

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

JUDICIAL WATCH, INC.,)
)
 Plaintiff,)
)
 v.)
)
 MONTGOMERY COUNTY POLICE)
 DEPARTMENT,)
)
 Defendant.)
)
 _____)

Case Number 482964-v

**PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT;
REQUEST FOR A HEARING**

COMES NOW Plaintiff Judicial Watch, Inc., by and through its attorneys and pursuant to Maryland Rule 2-501, and hereby cross-moves for summary judgment. Plaintiff also requests a hearing on its cross-motion.

Dated: October 5, 2020

Respectfully submitted,

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IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

JUDICIAL WATCH, INC.,)	
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Plaintiff,)	
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v.)	Case Number 482964-v
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MONTGOMERY COUNTY POLICE)	
DEPARTMENT,)	
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Defendant.)	
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**PLAINTIFF’S MEMORANDUM OF GROUNDS AND AUTHORITIES IN
OPPOSITION TO DEFENDANT’S MOTION TO DISMISS AND/OR
FOR SUMMARY JUDGMENT AND IN SUPPORT
OF PLAINTIFF’S CROSS-MOTION**

Plaintiff Judicial Watch, Inc., by and through its attorneys, submits this memorandum of grounds and authorities in opposition to Defendant’s motions to dismiss and/or for summary judgment and in support of Plaintiff’s cross-motion for summary judgment.

I. Introduction.

As issue in this Maryland Public Information Act (PIA) suit is Plaintiff’s request for Body Worn Camera (BWC) footage of an officer-involved shooting in Potomac, Maryland. After Plaintiff filed suit, Defendant denied the request, citing the PIA’s investigatory records exemption.

At 4:30 a.m. on March 12, 2020, Defendant’s SWAT team fatally shot Duncan Socrates Lemp while executing a no-knock search warrant at Mr. Lemp’s home. Defendant and Mr. Lemp’s family give sharply conflicting accounts of the shooting. According to Defendant, officers identified themselves as police and gave Mr. Lemp multiple orders to show his hands and get on the ground. The officers claim they shot and killed Mr. Lemp when he refused to comply with their commands and “confronted” them. Mr. Lemp’s family asserts that Mr. Lemp

was asleep next to his girlfriend when police entered, fatally shooting him in his sleep. The family attorney has called for the release of all BWC and audio recordings associated with the killing.¹

Police BWC programs exist primarily to improve transparency and promote public confidence in the police. In June 2015, Defendant began a BWC pilot program “to test and evaluate all aspects of the program including equipment, infrastructure, support, policy, and training.” *See* Montgomery County Police Department, Body Worn Camera System Pilot Program Evaluation Report, June 27, 2016 (“Evaluation Report”) available at <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/mcpd-bwcs-pilot-program-summary-report.pdf>. As the Evaluation Report notes, “These cameras can help promote agency accountability and transparency, and they can be useful tools for increasing officer professionalism, improving officer training, preserving evidence, supporting prosecutions, and accurately documenting encounters with the public.” *Id.* at 12. It continued:

Public perceptions of the police department are largely based on individual experience and can certainly impact the legitimacy of police actions, especially those actions that involve police use of force. The public expects and deserves a culture of transparency, accountability, fairness, trust, and respect, and every member of the department is held accountable for their actions. In today’s environment of heightened public expectations and scrutiny of police department operations, it is important to emphasize that regardless of how well the department believes it is fulfilling its mission, the ultimate measure of success, and the ability to maintain public trust and confidence is how well the department is able to earn and sustain the trust and respect of the citizens of the county.”

Id. at 13. “[T]he ultimate purpose of body worn camera technology should be to promote and support public safety, and help officers and prosecutors provide the highest level of service, and

¹ *See* Michael Kunzelman, Associated Press, “Lawyer: Man Killed By Officer Was Asleep When Police Fired,” ABC News, March 13, 2020, available at <https://abcnews.go.com/US/wireStory/lawyer-man-asleep-police-fired-house-killing-69587748>.

continue to protect and serve the citizens of Montgomery County.” *Id.* Defendant began full implementation of its BWC program in April 2016. *Id.* at 6.

Since implementation of the program, Defendant has released other BWC footage, including footage from the fatal shooting of Mr. Finan H. Berhe of Silver Spring, Maryland on May 7, 2020.² Footage of Mr. Berhe’s fatal shooting was released while the incident was still under investigation by the Major Crimes Division, the same entity that purportedly is investigating Mr. Lemp’s fatal shooting. *See* May 8, 2020 Press Release; Def’s Mem. at Attachment 2 (Affidavit of Detective Sergeant Edward Drew (“Drew Affidavit”)) at ¶ 2. Other instances in which BWC recordings of police shootings were released, obviously because of the substantial public interest in these incidents, include the Baltimore County Police Department’s June 24, 2020 fatal shooting of Robert Johnson, Jr.,³ and the Baltimore Police Department’s July 9, 2020 shooting of Ricky Walker, Jr.⁴

² *See* Montgomery County Department of Police, Press Release, “Update: Body-Worn Camera Footage of Officer-Involved Shooting in White Oak Released,” May 8, 2020 (“May 8, 2020 Press Release”), available at <http://www.mymcpnews.com/2020/05/08/update-body-worn-camera-footage-of-officer-involved-shooting-in-white-oak-released/>; ACLU of Maryland, “Montgomery County Police Hold African-American Family For An Hour To Conduct Illegal Search,” April 30, 2019, available at <https://www.aclu-md.org/en/press-releases/montgomery-county-police-hold-african-american-family-hour-conduct-illegal-search>.

³ *See* Mike Hellgren, “Baltimore County Police Release Body-Work Camera Footage in Fatal Officer-Involved Shooting of Robert Johnson Jr.,” CBS Baltimore, June 24, 2020, available at <https://baltimore.cbslocal.com/2020/06/24/baltimore-county-police-release-body-worn-camera-footage-of-may-16-officer-involved-shooting-robert-johnson-jr/>.

⁴ *See* Justin Fenton, “Baltimore police release body camera video of officers shooting man while responding to behavioral crisis,” Baltimore Sun, July 9, 2020, available at <https://www.baltimoresun.com/news/crime/bs-md-ci-cr-body-cam-footage-shooting-20200709-12r6li4hpbaorjxel6wyragsmu4-story.html>.

On June 18, 2020, Plaintiff submitted a PIA request to Defendant for “a copy of all body-worn camera videos relating to the raid on, and resulting death of, Duncan Socrates Lemp by a Montgomery County Police SWAT team on March 12, 2020 at Mr. Lemp’s home in Potomac, Maryland.” Def’s Mem. at Attachment 1. When Defendant failed to provide a substantive response to the request within the statutory time period, Plaintiff filed suit. On September 1, 2020, Defendant denied Plaintiff’s request, citing GP § 4-351(a) and (b). *Id.*

Defendant now moves to dismiss or, in the alternative, for summary judgment. Both motions should be denied. Plaintiff’s complaint plainly states a claim for violation of the PIA, and Defendant failed to meet its burden of proof justifying denial of the request. Accordingly, both motions should be denied.

II. Standard of Review.

For motions to dismiss for failure to state a claim under Md. Rule 2-322(b), “a court must assume the truth of all well pleaded facts and all inferences that can be reasonably drawn from those pleadings.” *Hrehorovich v. Harbor Hosp. Ctr., Inc.*, 93 Md. App. 772, 781 (1992) (citing *Sharrow v. State Farm Mut. Auto. Ins. Co.*, 306 Md. 754, 768 (1986)). The “court [is] not permitted to consider additional facts not plead by the plaintiff, especially facts set forth by the defendant.” *Id.* (citing *Beach v. Mueller*, 32 Md. App. 219, 224 (1976)). In order to place a complaint in context, however, a court considering a motion to dismiss may take judicial notice of additional facts that are either matters of common knowledge or capable of certain verification.⁵ *Faya v. Almaraz*, 339 Md. 435, 443 (1993).

⁵ Plaintiff respectfully requests that the Court take judicial notice of the following, as they are both generally known within the territorial jurisdiction of the trial court and capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned: (1) the contents of Defendant’s BWC Pilot Program Evaluation Report executive summary; (2) Defendant’s release of BWC footage of the May 7, 2020 shooting of Finan H.

If “matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 2-501.” *Hrehorovich*, 93 Md. App. at 782 (quoting Md. Rule 2-322(c)). “Summary judgment is appropriate only where there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law.” *Id.* at 789 (citations omitted). “In determining whether a factual dispute exists, all inferences should be drawn in the light most favorable to the non-moving party.” *Id.* at 790 (citing *King v. Bankerd*, 303 Md. 98, 111 (1985)). Judicial notice may be taken “at any stage of the proceedings,” including summary judgment. Md. Rule 5-201(f).

III. Argument.

A. Plaintiff Has Stated A Claim Against Defendant Under the PIA.

The PIA grants broad public access to records maintained in the possession of a local government agency. *See* GP § 4-201(a). It provides “a custodian shall permit a person or governmental unit to inspect any public record at any reasonable time” subject to certain exemptions. *Andy’s Ice Cream v. City of Salisbury*, 125 Md. App. 125, 137 (1999) (quoting GP § 4-201(a)). The PIA applies to any local government, as well as any “unit or instrumentality” of that government. *See* GP § 4-101(i), (j). If the governmental body has sufficient control over the political subdivision’s operations, then that entity is a “unit or instrumentality” of the governmental body and is subject to the PIA. *See, e.g., A.S. Abell Publishing Co. v. Mezzanote*, 297 Md. 26, 35-38 (1983) (finding that the Maryland Insurance Guaranty Association was an instrumentality of the State of Maryland because it was established by the General Assembly and

Berhe despite the pendency of an ongoing investigation of that shooting, (3) Baltimore County Police Department’s release of BWC footage of the June 24, 2020 shooting of Robert Johnson, Jr.; and (4) Baltimore Police Department’s release of BWC footage of the July 9, 2020 shooting of Ricky Walker, Jr. *See* Md. Rule 5-201.

its operating procedures were subject to the State Insurance Commissioner's approval and amendment, among other reasons); *see also Andy's Ice Cream*, 125 Md. App. at 142 (the Salisbury Zoo Commission was a "unit or instrumentality" of the Mayor and City Council of Salisbury because the local government exercised a sufficient level of control over the Zoo Commission).

As Defendant readily admits, albeit in not so express terms, the Montgomery County government has control over Defendant. The Montgomery County Council established the Department of Police as a departmental agency of the County and "Section 12-802(c) empowers the County to establish and maintain a police department." Def's Mem. at 3. In addition, the members of the department are subject to the control of the director of the police (Montgomery County Code § 35-1), who is appointed by the County Executive. Montgomery County Code § 1A-102(a). In turn, the director of police is "subject to such orders, rules and regulations as may be issued by the county executive." Montgomery County Code § 35-3(a). Moreover, the director of police is required to issue an annual report to the county executive and county council on department operations and submit recommendations for improvements. *See id.*, § 35-3(j). Clearly, the Montgomery County government exercises control over Defendant such that Defendant is a "unit or instrumentality" of Montgomery County, subjecting it to the PIA. *See* 86 Opinions of the Attorney General 94, 106 (2001) (records of Professional Standards Unit, an internal investigations unit of the Frederick City Police Department, are records of a "unit or instrumentality ... clearly within the purview of the PIA").

Defendant's authority is inapposite. It involves cases concerning whether the General Assembly waived sovereign immunity for certain local government agencies for tort liability, none of which is relevant in the instant dispute. *See* Def's Mem. at 4 (collecting cases). If

waiver of immunity were ever in doubt, the General Assembly erased it with respect to actions for government records. In enacting the PIA, the General Assembly expressly allowed for suits against local governments and any “units or instrumentality” of those governments. *See generally Condon v. State*, 332 Md. 481, 492 (1993) (recognizing that an agency may be sued where the General Assembly has authorized such suit). Indeed, it authorized injunctions against a “unit” of a political subdivision to prevent the unlawful withholding of government records. *See GP § 4-362(c)(3)(i)*. It also authorized award of damages against “a defendant governmental unit” in certain circumstances. *Id.* at 4-362(d). It would be completely incongruous for the General Assembly to have authorized injunctions and award of damages against such units if they could not be named as defendants. Defendant misreads the PIA in this regard. Plaintiff has plainly stated a claim for relief under the PIA against Defendant.⁶

B. Defendant is Unlawfully Withholding the BWC Footage.

There is no dispute that the BWC footage of Mr. Lemp’s fatal shooting is a record subject to disclosure under the PIA or that Plaintiff requested and Defendant denied Plaintiff access to the footage. Under the PIA, “the public agency involved bears the burden in sustaining its denial of the inspection of public records.” *Fioretti v. Maryland State Bd. of Dental Exam’rs*, 351 Md. 66, 78 (1998) (citations omitted). Defendant claims it is withholding the footage under GP § 4-

⁶ In the unlikely event the Court finds otherwise, Plaintiff may file an amended complaint naming Montgomery County as the defendant, without leave of court, because no deadline for filing amended pleadings has been established. *See Md. Rule 2-341(a) and (c)*. Moreover, Montgomery County clearly has had timely notice of Plaintiff’s lawsuit and, in fact, its attorneys have appeared and are defending the action even though the Montgomery County Police Department is named as the defendant. There can be no prejudice to Montgomery County under the circumstances, and, by contrast, Plaintiff and the public would be prejudiced by the resulting delay if Plaintiff were required to file an entirely new action instead of simply amending the complaint to correct a misnomer.

351(b), on the ground that disclosure would interfere with an ongoing investigation into Mr. Lemp's death.⁷ See Def's Mem. at 5; Drew Affidavit at ¶ 5. Defendant's bald, conclusory assertion of interference is woefully inadequate to satisfy its burden.

i. Defendant Ignores GP §§ 4-103(b) and 4-343 and the public interest in disclosure.

In enacting the PIA, the General Assembly was clear: "unless an unwarranted invasion of privacy of a person in interest would result, this title shall be construed in favor of allowing inspection of a public record." GP § 4-103(b). The General Assembly also provided: "Unless otherwise provided by law, if a custodian believes that inspection of a part of a public record by the applicant would be contrary to the public interest, the custodian may deny inspection by the applicant of that part of the record, as provided in this part." GP § 4-434.

Although the general presumption of the PIA is in favor of disclosure, there are circumstances where "disclosure either 1) **must** be denied or 2) **may** be denied in the discretion of the custodian." *Blyth v. State*, 161 Md. App. 492, 516 (2005). Denial under the investigatory records exception, GP § 4-351, falls under the latter, discretionary provisions. As a result, Defendant must show that disclosure of the BWC footage of Mr. Lemp's fatal shooting "would be contrary to the public interest." *Blyth*, 161 Md. App. at 518; GP § 4-343.

⁷ In its denial letter, Defendant cited both GP § 4-351(a) and (b) but, in its moving papers, only invoked GP § 4-351(b). See Def's Mem. at Attachment 1. The latter provision permits a custodian to "deny inspection by a person in interest only to the extent that the inspection would ... interfere with a valid and proper law enforcement proceeding." A "person in interest" is defined as "a person ... that is the subject of a record." GP § 4-101(g)(1). Plaintiff does not claim to be the subject of any BWC footage or a person in interest in Mr. Lemp's shooting. See *Office of the State Prosecutor v. Judicial Watch*, 356 Md. 118, 139 (1999) (finding Judicial Watch was not a person in interest under GP § 4-351(b) when seeking grand jury records unrelated to the organization). GP § 4-351(b) does not apply.

Defendant did not even attempt to make this showing, a necessary precondition for the custodian to justify withholdings under *all* permissive denials, including investigatory records. *See Prince George's County v. Wash. Post. Co.*, 149 Md. App. 289, 333 (2003). Nor could it. Disclosure here in no way contravenes the public interest; indeed, disclosure *favors* it. According to Defendant's own report, BWC footage provides "a more accurate and objective record of events" and "resolv[es] issues more quickly." *See* Evaluation Report at 7. "BWCs can create a public record that allows the entire community and the courts to see what actually happened." *Id.* Moreover, BWCs "can eliminate speculation and address unsubstantiated allegations of misconduct which frequently occur following critical incidents such as an officer involved shooting, an in-custody death, or other incidents that result in serious injury or death." *Id.* In such circumstances, "an objective and factual video recording from the officer's perspective can be invaluable for the officer, the department, *and the community.*" *Id.* (emphasis added).

Plaintiff agrees. Release of objective and factual video recordings of Mr. Lemp's shooting is critical to addressing and resolving conflicting reports about the killing. It also would, in Defendant's own words, "eliminate speculation and address unsubstantiated allegations of misconduct which frequently occur." These precise issues have arisen with respect to the fatal shooting of Mr. Lemp nearly seven months ago. The public interest demands that they be answered in a timely manner. This plainly is why Defendant publicly released on May 8, 2020, BWC footage of the officer-involved shooting death of Mr. Berhe *while the incident was still under investigation.* *See* May 8, 2020 Press Release. Releasing the footage answered important questions about the factual circumstances leading up to Mr. Berhe's shooting and the perspective and conduct of the officer involved. It did not contravene the public interest. It

aided it. It also likely did not prejudice the investigation into Mr. Berhe's death. Since the release, there have been no claims or reports that the investigation was jeopardized. If the public release of the footage of Mr. Berhe's shooting did not prejudice that investigation, why does it do so here in the case of Mr. Lemp? Defendant provides no explanation. Instead, Defendant invites this Court to adopt Defendant's indiscriminate standard of releasing some BWC footage while an investigation is ongoing but withholding others, a standard that is not justified under either the Maryland PIA or common sense. The Court should decline Defendant's invitation.

ii. Defendant's GP § 4-351(b) evidence is woefully inadequate.

"[B]ald assertions that documents may or may not be exempt from disclosure due to a privilege held by the government entity are not sufficient bases for a grant of summary judgment." *ACLU Foundation of Md. v. City of Salisbury*, No. C-22-CV-17-000440, 2018 Md. Cir. Ct. LEXIS 5, *20 (Md. Cir. Ct. May 31, 2018). The government entity has the burden of "sustaining a decision to deny inspection of a public record." *See* GP § 4-362(b)(2)(i)(1).

"[C]onclusory statements in support of 'generalized allegations of [exceptions]' do not satisfy the burden imposed by Maryland law to justify non-disclosure for each withheld document." *Lamson v. Montgomery Cty.*, 460 Md. 349, 368 (2018) (citation omitted). In evaluating whether an agency has met its burden, courts apply one of three methods. *See id.* at 367. The first method is the *Vaughn* index, which is a "system of itemizing and indexing that correlates each of the government's justifications for its refusal to disclose the documents with the actual portions of the documents at issue." *Id.* A *Vaughn* index must include "a list of documents in possession, setting forth the date, author, general subject matter and claim of privilege for each document claimed to be exempt from discovery." *Id.* Defendant provides no *Vaughn* index, so that method is irrelevant here.

The second method, which is the only relevant method here,⁸ is the submission of testimony or affidavits that provide a detailed description of the nature of the denial and establish the basis for denial. *Id.* Defendant’s affidavit in support of its GP § 4-351(b) claim consists of the single, conclusory sentence that “[r]elease of any investigatory records prior to the conclusion of” the ongoing investigation into Mr. Lemp’s death “would interfere with this investigation.” Drew Affidavit at ¶ 5. The statement is not even specific to the BWC footage, but instead is a blanket claim about *all* records of the purported investigation. It is exactly the type of bald, conclusory statement in support of a generalized assertion that fails to satisfy the government’s burden. *Lamson*, 460 Md. at 368. The provision does not even apply because Plaintiff is not a “person in interest.” *See* footnote 7, *supra*. In addition to failing to satisfy its burden under GP § 4-434, Defendant failed to satisfy its burden under GP § 4-351(b).

iii. Defendant cannot satisfy its burden of under GP § 4-351(a).

Defendant did not argue GP § 4-351(a) applied even though it referenced the provision in its denial letter. It has waived any such claim.

Even if Defendant had not waived any GP § 4-351(a) claim, it would not apply. Though “records of investigations conducted by agencies enumerated in the [investigatory records] exception” are “presumed” to be “compiled for law enforcement or prosecution purposes” (*Office of the State Prosecutor*, 356 Md. at 140 (citation omitted)), such presumption is not absolute. Defendant attempts to turn a presumption into a per se rule that shields from disclosure any and all records compiled by the police department. But that approach turns the PIA, a statute designed to favor disclosure, on its head. “*An agency cannot satisfy its statutory burden of*

⁸ The third method is *in camera* review, which has not occurred and is inapposite.

‘sustaining a decision to deny inspection of a public record’ *by simply asserting that all the records sought would prejudice an investigation*, for, if it could do that, the Public Information Act would be meaningless.” *Blyth*, 161 Md. App. at 527 (quoting *Fioretti*, 351 Md. at 100).

The exemption provides, in relevant part, “a custodian may deny inspection of ... records of investigations conducted by the Attorney General, a State’s Attorney, a municipal or county attorney, a police department, or a sheriff.” GP § 4-351(a)(1). Plaintiff respectfully submits that the BWC footage at issue is not a “record[] of [an] investigation[] conducted by the ... police department.” GP § 4-351(a)(1) (emphasis added). Nor is it an “investigatory file.” *Id.* § 4-351(a)(2). BWC recordings are records routinely created in the ordinary course of police business. Evaluation Report at 6 (noting that, as of July 2016, Defendant had 815 officers equipped with body cameras in the field); *see also Prince George’s County*, 149 Md. App. at 326 (police rosters not automatically shielded under the investigations exemption). They provide an objective, factual, unedited, and contemporaneous account of police officers’ actions. They are not specific to any particular investigation, but, like CCTV, surveil everything within the camera’s purview as long as they are operating. BWC footage is not even unique to any particular investigation because, as Plaintiff understands it, BWC cameras are always recording officers’ actions. That is their purpose. In sum, GP § 4-351(a) does not apply to BWC footage, a conclusion Defendant obviously reached when it chose not to even brief the issue.

IV. Conclusion.

For foregoing reasons, Defendant's Motion to Dismiss and/or for Summary Judgment should be denied, and Plaintiff's Cross-Motion for Summary Judgment should be granted.

Dated: October 5, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of October 2020, a copy of the foregoing was sent, via first class mail, postage prepaid, to:

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Haley M. Roberts
Office of the County Attorney
101 Monroe Street, Third Floor
Rockville, MD 20850


Paul J. Orfanedes

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