Circuit Court for Baltimore City
Case No. 24-C-15-005592

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 791

September Term, 2016

A.C.

v.

OFFICE OF THE ATTORNEY GENERAL

Eyler, Deborah S.,
Graeff,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: February 13, 2018

A.C., the appellant, a former employee of the Maryland Office of the Attorney General ("OAG"), the appellee, challenges an order of the Circuit Court for Baltimore City affirming the administrative decision by the Chief Deputy Attorney General (the "Agency") denying her request to inspect and correct certain public records in the custody of the OAG.

The appellant presents four questions for review, which we have reworded:

I. Did the Agency err by ruling that the OAG properly denied her request for eighteen documents that the OAG withheld based on exceptions under the Maryland Public Information Act?

II. Did the Agency err by ruling that the OAG properly denied her request to correct public records under the Maryland Public Information Act?

III. Did the Agency err by denying her request for an *in camera* inspection of the eighteen withheld documents?

IV. Did the Agency err by ruling that the OAG acted in good faith and produced all responsive documents?

For the following reasons, we shall affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

The appellant, an African American female, was formerly employed as a Special Assistant Attorney General for the OAG in the Health Club Registration Unit of the Consumer Protection Division ("CPD"). She had worked in that capacity for seven years. On March 3, 2012, the OAG gave the appellant an ultimatum—she could either resign or be terminated. She was given twenty-four hours to make a decision. The appellant did not give the OAG an answer, however, and on March 4, 2012, Attorney General Douglas F. Gansler sent her an official termination letter.

On June 21, 2012, the appellant's attorney sent a letter to the Attorney General appealing the termination and asserting that race had played a role. A week later, the appellant's attorney sent a second letter to the Attorney General, requesting that the OAG preserve all "pertinent evidence" in its possession for trial. By letter of July 19, 2012, the OAG denied the appellant's challenge to her termination as untimely.

On October 30, 2012, the appellant filed a complaint with the Maryland Commission on Civil Rights ("MCCR"), alleging that she had been terminated based on her race. In response, the OAG provided the MCCR with documents and a written position statement. Ten months later, on August 20, 2013, the MCCR held a fact-finding conference. According to the appellant, she learned for the first time at that conference that the OAG had received written complaints about her work.

On September 9, 2013, a few weeks after the fact-finding conference, the appellant submitted a Maryland Public Information Act ("PIA") request to the OAG seeking "a copy of all records in [its] custody and control contained in [her] personnel file and all documents pertaining to [her] discharge from the position of Assistant Attorney General[.]" On October 7 and October 24, 2013, the OAG provided the appellant with documents in response. It withheld certain documents from disclosure, however, claiming that several exceptions under the PIA applied. A month later, the appellant wrote to the OAG seeking production of the documents it had withheld and correction and removal of three documents from her personnel file. She alleged as to the latter documents that they were

"both false and misleading."[1] By letters dated January 7, 2014, the OAG denied her request to turn over the withheld documents, as they were excepted from disclosure, and denied her request to correct/remove the three documents from her personnel file, stating that after an inquiry the OAG had found the content of the documents to be accurate.

On February 12, 2014, the appellant filed an administrative appeal of the OAG's partial denial of her PIA request with the Office of Administrative Hearings.[2] After a motions hearing, the administrative law judge ("ALJ") directed that the OAG file a more descriptive *Vaughn* index of the eighteen documents withheld.[3] In response, the OAG filed a nine-page amended *Vaughn* index ("AVI") listing for each of the eighteen documents: the date of the document, the author(s), the recipient(s), a description of the document, the subject of the document, and the privilege/PIA exception claimed. On June 2, 2014, after a hearing on several pending motions, the ALJ issued an order that among other things denied the appellant's request for an *in camera* review of the eighteen withheld documents.

[1] *See* Md. Code (2014), §4-502 of the General Provisions Article ("GP") (permitting "a person in interest" to request a State agency to correct a public record).

[2] The OAG has delegated proposed decision making in PIA cases to the Office of Administrative Hearings. *See* COMAR 02.06.01.13.

[3] The term "*Vaughn* index" comes from *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974), a Freedom of Information Act ("FOIA") case in which the D.C. Circuit remanded with directions to the Civil Service Commission to provide an itemized description of the withheld materials and claimed exceptions so as to afford the parties and the court a means to address issues raised by an applicant's FOIA request and the agency's action in withholding requested documents. *See Glass v. Anne Arundel Cty.*, 453 Md. 201, 213 n.11 (2017) (stating that a *Vaughn* index includes a document's date, author, subject matter, and claimed privilege) (citations omitted).

On June 9–11, 2014, the ALJ held a merits hearing at which six witnesses testified and the parties submitted close to 100 documents. The witnesses included: the appellant; Beverly Pivec, the OAG's Director of Administration; Yolanda Colkley, the OAG's Fair Practices Coordinator; Steven Sakamoto-Wengel, the OAG's Consumer Protection Counsel for Regulation, Legislation, and Policy and a prior supervisor of the appellant; Philip Ziperman, Deputy Chief of the CPD and a prior supervisor of the appellant; and William Gruhn, Chief of the CPD and Ziperman's supervisor.

On July 11, 2014, the ALJ filed a 46-page proposed decision, making the following pertinent findings of fact. On May 3, 2012, the appellant received a telephone call from Colkley informing her that she was to meet with Pivec and Katherine Winfree, the OAG's Chief Deputy. The appellant refused to meet with them and said she might need an attorney. According to the appellant, Winfree subsequently called to inform her that her "services were no longer required" and told her to decide whether she wanted to resign or be terminated. The following day, after not receiving a response from the appellant, Attorney General Gansler sent the appellant the letter of termination.

The ALJ also found that upon receiving the appellant's PIA request, Pivec spoke with several OAG employees who she thought would have responsive documents, including: Sakamoto-Wengel, Ziperman, Gruhn, Colkley, and Winfree. The employees searched their files and provided Pivec with responsive documents in their possession. Pivec and Colkley compiled these documents and used them to respond to the appellant's PIA request.

The ALJ determined that the OAG had acted thoroughly and in good faith in gathering the documents in response to the appellant's PIA request. He analyzed each of the withheld documents, the OAG's claimed exception from disclosure, and the parties' arguments. In conclusion, the ALJ recommended affirmance of the OAG's decision to withhold the eighteen documents based on lawful exceptions recognized in the PIA. He also recommended affirmance of the OAG's decision to deny the appellant's request to correct/remove the three documents from her personnel records.

On August 11, 2014, the appellant filed exceptions to the proposed decision with the Agency. Oral argument was held on July 14, 2015.

On October 1, 2015, the MCCR issued a written decision on the appellant's discrimination complaint, making a "no probable cause" finding on her allegation that her termination had been based on race. The MCCR stated that the appellant's job performance had been "less than satisfactory" and that she had failed to put forward any evidence of discriminatory conduct toward her based on race.

On October 13, 2015, the Agency issued a 23-page final decision fully adopting the ALJ's findings of fact and adopting the ALJ's legal analysis and conclusions, with additional analysis of its own. The Agency upheld the OAG's decision to withhold the eighteen documents and not to correct/remove the three documents from the appellant's personnel file. The Agency also found that the ALJ had acted within his discretion by

denying the appellant's request for an *in camera* review of the eighteen withheld documents.[4]

In the Circuit Court for Baltimore City, the appellant filed an action for judicial review, challenging the Agency's final decision. As noted, the circuit court upheld the decision.

DISCUSSION

I.

The appellant contends the Agency erred by upholding the OAG's denial of her request for the eighteen withheld documents based on certain PIA exceptions. The OAG responds that it properly withheld the documents under several PIA exceptions, including the MCCR confidentiality statute for preliminary investigations; the work product privilege; the executive deliberative process privilege; and the attorney-client privilege.

Standard of Review

When reviewing a decision by the circuit court in an action for judicial review of an administrative agency's decision, "we review the decision of the agency rather than that of the circuit court." *Doe v. Allegany Cty. Dep't of Soc. Servs.*, 205 Md. App. 47, 54 (citation omitted), *cert. denied*, 427 Md. 609 (2012). We review the agency's decision to determine

[4] On December 4, 2015, the appellant filed a petition in the Circuit Court for Baltimore City for judicial review of the MCCR's "no probable cause finding." Roughly four months later, on April 5, 2016, the circuit court granted the OAG's motion to dismiss on the ground that a "no probable cause" finding by the MCCR was not an appealable final order subject to judicial review. We affirmed the dismissal on appeal. *See A.C. v. Maryland Comm'n on Civil Rights*, 232 Md. App. 558 (2017).

whether it had an adequate factual basis to support its findings and whether the administrative decision was premised upon an erroneous conclusion of law. *Comptroller of Treasury v. Immanuel*, 216 Md. App. 259, 266 (2014) (citation omitted).

The Maryland PIA

The Maryland Public Information Act, enacted in 1970, is currently codified at Md. Code (2014), sections 4-101 to 4-601 of the General Provisions Article ("GP").[5] The PIA states generally 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" and provides a right to inspect and copy public records with "the least cost and least delay[,]" subject to certain enumerated exceptions. *See* GP §§ 4-103 and 4-201. A "public record" is defined broadly as documentary material that is made or received by a unit of State or local government "in connection with the transaction of public business[.]" GP § 4-101(h). A public record may take myriad forms, including: paper documents, digital or electronic documents, and email messages. *Id.*; *see also* 81 *Op. of the Attorney Gen.* 140, 144 (1996). The legislative purpose of the PIA is to enable Maryland citizens to make informed decisions about the workings of their government. *Prince George's Cty. v. The Washington Post Co.*, 149 Md. App. 289, 307 (2003) (citations omitted). To effectuate that purpose, the PIA is to be "liberally construed" in favor of permitting inspection of a

[5] When the appellant filed her Maryland Public Information Act ("PIA") request in 2013, the PIA was codified at Md. Code (1984, 2009 Repl. Vol.) sections 10-611 to 10-630 of the State Government Article ("SG"). In 2014, the PIA was recodified at GP sections 4-101 to 4-601. *See* 2014 Md. Laws, Chap. 94.

public record. *Glenn v. Maryland Dep't of Health and Mental Hygiene*, 446 Md. 378, 384 (2016) (internal quotation marks and citation omitted).

The Court of Appeals has categorized the PIA's exceptions from disclosure as follows:

> *(1) Disclosure Controlled by Other Law.* The PIA generally defers to the dictates of other laws that control disclosure of a particular public record. Thus, if another law—*e.g.*, constitutional provision, statute, common law privilege—forbids disclosure of a record, or gives the agency discretion not to disclose the record, that other law controls disclosure of the record. *See* GP § 4–301. For example, a record of a communication covered by attorney-client privilege would not be disclosed in response to a PIA request, unless the client waived the privilege. GP § 4–301(1).[6]
>
> *(2) Mandatory Exceptions.* The PIA itself forbids disclosure of certain specified categories of *records*. *See* GP § 4–304 *et seq.* Similarly, the statute forbids an agency from disclosing certain types of *information* that may appear in a record, even if other parts of the record are open to inspection. *See* GP § 4–328 *et seq*. These exceptions to the PIA's general rule of disclosure are often called mandatory exceptions. . . .

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[6] GP section 4-301 states, in pertinent part:

> [A] custodian shall deny inspection of a public record or any part of a public record if:
>
> (1) by law, the public record is privileged or confidential; or
>
> (2) the inspection would be contrary to:
>
> (i) a State statute;
>
> (ii) a federal statute or a regulation that is issued under the statute and has the force of law;
>
> (iii) the rules adopted by the Court of Appeals; or
>
> (iv) an order of a court of record.

> *(3) Discretionary Exceptions.* The PIA specifies other categories of records or information that an agency may withhold from public inspection if it believes that disclosure "would be contrary to the public interest." GP § 4–343 *et seq.* For example, a custodian may deny inspection of interagency or intra-agency letters and memoranda that contain pre-decisional deliberations. GP § 4–344. . . . These exceptions to the PIA's general rule in favor of disclosure are often referred to as discretionary exceptions. They 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—that is, disclosure "would be contrary to the public interest"—is met.
>
> *(4) Catch-all Exception by Court Order.* Finally, even when disclosure of a record is not controlled by other law or precluded by one of the PIA's mandatory or discretionary exceptions, an agency may—subject to certain procedural requirements—temporarily deny inspection of the record if the official custodian believes that inspection would cause "substantial injury to the public interest." GP § 4–358(a). The agency must promptly seek a court order in order to continue to withhold the record.

Glass v. Anne Arundel Cty., 453 Md. 201, 209–10 (2017) (footnotes omitted) (emphasis in original).

The first and third exception categories are relevant here. We shall provide a more detailed explanation of them later, but note for now that the privilege governing MCCR cases, at Md. Code (1984, 2014 Repl. Vol), section 20-1101 of the State Government Article ("SG"), and the "attorney-client privilege" are exceptions under GP section 4-301(1), which mandates confidentiality where another law grants confidentiality, *see Glass*, 453 Md. at 209; and the deliberative process privilege and the attorney work product privilege, by contrast, are embodied within the intra/inter agency discretionary exception in GP sections 4-343 and 4-344.

After a PIA request is made, a custodian has 30 days in which to conduct a search for responsive records and grant or deny the request. GP § 4-203(a). "[T]he adequacy of

the agency's search is measured by whether it is reasonably calculated to uncover responsive records, not by whether it locates every possible responsive record." *Glass*, 453 Md. at 212 (citation omitted). If the PIA request is granted, the records are to be made available within a reasonable period of time, but no more than 30 days after receipt of the request. GP § 4–203(b). If the request is denied, the custodian is to provide a written explanation of the reasons for the denial, the legal authority supporting the denial, and notice of how the requestor may seek review of that decision. GP § 4-203(c). If a requestor appeals the custodian's decision to withhold documents, the custodian has the burden of proving that the proper procedure was followed. *See* GP § 4-362(b).

We now turn to the eighteen documents withheld by the OAG and the claimed PIA exceptions. They fall into three groups: ten documents relate to the MCCR investigation; five documents relate to the appellant's internal appeal of her termination; and three documents relate to the appellant's termination.

a. The Agency correctly determined that the ten OAG documents relating to the MCCR investigation were excepted from disclosure under the PIA.

1. The ten documents were confidential under SG section 21-1101

Ten of the eighteen withheld documents concern the MCCR discrimination complaint that the appellant filed with the MCCR on October 30, 2012. Of the ten documents, one is the OAG's position statement to the MCCR, consisting of the OAG's conclusions, opinions, and legal theories regarding the appellant's complaint. Six are drafts of the OAG's position statement, prepared by Julia Doyle Bernhardt, an Assistant Attorney General representing the OAG in the appellant's complaint before the MCCR. And three

are emails from Colkley to Pivec discussing communications with the MCCR and forwarding information from the MCCR about its investigation of the appellant's MCCR complaint.

As noted, the PIA provides that "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[.]" *See* GP § 4-301(1). SG section 20-1101 governs the confidentiality of the investigation the MCCR must undertake, pursuant to SG section 20-1005, when it receives a complaint alleging a discriminatory act. It states:

> (a) *Confidentiality of investigation; disclosure of information prohibited; exceptions.* – (1) Except as provided in paragraph (2) of this subsection, during an investigation of a complaint alleging a discriminatory act, and until the matter reaches the stage of public hearings:
>
> (i) the activities of all members and employees of the Commission in connection with the investigation shall be conducted in confidence and without publicity; and
>
> (ii) the members and employees of the Commission may not disclose any information relating to the investigation, including the identity of the complainant and the respondent.
>
> (2)(i) Information may be disclosed at any time if both the complainant and respondent agree to the disclosure in writing.
>
> (ii) The identity of the complainant may be disclosed to the respondent at any time.
>
> (b) *Penalty*. A member or employee of the Commission who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 1 year or a fine not exceeding $1,000 or both.

(Underlined emphasis added.)

If the ten withheld documents pertaining to the MCCR investigation of the appellant's complaint were confidential under SG section 20-1101, then they were properly

withheld under the PIA, specifically under GP section 4-301(1). The appellant argues that SG section 20-1101 only applies to the activities of members or employees of the MCCR, not to the activities of the parties to a MCCR complaint, and therefore does not cover the ten documents. She directs our attention to the words "members and employees of the Commission" in the statute and argues that this language restricts disclosure of confidential information by the MCCR, but not by the complainant or the respondent to a matter before it. She maintains that if the statute were intended to prohibit disclosure by persons in addition to the members and employees of the MCCR, the penalty provision would include additional language to mete out a penalty to those persons.

The OAG counters that SG section 20-1101 protects employees and members of the MCCR *and* "the activities" of the MCCR, and that includes communications by litigants with the MCCR. It asserts that "[i]f the statute restricted only the [MCCR], then subsection (a)(1)(i) would be unnecessary and redundant in light of subsection (a)(1)(ii)." It concludes that because the statute applies to the activities of the MCCR, the documented communications here fall within the language of the statute, as they were made in furtherance of the activities of the MCCR in the course of its investigation.

Whether the OAG documents and communications pertaining to the MCCR investigation were properly withheld depends upon the legislative intent underlying SG section 20-1101. This calls for statutory interpretation, the principles of which are well-settled. The Court of Appeals has explained:

> "[T]he primary goal of [statutory construction is] to 'ascertain and effectuate the intention of the legislature.' *Oaks v. Connors*, 339 Md. 24, 35 . . . (1995). In order to discern

> legislative intent, we first examine the words of the statute and if, giving them their plain and ordinary meaning, the statute is clear and unambiguous, we will end our inquiry. *Comptroller of the Treasury v. Kolzig*, 375 Md. 562, 567 . . . (2003). As we have recognized, however, '[a]n ambiguity may ... exist even when the words of the statute are crystal clear. That occurs when its application in a given situation is not clear.' *Blind Indus. & Servs. of M[aryland] v. M[aryland] Dep't of Gen. Servs.*, 371 Md. 221, 231 . . . (2002). Therefore, a statutory provision may be ambiguous: '1) when it is intrinsically unclear; or 2) when its intrinsic meaning may be fairly clear, but its application to a particular object or circumstance may be uncertain.' *Gardner v. State*, 344 Md. 642, 648–49 . . . (1997). Further, 'when the statute to be interpreted is part of a statutory scheme, . . . [we read it in context, together with the other statutes] on the same subject, harmonizing them to the extent possible . . . .' *Mid-Atlantic Power Supply Ass'n v. Pub. Serv. Comm'n*, 361 Md. 196, 204 . . . (2000). We also 'seek to avoid constructions that are unreasonable, or inconsistent with common sense,' *Frost v. State*, 336 Md. 125, 137 . . . (1994), and we will presume that 'the Legislature 'intends its enactments to operate together as a consistent and harmonious body of law,'" *Toler v. Motor Vehicle Admin.*, 373 Md. 214, 220 . . . (2003) . . . so that 'no part of the statute is rendered meaningless or nugatory.' *Id*[.]

Univ. Sys. of Maryland v. Baltimore Sun Co., 381 Md. 79, 93–94 (2004) (quoting *Bank of America v. Stine*, 379 Md. 76, 85–86 (2003)) (some citations omitted). We review matters of statutory interpretation *de novo*. *Harvey v. Marshall*, 389 Md. 243, 257 (2005) (citations omitted).

A literal reading of the words in SG section 20-1101 could support the appellant's view, but would produce absurd results. While the MCCR's internal communications about an investigation would be confidential, all its investigative communications would be exposed to disclosure. That could not have been what the General Assembly intended. Therefore, we reject the appellant's statutory interpretation argument as contrary to

common sense. Our reasoning finds support in the legislative purpose of the MCCR and the PIA as discussed in *State Comm'n on Human Relations v. Talbot Cty. Det. Ctr.*, 370 Md. 115 (2002), which both parties cite.

In *Talbot County*, the MCCR sought an injunction to keep an employer (the Talbot County Detention Center) from attending confidential interviews the MCCR was conducting in its preliminary investigation of two employment discrimination complaints.[7] The employer responded that the MCCR could not obtain injunctive relief because its investigative process was limited to the specific investigative tools set forth in certain regulations, *i.e.*, a fact-finding conference, requests for information, service of interrogatories, and issuance of subpoenas. More specifically, because neither the statute nor the regulations gave the MCCR the authority to conduct confidential interviews, the MCCR was not entitled to an injunction. The trial court agreed and denied injunctive relief.

The case reached the Court of Appeals, which reversed. It held that the MCCR was entitled to an injunction prohibiting the employer from attending the confidential interviews when the employer's presence threatened to cause irreparable harm to the investigatory process. The Court reasoned:

> While the investigative process may, in part, protect an employer from frivolous claims, it was never intended to provide an impenetrable shield through which no investigation could be completed in confidence and without undue influence or intimidation by the employer accused of violating the statute. The Legislature did not mandate that the preliminary

[7] At the time *State Comm'n on Human Relations v. Talbot Cty. Det. Ctr.*, 370 Md. 115 (2002) was decided, the MCCR was known as the "Maryland Commission on Human Relations." *See* 2011 Md. Laws, Chap. 580. We shall use the organization's current acronym, MCCR, for clarity.

investigation must be conducted through formal transcribed interviews where both the witness and the accused are privy to the questioning process; to the contrary, Section 13 of Article 49B[8] indicates *that the Legislature intended to keep the investigations confidential, to the extent feasible*.

* * *

The [MCCR's] request, i.e. to prevent the [employer] from hindering its investigation into complaints of discrimination by insisting on being present and recording and transcribing confidential interviews, is temperate and reasonable. The public has an interest in ensuring unfettered investigations of illegal company practices, particularly when civil rights are at issue. Accordingly, the Legislature has given the [MCCR] broad authority to conduct such investigations; the [MCCR] has statutory authority to begin a preliminary fact-finding process once a verified complaint is received. The rights of the accused, in this case the [employer], are not encumbered by this preliminary investigation; it will have full opportunity to view and contest the evidence gathered, and present its own, *if* after the preliminary investigation, the [MCCR] decides to file a formal legal complaint.

The [MCCR's] belief that it will suffer irreparable injury is not unreasonable or without basis. Absent an injunction, the [employer's] practice of interfering with the investigation by, as the evidence in the record suggests, insisting on being present at witness interviews and by demanding that those interviews be recorded and transcribed may continue, and will likely have the effect of intimidating or influencing witnesses and frustrating the truth-seeking and confidential nature of the investigative process. Furthermore, greater injury would result from the refusal of the injunction than in the granting of it, as ordering the [employer] to refrain from disrupting the interviews and other aspects of the investigation does not inconvenience the [employer], particularly when it has no statutory right to be involved at this preliminary stage of the investigative process.

The [MCCR] presented adequate evidence to support its belief that irreparable harm in the absence of injunctive relief would occur. The Legislature's interest in preventing and proscribing employment discrimination is beyond dispute. Pursuant to that interest, the Legislature explicitly provided the [MCCR] the ability to seek an injunction when prompt judicial action is necessary to carry out its purpose and that of the

[8] This section is now codified at SG section 20-1101. *See* 2009 Md. Laws, Chap. 120.

> anti-discrimination legislation of Article 49B. Logically speaking, without an unimpeded fact-finding process, the [MCCR] would be precluded from gathering the type of evidence that would normally be necessary to file a bill of complaint, and hence, the enforcement authority of the [MCCR] would be inherently limited.

Id. at 135, 141–43 (emphasis added).

In the case at bar, the Agency, relying on the Court's reasoning in *Talbot County*, concluded that the confidentiality provision of SG section 20-1101 applied to the ten documents relating to the MCCR investigation that the OAG withheld from its response to the appellant's PIA request. The Agency focused on the Court's statement that the "purpose of [SG section 20-1101] is 'to keep the investigation[] confidential, to the extent feasible,' even from the other party in the proceeding, until the [MCCR] decides that there is probable cause to believe that a discriminatory act occurred and issues formal charges against the employer." (Citing *Talbot Cty.*, 370 Md. at 135). Applying this reasoning to the facts before it, the Agency was persuaded that SG section 20-1101 applied here:

> This protects the parties by preventing sensitive information from being aired publically while the investigation is still under way. It also ensures that the [MCCR] can gather the information it needs to conduct its investigation and mediate the dispute by assuring the parties that their communications with the MCCR and their litigation positions will not be divulged to the other side.
>
> It would subvert the purpose of the statute if the complainant could force the employer to publically disclose its position statement and other communications relating to the investigation. [The appellant's] interpretation would transform a neutral statute designed to protect both parties into a lopsided tool that complainants could use to gain an advantage over government employers. The employers would not be entitled to any of the complainant's communications with the Commission or statements about her litigation position, but the complainant would have access to all of this same information from the government employer under the PIA. . . .

> As [the appellant] acknowledges, she already requested that the [MCCR] provide her with a copy of the OAG's position statement, and the [MCCR] refused. . . . She is not permitted to circumvent the [MCCR]'s decision or [SG] § 20-1101 by relying on the PIA.

Although the facts of *Talbot County* differ from the facts in this case, the spirit of the holding and the Court's expansive interpretation of the confidentiality provisions of MCCR investigations leads us to conclude that SG section 20-1101 applied, making the ten documents concerning the MCCR investigation excepted from PIA disclosure under GP section 4-301(1). The appellant reads *Talbot County* to mean that before the MCCR is granted additional powers outside those specifically provided for, such as an injunction, it first must show irreparable harm to its investigation. She argues that because the OAG "has presented no evidence to support the conclusion that providing documents will harm the MCCR's investigation" the documents are disclosable. The simple response to this is that an injunction was not requested here, and therefore, the element of irreparable injury that must be shown before an injunction will be granted is not relevant. Our holding about the application of SG section 20-1101 to the facts before us is supported by the reasoning articulated in *Talbot County*. Accordingly, we uphold the Agency's decision that the OAG properly withheld the ten documents relating to the MCCR investigation.

2. The six drafts of the OAG's position statement also were properly withheld under the attorney work product privilege.

GP section 4-344 sets forth a discretionary PIA exception for intra/inter agency memoranda. It provides that "[a] custodian may deny inspection of any part of an interagency or intra-agency letter or memorandum that would not be available by law to a

private party in litigation with the unit." In order to deny inspection, the custodian must also "believe[] that inspection . . . of [the] public record . . . would be contrary to the public interest." GP § 4-343; *Cranford v. Montgomery Cty.*, 300 Md. 759, 771–72 (1984). As a general rule, however, when a custodian properly invokes a privilege to protect a memorandum, a presumption arises that disclosure of the memorandum "would be contrary to the public interest." *Id.* at 776 ("There is a public interest which underlies each legally recognized privilege and, if the privilege applies, it would be at best difficult to say at that an agency decision to withhold was contrary to the public interest.").

"[T]he attorney work product privilege is embodied within the [GP section 4-344 exception]." *See Gallagher v. Office of Attorney Gen.*, 141 Md. App. 664, 674 (2001) (citing *Cranford*, 300 Md. at 776). This is so because attorney work product is not routinely discoverable and therefore generally is not available by law to a party in litigation with the agency. *Id*. at 673 (citation omitted).

The attorney work product privilege protects from disclosure attorney "materials prepared in anticipation of litigation[.]" *Diggs & Allen v. State*, 213 Md. App. 28, 77 (2013) (quotation marks and citation omitted), *aff'd sub nom*., *Allen v. State*, 440 Md. 643 (2014). Documents created "in the ordinary course of business" are not "prepared in anticipation of litigation." *E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc.*, 351 Md. 396, 409 (1998) (citation omitted).

There are two categories of attorney work product: fact and opinion. While neither are ordinarily discoverable, opinion work product "'is almost always completely protected from disclosure.'" *Diggs & Allen*, 213 Md. App. at 77 (citing *Blair v. State*, 130 Md. App.

571, 607–08 (2000)). "'Fact work product generally consists of materials gathered by counsel (or at counsel's instructions) in preparation of trial. Opinion work product concerns the attorney's mental processes.'" *Id*. (quoting *Blair*, 130 Md. App. at 607–08). The privilege protects "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *E.I. du Pont*, 351 Md. at 408 (citing Md. Rule 2-402(c)). Draft documents by an attorney that are prepared in anticipation of litigation and that contain fact and/or opinion work product are generally protected by the attorney work product privilege. *Cf. Schoenmann v. Fed. Deposit Ins. Corp.*, 7 F. Supp. 3d 1009, 1014 (N.D. Cal. 2014) (email attorney communications and the draft declarations attached and exchanged during those communications constitute work product and are protected from disclosure).

The attorney work product privilege may be waived through voluntary disclosure. *Diggs & Allen*, 213 Md. App. at 78 (citations omitted). While the release of protected attorney work product material without an intent to limit its future disposition "might forfeit" the confidentiality of the work product, "whether a waiver has occurred depends on the circumstances surrounding the disclosure of privileged documents[.]" *Gallagher*, 141 Md. App. at 677 (quotation marks and citations omitted). Additionally, even when a final version of a document is disclosed, the drafts prepared by counsel remain privileged when they are created as part of a confidential communication. *Cf. Inst. for Dev. of Earth Awareness v. People for Ethical Treatment of Animals*, 272 F.R.D. 124, 125 (S.D.N.Y. 2011) (lawyer's drafts, which have not been executed do not lose their character as work product because a final version has been used in the litigation); *Nesse v. Pittman*, 202

F.R.D. 344, 351 (D.D.C. 2001) (protecting from disclosure as work product modified drafts by an attorney because even if the final draft was disclosed, the drafts reflect the attorney's mental processes).

Clearly, the six drafts of the OAG's position statement were attorney work product. They were created in anticipation of litigation before the MCCR in the appellant's discrimination matter. The appellant's argument that the position statement drafts were not made in preparation for litigation because the MCCR process results not in a judicial decision but an administrative decision has no merit. As the Agency pointed out in its final decision, the work product privilege applies "not just to traditional litigation before a court but also to 'proceedings before administrative tribunals if they are of an adversarial nature'" (quoting Wright & Miller, 8 *Fed. Practice and Procedure* § 2024 (3d ed. 2010)).

The appellant also takes an overly restrictive view of the attorney work product privilege when she argues that the OAG lost the privilege to withhold the drafts because it provided the MCCR with a final position statement. In support of this argument, she relies on *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988). The *Martin Marietta* Court held that when fact work product is voluntarily disclosed via testimony, the privilege protecting the underlying facts is waived. The court did not hold, as appellant suggests, that an attorney waives his or her privilege protecting draft documents when he or she discloses the final version of a document. Nor could such a rule be inferred from the court's holding. Draft documents are not themselves facts that underlie final versions; rather, they are work product that likely contain mental impressions, conclusions, and opinions that did not make it into the final version. The Agency correctly found that the OAG did not waive

the work product privilege protecting the six draft position statements, even though it submitted a final version to the MCCR. Accordingly, it was within the OAG's discretion to withhold the drafts from disclosure. GP § 4-344.

3. The six draft position statements also were properly withheld under the deliberative process privilege

Like the attorney work product privilege, the deliberative process privilege is embodied in the intra/inter agency discretionary exception under the PIA. *See Stromberg Metal Works, Inc., v. Univ. of Maryland*, 382 Md. 151, 163–64 (2004); GP § 4-344. The deliberative process privilege protects from disclosure documents "'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and polices are formulated.'" *Stromberg*, 382 Md. at 165 (quoting *Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)). The purpose and intent of the privilege is "to incorporate generally the recognized rule that confidential intra-agency advisory opinions . . . are privileged from inspection, and that the public policy behind that privilege [is] the policy of open, frank discussion between subordinate and chief concerning administrative action." *Stromberg*, 382 Md. at 164 (quotation marks and citation omitted); s*ee also Hamilton v. Verdow*, 287 Md. 544, 558 (1980) (The policy behind the deliberative process privilege is to encourage "candid communications" that are necessary for an effective decision-making process that "may well be hampered if their contents are expected to become public knowledge.").

A custodian who seeks to avail of the deliberative process privilege must establish that the document to be protected is both pre-decisional and deliberative. *Stromberg*, 382

Md. at 165. The *Stromberg* Court noted that "the line between pre-decisional and post-decisional documents may not always be a bright one[;] decision-making is often a continuing process and . . . the privilege does not turn on the ability of the agency to identify a specific decision to which the [document] relates." *Id.* (citing *Sears*, 421 U.S. at 151–52 nn.18 & 19). The court also explained that the line between documents that contain deliberative material and documents that merely set forth facts may not always be obvious. *Id.* at 166 ("[T]he distinction [between purely factual data and deliberative opinions] is not always a clear one and is not rigid."). It suggested, however, that "analysis of pending or possible claims" is deliberative in nature. *Id.* at 167.

Furthermore, as explained above, a custodian who invokes the deliberative process privilege in order to prevent inspection of a document in response to a PIA request under GP section 4-344, must demonstrate that disclosure of the document is contrary to the public interest. GP § 4-343.

The appellant advances three arguments for why the OAG could not have properly relied on this discretionary PIA exception as it relates to the six drafts of the position statements. First, she asserts that the deliberative process privilege did not apply because the drafts were not pre-decisional and were not in reference to an important public policy. We disagree. As the Agency explained, "'[n]onfinal drafts . . . are typically pre[-]decisional and deliberative materials because they reflect a tentative view and are subject to later revisions'" (quoting *Van Aire Skyport Corp. v. Fed. Aviation Admin.*, 733 F. Supp. 316, 321 (D. Colo. 1990)). *See also Pfeiffer v. Cent. Intelligence Agency*, 721 F. Supp. 337, 339 (D.D.C. 1989); *Marzen v. Dep't of Health and Human Servs.*, 825 F.2d 1148,

1154–55 (7th Cir. 1987) (discussing the deliberative process privilege in the context of the Freedom of Information Act) (citation omitted).[9] In this case, the six drafts were created prior to the final position statement and were, accordingly, pre-decisional. Additionally, the appellant is incorrect that that deliberative process privilege applies only to "important policy issues."

Second, the appellant argues that the OAG has not demonstrated how withholding the six drafts "serves a public interest." As we have explained, when a privilege applies to protect a document from disclosure, there is a presumption that disclosure of the document is contrary to the public interest. That is because the interest that underlies a privilege suffices to prove that inspection of the document is contrary to the public interest. *Cranford*, 300 Md. at 776. The public policy behind the deliberative process privilege is to encourage open and frank administrative discussions between government decision-makers. *Stromberg*, 382 Md. at 164. Allowing these "frank discussions" to be revealed is contrary to the public interest.

Finally, the appellant argues that her interest in obtaining the six drafts outweighs the OAG's interest in withholding them. This argument lacks merit. The Agency properly dismissed it, explaining that

> [t]his type of balancing [that the appellant asserts is appropriate] . . . is only required in the context of a discovery request under the Maryland Rules; it does not apply to the PIA. As the Court of Appeals has explicitly explained,

[9] FOIA is substantially the same as the PIA, and therefore, interpretations and reasonings under the FOIA are persuasive in similar situations involving the PIA. *See Immanuel v. Comptroller of Maryland*, 449 Md. 76, 89 (2016).

> the "[n]eed on the part of the requesting party is not to be assumed or [even] considered in determining the outcome of the" exemption under the PIA. *Cranford*, 300 Md. at 775.[10]

We hold that the OAG acted within its discretion by disclosing the six drafts of the positions statements, as the drafts were protected by the deliberative process privilege.

b. The Agency correctly determined that the five OAG documents pertaining to the appellant's internal appeal of her termination were properly withheld under the deliberative process privilege.

As stated above, on June 21, 2012, the appellant filed an internal appeal of her termination, alleging racial discrimination. Roughly a month later, on July 19, 2012, Deputy Attorney General J.B. Howard, Jr., issued a letter denying her appeal as untimely. The appellant subsequently made her PIA request, and the OAG withheld from disclosure, among other things, five drafts of the OAG's July 19, 2012 decision letter. Specifically, the OAG withheld: the first draft of the OAG's decision letter dated July 9, 2012, authored by Julia Bernhardt, Assistant Attorney General; three revisions of the draft edited by Howard and dated July 18, 2012; and an email dated July 9, 2012, from Erica Esposito, an OAG law clerk, to Howard in which Esposito forwarded her comments on the draft. The Agency ruled that the OAG was entitled to withhold these documents under the deliberative process privilege, citing *Nat'l Council of La Raza v. Dep't of Justice*, 339 F. Supp. 2d 572,

[10] In her brief, the appellant cites to GP section 4-301(b)(2) in support of her argument that a balancing test is necessary. That section is inapplicable, however, for two reasons. First, subsection (b) did not exist when the Agency rendered a decision in this matter. Second, subsection (b) specifically applies to complaints filed with the Ombudsman, which did not occur here.

583 (S.D.N.Y. 2004) (footnote omitted), for the general rule that "[d]rafts and comments on documents are quintessentially pre[-]decisional and deliberative."

The appellant argues that the deliberative process privilege does not apply because the five documents were not "designed to assist in the decision-making process" and that based on the AVI descriptions, the five documents only contained factual observations and perceptions. The appellant, in other words, does not believe the five documents were deliberative. We disagree. The five draft documents demonstrated an on-going discussion of how to handle the appeal of appellant's discrimination complaint. *Stromberg*, 382 Md. at 167. We also find convincing the Agency's rationale for applying the deliberative process privilege to the five documents:

> [D]rafts are "tentative" and "subject to revision," *Van Aire*[], 733 F. Supp., at 321, and thus are part of the process of making a decision. Moreover, discussions about how to articulate a written decision can be just as sensitive—and just as much in need of protection under the deliberative process privilege—as the decision itself.

We hold that the deliberative process privilege applied to the five documents.

c. The Agency correctly determined that the three OAG documents relating to appellant's termination were properly withheld under the deliberative process privilege and in part under the attorney-client privilege.

Finally, the OAG withheld all or parts of three documents pertaining to the appellant's termination. The first document is an email dated May 1, 2012, from Pivec to Winfree that was disclosed except for the redaction in the following sentence: "If [appellant] resigns, [are] you okay with giving [a redacted amount]" as part of a settlement agreement. The second document, which was fully withheld, was a chain of three emails between Pivec and Winfree, dated May 4, 2012, discussing the appellant's "failure to

respond to inquiries from the OAG regarding the status of her employment, the OAG's consideration of its decision regarding termination of the [a]ppellant's employment, and the communication of the decision." The third document is an attachment to an email dated May 1, 2012, from Pivec to Bruce Martin, the Principal Counsel and Assistant Attorney General. The email was disclosed. The attachment is a redacted draft settlement agreement for Martin's review.

The Agency ruled that the OAG was entitled to withhold these documents under the deliberative process privilege. It reasoned that the redacted amount the OAG was considering offering to the appellant as part of her severance package if she resigned was deliberative because "Pivec is making a recommendation about a particular action to her superior before a decision has been made." It found that there was "a strong public interest in maintaining the confidentiality of the OAG's discussion of possible terms of a settlement agreement, so as to encourage frank and open discussion between agency decision-makers" (quotation marks, citation, brackets, and ellipses omitted). It found the email and draft settlement agreement Pivec sent to Martin to be deliberative for the same reasons. The emails between Pivec and Winfree were deliberative because they were discussing the appellant's failure to respond to inquiries from the OAG regarding the status of her employment, the OAG's consideration of its decision to terminate the appellant's employment, and the OAG's communication of that decision.

The appellant argues that the public policy factor of "open and frank" discussions cannot support withholding the documents under the deliberative process privilege. She

quotes from a paragraph in *Cranford*, 300 Md. at 776, which we have underlined below, but which does not support her argument when read in context.

> In cases in which the custodian invokes the agency memoranda exemption, and in which the trial court has determined that one of the privileges embraced within that exemption applies, the third element of § 3(b)(v) will typically be satisfied, namely, disclosure to the applicant would be contrary to the public interest. There is a public interest which underlies each legally recognized privilege and, if the privilege applies, it would be at best difficult to say that an agency decision to withhold was contrary to the public interest.
>
> The foregoing analysis means that a public record does not enjoy § 3(b)(v) exempt status simply because it would be contrary to the public interest to disclose it. In the unusual case where a public policy factor should control but none of the specific exemptions applies, the Md. Act provides for a special procedure to safeguard the material from disclosure. Under § 3(e) a custodian may apply to a court for an order permitting him to deny disclosure in order to prevent substantial injury to the public interest.

Cranford, 300 Md. at 776–77. Because the document falls within the deliberative process privilege (which is part of the intra/inter agency discretionary privilege), the public policy of "open and frank discussions" suffices as a public policy reason under the circumstances to withhold the document.

The appellant also argues that the May 4, 2012 email chain between Pivec and Winfree does not qualify under the deliberative process privilege because it was made after the decision to terminate her employment. The appellant is wrong. The OAG made the decision to terminate the appellant on May 4, 2012, when, on that date, it gave her a letter of termination. Before then, the OAG had given the appellant the option of resigning or being terminated and was awaiting her decision. Because the appellant did not respond,

however, Pivec and Winfree needed to confer to determine the best course of action. This deliberation took place before the OAG submitted the termination letter to the appellant.

Finally, the Agency found that the third document, the draft settlement that was attached to an email from Pivec to Martin, was also properly withheld under the attorney-client privilege. The attorney-client privilege is "a rule of evidence that prevents the disclosure of a confidential communication made by a client to his attorney for the purpose of obtaining legal advice." *E.I. du Pont*, 351 Md. at 414 (citing *Levitsky v. Prince George's Cty.*, 50 Md. App. 484, 491 (1982)). "'Only those attorney-client communications pertaining to legal assistance and made with the intention of confidentiality are within the ambit of the privilege.'" *Id.* at 415–16 (quoting *Burlington Indus. v. Exxon Corporation*, 65 F.R.D. 26, 37 (D.Md. 1974)) (emphasis omitted). "The attorney-client privilege is held by the client[.]" *Blair*, 130 Md. App. at 605. If a communication is protected by the attorney-client privilege, it is also protected under the PIA. GP § 4-301(1); *Glass*, 453 Md. at 209.

The appellant argues that the OAG failed to offer sufficient evidence at the hearing to prove that attorney-client privilege applied to the draft settlement. As the OAG retorts, however, Pivec, its representative, testified during the hearing and explained that she discussed the terms of a settlement with Martin, who was serving as counsel. We are satisfied with the Agency's conclusion that the draft settlement was protected by the attorney-client privilege. First, the Agency found that Pivec sought legal advice from an attorney (explaining that "Martin does not lose his status as a lawyer and become an administrator merely because he works for the government"). *Cf. Ehrlich v. Grove*, 396

Md. 550 (2007) (communications between state official and Attorney General can be privileged). Second, the Agency found that the OAG intended to keep draft versions of the settlement agreement confidential, even though it intended to disclose a final version of the agreement. *See In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1037 (2d Cir. 1984) ("The possibility that some of the information contained in [draft] documents may ultimately be" disclosed "does not vitiate the privilege."). Accordingly, the Agency correctly concluded that the draft settlement was protected by the attorney-client privilege and not disclosable under the PIA.

II.

The appellant contends the Agency erred by denying her request to correct/remove three documents from her personnel file. *See* GP § 4-502 (stating that "[a] person in interest may request a[n agency] to correct inaccurate or incomplete information in a public record[.]"). The first document is a memorandum written by Colkley summarizing her May 3, 2012 telephone conversation with the appellant. The second and third documents are emails sent in December 2007 from Ziperman, the appellant's supervisor at the time, to Sakamoto-Wengel, the appellant's prior supervisor. In the emails, Ziperman memorializes an encounter he had that day with the appellant.

The Agency adopted the ALJ's findings and recommendation not to correct/remove those records. After hearing the testimony of the appellant, Colkley, and Ziperman, the ALJ believed that the contemporaneous accounts, written in memorandum form by Colkley and in an email from Ziperman, of their encounters with the appellant were more believable than the appellant's self-serving version made years later in which she allegedly

remembered the entire incident verbatim. Moreover, the ALJ found that the appellant's disagreements with Colkley's and Ziperman's version of events were based primarily "on the tone and inferences" that might be drawn from the documents, not their accuracy. We are persuaded that an adequate factual basis exists to support the Agency's findings and that the Agency's decision was not premised upon an erroneous conclusion of law.[11] Accordingly, we shall uphold the Agency's ruling regarding the appellant's request to correct/remove certain records.

III.

The appellant contends the Agency erred by denying her request for an *in camera* inspection of the withheld documents. She argues that the "bare bones" AVI, which was not supported by affidavit or witness testimony, and was not signed and did not have an identified author, left her without an opportunity to cross-examine witnesses about the applicability of the claimed exceptions. According to the appellant, this resulted in the burden of proof improperly being shifted to her to identify missing documents to support her *in camera* request. The appellant also argues that an *in camera* review was necessitated by the OAG's fraud in failing to disclose documents. In support of her fraud argument, she cites *U.S. ex rel. Mayman v. Martin Marietta Corp.*, 886 F.Supp. 1243, 1246 (D.Md. 1995) ("The Supreme Court has held [in *United States v. Zolin*, 491 U.S. 554, 564–70 (1989)] that a court can examine [*in camera*] an otherwise privileged document to

[11] The Agency also correctly noted that the appellant's "correction request was improper because she did not actually seek to correct any records. Rather, she requested that the OAG remove the documents from her personnel file in their entirety . . . even though she admitted that some of the material in the documents was accurate."

determine if the crime-fraud exception applies to that document."). We find no merit in the appellant's arguments.

Trial judges have discretion to order an *in camera* review to determine whether "an agency has properly applied an exemption from disclosure." *Cranford*, 300 Md. at 791. The question in determining whether an *in camera* inspection is necessary is whether the trial judge believes it is needed "to make a responsible determination on claims of exemptions." *Id.* at 779 (citation omitted). The trial judge may consider several factors in making its determination, including: judicial economy; the conclusory nature of the agency's affidavits; bad faith on the part of the agency; disputes concerning the contents of the document; whether the agency has proposed an *in camera* inspection; the strength of the public interest in disclosure; and whether the agency can give a sufficiently detailed description without revealing the very information sought to be protected. *Id.* at 779–80 (citation omitted).

We conclude, contrary to the appellant's argument, that the AVI is neither general nor conclusory. The information provided was sufficient to allow an opposing party and a court to determine whether the claimed exceptions applied. There is no requirement that an agency elicit testimony about its *Vaughn* Index nor that a *Vaughn* Index be signed, the author identified, or affidavits supporting the index be filed. The Agency addressed the appellant's *in camera* argument as to each of the eighteen documents in its final decision, noting, among other things, that the appellant does not dispute the identity of the documents only the legal application of the claimed exception and there is no evidence that the OAG

acted in bad faith. We are persuaded that the Agency's reasoning is based on an adequate factual basis.

The appellant did not raise her fraud argument below and so has failed to preserve it for review. *See* Md. Rule 8-131(a). Even if she had, however, we would find it without merit for the simple reason that without even a finding of bad faith, *see infra* part IV, she cannot show the higher standard for fraud. *See Zolin*, 491 U.S. at 572 (before engaging in an *in camera* review to determine applicability of the crime fraud exception to privileged documents, the requesting party must make a *prima facie* showing of fraud) (citations omitted).

IV.

Finally, the appellant contends the OAG failed to produce "a body of documents responsive to [her PIA] request that is maintained outside of the official personnel record." She asks this Court to issue an order directing the OAG to provide her with: 1) a transcript from a certain administrative hearing (she does not know the date) before the MCCR in which she was a participant, and 2) access to an electronic file maintained by Sakamoto-Wengel. We can quickly dismiss this contention.

The Agency, in adopting the ALJ's factual findings, thoroughly addressed the appellant's argument about the adequacy of the OAG's search for records, concluding:

> The OAG conducted an exhaustive search of its records reasonably calculated to uncover relevant records responsive to the Appellant's PIA request. The OAG produced records it could easily retrieve consistent with its day-to-day practice of information management. Pivec and Colkley assembled the documents in response to the Appellant's PIA request, and Pivec asked other OAG employees to search their records for responsive documents.

> . . . As a result, the OAG provided the Appellant with hundreds of pages of documents in response to her request for her personnel records and documents related to her discharge from the OAG. The records produced included both internal and third-party complaints regarding the Appellant's employment, primarily in the form of email communications, but also in letters.

The Agency also adopted the following analysis:

> The Appellant attempted to characterize the OAG's actions in providing additional documents over time as evidence of the agency's bad faith and an attempt to deny her access to responsive materials. On the contrary, I find that the OAG's actions in providing additional documents during this proceeding demonstrate its good faith attempt to respond to the Appellant's PIA request and to her request for production of documents, and to respond to questions and clarifications she raised at the motions hearing and in pleadings. The evidence demonstrates that the OAG carefully searched its extensive database, conducted further review in response to questions raised by the Appellant, and provided her with some attachments and unredacted information not previously disclosed. With a large database and with several different employees having knowledge and access to various responsive records, the OAG's actions demonstrate a good faith, coordinated effort to comply and produce "records it [could] easily retrieve consistent with its day-to-day practice of information management." *McCready* [*v. Nicholson*], 465 F.3d [1,] 11 [(D.C. Cir. 2006)].

The appellant never raised below any argument regarding the hearing transcript and the electronic file, and accordingly, she has failed to preserve her argument on appeal. *See* Md. Rule 8-131(a). However, even if she had properly preserved her argument, we would find it without merit. Her argument as to the two documents, like the arguments she did raise below regarding other documents that she alleged were not provided to her but which the Agency found to the contrary, is based on mere suspicion and speculation. Accordingly, we again find that the Agency's reasoning that the OAG acted in good faith to provide her with documents is based on an adequate factual basis.

For all these reasons, we shall affirm the judgment of the Circuit Court for Baltimore City sustaining the Agency's final decision.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.