



The MD ACLU is committed to protecting constitutional rights, and it has a long history of defending civil liberties through promoting openness in government and protecting the people's right to know what their government is doing. The need for this protection is particularly relevant where, as here, a government entity collected and maintained information on a citizen after that citizen filed a complaint against a police officer. The issue before the Court is of particular importance to the MD ACLU, which frequently represents individuals whose rights have been violated by the police, and which has been deeply involved in police accountability efforts around the state of Maryland, in both the legislative and litigation arenas.

The **Public Justice Center** ("PJC"), a non-profit civil rights and anti-poverty legal services organization founded in 1985, has a longstanding commitment to protecting the broad right of access to public records. The PJC has fought to ensure government transparency through its Appellate Advocacy Project, which seeks to improve the representation of indigent and disadvantaged persons and their interests before state and federal appellate courts. The Appellate Advocacy Project has represented individuals or submitted *amicus curiae* briefs in several cases involving the right of access under the Maryland Public Information Act. *See, e.g., Md. Dep't of State Police v. Dashiell*, 443 Md. 435, 117 A.3d 1 (2015); *Ireland v. Shearin*, 417 Md. 401, 10 A.3d 754 (2010); *City of Baltimore*

*Dev. Corp. v. Carmel Realty Assocs.*, 395 Md. 299, 910 A.2d 406 (2006); *Massey v. Galley*, 392 Md. 634, 898 A.2d 951 (2006). The PJC seeks to participate as an *amicus* here because the outcome of this case will significantly impact efforts to address police misconduct in Maryland and protect the public right of access to information from further erosion.

**B. WHY THE BRIEF OF AMICI CURIAE IS DESIREABLE**

The *amici* are advocacy organizations with deep collective knowledge and experience concerning the legal issues raised in this appeal, including the public's right to information, particularly where, as here, it relates to issues of police accountability. *Amici* submit this brief to explain why public policy and this Court's own jurisprudence dictate that the Maryland Public Information Act's ("MPIA") personnel records exemption is subject to the MPIA's severability requirement in the context of the request for production of documents in a police internal affairs file.

**C. CONSENT OF THE PARTIES**

Counsel for *amici* sought consent from counsel for the parties to file this brief. Counsel for Petitioner consented to the filing of this brief, but counsel for Respondents did not consent.

#### D. ISSUES THAT *AMICI* INTENDS TO RAISE

*Amici* will address the Court of Special Appeals' ruling allowing the government categorically to refuse to disclose police internal affairs files, regardless of their content, pursuant to the MPIA's disclosure exemption for personnel records. *Amici* will explain that internal affairs investigation files may include many documents not properly characterized as personnel records, and that this Court's jurisprudence establishes that such records can and should be severed and disclosed pursuant to an MPIA request. *Amici* will address the Court of Special Appeals' ruling in this regard, and contend that the lower court incorrectly interpreted this Court's decision in *Maryland Department of State Police v. Dashiell*, 443 Md. 435, 117 A.3d 1 (2015) to mean that government agencies may withhold an entire internal affairs file, regardless of its content, and have no duty to review and produce severable portions of the file. *Amici* will explain that a close review of *Dashiell* and the precedent leading up to it do not support this conclusion.

To the contrary, under this Court's precedent, a police internal affairs file can be redacted in such a way as to omit any identifying personnel information to permit disclosure; there is no blanket personnel record exemption for police internal affairs files. *Amici* will also highlight that the rule articulated by the Court of Special Appeals is contrary to both the language and the broad remedial

purpose of the MPIA. Indeed, the rule promoted by the Court of Special Appeals will have a chilling effect on government officials' willingness to disclose public records and therefore limit—if not entirely thwart—the MPIA's purpose to promote transparency and open government.

**E. IDENTITY OF CONTRIBUTORS TO THE BRIEF**

No person, other than the MD ACLU, the PJC, their members, and their attorneys has made a monetary or other contribution to preparation or submission of the proposed brief.

WHEREFORE the MD ACLU and the PJC respectfully request that the Court grant it leave to file a brief in this appeal as *amici curiae*, pursuant to Md. R. 8-511(a)(4). A proposed Order is attached. Moreover, pursuant to Rules 8-431(e) and 8-511, *amici* provide on original and seven copies of this motion and proposed order, and two copies of the proposed brief.

Dated: August 31, 2016

Respectfully Submitted,

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**Statement of Grounds & Authorities**

1. Maryland Rule 8-511

Certificate of Service

I hereby certify that, on this 31 day of August, 2016, a copy of this Motion and accompanying proposed Order, and a copy of the proposed brief, was served on counsel for each party by first class mail, postage prepaid, to the following addresses:

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IN THE COURT OF APPEALS OF MARYLAND

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GARY ALAN GLASS,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action No.: 20
	)	
ANNE ARUNDEL COUNTY,	)	
MARYLAND, et al.,	)	
	)	
Respondents.	)	
	)	
	)	
	)	

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**PROPOSED ORDER**

This matter coming before the court on the Motion for Leave to File a Brief of *Amici Curiae* by the American Civil Liberties Union of Maryland and the Public Justice Center, in support of Petitioner Gary Glass,

IT IS HEREBY ORDERED THAT:

The *Amici Curiae* American Civil Liberties Union of Maryland and the Public Justice Center's Motion for Leave to File a Brief of *Amici Curiae* in Support of Petitioner Gary Alan Glass **BE** and the same hereby **IS, GRANTED.**

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Signature

**IN THE COURT OF APPEALS OF MARYLAND**

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No. 20  
September Term, 2016

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**GARY ALAN GLASS**

*Petitioner,*

v.

**ANNE ARUNDEL COUNTY, MARYLAND, et al.,**

*Respondents.*

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**BRIEF OF *AMICI CURIAE*  
AMERICAN CIVIL LIBERTIES UNION OF MARYLAND AND PUBLIC  
JUSTICE CENTER, IN SUPPORT OF PETITIONER GARY ALAN GLASS**

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August 31, 2016

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## INTEREST OF AMICI CURIAE

The **American Civil Liberties Union of Maryland** (“MD ACLU”) is the state affiliate of the American Civil Liberties Union (“ACLU”), a national, nonprofit, nonpartisan membership organization founded in 1920 to protect and advance civil liberties throughout the United States. The ACLU has more than 500,000 members nationwide, and the MD ACLU has over 10,000 members.

The MD ACLU is committed to protecting constitutional rights, and it has a long history of defending civil liberties through promoting openness in government and protecting the people’s right to know what their government is doing. The need for this protection is particularly relevant where, as here, a governmental entity collected and maintained information on a citizen after that citizen filed a complaint against a police officer. The issue before the Court is of particular importance to the MD ACLU, which frequently represents individuals whose rights have been violated by the police, and which has been deeply involved in police accountability efforts around the state of Maryland, in both the legislative and litigation arenas.

The **Public Justice Center** (“PJC”), a non-profit civil rights and anti-poverty legal services organization founded in 1985, has a longstanding commitment to protecting the broad right of access to public records. The PJC has fought to ensure government transparency through its Appellate Advocacy Project, which seeks to improve the representation of indigent and disadvantaged persons and their interests before state and federal appellate courts. The Appellate Advocacy Project has

represented individuals or submitted *amicus curiae* briefs in several cases involving the right of access under the Maryland Public Information Act. *See, e.g., Md. Dep't of State Police v. Dashiell*, 443 Md. 435, 117 A.3d 1 (2015); *Ireland v. Shearin*, 417 Md. 401, 10 A.3d 754 (2010); *City of Baltimore Dev. Corp. v. Carmel Realty Assocs.*, 395 Md. 299, 910 A.2d 406 (2006); *Massey v. Galley*, 392 Md. 634, 898 A.2d 951 (2006). The PJC seeks to participate as an *amicus* here because the outcome of this case will significantly impact efforts to address police misconduct in Maryland and protect the public right of access to information from further erosion.

#### **STATEMENT OF THE CASE**

In September 2010, Appellant Gary Alan Glass filed a complaint against an Anne Arundel County police detective, Det. Mark Collier, following a traffic stop. *See Glass v. Anne Arundel Cty.*, 38 F. Supp. 3d 705, 710-11 (D. Md. 2014). Concerned that he was the target of retaliation, Glass submitted various requests for information from the County police department, pursuant to rights afforded to him under the Maryland Public Information Act ("MPIA"). In February 2012, Glass submitted an MPIA request to inspect "[a]ny and all records of the police department and or any employees . . . on Gary A. Glass." (E. 48). In February 2013, Glass asked to inspect "any and all records . . . compiled from February 23, 2012 to present, that refer or pertain to 'Gary Glass,' 'Gary Alan Glass,' or 'Gary A. Glass.'" (E. 68). Thus, Appellant's requests were to inspect police records *about himself* (E. 48-49; 69).

The County denied Glass's request in large part, and withheld responsive records in the police internal affairs' files without informing him. (E. 50-53, 56, 71-72). The County later justified its withholding of responsive documents based on its position that all documents in a police internal affairs file, regardless of content, are subject to mandatory withholding as a matter of law. (E. 239-41, 246).

In light of the County's actions in response to Glass's MPIA requests, on June 12, 2012, Glass filed suit against the County and the County Police Department's Custodian of Records, Christine Ryder.<sup>1</sup> Discovery disputes ensued based on the County's continued refusal to produce documents. In resolving those disputes, the Circuit Court ordered the County to produce certain categories of documents to Glass, and the County produced approximately 115 discrete documents that the County had kept in police internal affairs files that pertained *solely* to Glass and had absolutely *nothing* to do with Det. Collier, or with any other police official. (E. 151-161, 200-203). These records included Glass's prior civil lawsuit against Best Buy, fire department records of calls for assistance from Glass's home for ten years prior, and Glass's driving history and vehicle registration. *Id.* Significantly, the vast majority of the records (92 of the 115) were placed in the internal affairs file pertaining to the traffic stop investigation *after* the police department had already concluded that Det. Collier was justified in his actions in the traffic stop. *See id.*

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<sup>1</sup> For purposes of this brief, Ryder and the County will be referred to collectively as the "County."

On Glass's motion for partial summary judgment, the Circuit Court issued declaratory judgments against the County regarding its document production obligations, concluding that the County had violated the MPIA in various ways. (E. 204-207). In April 2015, following a bench trial, the Circuit Court issued a mixed ruling in which it concluded that the County had knowingly and willfully violated the MPIA in certain ways, but held that Glass did not adequately prove any damages. (E. 526-545).

Both Glass and the County appealed the Circuit Court's ruling. Of significance for *amici*, the County appealed the Circuit Court's conclusion that it had violated the MPIA for failing to sever and produce contents of the police internal affairs files. *See Glass v. Anne Arundel Cty.*, No. 185, 2016 WL 903594, at \*3 (Md. Ct. Spec. App. Mar. 9, 2016), *cert. granted*, 448 Md. 314 (2016). On appeal, the Court of Special Appeals agreed with the County, holding that, under this Court's decision in *Dashiell*, 443 Md. 435, pursuant to the MPIA's disclosure exemption for personnel records, the County must withhold an entire internal affairs file, regardless of its content, and has no duty to review and produce severable portions of the file. *Glass*, 2016 WL 903594, at \*5-7. This Court is now asked to consider the validity of the Court of Special Appeals' decision and, in particular, the lower's court's interpretation of this Court's MPIA jurisprudence.

This Court must decide whether the MPIA's personnel records exemption is subject to the MPIA's severability requirement in the context of production of a

police internal affairs file. As noted, the Court of Special Appeals rejected the application of the severability provision, holding, instead, that the government has the right to refuse categorically to disclose any and all information in a police internal affairs file, regardless of the substance of that information, including whether it actually pertains to any police officer or official, or otherwise is characterized properly as a “personnel record” exempt from disclosure. According to the Court of Special Appeals, this Court’s recent decision in *Dashiell* “changed the law,” and definitively established a categorical disclosure exemption for all documents held within an officer-specific police internal affairs file. *Glass*, 2016 WL 903594, at \*5, \*7. Based upon a close review of *Dashiell* and the precedent leading up to it, however, the Court of Special Appeals’ conclusion cannot be sustained. *Dashiell* is a narrow, fact-specific decision, and should be confined to its facts.

## ARGUMENT

### **I. INTERNAL AFFAIRS INVESTIGATIONS INCLUDE MANY DOCUMENTS NOT PROPERLY CHARACTERIZED AS PERSONNEL RECORDS, AND THIS COURT’S JURISPRUDENCE ESTABLISHES THAT SUCH RECORDS CAN AND SHOULD BE SEVERED AND DISCLOSED.**

The facts of this case illustrate that, in the course of developing internal affairs investigations, police may amass numerous individual records, such as the records the County compiled pertaining only to Glass, that are simply not properly characterized as “personnel records” exempt from disclosure under the MPIA. *See Governor v. Washington Post Co.*, 360 Md. 520, 547, 759 A.2d 249, 264 (2000) (describing

personnel records as records pertaining to “hiring, discipline, promotion, dismissal, or any matter involving [one’s] status as an employee.”)<sup>2</sup> Under any reasonable interpretation, the records about a complainant that are merely added to police internal affairs files as the investigation proceeds, do not constitute “personnel records.” Here, in effect, the police department created a dossier on Mr. Glass that it placed within Det. Collier’s internal affairs file.<sup>3</sup>

One major deterrent against the filing of legitimate police misconduct complaints is the fear of retaliation. *See, e.g., Abella v. Simon*, 522 F. App’x. 872 (11th Cir. 2013) (considering allegations that police issued a citation in retaliation for reporting police misconduct); *Saleh v. City of New York*, No. 06 Civ. 1007, 2007 WL 4437167, at \*9 (S.D.N.Y. Dec. 17, 2007) (finding that police officers had unconstitutionally retaliated against an individual who filed police-misconduct grievances by notifying ICE of his immigrant status). This is especially true for those who are most vulnerable to retaliation, such as individuals who lack power and resources. An individual who files a police misconduct complaint is exposing himself to the extraordinary authority and investigative powers of the police. In stark contrast, that individual has little defense against abuse. Ensuring that a complainant can see the information compiled about him or her serves as a critical check on the

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<sup>2</sup> Moreover, other kinds of documents may be included that are simply not “personnel records” – such as video of an interaction that occurred in public that happens to be included as part of the investigatory record.

<sup>3</sup> The act of creating a dossier, in and of itself, could constitute a violation of the MPIA by the County. *See Am. Civil Liberties Union Found. of Md. v. Leopold*, 223 Md. App. 97, 115 A.3d 649 (2015) (holding that allegations that the government improperly created, disseminated, and used dossiers on certain individuals successfully stated a claim against the government for violating Section 10-624 of the MPIA).

potential for an abuse of power. Most victims of police misconduct lack knowledge of their rights under the MPIA, let alone resources to prosecute an MPIA case as Mr. Glass has done.

The rule articulated by the Court of Special Appeals—that regardless of the nature or content of a document or record, it is immune from disclosure because it is contained in an internal affairs investigation file—is both dangerous and insupportable as a matter of law. Adopting such a rule would be contrary to both the language and the broad remedial purpose of the MPIA. *See* Md. Code Ann., General Right to Information § 4-103 (“[a]ll persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees”.... “unless an unwarranted invasion of the privacy of a person in interest would result,” the law “shall be construed in favor of allowing inspection of a public record, with the least cost and least delay to the person” requesting the inspection); *A.S. Abell Publ’g Co. v. Mezzanote*, 297 Md. 26, 32, 464 A.2d 1068, 1071 (1983) (noting that the legislative intent of the MPIA is that “citizens of the State of Maryland be accorded wide-ranging access to public information concerning the operation of their government.”). Indeed, the Court of Special Appeals’ approach invites the exception of non-disclosure to swallow the rule of transparency.

Furthermore, the conclusion of the Court of Special Appeals is simply not supported under the prior decisions of this Court. The lower court’s ruling mandates application of an “all or nothing” standard as to whether a file constitutes a personnel

record exempt from disclosure under the MPIA. Significantly, however, this Court directly has rejected that approach. MPIA jurisprudence does not support that the term “record” is synonymous with “file,” such that if a “file” includes a document that is a personnel record, the entire “file” is exempt from disclosure under the MPIA.<sup>4</sup> See *Cranford v. Montgomery Cty.*, 300 Md. 759, 777, 481 A.2d 221, 230 (1984) (the government must “make a careful and thoughtful examination of each document” to determine whether any portion is severable and thus may be disclosed); see also *Md. Comm. Against the Gun Ban v. Mayor & City Council of Baltimore*, 91 Md. App. 251, 265, 603 A.2d 1364, 1371 (1992) (“The department seems to argue that, because some reports contain personal information that needs to be protected, it is necessary to shield all IID reports. But the law does not allow such generic, sweeping protection. It looks to the nature of the individual records actually sought, not that of other records compiled under different circumstances.”), *reversed on other grounds*, 329 Md. 78 (1993).

In fact, in construing the MPIA’s severability provisions, this Court has made clear that even an individual document in a file, which generally would qualify as a “personnel record,” can be redacted in such a way as to omit any identifying personnel information to permit disclosure. In *Maryland Department of State Police v. Maryland State Conference of NAACP Branches*, 430 Md. 179, 59 A.2d 1037

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<sup>4</sup> Such an interpretation would be in direct conflict with the MPIA, which expressly contemplates that “records” are individual documents. See Md. Code Ann., Definitions § 4-101(j)(1) (defining public record as including, among other things, “a card,” a “computerized record,” “a drawing,” and a “document that lists the salary of an employee.”).

(2013), this Court unambiguously confirmed that document redactions altered the nature of the documents at issue such that, in redacted form, they were *not* personnel records exempt from disclosure. In reaching this conclusion, this Court made very clear that the MPIA's personnel record exemption was subject to the MPIA's severability requirement or else the severability provision of the MPIA would be "nugatory." *NAACP Branches*, 430 Md. at 195-96, 59 A.2d at 1046-47. *NAACP Branches*, therefore, is in direct opposition with the Court of Special Appeals' creation of a categorical disclosure exemption for police internal affairs files.

Contrary to the Court of Special Appeals' conclusion, *Dashiell* in no way overruled *NAACP's* holding that the severability provision of the MPIA must be read as applicable to the personnel records exception, and that redaction and severance could change the character of the records sought, including files kept by police internal affairs offices. The Court did not hold that every record in an internal affairs file becomes a personnel record simply by virtue of being included in the file. Rather, consistent with the presumptions written into the MPIA itself, the Court's primary concern was records which implicate the privacy interests of police officers, such as unsupported allegations of misconduct or other assessments of the officer's conduct. *See* Md. Code Ann., General Right to Information § 4-103 ("unless an unwarranted invasion of the privacy of a person in interest would result," the law "shall be construed in favor of permitting inspection of a public record, with the least cost and least delay to the person" requesting the inspection). On its face, *Dashiell's* holding is

fact specific, and nothing in the Court’s opinion supports the conclusion that police internal affairs files are *never* subject to redaction and disclosure:

We shall hold that the internal affairs records of an investigation into the conduct of a specifically identified state trooper is a “personnel record” under Section 10–616(i) of the Maryland Public Information Act, and, *in this case, not capable sufficiently of redaction* such as to render it “sanitized” for possible disclosure, were disclosure necessary . . . . The internal affairs records in this case are specific to Sergeant Maiello, and thus are “personnel records” under *Shropshire* and *Kirwan* and its progeny. The holding of *NAACP Branches*, is inapposite, because the instant records, even were redaction possible (which is highly unlikely), would be related to a specific identified individual.

*Dashiell*, 443 Md. at 439 (emphasis added) (internal citations and quotations omitted).<sup>5</sup>

Contrary to the Court of Special Appeals’ assumption, this Court has not been confronted with the specific question of when individual documents included in an individual officer’s internal affairs file are properly severed and disclosed. In *Dashiell*, the Court’s primary focus was distinguishing the records requested in *NAACP*—non-officer-specific internal affairs files regarding complaints of racial profiling—from a request for an internal affairs file for a specific identified officer. The *Dashiell* Court reasoned that, in the context of a request for records about a particular identified officer, redacting that officer’s name from, for example, a

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<sup>5</sup> Similarly, in *Montgomery County Maryland v. Shropshire*, 420 Md. 362, 23 A.3d 205 (2011), this Court distinguished the facts at issue before the Court of Special Appeals in *Maryland State Police v. Maryland State Conference of NAACP Branches*, 190 Md. App. 359, 988 A.2d 1075 (2010) when it examined the specific contents of the internal affairs file materials in question and ultimately concluded that the documents constituted personnel records exempt from disclosure. See *Shropshire*, 420 Md. at 383, 23 A.2d 217 (“Records of alleged systemic racial profiling by a police department as a whole [as those at issue in *NAACP*] clearly are differentiated from records investigating alleged administrative rule violations by identified police officers in connection with a specific incident.”).

document describing discipline imposed, could not meaningfully change the character of the record to permit disclosure as it did in the context of *NAACP*. But *Dashiell*'s holding was limited to the facts at issue in that case, and it did not create a blanket categorical disclosure exemption for internal affairs files, regardless of their content.

**II. THE PERSONNEL RECORDS EXEMPTION HAS CHILLED PUBLIC OFFICIALS FROM DISCLOSING RECORDS OF PUBLIC CONCERN THAT ARE NOT PERSONNEL RECORDS AND IN SOME INSTANCES HAS BEEN USED TO THWART POLICE TRANSPARENCY AND ACCOUNTABILITY.**

The misinterpretation of this Court's prior decisions on the MPIA's personnel records disclosure exemption has had a chilling effect on government officials' willingness to disclose public records. In some instances, the exemption and this Court's jurisprudence appear to have been used to thwart transparency and to withhold public records that plainly are not properly characterized as personnel records. The result is that, rather than living up to the principles of open government promised by the MPIA, the MPIA is itself precluding the transparency that is essential to preventing police misconduct and encouraging public trust.

Just this month, the United States Department of Justice released a 164-page report documenting widespread constitutional violations by the Baltimore City Police Department ("BPD"), including, for example, patterns of racially-discriminatory

treatment, tens of thousands of improper stops and arrests, excessive force, unlawful street strip-searches of youth, and several instances of sexual assault.<sup>6</sup>

Of particular relevance, the Justice Department emphasized that these abuses were able to go unchecked because of systemic deficiencies in accountability structures. According to the Justice Department:

BPD lacks meaningful accountability systems to deter misconduct. The Department does not consistently classify, investigate, adjudicate, and document complaints of misconduct according to its own policies and accepted law enforcement standards. Instead, we found that BPD personnel discourage complaints from being filed, misclassify complaints to minimize their apparent severity, and conduct little or no investigation. As a result, a resistance to accountability persists throughout much of BPD, and many officers are reluctant to report misconduct for fear that doing so is fruitless and may provoke retaliation.

DOJ Report, at 10. Critically, there is nothing particularly unique about the inadequacy of BPD's internal affairs investigations, as police departments across the country have struggled with this systemic issue. *See, e.g.,* Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decision-Making*, 57 UCLA L. Rev. 1023, 791-92, 870-872 (2010) (noting that available information shows serious inadequacies in internal affairs investigations generally and that outside reviews typically identify significant issues).

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<sup>6</sup> See "Investigation of the Baltimore City Police Department," U.S. Department of Justice Civil Rights Division (Aug. 10, 2016), available at [http://civilrights.baltimorecity.gov/sites/default/files/20160810\\_DOJ%20BPD%20Report-FINAL.pdf](http://civilrights.baltimorecity.gov/sites/default/files/20160810_DOJ%20BPD%20Report-FINAL.pdf) (the "DOJ Report").

The Justice Department expressly referenced the MPIA, and overly-narrow interpretations of it, as a reason for the lack of transparency in the police department's actions:

BPD's accountability system is shielded almost entirely from public view, and the civilian oversight mechanisms that are currently in place are inadequate and ineffective. These flaws damage the Department's legitimacy in the community.

Community members are unable to obtain information about BPD's complaint and discipline systems at almost every step in the process . . . . The Maryland Public Information Act, or MPIA, further limits BPD's transparency to the public. The MPIA prohibits disclosure of documents that constitute "personnel records." *See* Md. Code Ann. § 10-616 [now § 4-343]. The statute does not define the scope of this prohibition, but Maryland appellate courts have held that it applies to all materials related to hiring, promotions, and discipline, as well as "any matter involving an employee's status." *See, e.g., Montgomery County v. Shropshire*, 23 A.3d 205, 215 (Md. Ct. App. 2011). **We heard from numerous sources that this provision has repeatedly blocked attempts to access information about the resolution of complaints and other issues of public concern related to BPD's policing activities.**

DOJ Report, at 147-48 (emphasis added).

The fact that improperly disclosing personnel records subjects the disclosing party to liability no doubt has encouraged government officials to err on the side of rejecting disclosure requests, and thus has had a chilling effect on transparency in policing at a moment in time when it is most critical. For example, in Montgomery County, Delric East was tased by police while trapped in car wreckage after a traffic accident, and he later died. Mr. East's family submitted an MPIA request for dash cam footage of the incident. The Montgomery County Police rejected the family's

request, asserting that, because the video of the incident had become a major evidentiary element of the internal investigation of the officers involved, the dash cam video recordings became personnel records of the individual officers and could not be disclosed. *See Estate of Delric East, et al., v. Montgomery County, Maryland, et al.*, Case No. 369783V (Circuit Court for Montgomery County, filed Oct. 18, 2012). Yet, it makes no sense for videos and other objective documentary evidence of an encounter with police to be deemed personnel records simply because they are relevant to an internal inquiry or placed in an officer's internal affairs file. That kind of result is directly contrary to the MPIA's presumption in favor of transparency, and effectively guts the law in circumstances when it is most vitally needed. Members of the public should not be forced to sue police in order to obtain such records.

In some instances the personnel records exemption has been used to shield from public scrutiny even basic documentation about police department performance, even when the documentation requested is non-officer-specific as in *NAACP*. In 2014, pursuant to the MPIA, the *Baltimore City Paper* requested all firearms discharge reports from the BPD for the prior year. These records are standard among police departments and frequently treated as public. New York City police, for example, have for years published public reports regarding firearms discharge records. BPD rejected the request because such reports become "a part of the internal investigation conducted by the BPD whenever an officer discharges his or her firearm" and are thus personnel records mandatorily exempt from disclosure, per the

department's lawyers. Edward Ericson Jr., *Baltimore Police Say We Can't Know Which Cops Fired What Shots, Ever, Ever*, Baltimore City Paper Aug. 29, 2014, <http://www.citypaper.com/blogs/the-news-hole/bcp-baltimore-police-say-we-cant-know-which-cops-fired-what-shots-ever-ever-20140828-story.html>.

And it is not only police who are improperly denying requests for information about legitimate matters of public concern that do not truly constitute personnel records. For example, Baltimore State's Attorney Marilyn Mosby said in an interview "that she could not divulge even a count of how many people she has terminated from her 400-member office. The number itself, she says, . . . is a 'personnel record.'"<sup>7</sup>

It appears that this Court's jurisprudence also is being used improperly in some instances as an affirmative weapon against even basic and longstanding mechanisms *intended to ensure* transparency and accountability in policing. For example, just this year, the Baltimore Fraternal Order of Police ("FOP") sued to forbid Baltimore City's Internal Affairs Department from producing records of internal affairs investigations to the city's Civilian Review Board ("CRB"). *See generally Fraternal Order of Police, Baltimore City Lodge #3, et al. v. Baltimore Police Department, et al.*, No. 24-C-16-1479 (Md Cir. Ct. for Baltimore City May 27, 2016) (Dkt 4.), First Amended Complaint, Circuit Court for Baltimore City, May 27, 2016. The FOP's lawsuit contends that the MPIA personnel records exemption forbids the Baltimore City

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<sup>7</sup> Edward Ericson Jr., *Baltimore Police Deny Twitter-Related Public Records Request We Did Not Make*, Baltimore City Paper, Jan. 21, 2015, <http://www.citypaper.com/blogs/the-news-hole/bcp-baltimore-police-deny-public-records-request-we-did-not-make-20150121-story.html>.

Police Department from providing records of misconduct investigations to the Civilian Review Board despite the explicit statutory mandate of the CRB that it must receive such records. *See* Code of Public Local Laws of Baltimore City § 16-45(a).

These are just a few examples of how the protections of the personnel records exemption have already been extended far more broadly than the class of records described in the statute itself. *See* Md. Code Ann., Personnel Records § 4-311(a) (referencing, as examples of personnel records, “an application, a performance rating, or scholastic achievement information”). If the interpretation of *Dashiell* adopted by the Court of Special Appeals in the instant case—that an agency must withhold any and all documents kept in a file pertaining to a specific police officer, regardless of the content of the documents—is allowed to stand, the prospects for transparency in policing will deteriorate further. *See Glass*, 2016 WL 903594, at \*5.

Under the lower court’s reasoning, police could categorically refuse to produce documents that had absolutely nothing to do with the officer for whom the file pertains (or with any other police official). Effectively, what this means is that an officer-specific internal affairs file could be chock-full of documents that are otherwise required to be disclosed under the MPIA, but barred from public access simply because officials chose to put those papers in an internal affairs file. The government therefore would be given *carte blanche* to conceal information by the simple expedient of placing it in one file rather than another. Such a rule would invite crafty and strategic record-keeping, for the purpose of defeating the clear intent of the

MPIA to encourage transparency. Indeed, experience suggests that this may already be happening. That result most certainly does *not* comport with the “broad remedial purpose” of the MPIA. There must be a check on the government’s actions.

**III. IT IS WELL-ESTABLISHED THAT AS MUCH TRANSPARENCY AS POSSIBLE IS ESSENTIAL TO PUBLIC TRUST IN POLICE AND THIS PRINCIPLE COUNSELS AGAINST EXEMPTING FROM INSPECTION ALL RECORDS OF INTERNAL AFFAIRS FILES.**

Transparency of police activity is essential to gaining the public’s trust in the police. This need for transparency is even more critical at this moment of great public doubt. Prevailing public opinion is that police departments do not sufficiently hold officers accountable for misconduct. For example, in a 2014 national poll conducted by the Pew Research Center, 91 percent of blacks and 58 percent of whites surveyed said that police departments do a poor or only fair job of holding officers accountable for misconduct.<sup>8</sup> These perceptions are grounded in reality. As explained by one of the nation’s first police monitors, “police officers [tend] to become uncooperative when faced with an investigation, creating what has been called the ‘blue wall’ to enforce a code of silence by intimidating any officer who shows any willingness to cooperate with investigators or point the finger at a fellow officer.” Merrick Bobb, *Internal and External Police Oversight in the United States* at 6 (2002), available at

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<sup>8</sup> See Pew Research Center, Few Say Police Forces Nationally Do Well in Treating Races Equally (Aug. 25, 2014), available at <http://www.people-press.org/2014/08/25/few-say-police-forces-nationally-do-well-in-treating-races-equally/>; see also Police Executive Research Forum, *Advice from Police Chiefs and Community Leaders on Building Trust: “Ask for Help, Work Together, and Show Respect,”* at 71 (Mar. 2016) (“Advice from Police Chiefs”) (“Many community members do not trust the criminal justice system or police agencies’ Internal Affairs processes to investigate, discipline, or prosecute officers who engage in misconduct.”).

[http:// www.prearesourcecenter.org/ sites/default/files /library/  
internalandexternalpoliceoversightintheunitedstates.pdf.](http://www.prearesourcecenter.org/sites/default/files/library/internalandexternalpoliceoversightintheunitedstates.pdf)

Officers themselves acknowledge this culture; in a survey of officers from 121 different police departments, only 39 percent believe that officers would report serious criminal violations committed by other officers. *See* Judith A.M. Scully, *Rotten Apple or Rotten Barrel?: The Role of Civil Rights Lawyers in Ending the Culture of Police Violence*, 21 Nat'l Black L.J. 137, 143 (2009). Indeed, officers who break the "code" often experience retaliation.<sup>9</sup> For example, former Baltimore Police Department Officer Joseph Crystal has asserted that he was retaliated against for reporting another officer's assault on a handcuffed suspect.<sup>10</sup> Crystal alleges that he was harassed, including finding a dead rat on the windshield of his car at his home, refused backup when out on patrol, and moved to an undesirable beat. *Id.* Such retaliatory acts obviously have a chilling effect on the willingness of officers to participate in an investigation of a fellow officer. In the absence of this participation, the ability to conduct meaningful investigations of police conduct may be materially limited.

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<sup>9</sup> *See, e.g.*, Christopher Cooper, Yes, Virginia, There is a Police Code of Silence: Prosecuting Police Officers and the Police Subculture, 45 Crim. L. Bull. 2 at 4(Spring 2009) Cooper (describing incidents where officers who reported misconduct by fellow officers were accused of perjury and deceived death threats); Radley Balko, Why Cops Aren't Whistleblowers, Reason.Com (Feb. 2011), available at [http://reason.com/archives/2011/01/25/ why-cops-arent-whistleblowers](http://reason.com/archives/2011/01/25/why-cops-arent-whistleblowers) ("It may be true that abusive cops are few and far between, as police organizations typically claim. The problem is that other cops rarely hold them accountable . . .").

<sup>10</sup> Rich Schapiro, 'If You Snitch, Your Career is Done': Former Baltimore Cop Says He Was Harassed, Labeled a "Rat" After Attempt to Root Out Police Brutality, N.Y. Daily News, Jan. 14, 2015. *See also* The Real News Network, *Whistleblower: Modern Policing Rooted in Racist Policies*, Sept. 13, 2015 (former BPD officer Michael Wood discussing culture of Baltimore Police, available at [http://therealnews.com/t2/index.php?option=com\\_content&task=view&id=31&Itemid=74&jumival=14707](http://therealnews.com/t2/index.php?option=com_content&task=view&id=31&Itemid=74&jumival=14707)).

And, the public's ability to assess self-policing by law enforcement is absolutely critical to public trust in police. Courts around the country have emphasized that the "citizenry's full and fair assessment of a police department's internal investigation of its officers actions promotes the core value of trust between citizens and police essential to law enforcement and the protection of constitutional rights." *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 787 N.E.2d 602, 607 (Mass. App. Ct. 2003). *See also, e.g., Jones v. Jennings*, 788 P.2d 732, 738 (Alaska 1990) ("There is perhaps no more compelling justification for public access to documents regarding citizen complaints against police officers than preserving democratic values and fostering the public's trust in those charged with enforcing the law."). Shrouding police investigations in secrecy reinforces the perception that such investigations are biased and meaningless. *Mercy v. Cty. of Suffolk*, 93 F.R.D. 520, 522 (E.D.N.Y. 1982) ("No legitimate purpose is served by conducting the investigations under a veil of near-total secrecy."). *See also Kelly v. City of San Jose*, 114 F.R.D. 653, 665 (N.D. Cal. 1987) ("[T]here is a real possibility that officers working in closed systems will feel less pressure to be honest than officers who know that they may be forced to defend what they say and report.").

Likewise, virtually every major national convening of law enforcement, experts, public officials and community leaders has emphasized the importance of transparency in building public confidence in police. *See, e.g., Final Report of the President's Task Force on 21st Century Policing*, at 12 (May 2015), available at

[http://www.cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf) (Recommendation 1.3: “Law enforcement agencies should establish a culture of transparency and accountability in order to build public trust and legitimacy.”); *Advice from Police Chiefs*, *supra* note 8, at 73 (“Transparency is critically important.”); International Association of Chiefs of Police, *IACP National Policy Summit on Community-Police Relations: Advancing a Culture of Cohesion and Trust* at 16 (2015), available at [http://www.theiacp.org/Portals/0/documents/pdfs/CommunityPoliceRelationsSummitReport\\_web.pdf](http://www.theiacp.org/Portals/0/documents/pdfs/CommunityPoliceRelationsSummitReport_web.pdf) (“Building relationships with the community requires meaningful inclusion of and partnership with community members in conducting the business of the police department.”)

These views have also been adopted and promoted by leading law enforcement agencies and managers. *See, e.g.*, Kris E. Pitcher, Andre Birotte Jr., and Django Sibley, *Developing Effective Interactions*, *The Police Chief* at 77, 48 (May 2010), available at [http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display\\_arch&article\\_id=2084&issue\\_id=52010](http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=2084&issue_id=52010); U. S. Department of Justice, *Building Trust Between the Police and the Citizens They Serve: An Internal Affairs Promising Practice Guide for Local Law Enforcement*, at 7 (“Police chiefs who are transparent (i.e., clear, concise, and open about their department’s Internal Affairs process) with their constituencies, acknowledge misconduct, appropriately deal with misconduct when it occurs, and include the public in the response to misconduct will

not only obtain, but also sustain, the respect and confidence of the citizens in their jurisdictions.”).

The Court of Special Appeals’ ruling, providing a categorical disclosure exemption for police internal affairs files, stands in direct opposition to the public policy favoring police transparency and the goal of strengthening public trust in law enforcement.

### **CONCLUSION**

For all of the foregoing reasons, *amici curiae* the MD ACLU and Public Justice Center respectfully urge this Court to reverse the decision of the Court of Special Appeals. In particular, this Court should hold that the Court of Special Appeals erred in reading *Dashiell* as changing the law so as to create a blanket exemption from MPIA disclosure for all documents contained within a policy internal affairs file. Rather, each particular document in an internal affairs file, or any other government file, must be evaluated on its own merit to determine whether any MIIPA exemption applies to the document. This Court should make clear that *Dashiell* is a narrow, fact-specific decision, and is properly confined to its facts.

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Respectfully submitted,

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1. This brief contains 5,566 words, excluding parts of the brief exempted from the word count by Rule 8-503.

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\_\_\_\_\_  
Kimberly Ashmore

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I hereby certify that on August 31, 2016, I caused a true and correct copy of the foregoing proposed BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF MARYLAND and PUBLIC JUSTICE CENTER, IN SUPPORT OF PETITIONER GARY ALAN GLASS, to be served, via first class U.S. mail, postage prepaid, on the following:

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**STATUTES, RULES, AND REGULATIONS**

**Md. Code Ann., General Provisions Article (2014)**

**§ 4-101. Definitions**

**In general**

(a) In this title the following words have the meanings indicated.

**Applicant**

(b) “Applicant” means a person or governmental unit that asks to inspect a public record.

**Board**

(c) “Board” means the State Public Information Act Compliance Board.

**Custodian**

(d) “Custodian” means:

(1) the official custodian; or

(2) any other authorized individual who has physical custody and control of a public record.

**News media**

(e) “News media” means:

(1) newspapers;

(2) magazines;

(3) journals;

(4) press associations;

(5) news agencies;

(6) wire services;

(7) radio;

(8) television; and

(9) any printed, photographic, mechanical, or electronic means of disseminating news and information to the public.

### **Official custodian**

(f) "Official custodian" 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.

### **Person in interest**

(g) "Person in interest" means:

(1) a person or governmental unit that is the subject of a public record or a designee of the person or governmental unit;

(2) if the person has a legal disability, the parent or legal representative of the person; or

(3) as to requests for correction of certificates of death under § 5-310(d)(2) of the Health--General Article, the spouse, adult child, parent, adult sibling, grandparent, or guardian of the person of the deceased at the time of the deceased's death.

### **Personal information**

(h)(1) "Personal information" means information that identifies an individual.

(2) Except as provided in § 4-355 of this title, "personal information" includes an individual's:

(i) name;

(ii) address;

(iii) driver's license number or any other identification number;

(iv) medical or disability information;

(v) photograph or computer-generated image;

(vi) Social Security number; and

(vii) telephone number.

(3) "Personal information" does not include an individual's:

(i) driver's status;

(ii) driving offenses;

(iii) five-digit zip code; or

(iv) information on vehicular accidents.

#### **Political subdivision**

(i) "Political subdivision" means:

(1) a county;

(2) a municipal corporation;

(3) an unincorporated town;

(4) a school district; or

(5) a special district.

#### **Public record**

(j)(1) "Public record" means the original or any copy of any documentary material that:

(i) is made by a unit or an instrumentality of the State or of a political subdivision or received by the unit or instrumentality in connection with the transaction of public business; and

(ii) is in any form, including:

1. a card;
2. a computerized record;
3. correspondence;
4. a drawing;
5. film or microfilm;
6. a form;
7. a map;
8. a photograph or photostat;
9. a recording; or
10. a tape.

(2) "Public record" includes a document that lists the salary of an employee of a unit or an instrumentality of the State or of a political subdivision.

(3) "Public record" does not include a digital photographic image or signature of an individual, or the actual stored data of the image or signature, recorded by the Motor Vehicle Administration.

### **Md. Code Ann., General Provisions Article (2014)**

#### **§ 4-103. General right to information**

##### **In general**

(a) All persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees.

##### **General construction**

(b) To carry out the right set forth in subsection (a) of this section, unless an unwarranted invasion of the privacy of a person in interest would result, this title shall be construed in favor of allowing inspection of a public record, with the least cost and least delay to the person or governmental unit that requests the inspection.

## **General Assembly**

(c) This title does not preclude a member of the General Assembly from acquiring the names and addresses of and statistical information about individuals who are licensed or, as required by a State law, registered.

### **Md. Code Ann., General Provisions Article (2014)**

#### **§ 4-311. Personnel records**

##### **In general**

(a) Subject to subsection (b) of this section, a custodian shall deny inspection of a personnel record of an individual, including an application, a performance rating, or scholastic achievement information.

##### **Required inspections**

(b) A custodian shall allow inspection by:

- (1) the person in interest; or
- (2) an elected or appointed official who supervises the work of the individual.

### **Code of Public Local Laws of Baltimore City (2014)**

#### **§ 16-45. Investigations**

**(a) IID to investigate within 90 days.**

The Internal Investigative Division shall make a comprehensive investigation of each complaint and submit its Internal Investigative Division Report relating to the incident alleged to the Board within 90 days from the date of the complaint.

**(b) Extension.**

For good cause shown, the Board may extend the time allowed to complete the report required under subsection (a) of this section.