

Circuit Court for Baltimore City
Case No. 24-C-2000-1270

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1058

September Term, 2020

OPEN JUSTICE BALTIMORE

v.

CITY OF BALTIMORE, ET AL.

Fader, C.J.,
Shaw Geter,
Harrell, Glenn T., Jr.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: August 6, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court, or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case arises from a Maryland Public Information Act (“MPIA”) request submitted on behalf of Appellant, Open Justice Baltimore, to the Baltimore City Civilian Review Board (“CRB”), seeking records relating to complaints against officers of the Baltimore City Police Department (“BPD”).¹ The CRB declined to produce files generated by the BPD’s Internal Investigative Division (“IID”) and demanded prepayment of the estimated costs and fees associated with the review, redaction, and reproduction of other records. When the records were not disclosed promptly, Appellant filed suit in the Circuit Court for Baltimore City, seeking declaratory and injunctive relief, as well as damages. In its complaint, Appellant named as defendants the City of Baltimore, the Baltimore City Office of Equity and Civil Rights, and Darnell Ingram (collectively, “Appellees”).² Appellees moved to dismiss or, in the alternative, for summary judgment. Appellant, in turn, filed an opposition and a cross-motion for summary judgment.

The court held a hearing on the parties’ motions and, in an order entered on 30 October 2020, granted summary judgment in favor of Appellees. Appellant appealed timely from that judgment and briefed the following questions for our consideration:

1. Do the specific Public Local Laws that establish the Baltimore Civilian Review Board override a general personnel records exemption of the Public Information Act and as a result allow for the public disclosure of

¹ The CRB is “an independent agency tasked with investigating complaints from the public regarding police misconduct.” *Wilbon v. Hunsicker*, 172 Md. App. 181, 194 (2006), *cert. denied*, 398 Md. 316 (2007).

² Mr. Ingram was named in his official capacity as the Director of the Baltimore City Office of Equity and Civil Rights.

- records provided to the Civilian Review Board by the Baltimore Police Department?
2. Are records created by the Baltimore Civilian Review Board subject to the Public Information Act's personnel record exemption, even though the records were created by an agency that lacks supervisory powers over the subjects of the records?
 3. Can an agency demand the prepayment of estimated production costs for Public Information Act record requests before beginning production, where no authority allows that agency to make such a demand?

Although raised in its brief, Appellant abandoned the first and second issues at oral argument. We will forego, therefore, examining the merits thereof. *See McCracken v. State*, 429 Md. 507, 515-16 n.6 (2012) (declining to address a Fourth Amendment challenge where the State abandoned that contention at oral argument); *Lazorcak v. Feuerstein*, 273 Md. 69, 73 n.3 (1974) (declining to consider the issue of fraudulent inducement where, although initially proposed by the appellant, the issue was abandoned at oral argument); *Mayor and City Council of Baltimore v. Guttman*, 190 Md. App. 395, 409 n.7, *cert. denied*, *Guttman v. Baltimore*, 415 Md. 39 (2010); *Wright v. Hixon*, 42 Md. App. 448, 450 (1979) (“At oral argument, appellants abandoned issue 4. Therefore, it will not be necessary for us to consider that issue in this opinion.”).

Concluding, as we shall, that Appellant's third issue is not preserved for our review, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

In an e-mail of 13 January 2020, a Baltimore Action Legal Team (“BALT”)³ attorney, acting on Appellant’s behalf, requested that the CRB produce the following:

1. All civilian and other complaints received by the Civilian Review Board, and subsequently created and obtained records related to those complaints, including but not limited to: investigations, findings, and recommendations. Include all files that the Civilian Review Board deemed closed during the period of January 1, 2019[,] through and including December 31, 2019. Please include the entire file and all related documents as further described below.

2. All civilian and other complaints received by the Civilian Review Board, and subsequently created and obtained records related to those complaints, including but not limited to: investigations, findings, and recommendations. Include all files that the Civilian Review Board has had under open investigation for over twelve months. Please include the entire file and all related documents as further described below.

3. Any records obtained from a police department regarding the conduct of a police officer involved in a Civilian Review Board investigation that the Civilian Review Board deemed closed during the period of January 1, 2019 through and including December 31, 2019.

4. All disciplinary recommendations made by the Civilian Review Board to the Baltimore Police Department, and other police departments, during the period of January 1, 2019[,] through and including December 31, 2019.

5. All records of civilian and other complaints obtained from the Baltimore Police Department, and other police departments. This includes any and all records obtained from the police with those complaints, such as but not limited to: investigations and evidence. Include all files that either the Civilian Review Board or the police deemed closed during the period of January 1, 2019 through and including December 31, 2019.

6. All findings, recommendations, and related records related to each complaint investigated by the Baltimore Police Department, and other police

³ BALT is an “organization[] that provide[s] support for community-centered efforts to improve the criminal justice system.” *Soderberg v. Carrion*, 999 F.3d 962, 965 (4th Cir. 2021).

departments, that was shared with the Civilian Review Board for all files the Civilian Review Board or the police deemed closed during the period of January 1, 2019 through and including December 31, 2019.

7. Any records obtained from the Baltimore Police Department, or other police departments, in the ordinary course of business related to the investigation of complaints that related to files that the Civilian Review Board deemed closed during the period of January 1, 2019[,] through and including December 31, 2019.

In a response sent on behalf of the CRB on February 3, Appellant’s request for the IID reports was denied implicitly, reasoning that Baltimore City, Public Local Law, § 16-52(b) deemed the IID the sole and exclusive custodian of such records.⁴ The CRB representative then explained that Maryland Code (2014, 2019 Repl. Vol.), § 4-301(a)(1) of the General Provisions Article (“GP”) requires that it “deny inspection of a public record or any part of a public record if by law, the public record is privileged or confidential.” She advised further that Baltimore City, Public Local Law, § 16-52(a) prohibits the disclosure of “records containing the names or identification of complainants, investigators, and witnesses[.]” She asked whether, given these restrictions, Appellant wished to maintain its request, cautioning: “This review and redaction may not yield many useful records, but it will not be possible to know this until the review and redaction is completed.” Finally, the CRB representative informed Appellant that she charged an hourly

⁴ Baltimore City, Public Local Law, § 16-52(b) provides, in pertinent part: “The Internal Investigative Division shall retain sole custody of an Internal Investigative Division Report.”

rate of \$23.95 and asked: “Can I help you narrow what you are seeking so that you do not have to pay any costs?”⁵

In a responding e-mail sent that same day, the BALT attorney elicited clarification on three points. First, he asked whether the CRB intended to redact the names of complainants, investigators, and witnesses—and not the names of the officers being investigated—or whether pages bearing those names would be withheld entirely. Secondly, he requested confirmation that the CRB would produce “records provided to the CRB from BPD.” Finally, he asked whether the CRB would grant a fee waiver pursuant to GP § 4-206(e).⁶

On February 11, the BALT attorney sent yet another e-mail to the CRB representative in which he noted that the ten-working-day deadline for providing written notice of its decision had lapsed and apprised her that the 30-day disclosure deadline

⁵ This seems to have been an implicit reference to GP 4-206(c), which prohibits an official custodian of public records from charging a fee for the first two hours needed to search for such a record and prepare it for inspection.

⁶ GP § 4-206 provides:

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

(1) the applicant asks for a waiver; and

(2) (i) the applicant is indigent and files an affidavit of indigency; or

(ii) after consideration of the ability of the applicant to pay the fee and other relevant factors, the official custodian determines that the waiver would be in the public interest.

expired the following day.⁷ He repeated his inquiries regarding fee waiver and redaction, and stated that if he did not receive a reply by the end of the week he would interpret such silence as a constructive denial of the entire MPIA request. In a reply sent later that day, the CRB representative wrote:

⁷ GP § 4-203 governs the timeliness of a decision on a MPIA application, and provides, in pertinent part:

(b)(1) A custodian who approves the application shall produce the public record immediately or within a reasonable period that is needed to retrieve the public record, but not more than 30 days after receipt of the application.

* * *

(c)(1) A custodian who denies the application shall:

(i) within 10 working days, give the applicant a written statement that gives:

1. the reasons for the denial;
2. if inspection is denied under § 4-343 of this title:
 - A. a brief explanation of why the denial is necessary; and
 - B. an explanation of why redacting information would not address the reasons for the denial;
3. the legal authority for the denial;
4. without disclosing the protected information, a brief description of the undisclosed record that will enable the applicant to assess the applicability of the legal authority for the denial; and
5. notice of the remedies under this title for review of the denial[.]

[T]here would need to be redactions of names of complainants, investigators[,] and witnesses. . . . I cannot tell you with specifics of the required redactions until seeing the actual documents first and reviewing what they say with the applicable laws on the subject.

As for the IID file, even though it is given to [the] CRB for particular reviews, the General Assembly has decided that the CRB is deemed not to be the record custodian of that file for purposes of the Public Information Act. Therefore, the request to the CRB for that file will not result in the production of that file.

Finally, because there are so many documents at issue in your request, and because you would not receive IID files or the names of complainants, investigators or witnesses, I wanted to see if you wanted to narrow your request or were still interested in the documents since so much may have to be redacted. In addition, regardless of a fee, redaction takes a lot of time. Thus, it may be a while before responsive documents are received. Do you want just a sample or a particular matter instead?

The BALT attorney responded to the CRB representative the following day. In that communicate, he acknowledged that the review and reproduction of the records would be time consuming. He advised that Appellant declined to reduce the scope of its initial request, confirming that it sought all records pertaining to the complaints that the CRB had received, the investigations that it had conducted, any proceedings related thereto, and the recommendations that the CRB had made. The BALT attorney then requested an estimate of how long it would take the CRB to produce those records and elicited confirmation that the public interest waiver had been denied.

In an e-mail sent on February 24, the CRB representative notified the BALT attorney that “there are 33 closed cases for 2019” and estimated that, assuming each file contained 100 pages, it would take her approximately 33 hours to review, redact, and

reproduce them. She explained further that her other professional duties precluded her from working continuously on fulfilling the records request. Accordingly, she projected that “it could be weeks before I would be able to release whatever parts of the files that I could from the year 2019.”

In yet another e-mail, the BALT attorney reiterated that Appellant sought all the records that it had requested initially, including both the “closed CRB files and the CRB files [that had been] open for an extended period of time.” He then asked that “any privileges, redactions, or exemptions [be] discussed before actual application and [that] an index [be] produced.” The BALT attorney asked also that the CRB specify which records it would deny and which it would disclose. Finally, he advised the CRB representative that if he did not receive a response by week’s end, he would interpret such reticence as an “unnecessary delay.”

In a complaint, filed on March 2nd in the Circuit Court for Baltimore City, Appellant alleged that Appellees had “failed to provide a ten-day notice of denial in response to the [M]PIA request” as prescribed by GP § 203-c. It claimed further that Appellees had violated the MPIA by relying on “inapplicable and fictitious exemptions and privileges, by . . . not assisting in the request, and by [their] willful refusal to provide any and all records responsive to the request[.]” Finally, Appellant alleged both that Appellees had charged unreasonable fees and that the denial of its fee waiver request was arbitrary and capricious.⁸

⁸ In its complaint, Appellant did not allege that Appellees violated the MPIA or any other law, rule, or regulation by demanding prepayment of fees as a condition precedent

On the same day that Appellant filed suit (but after it had done so), the BALT attorney received an e-mail from the CRB representative with whom he had conversed previously. That e-mail read:

Since you are not interested in narrowing the request, I want you to know that we have begun the process of gathering each of the files. While the actual charge will be based on my review time, the files are estimated to contain 100 pages each. A review of 5,500 pages at \$23.95 an hour is \$1,317.25 fee. While we have no doubt that your entity serves a laudable purpose, the City normally does not completely waive fees for such a time-intensive task because the [M]PIA contemplates the government’s recoupment of the cost for these requests. The City is willing to cut the fee in half, however. Please send me [a] check for \$658.625 [sic] made payable to the Director of Finance. Once I receive it, I can begin this work. I will keep you updated.

On 13 August 2020, Appellees filed a motion to dismiss or, in the alternative, for summary judgment, and request for a hearing. In that motion, Appellees asserted that they complied with GP § 4-203(c)(1) by identifying properly the records requested, specifying those that it would withhold, and citing the legal bases for its withholding or redacting any requested records. Appellant responded with an opposition and cross-motion for summary judgment, in which it complained for the first time that Appellees had “demanded prepayment of fees for production of records in violation of the [MPIA].” Following a full hearing, the circuit court granted Appellees’ motion for summary judgment, in which it reasoned that: (i) the CRB was “not the custodian of the Internal Investigative Division

for their complying with the MPIA request, nor did it amend that complaint to include any such assertion.

reports”; (ii) the fees charged had been reasonable; (iii) Baltimore City had been required to redact excerpts from the requested records; (iv) the denial of Appellant’s fee waiver request was neither arbitrary nor capricious; and (v) the CRB was correct in applying the personnel exception to the MPIA.

DISCUSSION

Although Appellant abandoned at oral argument its first two appellate contentions, it continues to maintain that the CRB lacked the “authority to demand prepayment” and that by doing so it violated Appellant’s right of access pursuant to the MPIA. Appellees contend, *inter alia*, that this argument was neither included in Appellant’s complaint, nor ruled upon by the circuit court. Accordingly, Appellees assert that this contention is not preserved for our review. *See* Md. Rule 8-131(a) (“Ordinarily, the appellate court will not decide any other issue unless it plainly appears . . . to have been raised in or decided by the trial court[.]”). We agree with Appellees.

“A trial court’s authority to act in a case is ‘limited by the issues framed by the pleadings.’” *Dietrich v. State*, 235 Md. App. 92, 102 (2017) (quoting *Gatuso v. Gatuso*, 16 Md. App. 632, 637 (1973)), *cert. denied*, 457 Md. 669 (2018). Accordingly, a “court has ‘no authority, discretionary or otherwise, to rule upon a question not raised as an issue by the pleadings[.]’” *Id.* (Quoting *Gatuso*, 16 Md. App. at 633). *See also Tshiani v. Tshiani*, 208 Md. App. 43, 51 n.6 (2012) (“A contention not raised below either in the pleading or in the evidence and not directly passed upon by the trial court is not preserved for appellate review.” (Quoting *Zellinger v. CRC Dev. Corp.*, 281 Md. 614, 620 (1977))), *aff’d*, 436

Md. 255 (2013). *Cf. Allied Inv. Corp. v. Jasen*, 354 Md. 547, 568 (1999) (“[A]ppellate courts generally are restricted to determining whether the trial court’s grounds for granting the motion to dismiss were legally correct[.]”).

As noted *supra*, although Appellant’s complaint alleged that the costs and fees at issue were unreasonable and that the denial of its fee waiver request was arbitrary and capricious, it did not challenge the CRB’s demand for advanced payment. In fact, at the time that the complaint was filed, a request for prepayment had not yet been made. Upon learning of that demand, Appellant did not amend its complaint to allege that requiring prepayment in advance of disclosure violated the MPIA or was otherwise illegal. Rather, it first raised this issue in its opposition to Appellees’ motion for summary judgment and cross-motion for summary judgment. In light of Appellant’s failure to raise this issue in its pleadings, the circuit court did not address even remotely the merits of this issue when ruling on the parties’ summary judgment motions. *See Gatuso, supra*, 16 Md. App. at 637 (“[T]he authority of the court to act in any case is . . . limited by the issues framed by the pleadings.”). Given that Appellant’s complaint did not address this issue, its failure to amend that complaint, and the court having declined to rule on the merits thereof, this issue is not preserved properly on this record for our review. While we have discretion to review such unpreserved issues, Appellant has neither asked that we do so, nor do we perceive any reason to “exercise th[is] extraordinary prerogative” on the state of this record. *Martin v. State*, 165 Md. App. 189, 195 (2005) (citation omitted), *cert. denied*, 391 Md. 115 (2006).

For the foregoing reasons we affirm the court's entry of summary judgment in favor of Appellees.

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE CITY AFFIRMED;
COSTS TO BE PAID BY APPELLANT.**