PETITION OF THE MAYOR AND CITY COUNCIL OF BALTIMORE **FOR JUDICIAL REVIEW OF THE DECISION OF THE MARYLAND PUBLIC INFORMATION ACT COMPLIANCE BOARD** **IN THE MATTER OF** **FERN SHEN, Complainant** **v.** **BALTIMORE CITY BOARD OF ETHICS, Custodian.** **Case No. PIACB 23-31**	**IN THE** **CIRCUIT COURT** **FOR** **BALTIMORE CITY** **Case No. 24-C-23-004122**

JOINT MEMORANDUM OPINION

In this action, Petitioner Mayor and City Council ("City"), on behalf of the Baltimore City Board of Ethics ("City Ethics Board"), seeks judicial review of a decision of the Maryland Public Information Act Compliance Board ("MPIA Compliance Board"). The MPIA Compliance Board reviewed the City's denial of a request for public records to the City Board of Ethics made by Fern Shen, a reporter for The Baltimore Brew, and determined that the record at issue must be disclosed. In a separate action, *Petition of Mayor and City Council of Baltimore*, Case No. 24-C-23-004416, the City seeks judicial review of a parallel decision of the MPIA Compliance Board based on a request for the same record by Emily Opilo, a reporter for The Baltimore Sun. Although the two actions are not consolidated, they present identical issues. The Court is issuing this Joint Memorandum Opinion in both actions and a separate Order in each action.

In the action originating from Ms. Shen's Maryland Public Information Act ("MPIA") request (Case No. 24-C-23-004122), the City filed a Memorandum in Support of Petition for

Judicial Review (Paper No. 1/2), The Baltimore Brew filed a Response (Paper No. 1/3), and the City filed a Reply Memorandum (Paper No. 1/4). In the action originating from Ms. Opilo's MPIA request (Case No. 24-C-23-004416), the City filed a Memorandum in Support of Petition for Judicial Review (Paper No. 1/2), The Baltimore Sun filed a Response (Paper No. 1/3), and the City filed a Reply Memorandum (Paper No. 1/4). The Court conducted a joint hearing by remote electronic means using Zoom for Government in both actions on March 5, 2024. All parties appeared by counsel. The Court appreciates the parties' helpful written and oral arguments.

Background

The Baltimore City Board of Ethics conducted an investigation and issued a decision in a matter involving City Council President Nicholas J. Mosby.[1] The issues in that matter included an effort by a special purpose trust organized in the District of Columbia, The Mosby 2021 Trust, to raise money to pay legal expenses incurred by City Council President Mosby and by his former wife, Marilyn Mosby, who was the State's Attorney for Baltimore City. The Mosby 2021 Trust solicited donations at least in part through a web site known as Donorbox. As part of its investigation, the City Ethics Board subpoenaed Donorbox's payment processor, Stripe, and obtained a list of donations made to The Mosby 2021 Trust through Donorbox. That list includes the name, address, and email address of each donor, the amount of the donation, the date and time of the donation, and the payment method.

[1] Mr. Mosby sought judicial review of the City Ethics Board's decision in the Circuit Court for Baltimore City, and that action was decided by this Court. The current actions were not specially assigned to this Court, and this Court's prior decision of the action for judicial review of the Ethics Board decision has no bearing on the issues in these actions.

The City Ethics Board included in the administrative record of its decision a redacted version of the spreadsheet of Donorbox donations. It redacted the names and email addresses of the donors and most of the address information for each donor. The City Ethics Board did not redact the zip code, state, and country for donors. It also did not redact the date and time of each donation, the amount of the donation, and the payment method. The payment method information includes the type of card used and the issuer of the card. Because the City Ethics Board included only the redacted spreadsheet as an exhibit in its administrative record, the court file in this Court for the action for judicial review of the City Ethics Board's decision contains only the redacted exhibit.

Ms. Shen for The Baltimore Brew and Ms. Opilo for The Baltimore Sun both submitted MPIA requests to the City Ethics Board seeking "a copy of the list of donors to the Mosby 2021 Trust," effectively a request for the unredacted Donorbox spreadsheet. A.R. 9.[2] The City Ethics Board responded to both requests by producing the redacted Donorbox spreadsheet and by denying access to the redacted information. A.R. 10. The City Ethics Board cited Md. Code, Gen. Prov. § 4-336, and stated that "[t]he names of donors are redacted because they constitute information about the finances of an individual, which the Board is required to protect under the PIA." *Id.* Both requestors invoked mediation with the Maryland Office of the Public Access Ombudsman, which was unsuccessful. A.R. 14-15. The requestors then sought review by the MPIA Compliance Board. A.R. 1-8.

[2] The references here are to the Administrative Record assembled by the MPIA Compliance Board in the matter based on the MPIA request by Ms. Opilo of The Baltimore Sun. Similar documents are contained in the Administrative Record related to the MPIA request by Ms. Shen of The Baltimore Brew. It appears that Ms. Shen's MPIA request was made orally by telephone, but it was still treated by the City Ethics Board as a full request.

The MPIA Compliance Board issued its written decisions on September 6, 2023. A.R. 63-70. The Board concluded "that § 4-336 [of the General Provisions Article of the Maryland Code] does not apply to shield the redacted information from disclosure." A.R. 63. It therefore found that the City Ethics Board "violated the PIA by redacting the list of donors to the Mosby Trust and order[ed] the BOE to produce the list without redactions." *Id.* The Compliance Board reached this conclusion with heavy reliance on the fact that The Mosby 2021 Trust claimed status as a tax exempt "political organization" under § 527 of the Internal Revenue Code. A.R. 66-67. The Board concluded that federal law requires such organizations to file reports with the Internal Revenue Service when they accept contributions or make expenditures "for an exempt function." A.R. 67 (quoting 26 U.S.C. § 527(j)(2)).[3] Under federal law, those reports must include the name and address and contribution dates and amounts for any contributor who give more than $200 within a calendar year, and the reports must be made public. A.R. 67 (citing 26 U.S.C. § 527(j)(3)(B), (j)(7), and (k)). The Compliance Board acknowledged that "donations to a § 527 political organization might broadly qualify as 'financial activity'" protected from disclosure by § 4-336, but it decided instead that "we do not think that these donations are what the Legislature intended to protect when it enacted § 4-336." A.R. 67.

[3] The federal statute defines "exempt function" to mean "the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed. Such term includes the making of expenditures relating to an office described in the preceding sentence which, if incurred by the individual, would be allowable as a deduction under section 162(a)." 26 U.S.C. § 527(e)(2). It is not clear to this Court that the goal of paying legal fees incurred by an elected official would qualify as an "exempt function." As discussed below, the difficulty of resolving that issue as a predicate to determining whether information is subject to disclosure under federal law is one of the problems in this situation.

The Compliance Board then drew on Maryland election law for the idea "that not all monetary donations are necessarily protected by § 4-336" because "certain campaign-related donations [must] be reported." A.R. 67-68. The Board cited Md. Code, Elec. Law § 13-309.2 and Maryland regulations for the example that "'participating organizations,' which are defined to include § 527 organizations that make 'political disbursements,' must file certain registrations or reports after the political organization makes disbursements over certain threshold amounts – i.e., more than $6,000, $10,000 or more, and $50,000 or more." A.R. 68. The Board, however, acknowledged the complexity of making these determinations either generally or in the specific context of this case: "Though it is not for us to determine the extent to which the Mosby Trust may be subject to (or may have violated) State election laws, we find these provisions relevant to whether donations to a § 527 political organization fall within the scope of § 4-336." *Id.*

The Compliance Board thus concluded as a matter of its construction of § 4-336 that § 4-336 does not apply to *any* contributions to federal § 527 political organizations: "Put simply, donations to that organization do not 'seem to fall in the same category as information about "assets, income, liabilities, net worth, bank balances, financial history or activities, or creditworthiness"' that § 4-336 safeguards." *Id.* (quoting *Kirwan v. Diamondback*, 352 Md. 74, 85 (1998)). Indeed, the Board appears to intend its interpretation to extend even further:

> Campaign finance activity, for example, is not ordinarily protected financial information. We think that donations like these – donations that are made to support elected officials in their political capacities – are much more akin to that sort of financial activity, which is commonly accepted as disclosable.

A.R. 68.

In *dictum*, the Compliance Board also stated its disagreement with the City Ethics Board's position concerning the effect of "other law" under Md. Code, Gen. Prov. § 4-328.

A.R. 69. That section provides that the mandatory denial provisions, including § 4-336, apply "[u]nless otherwise provided by law." The City Ethics Board argued that this limitation on § 4-336 is activated only if the "other law" provides a disclosure direction specifically to the custodian. The Compliance Board acknowledged that the issue was not necessary to its decision because it based its decision on interpretation of the scope of § 4-336 standing alone, but it opined that the limiting effect of § 4-328 should not be constrained as argued by the City Ethics Board. A.R. 69-70.

Discussion

"A court's role in reviewing an administrative agency adjudicatory decision is narrow . . . ." *Maryland Aviation Admin. v. Noland*, 386 Md. 556, 571 (2005) (quoting *Board of Physician Quality Assurance v. Banks*, 354 Md. 59, 67 (1999)). "[J]udicial review of an administrative agency action 'is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.'" *Bd. of Liquor License Commissioners for Baltimore City v. Kougl*, 451 Md. 507, 513 (2017) (quoting *United Parcel Serv., Inc. v. People's Counsel for Balt. Cnty.*, 336 Md. 569, 577 (1994)). Under the substantial evidence standard, a court must "defer to the regulatory body's fact-finding and inferences, provided they are supported by evidence which a reasonable person could accept as adequately supporting a conclusion." *Kenwood Gardens Condominiums, Inc. v. Whalen Properties, LLC*, 449 Md. 313, 325 (2016). The Court reviews conclusions of law *de novo* to correct any legal errors. *United Parcel Serv., Inc.*, 336 Md. at 577. *See also Amster v. Baker*, 453 Md. 68, 74 (2017) (recognizing that trial courts often make factual determinations on summary judgment in MPIA and federal Freedom of Information Act cases, but appellate courts review those decisions *de novo*).

No party in this Court argues that there are any disputes of fact. All parties and the MPIA Compliance Board accepted the decision of the City Ethics Board in the separate matter concerning City Council President Mosby as establishing the context of the public record in question. Resolution of this action turns entirely on the MPIA Compliance Board's legal conclusions in interpreting § 4-336. *See Univ. Sys. of Maryland v. Baltimore Sun Co.*, 381 Md. 79, 93 (2004) (holding that resolution of MPIA issues depended solely on statutory interpretation).

Although no party has asked the Court to review the unredacted spreadsheet *in camera*, the Court has considered that possibility. *See id.* at 105-06 (remanding case for trial court to conduct *in camera* inspection to determine interrelatedness of public and private contracts). Here, *in camera* inspection is not necessary because the single public record is relatively simple and the column headings clearly define the nature of the redactions made. The redacted version of the record appears at A.R. 40-47 in Case No. 24-C-23-004122 (Baltimore Brew) and at A.R. 30-37 in Case No. 24-C-23-004416 (Baltimore Sun).

The Court concludes this particular MPIA dispute is controlled by *Immanuel v. Comptroller of Maryland*, 449 Md. 76 (2016), and that the MPIA Compliance Board erred as a matter of law in construing § 4-336 to require disclosure. In *Immanuel*, as it has in many decisions, the Court of Appeals, now the Supreme Court of Maryland, noted the statutory balance between presumptive openness and mandatory protections against disclosure of certain information:

> The MPIA gives the public the right to broad disclosure of government or public documents with exemptions for specific kinds of information. GP § 4-101, *et seq.* * * * We construe the MPIA liberally to effectuate the Act's broad remedial purpose. *A.S. Abell Pub. Co. v. Mezzanote*, 297 Md. 26, 32, 464 A.2d 1068, 1071 (1983). * * *

> The State must disclose certain records unless the requested records are within the scope of a statutory exemption. *Faulk v. State's Att'y for Harford Cty.*, 299 Md. 493, 506-07, 474 A.2d 880, 887 (1984). * * * Section 4-103(b) of the MPIA provides that records should be withheld if "an unwarranted invasion of the privacy of a person in interest would result . . . ." The MPIA is clear that "[u]nless otherwise provided by law, a custodian shall deny inspection of a public record, as provided in this part." GP § 4-304. Sections 4-328-342 of the MPIA sets out required denials for specific information—exemptions to the general policy of disclosure of public records. The exemptions are categories of documents and information "that the statute mandatorily instructs a custodian to deny, or permit, inspection." *Univ. Sys. of Maryland v. Baltimore Sun Co.*, 381 Md. 79, 88, 847 A.2d 427, 432 (2004). Importantly, the express exemptions set out in the statute, "are intended to address the reasonable expectation of privacy that a person in interest has in certain types of records identified by the Legislature." *Id.* at 99-100, 847 A.2d at 439.

Immanuel, 449 Md. at 81-82. And the Court repeated many of the same principles later in its opinion:

> This Court has recognized that the MPIA establishes a public policy and a general presumption in favor of disclosure of government or public documents. *Kirwan v. The Diamondback*, 352 Md. 74, 80, 721 A.2d 196, 199 (1998). The MPIA is clear that its provisions "shall be construed in favor of allowing inspection of a public record." GP § 4-103. We construe the MPIA liberally "in order to effectuate the [Act's] broad remedial purpose." *A.S. Abell Pub. Co. v. Mezzanote*, 297 Md. 26, 32, 464 A.2d 1068, 1071 (1983). In a doubtful case, the party requesting information under the Act is favored. *Kirwan*, 352 Md. at 84, 721 A.2d at 200. Significantly, however, the State's duty to disclose certain records is limited by the scope of the statutory exemptions. *Faulk v. State's Att'y for Harford Cty.*, 299 Md. 493, 506-07, 474 A.2d 880, 887 (1984). The MPIA is clear that "[u]nless otherwise provided by law, a custodian shall deny inspection of a public record, as provided in this part." GP § 4–304.
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> While the public policy of the MPIA favors disclosure, the purpose of the Act reveals a legislative goal other than complete *carte blanche*, unrestricted disclosure of all public records. *Univ. Sys. of Maryland v. Baltimore Sun Co.*, 381 Md. 79, 94, 847 A.2d 427, 436 (2004). The legislative purpose underpinning the MPIA

> is that "citizens of the State of Maryland be accorded wide-ranging access to public information concerning the operation of their government." *Fioretti v. Maryland State Bd. of Dental Exam'ns,* 351 Md. 66, 73, 716 A.2d 258, 262 (1998) (emphasis added) (quoting *A.S. Abell Pub. Co.*, 297 Md. at 32, 464 A.2d at 1071); *see also Hammen v. Baltimore Cty. Police Dep't*, 373 Md. 440, 454–56, 818 A.2d 1125, 1134-36 (2003); *Kirwan*, 352 Md. at 81, 721 A.2d at 199.

Id. at 88. The Baltimore Brew and The Baltimore Sun are wrong when they argue that "Sections 4-304 to -342 set forth a number of exemptions upon which a custodian *may* rely to deny inspection of public records." Respondent's Mem. at 6 (emphasis added). All of these sections, including § 4-336, are mandatory and *require* a custodian to deny inspection of either a record or information that is included within the provision. The custodian has no discretion to disclose information covered by a mandatory denial if the custodian believes there is special public interest in the information or that a person in interest would not be affected adversely by disclosure.

The mandatory denial provision for financial information provides:

> (a) This section does not apply to the salary of a public employee.
>
> (b) Subject to subsection (c) of this section, a custodian shall deny inspection of the part of a public record that contains information about the finances of an individual, including assets, income, liabilities, net worth, bank balances, financial history or activities, or creditworthiness.
>
> (c) A custodian shall allow inspection by the person in interest.

Md. Code, Gen. Prov. § 4-336. By its plain terms, the use of multiple, overlapping illustrative terms – "assets, income, liabilities, net worth, bank balances, financial history or activities, or creditworthiness" – indicates the General Assembly's intention that "information about the finances of an individual" be construed broadly. The Court recognized this legislative intention in *Immanuel*. Before considering the effect of the separate Maryland Abandoned Property Act,

the Court opined that § 4-336 "would prohibit the Comptroller from disclosing any information about individual accounts that are in his guardianship." 449 Md. at 94. The Court ultimately approved disclosure of accountholder names and last known addresses, without disclosing any amounts held, only because the Abandoned Property Act required publication of that information. *Id.* at 96.

This Court concludes that information identifying specific contributions made by private individuals to a private trust through a private web site is information concerning the contributors' "financial . . . activities" and therefore is "information about the finances of an individual" that the City Board of Ethics was required to withhold from public disclosure. It may be argued that these single transactions, some of them in very small amounts, show little about any person's overall financial position. But the same could be said of the minimal information concerning unclaimed funds held by the Comptroller, yet the Court concluded in *Immanuel* that that information was covered by § 4-336.

The Court rejects the MPIA Compliance Board's conclusion – as an interpretation of § 4-336 itself – that private financial transactions that have some political nexus were meant by the General Assembly to be excluded from § 4-336. The statute itself shows that the legislature knew how to carve out specific information. The "salary of a public employee" plainly is "information about the finances of an individual," but the statute provides explicitly that public salaries are not exempt from disclosure under § 4-336. That expressed exclusion formed the basis for the disclosures considered in *Univ. Sys. of Maryland v. Baltimore Sun Co.* *See* 381 Md. at 100. Discussing *Univ. Sys. of Maryland* in *Immanuel*, the Court characterized its earlier decision as reflecting "our emphasis on maintaining the barrier between disclosure of public activity and exempting private information . . . ." *Immanuel*, 449 Md. at 93. The MPIA

Compliance Board did not identify anything in the text or legislative history of the MPIA itself that would support a silent exclusion from § 4-336 of any financial transactions that implicate political officials in some way.

In this Court's opinion, the MPIA Compliance Board used Internal Revenue Code § 527 and the Maryland Election Law Article incorrectly to construe GP § 4-336. The essence of the Compliance Board's logic is that because *some* political contributions must be disclosed under federal and State campaign finance regulations, therefore *all* contributions with some nexus to political activity are removed as a matter of law from the § 4-336 exemption. That is not the approach taken by the Court in *Immanuel*. There, the Court had to harmonize two statutes: the MPIA and the Maryland Abandoned Property Act, Md. Code, Com. Law § 17-301 *et seq.* The Court first construed § 4-336 of the MPIA on its own terms to determine that all the information at issue would be considered financial information exempt from public disclosure. The Court then determined that the same custodian – the Maryland Comptroller – was subject to a publication requirement under the Abandoned Property Act that applied to some but not all of the information at issue. "In order to harmonize the two statutes, we give value to the choice that the Legislature made in selecting for publication just the included information about each account, and the specificity with which it described the information." *Immanuel,* 449 Md. at 96. The Abandoned Property Act resulted in production of that specifically limited information under the MPIA because GP § 4-304 provides that MPIA exemptions must be applied "[u]nless otherwise provided by law."[4] *Id.* at 95. The Abandoned Property Act was such "other law" specifically applicable to this information held by this custodian.

[4] Section 4-304 is the "other law" provision that applies to mandatory denials of specific categories of records; § 4-328 is the "other law" provision that applies to mandatory denials of specific types of information in public records.

The MPIA Compliance Board eschewed reliance on "other law" and as a result failed to harmonize the MPIA with either § 527 of the Internal Revenue Code or Maryland election law. The discord is evident in how the Compliance Board's conclusions would apply to the State Board of Elections. This Court has not analyzed the State's campaign finance disclosure laws in detail, but the State Elections Board presumably receives reports that campaigns and other political entities must submit to it and makes available to the public the information required to be disclosed by Maryland election law. In doing so, the State Elections Board must understand that law and apply its various disclosure requirements, including the disclosures that are triggered at different levels of contributions or expenditures. But under the MPIA Compliance Board's construction of § 4-336, if the State Elections Board came into possession of political contribution information that was not within the technical disclosure requirements of Maryland election law, the State Elections Board would have an independent *MPIA* obligation to disclose that information because it would be a non-exempt public record. The MPIA Compliance Board's interpretation thus would negate the careful disclosure calibrations made by the General Assembly in Maryland election law. This cannot have been the result intended by the General Assembly.

Harmonizing § 4-336 of the MPIA with campaign finance disclosure statutes means that the exemption contained in § 4-336 does not counteract required campaign finance disclosures. A contributor could not claim that her or his otherwise disclosable campaign contribution cannot be disclosed because it falls within the meaning of § 4-336. That is the effect of § 4-328 and "other law" on narrowing the scope of § 4-336 and other mandatory exemptions from disclosure. But that principle creates an untenable practical problem in this case. As more fully explicated by the City in its memorandum, the campaign finance disclosure requirements under federal and

State law are technical and complex. Where, as here – and unlike as in *Immanuel* – the agency custodian is not an official charged with administration of the "other law," it is too much to expect the custodian to make fine determinations concerning disclosure under the "other law." This Court is not willing to go as far as suggested by the City to hold that "other law" only applies when it is directed to the specific custodian. There are many instances where the "other law" is straightforward and can be applied readily by the custodian. But this is not such a case. The "other law" here is complex, and the City Ethics Board became the custodian of this information only because it had relevance to its independent ethics investigation. In these circumstances, the City Ethics Board was justified in denying public access to all of the redacted information identifying specific individuals because identifying the individuals would have disclosed exempt individual financial information.

Conclusion

For these reasons, the decision of the MPIA Compliance Board will be reversed and the action of the Baltimore City Board of Ethics denying access to the requested information will be affirmed. The Court is issuing a separate Order in each of the actions.

Judge Fletcher-Hill's signature appears on the original document in the court file.

March 15, 2024

Judge Lawrence P. Fletcher-Hill