

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

EDWARD A. SHROPSHIRE, *

Plaintiff, *

vs. *

Civil Action No. 319081

MONTGOMERY COUNTY, MARYLAND* *

et al., *

Defendant. *

ORDER

It is this 27th day of April, 2010, by the Circuit Court for Montgomery County, Maryland,

ORDERED, that the attached transcript shall serve as the Court's Opinion and Order rendered in the hearing held on March 25, 2010 on the cross-motions for summary judgment.

Michael D. Mason

MICHAEL D. MASON, JUDGE
Circuit Court for Montgomery County, MD.

Copies to:

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ENTERED

APR 30 2010 *mkd*

Clerk of the Circuit Court
Montgomery County, Md.

2010

COUNTY: MD
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IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

EDWARD A. SHROPSHIRE,

*

Plaintiff,

*

vs.

*

Civil Action No. 319081

MONTGOMERY COUNTY, MARYLAND*

et al.,

*

Defendants.

*

JUDGMENT

It is this 28th day of April, 2010, by the Circuit Court for Montgomery County, Maryland,

ORDERED, ADJUDGED AND DECREED, as to Count I, that pursuant to State Government Article § 10-618(f) the Custodian of Records is authorized to release records relating to the investigation by the Internal Affairs Division into the conduct of the Plaintiff in the underlying matter, provided, however, that the custodian may not release information within the file that is of a personal nature, unless such personal information is directly relevant to the underlying investigation; and it is further,

ORDERED, ADJUDGED AND DECREED, as to Count II, judgment is entered in favor of the Defendants.

ENTERED

APR 30 2010

Clerk of the Circuit Court
Montgomery County, Md.



MICHAEL D. MASON, JUDGE
Circuit Court for Montgomery County, MD.

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P R O C E E D I N G S

1

2

THE BAILIFF: All rise.

3

THE COURT: Afternoon. Have a seat.

4

5

THE CLERK: Calling Civil 319081, Edward Shropshire,
et al. versus Montgomery County, Maryland, et al.

6

THE COURT: Counsel?

7

MS. HANDMAN: Good afternoon, Your Honor.

8

THE COURT: Good afternoon.

9

MS. HANDMAN: Martha Handman for the plaintiffs.

10

MS. LLOYD: Kathryn Lloyd and Ed Lattner for

11

Montgomery County.

12

THE COURT: Good afternoon.

13

MR. LATTNER: Good afternoon.

14

THE COURT: Just give me one second.

15

Okay. So we have cross-motions for summary judgment,

16

oppositions thereto, and some supplemental memorandum.

17

Let me see here. They were both filed on the same

18

day. Did you have any discussion among yourselves as to who

19

would argue first?

20

MS. HANDMAN: No, Your Honor.

21

THE COURT: Okay, Ms. Handman, since you're the

22

moving party, why don't I hear from you first, I mean, with

23

respect to the underlying action, the moving party, I mean. I

24

understand there's cross-motions for summary judgment so, in

25

that sense, you're both the moving party.

1 MS. HANDMAN: Thank you, Your Honor.

2 We are asking the Court to grant our, plaintiffs'
3 motion for summary judgment and to deny the defendants' motion
4 for judgment. In the alternative, if the Court feels that the
5 Inspector General's claim need for plaintiffs' records is a
6 material fact, we dispute his need for those records.

7 I would point, it's my understanding -- and the Court
8 will correct me if I'm wrong -- that the defendants did not
9 file an opposition to our motion for summary judgment? They
10 filed their own motion, but did they formally oppose our
11 motion?

12 THE COURT: Well, I guess to the extent that the
13 cross-motion is, in a manner of speaking, an -- I'm not sure,
14 let me see if they filed a separate document entitled
15 "opposition."

16 MS. LLOYD: We just filed the motion for summary
17 judgment, and then a supplement. There was no document labeled
18 "opposition."

19 THE COURT: I mean, I just took their motion,
20 basically, as an opposition.

21 MS. HANDMAN: Okay. I'm not quite sure, I tried to
22 find out the effect of that, and I really couldn't find
23 anything on that.

24 Plaintiffs have alleged two grounds for denying the
25 Inspector General access to the Internal Affairs records: one,

1 that the records are made confidential by the Law Enforcement
2 Officers' Bill of Rights, commonly known as the LEOBR; and --

3 THE COURT: And can I ask you about that, because I
4 went and looked at the provision that you cited, which was 3-
5 104(n).

6 MS. HANDMAN: Yes, Your Honor.

7 THE COURT: And 3-104(n) doesn't specifically say
8 they're confidential. Rather, it's a subsection that deals
9 with -- 3-104 generally deals with an investigation or
10 interrogation of law enforcement officer, generally. And then
11 (n) deals with information provided on completion of
12 investigation. And basically says, "On completion of the
13 investigation, and at least 10 days before a hearing, the law
14 enforcement officer under investigation shall be" -- and then
15 there are subsections -- "notified of the name of each
16 witness," et cetera, "to provided with a copy of the
17 investigatory file and any exculpatory information if the law
18 enforcement officer and the law enforcement officer's
19 representative agree to, one, execute a confidentiality
20 agreement with the law enforcement agency, not to disclose any
21 material contained in the investigatory file and exculpatory
22 information for any purpose other than to defend the law
23 enforcement officer; and two, pay reasonable charge of cost."

24 And then there's a subsection that says, "The law
25 enforcement agency may exclude from the exculpatory information

1 provided to a law enforcement officer under this subsection,
2 the identity of confidential sources, non-exculpatory
3 information, and recommendations as to charges of disposition
4 or punishment."

5 So there is an indirect reference to them, in some
6 sense being confidential, because it requires that the
7 representative execute, and the officer execute,
8 confidentiality agreements, but it doesn't specifically say
9 that these records are confidential and may not be disclosed.

10 MS. HANDMAN: The Court of Appeals has interpreted
11 that, and if you look at Robinson v. State, 354 Md. --

12 THE COURT: Yes.

13 MS. HANDMAN: -- 287, which we cited, now that was a
14 Jencks Act case. And it talks about that section of the LEOBR,
15 and it, giving rise to confidentiality interest, creating a
16 confidentiality interest --

17 THE COURT: Yes.

18 MS. HANDMAN: -- for the officers.

19 THE COURT: Yes.

20 MS. HANDMAN: And also, I believe, it's Reynolds --
21 let me get the cite on that, it's described in Police Security,
22 Police Patrol, that is at -- I'm sorry -- not Police Patrol, on
23 the Baltimore City -- talks about Reynolds, the Reynolds
24 decision.

25 THE COURT: Yes.

1 MS. HANDMAN: Reynolds v. State, 98 Md. App. 348.

2 And again, the Courts found that these section, this
3 section gives the officer a confidentiality interest. What the
4 Court said about it was that, Robinson, 354 Md. 287, at 308,
5 "This section limits the access to the effected officer, does
6 not specifically provide for access by anybody else, deals only
7 with the rights of the officer," as you said, and, "but the
8 officer's confidentiality interest in these records," the Court
9 recognized the officer's confidentiality interest in the
10 records, "has to yield to due process concerns, rights of
11 confrontation."

12 THE COURT: Yes.

13 MS. HANDMAN: The Court of Special Appeals has, in
14 the Blades case and in the Baltimore City Police Department,
15 applied that, in Blades, applied this, the confidentiality --

16 THE COURT: Yes.

17 MS. HANDMAN: -- the officer's confidentiality
18 interest in the context of civil litigation, the 1983 case; and
19 in the Baltimore City Police Department case, in a criminal
20 case.

21 THE COURT: Well, I'm not disputing that, I mean, the
22 language, particularly as interpreted by the Court, may create
23 a confidentiality interest. But the statute doesn't
24 specifically say that they are confidential and are protected
25 from disclosure.

1 MS. HANDMAN: Well, I think we, you have to read that
2 in conjunction with Section 3-110 of the Law Enforcement
3 Officers' Bill of Rights, which is the expungement provision.
4 And if an officer is found not guilty by a hearing board, or
5 the department doesn't sustain charges, doesn't charge the
6 officer to begin with, in three years, the officer has the
7 right to have that expunged.

8 THE COURT: Okay. But that argument could be turned
9 on its heel, because basically, expungement is defined to mean
10 to "restrict from public access." So I mean, that's as
11 expungement is defined generally. So that if there were no
12 right to the records, public right to the records, I mean,
13 there would be no need for expungement. You'd already
14 basically have records that were, in effect, expunged.

15 MS. HANDMAN: From the public, but also, they're
16 expunged from the police department's files, completely
17 expunged from the police department's files.

18 THE COURT: Well, unless there's --

19 MS. HANDMAN: And --

20 THE COURT: -- a separate definition of "expungement"
21 within the police department regulations. I mean, expungement
22 generally is defined within the Criminal Code to mean
23 "restricted from public access." Expunged records do not have
24 to be destroyed in their entirety.

25 MS. HANDMAN: It says, "The officer may have expunged

1 from any file --

2 THE COURT: Right.

3 MS. HANDMAN: -- the record of a formal complaint."

4 "Any file," meaning any government file. And so if the file

5 is, has been disseminated elsewhere --

6 THE COURT: Yes.

7 MS. HANDMAN: -- that defeats the whole purpose.

8 When you go back to the Blades --

9 THE COURT: No, no, it would mean that if the file
10 had been disseminated anywhere elsewhere, anywhere that the
11 public would have access to it, he would be entitled to have
12 those records destroyed. But expungement, my recollection
13 is -- I mean, I wasn't really anticipating this was going to
14 come up -- but expungement generally was not defined to mean
15 that you had to destroy all copies of a record in existence.
16 It could be, you could have them so restricted that they were
17 not available to anyone in the public. And my recollection is,
18 under the definition, that satisfied expunged, or that met the
19 requirements of expungement.

20 MS. HANDMAN: I believe the purpose was to protect
21 these records from public -- well, from dissemination.

22 THE COURT: Yes.

23 MS. HANDMAN: If you go back and look at the
24 procedure that's in, that Blades sets forth, it's pretty
25 detailed. It says, it, "Based on the officer's privacy

1 concerns, first, the person seeking" -- and this is in
2 litigation -- "the person seeking the records has to show,
3 demonstrate a need for them."

4 Once they've met that, the Court does in camera
5 inspection of the records. Then that's followed by a second in
6 camera hearing with counsel as officers of the court. And then
7 that is, once a determination is made as to which records have
8 the potential for disclosure, then there is a closed, on the
9 record hearing where the officers have the opportunity to come
10 and say why they don't, why these records shouldn't be used.

11 THE COURT: Yes.

12 MS. HANDMAN: That same procedure applies in criminal
13 cases. That was the Baltimore City Police Department case.

14 THE COURT: Yes.

15 MS. HANDMAN: And this is all in recognition of the
16 privacy interest.

17 What Blades says, "that the officers whose records
18 are confidential are entitled to be heard on the issue of
19 whether, and to what extent, the litigant seeking disclosure
20 can use the records." And the Court makes the ultimate
21 determination of what records are confidential.

22 So clearly, the Court of Special Appeals, and the
23 Court of Appeals, and in Robinson case, have recognized that
24 these records are confidential. They say, just because they
25 are confidential, though, doesn't mean that they can't be

1 disclosed, doesn't protect them entirely when there are due
2 process concerns, right to confrontation concerns. But the
3 courts have recognized that they are, indeed, confidential.

4 There is a public interest in the confidentiality of
5 records, "While confidentiality does not go to discoverability,
6 it does go to discoverability, it does not guarantee insulation
7 of the confidential matter from disclosure."

8 And in Robinson it says that, the protections in 3,
9 in Section 104(n) serve as a protection for the officers, but
10 when due process concerns are involved, these, the
11 confidentiality of these records has to yield to those
12 concerns. So the Court has recognized the confidentiality.

13 You see, police officers are in a --

14 THE COURT: No, I mean, I guess I'm not disagreeing
15 with you. But it's a limited right of confidentiality as the
16 case law has interpreted it.

17 MS. HANDMAN: It's -- yes, it doesn't mean that they
18 are totally non-discoverable. But those procedures don't apply
19 to a PIA case. The procedures that are in Blades and Baltimore
20 City Police Department apply when you're dealing with due
21 process concerns, or dealing with a criminal case and right to
22 confrontation.

23 What the PIA says at Section 615(1) is, "If a record
24 is confidential by law," and the Courts have interpreted
25 Section 104(n) of the LEOBR to say that these records are

1 confidential. They provide the officer with access, but they
2 don't allow anybody else to have access. And when you read
3 that in conjunction with the --

4 THE COURT: Well, but, obviously, the police have
5 access to them --

6 MS. HANDMAN: Well, the department --

7 THE COURT: because they --

8 MS. HANDMAN: -- right, yes.

9 THE COURT: Okay.

10 MS. HANDMAN: I mean, the people who have a need to
11 know, within the police department they're even confidential.
12 Not every police officer has a right to see it. But clearly,
13 you know, the chief can see it, the Internal Affairs people.

14 But the, and the officer has to sign a
15 confidentiality agreement when he gets the file. You would
16 have the situation, if you take the County's argument, that an
17 officer -- say, an officer is charged, and goes to challenge
18 his charges, goes to a hearing board, is found not guilty. The
19 officer has signed a confidentiality agreement that says, "I'll
20 only use these for my defense." But the County's position is,
21 "Well, we can give it out to anybody else." That doesn't make
22 any sense.

23 THE COURT: No, but that's not their position.
24 They're not saying they can give it out to anybody else.

25 MS. HANDMAN: Well, they're saying it's an

1 investigatory record only, and that they have discretion of
2 whom to give it to, as a, that it's only an investigatory
3 record. We're saying no, that the law enforcement officer, we
4 still maintain it's a personnel record.

5 THE COURT: Yes.

6 MS. HANDMAN: But let's, dealing with the LEOBR,
7 we're saying no. It's confidential under the LEOBR. And
8 Section 615(1) of the Public Information Act is a mandatory
9 denial provision.

10 And if you look at why, what's the reasoning behind
11 making these records confidential for police officers? I think
12 it's because police officers are in the position of, when
13 they're questioned, when there's an investigation of a police
14 officer, Section 3-104, I believe it's (1) of the LEOBR, says
15 that the officer can be ordered to submit to interrogation and
16 answer questions, and if the officer refuses, the officer can
17 be disciplined for that refusal.

18 So there is duress, there's direct duress. If the
19 police question me about something, I can tell them to pound
20 sand. I don't have to answer. But the officer has a choice
21 between his or her job, and answering the question.

22 And these investigations can, and have, and can --
23 I've seen it -- involve personal information.

24 Give you an example, Your Honor. Suppose an officer
25 is alleged to, there's a complaint about an officer. And the

1 officer says, "No, it wasn't me, I wasn't there.

2 "Well, where were you?

3 "Well, I'd rather not say.

4 "Well, now, you're ordered to answer. Where were
5 you?

6 "I was at the doctor. It couldn't have been me. I
7 was at the doctor.

8 "What doctor?

9 "I was seeing my psychiatrist."

10 That is nobody's business. The officer has a privacy
11 interest in that information.

12 Or say there's a courtesy complaint against an
13 officer. And the officer says, "Gee, I could see where the
14 person thought I was rude that day. But no, I wasn't rude
15 because of the person's race or gender. I, but I could see
16 that. My kid got suspended from school just before I left for
17 work, and I was upset about my kid. I wasn't, and that must
18 have shown." Who's business is that?

19 So the officers may be in the position of having to
20 give private information, medical information. These files,
21 some of them, contain fitness for duty, information about a
22 fitness for duty exam. That certainly goes, is private
23 information. Especially if it, because typically those exams
24 involve, or prompted by a medical or perhaps a psychological
25 issue. And so the officers have a need to keep that

1 information private, because it's very personal.

2 The, and so the, also, it's, an officer, if, anybody
3 can make an allegation against a police officer.

4 THE COURT: Yes.

5 MS. HANDMAN: And under Miner v. Novotny, the officer
6 can't sue. There's an absolute privilege for making a
7 complaint against a police officer. And the officer can't sue
8 to clear his name. And, frankly, I think it's the most
9 salacious and outrageous complaints against police officers are
10 the ones that are likely to be unfounded, not sustained.

11 Now, if those can be disseminated over and over and
12 over again, how does the officer ever clear his or her name?
13 And the LEOBR recognizes that and says, "You have a right to
14 have this confidential if there's no discipline resulting, if
15 you're cleared. And you have a right to have this record
16 destroyed." And that right is eviscerated if the records can
17 be, if the records are solely investigatory records of a law
18 enforcement agency that the department has discretion whether
19 or not to release.

20 THE COURT: Well, that sort of assumes they don't
21 exercise that discretion; they just give it out willy nilly to
22 anybody who's going to republish information that, perhaps on
23 its face, would be patently absurd.

24 MS. HANDMAN: I'm sorry, Your Honor, I don't
25 understand.

1 THE COURT: Your argument sort of assumes that the
2 custodian of the records wouldn't exercise any discretion, it
3 would just give it out to any Tom, Dick, or Harry so that the
4 officer could be vilified.

5 I mean, I don't doubt that the LEOBR is to protect
6 officers from having malicious complaints made against them
7 without foundation from those just being generally and
8 routinely disseminated and/or, you know, reported out, and
9 thereby somehow given an aura of believability because they're
10 the subject of an investigation. They don't dispute that.

11 But that's not what the County is suggesting is the
12 course they seek here. Here they're saying that it is the
13 Inspector General from the County, who is also subject to
14 certain restrictions with respect to information received that
15 is otherwise confidential, that has asked for these records,
16 and they want to honor the request that is being made.

17 MS. HANDMAN: Well, I'm not sure what confidentiality
18 provision the County claims is restricting the Inspector
19 General.

20 The County did not address our LEOBR claim. I
21 believe in the original motion to dismiss, or opposition to
22 our, or reply to our opposition to the motion to dismiss, the
23 County address, mischaracterized it as saying, because we,
24 County characterized plaintiffs' position as, because the, they
25 were personnel records, we said they were confidential. No.

1 we're saying they were confidential because of the LEOBR and,
2 but also, the personnel records exemption of the Public
3 Information Act protects them.

4 And the County has never addressed this. So the
5 County has said, taken, at least in their briefs, has taken the
6 position that they're not personnel records; they are
7 investigatory records subject to the County's discretion,
8 subject to the custodian's discretion.

9 And that, if that's the case, if they are
10 investigatory records subject to the Inspector General's
11 discretion, they, I don't understand what their, how they're
12 claiming he is restricted, the basis for his restriction. If
13 he determines to, is he restricted? I would say, yes. The
14 LEOBR says that he can't, because of the confidentiality
15 provisions of the LEOBR, he cannot disseminate them. But the
16 County has never addressed that issue, it, in the briefs,
17 because they haven't addressed the LEOBR issue.

18 What you've got here is, the legislature created a
19 protective barrier around Internal Affairs records. And it
20 doesn't make sense for that protective barrier to, for a local
21 government to eviscerate it.

22 Plus, the LEOBR, Section 612 -- I'm sorry -- Section
23 3-102(a) says that, "The LEOBR supersedes any other law of the
24 state, county, or municipal corporation that conflicts with
25 it."

1 And 3-102(b) says, "Any local law is preempted by the
2 subject and material of the LEOBR." Therefore, the LEOBR
3 preempts Montgomery County Code 2-151.

4 And if the LEOBR restricts the --

5 THE COURT: Well, it would preempt it if it was in
6 conflict.

7 MS. HANDMAN: No. It, "Any local law is preempted by
8 the subject and material of the LEOBR." And "The LEOBR
9 supersedes any other law."

10 So if the, if, as we argue, the LEOBR says, "You
11 can't give this out," the County and a local law cannot
12 supersede the LEOBR. Similarly, it can't adopt a law that
13 conflicts, that allows them to disclose a record when the
14 Public Information Act requires that that record, that
15 disclosure be denied. And that's the Police Patrol Security
16 Systems case.

17 The records at issue here have, as we said in our
18 brief, have information in them that is personal, protected.
19 Section, in fact, Section 10 -- or I'm sorry -- 10-617 of the
20 LEOBR, of the Public Information Act, which deals with specific
21 types of information that must be denied, that doesn't apply to
22 the entire record, but it says, "When you give out a record,
23 you can't give out the address, home address and telephone
24 number of a public employee." There is a an address and
25 telephone number of a public employee.

1 These records contain the dates of birth of
2 plaintiffs. It has Social Security number of one. It has
3 their photographs. It's got the telephone number of one,
4 driver's license number of one.

5 The Public Information Act, in the definition
6 section, 10-617(f), says, "Personal information is a person's
7 address, driver's license number, medical or disability
8 information, name, photograph, Social Security number,
9 telephone number." That's personal information.

10 When an Internal Affairs file contains medical or
11 psychological information, that information cannot be
12 disseminated. Section, again, Section 10-617(b) prohibits the
13 disclosure of that part of a record that contains any such
14 information.

15 So we know that some records have, I've seen a
16 performance evaluation. I've seen performance counseling forms
17 in Internal Affairs files. And it's in my affidavit. And
18 those certainly qualify as personnel records in an Internal
19 Affairs file.

20 The premise that these are being, there may be things
21 in the file, in a file that wouldn't necessarily constitute
22 just a, I would say, that might be discoverable. For instance,
23 if there was a report of an incident, the underlying incident,
24 say an arrest of someone, and then there's an internal
25 investigation in connection with that arrest, if that police

1 report of the incident is otherwise discoverable, okay, it
2 doesn't become not discoverable just because it happens to be
3 in the Internal Affairs file.

4 But when these, but given the personal information
5 that's in these files, and the officer's privacy interest, what
6 need does the Inspector General have to know their dates of
7 birth? Many of these files contain the person's, contain
8 information about the academic achievement (unintelligible).

9 THE COURT: Well, I don't recall, but I mean, what
10 was the Inspector General's request in this case? How was it
11 framed? Was it framed in terms of "all information within the
12 file," or "I want the results of the investigation conducted by
13 Internal Affairs into this incident?"

14 MS. HANDMAN: I have an e-mail from the County,
15 Assistant County Attorney Chris Henricks. Your Honor, can I --

16 THE COURT: Sure.

17 MS. HANDMAN: -- approach, give it to you? Saying
18 that the County intends to release all documents.

19 THE COURT: But it, okay, this, I guess, says that
20 the County's position would be, in terms of what they would
21 give them access to.

22 MS. HANDMAN: Right --

23 THE COURT: But in terms of the request, on what, was
24 there a written request that was made by the IG?

25 MS. HANDMAN: I never saw, I don't think I saw a

1 specific, maybe the County can answer that. I don't recall
2 seeing a specific request. I was informed that the Inspector
3 General had asked for "the file."

4 THE COURT: Do you know, Ms. Lloyd or Mr. Lattner?

5 MS. LLOYD: I don't think the IG made a specific
6 request to the IAD. I think he went through maybe either the
7 County Executive's Officer or through the -- Chris Henricks is
8 the attorney that represents the Internal Affairs Division, and
9 Dave Falcinelli is the Director. So I think there was
10 something either verbal or through them. But we don't have
11 anything written.

12 THE COURT: Okay.

13 MS. HANDMAN: In the Baltimore City Police Department
14 v. The Gun Ban case, 329 Md. 78, which was a PIA case, and the,
15 that dealt solely with the investigative exception. The police
16 department never raised, nor did the Court of Appeals rule on,
17 on the personnel records or the Section 615(1) issue.

18 And the Court recognized that when an Internal
19 Affairs investigation does not sustain allegations against
20 officers, fairness to the officers justifies the custodian in
21 denying inspection. And it's that fairness -- to anyone other
22 than the officers -- it's that fairness to the officers that we
23 are talking about today. That because of their privacy
24 interest as to the allegations, as to the evidence that is,
25 that the department collects in connection with those

1 allegations.

2 THE COURT: But to say fairness justifies denial in a
3 particular case doesn't mean the reverse is true, that it can't
4 be, therefore, released in any case.

5 MS. HANDMAN: Under the, as confidential records,
6 yes, because the Public Information Act says, if the record is
7 confidential, that -- and it's the record. I think there is
8 attendance, it's important to remember the Act deals, the PIA
9 deals with records. Each document is a record, a separate
10 record. The whole file is a record in a sense, but within that
11 file are individual records.

12 And I really don't see how releasing, allowing the
13 department the discretion to release the file protects the
14 officer's confidentiality interest. I'm going beyond what,
15 we're looking beyond the specific request here. I'm looking at
16 the basis for the department's decision to release it to the
17 Inspector General. And the basis of that decision is that it
18 is strictly an investigative file.

19 That brings me to why this is different from the
20 Maryland State Police case, which the County relied on. And
21 the, in that case, the Court held that racial profiling
22 complaints against troopers do not involve private matters
23 concerning intimate details of the troopers' lives.

24 Contrast, we've got private information about these
25 officers at issue. We don't know, the case doesn't, the

1 Maryland State Police case doesn't say what types of
2 information was in the files.

3 So that case can't be applied blanketly to say, "Oh,
4 well, this, that all Internal Affairs files, that no officer
5 has any privacy interest in any Internal Affairs file."

6 The factors that make records available to a party in
7 litigation with due process confrontation simply don't apply in
8 a Public Information Act case. And that was Hammen v.
9 Baltimore City Police Department, 373 Md. 440; and University
10 of Maryland v. Baltimore Sun, 384 Md. 79.

11 The other thing about the, that the Court never
12 addressed in the Maryland State Police case was the Gallagher
13 decision, in which the Court of Appeals said -- Office of the
14 Attorney General v. Gallagher.

15 And that case involved, I think it was an inmate who
16 was trying to get records of an investigation that the Attorney
17 General's Office conducted. And he used the investigative, the
18 618(f) investigative, discretionary provision. He was a person
19 in interest. And he used that as the basis for his request.
20 And the Attorney General's Office gave him some records, but
21 they denied him other records, claiming attorney work, claiming
22 they were confidential or privileged attorney work product.

23 And the Court of Special Appeals said, "Oh no,
24 because they're investigative records and he's a person in
25 interest, he can have them, unless you meet the exceptions in

1 the statute." And the Court of Appeals said, "No, the
2 investigative records section does not trump the mandatory
3 denial provisions. If you've got a mandatory denial provision
4 in the Public Information Act" -- as we have here under both
5 the personnel records and confidential records section -- "if
6 you've got that, then you cannot release those records."

7 And the Court of Special Appeals never addressed
8 that. One of the concurring, Judge Kehoe's concurring opinion
9 addressed that. But the majority opinion did not address it.

10 So what we still, I think we have to go by what the
11 Court of Appeals says, which is that the investigative section
12 does not trump the mandatory denial provision.

13 THE COURT: But didn't the Court of Special Appeals
14 address it to the extent that they say, when you have a statute
15 that has a general section, a general prohibition, that the
16 same statute then also provides within it a detailed exception
17 that specifically authorizes certain records to be distributed;
18 that the more detailed section would evidence the intent of the
19 legislature that this section be given force.

20 MS. HANDMAN: Here's what the Court of Appeals said
21 in Gallagher. "Nothing in the language or history of the
22 Public Information Act supports the view that when records are
23 contained within an investigatory file, Section 10-618(f)"
24 -- and they were dealing with (2) because it was person in
25 interest -- "that Section 10-618(f)(2) displaces all other

1 exemptions in nature."

2 THE COURT: Well, I understand that they said that.
3 But by the same token, I mean, this was the entire bench of the
4 Court of Special Appeals that apparently -- I don't recall
5 factually what the facts of the case were you were citing to me
6 were -- but the Court of Special Appeals, sitting en banc,
7 basically arrived at a different conclusion than the conclusion
8 you suggest there.

9 MS. HANDMAN: What the Court says is, "In conclusion,
10 as the language and legislative history of the Public
11 Information Act make clear, if any exemption under Sections 10-
12 615, 616, or 617 is applicable to a particular record, then it
13 must be withheld. That 617 does, our holding that 617(f) does
14 not override other exemptions under the Act is supported by
15 the" -- then they cite another recent decision of theirs
16 -- "that the mandatory, that the 618 applies when it's the only
17 exemption that applies, but it doesn't undercut the mandatory
18 provisions."

19 I don't think they could have been clearer about it,
20 about the effect of 618, or the non-effect of 618 on the
21 mandatory denial provisions.

22 "This is, the language of the act, as it exists
23 today, provides further evidence that the interpretation by the
24 Court of Special Appeals is contrary to the General Assembly's
25 intent. Section 615, 617 are both mandatory provisions,

1 meaning that when they are applicable to a particular record,
2 the custodian must deny inspection of that record. This is
3 made clear by the use of the word 'shall' in both provisions
4 which specifically state that, 'a custodian shall deny
5 inspections when one of the enumerated exceptions under that
6 section applies.'"

7 THE COURT: But that's the exact argument that was
8 made to the Court of Special Appeals in the State Troopers'
9 case having to do with personnel records, and the Court of
10 Special Appeals -- again, and it's the entire bench --

11 MS. HANDMAN: Your Honor, I --

12 THE COURT: -- was unpersuaded by the argument.

13 MS. HANDMAN: I understand that, Your Honor. And I
14 don't, I, what I'm saying is, I don't understand that in light
15 of the Court of Appeals holding in Gallagher. I can't explain
16 it. I can't explain that, how the Court could say that 618
17 discretionary exemption overrides, would override a mandatory
18 exemption. Plus, I would say that's dicta, because they said
19 they weren't personnel records to begin with.

20 So, but aside from that, I don't, and they didn't,
21 they simply didn't address Gallagher. They didn't explain why
22 Gallagher wouldn't apply. And only the concurring opinion did.
23 And I just don't, I don't know. I don't know how they could
24 reach that conclusion that, in light of Gallagher.

25 If Gallagher says that attorney work product is

1 protected from disclosure under 615, when it's contained in an
2 investigatory file, how is it different when you have a
3 different type of confidential record? You've got the same
4 situation, just substitute a different type of confidential
5 record.

6 As to the authority of the County, as to
7 dissemination to the Inspector General, the state statute has
8 to authorize, the state statute, the federal statute, I would
9 say a court order, court rule, would have to, the factors
10 listed in 615(2) of the Public Information Act are those
11 things -- the state statute, federal statute or regulation that
12 is issued under the statute and has the force of law, the rules
13 adopted by the Court of Appeals, or an order of a court
14 -- those overcome the required denial provisions in Section 10-
15 615.

16 Again, the Court of Appeals could not have been
17 clearer in Police Patrol Security Systems when it said, "Local
18 law cannot authorize disclosure of information when the Public
19 Information Act requires its denial," and vice versa.

20 We also have, as I said before, the exemptions in
21 the, provision in Section 102 of the Law Enforcement Officers'
22 Bill of Rights which says that it supersedes and preempts any
23 local law.

24 The, what we have, you know, the County is, I
25 understand what the County was trying to do in giving the

1 Inspector General that access. But the problem is, the law
2 doesn't permit it. And this is a job for the legislature to
3 fix.

4 The legislature has been very specific when, in
5 making exemptions to provisions of the Public Information Act,
6 and allowing; and the Court has made, that said, "Well, you,
7 local government can't do that." If you've got a discretionary
8 provision, yes, it can guide the discretion.

9 And I agree with the County that, that the County, if
10 you're dealing strictly with a discretionary provision, the
11 County can enact a local law guiding the exercise of that
12 discretion. But it can't, that discretion doesn't apply when
13 there's a mandatory denial provision.

14 Suppose the County Council passed a law which said
15 that they, that the County Council, the Public Safety Committee
16 has access to all personnel records, or whatever committee has
17 jurisdiction has access to all adoption records, all records
18 from libraries of individual records of books that individuals
19 use, things that the LEOBR specifically prohibits. And the
20 County Council gives itself access to it.

21 Or if you, taking the County's argument about the
22 Inspector General to the next step, the Inspector General would
23 have access to anything, just because he says he needs it. We
24 have protections. The state legislature gave us protections,
25 gave citizens of Maryland specific protections. And the County

1 has no authority to override those protections.

2 If they want, they say, "Well, we're like the state
3 auditor, the Inspector General is like the state auditor,"
4 there is no law establishing an Inspector General. And from
5 what I read in the paper, apparently, Maryland is one of the
6 few jurisdictions in the country that has an Inspector General.

7 If they --

8 THE COURT: I don't think Maryland, you mean
9 Montgomery County.

10 MS. HANDMAN: I mean Montgomery County, yes. I'm
11 sorry. Montgomery County is one of the few jurisdictions.

12 So clearly, I mean, how could the legislature have
13 been thinking, "Oh yes, we don't mean for this to apply to
14 someone like the Inspector General," when you just don't have
15 that. It's not a common position throughout, even throughout
16 the country.

17 If they wanted, when they did the provision, when the
18 General Assembly enacted the provision on retirement records,
19 they had a specific exemption in there for when the, when a
20 local government has someone to audit retirement records, that
21 person can access retirement records. But they are bound, the
22 specific provisions say, "Well, you can't release them."

23 If they wanted to authorize someone else, if the
24 legislature intended for someone else to authorize these
25 records that are under the mandatory denial provisions, they

1 would have said so. And if they are to have access, it's up to
2 the legislature to give them access, not the County government.

3 THE COURT: Let me ask, to return to one of your
4 earlier concerns and your argument about the date of birth
5 information, the height, weight information, the personal
6 vehicles owned information. What is before the Court is a suit
7 for declaratory judgment, to declare what the rights are, and
8 summary, competing summary judgment motions on that request for
9 declaration of rights.

10 So why could not the Court address that concern in
11 declaring the rights, and declare that even if the Inspector
12 General, if the Court were to declare the Inspector General had
13 access to these records under, as investigatory records, that
14 that notwithstanding, the custodian could not disclose records
15 that contained personal information of the officer, such as
16 height, weight, date of birth, school records, things of that
17 nature. So that, to make it clear that if what is obviously a
18 personnel record found its way into what the Court of Special
19 Appeals says is an investigatory record, that it didn't, of
20 necessity, lose its identification as a personnel record, which
21 is actually one of the arguments I think you made.

22 MS. HANDMAN: Yes. I mean, are you saying that you
23 could or you could not, Your Honor?

24 THE COURT: Why could I not? And why would that not
25 then solve the problem that you raise, or the concern that you

1 raise about the custodian of records being able to release all
2 this personal information, as opposed to personnel records?

3 MS. HANDMAN: That solves part of it, Your Honor.

4 But the second point is then, what happens once the Inspector
5 General has it? What --

6 THE COURT: The Inspector General wouldn't get it.

7 MS. HANDMAN: No, no, has the rest of the
8 information.

9 THE COURT: The investigatory file.

10 MS. HANDMAN: Right. The investigatory file. What,
11 and perhaps the County can clarify, what are the, since they
12 didn't address the LEOBR argument, what are the constraints on
13 the Inspector General?

14 THE COURT: Okay. Well, let's hear from the County.

15 MS. HANDMAN: And in disclosing the investigatory
16 file.

17 MS. LLOYD: As to that specific question, Your Honor,
18 Section 2-151(1) of County Code states, "The Inspector General
19 must comply with any restrictions on public disclosure of the
20 documents or information that are required by federal or state
21 law."

22 So the County's opinion is that, once the Inspector
23 General receives the information, he would be required to
24 follow any restrictions that are listed in the Public
25 Information Act --

1 THE COURT: What --

2 MS. LLOYD: -- and not be able to further disclose
3 that information.

4 THE COURT: Okay. And how do you respond to her
5 argument that if the records, the PIA prohibits records from
6 being disclosed that are otherwise protected by law, that the
7 LEOBR protects these records, so therefore, these records are
8 protected by law, and in the State Police case, the Court of
9 Special Appeals specifically declined to reach that issue, as I
10 recall?

11 MS. LLOYD: All right. Well, first of all, the
12 complaint makes no mention of the LEOBR at all, which is why
13 the County hadn't addressed it in their motion for summary
14 judgment.

15 The State Police case does say that officers do not
16 have a reasonable expectation of privacy in the Internal
17 Affairs records because the events occurred while the officers
18 are on public service.

19 THE COURT: I understand that, but don't they
20 specifically decline to decide the LEOBR argument, because it
21 had been raised the first time on appeal?

22 MS. LLOYD: Right. The County's position is that,
23 the LEOBR deals with disclosure of information to the officer
24 that's being under investigation. It doesn't necessarily deal
25 with what the custodian of the records can and cannot disclose.

1 We understand that there's a, the case law's, such as the
2 Robinson case, mentioned that the officers do have a privacy
3 right in this information. However, the Robinson case also
4 stated that, in that case, as here, "The officers had been
5 exonerated from the IAD investigation, thus, any privacy
6 interest in their statements that may have existed is no longer
7 applicable."

8 In this case -- in addition, the LEOBR section that
9 she's referring to deals with the information that goes through
10 to the hearing and what can be disclosed in that process. This
11 case didn't even reach a hearing phase. The officers just,
12 there was an investigation. There was no hearing. There was
13 no finding.

14 So that's the County's position on the LEOBR issue.

15 THE COURT: But does Robinson, the plaintiffs suggest
16 that Robinson interprets the LEOBR as sort of a blanket grant
17 of a right of confidentiality in those records.

18 MS. LLOYD: I disagree with that, and I also, I think
19 the Robinson case does provide that there is some privacy
20 interest, and that there may be a balancing. But I don't think
21 it provides a total exclusion, and that the records cannot be
22 disclosed at all. It does specifically state that any privacy
23 interest is dissolved once the officers are exonerated from any
24 wrongdoing, as is the case in this situation. And the actual
25 statute itself deals with what the officers can and cannot have

1 in conjunction with a hearing, which isn't even applicable
2 here.

3 THE COURT: One of the facts, as I recall, that the
4 Court of Special Appeals sort of weighs in deciding, in
5 reaching their conclusion in the case before it, in the
6 Maryland State Police Officers case, was there was no personal
7 information being sought. And in this case, the representation
8 is, there's much personal information in the file. So that
9 would sort of distinguish this case, or these cases, from the
10 Maryland State Police case, wouldn't it?

11 MS. LLOYD: Well, both cases deal with IAD records.
12 So I don't think that it would distinguish the case. The --

13 THE COURT: But I think, doesn't the Court of Special
14 Appeals make mention in the Maryland State Police case of,
15 "they are not seeking here," et cetera --

16 MS. LLOYD: I mean, the purpose of an IAD
17 investigation is obviously to do with the officer's employment.
18 So we're not sure what personal information is involved with
19 the records, but --

20 THE COURT: Well, she's, has, by way of the
21 affidavit, specifically recited that she's reviewed these
22 files, and in these files is contained information such as date
23 of birth, I think Social Security number, she alleges, the
24 identity of the private vehicle owned, you know, things that
25 would certainly, on their face, appear to be personal, as

1 opposed to personnel, but personal information.

2 MS. LLOYD: Right. Your Honor, I mean, there's no
3 general prohibition in the Public Information Act against
4 disclosing anything called "personal information." I believe
5 there might be certain provisions that deal with telephone
6 number or home address, but there's nothing that deals
7 specifically with personal information.

8 And the County's position, that even if the IAD
9 records, in this case, have what would be maybe considered
10 personnel information, that that record, those records could
11 still be disclosed to the Inspector General, because the Act
12 should construed in a way that would make sense for such
13 information to be given out to someone with an official duty to
14 access those records in the course of their employment.

15 THE COURT: Give me a second. I'm, find something.

16 I guess what I'm referring to is that the, on the
17 slip opinion at the beginning of the top of 18, in
18 distinguishing the Baltimore City Police Department case, they
19 say that, "Lastly, the" -- starting at the bottom of 17 --
20 "Lastly, the documents the trial court ordered produced in
21 Baltimore City Police case, records as to one officer regarding
22 one particular character trait of that officer, comes far
23 closer to meeting the common sense meaning of the phrase,
24 'personnel records of an individual' than the records here at
25 issue, where the NAACP does not seek to impeach any officer,

1 and is not even interested in obtaining the names of any
2 trooper."

3 But here, in addition to the names within the
4 records, if it's a broad request -- and the NAACP was a more
5 tailored request, at least in terms of what they had agreed to
6 seek -- if it's a broad request for access to everything in the
7 file, and the file contains the information that's clearly of a
8 personal nature, then that may well, at least bring some of
9 that information within the definition of personnel records.

10 MS. LLOYD: Well, Your Honor, the County's position
11 that, is that, even if some portion of the records would be
12 considered personnel records, that the Inspector General, at
13 least, would still have the authority to access them, and then
14 under the 2-151(1) of the County Code, would not be able to
15 release that information further onto the general public.

16 THE COURT: But that involves accepting that the, a
17 ordinance promulgated by the County can supersede the
18 legislative, or the enactment of the legislature, the state
19 legislature.

20 MS. LLOYD: You mean the fact that the Inspector
21 General couldn't release them further?

22 THE COURT: No --

23 MS. LLOYD: Or --

24 THE COURT: -- the fact that you're granting the, I
25 mean, they point out that the Inspector General is not among

1 the specifically enumerated persons. So it's an otherwise
2 authorized by law, a person otherwise --

3 MS. LLOYD: Well --

4 THE COURT: -- authorized by law, so you're relying
5 upon the fact that he was authorized by the, that the Inspector
6 General is authorized by the County Code to have access to
7 them; and therefore, he's otherwise authorized by law.

8 MS. LLOYD: Right.

9 THE COURT: So that you're saying that the County can
10 enact a law that creates an exception that the State didn't
11 create.

12 MS. LLOYD: Well, in a, in this specific case, just
13 primarily, more on a reading of the statute of the Public
14 Information Act, in that the County doesn't believe that it
15 should be construed so narrowly as to conclude that the
16 personnel records can only be disclosed to the, I think in the
17 Act, it says "to the person in interest or their direct
18 supervisor."

19 And obviously, say there was a criminal case and
20 somehow the personnel records needed to be pulled up for other
21 situations such as the Inspector General, in the course of his
22 investigations, needs to access these records. I mean, there's
23 other situations in the Public Information Act, such as library
24 records. It doesn't specifically say that whoever's checking
25 out the materials can view what the library has is checked out,

1 but obviously, they do do so.

2 THE COURT: But your argument, you talking about the
3 argument that then the Court should find that the Inspector
4 General is among the persons, by implication, found within the
5 persons authorized under the PIA to have access to the records?

6 MS. LLOYD: Right.

7 THE COURT: That we should interpret the persons
8 authorized to have access, which are the supervisor and a
9 person in interest?

10 MS. LLOYD: Well, we're saying that the action be
11 construed so narrowly as to say that only just those
12 individuals --

13 THE COURT: But are those --

14 MS. LLOYD: -- can --

15 THE COURT: Those are the only two identified within
16 the Act.

17 MS. LLOYD: Those are the only two identified, that's
18 correct.

19 THE COURT: And "person in interest" is defined as?

20 MS. LLOYD: I believe it's defined as "the person who
21 the personnel records are about."

22 THE COURT: Okay. So, basically, the person at issue
23 and their direct supervisor are the only two listed?

24 MS. LLOYD: That's correct.

25 THE COURT: But you think I should expand the reading

1 of that, or give that a reading that would authorize also an
2 Inspector General?

3 MS. LLOYD: Well, we think that's the logical reading
4 is to allow other parts of government to review information of
5 the government on a need-to-know basis, as well as to allow an
6 official who has the duty to review those records in their
7 capacity of their job to be able to do so.

8 And that in other circumstances, such records where
9 it's not specifically listed that only these certain
10 individuals can view the records; obviously, other individuals
11 do have access. So the Public Information Act isn't narrowly
12 construed as just the individuals that are listed are the only
13 ones that can ever view those records.

14 THE COURT: Well, suppose I don't want to go there,
15 or go that far, and I just want to stay within the
16 investigatory records action?

17 MS. LLOYD: Well, the County's opinion is that, the
18 Maryland Department of State Police case clearly authorized
19 that Internal Affairs records are investigatory records, no
20 matter what's in there, it's, or it's an Internal Affairs
21 record, therefore, it's investigatory.

22 The investigatory record exception to the Public
23 Information Act gives the custodian of records discretionary
24 authority to release them. However, in the Caffrey case, the
25 Court of Appeals said that county law can direct that county

1 employees that have discretion can be required to disclose the
2 investigatory files. And in this case, the county law would
3 require that these records be disclosed to the Inspector
4 General.

5 THE COURT: Okay.

6 Ms. Handman, let me ask you, how do you, if Robinson
7 ended up saying, or concluded by saying that, "In instances
8 where the police officer was exonerated, there is no privacy
9 interest," then that seems to suggest it's just a limited
10 degree of confidentiality that's proposed in those records?

11 MS. HANDMAN: If you look at exactly what Robinson
12 said, and it was on page 313, "In this case, the defendant has
13 a particular need for access to the officer's statements to
14 test the officer's trial testimony. On the other hand, the
15 officers have been exonerated by the IAD investigations; thus,
16 any privacy interest in their statements" -- not everything
17 that's in the file. This was a Jencks --

18 THE COURT: Yes.

19 MS. HANDMAN: The Jencks case dealing strictly with
20 the statements of the officers who testified at trial. It
21 didn't deal with disclosure of an entire record.

22 When you're dealing with the disclosure of an entire
23 record, the Court of Special Appeals has said, has recognized
24 the privacy interest in Blades and in the Baltimore City Police
25 Department, and said that, in those situations, you got to go

1 through, jump through hoops to get those, if you want those
2 records, you've, in recognition of the officer's privacy
3 concerns, you've got to go through this very elaborate
4 procedure.

5 And, Your Honor, I've been through that procedure a
6 couple times protecting officers' records. And it does have
7 the in camera review, and as I said, the two in camera reviews,
8 one with counsel. And the officer, and the closed hearing, and
9 the officer's given a chance to say why the information
10 shouldn't be released.

11 And the Court would not have imposed those
12 requirements, even in the face of due process and cross-
13 examination concerns, if there were, if a police officer did
14 not have a privacy interest.

15 And if you look at the Baltimore City Police
16 Department, it appears that the record actually, in that case,
17 that the records, the officer in question, Detective Dressel,
18 had actually been cleared of any wrongdoing in the case; that
19 on page 281, it says, was dealing with -- let me see -- after
20 hearing, okay. The initial court order was for, said that any
21 disclosure, any statement that officer, everything was
22 suppressed except for a statement that Officer Dressel engaged
23 in, any statement by a Baltimore County Police Officer, that
24 Officer Dressel engaged in dishonesty in a now-completed
25 investigation in which Officer Dressel has been exonerated.

1 THE COURT: Okay.

2 MS. HANDMAN: And so you're dealing with, they
3 applied to, they said, yes, and the problem with that case,
4 they, the Court said, the problem is, "you didn't follow our
5 procedures in Blades. You didn't go through," to get this
6 information, the judges said, "Okay, you can have these
7 records."

8 But there was no in camera hearing, no determination
9 of the need for the records. You're not dealing with the
10 Jencks situation where it's a statement about the very incident
11 that's at issue. The Baltimore City Police case was looking at
12 a unrelated case, criminal case, unrelated criminal case,
13 looking for impeachment evidence about the officer.

14 So the Court of Special Appeals has recognized and
15 set up elaborate procedures for protecting the officers'
16 privacy. The --

17 THE COURT: I understand that. Let me ask you two
18 other questions.

19 MS. HANDMAN: Sure.

20 THE COURT: One is, the prohibition against releasing
21 records otherwise protected by law is of the same general
22 nature, is it not, as the prohibition against releasing any
23 personnel records? It's a general statement, as opposed to the
24 more specific under 618, I guess it is.

25 MS. HANDMAN: 615 is any, it's not any, it says, "A

1 custodian shall deny inspection if, by law, the record is
2 privileged or confidential."

3 THE COURT: Okay.

4 MS. HANDMAN: Or then, Section 1. Section 2 is, "if
5 it's prohibited by a state statute."

6 THE COURT: Okay.

7 MS. HANDMAN: And I think here it's also, I think we
8 cited --

9 THE COURT: And the personnel records under 616.

10 MS. HANDMAN: 616. And I believe we cited the, I
11 would expand what we said to include (2), because we think that
12 the 615(2), we've relied on (1), but it would go to (2) as
13 well. It would be contrary to the LEOBR.

14 I would like to add that the County, County's claimed
15 the Inspector General is dealing with the personal information,
16 has said that the Inspector General needs, is entitled to
17 everything. Well --

18 THE COURT: Yes, okay, but I --

19 MS. HANDMAN: Well --

20 THE COURT: -- don't necessarily agree with that.

21 MS. HANDMAN: Right. But, and that his purpose is,
22 you know, to carry out his investigation. Well, how does
23 getting this personal information, especially information --

24 THE COURT: But I return to, why can't that, this is
25 a complaint for a declaration of rights, so the rights can be

1 declared broadly or narrowly. And it may be that, you know,
2 the Inspector General is not, under Maryland State Police even,
3 entitled to the entire file. Because under Maryland State
4 Police, it sounds like they had worked out a compromise with
5 respect to what they had agreed to turn over. And the Court
6 does look at, in part, the nature of the information that was
7 being turned over. And they talk about the purpose of the
8 request, or which you've pointed out, really, you argue, really
9 shouldn't be part of a determination of whether it's personnel,
10 put that argument to the side.

11 So, but that's part of the analysis that they went
12 through in declaring that these records are, fall under 618, as
13 opposed to under 616 personnel records. So I think that the
14 Court could address that issue in declaring the rights of the
15 parties involved here.

16 Let me ask one other question, though, and that is,
17 you suggested some part in your motion -- I forget exactly
18 where -- or your opposition rather, that it's not ripe for
19 summary judgment in any event; that it couldn't be decided on
20 summary judgment. And I guess I don't really, what dispute of
21 material fact exists that would, on a complaint for a
22 declaration of rights, for a declaratory judgment, prevent the
23 Court from granting summary judgment in this case? I mean, I'm
24 prepared to accept there's personal, as opposed to personnel,
25 information within the file.

1 MS. HANDMAN: The, in light of the Inspector
2 General's stated reason for wanting the records, his need for
3 this information, if I can paraphrase, he said he needs it "to
4 see how management investigated the accident at issue, the
5 methods that management used, and any wrongdoing by those
6 involved in the accident."

7 And the County, and he asked the County, it was one
8 of the exhibits on our reply memo, or our opposition and
9 supplemental memo, and he asked the County for a list of
10 documents, including what standards they use, what training do
11 you give, what standards do you use for, you know,
12 investigating DUIs, for breath tests, et cetera. And the
13 County gave it to him.

14 THE COURT: Yes.

15 MS. HANDMAN: That's what he's supposed to be
16 investigating. He says he's not investigating my clients.
17 He's not investigating plaintiffs.

18 THE COURT: But wouldn't part of an investigation to
19 (unintelligible), okay, if you have standards, do you follow
20 them? I mean, that's sort of part and parcel of, you know, do
21 you have standards. You know, you may or may not. They may or
22 may not be written on paper, but if you're not using them, they
23 don't mean much.

24 MS. HANDMAN: He used the term "management." He,
25 yes, let me find it. In, it was in the response, in his

1 interrogatories, I believe. Let me find it. Yes.

2 "The objectives of the Inspector General's
3 investigation are to determine whether management's methods to
4 investigate Gregory DeHaven's vehicle accident. And any
5 improper actions on the part of those involved are consistent
6 with generally-accepted investigative standards to ensure
7 legal, fiscal, and ethical accountability."

8 So he's looking at what are the management standards,
9 not what was done at that particular --

10 THE COURT: No, I --

11 MS. HANDMAN: That's how I read it.

12 THE COURT: I read it a little bit broader than that.

13 MS. HANDMAN: And also, the, what is his, I mean, I
14 think you've addressed it, but also the fact would be, what's
15 his need to know this personal information?

16 THE COURT: Yes, I don't dispute that or disagree
17 with that.

18 MS. HANDMAN: And one of the problems here is, County
19 says, "Well, because he needs to know." Well, where's the
20 check on the Inspector General, or any similar official, on the
21 need to know? Who decides the need to know? And if the
22 Inspector General has such broad access to anything, regardless
23 of what the Public Information Act says, where are the privacy
24 protections for anybody? The privacy protections given by, not
25 just police officers, but the privacy protections under the

1 Public Information Act?

2 THE COURT: I understand.

3 MS. HANDMAN: Okay.

4 THE COURT: Okay.

5 MS. HANDMAN: Thank you, Your Honor.

6 THE COURT: Do you have anything further that you
7 want to argue?

8 MS. LLOYD: Just the County's position is, the
9 purpose of the IG requesting them isn't, have any, isn't a
10 material fact in dispute, and he's requested the files. And
11 the issue is whether or not they can be disclosed under the
12 Public Information Act.

13 THE COURT: Okay.

14 What I want to try and do, it's a complaint for
15 declaratory judgment, so were judgment to be granted on summary
16 judgment, I just can't grant in favor of the plaintiff or grant
17 in favor the defendant; I've got to also announce the judgment
18 of the Court on the record.

19 So what I'm going to try and do is, in light of the
20 arguments, I'll take a look at Robinson. The other cases, I
21 think I've read sufficiently, but I understand the arguments.

22 And if I believe, based upon what I read, that I can
23 decide it on summary judgment, I want to try and do it this
24 afternoon. Because if I took it under advisement for a couple
25 of months, maybe it would be prettier, but it would be a couple

1 of months before you would ever get a decision. And I've come
2 to reconcile myself with sometimes reading what I've said
3 without the benefit of a couple of months to work on it.

4 But I just think you're better off with a decision,
5 since I'm probably not the final word on this, than you are
6 with a eloquent decision.

7 So what I'd like to do is recess until 4:30. I'll
8 come back at 4:30 and announce the decision then.

9 Do you have to be somewhere or --

10 MS. HANDMAN: No, Your Honor. I'm fine. But I would
11 advise Your Honor that one of my clients cannot stay late.

12 THE COURT: That's --

13 MS. HANDMAN: I, but --

14 THE COURT: -- I mean, there's not --

15 MS. HANDMAN: It's not lack of --

16 THE COURT: -- they're not obliged --

17 MS. HANDMAN: Not lack of interest, Your Honor.

18 THE COURT: Yes. I'm sure they're interested. I've
19 noted their presence before. But I full well understand that
20 they can't be here.

21 But I just, I want to not keep it any longer if I
22 don't have to. So I'll take a look at Robinson and if I decide
23 I can decide, I'll announce my decision at 4:30. Okay?

24 MS. HANDMAN: Thank you, Your Honor.

25 THE COURT: Thank you very much.

1 MS. LLOYD: Thank you.

2 MR. LATTNER: Thank you, Your Honor.

3 THE BAILIFF: All rise.

4 Court stands in recess.

5 (Recess)

6 THE BAILIFF: All rise. You may be seated.

7 THE COURT: You can come forward.

8 THE CLERK: Recalling Civil 319081, Edward

9 Shropshire, et al. versus Montgomery County Maryland, et al.

10 THE COURT: Counsel, I guess you can go ahead and
11 identify yourselves again for the record.

12 MS. HANDMAN: Martha Handman for plaintiffs.

13 MS. LLOYD: Kathryn Lloyd for Montgomery County.

14 MR. LATTNER: Ed Lattner for Montgomery County.

15 THE COURT: Okay.

16 Preliminarily, let me say, I thank you all for your
17 briefs and your memos that are extremely well-written and very
18 helpful to the Court in an effort to try and resolve this.

19 And I will also say, based upon the decision I reach
20 here today, it is my view and opinion that there are no
21 material disputes of fact with respect to the issue presented
22 to the Court, and the Court is able to resolve the issue
23 present on motions for summary judgment.

24 Again, forgive me for my ineloquence, but I have had
25 a chance to review the memos, I have had a chance to consider

1 your arguments. And I did take the time and read Robinson, at
2 least the provisions that dealt with this particular issue.
3 And having done that, I've tried to sort of jot out my notes
4 with respect to the decision that I've reached, and the reasons
5 for it, which as I say, I think for the parties, is the most
6 important thing, more important than it be eloquent.

7 JUDGE'S RULING

8 The matter comes before the Court on the parties'
9 cross-motions for summary judgment, and the plaintiffs'
10 complaint for declaratory judgment in a writ of mandamus.

11 The plaintiffs ask the Court to adjudicate and
12 declare the parties' rights with respect to the Inspector
13 General's request, which is referred to in the pleadings, and
14 specifically declare that the custodian of the records has a
15 duty to deny access to the records to the Inspector General.

16 In Count 2, the plaintiffs ask the Court, by writ of
17 mandamus, to order the custodian to perform its statutory
18 duties.

19 Following discovery, the matter initially came before
20 the Court on motion to dismiss. It appeared that there were
21 some questions of facts, so the Court permitted discovery with
22 respect to those so the record could be more fleshed out. Some
23 discovery has taken place, and some facts have now been
24 provided to the Court by way of affidavit, deposition, or
25 otherwise, evidencing admissible and competent evidence for

1 purposes of the summary judgment.

2 The plaintiff argues that there is no dispute of fact
3 or law, and that the custodian of the records, under the Public
4 Information Act, is prohibited from releasing records relating
5 to an Internal Affairs investigation.

6 They cite Sections 10-615 and 10-616 in support of
7 their argument. They say access must be denied under the
8 mandatory provisions of 10-615 because the Internal Affairs
9 records are confidential under the LEOBR, the Law Enforcement
10 Officers' Bill of Rights. And, further, that under 10-106, the
11 records are covered by 10-106, which prohibits disclosure,
12 because they are personnel records.

13 For its part, the County also seeks summary judgment,
14 although I would note, there's no cross-claim in here, or other
15 claim by the County. And, in fact, I don't think there was
16 even ever any answer that was ever filed by the County because
17 it first came before the Court on motion to dismiss. We then
18 continued the matter to be heard on motion for summary
19 judgment. And I don't see from the docket entries that an
20 answer was filed, again, it's in the nature of declaratory
21 relief. But, nevertheless, the County files a motion seeking
22 judgment.

23 In their motion, they argue that the records are not
24 personal records under 10-6, and governed, therefore, by 10-
25 616. Instead, they argue that the discretionary provisions of

1 10-618 relating to investigations or investigatory files,
2 police investigations apply in this particular case.

3 Because they fall within the discretionary provisions
4 of the Public Information Act, pursuant to the holdings of the
5 Court of Appeals, the County, in their view, can enact
6 ordinances directing how that discretion should be exercised in
7 a given case. And here, the County has, by law or ordinance,
8 directed that access should be granted to the Inspector
9 General. And, therefore, the Inspector General should be
10 granted access under the County Code Sections at 2-151.

11 Since the motions and memoranda in this case, at
12 least some of the motions and some of the memoranda were filed,
13 the Court of Special Appeals rendered its opinion in the
14 Maryland Department of State Police v. The Maryland State
15 Conference of the NAACP Branches, and that case involved a
16 request by the NAACP under the Public Information Act for
17 records relating to complaints about racial profiling that may
18 have been engaged in by members of the state police.

19 Similar arguments were presented in that case,
20 involving the Public Information Act, and the right of a
21 party's access to them under that Act.

22 The Court, in resolving that matter, held that the
23 records were investigatory records and were not personnel
24 records, as had been urged by the Maryland State Police who
25 wished to withhold the records. Accordingly, the Court of

1 Special Appeals held in Maryland State Police that the
2 provisions of Section 10-618 applied, not 10-616, and the
3 records should be disclosed.

4 The plaintiff argues that, the plaintiffs, rather,
5 argue that the case is distinguishable and is wrongly decided.
6 With respect to the latter suggestion that the case is wrongly
7 decided, the Court can't help but note that the opinion of the
8 Court of Special Appeals in this case was rendered en banc;
9 that is, by the entire bench.

10 The County argues that the case is largely
11 dispositive of the question of whether the IAD records are
12 investigatory and can be disclosed under the discretionary
13 provisions of 10-618(f).

14 While the Court finds that there are some significant
15 distinctions in the facts between the two cases; that is, the
16 case before the Court of Special Appeals and the instant case,
17 in this Court's view, the Maryland, the Department of State
18 Police case controls a resolution of at least one of the
19 questions presently before the Court.

20 The records ordered produced in the State Police case
21 contained no information that could be described as personal,
22 that's P-E-R-S-O-N-A-L, as opposed to personnel. And that is
23 part of the analysis employed by the Court of Special Appeals
24 to arrive at the conclusion that the records there were
25 investigatory and not personnel records.

1 There is evidence before the Court in this case that
2 the IG is requesting access, it appears, to the entire file --
3 or, yes, to the entire file of the Internal Affairs Division.
4 And there is further evidence that within that file, in this
5 case, are records that contain personal information, or in any
6 event, personal information.

7 Counsel for the plaintiff, Ms. Handman, has filed an
8 affidavit, which is Exhibit 2, to her opposition to the
9 defendant's motion for summary judgment. She cites upon
10 personal oath and affirmation, that contained within the
11 records are photos of the plaintiffs, their dates of birth,
12 dates of hire. As to one of the plaintiffs -- and she does not
13 indicate which -- there is further information, including
14 height, weight, home address, home phone number, Social
15 Security number, driver's license number, license of car, and I
16 think the vehicle make and model, and the names of the party's
17 family members.

18 It is also undisputed that there is information there
19 with respect to the results of the investigation of the
20 underlying incident described in the complaint. And it is
21 further undisputed that the investigation did not result in any
22 disciplinary action taken against either of the officers, the
23 plaintiffs herein.

24 In the Court's view, the presence of such
25 information; that is, the personal information within the file,

1 does not strip the IAD file of its identification or
2 characterization as an investigatory record. It does not
3 automatically transmute it into a personnel file.

4 Accordingly, in the Court's view, requests for access
5 to the Internal Affairs Division's filed in this case still
6 fall within 10-618, which allows discretionary release of the
7 investigatory information.

8 However, to the extent that certain personal
9 information was and is contained within the file, such again as
10 that described in Ms. Handman's affidavit, it would more
11 properly fall, in the Court's view, within the definition of
12 personal file; that is, that specific record or that specific
13 information, and therefore, would fall within 10-616.

14 In arriving at its decision in the Maryland State
15 Police case, the Court of Special Appeals looked at a number of
16 factors in deciding whether the records were personnel records
17 or investigatory records, or investigative records I should
18 say. The fact that the records were contained within a file
19 within the Interval Investigation Affairs Division's Office was
20 not dispositive of the issue.

21 One of the factors the Court looked at, in addition
22 to the nature of the information that was being sought, was the
23 purpose for which the information was being sought. The
24 purpose here proffered by the County is to review the
25 management practices and policies for investigating incidents

1 against such as of the underlying incident described in the
2 complaint. To serve that purpose, personal information of the
3 officers, such as that described, again, in Ms. Handman's
4 affidavit, would serve no purpose.

5 Apart from the issue of whether the records are
6 investigatory versus personnel, or rather are personnel
7 records, the defendant also argues that the records are, in any
8 event, confidential under the LEOBR, and therefore, are
9 protected by the mandatory provisions of 10-615, which prohibit
10 the release of confidential information unless otherwise
11 authorized by law.

12 In support, they cite to the Public Safety Article
13 Section 3-104(n); again, the shorthand would be the LEOBR.
14 However, that particular section contains no expressed
15 declaration that the records are confidential. Instead, the
16 subsection deals with procedures by which affected officers
17 must be granted access to the information contained within the
18 records of the IAD at a time when they are facing a hearing.

19 One of the requirements set out therein is that the
20 officer and their duly-authorized representative sign
21 confidentiality agreements, and I believe, agree to return the
22 records at the conclusion of the proceeding. I'm not positive
23 about the latter, but I think that's the, really the case. But
24 at a minimum --

25 MS. HANDMAN: No.

1 THE COURT: -- they have -- no?

2 MS. HANDMAN: No.

3 THE COURT: At a minimum, they have to sign the --

4 MS. HANDMAN: Yes.

5 THE COURT: -- confidentiality agreement to get
6 access to the records.

7 Notwithstanding that there's no expressed declaration
8 within the subsection that the records are confidential, the
9 plaintiff points to opinions of the appellate courts as
10 interpreting the section as creating a right of
11 confidentiality. Specifically, the plaintiffs have drawn the
12 Court's attention to Robinson v. State, which I think is at 354
13 Md. 287, a 1990 opinion.

14 I've had a chance to look at that case after hearing
15 the argument of plaintiff in some detail. The case involves a
16 defendant's right of access in a criminal case to what is
17 described as Jencks information, under an earlier opinion, I
18 believe of one of the circuit appellate courts in the District
19 of Columbia, I believe.

20 While Robinson does talk about confidentiality, and
21 does use that term, it uses it, in the Court's view, in a very
22 broad sense. And it also talks about a right of privacy,
23 rather. They do, in fact, say that the records are
24 confidential as against a request -- sorry (unintelligible) --
25 well, I'm not sure what that sentence there -- yes, okay.

1 The point that I wanted to make is, they do, in the
2 context of the defendants' rights under Jencks in the criminal
3 case, say because there is this expectation of privacy, that
4 the records are confidential in, within that analysis that you
5 have to go through a balancing test and decide whether or not
6 they should be disclosed.

7 But notwithstanding using the term "confidential," it
8 is interesting, or it's, in the Court's view, to some extent,
9 significant to note that the way they arrive at the fact that
10 the records are nevertheless potentially discoverable, are they
11 say that because the records are within an Internal Affairs
12 Department, and because an, or every state police department
13 has an Internal Affairs Department, and because the police is
14 an arm of the prosecution, that it therefore follows that the
15 records are in possession of the prosecution.

16 So they, sort of, in this case, impute the knowledge
17 of those records -- well, not so much the knowledge, but they
18 say the records are in the constructive possession of the
19 prosecution, the State's Attorney's Office in most counties,
20 which would tend to suggest that the State's Attorney's under
21 some instances, it could certainly have access to those
22 records.

23 So I don't read Robinson as creating a judicial fiat
24 that those records are confidential within the meaning of the
25 Public Information Act. Robinson was not a Public Information

1 Act case. And accordingly, notwithstanding the provisions of
2 Section 3-104 of the Public Safety Article, the Court finds
3 that the Internal Affairs Division records do not fall within
4 the mandatory provisions of 10-615.

5 Assuming they did, applying the same analysis the
6 Court of Special Appeals applied when saying, when you're
7 dealing with a broad prohibition for personnel records than
8 this, followed by a much more specific provision dealing with
9 the release of certain records, that the more detailed and
10 specific provision of the statute in order to reconcile the two
11 must be given effect, the same logic would follow.

12 So even if, for any reason, it could be argued that
13 they would fall within 10-615, which I don't accept, but
14 assuming they did, again, it would not preclude the records
15 then from still being accessible under 10-618, which would be
16 accessible under another provision of law, a subsection within
17 the Public Safety Article.

18 I'm also persuaded in response to an argument raised,
19 although I don't know that, frankly, it would change the
20 analysis of, that any concerns about the officer's privacy
21 rights are also ameliorated by the fact that the disclosure
22 here is to the Inspector General who, under a separate section
23 of the County Code, is obliged to treat those records as
24 confidential to the extent that they are confidential under
25 other provisions of state and/or federal law. So this is not a

1 case where they are being disclosed to the public generally.

2 Accordingly, in the face of these competing motions
3 for summary judgment, the County really having no counterclaim
4 in the case, the plaintiff has asked, under Count 1, that the
5 Court declare the rights of the parties. So to that extent,
6 I'll grant the request for summary judgment of the plaintiff,
7 and I will declare the rights of the parties because there is
8 no material dispute of fact in light of the way that the Court
9 will resolve this issue.

10 And the Court, accordingly, declares and adjudges
11 that pursuant to 10-618(f), the custodian of records is
12 authorized to release records relating to the investigation by
13 the Internal Affairs Division into the conduct of the
14 plaintiffs in the underlying matter, provided however, that the
15 custodian may not release information within the file that is
16 of a personal nature, unless such personal information is
17 directly relevant to the underlying investigation.

18 And by way of illustration, date of hire was
19 mentioned. Well, certainly, date of hire would generally be
20 personal information and not investigatory information. It
21 would generally not fall within the definition of an
22 investigatory record. However, if, for instance, the date of
23 hire, the fact that an officer was a rookie, had just recently
24 begun -- and I don't suggest for a moment that was the case
25 here, but I'm just trying to give by way of an illustration --

1 that if date of hire was relevant to the conduct of the
2 investigation; that is, that it in part explained perhaps why
3 an officer did or did not do something, then it would be
4 subject to disclosure.

5 So if the personal information is relevant, directly
6 relevant to the investigation, it could be disclosed, but not
7 unless directly relevant to the investigation.

8 With respect to Count 2, where I'm asked to grant a
9 writ of mandamus, mandamusing the custodian to abide by his or
10 her statutory duties, and because there is no evidence before
11 me that would lead me to believe, and no reason to believe,
12 that the custodian will not follow his or her statutory duties,
13 in fact because the Court has every reason to believe that the
14 custodian will follow their statutory duties, the Court will
15 grant the County judgment as to Count 2, all under the request
16 for a writ of mandamus.

17 Let me finally say that the County has made an
18 alternative argument that even if it's personal information,
19 that it nevertheless would be subject to the disclosure,
20 notwithstanding the mandatory provisions of Section 10-616,
21 because it could nevertheless be disclosed in light of the
22 County ordinance which created the Office of the Inspector
23 General and empowered the Inspector General to investigate
24 issues concerning waste, management, et cetera, of various
25 departments; and further, that the ordinance directed the

1 custodian of records to provide, upon request, the information
2 to the Inspector General in the conduct of those duties. The
3 Court finds, in light of the controversy as it was described
4 before the parties, that it is unnecessary for the Court to
5 reach that issue in this case, and particularly in light of the
6 fact that there's no cross-claim for declaratory judgment, or
7 any other kind of relief, I decline to decide that issue.

8 So that is the opinion and judgment of the Court.

9 I'll order that the remarks of the Court be
10 transcribed and filed herein as the opinion, order, and
11 judgment of the Court. And upon getting it transcribed, I'll
12 file it with a line noting that it is the judgment of the
13 Court, because I think you have to have a writing saying that
14 it is a judgment before any appeal would start.

15 Okay? Thank you all very much. I appreciate it.

16 MS. HANDMAN: Thank you, Your Honor.

17 MS. LLOYD: Thank you, Your Honor.

18 THE BAILIFF: All rise.

19 Court stands in recess.

20 (The proceedings were concluded.)

21

22

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24

25

√ Digitally signed by Kimberly L. Chwirut

DIGITALLY SIGNED CERTIFICATE

DEPOSITION SERVICES, INC. hereby certifies that the foregoing pages represent an accurate transcript of the duplicated electronic sound recording of the proceedings in the Circuit Court for Montgomery County in the matter of:

Civil No. 319081

EDWARD A. SHROPSHIRE, et al.

v.

MONTGOMERY COUNTY MARYLAND, et al.

By:

Kimberly L. Chwirut

Kimberly L. Chwirut
Transcriber

