Circuit Court for Baltimore City
Case No. 24-C-19-003659

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1629

September Term, 2019

E. DAVID HOSKINS

v.

CIRCUIT COURT FOR BALTIMORE CITY,
et al.

Shaw Geter,
Gould,
Maloney, John M.
(Circuit Court Judge, Specially Assigned),

JJ.

Opinion by Gould, J.

Filed: April 1, 2021

Appellant E. David Hoskins requested three categories of documents from the Circuit Court of Baltimore City pursuant to the Maryland Public Information Act (the "MPIA") and the Access to Judicial Records rules (the "Judicial Access Rules" or the "Rules"). The requests related to the manner in which the circuit court assigned motions to certify a class action. The court's administrative judge, the Honorable W. Michel Pierson, found no documents responsive to Mr. Hoskins' first two categories of requested documents. Judge Pierson found a small number of documents that he determined were potentially responsive to the third category, but withheld those documents because he determined that they were exempt from disclosure under the Judicial Access Rules.

Mr. Hoskins sought judicial review of Judge Pierson's decision by filing a complaint in the Circuit Court for Baltimore City. Mr. Hoskins named the Circuit Court for Baltimore City and Judge Pierson, in his official capacity, as defendants. Defendants moved to dismiss the case for failure to state a claim, or in the alternative, for summary judgment. The court granted defendants' motion for summary judgment and dismissed the case.

Mr. Hoskins filed a timely notice of appeal, and presents four questions for our review, which we have consolidated and reframed into the following two questions:[1]

[1] Mr. Hoskins framed his four questions as follows:

1. Does the MPIA apply to a request for judicial administrative records and provide a statutory right of judicial review to challenge a decision on the MPIA request?

2. Do the Access to Judicial Records rules preempt or otherwise limit the access to the judicial review provided by the MPIA?

1. Did Mr. Hoskins have a right to seek judicial review of Judge Pierson's response to his MPIA request?

2. Assuming a right to judicial review, did the actions taken by Judge Pierson in response to Mr. Hoskins' request comport with the relevant provisions of the MPIA and the Rules?

For the reasons that follow, we answer both questions in the affirmative and affirm the judgment of the circuit court.

BACKGROUND

In the State of Maryland, each of the 23 counties as well as Baltimore City, has its own circuit court, and each circuit court has its own administrative judge. *See* Md. Rules 16-103, 16-104.4(a). Administrative judges have general administrative responsibility for their respective courts. Relevant here, administrative judges are responsible for the:

> (1) supervision of the judges, officials, and employees of the court;
>
> (2) assignment of judges within the court pursuant to Rule 16-302 (Assignment of Actions for Trial; Case Management Plan);
>
> (3) supervision and expeditious disposition of cases filed in the court, control over the trial and other calendars of the court, assignment of cases for trial and hearing pursuant to Rule 16-302 (Assignment of Actions for Trial; Case Management Plan) and Rule 16-304 (Chambers Judge), and scheduling of court sessions;

3. Did the Defendants carry their burden of sustaining their decision to deny the Plaintiff's MPIA request for documents by demonstrating that a search reasonably calculated to uncover all documents relevant to the Plaintiff's request was conducted?

4. Were the Defendants required to provide an index of the withheld documents that provided information sufficient to permit the Plaintiff to test the justification of the withholding?

* * *

> (5) preparation of a case management plan for the court pursuant to Rule 16-302;
>
> * * *
>
> (11) implementation and enforcement of all administrative policies, rules, orders, and directives of the Court of Appeals, the Chief Judge of the Court of Appeals, the State Court Administrator, and the Circuit Administrative Judge of the judicial circuit; and
>
> (12) performance of any other administrative duties necessary to the effective administration of the internal management of the court and the prompt disposition of litigation in it.

Md. Rule 16-105(b).

Judge Pierson served as the administrative judge for the Circuit Court for Baltimore City from December 1, 2013 through January 11, 2020. As required by Maryland Rule 16-105(b)(2), Judge Pierson established a differentiated case management plan in the manner required by Rule 16-302 (the "Plan"). A case management plan "include[s] a system of differentiated case management in which actions are classified according to complexity and priority and are assigned to a scheduling category based on that classification and, to the extent practicable, follow any template established by the Chief Judge of the Court of Appeals." Md. Rule 16-302(b)(1)(A). Relevant here, a case management plan must "adopt procedures consistent with the Maryland Rules designed to . . . ensure the prompt disposition of motions and other preliminary matters[.]" Md. Rule 16-302(c)(2).

The Plan provides information on, among other things, the court's process for handling motions.[2] The Plan describes the specific types of motions—none of which are motions to certify class actions—that are decided by a "discovery judge" or a "chambers judge." The Plan states that the "Administrative Judge designates certain judges to hear the various civil matters, and makes final decisions about whether and to whom a case

[2] Regarding motions procedure, the Plan states:

> There are no walk-in motions. All motions must be filed in the Clerk's office. Motions filed in expedited cases are heard by the hearing/trial judge. A proposed order should be attached to all motions.
>
> Types of motions on chambers and non-hearing motions docket include: motions for summary judgment, motions to dismiss, motions to transfer venue, motions concerning service of process, motions to consolidate, motions for sanctions that are not discovery motions, motions to bifurcate, and motions to sever. Motions assigned to the chambers judge are scheduled in half hour intervals on Monday, Wednesday, and Friday.
>
> Types of motions heard by the discovery judge include: discovery motions unrelated to a law motion, motions to compel, requests for protective orders, and motions for sanctions. Motions to strike experts may be decided by discovery or chambers judge depending on the basis of the motion.
>
> Types of motions heard by the JICC [Judge in Charge of Civil]: changes to scheduling orders, motions to strike counsel's appearance, postponements, motions to seal, motions to enforce settlement agreements, . . . extensions of time or motions to shorten time, and motions to stay a case. The Administrative Judge hears 2-507 motions. The supervising Judge for Alternative Dispute Resolution hears motions to excuse from mediation.
>
> All emergency motions must be delivered to the Clerk's office and are then sent to the magistrate's office. There are no walk-in emergency motions.

should be assigned, when necessary."[3] CIR. CT. FOR BALTIMORE CITY, DIFFERENTIATED CASE MANAGEMENT PLAN (2016), http://www.baltimorecitycourt.org/wp-content/uploads/2016/12/Balt-City-CCt-Civil-Division-DCM-Plan.-revision-Nov-18-2016.pdf (last visited Mar. 18, 2021). The circuit court also publishes on its website a general explanation of its civil motions practice.

Mr. Hoskins noticed that motions to certify class actions were being "assigned to a specific judge, the Honorable Videtta Brown." In his view, this practice constituted "an unpublished and previously undisclosed administrative policy" that did not "comport with the motions procedures that have been published" on the court's website. This perceived deviation from the procedures described on the court's website prompted Mr. Hoskins to issue a request for documents under the MPIA.

In a letter dated May 21, 2019 to Judge Pierson, Mr. Hoskins requested three categories of documents. Mr. Hoskins qualified his request with the following assurance:

> This request seeks only documents that would qualify as an "administrative record" pursuant to Md. R. 16-902, and as "an administrative order, policy, or directive that governs the operation of" the Circuit Court for Baltimore City. . . . This request does not seek documents exempt from production by Md. R. 16-905(f).

Citing Maryland Rule 16-902(e)(2), Mr. Hoskins further explained that he was "directing this request to [Judge Pierson's] attention because" he believed Judge Pierson "qualif[ied] as the 'custodian' of the requested records." Mr. Hoskins described the three categories of documents he sought as follows:

[3] Because Mr. Hoskins included only two pages from the Plan, pursuant to Rule 5-201(c), we take judicial notice of the entire Plan.

1. The administrative orders, policies, or directives pursuant to which motions for class certification are assigned to a single designated judge for a decision.

2. The administrative orders, policies, or directives pursuant to which motions for class certification have been assigned to the Honorable Videtta A. Brown.

3. Documents that would allow for the identification of the cases in which a motion for class certification has been assigned to the Honorable Videtta A. Brown, or that would otherwise allow for the ability to identify the case in which Judge Brown has ruled on a motion for class certification so that the orders issued can be retrieved from the appropriate dockets.

Mr. Hoskins did not receive a response from Judge Pierson within 30 days, and on July 9, 2019, he filed his complaint, seeking a declaratory judgment that defendants "violated the MPIA and the Access to Judicial Records rules by failing to allow inspection of the records requested by" Mr. Hoskins. The complaint alleged that Mr. Hoskins made a proper request under the MPIA and the Rules, and that Judge Pierson violated Section 4-203 of the MPIA by failing to respond within 30 days. The complaint sought injunctive relief to prevent defendants from withholding records responsive to his requests and requiring defendants to permit Mr. Hoskins to inspect and copy such records. The complaint further requested "actual and statutory damages, as authorized by the MPIA" as well as litigation costs and "compensation" for Mr. Hoskins' time, pursuant to the MPIA.

Judge Pierson responded to Mr. Hoskins' request by letter dated August 5, 2019. Judge Pierson stated that his "search of the records in the custody and control of the court has disclosed no records responsive to Requests Nos. 1 and 2." Concerning the third request, Judge Pierson explained that "it is conceivable that such documents would be

contained in individual cases files[,]" but that the "custodian of such case records is the Clerk of the Court." Judge Pierson also "identified thirty-four documents within [his] custody or control that [were] potentially responsive" to the third request, but explained that such documents consisted of "communications among one or more judges, and [were] prohibited from inspection by Maryland Rule 16-905(f)(1) and/or 16-905(f)(3)."[4]

[4] The Court of Appeals adopted amendments to the Rules that became effective on August 1, 2020. We will apply, however, the Rules that were in effect at the time of these proceedings.

The relevant sections of Maryland Rule 16-905 stated:

> **(a) Notice Records.** Except as otherwise provided by statute, a custodian may not deny inspection of a notice record that has been recorded and indexed by the clerk.
>
> *** * ***
>
> **(c) Administrative and Business License Records.**
>
> (1) Except as otherwise provided by the Rules in this Chapter, the right to inspect administrative and business license records is governed by the applicable provisions of Code, General Provisions Article, Title 4.
>
> *** * ***
>
> **(f) Certain Administrative Records.** A custodian shall deny inspection of the following administrative records:
>
> (1) judicial work product, including drafts of documents, notes, and memoranda prepared by a judge or other court personnel at the direction of a judge and intended for use in the preparation of a decision, order, or opinion;
>
> (2) unless otherwise determined by the State Court Administrator, judicial education materials prepared by, for, or on behalf of a unit of

The next day, Mr. Hoskins filed an amended complaint. The amended complaint alleged that the 34 documents described by Judge Pierson were administrative records that were not exempt from disclosure under Maryland Rule 16-905 because they were "the only documents that established the policy pursuant to which motions for class certification are assigned to a single designated judge for decision." The amended complaint also claimed that defendants violated the MPIA by failing to respond to Mr. Hoskins' request within 30 days as required under Section 4-203 of the MPIA.

Defendants responded to the amended complaint with a motion to dismiss, or in the alternative, for summary judgment. Defendants made three arguments in support of their motion. *First,* defendants contended that Mr. Hoskins' request was subject to the judicial review provisions of the Judicial Access Rules, not the MPIA. And because the limited basis for judicial review allowed under the Judicial Access Rules did not apply, defendants argued that Mr. Hoskins was not entitled to judicial review.

> the Maryland Judiciary for use in the education and training of Maryland judges, magistrates, and other judicial personnel;
>
> (3) an administrative record that is:
>
> > (A) prepared by or for a judge or other judicial personnel;
> >
> > (B) either (i) purely administrative in nature but not a local rule, policy, or directive that governs the operation of the court or (ii) a draft of a document intended for consideration by the author or others and not intended to be final in its existing form; and
> >
> > (C) not filed with the clerk and not required to be filed with the clerk.

Second, defendants argued that the 30-day deadline in the MPIA did not apply to requests made under the Rules and, therefore, Mr. Hoskins did not state a claim for violation of the MPIA or the Judicial Access Rules.

Third, defendants argued that the 34 documents described in Judge Pierson's letter were not "'administrative orders, policies and directives pursuant to which motions for class certification are assigned to a single designated judge for decision' or 'have been assigned to the Honorable Videtta A. Brown'" as alleged by Mr. Hoskins. Rather, defendants maintained, the 34 withheld documents were "communications among one or more judges" and thus were properly withheld under the Rule 16-905(f)(1) and 16-905(f)(3) exemptions.

Mr. Hoskins opposed defendants' motion with four arguments. *First*, he argued that the right to judicial review under the MPIA applied to the denial of requests made pursuant to the Judicial Access Rules. *Second*, he argued that defendants failed to meet their burden under the MPIA to show that they made a good faith search for responsive records and did not support their motion for summary judgment with an "affidavit or other evidence demonstrating that a good faith effort to conduct a search for the requested records, using methods which could be reasonable expected to produce the information requested actually occurred in this case," as required by Maryland Rule 2-501.

Third, Mr. Hoskins maintained that Judge Pierson's representation that he found no documents responsive to the first two requests "defie[d] both logic and common sense." Mr. Hoskins maintained that somehow the class action certifications were assigned to Judge Brown, and therefore someone must have been instructed to forward the motions to

her. Mr. Hoskins concluded that such instructions were "potentially memorialized in some fashion."

Fourth, Mr. Hoskins argued that defendants "failed to provide a *Vaughn* index or any other evidence that would permit" Mr. Hoskins to "test the justification" given by Judge Pierson in denying access to the 34 records.[5]

The court held a hearing on October 4, 2019. Defendants' counsel brought the 34 withheld documents to the hearing and suggested that the court conduct an *in camera* review to determine the applicability of the exemptions asserted by Judge Pierson.[6] Mr. Hoskins objected to this review because he had not been provided a *Vaughn* index, which would detail each record withheld. The court overruled his objection, noting that there was no need to provide a *Vaughn* index because the records were not voluminous and there was no requirement to do so under the MPIA or the Rules. The court took a recess so that it could review the documents *in camera*.

After its *in camera* review, the court resumed the hearing and gave a verbal ruling. The court agreed with defendants that neither the 30-day deadline nor the judicial review provisions of the MPIA applied to Mr. Hoskins' requests. The court also agreed with

[5] The term "*Vaughn* index" comes from *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), and constitutes a list prepared by the responding party that identifies the withheld documents by "date, author, general subject matter and claim of privilege for each document claimed to be exempt from discovery." *Office of State Prosecutor v. Judicial Watch, Inc.*, 356 Md. 118, 121 n.1 (1999).

[6] An *in camera* review is a review that occurs in a trial judge's private chambers and involves the judge's private consideration of evidence. *Ehrlich v. Grove*, 396 Md. 550, 554 n.3 (2007).

defendants that the limited basis for judicial review under the Judicial Access Rules did not apply, and therefore Mr. Hoskins was not entitled to judicial review. The court also upheld Judge Pierson's determination that the 34 documents were subject to the exemptions set forth in Rule 16-905(f)(1) or (f)(3). Finally, the court found that defendants were not required to provide an affidavit because Judge Pierson's search was reasonable and the letter he wrote to Mr. Hoskins "[made] it clear that he did do a search." After the hearing, a written order memorializing the court's verbal ruling was filed.

Mr. Hoskins filed a timely notice of appeal.

DISCUSSION

I.

STANDARD OF REVIEW

In reviewing a court's decision on a government's response to an MPIA request, the standard of review is "whether that court had an adequate factual basis for the decision it rendered and whether the decision the court reached was clearly erroneous." *Lamson v. Montgomery Cnty.*, 460 Md. 349, 359-60 (2018) (quotations omitted). Decisions on issues of law are reviewed without deference. *Schisler v. State*, 394 Md. 519, 535 (2006).

II.

LEGAL FRAMEWORK FOR MR. HOSKINS' RECORDS REQUEST

This appeal implicates provisions of the MPIA as well as provisions of the Judicial Access Rules promulgated by the Court of Appeals in Chapter 9 of Title 16 of the Maryland Rules. To place the legal issues in context, we will begin our discussion with a brief review of the relevant provisions from both sources.

A.

THE MPIA

The MPIA protects the public's access to records and information. Md. Code Ann., General Provisions Article ("GP") Title 4 (2014, 2019 Repl. Vol.). The MPIA provides 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." GP § 4-103(a). The MPIA broadly defines a "public record" as any document that "is made by a unit or an instrumentality of the State or of a political subdivision or received by the unit or instrumentality in connection with the transaction of public business[.]" GP § 4-101(j)(l)(i).

It is a well-established principle that the MPIA provides a "general presumption in favor of disclosure[.]" *Maryland Dep't of State Police v. Maryland State Conference of NAACP Branches*, 430 Md. 179, 190 (2013). Consistent with this notion, the provisions of the MPIA "are to be 'liberally construed . . . in order to effectuate the [MPIA's] broad remedial purpose.'" *Glenn v. Maryland Dep't of Health & Mental Hygiene*, 446 Md. 378, 384-85 (2016).

A request for inspection is made by submitting a written application to the custodian of the records. GP § 4-202(a). A custodian is defined as any "authorized individual who has physical custody and control of a public record." GP § 4-101(d)(2). If the custodian does not find any documents, the custodian must notify the applicant that the record does not exist. GP § 4-202(d).[7]

[7] In relevant part, GP § 4-202 provides:

The public's right to inspect is limited by certain exceptions. Relevant here, under GP § 4-301(a)(2)(iii), the "custodian shall deny inspection of a public record or any part of a public record if . . . the inspection would be contrary to . . . the rules adopted by the Court of Appeals."

Under the MPIA, judicial review is available to the applicant when the request is denied. GP § 4-362.[8] On judicial review, the defendant has the burden of sustaining the

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In general

(a) Except as provided in subsection (b) of this section, a person or governmental unit that wishes to inspect a public record shall submit a written application to the custodian.

Exceptions

(b) A person or governmental unit need not submit a written application to the custodian if:

(1) the person or governmental unit seeks to inspect a public record listed by an official custodian in accordance with § 4-201(c)(2) of this subtitle; or

(2) the custodian waives the requirement for a written application.

*** * ***

Nonexistent record

(d) When an applicant requests to inspect a public record and a custodian determines that the record does not exist, the custodian shall notify the applicant of this determination:

(1) if the custodian has reached this determination on initial review of the application, immediately; or

(2) if the custodian has reached this determination after a search for potentially responsive public records, promptly after the search is completed but not more than 30 days after receiving the application.

[8] In relevant part, GP § 4-362 provides:

Complaint filed with circuit court

(a) (1) Subject to paragraph (3) of this subsection, whenever a person or governmental unit is denied inspection of a public record or is not provided with a copy, printout, or photograph of a public record as requested, the person or governmental unit may file a complaint with the circuit court.

(2) Subject to paragraph (3) of this subsection, a complainant or custodian may appeal to the circuit court a decision issued by the State Public Information Act Compliance Board as provided under § 4-1A-10 of this title.

(3) A complaint or an appeal under this subsection shall be filed with the circuit court for the county where:

(i) the complainant resides or has a principal place of business; or

(ii) the public record is located.

Defendant

(b) (1) Unless, for good cause shown, the court otherwise directs, and notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to the complaint within 30 days after service of the complaint.

(2) The defendant:

(i) has the burden of sustaining a decision to:

1. deny inspection of a public record; or

2. deny the person or governmental unit a copy, printout, or photograph of a public record; and

(ii) in support of the decision, may submit a memorandum to the court.

Authority of court

(c) (1) Except for cases that the court considers of greater importance, a proceeding under this section, including an appeal, shall:

(i) take precedence on the docket;

(ii) be heard at the earliest practicable date; and

(iii) be expedited in every way.

(2) The court may examine the public record in camera to determine whether any part of the public record may be withheld under this title.

(3) The court may:

(i) enjoin the State, a political subdivision, or a unit, an official, or an employee of the State or of a political subdivision from:

1. withholding the public record; or

2. withholding a copy, printout, or photograph of the public record;

denial. GP § 4-362(b)(2). The court may "examine the public record in camera to determine whether any part of the public record may be withheld[.]" GP § 4-362(c)(2). This review shall "be expedited in every way." GP § 4-362(c)(1)(iii).

B.

JUDICIAL ACCESS RULES

The Court of Appeals has the constitutional authority and duty to "adopt rules and regulations concerning the practice and procedure in and the administration of the appellate courts and in the other courts of this State, which shall have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law." MD CONST. art. IV, § 18(a). In 2004, the Court of Appeals adopted the Judicial Access Rules found in Title 16, Chapter 900 of the Maryland Rules of Court. Reflective of the "common law right of access" to judicial records, *Baltimore Sun v. Thanos*, 92 Md. App. 227, 233 (1992) (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978)), the Rules are designed "to provide public access to judicial records while protecting the legitimate security and privacy rights of litigants and others who are the subject of those records." Md. Rule 16-903(a).

The Rules recognize five types of judicial records: administrative records, business license records, case records, notice records, and special judicial unit records. Md. Rule

> (ii) issue an order for the production of the public record or a copy, printout, or photograph of the public record that was withheld from the complainant; and
> (iii) for noncompliance with the order, punish the responsible employee for contempt.

16-902(h). An "administrative record" is a record that "pertains to the administration of a court, a judicial agency, or the judicial system of the State; and is not a case record." Md. Rule 16-902(a)(1). Administrative records include "administrative order[s], polic[ies], or directive[s] that govern[] the operation of a court or judicial agency[.]" Md. Rule 16-902(a)(2)(B). Also included under the definition of administrative records is:

> judicial or other professional work product, including drafts of documents, notes, and memoranda prepared by a judge or other Judicial Branch personnel at the direction of a judge or other judicial official and intended for use in the preparation of a decision, order, recommendation, or opinion.

Md. Rule 16-902(a)(2)(K).

Although both the MPIA and the Judicial Access Rules are applicable here, we need not despair if inconsistencies between the two sources are perceived or discovered because the Rules and the MPIA both agree that the Rules take precedence in the event of any conflict. In that regard, the MPIA requires the custodian to deny a request if "the inspection would be contrary to . . . the rules adopted by the Court of Appeals[.]" GP § 4-301(a)(2)(iii). Likewise, Rule 16-905(c)(1) provides that "[e]xcept as otherwise provided by the Rules in this Chapter," the right to inspect administrative and business license records" is governed by the MPIA.

For an example of how this would work, let's assume a judge writes up an outline of a verbal decision that she plans on rendering in a pending case, and let's also assume that one of the litigants in that case makes a request under the MPIA for access to that outline. If we assume that access to the outline would be available under the MPIA, we would still have to contend with the Judicial Access Rules to determine whether the record

is subject to inspection. Specifically, Rule 16-905(f), requires the custodian to deny inspection of "drafts of documents, notes, and memoranda prepared by a judge or other court personnel at the direction of a judge and intended for use in the preparation of a decision, order, or opinion[.]" In this example, therefore, the custodian could properly deny access to the judge's outline under the Rules.

Another notable feature of the Judicial Access Rules is that a custodian is not required to "index, compile, re-format, program, or reorganize existing judicial records or other documents or information to create a new judicial record not necessary to be maintained in the ordinary course of business." Md. Rule 16-903(f)(1).

In recognition of the fact that the applicability of a particular exception under the Rules to a specific record may not be obvious or clear and the custodian may not be sure whether a record is subject to inspection, Rule 16-914 establishes a procedure for the custodian to apply for and obtain a preliminary determination from a judge.[9] Under this

[9] Md. Rule 16-914 provides:

> **(a) Application by Custodian.** If, upon a request for inspection of a judicial record, a custodian is in doubt whether the record is subject to inspection under the Rules in this Chapter or other applicable law, the custodian, after making a reasonable effort to notify the person seeking inspection and each identifiable person who is the subject of or is specifically identified in the record shall apply in writing for a preliminary judicial determination whether the judicial record is subject to inspection.
>
> > (1) If the record is in an appellate court or an orphans' court other than in Harford or Montgomery County, the application shall be to the chief judge of the court.

> (2) If the record is in a circuit court or in the orphans' court for Harford or Montgomery County, the application shall be to the county administrative judge.
>
> (3) If the record is in the District Court, the application shall be to the district administrative judge.
>
> (4) If the record is in a judicial agency other than a court, the application shall be to the Chief Judge of the Court of Appeals, who may refer it to the county administrative judge of a circuit court.

(b) Preliminary Determination. After hearing from or making a reasonable effort to communicate with the person seeking inspection and each person who is the subject of or is specifically identified in the record, the court shall make a preliminary determination of whether the record is subject to inspection. Unless the court extends the time for good cause, the preliminary determination shall be made within 10 days after the court receives the written request.

(c) Order; Stay. If the court determines that the record is subject to inspection, the court shall file an order to that effect. If a person who is the subject of or is specifically identified in the record objects, the judge may stay the order for not more than five business days in order to allow the person an opportunity to file an appropriate action to enjoin the inspection.

(d) Action to Enjoin Inspection. An action under section (c) of this Rule shall be filed within 30 days after the order is filed, and the person who requested inspection of the record shall be made a party. If such an action is timely filed, it shall proceed in accordance with Rules 15-501 through 15-505.

(e) Order; Action to Compel Inspection. If the court determines that the judicial record is not subject to inspection, the court shall file an order to that effect, and the person seeking inspection may file an action under Code, General Provisions Article, Title 4 (PIA) or on the basis of the Rules in this Chapter to compel the inspection. An action under this section shall be filed within thirty days after the order is filed.

(f) When Order Becomes Final and Conclusive. If a timely action is filed under section (d) or (e) of this Rule, the preliminary determination by the court shall not have a preclusive effect under any theory of direct or collateral

Rule, the court is required to memorialize its determination in a court order, and if access to the record is denied, then the party requesting inspection has the right to petition for judicial review under the judicial review provisions of the MPIA. Md. Rule 16-914(e).

III.

JUDICIAL REVIEW

Defendants contend that Mr. Hoskins was not entitled to judicial review of Judge Pierson's determinations. As defendants see it, the judicial review provisions of the MPIA do not apply here because with regard to judicial records, the Court of Appeals—which is constitutionally authorized and mandated to adopt the rules that govern the administration of the courts—chose to limit judicial review to the limited circumstances provided under Rule 16-914. Defendants maintain, however, that we should not decide whether Rule 16-914 provides the sole basis for judicial review because Mr. Hoskins did, in fact, obtain judicial review of Judge Pierson's determination. Thus, they contend, the issue is moot. Moreover, defendants argue that in light of the changes to the judicial review provisions of the Rules, this issue is not likely to recur. Thus, the exception to the mootness doctrine—issues that are capable of repetition yet evading review, *see Cabrera v. Mercado*, 230 Md. App. 37, 87 (2016), is not applicable here.

estoppel or law of the case. If a timely action is not filed, the order shall be final and conclusive.

Further, arguing that the constitutional avoidance doctrine applies,[10] defendants urge us not to address the "moot issue of whether a judicial review action may be brought under [GP] § 4-362 to review the denial of access to judicial records and the fundamental attack on the constitutional authority of the Court of Appeals to enact rules governing disputes over access to judicial records."[11] However, defendants fail to specify which non-constitutional ground would enable us to resolve this case without determining, in the first instance, whether we have jurisdiction over this case. Thus, we will first address whether Mr. Hoskins had the right to seek judicial review.

A.

THE RIGHT TO JUDICIAL REVIEW

We agree with Mr. Hoskins that the judicial review provision under GP § 4-362 is applicable here. As noted above, Rule 16-905(c)(1) specifically states that the MPIA governs the right of access to administrative records "[e]xcept as otherwise provided" by the Rules. Under this rule, therefore, we start with the presumption that the judicial review provisions of GP § 4-362 apply, and then we look to see if there is a provision in the Rules that negates that right.

Defendants claim to have found a conflicting provision in Rule 16-914(a), which establishes the process for a custodian to follow if he or she is not sure if a record is subject to disclosure. Rule 16-914(a) provides:

[10] Under this doctrine, appellate courts decline to decide an issue on constitutional grounds if the issue can be resolved on a non-constitutional ground. *In re Julianna B.*, 407 Md. 657, 667 (2009).

> If, upon a request for inspection of a judicial record, a custodian is in doubt whether the record is subject to inspection under the Rules in this Chapter or other applicable law, the custodian, after making a reasonable effort to notify the person seeking inspection and each identifiable person who is the subject of or is specifically identified in the record shall apply in writing for a preliminary judicial determination whether the judicial record is subject to inspection.

Defendants contend that this is the only rule that allows for judicial review, so in that sense, it negates the right to judicial review under GP § 4-362. Defendants further argue that judicial review under this rule is limited to cases when the custodian is not sure if a record is subject to inspection. Thus, their argument goes, because the custodian in this instance was Judge Pierson, and he had no doubt about the applicability of the exemptions, Mr. Hoskins is not entitled to judicial review of Judge Pierson's decision.

We disagree with defendants' characterization of this rule. As stated above, Rule 16-914(a) applies when the custodian is uncertain whether a requested record is subject to disclosure. When that happens, this rule allows the custodian to relinquish to a judge the duty of making the initial determination. In other words, this is not a judicial review provision, because the judge is *making* the initial decision, not *reviewing* it. As such, this rule does not conflict with the MPIA. *See Maryland-Nat'l Cap. Park & Plan. Comm'n v. Anderson*, 395 Md. 172, 183 (2006) (statutes regarding the same subject matter should be construed and harmonized consistent with their purpose and scope).

Our interpretation of subsection (a) of Rule 16-914 is bolstered by the fact that elsewhere in this rule—subsection (e)—there *is* a right to judicial review. There, if the custodian is in doubt and asks the court to make the initial determination, and if the court decides that the record is *not* subject to inspection and enters an order to that effect, the

applicant has the right to seek judicial review from that court order. Md. Rule 16-914(e). The court order, therefore, is the object of the judicial review, not the product of it.

If we take a step back and look at the Rules as a whole, we can see that there are two paths by which a party requesting a judicial record can be denied access to a record. The first path is when the custodian reviews the request and determines, without any doubt, that the record is subject to an exception. The second path is when the custodian reviews the request, has doubt, applies to the court for a preliminary determination, and the court determines that the record must be withheld and enters an order to that effect. Same request, same end result, and yet, under defendants' theory, judicial review would only be available for the latter. We don't believe that the Court of Appeals, in adopting this Rule, intended to condition an applicant's right to judicial review on the extent of the custodian's certitude as to the applicability of an exception. We also doubt that the Court of Appeals perceived a greater need for judicial review if the court denied a request than if the denial came from the custodian. It makes far more sense that both paths—Rule 16-905(c)(1) and Rule 16-914(e)—allow for judicial review under GP § 4-362.

Accordingly, we hold that Rule 16-914 does not preclude judicial review, and that the right to judicial review under GP § 4-362 applies to Mr. Hoskins' request.

B.

THE SCOPE OF JUDICIAL REVIEW

The scope of Mr. Hoskins' right to judicial review is another matter. Judicial review of an agency decision is available only when it is authorized by statute. *Oltman v. Maryland State Bd. of Physicians*, 182 Md. App. 65, 73 (2008). Before turning to the

judicial review section of the MPIA, it's worth recalling that in response to a request under the MPIA, the custodian has three basic choices: (1) approve the request under GP § 4-203(b); (2) deny the request under GP § 4-203(c); or (3) inform the requestor that, after undertaking an initial review of the application or a search for potentially responsive records, no responsive documents exist, under GP § 4-202(d). In the eyes of the MPIA, therefore, a response denying a request is substantively different from a response stating that no responsive documents exist. *Cf. Glass v. Anne Arundel Cnty.*, 453 Md. 201, 234 (2017) (distinguishing denial of a request from a dispute over conditions of access). For purposes of judicial review, this distinction is decisive.

As noted above, the right to judicial review applies "whenever a person or governmental unit is *denied* inspection of a public record or is not provided with a copy, printout, or photograph of a public record[.]" GP § 4-362(a)(1) (emphasis added). Clear and unambiguous words of a statute are accorded their plain and ordinary meaning. *Schreyer v. Chaplain*, 416 Md. 94, 101 (2010). The word "denied" is clear and unambiguous. A response stating that no records exist is not a denial.

Thus, judicial review is not available when the agency reports that it has no documents responsive to a request. That's what happened here when Judge Pierson responded that he found no records responsive to the first two requests. This response satisfied the substantive requirements of GP § 4-202(d). Mr. Hoskins, therefore, was not entitled to judicial review of Judge Pierson's response to his first two requests. But Judge Pierson's response to the third request—that the request for inspection was denied—is subject to judicial review.

IV.

REQUEST NO. 3

To recap, Mr. Hoskins' third request sought:

> Documents that would allow for the identification of the cases in which a motion for class certification has been assigned to the Honorable Videtta A. Brown, or that would otherwise allow for the ability to identify the case in which Judge Brown has ruled on a motion for class certification so that the orders issued can be retrieved from the appropriate dockets.

In response, Judge Pierson notified Mr. Hoskins that some responsive documents might be contained in the "individual case files," and further identified the clerk of the court as the custodian of such records. Substantively, this part of Judge Pierson's response complied with GP § 4-202(c).

In addition, Judge Pierson informed Mr. Hoskins that he had identified 34 documents in his custody and control that were "potentially" responsive to the third request. Judge Pierson then explained that:

> These documents consist of communications among one or more judges, and are prohibited from inspection by Maryland Rule 16-905(f)(1) and/or 16-905(f)(3).
>
> Rule 16-905(f)(1) requires the denial of inspection of "judicial work product, including drafts of documents, notes, and memoranda prepared by a judge or other court personnel at the direction of a judge and intended for use in the preparation of a decision, order, or opinion[.]" Rule 16-905(f)(3) prohibits from inspection administrative records "prepared by or for a judge[,]" that are "not a local rule, policy or directive[,]" and are "not filed with the clerk and not required to be filed with the clerk."

On appeal, Mr. Hoskins argues that defendants did not establish that Judge Pierson undertook a good faith effort to search for responsive documents. He contends that defendants did not offer an affidavit, live testimony, or other evidence that Judge Pierson

conducted an adequate search. Relatedly, Mr. Hoskins argues that there was no basis for him to evaluate Judge Pierson's search because defendants did not produce a "*Vaughn* index." Thus, Mr. Hoskins maintains, the circuit court should not have granted summary judgment.

We will address the *Vaughn* index issue first. In short, neither the MPIA nor the Judicial Access Rules require a *Vaughn* index. In any event, it's not as if Mr. Hoskins was kept in the dark about the nature of the withheld records because in Judge Pierson's letter, he informed Mr. Hoskins that the 34 documents were communications between and among various judges. Under the circumstances, we find no abuse of discretion in the circuit court's refusal to order defendants to produce a *Vaughn* index.

We reach the same conclusion regarding the affidavit issue. Under Rule 2-501, affidavits are used to establish the material facts that are *not* genuinely disputed or to demonstrate that the material facts *are* genuinely disputed. *See* Md. Rule 2-501(a), (b), and (c). Here, Mr. Hoskins did not allege in his amended complaint that Judge Pierson failed to undertake a reasonable and/or good faith search for responsive documents, thus whether Judge Pierson conducted an adequate search for the records was not an issue of *material* fact in the summary judgment motions. Thus, no affidavit was necessary.

To be fair, at the hearing before the circuit court, Mr. Hoskins requested leave to amend his complaint so that he could put the adequacy of the search at issue. Whether to grant leave to amend was a discretionary call that we would not disturb in the absence of an abuse of that discretion. *See McMahon v. Piazze*, 162 Md. App. 588, 598 (2005). Here,

the court dismissed the case without granting leave to amend, for which we perceive no abuse of discretion.

Judge Pierson was the administrative judge of the circuit court. He would, therefore, have known which orders, policies, and directives existed with respect to the assignment of all types of motions. He would also have known where to look for any such records. In light of Judge Pierson's role as administrative judge, and in the absence of any reason proffered by Mr. Hoskins to the contrary, the circuit court had ample reason to believe that the adequacy of the search would be a dead-end issue for Mr. Hoskins.

Ultimately, the sole material issue as to Mr. Hoskins' third request was whether Judge Pierson properly invoked the Rule 16-905(f)(1) or (f)(3) exemptions. That's purely a legal question. *See State v. WBAL-TV*, 187 Md. App. 135, 150-51 (2009) (applying tools of statutory construction to interpret the applicability of the Judicial Access Rules). As noted above, the MPIA grants the circuit court the discretion to review the subject documents *in camera* and compels the court to expedite its review. GP §§ 4-362(c)(1)(iii) & (c)(2); *see also Lamson*, 460 Md. at 365; *Cranford v. Montgomery Cnty.*, 300 Md. 759, 779 (1984). Thus, when defendants brought the documents to the hearing and tendered them to the court for an *in camera* review, the court was well within its authority and discretion to receive the documents and review them *in camera*. And from our own review of the records, we are satisfied that the trial court correctly concluded that the documents were exempt from disclosure for the reasons stated by Judge Pierson.

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