

**IN THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY**

CLERK OF THE
CIRCUIT COURT

2021 OCT -6 PM 2:41

PR GE0 CO MD #54

US RIGHT TO KNOW,

Plaintiff,

v.

UNIVERSITY OF MARYLAND,

Defendant.

Case No. _____

CA21-
11730

COMPLAINT

Plaintiff U.S. Right to Know ("USRTK"), by and through its undersigned counsel, and for its complaint against Defendant University of Maryland ("University"), hereby complains and alleges as follows:

1. This is an action for equitable, monetary, and other relief arising from Defendant's serial refusal to comply with the obligations imposed by the Maryland Public Information Act, Md. Code, GP, §§ 4 – 101 through 4 – 601 ("MPIA"), which requires a governmental custodian of records to permit any person to inspect any public record at any reasonable time or provide copies of any public record.

THE PARTIES

2. Plaintiff USRTK is a nonprofit investigative research group focused on promoting transparency for public health. It works globally to expose corporate wrongdoing and government failures that threaten the integrity of health, the environment and the food system. Since 2015, it has obtained, posted online, and shared with the media, thousands of industry and government documents, including many acquired through judicial enforcement

of open records laws. Tens of thousands of pages of documents obtained by USRTK are now available for free public access.

3. Defendant the University of Maryland is a research institution established by the legislature. Md. Code Educ. § 12-303. Its General Counsel's address is 4716 Pontiac Street, Suite 2117 Seneca Bldg., College Park, MD 20742. It is an instrumentality of the State of Maryland within the meaning of GP § 4-101(j)(1)(i) and *Immanuel v. Comptroller of Md.*, 449 Md. 76, 81, 141 A.3d 181, 184 (2016).

JURISDICTION AND VENUE

4. This Court has jurisdiction over this matter pursuant to Md. Code, GP § 4-362(a).
5. Venue is proper in this Court pursuant to Md. Code, GP § 4-362(a)(3), as the public information requested is likely located at the College Park Campus of the University, which is located in Prince George's County.

FACTUAL ALLEGATIONS

6. Dr. Rita Colwell is a "Distinguished University Professor" at the University of Maryland, where her work focuses "on global infectious diseases, water, and health." A true and correct copy of the University of Maryland's webpage devoted to Dr. Colwell is attached as Exhibit A. A true and correct copy of Dr. Colwell's Curriculum Vitae, which reflects her work on behalf of the University of Maryland and other government entities in Maryland is attached as Exhibit B.
7. The records at issue in this case relate to Dr. Colwell's work on behalf of and at the University of Maryland.
8. The University of Maryland promotes Dr. Colwell not only as an expert on infectious disease, but on the basis that she is a published expert in her field. The University specifically

promotes Dr. Colwell's affiliation with EcoHealth Alliance, in whose publications she writes the touted materials and at whose events Dr. Colwell appears expressly in her capacity as a University academic.

9. These are activities of precisely the kind which University's policies encourage faculty to engage in. Such activities are a way to "serve" the University outside the classroom, but as an integral part of their employment with (and to advance within) the University. For example, its faculty manual notes that tenure is awarded on the basis of "service" and "recognition" outside the University's walls. Further, the University encourages and explicitly rewards "entrepreneurial, public engagement, and creative activities." As such, these activities are related to faculty responsibilities and work.
10. Plaintiff submitted a request on July 2, 2020 seeking records generated during and related to Dr. Colwell's employment at the University of Maryland. The University assigned that request tracking number 246, and produced records under the Public Information Act in response to the request, acknowledging that these records are public records subject to release.
11. Since that time, however, whether in response to faculty or outside pressure or other reasons the University has adopted a startling change of position. In response to two of the Plaintiff's most recent requests for records of the same class and subject matter, the University has declined to search for or produce any records, of any description, on the ostensible grounds that the records are not public records within the meaning of the Public Information Act.
12. On November 20, 2020, the Plaintiff submitted the request attached hereto as Exhibit C. Specifically, the Plaintiff sought email correspondence between Dr. Colwell and individuals

using various other specified email domains, including domains associated with other academic institutions.

13. On December 3, 2020, the University responded by letter denying the request in full. The University's response is attached hereto as Exhibit D.
14. On April 15, 2021, Plaintiff sent another request to the University. A true and correct copy of that request is attached hereto as Exhibit E. This request sought email correspondence between Professor Colwell and any individual using one email domain, which is affiliated with an organization active on global health issues within Dr. Colwell's field of work at the University of Maryland.
15. The following day, April 16, 2021, the University responded by letter denying the request in full. The University's response is attached hereto as Exhibit F.
16. On information and belief, the University failed to search for records responsive to either records request described herein. With respect to the first request, it would be practically impossible for the University to review the voluminous records at issue, and to determine that each and every record was not a public record, between November 20 and December 3, 2020. With respect to the second request, the University responded within one day, apparently taking a categorical approach that no email record exchanged with a particular domain could possibly be a public record, rather than inventorying potentially responsive records and determining, one-by-one, whether the records Dr. Colwell generated were related to her work for the University.
17. On information and belief and based on the circumstances set forth above, the Defendant did not review any or all potentially responsive documents and/or records to determine whether any MPIA exemption applied to the relevant record or document or whether the record or

document at issue was a public record at all. On information and belief, the Defendant made no effort to review the record(s) for coverage or exemption, or otherwise to determine whether the responsive record(s) could have been redacted or released in part. This also would violate Plaintiff's rights under the MPIA.

18. Defendant's rote, categorical assertion that certain records housed on the University's servers

mayn't be public records is overbroad and an invention at best. As the Attorney General's November 2020 PIA Manual, 15th Ed., notes, "In rare instances, the General Assembly has exempted an instrumentality of the State from coverage under the Public Information Act. *Napata v. University of Maryland Medical System Corp.*, 417 Md. 724 (2011) (UMMS not subject to the PIA because its enabling law provides that it "is not subject to any provisions of law affecting only governmental or public entities")." The University Department of Computer Science, which houses the Center for Bioinformatics and Computational Biology, is not one of them. Unlike UMMS, the Department of Computer Science cannot claim an "enacting statute expressly provid[ing] that the corporation was not subject to laws affecting only governmental or public entities." Instead, it is included as a non-exempt department within a public University which the legislature covered by the Act.

19. If a court determines that a PIA request recipient is an instrumentality, it must then ascertain

whether UMMS is otherwise exempt from the PIA by law. *Napata v. UMMS Corp.*, 417 Md. at 733. There is no exemption for the Department of Computer Science, or otherwise for a category of records capturing those sought in Plaintiff's requests at issue here. The University therefore breezily declares that the records are not covered because they "relate to Dr. Colwell's non-University engagement." This self-serving escape hatch is also an invention. The test is whether these records on the University's system (or even on an

employee's private device or account, as the Attorney General's Manual also notes, at 1-6) relate to Dr. Colwell's University engagement. 73 Opinions of the Attorney General 12, 24 (1988) ("public record" includes correspondence that is made or received by a unit of State government in connection with its conduct of public business). "Public records are any records that are made or received by a covered public agency in connection with the transaction of public business. The scope is broad, and all "records" possessed by an agency generally fall within the definition of "public records." As the Court of Appeals has explained, "[t]his definition is in line with the purpose of the [PIA] generally. Because the [PIA] is designed to grant access to documents regarding the affairs of government and the official acts of public officials, it follows that the definition of a public record should be broad enough to cover a wide range of document types." *Lamson v. Montgomery County*, 460 Md. 349, 362 (2018)." Attorney General's Manual at 1-5.

20. The Court of Appeals has held that "The MPIA defines 'public record' as 'the original or any copy of any documentary material that: (I) is made by a unit or an instrumentality of the State or of a political subdivision or received by the unit or instrumentality in connection with the transaction of public business . . .'" *Immanuel v. Comptroller of Md.*, 449 Md. 76, 81, 141 A.3d 181, 184 (2016).
21. The University's apparent categorical determination that *none* of Dr. Colwell's emails with various individuals, including academics at other institutions, is a public record generated in "transaction of public business" of the University beggars belief.
22. The requests' search parameters and the University's own description of that engagement ensure that the records, all of which also were sent to and from Dr. Colwell's University-

provided account, are inarguably connected to the Professor's work at the University, indeed her work which the University touts on its own publications.

23. Regardless, even were we to assume, *arguendo*, that certain non-public records are housed on a faculty member's University-assigned email account (for example, correspondence setting up an appointment with a physician), any analysis of whether a record is a public record must be undertaken with reference to an individual record and its subject matter, and the University must review the potentially responsive records for possible exclusion.
24. The records sought relate to the origins of Covid-19, which is a topic of tremendous public and media interest and public policy importance. Despite this, and Defendant's statutory obligations, the University summarily withheld (and continues to withhold) non-exempt, non-privileged requested information. The Defendant does so seemingly, as set forth above, without ever having conducted an actual search or review, in violation of the MPIA. Further, the Defendant has not established factual circumstances giving rise to its position that the requested records housed on the University's servers and related to the Professor's research and teaching competency are not public records, or that such records are subject to any MPIA exemption. Nor has the University identified the manner in which a privilege or exemption might apply to any particular record or discrete category of records. In short, it simply waved the two requests away.

APPLICABLE LAW

25. The MPIA establishes a general rule that "[a]ll persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees." Md. Code, GP § 4-103(a).

26. Defendant must perform a search reasonably calculated to uncover all relevant documents.
- Maryland Public Information Act Manual § 2-5. The MPIA permits a custodian to deny access to a public record only to the extent provided in the MPIA. Md. Code, GP § 4-201(a)(2). In order to deny access to a record, the custodian must first search for and identify the record, and then establish that such record fits into a category of records that are exempt under the MPIA.
27. Defendant has the burden of sustaining a decision to deny inspection or copies of a public record. Md. Code, GP § 4-362(b)(2). Meeting this burden requires the Defendant to establish that it has searched for all responsive records. Further, the Defendant must prove how any exemption found within the MPIA applies to the discrete records that have been identified as responsive to the Plaintiff's request.
28. Defendant must justify all of its withholdings. The 2020 Office of the Maryland Attorney General's Maryland Public Information Act Manual states "[t]o satisfy the statutory burden, an entity or official withholding a record must put forth evidence sufficient to justify the decision." Maryland Public Information Act Manual §5-2.
29. Mere argument is not admissible "evidence" that will suffice to meet the Defendant's burden to withhold a record.
30. Records custodians may not rely on generic exemptions and "the burden of justifying the non-disclosure of even part of a record is squarely cast upon the custodian of the record". *Blythe v. State*, 161 Md.App. 492, 521 (Md. Ct. Spec. App. 2005) citing *Cranford v. Montgomery County*, 300 Md. 759, 777, 481 A.2d 221 (Md. 1984).
31. For any and/or all of the reasons set forth above, the Defendant has violated the MPIA and Plaintiff is entitled to relief.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff respectfully prays, through counsel, that this Court:

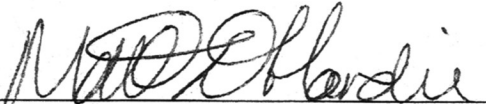
- A. Require the Defendant to establish the factual basis for any claim that a record either is not a public record within the meaning of the Maryland Public Information Act, or is exempt from production under the Act, including but not limited to identifying the nature of the record and its connection or lack thereof to Dr. Colwell's work on behalf of the University, as well as the factual basis for any assertion that no portion of any requested record may be produced in redacted form;
- B. Enter an injunction directing Defendant to comply fully with the MPIA, including but not limited to requiring the Defendant to conduct and to certify that it has conducted a reasonable search for the relevant records and has reviewed each record to determine whether any record in full to determine if each and every portion of each and every document is exempt from disclosure under the MPIA;
- C. Order the Defendant to furnish Plaintiff the public records at issue in this matter, subject only to demonstrated, legally permissible withholdings which must be supported by admissible evidence establishing that any MPIA exemption applies to the particular record(s) which are being withheld in full or in part;
- D. Alternately, perform an *in camera* review of the information withheld by the Defendant and compel Defendant to release all information for which the Defendant is unable to carry its burden to prove each withheld record or portion of a record is not subject to disclosure; and further,
- E. Enter judgement that Defendant has wrongfully withheld information under the MPIA;
- F. Enter judgement in Plaintiff's favor for nominal damages;

G. Award Plaintiff reasonable attorneys' fees and costs as authorized by Md. Code, GP § 4-362(f); and

H. Order such additional relief as the Court may deem just and proper.

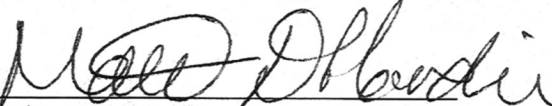
Respectfully submitted this 4th day of October, 2021,

US RIGHT TO KNOW
By Counsel


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Certification Pursuant to Rule 1-313

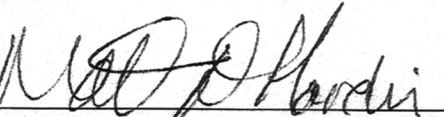
I hereby certify that I have been admitted to practice law in the State of Maryland.


Matthew D. Hardin

Certificate of Service

I hereby certify that on this the 4th day of October, 2021, I mailed a true and correct courtesy copy of the foregoing to the following counsel for the Defendant:

Michael R. Poterala, General Counsel
University of Maryland
Office of General Counsel
4716 Pontiac Street
Room 2117 Seneca Bldg
College Park, MD 20742


Matthew D. Hardin