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CIRCUIT COURT FOR FREDERICK COUNTY, MARYLAND
100 West Patrick Street
Frederick, Maryland 21701
Clerk of the Court: 301-600-1976 Assignment Office: 301-600-2015

Case Number: **C-10-CV-22-000369**
Other Reference Numbers:

IN THE MATTER OF SUGARLOAF ALLIANCE INC.

OPINION AND ORDER REGARDING ATTORNEYS' FEES

Background and Factual Findings

This case had its genesis on October 19, 2021, when Steven Black, current president of Plaintiff Sugarloaf Alliance, Inc., along with then-current president Mr. Winkler, filed two Maryland Public Information Act ("MPIA") requests with Frederick County government. On the same day, written acknowledgement of the two requests was received from Defendant Andrew Ford, Esq., public information officer for the county.

The MPIA requests pertained to zoning changes that were being contemplated so as to enable possible siting of "Critical Digital Infrastructure" within the county, purportedly to accommodate Amazon Web Services ("AWS"). AWS was rumored to be interested in locating a data center facility in Frederick County. The requests were also related to implementation of the so-called "Sugarloaf Plan," a master plan for the region then under discussion by county planning agencies.

Sugarloaf Alliance is a non-profit civic organization dedicated to the preservation of Sugarloaf Mountain and the surrounding community. Black, on behalf of the 650 or so members of Sugarloaf Alliance, was concerned about sudden changes in the Sugarloaf Plan that were being proposed at planning commission meetings in early 2021, but was unable to obtain a satisfactory answer to his inquiries. His suspicions aroused, the MPIA requests were filed to learn more about the reasons for the proposed changes.

After the filing of the MPIA requests, no information was provided from any county representative regarding how long it would take to comply, nor did Black, Winkler, or any other representative from his organization follow up with the county. During the period from October 19, 2021, until the filing of the instant case on June 4, 2022, Black talked to Ford regarding other matters, as well as various public officials including county council members, but did not bring up the subject of the unanswered MPIA requests.

More than two months after filing of this lawsuit, on August 16, 2022, a number of documents responsive to the requests were provided to Plaintiff. Twenty (20) responsive items were produced in their totality, out of 156 that were deemed to be germane to Plaintiff's requests. At trial in this matter, Plaintiff's counsel described the items received as 197 pages of pamphlets, promotional materials, and several emails. None of them were redacted in any way. As to the 136 items not produced, the county provided two so-called *Vaughn* indices (named after the case of *Vaughn v. Rosen,* 474 F.2d 820 (D.C. Cir. 1973)), identifying the subject matter of the documents withheld as privileged, naming their creators, and recipients, along with the dates sent and reasons for non-production.

The *Vaughn* indices were admitted at trial on April 11, 2023, as Plaintiff's Exhibits 1 and 2, respectively, at the suggestion of the court. The first exhibit contained 66 entries, and the second 92 entries. Seven of the entries blacked out various information, including subject matter and/or recipients.

Once the case was at issue, cross-motions for summary judgment were filed by the parties. Both

motions were denied, after a hearing, on November 2, 2022, by Judge Kathleen English of this court. A second such motion, filed by the county, was denied without a hearing on February 24, 2023, also by Judge English. The parties conducted discovery, including interrogatories and depositions, and a pretrial hearing was held on March 15, 2023. On that day, the matter was set for a two-day bench trial to commence on April 11.

Defendants' Pretrial Statement did not specifically identify the *Vaughn* indices as documents that it would offer into evidence, but suggested that "[i]f Plaintiff contends that the County's responses are insufficient, it needs to amend its Complaint, asking the Court to review the Vaughn index and/or documents to determine whether non-disclosure was appropriate."

At the time the case was called for trial, the county contended that the matter was moot, as production had occurred – albeit tardily – and there had been no amendment of Plaintiff's Complaint to reflect dissatisfaction with the *Vaughn* indices. Plaintiff, on the other hand, contended that there continued to be non-production, and it was not its burden to particularize any dissatisfaction with the content of the indices. Rather, Plaintiff maintained, it was the county's obligation to satisfactorily explain to the court's satisfaction the reasons for that non-production.

This court issued its oral opinion in the case on June 8, 2023. For reasons stated on the record, the court granted relief to Plaintiff as to the vast majority of public information requests, which had been withheld on discretionary privilege grounds. It took under further consideration 13 requests dealing with claims of attorney-client privilege and confidential commercial information privilege, to be reviewed by the court *in camera.* There was no request by the county to stay the ruling, although a subsequent Motion for Reconsideration was filed on June 20, apparently after production had occurred. That motion was denied by the court on July 25.

A further hearing occurred on September 6, on the issues of attorneys' fees, and a ruling on the disclosure of the remaining documents that had been examined by the court *in camera.* The court upheld the claim of privilege as to 14 categories of documents. Several of the documents found to be privileged, however, had already been produced by the county in response to the court's order of June 8. This was ostensibly because those documents were listed separately under a claim of a discretionary privilege, and not attorney-client or confidential commercial information privilege.

As to one other set of documents, the parties agreed cooperatively to review them jointly. Their status will not be germane to the court's analysis of entitlement to attorneys' fees herein. It should be noted that the number of *in camera* documents increased by two at the county's request, with the court's consent, after the June 8 order, because they were alleged by the county to be covered by the attorney-client and/or confidential commercial communication privilege.

Such other facts as may be necessary to the court's decision are set forth below.

Statutory and Case Law Relevant to Attorneys' Fees Entitlement

Pursuant to the *Annotated Code of Maryland,* General Provisions §4-362(f), where after the filing of suit an MPIA "complainant has substantially prevailed, the court may assess against a defendant governmental unit reasonable counsel fees and other litigation costs that the complainant reasonably incurred." A complainant substantially prevails when "the lawsuit could reasonably be regarded as having been necessary in order to gain release of the information." *Caffrey v. Department of Liquor Control for Montgomery County,* 370 Md. 272, 299 (2002). Furthermore, there must be "a causal nexus between the prosecution of the suit and the agency's surrender of the requested information, and that the complainant recovered key documents." *Id.*

In *Kline v. Fuller,* 64 Md. App. 375 (1985), the Appellate Court of Maryland adopted several non-

exhaustive factors to be considered when determining an award of attorneys' fees, including: 1) benefit to the public derived from the suit; 2) the nature of the complainant's interest in the released information, and 3) whether the agency's withholding of the information had a reasonable basis in law.

Section 4-362(f) is to be distinguished from subsections (d)(1)-(3), which permit the court to assess actual and statutory damages where a government agency "knowingly and willfully" fails to disclose a record that should have been disclosed to the requestor.

Plaintiff's Request for Attorneys' Fees

Plaintiff argues that it "substantially prevailed" in this case, and that the public benefitted significantly from the disclosure of previously-withheld documents. It points to the "paltry" production of some 20 documents before this court ordered disclosure on June 8, in contrast to 786 pages that were thereafter produced. The records, Plaintiff claims, "reflected that Frederick County Officials had a secret plan to develop a portion of Sugarloaf into an Amazon Web Services data center. These records are 'key' to Sugarloaf's mission in that they reflect an unlawful attempt to subvert lawful land use in a protected part of Frederick County."

Sugarloaf Alliance suggests that its efforts exposed what Frederick County officials were attempting to conceal from the public, namely a secret deal between AWS, a private company, and the government, without public input. It avers that it has no pecuniary, commercial or personal interest in the matter, only that zoning changes be handled transparently, thus protecting the public interest. Plaintiff contends that the discretionary denials of public records were without reasonable basis, but necessitated by the potential that release of the records would be embarrassing to certain Frederick County officials.

Plaintiff also points to the failure of the county to conduct any type of severability analysis, whereby otherwise confidential documents could be "sanitized" so as to provide at least some factual content, citing to *Cranford v. Montgomery County,* 300 Md. 759, 777 (1984) (records custodian must conduct a careful examination to determine whether the document or any severable portion of it meets the elements of an exemption).

Defendant's Opposition

Defendant denies that Plaintiff substantially prevailed in the matter, pointing to the fact that there was no follow-up after the initial MPIA requests were made. It suggests that had there been such contact, there would have been no necessity to file the lawsuit, asserting that "the County would have searched its records and produced the responsive documents to Plaintiff at that time, without requiring Plaintiff to bring the instant suit."

Moreover, Defendant says that no key documents were recovered, and the county had a reasonable basis for withholding records. It points to the fact that although the court found that the county failed to provide sufficient information regarding persons identified in the *Vaughn* indices, "the records withheld...substantially reflect the contours of the deliberative process privilege," and there was no finding that the privileges were inappropriately invoked.

The county continues to maintain that it was blindsided by Plaintiff's failure to enumerate problems with the content of the *Vaughn* index descriptions, and suggests that Plaintiff was aware of the identity and positions of individuals referenced in the indices because time entries in the Petition for Attorneys' Fees show that Plaintiff was reviewing a Fredcrick County government directory to identify such persons.

Defendants further contend that certain drafts of documents regarding zoning changes would eventually

have been part of the public record, anyway, after implementation of those changes. Finally, the county contends that there is "no reported Maryland precedent in which a court has awarded attorneys' fees, pursuant to the PIA, where the Court did not find that a governmental entity violated the PIA in a knowing and willful manner. In fact, awarding attorneys' fees under those circumstances appears to be contrary to Maryland law."

Analysis

The court will not review at great length all the rulings that it made at previous stages of this case, but some bear repeating. This member of the court, a senior judge from another county, was assigned to hear the merits trial because of the unavailability of any other member of the Frederick County bench to hear it. The court had no familiarity with persons in Frederick County government, nor even the nature of the controversy, which was apparently a matter of public interest and deemed worthy of local press coverage.

At the trial, which had initially been scheduled for two days, each side adopted legal positions that militated against a thorough exposition of the content of the *Vaughn* indices. The county did not offer them in evidence, believing that it was Plaintiff's burden to specifically assert any deficiencies. Plaintiff denied that it had any duty with respect to challenging the indices, and contended that the burden of justifying a decision to deny inspection was on Defendant. Ultimately, it was the court that proposed taking judicial notice of the exhibits, to which the parties assented. As a result, no further substantive explanation of the indices and their content occurred.

Contemporaneous with the filing of its Motion for Reconsideration on June 20, 2023, Defendant provided to the court a single binder containing the documents that were produced after the court's June 8 order. Many of the documents are duplicates, and as Defendant points out, "were drafts of planning documents, drafts of potential budgets, internal discussions regarding drafts of planning documents and initiatives regarding the same, and discussion of topics for future meetings with the County Executive."

Defendant is correct that at trial the court found no evidence of a knowing and willful withholding of documents. However, the documents that were produced after the court's order June 8 strongly suggest that potential embarrassment to county officials could have motivated the reluctance to disclose them.

Among the key documents that were produced which the court finds significant are these:

- A draft map of areas to be considered for the Critical Infrastructure Floating Zone (tab number 2) showing three sites located on both sides of Interstate 270, dated March 12, 2021.
- An email from a county employee dated April 2, 2021 (tab number 3), expressing dismay with the manner in which the rezoning process was being handled. The employee stated, among other things: "The question for the planners is how to achieve the administration's desire for establishing these digital infrastructure areas in a manner that is open and transparent, and does not subject me, you, and the Planning Department to charges of secrecy, insincerity, obfuscation, dishonesty, or even deception. I do not want my, your and the Department's reputation and integrity to suffer, sacrificed as part of this endeavor."
- An email dated February 19, 2021 (tab number 22), from a county employee, reading: "Had a scary thought...based on the definition of CDI and what we have written to date for the FZ, how will we address other uses in the FZ such as parks, Ag processing and other AG uses that have been discussed? Its [sic] not something we can easily address without letting the cat out of the bag."
- A memorandum sent to the county by an attorney for Amazon.com Services, LLC, titled

"Summary of Critical Digital Infrastructure Comprehensive Plan Map, Zoning Text and Comprehensive Zoning Map Amendment Initiative," summarizing his client's position regarding rezoning, with an implementation strategy and suggested language for a text amendment to the county code, dated March 23, 2021 (tab number 35).

- The county's response to comments on Amazon's draft Critical Digital Infrastructure bill, dated April 12, 2021 (tab 47).
- At least one reference to "Project Holiday" – which was apparently the code word for the Amazon proposal – in an email dated April 12, 2021 (tab 36).

The court finds significant public benefit to the disclosure of these documents. They suggest that while purportedly open meetings were taking place regarding the Sugarloaf Plan, the county was courting AWS behind the scenes, apparently under a non-disclosure agreement. The court is well aware that locating a large corporation such as Amazon could confer economic benefits on the county, including but not limited to increasing the tax base, providing jobs, and encouraging other businesses to relocate to the area. Undoubtedly, some degree of confidentiality might attach to such a process.

This court here is not tasked with deciding whether the county's actions were inappropriate. Whether the county's actions herein were something the citizens of Frederick County would think appropriate, however, is certainly a matter of public concern. Plaintiff correctly points out that the legislative intent of the MPIA is that citizens of this state have broad access to public information regarding the operation of their government, and the act is liberally construed to effectuate that purpose. Transparency in government is critical to the public interest.

While lamenting Plaintiff's failure to follow up its initial MPIA requests, the court does not believe that if it had brought the matter to the attention of the county prior to filing suit such action would have resulted in production of the records sought. No reason has been advanced to suggest that those records ordered to be produced on June 8 would have been produced without protracted struggle. If that were the case, the county would have produced them when suit was filed. This is especially so in light of the court's review, above, of the content of certain key documents. Nor does the court believe those documents would have been revealed after rezoning had occurred, absent further pursuit by citizen requestors.

The county asserts that the court never ruled that the purported justifications for the discretionary privileges were inappropriate, but simply did not uphold the privileges because certain parties named in the *Vaughn* indices were not sufficiently identified. Even absent such a finding by the court ,however, the county has never addressed its failure to conduct a severability analysis on the documents, so that non-privileged information in otherwise privileged documents could be provided to the requesters. The court hearkens back to the language in *Cranford, supra,* where a similar situation was presented, and the Appellate Court of Maryland observed: "We do not encroach on the trial court's domain as fact finder by observing that it is unlikely that over 130 documents in the files of [the government] are so inextricably devoted to predecisional deliberations that no severable factual material is present in any of them." 300 Md. App. at 380-81.

The court attaches no significance to the fact that there may be no reported decisions upholding an attorneys' fee award without a "knowing and willful" finding. GP §4-362(f) exists independently of its companion subsection (d) (1)-(3), which requires a finding of knowledge and willfulness before "damages" – including attorneys' fees – can be awarded. While it is

true that this court found no such knowledge and willfulness on the part of Defendant Ford, who was dismissed from the case, it merely commented in rendering its verdict that had there been followup on the Plaintiff's MPIA requests before the filing of suit, with no response, the knowing and willful standard might come into play. The court also notes that an assessment of attorneys' fees under the analogous Open Meetings Act (SG §3-401 (d)(5)) does not depend upon a finding that a violation was willful. *Wesley Chapel Bluemount Association v. Baltimore County,* 347 Md. 125 (1997).

In conclusion, the filing of this lawsuit was necessary to obtain the documents sought. Key documents recovered were of legitimate public interest, and did not personally benefit Plaintiff. *Cf. Stromberg Metal Works, Inc. v. University of Maryland, et al.,* 395 Md. 120 (2006) (no entitlement to attorneys' fees where Plaintiff sought and used the information sought for its own pecuniary benefit, without benefit to the public).

As previously discussed, the court was not provided with sufficient information at trial to determine whether the discretionary privilege should or should not attach to the shielded documents. Nevertheless, no severability analysis was performed by the county prior to its decision not to produce the requested documents, making its invocation of discretionary privileges inappropriate. The court, in its discretion and for the reasons stated above, finds that Plaintiff is entitled to recovery of reasonable attorneys' fees.

AWARD OF ATTORNEYS' FEES

The court took testimony on September 6 regarding the amount and reasonableness of Plaintiff's attorneys' fees, totaling $48,813.62. Using the lodestar method, and considering the factors set forth in the applicable Maryland Rules of Procedure, the court finds the fees to be customary and reasonable. The time and labor required were extensive, and the services were performed skillfully. The number of hours expended and the hourly fees were also reasonable, and the results obtained by Plaintiff were favorable.

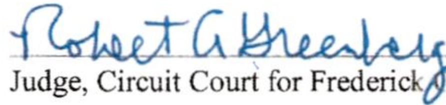
At the same time, there were 14 documents that were justifiably withheld by Defendant on the grounds of either attorney-client or confidential commercial information privilege. Unfortunately, some of those documents have already been produced because the county in its *Vaughn* indices also sought to withhold them based upon the assertion of discretionary privileges which were not accepted by the court.

The court has the discretion to award attorneys' fees in an amount that it believes appropriate. It has taken into account that a substantial portion of the documents produced were drafts, cover emails, and redundant in nature. It also ascribes no evil motive to county officials, some of whom were uncomfortably caught in the middle of an attempt to land a large national corporation who might enhance the county's stature and add to its tax base, while maintaining the confidentiality AWS required. Unfortunately for the county, during this quest, some county citizens questioned the transparency of the process and ultimately acquired important information that was of interest to the public. As the county has pointed out in its submission, ultimately – and unfortunately - the citizens of Frederick County will bear the burden of an award of attorneys' fees, an irony that is not lost on the court.

Taking all of these factors into consideration, it is this 28th day of September, 2023, by the Circuit Court for Frederick County, Maryland

ORDERED, that Defendant Frederick County shall pay to Plaintiff the sum of $25,000.00 as attorneys' fees, within 30 days of docketing of this order.

September 28, 2023



Judge, Circuit Court for Frederick County, Maryland

Entered: Clerk, Circuit Court for
Frederick County, MD
September 28, 2023