Circuit Court for Montgomery County
Case No. 415227V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2101

September Term, 2019

---

BERNADETTE FOWLER LAMSON

v.

MONTGOMERY COUNTY, MARYLAND

---

Kehoe,
Nazarian,
Friedman,

JJ.

---

Opinion by Nazarian, J.

---

Filed: September 17, 2021

This Maryland Public Information Act ("MPIA") case returns, this time for us to address whether Bernadette Fowler Lamson was entitled to attorneys' fees and costs after she won disclosure of documents her employer, Montgomery County, had withheld. Ms. Lamson, an employee of the Office of County Attorney, filed a broad MPIA request that included requests for her supervisor's records about her. The County produced documents in response but withheld four pages of handwritten notes. The notes were produced after Ms. Lamson litigated the issue all the way to the Court of Appeals, and she filed a petition seeking attorney fees and costs, which the circuit court denied on the grounds that there was no public benefit from the disclosure and that the original denials had a reasonable basis in law. Ms. Lamson argues on appeal that the Circuit Court for Montgomery County abused its discretion in denying her request for attorney fees and costs outright. And although reasonable people (and judges) might disagree about whether this case warranted a fee award, we hold that the circuit court did not abuse its discretion in finding that it didn't, and we affirm the judgment of the circuit court.

## I. BACKGROUND

In September 2015, Ms. Lamson was engaged in an employment dispute with her employer, the Office of the County Attorney, and asked to see her supervisory file. The County denied the request, so on October 8, 2015, she filed an MPIA request seeking sixteen categories of documents relating to her and to then-recent personnel decisions affecting her. The County responded on January 27, 2016—111 days after the request—by disclosing some items, contending that no responsive documents existed as to others,

charging her $2,216.67 for the production, and withholding two sets of supervisory notes: three pages of handwritten notes contained in Ms. Lamson's supervisory file and another set of handwritten notes in a moleskin journal the supervisor kept at her home. The County withheld these as inter- or intra-agency memoranda, as shielded by executive privilege, as containing attorney work product, and because disclosure would be contrary to the public interest.

Ms. Lamson filed a complaint in the circuit court, alleging that the County had violated the MPIA and seeking disclosure of the supervisor's notes. The court dismissed the complaint, largely on the ground that the Montgomery County Code exempted the notes from disclosure. She appealed, and in an unreported opinion, we upheld the decision of the circuit court in part, but held that the Montgomery County Code was preempted by the MPIA, and that under the MPIA itself the circuit court had erred by dismissing the case as to the first set of notes, but not the second. *Lamson v. Montgomery County*, No. 892, Sept. Term 2016 (August 25, 2017). Ms. Lamson sought a writ of *certiorari* from the Court of Appeals, which granted her petition and, after argument, agreed that the MPIA preempted the County Code, and vacated the judgments and remanded for the circuit court to undertake a "responsible determination" of whether both sets of supervisory notes were subject to exemptions. *Lamson v. Montgomery County*, 460 Md. 349, 366 (2018).

That brings us to the current iteration of the case. On remand, the circuit court reviewed the notes, found that none of the privileges the County asserted applied, and

ordered the County to produce both sets of notes within seven days.[1] Ms. Lamson then filed a petition seeking to recover the attorneys' fees and costs she incurred in litigating the disclosure of the supervisors' notes. And although the court found that she had "substantially prevailed," Md. Code (2014, 2019 Repl. Vol.), § 4-362(f) of the General Provisions ("GP") Article, the court denied the petition. Notwithstanding the absence of any dispute about the amount requested, the court found that there had been no benefit to the public from the suit; that it was a purely private dispute relating to Ms. Lamson's employment; that there was no broader commercial benefit from the disclosure; and that the County's decision to withhold the documents had had a reasonable basis in law.

Ms. Lamson filed a timely notice of appeal. We supply additional facts as necessary below.

## II. DISCUSSION

Although she split them into two,[2] this appeal asks the single question of whether

[1] The County produced the documents and has not appealed that decision.

[2] Ms. Lamson phrased her Questions Presented as follows:

> 1. Whether the court below abused its discretion and erred in denying Appellant attorneys' fees, which are permitted under the MPIA?
>
> 2. Whether the court below abused its discretion and erred in denying Appellant costs, contrary to the mandate of the Court of Appeals?

Ms. Lamson's second question is encompassed fully by the first. If, on the one hand, she was awarded appellate costs in the Court of Appeals, they have been ordered already and she could collect them without needing to resort to a petition in the circuit court. If, on the other, she is claiming that the Court of Appeals's award of appellate costs in connection with her victory there entitles her to litigation costs more broadly, she's mistaken. An award of appellate costs includes only costs relating specifically to

the circuit court abused its discretion in denying outright Ms. Lamson's petition for fees and costs. The statute defines the standard in expressly discretionary terms: "If the court determines that the complainant has substantially prevailed, the court *may* assess against a defendant governmental unit reasonable counsel fees and other litigation costs that the complainant reasonably incurred." GP § 4-362(f) (emphasis added); *see also Caffrey v. Dep't of Liquor Control for Montgomery Cty.*, 370 Md. 272, 289 (2002) ("Generally, the decision whether to award counsel fees to an eligible party under the MPIA rests within the sound exercise of discretion by the trial judge."). A court abuses its discretion "where no reasonable person would take the view adopted by the trial court, or when the court acts without reference to any guiding rules or principles . . . [or] where the ruling . . . is clearly against the logic and effect of facts and inferences before the trial court." *Wilson v. John Crane, Inc.*, 385 Md. 185, 198 (2005). We review *de novo* any legal conclusions the court drew along the way. *Caffrey*, 370 Md. at 290.

Although the statute doesn't require anything specific beyond a finding that the party "substantially prevailed," courts (borrowing from federal Freedom of Information Act cases) have identified three factors bearing on whether a successful MPIA requester should recover attorneys' fees and costs: (1) the benefit to the public, if any, derived from the suit; (2) the nature of the complainant's interest in the released information; and (3) whether the agency's withholding of the information had a reasonable basis in law.

the appeal, and the amounts are set forth in the appellate court's mandate. *See* Md. Rule 8-607. Her right to litigation fees and costs in connection with the request itself is altogether separate and governed by GP § 4-362(f).

*Kirwan v. The Diamondback*, 352 Md. 74, 96 (1998) (*quoting Kline v. Fuller*, 64 Md. App. 375, 386 (1985)). But prevailing is just an eligibility threshold—the claimant bears the burden of proving that a fee award is warranted.

As we work through these factors, it is important to frame this dispute and this claimant. This case is a quintessentially individual dispute imbued with a moderate degree of public interest. Ms. Lamson isn't a media company or whistleblower claimant who sought documents for the purpose of exposing matters of public interest or public misbehavior. She is a County employee who sought these documents for an altogether personal reason, *i.e.*, to advance her employment litigation against the County. There is, to be sure, a general public interest in county government acting appropriately in its role as an employer. But it's a general one, a public interest in government complying with its MPIA obligations. The first-level questions with regard to fees are whether this request was motivated by and achieved a public interest that warrants a fee award and, alongside that, whether the County had a reasonable basis in the law for resisting disclosure. The second-level question for us is whether the circuit court abused its discretion in finding that this claim fell short.

The *first* factor, the benefit to the public, looks at whether the information the party is seeking benefits the general public. *Stromberg Metal Works v. Univ. of Md.*, 395 Md. 120, 129 (2006). *Stromberg* involved a ductwork subcontractor who requested documents relating to a construction project at the University of Maryland, prevailed on the merits, but was denied fees. *Id.* The Court of Appeals held that "'in weighing this factor a court

should take into account the degree of dissemination and likely public impact that might be expected *from a particular disclosure*,'" and whether "'the complainant's victory is likely to add to the fund of information that citizens may use in making political choices.'" *Id.* at 132 (*quoting Blue v. Bureau of Prisons*, 570 F.2d 529, 533–34 (5th Cir. 1978)). Stromberg's interest was personal and commercial, and although there was a broader public interest in delays or cost overruns in public contracts, Stromberg had no intention to disseminate the records to the public. *Id.* at 132–33.

Ms. Lamson counters that her success in gaining access to her supervisory notes benefits all public employees. She cites as evidence of the public interest in these documents the fact that a group of labor unions in Montgomery County[3] filed briefs *amicus curiae* in support of her petition for a writ of *certiorari* in the Court of Appeals. And because, she says, the supervisory notes are personnel records, her victory "advance[s] the interests of all public employees to gain access to their supervisory files and related documents and prevent rogue managers from maintaining off-line personnel records." It's true that Ms. Lamson's victory in this case secured the documents for her, and the holding of the Court of Appeals in this case should prevent future public employers, including the County, from withholding similar documents in future cases. But as in *Stromberg*, Ms. Lamson's core purpose in requesting these documents was entirely personal, and neither

[3] Montgomery County Career Firefighters Association, International Association of Firefighters, Local 1664, Montgomery County Government Employees Organization, United Food and Commercial Workers Local 1994, and Fraternal Order of Police, Montgomery County Lodge 35 ("Unions").

her documents nor any future productions will make new or additional information available to the broader public.

The *second* factor, the nature of the complainant's interest in the released information, leads to a similar conclusion. There is no doubt that Ms. Lamson's interest in these documents was legitimate and, unlike *Stromberg*, was not commercial. *Stromberg*, 395 Md. at 129 (courts generally should not award fees "if [a complainant's] interest was of a frivolous or purely commercial nature"). Her lawsuit was personal—she challenged employment actions and sought redress in her personal capacity. She counters that broadened access to supervisory notes benefit other public employees, and thus the rulings she secured in this case will bring lasting benefits to others. She argues as well that "[n]o public employee plaintiff under the MPIA can be expected to have the foresight to predict accurately what documents . . . she might obtain at the conclusion of litigation, and whether those documents can be expected to further the public's interest." And it was reasonable for her to pursue them. And in her case, Ms. Lamson found herself in the common-but-still-difficult position of having to incur the expense to pursue documents that the County withheld without knowing what is in them, then being left to prove after whether the effort was worth it. Nevertheless, "'the public should not be required to finance the investigation of a FOIA plaintiff who makes the request with an eye toward prosecuting some litigation to his own benefit.'" *Stromberg*, 395 Md. at 133 (*quoting Education-Instruccion, Inc. v. U.S. Dep't of Housing and Urban Dev.*, 87 F.R.D. 112, 116 (D. Mass. 1980), *aff'd*, 649 F.2d 4 (1st Cir. 1981)). And at its core, personal interests motivated this MPIA litigation.

The *third* factor looks at "'whether the agency's withholding of the information had a reasonable basis in law.'" *Kirwan*, 352 Md. at 96 (*quoting Kline*, 64 Md. App. at 386). *Stromberg* phrased it in terms of the agency's motivation: "a court would not award fees where the government's withholding had a colorable basis in law but would ordinarly award them if the withholding appeared to be merely to avoid embarrassment or to frustrate the requester." 395 Md. at 129 (citation omitted). This case has another twist that many don't: Ms. Lamson sought these documents to further her employment claim against the County, who was also her employer. She characterizes the County's decision to withhold the supervisory documents as steeped in personal animus.

Viewing this litigation in hindsight, the County ultimately lost on every position it took on the four pages of supervisory notes. Although the circuit court initially upheld the County's decisions and agreed with its legal positions, the County abandoned its claims of privilege in this Court. We then held that the County's reliance on the County Code was preempted, and the Court of Appeals agreed with our core holding and ordered what proved to be a successful *in camera* review proceeding. That said, those four pages responded to one of the sixteen categories of documents she requested, and the County prevailed altogether on the other fifteen. Overall, then, she prevailed substantially with regard to the supervisory notes, the documents at the heart of the appellate litigation and the remand in the circuit court, but not beyond those.

We cannot say, then, that the circuit court abused its discretion in deciding ultimately to deny Ms. Lamson's fee petition. The reported cases indicate that fees and

costs are difficult to win. This case isn't commercial, as *Stromberg* was, but the victory resides entirely with her, and the downstream benefits of her win are ephemeral at best. 395 Md. at 133. A fee award would, in the end, have the public financing a private victory. *Id.* It is also difficult to square a fee award in this case with *Kirwan*, which is perhaps the archetypal MPIA case. 352 Md. at 96–97. There, the Diamondback, a University of Maryland student newspaper, sought public documents in order to uncover and publicize misconduct on the part of University officials, employees, and student-athletes. *Id.* The Diamondback won *in toto*, yet the Court of Appeals upheld the outright denial of its fee petition—there were, the Court held, no reported Maryland cases dealing with the particular issue, and federal law could have been construed to block disclosure. *Id.* It was enough, the Court held, that "the University's withholding of the information was not entirely unjustified," and its "position was not wholly unwarranted." *Id.* In any event, it is not clear that the litigation effort would have yielded anything of value for Ms. Lamson. Yes, Ms. Lamson obtained the documents, but she doesn't argue anywhere that they had any litigation value, that they moved the case forward, that they made a difference in her dispute with the County, or revealed anything that had any public value.

Fee and cost awards are committed to the broad discretion of the circuit court. *See Caffey*, 370 Md. at 289. The court had before it an individual dispute, with over four pages of documents that, although withheld for reasons that didn't hold up to legal challenge, don't appear to have revealed anything of significance, and especially not of public significance. Although an individual judge might weigh the circumstances of this case

differently, we cannot say here, against the backdrop of *Stromberg* and *Kirwan*, that the circuit court abused its discretion in denying Ms. Lamson's petition.

**JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. APPELLANT TO PAY COSTS.**