualify as law-enforcement records, the documents must arise out of 'investigations which focus directly on specifically alleged illegal acts . . . which could, if proved, result in civil or criminal sanctions." *Id.* (quoting *Rural Hous. All. v. United States Dep't of Agric.*, 498 F.2d 73, 81 (D.C. Cir. 1974)) (alteration in original).

The County did not demonstrate that the Herrold investigation was conducted for a law enforcement purpose. To be sure, courts have broadly interpreted law enforcement

[7] As we will discuss below, a notable difference in language between the PIA and FOIA is that the latter does not contain an enumerated list of agencies whose investigations are identified as falling within the investigatory records exemption without necessitating an inquiry into the purpose of the investigation. Nonetheless, federal caselaw is persuasive to the extent that it interprets and analyzes how a nonenumerated government agency may demonstrate that its investigatory records were compiled for a law enforcement purpose. *See Bartko*, 898 F.3d at 64-65; *Ctr. for Nat'l Sec. Stud. v. United States Dep't of Justice*, 331 F.3d 918, 926 (D.C. Cir. 2003); *Campbell v. Dep't of Justice*, 164 F.3d 20, 32 (D.C. Cir. 1998).

purpose to embrace not just criminal, but also "civil investigations and proceedings," and to include "not merely the detection and punishment of violations of law but their prevention." *Mittleman v. Off. of Pers. Mgmt.*, 76 F.3d 1240, 1243 (D.C. Cir. 1996) (quoting *Miller v. United States*, 630 F. Supp. 347, 349 (E.D.N.Y. 1986)). Nonetheless, "an agency must establish 'a rational nexus between the investigation and one of the agency's law enforcement duties,' and 'a connection between an individual or incident and a . . . violation of federal law.'" *Bartko*, 898 F.3d at 64 (quoting *Ctr. for Nat'l Sec. Stud.*, 331 F.3d at 926) (alterations in original).

As reflected in both Ms. Herrold's affidavit and the unredacted portions of her investigation report that are included in the record, her investigation was a personnel investigation that was not conducted for law enforcement purposes. Indeed, the County did not establish that the Office of Personnel has *any* law enforcement duties, much less that there was a nexus between the investigation and "one of the agency's law enforcement duties." *Id.* The County contends that the investigation served a law enforcement purpose because it was conducted as part of the County's enforcement of "federal, State, and County law[s] that prohibit discrimination and harassment[.]" In context, however, the County's investigation is more aptly described as undertaken for a law compliance purpose—taking appropriate steps, as required by law, to determine whether one of its supervisory employees was discriminating against one of his subordinates and, if so, being prepared to take appropriate remedial action—than for a law enforcement purpose. Indeed,

the County's internal investigation was no different than similar investigations conducted by private employers around the State to comply with the same statutory schemes.

Notably, there is no indication in the record that the investigation of Mr. Napolitano could have resulted in any sanctions beyond personnel sanctions. "To be sure, enforcement proceedings need not be imminent for [the investigatory records exception] to apply, but they must be '*more than ephemeral possibilities*[.]'" *Bartko*, 898 F.3d at 68. The only consequences the County has identified as possibly resulting from the Herrold investigation are those identified in the Non-Discrimination and Non-Harassment in Employment Policy pursuant to which it conducted the investigation: "appropriate disciplinary action up to and including termination from employment." Those classic personnel sanctions are not law enforcement penalties—civil, criminal, or regulatory—nor is there any suggestion that Ms. Herrold's investigation could have served as a direct precursor to a proceeding involving the potential for law enforcement penalties. *Cf. Bartko*, 898 F.3d at 68 (finding that the files of the Office of Professional Responsibility were not compiled for a law enforcement purpose because for any law enforcement proceeding to be initiated, its findings would need to be referred to a state bar "that would presumably go through its own investigative process (and compile its own records) to determine whether punishment should ensue").

In sum, Ms. Herrold's investigation was not undertaken "with any eye toward law-enforcement proceedings," *id.* at 69, and it did not fall within the scope of General Provisions § 4-351(a)(2). In its brief, the County asks that if we conclude that it was not

permitted to deny inspection of the Herrold Documents or the Marshall Documents as investigatory records, we remand this matter to the circuit court to determine whether the County nonetheless could deny inspection of those records as personnel records. However, the County did not rely on the personnel records exemption under the PIA before the circuit court nor has it made any argument in support of the applicability of that exemption in this Court. The County has therefore waived reliance on that exemption. *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]"). We reach no conclusion concerning whether the County could have permissibly denied disclosure of any of the records at issue as personnel records had it not waived reliance on that exemption.

Accordingly, we will reverse the circuit court's order to the extent it upheld the County's denial of disclosure of the Herrold Documents as investigatory records, and remand with instructions to order the County to disclose to Mr. Sharma unredacted versions of: (1) Document 2 on the Vaughn index responsive to Mr. Sharma's June 13, 2019 PIA request; and (2) Documents 1 through 5 on the Vaughn index responsive to Mr. Sharma's July 3, 2019 PIA request.

II. THE MARSHALL DOCUMENTS ARE INVESTIGATORY RECORDS FOR PURPOSES OF GENERAL PROVISIONS § 4-351(A)(1), BUT MR. SHARMA MAY BE ENTITLED TO PRODUCTION OF PORTIONS OF THEM AS A "PERSON IN INTEREST."

We turn next to the Marshall Documents. Our review of the County's withholding of those documents turns on three issues: (1) whether the documents are investigatory

records for purposes of General Provisions § 4-351(a)(1); (2) if so, whether the circuit court erred in determining that the County had a valid public interest purpose for refusing to disclose the records; and (3) if so, whether Mr. Sharma nonetheless may be entitled to disclosure of some or all of the documents as a person in interest. We hold that the Marshall Documents are investigatory records and that the circuit court did not err in concluding that the County had a valid public interest justification to withhold disclosure. However, we must vacate the court's order and remand for further proceedings to determine whether Mr. Sharma is a person in interest with respect to parts of those records.

A. The Marshall Documents Are Records of Investigation for Purposes of § 4-351(a)(1).

We turn first to whether the Marshall Documents are investigatory records for which the County had discretion to deny disclosure. Unlike the Herrold investigation, the Marshall investigation was conducted by an entity enumerated in General Provisions § 4-351(a)(1). As discussed above, investigatory records of an enumerated agency are presumed to be for a law enforcement purpose and, therefore, such an agency is not required to demonstrate such a purpose to support withholding of an investigatory record. *See, e.g.*, *Henschen*, 279 Md. 468; *Off. of the State Prosecutor v. Judicial Watch, Inc.*, 356 Md. 118, 140 (1999); *see also Maryland Public Information Act Manual* at 3-40 ("When the records in question are investigatory, and when they come from one of these enumerated agencies, the exception applies without any need for an actual showing that the records were compiled specifically for law enforcement or prosecution purposes.").

Notwithstanding this established law, Mr. Sharma argues that even agencies enumerated under § 4-351(a)(1) must prove that their investigatory records were compiled for a law enforcement purpose to be entitled to withhold disclosure under that provision. He grounds his argument not in the language of § 4-351(a)(1), but in an inference he gleans from the language of § 4-351(a)(2). Specifically, focusing on the word "other," he argues that the phrase "other law enforcement . . . purpose" in § 4-351(a)(2) means that the agencies enumerated in § 4-351(a)(1) must also demonstrate a law enforcement purpose underlying an investigation for the records of that investigation to fall within the scope of § 4-351(a)(1).

Mr. Sharma's argument is at odds with both the plain language of § 4-351(a)(1) and Court of Appeals precedent interpreting it. As noted, § 4-351(a)(1) identifies the investigatory records it encompasses by only one criterion: the identity of the entity conducting the investigation. That stands in contrast to the language in § 4-351(a)(2), which uses a different criterion: whether the investigation was conducted for a law enforcement purpose. Even more importantly, the Court of Appeals has already considered and rejected Mr. Sharma's statutory interpretation argument. In *Henschen*, the Court explained that the use of the word "other" in what was then the second part of a single statutory provision suggested a legislative presumption that investigations conducted by one of the enumerated agencies were for law enforcement purposes. 279 Md. at 475. That "presumption negate[s] the need for the agency to demonstrate that the files were compiled

for a law enforcement purpose."[8] *Fioretti*, 351 Md. at 80. Here, because the Marshall Documents are records of an investigation conducted by the County Attorney, an enumerated agency, they fall within the scope of § 4-351(a)(1).

B. The Circuit Court Did Not Err in Determining that the County's Decision to Withhold the Documents Was in the Public Interest.

The second question we must answer is whether the County has expressed a valid public interest to deny disclosure of the Marshall Documents. The discretionary exemptions, including the exemption applicable to investigatory records, "are 'discretionary' not in the sense that the agency may withhold or disclose as it pleases, but in the sense that the agency must make a judgment whether the statutory standard for withholding a record . . . is met." *Glass v. Anne Arundel County*, 453 Md. 201, 210 (2017). When the requester is not a person in interest—a circumstance we will address below—General Provisions § 4-343 permits a custodian of a record of investigation to deny inspection of part of the record if the "custodian believes that inspection . . . by the applicant would be contrary to the public interest[.]" Thus, to deny inspection pursuant to a discretionary exemption, a "custodian of the record must believe, and ultimately demonstrate to a court, that the inspection of a certain part of a record 'would be contrary to the public interest.'" *Blythe*, 161 Md. App. at 518 (quoting former rule). In reviewing

[8] Mr. Sharma also observes that this outcome is out-of-sync with federal caselaw, which has interpreted FOIA to always require a demonstration of law enforcement purpose to apply its analogous exemption. But, as explained above, that is because the FOIA exemption uses materially different language. Had the General Assembly intended to make Maryland law on that point identical to federal law, it could have adopted the federal statutory language. *See Wagner v. State*, 445 Md. 404, 418 (2015) ("[T]he General Assembly is presumed to have meant what it said and said what it meant.").

a circuit court's decision to uphold an agency's denial of disclosure, we consider "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*, 229 Md. App. at 558 (internal quotations omitted). Any errors in interpreting the PIA, however, we review without discretion. *Id.*

Mr. Sharma contends that the circuit court erred in finding that the County validly invoked the investigatory records exemption because: (1) the investigations were closed, with no possibility of reopening at the time he requested the records, and (2) the County's proffered justifications—that the witnesses were promised confidentiality and that the County worried that Mr. Napolitano would retaliate against the witnesses—were invalid. The County responds that it validly withheld the documents because upholding the confidentiality of the information conveyed by the witnesses is necessary to the integrity of future investigations.

We turn first to Mr. Sharma's contention concerning the status of the investigation. There is no per se rule that once an investigation is closed, related records automatically lose all protection under the PIA. *See Blythe*, 161 Md. App. at 561; *see also Maryland Public Information Act Manual* at 3-40. To be sure, once an investigation is closed, certain bases for withholding records—such as avoiding interfering with the investigation—are no longer valid and cannot support denial of disclosure. Thus, when an investigation is closed and no enforcement proceedings are contemplated, "the bare assertion that the files are for law enforcement purposes is not sufficient to preclude disclosure," *Fioretti*, 351 Md. at 82

(quoting *Moore-McCormack Lines, Inc. v. I.T.O. Corp.*, 508 F.2d 945, 949 (4th Cir. 1974)), and courts will require a more particularized factual basis for a "public interest" denial, *City of Frederick v. Randall Fam., LLC*, 154 Md. App. 543, 562-67 (2004); *Prince George's County v. The Wash. Post Co.*, 149 Md. App. 289, 333 (2003). Here, however, the County's denial of disclosure was not premised on interference with or prejudice to the investigation, but on its claim that the confidentiality of witness statements is essential to encourage candid and honest witness cooperation and to ensure that future instances of misconduct are reported. That interest, unlike some others, does not evaporate with the closure of the investigation. We therefore turn to evaluating it.

The County contends that disclosure of the witness statements would be contrary to the public interest because of the need to encourage victims of harassment to come forward and witnesses to harassment to participate in County investigations. The County argues that that interest against disclosure is particularly robust when witnesses are promised that their statements would be kept confidential to the fullest extent possible, as they were here. We agree with the circuit court that the County articulated a specific and valid basis to suggest that disclosure of the records would be contrary to the public interest and conclude that the court had an adequate factual basis for upholding the County's denial of disclosure. "[E]mployees who consent to interviews may want and expect the agency to keep their statements private and their identities confidential." *Cooper Cameron Corp. v. United States Dep't of Labor, OSHA*, 280 F.3d 539, 553 (5th Cir. 2002). Unlike many other types of investigations, an expectation of confidentiality is likely to be particularly important

when the witnesses are fellow employees who may need to continue to work with both the subject and the initiator of an investigation, as well as with others involved with one or both of them. Here, although the identity of the employees interviewed was not kept confidential, the circuit court did not err in concluding, based on the record before it, that revealing the substance of the statements the employees made might dissuade those employees or others from participating fully and frankly in future investigations. The court thus did not err or abuse its discretion in determining that the County's decision to deny disclosure of the Marshall Documents was based on a valid public interest in securing cooperation of witnesses in future investigations.[9] That conclusion, however, does not end our inquiry because public interest alone would not be a sufficient reason to justify nondisclosure if Mr. Sharma is a "person in interest," as he claims he is. We turn next to that contention.

C. Remand Is Necessary Because Mr. Sharma May Be a Person in Interest with Respect to Parts of Some of the Marshall Documents.

Although a custodian is generally permitted to deny inspection of records of investigations conducted by an enumerated agency on the custodian's demonstrated belief and the court's determination that disclosure would be contrary to the public interest, a

[9] The County also identified a second public interest in withholding disclosure of the documents, which was avoiding the potential for retaliation against those witnesses from Mr. Napolitano or, if he wins reinstatement, Mr. Sharma. Sharma contends that precluding retaliation from the County's own employee is an invalid basis for the County to deny disclosure. We need not reach that issue based on our conclusion that the County's interest in protecting the integrity of future investigations provided a sufficient basis for the circuit court's ruling.

custodian's authority to do so is further circumscribed when the requestor is a "person in interest." Gen. Provs. § 4-351(b); *see Randall Fam.*, 154 Md. App. at 561 ("When a request for public documents is made by a person in interest, that person is entitled to more favorable treatment[.]"). In that circumstance, barring another applicable exemption,[10] a custodian may deny inspection of the records "only to the extent that the inspection would" result in one of seven identified harms. Gen. Provs. § 4-351(b); *see also Mayor and City Council of Baltimore v. Md. Comm. Against the Gun Ban*, 329 Md. 78, 82 (1993) (stating that the predecessor of § 4-351(b) "permits denial of inspection 'by a person in interest,' but 'only if permitting inspection would' produce one of the seven results enumerated" in the statute). When a custodian denies disclosure to a person in interest based on one of those seven identified harms, the custodian must identify and explain which harm would result from the inspection. *Blythe*, 161 Md. App. at 531. Of the seven identified harms, the only one that the County relies on here is that inspection of the record would "constitute an unwarranted invasion of personal privacy." Gen. Provs. § 4-351(b)(3).

Mr. Sharma contends that he is entitled to inspect the Marshall Documents because (1) he is a person in interest with respect to them and (2) none of the seven identified harms is applicable. The County responds that Mr. Sharma is not a person in interest because he

[10] In *Office of Attorney General v. Gallagher*, the Court of Appeals explained that the limitations on denying inspection of an investigatory record to a person in interest are limitations on the scope of a custodian's right to deny inspection pursuant to the investigatory records exemption, but do not negate other grounds for denial of inspection, such as the exemptions applicable to interagency memoranda and deliberative process materials now found in General Provisions §§ 4-344 and 4-351, *see* 359 Md. 341, 349-51 (2000), or the exemption for personnel records contained in General Provisions § 4-311.

was not the subject of the Marshall investigation and, even if he had been, the circuit court properly determined that disclosure of the records would constitute an unwarranted invasion of personal privacy.

A "person in interest" is, in pertinent part, "[a] person . . . [who] is the subject of a public record or a designee of the person[.]" Gen. Provs. § 4-101(g)(1). The Court of Appeals has declined to interpret the definition of person in interest broadly to encompass all persons who are interested in the investigation or whose conduct might be relevant to, but not the subject of, the investigation. Indeed, the Court has determined that (1) the PIA's "history covering reports of police investigations . . . makes clear that the 'person in interest' referred to in [what is now § 4-351(b)] is the person who is investigated," *Md. Comm. Against the Gun Ban*, 329 Md. at 92; and (2) a "complainant who triggered the investigation . . . [is] not the subject of the investigation itself" and thus is not a "person in interest" on that basis, *Maryland Dep't of State Police v. Dashiell*, 443 Md. 435, 462 (2015).

The first paragraph of Ms. Marshall's investigation report identified that the investigation was initiated by Mr. Sharma's complaint and that "[t]he subject/respondent of the complaint was identified as Director of the Office of Information Technology (OIT) Richard Napolitano." The unredacted portions of the report that have been included in the record appear to confirm that the sole subject of the investigation—"the person or thing that is being discussed or described," *Dashiell*, 443 Md. at 463 (quoting *Webster's Third New Int'l Dictionary of the Eng. Language Unabridged* 1585 (3d ed. 2002))—was

Mr. Napolitano. The report, of course, naturally and necessarily concerns Mr. Napolitano's treatment of Mr. Sharma, which was the crux of the complaint. In doing so, however, the focus of the report is Mr. Napolitano's conduct, not Mr. Sharma's. Based on that, as well as Ms. Marshall's affidavit submitted by the County, we find no fault with the circuit court's conclusion that Mr. Sharma was not generally a person in interest with respect to the investigation.

Nonetheless, our analysis cannot end there because one of the documents that the circuit court ordered the County to disclose to Mr. Sharma in unredacted form reflects that Mr. Sharma may have been a person in interest with respect to at least some of the investigatory records as to which he was denied inspection. Specifically, pursuant to the circuit court's order, the County disclosed an email dated January 31, 2019, from Ms. Marshall to Jack Martin, one of the witnesses she interviewed, in which Ms. Marshall wrote:

> As I mentioned in my first email, what I'm most interested [in] at this stage is [Mr. Sharma's] performance as relates to his termination. I understand that [Mr. Sharma] may not have directly reported to you, but I'm interested in any thoughts you may have on [Mr. Sharma's] work and abilities.

According to the Vaughn index, Ms. Marshall interviewed Mr. Martin a week later, on February 6, 2019. Ms. Marshall's notes of that interview have been withheld, as have her notes of eight other witness interviews conducted from March 1 through March 13, 2019.

Notably, because the County had initially—and, the court held, incorrectly—withheld the email exchange between Ms. Marshall and Mr. Martin, neither Mr. Sharma nor the circuit court had the benefit of it when initially considering Mr. Sharma's

contention that he was a person in interest with respect to the Marshall Documents. According to the email exchange, in addition to whatever questions she might have had about Mr. Napolitano's treatment of Mr. Sharma, Ms. Marshall was also interested specifically in information about Mr. Sharma's own job performance, work, and abilities. Indeed, in her email to Mr. Martin, Ms. Marshall identified that as the topic in which she was "most interested." If her interview notes reflect information obtained from Mr. Martin or any other witnesses that is specifically (and not merely tangentially) focused on Mr. Sharma himself, as distinct from Mr. Napolitano's treatment of Mr. Sharma, then Mr. Sharma would properly be viewed as the subject of—and therefore a person in interest with respect to—those portions of the interview notes.

Under the circumstances, we will vacate the court's decision to deny inspection of the Marshall Documents (those described in paragraph 1 of the court's July 6, 2020 order) and remand for further proceedings. On remand, the court should take whatever steps it determines are appropriate, upon consideration of the information conveyed in the January 31, 2019 email exchange and our discussion above, to determine whether any of the other withheld or redacted documents contain information as to which Mr. Sharma is a person in interest. To the extent they do not, for reasons discussed above, such records are not required to be disclosed pursuant to the PIA.

If the court determines that Mr. Sharma is a person in interest with respect to any part of a withheld record, the question then becomes whether the County may nonetheless withhold the record on the ground that disclosing it would "constitute an unwarranted

invasion of personal privacy[.]" Gen. Provs. § 4-351(b)(3). Because the only material that is subject to disclosure on remand is information about Mr. Sharma's job performance, work, and abilities, and the identities of the witnesses themselves are already known, we do not see how disclosure of that information could constitute an unwarranted invasion of the personal privacy of anyone other than Mr. Sharma himself. As a result, on remand the court should order the County to disclose to Mr. Sharma any portions of the withheld Marshall Documents as to which Mr. Sharma is a person in interest.

We hasten to add that our conclusion that the Marshall Documents generally need not be disclosed *pursuant to the PIA* does not resolve the question of whether due process will require that they be disclosed to Mr. Sharma in connection with his pending challenge to his termination. As the Court of Appeals discussed in *Henschen*, "whether or not due process considerations might make [records requested under the PIA] available to [a requester] as a party in [an underlying] administrative proceeding . . . does not determine whether they are available under the Public Information Act," and a court ruling "that the records need not be disclosed under the Public Information Act [based on an exemption] does not determine whether [the requester] may be entitled to see them in connection with the [underlying administrative] proceeding." 279 Md. at 474. Even where the PIA does not compel disclosure of a public record, "procedural due process requirements may yet make that same document available to a party . . . in an administrative . . . proceeding" such as that in which the County and Mr. Sharma are currently involved. *Id.* That issue will

need to be resolved in connection with the underlying administrative proceeding and, as appropriate, on judicial review.

III. THE CIRCUIT COURT DID NOT ENGAGE IN THE REQUIRED BALANCING WHEN DETERMINING THAT THE DELIBERATIVE PROCESS PRIVILEGE APPLIED TO THE INTERNAL COMMUNICATIONS DOCUMENTS.

The Internal Communications Documents (identified in paragraph 3 of the court's July 6, 2020 order) are four collections of emails containing discussions among County employees about how to respond to Mr. Sharma's complaint and witness questions about the confidentiality of its investigation. All four were produced with redactions. The County contends that because each exchange occurred before the finalization of the response and were deliberative in nature, the deliberative process privilege, as embodied in General Provisions § 4-344, applies and justifies withholding the unredacted versions of the records.

"The deliberative privilege is a species of executive privilege, 'which has been considered part of the common law of evidence[,]'" *Maryland Bd. of Physicians v. Geier*, 225 Md. App. 114, 148 (2015), although it "'differs from many other evidentiary privileges' in that '[i]t is for the benefit of the public and not the governmental officials who claim the privilege,'" *id.* at 150. Accordingly, the privilege is not absolute, but rather aims to strike a balance between the just resolution of legal disputes and the need to protect confidential government communications. *See id.* When properly invoked, the privilege protects documents "reflecting advisory opinions, recommendations and deliberations

comprising parts of the process by which governmental decisions and policies are formulated." *Id.* at 149 (citations omitted).

To assert the deliberative process privilege, a custodian must establish that the document is both pre-decisional and deliberative. *See id.* at 135; *see also Off. of the Governor v. Wash. Post Co.*, 360 Md. 520, 551 (2000). Additionally, the document must have been "created by government agencies or agents . . . 'to assist it in internal decisionmaking.'" *Off. of the Governor*, 360 Md. at 552. Finally, the agency must have a reasonable basis for concluding that disclosure would inhibit creative debate and discussion within or among agencies or would impair the integrity of the agency's decision-making process. *NLRB v. Sears*, 421 U.S. 132, 151 (1975). Generally, when a claim of privilege is made for confidential communications of government officials in pre-decisional deliberations, "there is a presumptive privilege, with the burden upon those seeking to compel disclosure." *Geier*, 225 Md. App. at 151. Ultimately, however, the applicability of the privilege "is for the court to decide." *Hamilton v. Verdow*, 287 Md. 544, 562 (1980).

When the government is a party to the dispute in which a claim of deliberative process privilege is invoked, courts must also engage in a balancing process to see if they *should* uphold the claim of privilege.[11] *See Geier*, 225 Md. App. at 151; *Hamilton*, 287 Md. at 563-64. The requisite balancing requires the court to "weigh[] the need for

[11] Unlike the investigatory records exemption in General Provisions § 4-351, the application of the PIA's exemption that incorporates the deliberative process privilege, General Provisions § 4-344, is expressly defined by reference to whether such records "would . . . be available by law to a private party in litigation with the unit." In assessing whether the privilege should be applied under the PIA, therefore, we must assess whether it would be available if asserted by the County in litigation with Mr. Sharma.

confidentiality against the litigant's need for disclosure and the impact of nondisclosure upon the fair administration of justice." *Hamilton*, 287 Md. at 563. That is because, "[w]here the government is a party, a question of unfair litigation advantage may arise. In other words, the government may be in a position of asserting or defending a claim while at the same time depriving its opponent of information needed to overcome the government's position." *Id.* at 564 n.8; *see also Geier*, 225 Md. App. at 151.

At the hearing before the circuit court, the County provided a summary of the material it claimed was exempt under the deliberative process privilege and argued that open and frank discussion between county officials would be stifled if disclosure of the documents was permitted. Mr. Sharma responded that regardless of the substance of the redactions, the privilege applied only to high-ranking government officials and not Ms. Marshall, Ms. Herrold, and the other participants in the communications. The court, relying on the County's Vaughn index, inquired only into whether any statements other than the deliberative exchanges had been redacted. Upon the County's assurance that no other material had been redacted, the court ordered that the withheld documents need not be disclosed.

Although we find no fault in the court's determination that, under these circumstances, the deliberative process privilege can apply to discussions among individuals who are not high-level decisionmakers, *see Hamilton*, 287 Md. at 558 ("The making of candid communications by [subordinate officials] may well be hampered if their contents are expected to become public knowledge."), the court should have engaged in

the required balancing process before concluding that the materials at issue did not need to be disclosed. Because it did not do so, we are compelled to vacate the court's order with respect to the Internal Communications Documents and remand for further proceedings.

CONCLUSION

For the reasons stated, we will:

(1) reverse the circuit court's ruling that the County need not disclose the Herrold Documents (identified in paragraph 2 of the July 6, 2020 order). Upon remand, the court should instruct the County to produce those records;

(2) vacate the circuit court's ruling that the County need not disclose the Marshall Documents (identified in paragraph 1 of the July 6, 2020 order). Upon remand, the court should determine whether Mr. Sharma is a person in interest with respect to any portions of the Marshall Documents and, if so, instruct the County to produce those portions of the records. The court may uphold the County's denial of disclosure (under the PIA only) of portions of the Marshall Documents as to which Mr. Sharma is not a person in interest; and

(3) vacate the circuit court's ruling that the County need not disclose the Internal Communications Documents (identified in paragraph 3 of the July 6, 2020 order). Upon remand, the court should engage in the required balancing process before ruling on whether the records may be withheld pursuant to the deliberative process privilege.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED IN PART AND VACATED IN PART. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID 50% BY APPELLANT AND 50% BY APPELLEE.