UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0786

September Term, 2014

RUSSELL K. HARDEN

v.

FRANK BISHOP, WARDEN

Wright,
Graeff,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: August 17, 2016

This appeal arises from the dismissal of an action filed by Russell K. Harden, appellant, against Bobby P. Shearin, Warden of the North Branch Correctional Institution ("NBCI"),[1] in the Circuit Court for Allegany County seeking (a) to compel Warden Shearin to comply with his request for information under the Maryland Public Information Act ("MPIA") pursuant to Maryland Code (2014) § 10-623 of the State Government Article,[2] (b) sanctions for Warden Shearin's alleged failure to comply with the Act, and (c) damages.

On appeal, appellant presents two questions for this Court's review, which he have consolidated and rephrased as follows:

> Did the circuit court err in dismissing Mr. Harden's amended complaint in light of Warden Shearin's response to appellant's Maryland Public Information Act request?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On January 10, 2014, Warden Shearin received Mr. Harden's MPIA request, which was dated December 26, 2013. In his request, Mr. Harden requested "any and all records" pertaining to:

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[1] Bobby P. Shearin subsequently was replaced as warden of the North Branch Correctional Institution by Frank Bishop. On April 21, 2015, counsel for Warden Bishop filed in this Court a Notice of Substitution of Party, indicating that, pursuant to Maryland Rules 2-241(a)(5) and 8-401(b), Warden Bishop was substituted as appellee in the place of Mr. Shearin.

[2] Effective October 1, 2014, the provisions of the Maryland Public Information Act ("MPIA") were moved from the State Government Article to Title 4 of the General Provisions Article. The statutory provision at issue is now Maryland Code (2014) § 4-362 of the General Provisions Article ("GP").

1. "All of the institutional information on NBCI prison news channel 2";[3]
2. The contract that NBCI had with Keefe Commissary, Inc.;
3. "[I]nmates' rights to the courts";
4. "[I]ndigent inmates' rights" to "copies, certified legal mail to the courts, welfare, etc.";
5. "[I]nmates' equal protection rights of those that are in general population";
6. "[T]he Division of Correction['s] mandatory clothing issue provided by the institution . . . ";
7. "[M]andatory meal services of the Division of Correction . . . ";
8. "American Correctional Association (ACA) standards and the Required NBCI policy and procedure that [it] must abide by ACA standards";
9. "Any and all records" of the Division Correction Directives ("DCDs") "that NBCI must abide by."

In a letter dated February 6, 2014, a representative from the custodian of records office answered, on behalf of the Warden, regarding Mr. Harden's request. With respect to requests 1 and 9, the letter stated that the requests were "unreasonably broad," and Mr. Harden was requested to "resubmit" each request with more specificity. Moreover, with respect to request 9, the custodian of records indicated that many of those DCDs were restricted because they included emergency and security procedures that would not be in the public interest to disclose. With respect to requests 2-7, the letter indicated that the information requested was "available for review in the NBCI Support Services Building Library," and it stated that Mr. Harden should "contact the institutional Librarian for the

[3] With respect to his first request, Mr. Harden specifically requested "a printout" of "all" the news channel information.

allotted time your housing unit is scheduled for library services or request [the item] for check out." With respect to requests 3-7, the custodian of records office offered to provide copies for a total fee of $10.35. Finally, with respect to request 8, the letter stated that the "information you have requested is neither generated nor maintained by the Department of Public Safety and Correctional Services or the North Branch Correctional Institution."

On February 10, 2014, Mr. Harden filed an action in the Circuit Court for Allegany County against Warden Shearin, alleging that the Warden failed to respond to his MPIA request, thereby constructively denying his right to inspect the documents.[4] It appears that Mr. Harden had not yet received, or did not read, the response letter until after his initial filing because, on February 19, 2014, Mr. Harden filed an amended complaint, alleging that Warden Shearin "improperly denied plaintiff's request under the MPIA by redirecting plaintiff to request . . . the requested records elsewhere, where [Warden] Shearin is in fact the official custodian of records and it is his responsibility to respond to . . . information requests."

On April 25, 2014, Warden Shearin filed a motion to dismiss, arguing two grounds in support. First, Warden Shearin argued that Mr. Harden requested information that was not part of the records maintained by NBCI, and therefore, he was not under an obligation to produce that requested information pursuant to the MPIA. Second, Warden Shearin

[4] Pursuant to GP § 4-362(a)(1), "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."

argued that the lawsuit was not ripe because he did not deny Mr. Harden's requests. He explained that, with respect to requests 1 and 9, he did not deny those requests, but rather, he asked for clarification, and with the remaining requests, the information requested was made available to Mr. Harden through the NBCI inmate library.

On May 16, 2014, the circuit court dismissed Mr. Harden's lawsuit. The court stated: "Upon consideration of [Warden Shearin's] Motion to Dismiss . . . , and lack of any response thereto, it is . . . ORDERED that the Petition for Judicial Review . . . be DISMISSED."

On June 2, 2014, Mr. Harden filed a response to Warden Shearin's motion to dismiss. Mr. Harden reiterated his argument that he "should not have been redirected to any department to obtain" the records that he requested. He also argued that he did not "request to print out all information ever uploaded on Channel 2, but only what was on Channel 2 when this request was received."[5]

Also on June 2, 2014, Mr. Harden filed a motion to reconsider dismissal. He argued that he did not receive Warden Shearin's motion to dismiss until April 30, 2014, and he timely mailed his response on May 10, 2014. On June 9, 2014, the circuit court denied Mr. Harden's motion for reconsideration.

[5] In his response to Warden Shearin's motion to dismiss, Mr. Harden claims that he had "sent notice to the Warden's office on February 6, 2014, specifically requesting what information was needed on Channel 2." We found no evidence in the record of this notice.

DISCUSSION

Mr. Harden argues on appeal that the circuit court erred in dismissing his complaint. He correctly explains that, pursuant to the MPIA, the recipient of an application for information must "verify (1) that he or she is in fact a custodian of the record, [Maryland Code (2014) § 4-202(c) of the General Provisions Article ("GP")], and (2) that the document in question exists, see [GP § 4-202(d)]." *Ireland v. Shearin*, 417 Md. 401, 408 (2010). He asserts that, "[i]f these two requirements are met, the custodian of the records must then either grant or deny the application within thirty (30) days of receiving the initial application." *Id.* He argues that Warden Shearin (now Warden Bishop), was the custodian of NBCI's records, which appellee does not dispute, and therefore, it fell within Warden Shearin's responsibility to grant or deny his application for information. He contends that Warden Shearin improperly "directed Appellant to make a second request of individual departments within the agency to obtain requested records" in violation of the rule, set forth in *Ireland v. Shearin*, *supra*, prohibiting such redirection.

Appellee contends that the circuit court properly determined that "Warden Shearin's response was fully in accord with the PIA, and Mr. Harden was not denied any records to which he was entitled." He argues that, with respect to eight of Mr. Harden's nine information requests, his requests were not *denied*: six requests were explicitly granted, two requests were overbroad, and the Warden sought clarification of the scope of the requests. With respect to the last request, appellee asserts that the information sought was not a "public record" as defined in the MPIA because the information did not exist within

Warden Shearin's possession or control, and therefore, Mr. Harden's request was properly denied. Accordingly, appellee contends the court did not err in dismissing Mr. Harden's complaint.

I.

Standard of Review

Recently, in *Advance Telecom Process LLC v. DSFederal, Inc.*, 224 Md. App. 164, 173-74 (2015), we set forth the proper standard for reviewing a case dismissed by the circuit court:

> "A trial court may grant a motion to dismiss if, when assuming the truth of all well-pled facts and allegations in the complaint and any inferences that may be drawn, and viewing those facts in the light most favorable to the non-moving party, 'the allegations do not state a cause of action for which relief may be granted.'" *Latty v. St. Joseph's Soc'y of the Sacred Heart, Inc.*, 198 Md. App. 254, 262-63 (2011) (quoting *RRC Northeast, LLC v. BAA Md., Inc.*, 413 Md. 638, 643 (2010)). The facts set forth in the complaint must be "pleaded with sufficient specificity; bald assertions and conclusory statements by the pleader will not suffice." *RRC*, 413 Md. at 644.
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> "'We review the grant of a motion to dismiss de novo.'" *Unger v. Berger*, 214 Md. App. 426, 432 (2013) (quoting *Reichs Ford Road Joint Venture v. State Roads Comm'n*, 388 Md. 500, 509 (2005)). *Accord Kumar v. Dhanda*, 198 Md. App. 337, 342 (2011) ("We review the court's decision to grant the motion to dismiss for legal correctness."), *aff'd*, 426 Md. 185 (2012). We will affirm the circuit court's judgment "'on any ground adequately shown by the record, even one upon which the circuit court has not relied or one that the parties have not raised.'" *Monarc Constr., Inc. v. Aris Corp.*, 188 Md. App. 377, 385 (2009) (quoting *Pope v. Bd. of Sch. Comm'rs*, 106 Md. App. 578, 591 (1995)).

(parallel citations omitted).

II.

MPIA Requests 2 Through 7

With respect to requests 2 through 7, Warden Shearin did not deny Mr. Harden's request. The Warden's office stated that the information Mr. Harden sought was "available for review in the NBCI Support Services Building Library." Mr. Harden could access those records during his housing unit's next scheduled library visit. Moreover, for all but one of these requests, the Warden's office offered to gather the documents and make copies for a nominal fee permitted by the MPIA. *See* GP § 4-206.

Appellant's reliance on *Ireland*, is misplaced. In that case, the warden of NBCI responded to an inmate's MPIA request by stating that the requested information was "not kept on file in the Warden's Office. Each department is responsible for maintaining files that are related to that particular department. Please redirect your request to each department in which the request is relevant." 417 Md. at 405. The Court of Appeals held that a custodian may not "redirect" an applicant "to more appropriate custodians." It explained that "the burden to collect and assemble the requested records falls squarely on the State rather than the applicant. In short, [the Warden] could only grant or deny [the inmate's] application because of his status as the official custodian of records." *Id.* at 410. The Court hastened to add, however, that

> this burden does not obligate the custodian of records to gather the requested documents so that they will be available for inspection at a centralized location, especially if doing so would "interfere[ ] with official business." Rather, the [M]PIA directs each official custodian to "adopt reasonable rules or regulations that . . . govern timely production and inspection of a public record."

Id. at 411 (citations omitted). The Court concluded that the Warden in *Ireland* "would have complied with the [M]PIA if he had timely directed his subordinate departments to produce the requested records for inspection rather than directing [the applicant] to resubmit his request to those entities." *Id.*

Here, Warden Shearin *granted* appellant's MPIA requests 2 through 7. He did not *redirect* Mr. Harden's request to another custodian, but rather, he was directing Mr. Harden to the *location* where the information was maintained and already available to him, i.e., in the NBIC library. This was in full compliance with the MPIA. *See* GP § 4-201(b) ("To protect public records and to prevent unnecessary interference with official business, each official custodian shall adopt reasonable rules or regulations that, subject to this title, govern timely production and inspection of a public record."); Code of Maryland Regulations ("COMAR") 12.11.02.06(C) ("Place of Inspection. A custodian shall require that the public record be inspected or copied at the location where the public record is maintained, unless the custodian determines that another location would better serve the needs of the individual inspecting or copying the public record or of the Department.").

To the extent that Mr. Harden is interpreting Warden Shearin's recommendation that he "contact the institutional Librarian for the allotted time your housing using is scheduled for library services" as the Warden "redirecting" his application to another custodian, we disagree. Mr. Shearin was not redirecting Mr. Harden to another custodian to grant or deny his requests, but rather, he was recommending that Mr. Harden contact the librarian to determine when the prison's schedule would permit him to visit the library or

to arrange to borrow the library materials. In short, this statement addressed the issue of *when* and *how*, not *whether*, Mr. Harden could inspect the records. Accordingly, we hold that the circuit court properly dismissed Mr. Harden's complaint with respect to requests 2 through 7.

III.

MPIA Request 8

With respect to request 8, seeking "any and all American Correctional Association (ACA) standards and the Required NBCI policy and procedure that [it] must abide by ACA standards," Warden Shearin denied Mr. Harden's request because it was not a record "generated nor maintained by the Department of Public Safety and Correctional Services" or NBCI. Appellee contends that, because the documents requested "did not exist within NBCI as a 'public record,'" the Warden "was not their custodian under the PIA and therefore could not produce them for inspection." Accordingly, appellee asserts that the circuit court properly dismissed Mr. Harden's complaint with respect to this request. We agree.

A "custodian" is defined by the MPIA as "(1) the official custodian," which means "an officer or employee of the State or of a political subdivision who is responsible for keeping a public record, whether or not the officer or employee has physical custody and control of the public record," or "(2) any other authorized individual who has physical custody and control of a public record." GP § 4-101 (d), (f). Section 4-202(d) states:

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

Section 4-202(c) states:

> If the individual to whom the application is submitted is not the custodian of the public record, within 10 working days after receiving the application, the individual shall give the applicant:
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> (1) notice of that fact; and
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> (2) if known:
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> (i) the name of the custodian; and
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> (ii) the location or possible location of the public record.

Here, Warden Shearin complied with the statute by advising Mr. Harden that the records sought in request 8 did not exist or were not within his custodial control, and therefore, there was nothing for Mr. Harden to inspect. "Obviously, a custodian cannot properly be ordered to produce records under the [MPIA] when those records simply do not exist." *Office of the Governor v. Washington Post Co.*, 360 Md. 520, 540 (2000).

Moreover, as appellee notes, to the extent that the request sought "NBCI policy and procedures that must abide by ACA standards," it did not fall under the scope of the MPIA. The MPIA does not require a custodian to create records if they do not exist. *See Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 152 (1980) ("The [Freedom of Information Act ('FOIA')] does not obligate agencies to create or retain documents; it

only obligates them to provide access to those which it in fact has created and retained.")[6]; *Yeager v. Drug Enf't Admin.*, 678 F.2d 315, 321 (D.C. Cir. 1982) (same); GP § 4-201(a)(1) ("[A] custodian shall allow a person or governmental unit to *inspect* any public record at any reasonable time.") (emphasis added); GP § 4-202(d) (requiring only that a custodian notify applicant when a public record does not exist); GP § 4-202(c) (requiring that a custodian notify applicant when a public record is not within the custodian's control). Accordingly, appellee's response did not violate the MPIA, and the circuit court properly dismissed Mr. Harden's complaint with respect to request 8.

IV.

MPIA Requests 1 and 9

With respect to requests 1 and 9, which sought to inspect "all information" displayed in NBCI's news channel 2, along with "any and all" DCDs "that NBCI must abide by," Warden Shearin did not deny Mr. Harden's request. Rather, in its response to Mr. Harden's requests, the Warden's office stated that the requests were "unreasonably broad," and it sought further clarification and as to the precise scope of the information that Mr. Harden

[6] In *MacPhail v. Comptroller of Maryland*, 178 Md. App. 115, 119 (2008), the Court of Appeals stated:

> The General Assembly enacted the MPIA in 1970, four years after Congress's passage of the Freedom of Information Act ("FOIA") . . . . The purpose of the Maryland Public Information Act . . . is virtually identical to that of the FOIA; consequently, to the extent that the MPIA is like the FOIA, the federal circuits' interpretation of the FOIA is persuasive.

(Citations and quotations omitted). Accordingly, we may look to federal cases interpreting FOIA as guidance in interpreting the MPIA.

was seeking. Moreover, with respect to request 9, which sought all "records of the DCDs that NBCI must abide by," Warden Shearin indicated that many of those DCDs included emergency and security procedures that would not be in the public interest to disclose. Accordingly, rather than deny the entire request, Warden Shearin asked Mr. Harden to clarify precisely which DCDs he was interested in inspecting. Mr. Harden failed to respond to this request, and instead, he filed suit.

The MPIA does not provide any direct guidance with respect to the proper procedure for responding to a vague or overly broad information request.[7] Case law interpreting the FOIA, however, is instructive. In *Marks v. U.S. (Dept. of Justice)*, 578 F.2d 261, 263 (9th Cir. 1978), the Ninth Circuit noted that the "FOIA requires that federal agencies make records available only upon a request which 'reasonably describes' the records sought." "[B]road, sweeping requests lacking specificity are not permissible." *See Mason v. Callaway*, 554 F.2d 129, 131 (4th Cir.) (holding that request for "all correspondence, documents, memoranda, tape recordings, notes, and any other material pertaining to the atrocities committed against plaintiffs . . . , including, but not limited to, the files of (various government offices)" lacked specificity and failed to adequately identify documents

[7] We note that, shortly after the circuit court dismissed Mr. Harden's complaint, the Maryland General Assembly passed a bill adding GP §§ 4-1B-01 through 4-1B-04, which established the Office of the Public Access Ombudsman. One of the duties of the Ombudsman is to "make reasonable attempts to resolve disputes between applicants and custodians relating to requests for public records under this title, including disputes over: . . . (4) overly broad requests for public records." GP § 4-1B-04(a). This statute reveals that the General Assembly is cognizant that some information requests may be overly broad, thereby suggesting that such requests may exceed the reasonable scope of what a custodian is required to do under the MPIA.

requested), *cert. denied*, 434 U.S. 877 (1977); *Irons v. Schuyler*, 465 F.2d 608, 613 (D.C. Cir.) (request for "all unpublished manuscript decisions of the Patent Office" was "so broad in the context . . . as not to come within a reasonable interpretation of 'identifiable records'"), *cert. denied*, 409 U.S. 1076 (1972).

The decision of the United States Court of Appeals for the Second Circuit in *Halpern v. F.B.I.*, 181 F.3d 279, 288-89 (2d Cir. 1999), is particularly instructive:

> The case law indicates that a FOIA request binds an agency to disclose information to the extent that "'the agency is able to determine precisely what records are being requested.'" *Kowalczyk v. Dep't of Justice*, 73 F.3d 386, 388 (D.C.Cir.1996) (quoting *Yeager v. DEA*, 678 F.2d 315, 326 (D.C.Cir.1982)). When the request demands all agency records on a given subject then the agency is obliged to pursue any "clear and certain" lead it cannot in good faith ignore. *Id.* at 389. But, an agency need not conduct a search that plainly is unduly burdensome. *See Ruotolo v. Dep't of Justice, Tax Div.*, 53 F.3d 4, 9 (2d Cir.1995).
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> Under the *Kowalczyk* standard, the FBI initially was bound to process the cross-referenced files according to the terms of Halpern's original FOIA requests. But, in light of the burdens this task would have imposed, it was reasonable for the FBI to ask Halpern to clarify the precise scope of his request, as it did in early 1993 when it indicated the existence of the cross-referenced files and offered to process them upon specific request. In many FOIA cases requests for clarification are necessary from a practical standpoint to justify the heavy expenditure of agency resources needed to process the unearthed files. *See, e.g., Carney* [*v. U.S. Dept. of Justice*, 19 F.3d 807, 810 (2d Cir. 1994)] (FOIA request retrieved 111 boxes, each containing about 5000 pages); *Meeropol v. Meese*, 790 F.2d 942, 946, 951 (D.C. Cir. 1986) (500,000 pages retrieved).
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> Once the FBI had requested such clarification, it could then in good faith ignore the cross-referenced files until it received an affirmative response from plaintiff. *Cf. Kowalczyk*, 73 F.3d at 389 (agency only needs to pursue leads that are clear and certain). Because Halpern did not respond to the request for clarification until after he filed his amended complaint, he lacked any grounds on which to plead that the FBI had failed to process the files.

Pursuant to this reasoning, Mr. Harden has failed to show that the Warden did not comply with the MPIA. Rather, because Mr. Harden's request for a printout of "all the institutional information on NBCI news Channel 2" was too vague to reasonably identify exactly what records he was seeking, and his request for "all records of the DCDs that NBCI must abide by" was excessive, as well as overly broad to the extent that it encompasses DCDs that would not be in the public interest to disclose, the Warden properly sought clarification of Mr. Harden's requests. Mr. Harden, however, failed to respond to Warden Shearin's reasonable attempts to clarify the scope of his request, and instead, prematurely filed an action in the circuit court. Because Mr. Harden did not respond to the request for clarification, he lacked any grounds on which to plead that appellee had failed to properly process his requests. Accordingly, we conclude that the circuit court did not err in dismissing Mr. Harden's complaint.

JUDGMENT OF THE CIRCUIT COURT FOR ALLEGANY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.