Circuit Court for Baltimore City
Case No. 2-C-19-002271

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1274

September Term, 2020

MAYOR AND CITY COUNCIL
OF BALTIMORE

v.

FRIENDS OF GWYNNS FALLS/LEAKIN
PARK, INC., ET AL.

Kehoe,
Nazarian,
Raker, Irma S. Raker,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Kehoe, J.

Filed: January 7, 2022

The issue in this interlocutory appeal is whether the Circuit Court for Baltimore City erred when it denied a motion to quash subpoenas requiring former Baltimore Mayor Bernard C. "Jack" Young and former Comptroller Joan Pratt to appear for depositions in a civil action. The appellant is the Mayor and City Council of Baltimore; the appellees are the Friends of Gwynns Falls/Leakin Park, Inc. and several individuals[1] (collectively the "Friends"). The City presents one issue, which we have reworded:

> Did the circuit court abuse its discretion in denying the City's motion to quash subpoenas to depose former Mayor Young and former Comptroller Pratt about their roles in the City's Board of Estimates' decision-making process with respect to the grant of a franchise?[2]

Because the answer to this question is yes, we will reverse the judgment of the circuit court.

BACKGROUND

"Franchise" is a protean term in American jurisprudence. In this opinion, we will use the term to mean a "right conferred by the government esp. one given to a public utility, to use property for public use but for private profit." *Black's Law Dictionary* 800 (11th ed.

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[1] The other appellees are Jack Lattimore, George Farrant, and Bridget McCusker. {E 18}

[2] The City articulates the issue as follows:

> Whether the circuit court abused its discretion in refusing to quash subpoenas to depose the mayor and comptroller of Baltimore, two members of the City's Board of Estimates, about the Board's decision-making with respect to a franchise.

2019). The governmental unit in this case is the Mayor and Council of Baltimore, the private party is Baltimore Gas and Electric Company ("BGE"), the public use is a natural gas pipeline, and the public property at issue is a part of Baltimore's iconic Gwynns Falls/Leakin Park.

In 1949, BGE constructed a pipeline across a portion of the park to provide natural gas service to customers within Baltimore City and the greater Baltimore region. More than five decades later, BGE approached the City with a proposal to replace part of the existing pipeline with a new line[3] located in a different part of the park. The first step in the process occurred in 2017, when BGE and the City entered into a right of entry agreement whereby the utility obtained the right to relocate a portion of the pipeline to a different location within the park. As part of the 2017 agreement, BGE agreed to pay the City approximately $3.1 million for park maintenance, forest conservation, and environmental mitigation expenses associated with relocating the pipeline. In addition to the right of entry, BGE was required to obtain a franchise from the City.

In Baltimore, the City Council has the ultimate authority to grant a franchise. *See* Baltimore City Charter, Art. VIII § 1. However, before the City Council can act, the Charter

[3] Aging natural gas pipelines pose a significant threat to public safety. *See Washington Gas Light Co. v. Maryland Pub. Serv. Comm'n*, 460 Md. 667, 686–89 (2018) (discussing the legislative history of Md. Code, Pub. Util. Cos. § 4-210). Section 4-210 was enacted "in response to increasing concerns about threats to public safety posed by aging and deteriorating gas infrastructure throughout the state." 460 Md. at 671.

requires that the proposed franchise agreement be submitted to City's Board of Estimates (the "Board") for the Board to make a

> diligent inquiry as to the money value of said franchise or right proposed to be granted and the adequacy of the proposed compensation to be paid therefor to the City as offered in said ordinance, and the propriety of the terms and conditions of said ordinance[.]

Charter Art. VIII § 2.

The Board is also required "to fix . . . the said compensation at the largest amount it may be able to obtain[.]" *Id.* Moreover, the Board is authorized to increase the compensation to be paid by the franchisee, and to change the terms of the ordinance granting the franchise, including the location of the area to be subject to the franchise, as long as the changes "are not inconsistent with the requirements and provisions of the Charter." *Id.* The terms and conditions imposed by the Board must be attached to the final version of the franchise ordinance. *Id.*

The Board is comprised of the mayor, the City Council president, the City comptroller, the City solicitor, and the City director of public works. Charter Art. VI § 1(a). We now turn to the events giving rise to this appeal.

On April 11, 2019, while BGE's franchise request was pending before the Board, the Friends filed the present action seeking various forms of declaratory and injunctive relief.

On April 26, 2019, Reginald R. Moore, the director of the City's Department of Recreation and Parks, recommended to the Board that the franchise fee should be a one-time payment of $1.4 million.[4]

The Board considered the proposed franchise agreement at a meeting on May 1, 2019. Before acting on the proposed franchise ordinance, the Board heard from proponents and opponents to the proposed franchise. Jack Lattimore, a member of the Friends' board of directors, stated that the Board had "had failed "to conduct a diligent inquiry into the value of the franchise being granted" or to fix fee "the largest amount [the City could] obtain." Victor K. Tervala, a member of the City's Department of Law, responded to these assertions, explained his view of the relationship between the Board and its staff, and offered an explanation of the basis for the City's staff's recommendation of a $1.4 million franchise fee.[5]

[4] The franchise fee was in addition to the $3.1 million that BGE paid to the City for its right of entry.

[5] The record contains no evidence as to the proceedings before the Board on that day. In its appellate brief, the City directs us to the minutes of the Board's meeting, which includes a transcript of the proceedings. We take judicial notice of the fact that the minutes of the May 1 meeting includes the statements from Mr. Lattimore and Mr. Trevala referred to in the main text. *See* Md. Rule 5-201. But taking judicial notice that a transcript contains an assertion of fact is not the same as concluding that the assertion is accurate. *Cf. Abrishamian v. Washington Medical Group*, 216 Md. App. 386, 416 (2014) ("Noticing pleadings does *not* mean accepting what they say as true, only that they exist as public records." (emphasis in original)).

On May 1, 2019, the Board approved the franchise ordinance. After the Board's approval, the City Council enacted an ordinance approving the franchise agreement. The Friends then filed an amended complaint, which is the operative complaint for our purposes. Pertinent to the issues raised in this appeal, the complaint alleges that the members of the Board pervasively failed to carry out their duties set out in Charter Art. VIII § 2 with the result that the franchise fee was "grossly inadequate" to compensate the City and its citizens for the "value of the parkland permanently destroyed" by the pipeline project. The Friends sought a declaratory judgment that the franchise was invalid and a writ of mandamus directing the members of the City Council and the Board to fulfill their duties imposed by the relevant provisions of the City Charter.

In the course of discovery, the City produced over 3,000 pages of City records regarding its negotiations with BGE regarding the franchise agreement. Additionally, the Friends deposed several City officials who directly handled the negotiations with BGE and/or advised the Board with regard to the franchise agreement: Mr. Tervala and Hana Rose Kondratyuk, another senior member of the City's Department of Law; as well as Ashley Bowers, a natural areas conservation analyst with City's Recreation and Parks Department. The Friends asserted that they were not satisfied with the information gathered through discovery. The City agreed to make other City officials available for deposition, including Reginald R. Moore, the director of the Recreation and Parks Department. This was still not enough to satisfy the Friends, and on September 25, 2020, they filed notices to take the depositions of then-sitting Mayor Young and then-sitting Comptroller Pratt.

The City filed a motion to quash the subpoenas. It argued that the Friends were not entitled to question either the Mayor or the Comptroller as to their "mental process[es] behind their votes to approve" the franchise fee. Additionally, the City asserted that requiring the Mayor and the Comptroller to testify would place an undue burden on the City and that their appearance at a deposition could be justified only if the Friends demonstrated that there were exceptional circumstances to support the request or material personal involvement by those officials in the decision-making process. The City argued that there were no exceptional circumstances warranting the depositions nor was there any showing that either Mr. Young or Ms. Pratt had been materially personally involved in the pipeline controversy. Finally, it was the City's position that, to the extent that the Mayor and the Comptroller testified, their testimony would be duplicative of the deposition testimony provided by other City officials.

As legal support for its contentions, the City cited *Johnson v. Clark,* 199 Md. App. 305 (2011); *United States v. Merhige*, 487 F.2d 25, 29 (4th Cir. 1973); and *United States v. Singer Sewing Machine Co*., 329 F.2d 200, 206–08 (4th Cir. 1964). As we will explain, these cases all involved application of the "*Morgan* doctrine,"[6] which limits the ability of litigants to depose high-ranking government officials.

[6] *See United States v. Morgan*, 313 U.S. 404, 422 (1941).

In their response and pertinent to the issues raised on appeal, the Friends asserted that the City had not identified how taking "brief depositions" of the Mayor and Comptroller would unduly burden the City. The Friends contended that they were not required to make a showing of exceptional circumstances or material personal involvement in order to take the depositions. This was so, they said, because they were not seeking to learn "the mental processes" that led up to the Mayor and the Comptroller's decision to vote in favor of the franchise agreement but rather "what actions" the officials took and "what information they were provided and relied upon." The Friends asserted that the burden was on the City to "make a particular and specific demonstration of fact . . . revealing some injustice, prejudice, or consequential harm that would result if protection [from discovery] is denied." (quoting *Tanis v. Crocker*, 110 Md. App. 559, 574 (1996)). Finally, they argued that the information provided by the Mayor and the Comptroller would not be duplicative because "Plaintiffs have not deposed any other member of the Board of Estimates and the information they have regarding this matter is not available by other means."[7]

[7] The sole legal authority for these contentions cited by the Friends was *Tanis v. Crocker*. The relevant issue in *Tanis* was whether the circuit court erred in granting one spouse's motion for a protective order to prevent the other spouse from reviewing unredacted copies of his tax returns for several years, a loan application, and settlement documents from the sale of a residence because producing them would be an undue hardship and intended to annoy and embarrass him. 110 Md. App. at 576. *Tanis* has nothing to do with the *Morgan* doctrine or any other legal principle involving testimonial privileges.

The Friends filed their response on October 23, 2020. Mr. Young and Ms. Pratt were unsuccessful in the 2020 Baltimore municipal elections and their terms expired on December 8th. On December 11th, and without a hearing, the circuit court denied the motion to quash. The court provided no explanation for its decision. The City has appealed the court's order. [8]

THE STANDARD OF REVIEW

The trial court's decision in denying a motion to quash a subpoena involves the exercise of the court's discretion. *See, e.g.*, *WBAL-TV Div., Hearst Corp. v. State*, 300 Md. 233, 247 (1984); *Floyd v. Baltimore City Council*, 241 Md. App. 199, 207-208 (2019). Although the circuit court did not provide an explanation for its decision, the issue presented to it was the scope and proper application of the *Morgan* doctrine, first espoused by the United States Supreme Court in *United States v. Morgan*, 313 U.S. 404, 422 (1941), and further developed by subsequent federal and state appellate decisions. When a trial court's exercise of its discretion "involves an interpretation and application of statutory and case law, [an appellate court] must determine whether the lower court's conclusions are legally correct

[8] Court orders denying motions to quash efforts to depose high-ranking government officials regarding their decision-making processes are appealable under the collateral order doctrine. *Johnson v. Clark*, 199 Md. App. 305, 308 n.1 (2011) (citing, among other cases, *Ehrlich v. Grove*, 396 Md. 550, 562–64 (2007)); *see also* Kevin F. Arthur, FINALITY OF JUDGEMENTS AND OTHER APPELLATE TRIGGER ISSUES 52 (3rd ed. 2018) (collecting cases).

under a *de novo* standard of review." *Saint Luke Institute v. Jones*, 471 Md. 312, 329 (2020) (citing *Nesbit v. Gov't Emps. Ins. Co.*, 382 Md. 65, 72, 854 A.2d 879 (2004).

THE *MORGAN* DOCTRINE

United States v. Morgan, 313 U.S. 409, 422 (1941), was the third time that a protracted dispute over rates charged by companies doing business in the Kansas City Stockyards came before the United States Supreme Court.[9] In the earlier stages of the litigation, the Secretary of Agriculture determined that the companies in question had overcharged customers in violation of federal law and impounded the excess fees. *Id.* at 413–14. The primary issue before the Supreme Court in *Morgan* was whether the Secretary had erred in allocating the impounded funds among various parties who had presented conflicting claims to the money. *Id.* at 414. After concluding that the Secretary's decision was a reasonable one in light of the evidence presented, the Court turned to another matter: whether the trial court erred in permitting the parties to depose the Secretary as to the basis for his decision and then requiring him to testify at trial. *Id.* at 421. In both the deposition and at trial, the Secretary "was questioned at length regarding the process by which he reached the conclusions of his order, including the manner and extent of his study of the record and

[9] The prior cases were *Morgan v. United States*, 304 U.S. 1, 13 (1938), and *Morgan v. United States*, 298 U.S. 468, 469 (1936).

his consultation with subordinates." *Id*. at 422. After observing that "the short of the business is that the Secretary should never have been subjected" either to a deposition or to testifying at trial, the Court stated:

> [I]t was not the function of the court to probe the mental processes of the Secretary. Just as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected. It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other.

313 U.S. 421–22 (cleaned up).

This was the genesis of the *Morgan* doctrine. In the intervening six decades, both federal and state courts have applied it in a variety of contexts. In doing so, the courts have broadened its scope in certain respects. There are many decisions[10] and inevitably, not all of them are in lockstep. Nonetheless, several principles have emerged.

First, as to quasi-judicial administrative decisions, *Morgan* "unequivocally established . . . that a party challenging [an] agency action is ordinarily forbidden from inquiring into the mental processes of an administrative official" in reaching the decision in question.

[10] According to Westlaw's search engine, the relevant holding in *Morgan* itself has been cited in over 400 trial and appellate court decisions. *See* https://1.next.westlaw.com/RelatedInformation/Ib1b388869cbf11d993e6d35cc61aab4a/kcCitingReferences.html?docSource=273658c899204d0a888c3c1dc7aa90a9&pageNumber=5&facetGuid=h16096aaa8cfd31b036fbe9a5f46bd2a4&ppcid=32d82f66ff4f425287b99fe3f46e5882&transitionType=ListViewType&contextData=(sc.UserEnteredCitation) (last visited November 24, 2021).

Public Serv. Comm'n v. Patuxent Valley Conservation League, 300 Md. 200, 214 (1984).[11] The parties do not assert that the Board was engaged in a quasi-judicial proceeding when it reviewed the franchise agreement at issue in this case.

Second, courts have repeatedly held that "a high-ranking government official should not—absent exceptional circumstances—be deposed or called to testify regarding the reasons for taking official action, including the manner and extent of his study of the record and his consultation with subordinates." *Lederman v. New York City Dep't of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013); *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir.2007) (same)[12]; *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985) ("[T]op executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions.")[13]; *United States v. Wal-Mart Stores, Inc.*, 2002 WL 562301 at *1 (D. Md. 2002)

[11] In its opinion, the Court recognized that there was an exception to the rule "where there is a "'strong showing' of bad faith or improper procedure it may be proper for the circuit court to consider post-administrative testimony of individual agency decision makers, and any additional post-administrative evidence which such testimony may lead to[.]" 300 Md. at 217; *see also Colao v. County. Council of Prince George's County*, 109 Md. App. 431, 466 (1997).

[12] The "high government officials" in *Lederman* and *Bogan* were, respectively, the mayors of New York and Boston.

[13] The officials in question in *Simplex* were the Solicitor of Labor, the Secretary's chief of staff, a regional administrator and an area director of the Occupational Safety and Health Review Commission. 766 F.2d at 580.

("*Morgan* has come to stand for the notion that as for high-ranking government officials, their thought processes and discretionary acts will not be subject to later inspection under the spotlight of deposition. Decision-makers enjoy a mental process privilege.").[14]

These decisions reflect a concern that high-ranking public officials "have greater duties and time constraints than other witnesses. If courts did not limit these depositions, such officials would spend an inordinate amount of time tending to pending litigation." *Moriah v. Bank of China*, 72 F.Supp.3d 437, 440 (S.D. N.Y. 2014) (quoting *Bogan v. City of Boston*, 489 F.3d at 423)). Relatedly, some courts have stated because "depositions can be used to harass parties . . . . 'high-ranking government officials should not be subject to the taking of depositions absent extraordinary circumstances.'" *Odom v. Roberts*, 337 F.R.D. 359, 363 (N.D. Fla. 2020) (quoting *United States v. Sensient Colors, Inc.*, 649 F. Supp. 2d 309, 321 (D. N.J. 2009)).[15]

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[14] It is now this Court's policy to permit "the citation of unreported opinions of federal courts or the courts of other states for persuasive value, provided that the jurisdiction that issued any particular opinion would permit it to be cited for that purpose." *Gambrill v. Board of Education of Dorchester County*, 252 Md. App. 342, ___, 259 A.3d 144, 150 n.6, *cert. granted*, 476 Md. 238, 259 A.3d 787 (2021); *CX Reinsurance Co. v. Johnson*, 252 Md. App. 393, ___, 259 A.3d 174, 186 n.7 (2021). *See* https://www.courts.state.md.us/sites/ default/files/import/cosappeals/pdfs/20210908policymemounreportedopinions.pdf.

[15] In *Monti v. State*, 151 Vt. 609, 612–13 (1989), Supreme Court of Vermont drew a distinction between "the content of the testimony, for which an executive branch official might claim executive privilege [and] a doctrine founded on notions of the public's interest in limiting unnecessary demands on the time of highly-placed public officials." In *Hamilton v. Verdow,* 287 Md. 544, 561 (1980), the Court of Appeals cited *Morgan* as well as other

Third, the *Morgan* doctrine applies to former, as well as incumbent, high-ranking government officials. *See, e.g., Arnold Agency v. West Virginia Lottery Comm'n*, 206 W. Va. 583, 599 (1999) ("Former high-ranking government administrators, whose past official conduct may potentially implicate them in a significant number of related legal actions, have a legitimate interest in avoiding unnecessary entanglements in civil litigation. That interest obviously survives leaving office."); *United States v. Wal-Mart Stores, Inc*., 2002 WL 562301, at *3 (D. Md. 2002) (If *Morgan* immunity lapses when a high-ranking official leaves office, then "such public servants should very well expect a mailbag full of deposition subpoenas on the day they depart office. If the immunity *Morgan* affords is to have any meaning, the protections must continue upon the official's departure from public service.").

Finally, *Morgan* immunity is "not absolute." *Bogan*, 489 F.3d at 423 (citing *United States v. Wal-Mart Stores,* 2002 WL 562301, at *3 ("[C]ourts will require the high-ranking official [to] submit to deposition in litigation not specifically directed at his conduct if: 1)

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cases, as standing for the proposition that courts "throughout the country, both federal and state, have recognized the doctrine of executive privilege which, in addition to state and military secrets, gives a measure of protection to the deliberative and mental processes of decision-makers."

As this Court noted in *Johnson v. Clark*, 199 Md. App. 305, 326 (2011), "the relationship between the doctrine of executive privilege and the *Morgan* doctrine is unclear" in the Maryland cases. We did not address the issue in *Johnson* because the parties framed their arguments at both the circuit court and appellate levels exclusively in terms of the *Morgan* doctrine. *Id.* The same is true in the present case and we will limit our analysis accordingly.

extraordinary circumstances are shown; or 2) the official is personally involved in a material way.").

A party demonstrates "exceptional circumstances" when it shows that "the official has unique first-hand knowledge related to the litigated claims or that the necessary information cannot be obtained through other, less burdensome or intrusive means." *Lederman*, 731 F.3d at 203; *see also In re Cheney,* 544 F.3d 311, 314 (D.C. Cir. 2008) ("The duties of high-ranking executive officers should not be interrupted by judicial demands for information that could be obtained elsewhere.").

In *Johnson v. Clark,* this Court summarized the *Morgan* doctrine as follows:

> In *Morgan*, the Supreme Court created an exception to the general discovery principles as it applies to high-ranking officials holding public office. Under the doctrine, as developed in later case law, high-ranking government officials are not subject to being deposed with respect to their mental processes in performing discretionary acts. The privilege applies to former as well as current officials.
>
> The *Morgan* doctrine is not absolute, for instance, in situations where a high-ranking official's involvement becomes less supervisory and directory and more hands-on and personal, that it is considered so intertwined with the issues in controversy, fundamental fairness may require the deposition of an official. In general, a deposition of a high-ranking official in litigation not specifically directed at his alleged misconduct will only be permitted if (1) extraordinary circumstances are shown, or (2) the official is personally involved in a material way. The burden is on the party seeking the deposition of the high-ranking official to demonstrate the existence of the foregoing.
>
> With respect to personal involvement, knowledge or awareness of information that may be helpful if discovered is insufficient to make the requisite showing. With respect to determining whether extraordinary circumstances exist the courts consider whether the party seeking the deposition has shown:

> (1) that the official's testimony is necessary to obtain relevant information that is not available from another source; (2) the official has first-hand information that could not be reasonably obtained from other sources; (3) the testimony is essential to that party's case; (4) the deposition would not significantly interfere with the ability of the official to perform his government duties; and (5) that the evidence sought is not available through any alternative source or less burdensome means.

199 Md. App. 323–24 (2011) (cleaned up).

As we explained in *Johnson*, 199 Md. App. at 324, the *Morgan* doctrine has been applied in several decisions by the Court of Appeals. *See, e.g., Hamilton v. Verdow,* 287 Md. 544, 562 (1980), *PSC v. Patuxent Valley Conservation League*, 300 Md. 200, 214 (1984); and *Montgomery County v. Stevens*, 337 Md. 471, 481 (1995).

THE PARTIES' CONTENTIONS

To this Court, the City argues that the circuit court abused its discretion when it denied its motion to quash the subpoenas. The City presents essentially the same arguments that it presented to the circuit court.

First, the City asserts that former Mayor Young and former Comptroller Pratt were "high-ranking government officials" for the purposes of the *Morgan* doctrine. The Friends did not dispute this point before the circuit court and do not dispute it now.

Second, the City contends that *Morgan* and cases interpreting and applying its holding have established that "neither high-ranking public officials nor administrative decisionmakers are typically subject to being deposed, unless the proponent can establish extraordinary, exceptional, or compelling circumstances, requiring essentially a showing that

the official has firsthand knowledge of information relevant and material to the issues that cannot be obtained from another source or through a less burdensome means of discovery." (Cleaned up.) According to the City, and the Friends' assertions to the contrary notwithstanding, they indisputably "sought to question [Mr. Young and Ms. Pratt] about 'what information they were provided and relied upon.'" (quoting the Friends' response to the City's motion to quash). Thus, in reality, the Friends were seeking "to examine these high-ranking public decisionmakers about how they arrived at their decision." The City asserts that the Friends "failed to satisfy their very high burden of establishing exceptional circumstances warranting such depositions." Therefore, according to the City, the circuit court abused its discretion when it denied the motion to quash.

In response, the Friends present three arguments.

First, according to them, "there is no 'general rule' against taking the depositions of high-ranking officials, only a rule against seeking their mental impressions[.]" They assert that they did not intend to examine Mr. Young and Ms. Pratt "about how they arrived at their decision." Rather, the Friends state that they were seeking

> to determine what Mr. Young and Mrs. Pratt *did* or *did not do* in connection with the franchise ordinance and the franchise fee, specifically what inquiry they performed, if any, regarding those matters. The term "inquiry" in the Charter entails some questioning or investigation of others or other matters, not one's own mental processes.

(Emphasis in original.)

Second, they point out that:

> The *Morgan* doctrine is not absolute. . . . In general, a deposition of a high-ranking official in litigation not specifically directed at his alleged misconduct will only be permitted if (1) extraordinary circumstances are shown, or (2) the official is personally involved in a material way.

(quoting *Johnson v. Clark*, 199 Md. App. at 323).

The Friends do not suggest that the present case satisfies any of the extraordinary circumstances criteria; rather they argue that Mr. Young and Ms. Pratt were "personally involved in a material way" because the two officials

> were members of the Board of Estimates, the sole entity charged with conducting the inquiry by the Charter into the amount of the franchise. Their involvement was not supervisory but rather "hands-on and personal," or at least the Charter charged them with such involvement. The depositions sought by [the Friends] are specifically directed to their involvement. Thus, contrary to the City's assertion, [the Friends] do not need to demonstrate "extraordinary circumstances."

Finally, the Friends argue that the policy underlying the "general rule" is that higher ranking officials have important duties, time constraints, and the public would be harmed by the disruption of governmental processes." They state that "[t]his policy reason is not implicated here since Mr. Young and Ms. Pratt are no longer employed by the City."

ANALYSIS

As we have noted, the circuit court did not provide an explanation of its reasoning in denying the motion to quash. While this is unfortunate, it does not preclude us from addressing the parties' contentions. This is because the circuit court's decision necessarily turned on its application of the cases applying the *Morgan* doctrine to the facts presented in the City's motion to quash and the Friends' response. Accordingly, our review is *de novo.*

See Saint Luke Institute, 471 Md. at 329. After reviewing the record, we conclude that the cases interpreting and applying the *Morgan* doctrine point ineluctably to the conclusion that the motion to quash should have been granted.

The Friends' first contention is that the *Morgan* doctrine does not protect high government officials against depositions but only against being required to testify regarding their mental processes for discretionary decisions. Based on the caselaw that we have previously cited, we do not agree. But, even if we did, it is clear that, their appellate protestations to the contrary notwithstanding, the Friends were, and are, clearly seeking insight "with respect to [Mr. Young's and Ms. Pratt's] mental processes" in deciding whether to approve the franchise agreement.

In their response to the City's motion to quash, the Friends stated that they intended to question the officials as to "what information they were provided and relied upon" in deciding to approve the terms and conditions of the BGE franchise. It is impossible to differentiate the Friends' proposed inquiries into what information Mr. Young and Ms. Pratt received and relied upon in making their decision from questions pertaining to "the manner and extent of [their] study of the record and [their] consultation with subordinates," which were the sort of questions that the Supreme Court held were improper in *Morgan*, 313 U.S. at 422.[16]

[16] The Friends effectively conceded this point at during oral argument (emphasis added):

The next step in the Friends' reasoning is that the *Morgan* doctrine does not apply because their deposition questions would be limited to what Mr. Young and Ms. Pratt "did or did not do in connection with the franchise ordinance and the franchise fee, specifically what inquiry they performed, if any, regarding those matters." They argue that deposition questions as to the scope and nature of the City officials' inquiry are different from questions as to the officials' reasons for approving the franchise agreement.

In *Johnson v. Clark*, we considered a similar argument. That appeal arose out of an incident in which Keith Washington, a Prince George's County police officer, shot two furniture movers who were attempting to install furniture in his residence, killing one and severely injuring the other.[17] At the time of the shooting, Washington was serving as the

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> The Court: [Y]ou told the circuit court . . . that . . . what you were seeking was what information [Mr. Young and Ms. Pratt] were provided and relied upon. How is that not an inquiry into their mental processes?
>
> Counsel for the Friends: [“]Relied upon[”] *I will agree with you was probably a misstatement. I'm not going to ask any one of these witnesses "Did you rely upon this?"* I do not recall my saying that your Honor, but if I did that was a misstatement on my part because that is inconsistent with the position that I have taken on appeal and on the papers that were filed below.

The problem from the Friends' perspective is that it was clearly their position before the circuit court that they had the right to ask what Mr. Young and Ms. Pratt relied upon in making their decision and intended to do so. To be sure, the Friends have changed their approach on appeal, but what is relevant for our decision is what they represented to the circuit court.

[17] The conflicting evidence regarding the circumstances of the shooting is summarized in *Washington v. State,* 191 Md. App. 48, 59–66 (2010).

Deputy Director of the Prince George's County Department of Homeland Security. He had been appointed to that position by Jack Johnson, the Prince George's County Executive. The plaintiffs sought to depose Johnson, who by that time was no longer in office, regarding his "knowledge of Washington's psychological issues, misconduct, internal investigations, and civil complaints against him, or knowledge of Washington's 'personal relationship'[18] with [Johnson]." 199 Md. App. at 327–28. The County filed a motion to quash the notice of Johnson's deposition, which was denied by the circuit court. We reversed the circuit court.

We explained that the only action by Johnson himself that related to Washington was the former's decision to appoint the latter as the deputy director of the County's Department of Homeland Security. We noted that questions as to why Johnson made the decision to appoint Washington "necessarily involves asking why [Johnson] took certain action or did not take certain action based on whatever knowledge he had, which is information protected" by the *Morgan* doctrine. *Id.* at 330. We continued:

> If [Johnson's] deposition is limited to knowledge, and he testifies to having knowledge, he would be forced to explain his action or inaction, thus violating his mental process privilege. Appellees' showing is insufficient to overcome that privilege.

Id.

[18] The plaintiffs alleged that Washington had at one time been a member of Mr. Johnson's security detail. 191 Md. App. at 229.

Returning to the case before us, if Mr. Young or Ms. Pratt were required to testify as to what information they relied upon in deciding to approve the franchise agreement, they would necessarily also reveal what information they did not rely upon in reaching their decisions. The *Morgan* doctrine protects high-ranking public officials from answering indirect, as well as direct, questions as to their reasoning for making discretionary decisions.

The Friends also assert that the Charter requires the members of the Board to personally investigate the merits of each franchise proposal. This contention is completely unconvincing. To be sure, the Board is required to engage in a "diligent inquiry" as to the value of the proposed franchise and the adequacy of the proposed compensation to be paid to the City. Charter Art. VIII § 2. But there is nothing in the Charter that states that the members of the Board must personally investigate the merits of each of the proposed franchise agreements that come before them on an annual basis. Imputing such an obligation to the members of the Board would be unwise. First, the members of the Board perform other duties for the City. Second, in addition to reviewing proposed franchise agreements, the scope of the Board's other duties is significant. *See, e.g., City of Baltimore v. Am. Fed'n of St. Etc.*, 281 Md. 463, 471 (1977) (The Board of Estimates is "required to review the financial status of the City on an annual basis and to determine, in its sole discretion, which items should be included in the City budget. . . . [Its] determination is final, as the City Council is without power to include any new item in the Ordinance of Estimates."); *Mayor & City Council of Baltimore v. Guttman*, 190 Md. App. 395, 402 (2010) (The Board is the ultimate deci-

sion-maker regarding termination of contracts with the City.); *Floyd v. Mayor & City Council of Baltimore*, 179 Md. App. 394, 402–11 (2008), *aff'd*, 407 Md. 461 (2009) (The Board is responsible for approving bylaws adopted by community benefits district management authorities.); *Madison Park N. Apartments, L.P. v. Comm'r of Hous. & Cmty. Dev*., 211 Md. App. 676, 693 n.6 (2013) (The Board, acting in a quasi-judicial capacity, considers appeals by persons aggrieved by decisions of the City's Inclusionary Housing Board.); *120 W. Fayette St., LLLP v. Mayor & City Council of Baltimore City*, 413 Md. 309, 332–33 (2010) (The Board is responsible for accepting and rejecting bids submitted under the City's request for bids process.); *Mayor & City Council of Baltimore City v. Valsamaki*, 397 Md. 222, 230 n.6 (2007) (The Board must approve any acquisition of residential property within the City when it is acquired for redevelopment.); *Brown v. Mayor*, 167 Md. App. 306, 314–15 (2006) (The Board approves or disapproves requests by law enforcement officers for indemnification "in litigation arising out of acts within the scope of [the officer's] employment."); *Brown v. Fire & Police Employees' Ret. Sys*., 375 Md. 661, 671–72 (2003) (The Board appoints hearing examiners to conduct hearings regarding claims for disability an death benefits made by City employees or their survivors.).

The Friends point to nothing in the record to suggest that, other than participating in the Board's decision, either Mr. Young or Ms. Pratt had any personal involvement in the City's negotiations with BGE. Holding that officials are personally involved in a matter solely because they are the ultimate decision-makers would negate the *Morgan* doctrine in its entirety.

Finally, the Friends assert that the *Morgan* doctrine no longer applies to Mr. Young or Ms. Pratt because they are no longer City officials. We do not agree. *See Johnson*, 199 Md. App. at 323 ("The privilege applies to former as well as current officials."); *United States v. Wal-Mart Stores, Inc*., 2002 WL 562301, at *3 (D. Md. 2002) ("If the immunity *Morgan* affords is to have any meaning, the protections must continue upon the official's departure from public service.")

In conclusion, we hold that the circuit court's denial of the motion to quash was contrary to the relevant legal principles. We reverse the court's judgment. On remand, the court should enter an order granting the City's motion to quash.

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS REVERSED AND THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. APPELLEES TO PAY COSTS.