IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

U.S. RIGHT TO KNOW	*	
Plaintiff,	*	
	*	
vs.	*	
	*	**Case No. CAL21-11730**
UNIVERSITY OF MARYLAND	*	
Defendant.	*	

MEMORANDUM OPINION AND ORDER OF COURT

Before the Court are Defendant University of Maryland's ("University" or "UMD") Renewed Motion for Summary Judgment with Request for Hearing and Plaintiff U.S. Right to Know's ("USRTK") Opposition, USRTK's Motion for Summary Judgment and University's Opposition. For the reasons below, the Court grants both motions in part and denies both motions in part.

Undisputed Facts

USRTK's Investigation into COVID-19's Origins

The facts of this case originate at the height of the COVID-19 pandemic. Around July 2020, USRTK, a non-profit public health research and journalism group, launched a massive investigation into COVID-19's emergence and spread. Ruskin Aff. ¶ 2. EcoHealth Alliance ("EcoHealth"), a non-profit research organization studying zoonotic diseases[1], became a repeated subject of USRTK's investigation after news reports alleged COVID-19 spread due to a laboratory leak at the Wuhan Institute of Virology in China. Daszak Aff. ¶ 4. At the time, EcoHealth had an affiliation with the Institute, prompting USRTK to dig into EcoHealth's activities. *Id.*; Ruskin Aff. ¶ 2.

[1] Zoonotic diseases are those diseases transmitted from animals to humans.

USRTK's primary investigatory tool became public information requests seeking EcoHealth's records, including emails. Because EcoHealth is a private organization and not generally subject to public records laws, USRTK explored potential connections with state or public actors that could serve as a conduit into EcoHealth's records. These connections included relationships with professors teaching at public research institutions, such as Dr. Rita Colwell ("Colwell") teaching at the University of Maryland.[2] Ruskin Aff. ¶ 3.

Dr. Rita Colwell

Dr. Colwell is a Distinguished University Professor at UMD who primarily researches cholera but also studies global infectious diseases, water, and public health. Colwell MSJ Aff. ¶ 4; Compl. ¶ 6. She gained tenure at UMD in 1972 and was later appointed as Director of the National Science Foundation ("NSF"). Colwell MSJ Aff. ¶ 2. Upon appointment, Colwell retired from UMD, and the University awarded her honorary emeritus status, which included the ability to continue using her university email address for personal and professional purposes. Bertot Aff. ¶ 7. In 2004, she returned to the University as a specially appointed Distinguished University Professor and Professor Emerita to pursue her research on cholera and related bacteria. Colwell MSJ Aff. ¶ 3; Bertot Aff. ¶ 4. As a special appointee, she is no longer tenured, evaluated for periodic promotion and review, or subject to service requirements. Bertot Dep. at 50.

Colwell's research is funded by grants from the NSF and the National Aeronautics and Space Administration. Colwell MSJ Aff. ¶ 4. During her lengthy career, Colwell developed a computational model that uses climate data from satellites to predict cholera outbreaks. Colwell Dep. at 10:11-14. Colwell has given presentations on how her model and research could predict

[2] The Executive Director of USRTK, Gary Ruskin, attested that the purpose of seeking out Universities is to better understand how public research institutions and their respective faculty have come to take various positions on COVID and its origin. Ruskin Aff. ¶ 2.

COVID-19 outbreaks. Colwell Dep. at 12:13-15, 33:1-8. Her laboratory and research work at the University, however, is confined to bacterium that cause cholera, not viruses like COVID-19. Colwell MSJ Aff. ¶ 3; Colwell Dep. at 33:8-10.

Colwell's EcoHealth Board Membership

Around 2012, EcoHealth invited Colwell to join its Board of Directors because of her experience in advisory roles for the U.S. government, policy organizations, and private foundations. Colwell Dep. at 40-41; Daszak Aff. ¶ 1. Colwell accepted and joined EcoHealth's Board without any input or support from the University. As a Board member, she is uncompensated and serves in a strictly advisory capacity. Colwell MSJ Aff. ¶ 6. Colwell has never conducted research for EcoHealth and EcoHealth has never directed her University research. Colwell MSJ Aff. ¶ 7, 10. Likewise, the University does not direct or supervise Colwell's EcoHealth activities and, in general, remains uninvolved with a faculty members' outside engagements. Bertot Aff. ¶ 6.

UMD university email accounts are primarily used for conducting "faculty responsibilities," not for private business or commercial ventures. Bertot Dep. at 38:24; 39:24-40:5. Faculty members, however, are not necessarily prohibited from using their university email accounts for any personal endeavor. *Id.* at 39-40. Colwell, like other emeritus faculty, uses her university email for a variety of purposes, such as her service on EcoHealth's Board. Colwell Aff. ¶ 10. Vickie Lord, Colwell's UMD-funded assistant, is occasionally included on her emails with EcoHealth so Lord can effectively manage Colwell's calendar. Colwell Dep. at 41:1-11.

On one occasion, the University reimbursed Colwell for one-night travel to an EcoHealth event. Aside from that instance, the University provides no financial support to EcoHealth.

Watson Aff. ¶ 2. Similarly, EcoHealth conducts no business on University property nor does it provide financial support to the University. Daszak Aff. ¶ 7; Montgomery Aff. ¶ 2.

MPIA Requests

Upon discovering the connection between Colwell, the University, and EcoHealth, USRTK made several Maryland Public Information Act ("MPIA") requests directed at the University. USRTK's first request in July 2020 sought disclosure of Colwell's emails relating to EcoHealth and the origins of COVID-19. Compl. ¶ 10. The University complied and produced the requested emails. After the disclosure, USRTK published an email about the recent passing of Colwell's husband, and, on another occasion, publicly disclosed EcoHealth personnel's addresses and Social Security Numbers. Daszak Aff. ¶ 13. The University then decided against disclosing additional Colwell emails because such disclosure exposed Colwell and EcoHealth employees to threats and harassment. *Id.*

USRTK submitted a second request in November 2020 seeking emails between Colwell and EcoHealth and between Colwell and individuals from other academic institutions that discussed "the origins and spread of the COVID-19 pandemic." Compl. Exh. C, at 2.

The request specifically states, in relevant part:

> **Part I.** We request all email correspondence to or from Dr. Colwell – including attachments, CC, and BCC by the following e-mail extensions:
>
> - @ecohealthalliance.org
> - @wh.iov.cn
>
> **Part II.** We request email correspondence to or from Dr. Colwell – including attachments, CC and BCC – with the following e-mail addresses:
>
> - jmhughe@emory.edu
> - bushschoolscowcroft@tamu.edu
> - calisher@cybersafe.net
> - asall@pasteur.sn
>
> The time period covered by Parts I and II of this request is from July 1, 2020 to November 20, 2020.

> **Part III.** We request email correspondence to or from Dr. Colwell – including attachments, CC and BCC – with the following e-mail addresses:
>
> - roberts@neb.com
> - schekman@berkeley.edu
> - lucy.stitzer@cargillnc.com
> - nancy.griffin@novartis.com
> - mdbacker@its.jnj.com
>
> The time period covered by Part III of this request is from January 1, 2020, to November 20, 2020.
>
> Please narrow the search results to exclude any published papers, published articles, organizations newsletters, or other widely available published materials.

Compl. Exh. C at 1-2. The University denied this request in full as unrelated to Colwell's work at the University, and thus not "public records" subject to disclosure. Compl. Exh. D at 2. The University defined public records as: "any records that are made or received by a covered public agency in connection with the transaction of public business." *Id.* (citing Maryland Public Information Act Manual, 15th edition at 1-5). In its denial, the University admits it erred in its July 2020 disclosure and suggests the volume of the records requested was too excessive. *Id.*

In April 2021, USRTK submitted a third request stating in relevant part:

> **Part I.** We request all email correspondence to or from Dr. Colwell – including attachments, CC and BCC - and the following e-mail domain
>
> - @ecohealthalliance.org
>
> The time period covered by this request is from August 1, 2012 to December 31, 2017.

Compl. Exh. E at 1. USRTK's stated purpose remained the same: to uncover the origins and spread of COVID-19 to ensure public transparency on the worldwide health crisis. *Id.* at 2. The next day, the University denied the request in full for the same reasons –that the requested emails relate to Colwell's non-University activities and fall outside the MPIA's scope. Compl. Exh. F. Again, the University suggests the volume of the records requested was too excessive. *Id.*

Procedural History

USRTK then sued the University to compel it to search for and produce email communications sent to or received by Colwell relating to EcoHealth. Before filing an answer, the University moved for summary judgment and USRTK timely opposed. The Court denied the University's motion because the parties' disputed whether Colwell's status as an EcoHealth Board Member relates to her work as a Distinguished University Professor and Professor Emerita. Following the court's denial, USRTK propounded written discovery requests and deposed Colwell and Dr. John Bertot, the University's Associate Provost of Faculty Affairs. Part of the requested discovery included the copies of the emails allegedly subject to USRTK's disclosure request. The Court entered a protective order over those emails and granted access only to the parties' attorneys. Both sides now move for summary judgment.

Standard of Review

Summary judgment is proper when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Md. Rule 2-501(a). In rendering its decision, the court must determine whether there is a genuine dispute or controversy over any material fact. *Robb v. Wancowicz*, 119 Md. App. 531, 536-37 (1998); *see also A.J. Decoster Co. v. Westinghouse Elec. Corp.*, 333 Md. 245, 262 (1994) (explaining that mere speculation is not sufficient to defeat summary judgment). A material fact affects the "outcome of the case." *Robb*, 119 Md. App. at 536 (citations omitted). Any doubt as to the existence of a genuine dispute should be resolved in favor of the non-moving party. *Med. Mut. Liab. Ins. Soc. of Maryland v. Mut. Fire, Marine and Inland Ins. Co.*, 37 Md. App. 706, 712 (1977) (citations omitted). Similarly, all reasonable inferences should be construed in the light most favorable to the non-moving party. *Fick v. Perpetual Title Co.*, 115 Md. App. 524, 533 (1997).

Discussion

The Court agrees with both parties that there is no genuine issue of material fact, and this matter is ripe for summary judgment.

I. Are Colwell's Emails Public Records?

URSTK first argues that the requested emails are public records subject to the MPIA because they are generated by a university employee using taxpayer dollars in direct pursuit of her university work. As support, USRTK points out that UMD email accounts are used to conduct "faculty responsibilities," not private business ventures. USRTK argues that Colwell's use of Lord, a university-funded assistant, to schedule her calendar around EcoHealth activities and the one occasion where the University reimbursed Colwell's travel to an EcoHealth event creates a connection between the University and EcoHealth. USRTK further argues that Colwell's research extends past cholera to include COVID-19, the subject of its MPIA request. Lastly, some emails reflect Colwell requesting peer review of a forthcoming scholarly article discussing potential COVID-19 outbreaks and challenging a colleague's view on COVID-19. Taken together, USRTK argues, these connections between Colwell and EcoHealth are sufficient to entitle USRTK to a broad swath of email communications between Colwell and EcoHealth. The University counters by arguing that the emails disclosed to the Court clearly establish that Colwell's correspondences with EcoHealth are not connected to her duties as a professor and do not concern the transaction of public business. Thus, the emails fall squarely outside the MPIA's scope. The Court agrees to an extent with USRTK and the University.

Overview of MPIA

The General Assembly enacted the MPIA in 1970 to grant the public a broad right to inspect public records to better oversee government operations. *See e.g., Glenn v. Mayland Dep't*

of Health and Mental Hygiene, 446 Md. 378, 386 (2016); *Haigley v. Dep't of Health and Mental Hygiene*, 128 Md. App. 194, 207 (1999) (citations omitted). The statutory right to inspect or copy a "public record" is governed by the MPIA. Md. Gen. Prov. §§ 4-101–4-601. The statute defines a public record as "the original or any copy of any documentary material that: (i) is made by a unit or instrumentality of the State or of a political subdivision or received by the unit or instrumentality in connection with the transaction of public business; and (ii) is in any form [as defined in the statute]." Md. Gen. Prov. § 4-101(k)(1); *Univ. Syst. of Maryland v. Baltimore Sun Co.*, 381 Md. 79, 102 (2004). Any person is entitled to access information in a public record "about the affairs of government and the official acts of public officials and employees." *Id.* § 4-103(a). To carry out this right and foster transparency, the statute creates a general presumption in favor of disclosure "[u]nless an unwarranted invasion of privacy would result." *Id.* § 4-103(b). This presumption helps effectuate the Act's broad remedial purpose. *Kirwan v. The Diamondback*, 352 Md. 74, 81-82 (1998) (citations omitted). Despite this broad purpose, the MPIA does not require a "carte blanche, and unrestricted disclosure, of all public records." *Baltimore Sun*, 381 Md. at 94. The Supreme Court of Maryland has created four basic categories of public records that are exempt from inspection: (1) disclosure controlled by other law; (2) mandatory exceptions; (3) discretionary or permissive exceptions; and (4) catch-all exception authorized by court order. *Glass v. Anne Arundel Cty.*, 453 Md. 201, 209-10 (2017).

Upon denial of a public records request, the proponent of the request is entitled to judicial review to evaluate the sufficiency of the denial. Md. Gen. Prov. § 4-362; *Lamson v. Montgomery Cty.*, 460 Md. 349, 369 (2018). The records custodian carries the burden of sustaining its decision to deny inspection or copies of a public record. *Id.* § 4-362(b)(2); *see* Md. Pub. Info. Act Manual § 5-2 ("[T]o satisfy the statutory burden, an entity or official withholding a record must put forth

evidence sufficient to justify the decision"); *Blythe v. State*, 161 Md. App. 492, 521 (2005) (citation omitted). When making its decision, the court may examine the disputed records *in camera,* require the presentation of evidence such as testimony or affidavits, or order a *Vaughn* index[3] to determine whether any part of the record should be exempted. *Lamson*, 46 Md. at 369 (explaining that the trial court is "free to employ the method it deems appropriate under the circumstances..."); Md. Gen. Prov. § 4-362(c)(2). But if the court finds no exemption applies and the public record has been wrongfully withheld, it can issue an order mandating the custodian to produce the public record. *Id.* § 4-362(c)(3)(ii). In short, the trial court must be satisfied that the agency's rationale supports the denial of the request. *Lamson*, 46 Md. at 369.

Defining Public Records

Maryland jurisprudence discussing the definition of "public records" under the MPIA is in short supply. Specifically, the cases fail to settle the ambiguity that arises when determining whether a record was "made...or received...in connection with the transaction of public business." Md. Gen. Prov. § 4-101(k)(1).

In *Baltimore Sun Co.*, the Supreme Court of Maryland reasoned that records describing financial arrangements between university coaches and third parties were not subject to disclosure unless the third-party contracts were "so connected" with the coach's public employment that it was, in effect, a part of the University contract. 381 Md. at 104-106 (remanding to the lower court for *in camera* review to determine whether such a strong connection exists). Later in *Glenn v. Md.*

[3] The *Vaughn* index originates from *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). Similarly, the U.S. Court of Appeals for the Ninth Circuit describes it as "a system of itemizing and indexing that correlates each of the government's justifications for its refusal to disclose the documents with the actual portions of the documents at issue." *Lewis v. IRS*, 823 F.2d 375, 377 n. 3 (9th Cir. 1987). When applying the *Vaughn* index, the Maryland Supreme Court "require[s] the responding party to provide a list of documents in possession, setting forth the date, author, general subject matter and claim of privilege for each document claimed to be exempt from discovery." *Officer of State Prosecutor v. Judicial Watch, Inc.*, 356 Md. 118, 121, n.1 (1999).

Dep't of Health & Mental Hygiene, the Supreme Court of Maryland stressed that the disclosure of documents and records "relating to the operation of the government" is essential to the Act's purpose of transparency. 446 Md. at 380; *see also Fioretti v. Md. State Bd. of Dental Exam'rs*, 351 Md. 66, 73 (1998) (emphasizing the legislative goal is to shine a light on the operations of government).

Lastly, the Supreme Court of Maryland has described the MPIA as a statutory mechanism for "revealing matters of governance" and not revealing information "beyond where State activity ends and private activity begins." *Immanuel v. Comptroller of Maryland*, 449 Md. 76, 93 (2016); *accord Md. Dep't of State Police v. Md. State Conference of NAACP Branches*, 190 Md. App. 359, 368 (2010) (explaining that the contents of police complaints do not concern intimate details of a trooper's private life but rather concern government affairs when the troopers are on duty and engaged in public service). But Maryland case law creates further ambiguity in deciding "where State activity ends and private activity begins.[4]" For this reason, the Court now turns to judicial interpretations of federal and other states' public records statutes for additional guidance.

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4 It is well-settled that the "cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the Legislature." *Espina v. Jackson*, 442 Md. 311, 321 (2015) (quoting *Williams v. Peninsula Reg'l Med. Ctr.*, 440 Md. 573, 580 (2014)). To determine legislative intent, a court first examines the words of the statute and, if, given the words' plain and ordinary meaning, the statute is clear, then the court's inquiry ends. *Amaya v. DGS Constr. Inc.*, 479 Md. 515, 540 (citation omitted); *Comptroller of the Treasury v. Kolzig*, 375 Md. 562, 567 (2003) (citation omitted). If, however, the plain language is ambiguous and subject to more than one reasonable interpretation, the court resolves the ambiguity by searching for intent elsewhere, including legislative history. *Espina*, 442 Md. at 322 (citations omitted). After that, courts often consider the statute's structure, relation to other laws, general purpose, and "the relative rationality and legal effect of various competing constructions." *Id.* (citing *Bd. of Cty. Comm'rs of St. Mary's Cty. of Marcas, LLC*, 415 Md. 676, 686 (2010). In light of these considerations, the court should construe the relevant language in such a way that carries out the statute's object and purpose. *Blackstone v. Sharma*, 461 Md. 87, 113-14 (2018).

Though the legislative history sheds light on the MPIA's purpose and other provisions, there is no discussion or previous draft that reveals the meaning of "public," "connection," or "transaction." Information as to the extent or degree of the connection necessary between the record and public business transactions is lacking. The Assembly did not outline what constitutes "business" under the MPIA or whether such business requires just purposeful activity or a relation to economic or commercial interests.

Freedom of Information Act Defining Public Records

Maryland courts have found federal courts' interpretation of the Freedom of Information Act ("FOIA") to be persuasive when interpreting counterpart provisions of the MPIA. *Faulk v. State's Attorney for Harford Cty.*, 299 Md. 493, 506 (1984); *MacPhail v. Comptroller of Maryland*, 178 Md. App. 115, 119 (2008) (reasoning that because the MPIA's purpose "is virtually identical to that of the FOIA" to the extent they are alike "the federal circuits' interpretation of the FOIA is persuasive"). This Court agrees.

To determine a document's status as an agency record,[5] the United States Supreme Court created the *Kissinger* factors: whether the document is "generated within the agency," in the "agency's control," "placed into the agency's files" and "used by the agency." *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 157 (1980).

The first factor, "generated within the agency," asks when and by whom was the record created. All documents generated within an agency, however, are not automatically subject to the statute's disclosure requirements. *Bureau of Nat'l Affairs v. U.S. Dep't of Justice*, 742 F.2d 1484, 1493 (D.C. Cir. 1984).

For the second factor, agency control of the document, courts consider whether the agency itself has access to the data or document generated by an agency employee or affiliate, though the agency's ability to control or access the document is not dispositive. *Forsham v. Harris*, 445 U.S. 169, 186 (1980) ("the FOIA applies to records which have been *in fact* obtained, and not to records which merely *could have been* obtained") (emphasis in original).

After carefully reviewing previous legislative reports, vote records, bill drafts, and statutory scheme, the ambiguity of the language is left unresolved. It is unclear where the limits lie or how to establish a test in defining public records that do not encroach on privacy rights.

[5] An "agency record" is the FOIA analog to MPIA's "public record."

For the third factor, "placed into the agency's files," a court will consider where the document is located, i.e., whether it is kept with official agency records. *Bloomberg LP v. U.S. Sec. & Exch. Comm'n*, 357 F.Supp.2d 156, 167 (D.D.C. 2004). Though placement of the record into an agency's files or database is considered, wholly personal materials in the employee's possession are not covered. *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 145 (1989). The United States Supreme Court has clarified this distinction by stating that in cases where documents are created by an agency employee and located in the agency, the use of the document, rather than location, becomes paramount. *Gallant v. NLRB*, 26 F.3d 168, 172 (D.C. Cir. 1994) (quoting *Bureau of Nat'l Affairs*, 742 F.2d at 1490).

For the final factor, use of the document within the agency, courts consider whether the record created by an agency employee is used for "personal" endeavors or official duties. *Bureau of Nat'l Affairs*, 742 F.2d at 1492-1493 (finding a desk calendar is a personal, not agency, record when not distributed to other employees and used for individual convenience but concluding a daily agenda is an agency record when used to inform other staff of an Attorney General's schedule, thus facilitating daily operations). Personal, in this context, means unrelated to agency business or official duties. *Id.* at 1493-94; *see also Bloomberg LP*, 357 F. Supp.2d at 166-67 (explaining that employing agency resources alone is insufficient to render a document an agency record when it is intended only for personal use, not circulated to anyone, and not kept with any official agency records). For this factor, a court will also consider the document's purpose and the extent to which the document's creator and other employees relied upon the document to carry out official business. *Bureau Nat'l* Affairs, 742 F.2d at 1493.

Though use was decisive in *Bureau Nat'l Affairs*, the D.C. Circuit emphasized the importance of considering every *Kissinger* factor. *Id.* at 1492. The inquiry thus requires a focus on

the totality of circumstances surrounding the creation, maintenance, and use of the documents and not just the physical location of the document. *Id.* at 1492–93.

Other States Defining Public Records

Other states have employed the same analysis in defining the scope of public records.[6] In *U.S. Right to Know v. Univ. of Vermont*, USRTK sought disclosure of a university professor's email communications with two academic journals, two government advisory committees, and the University of Illinois. 255 A.3d 719, 720 (Vt. 2021). The Vermont Supreme Court held that those emails did not constitute public records under Vermont's Public Records Act because the content of the emails reflected the personal endeavors of a government employee and did not reflect government business. *Id*. at 721.

To reach its conclusion, the Vermont Supreme Court used an analytical structure like that of the U.S. Supreme Court. The *University of Vermont* Court held that the "determinative factor" in defining a "public record" is whether the requested record was produced or acquired in the course of public agency business—a question informed by the circumstances surrounding the record's creation and the role it played in the agency's daily functioning. *Id*. at 722 (citations omitted). A second "essential" factor is whether the public record's contents reflect government business, and not personal endeavors, taking into consideration whether the record contains

[6] Some states follow a similar totality of circumstances test. *Pulaski Cty. v. Arkansas Democrat-Gazelle, Inc*., 370 Ark. 435 (2007) (explaining the court must make a fact-specific determination through an *in camera* inspection of the document's content, nature, and purpose); *Griffis v. Pinal Cty.*, 215 Ariz. 1, 5 (2007) (determining a document's status as a public record requires a content-driven inquiry); *Denver Pub. Co. v. Bd. of Cty. Comm'rs of Cty. of Araphoe*, 121 P.3d 190, 205 (2005); *State v. Clearwater*, 863 So.2d 149, 154 (Fla. 2003); *Salt River Pima-Maricopa Indian Community v. Rogers*, 168 Ariz. at 531, 541 (1991); *see Cowles Publ'g Co. v. Kootenai Cty. Bd.*, 144 Idaho 259, 264 (2007) ("[i]t is not simply the fact that the emails were sent and received while the employees were at work or the fact that they were in the employee's office...it is their relation to legitimate public interest that makes them a public record"); *Clearwater*, 863 So.2d at 154 (explaining that private emails are not public records solely because they are on an agency-owned computer).

information bearing on a government function, provides government officials with bases to make decisions, ensures continuity with previous government operations, or documents responsibilities of government actors. *Id.* at 724. Lastly, the Vermont Supreme Court found that the location of the requested documents is a factor to be considered but is not dispositive. *Id.*

The University argues this Court should follow *University of Vermont's* reasoning to reach the same conclusion–that Colwell's email communications with EcoHealth do not constitute public records because they are entirely unrelated to her work at the University. USRTK argues that this Court is not bound by Vermont law and that there are key factual differences distinguishing the instant case from *University of Vermont.* Yet, USRTK fails to point to any legal standard that this Court should use to reach its determination. The Court agrees with the University that the *University of Vermont* analysis is appropriate to adopt here.

The Factors Applied

The Court will utilize the *Kissinger* and *University of Vermont* factors discussed above, informed by Maryland MPIA jurisprudence. The first factor is whether the requested record was produced or acquired in the course of public business. This requires looking at the circumstances surrounding the record's creation including the creator, intended recipient, the initial purpose, the role the record plays in the agency's daily functions, and whether Colwell was on duty when the document was created. Second, this Court will consider the extent to which the public employee's activities with the entity they are communicating with via email were connected to their public employment. The third factor asks whether the contents of the records reveal "the operation of the government" such that their disclosure promotes the MPIA's purpose of transparency. Fourth, the Court will look to the record's location. These factors are essential in carrying out the MPIA's

remedial purpose and objective to effectively oversee government operations when determining whether a document is a "public record" subject to disclosure.

For the first factor, Dr. Colwell and EcoHealth personnel created and sent the emails at issue. The varied purposes of the emails ranged from electing new Board members and organizing business affairs to wide-ranging discussions on Colwell's COVID-19 research. Most of the emails did not affect the University's daily functions in any way, and it is irrelevant that Colwell sent the emails during her off-work hours. This factor thus weighs in favor of disclosing those emails specifically related to Colwell's University research, including any reference to her computational model to predict COVID-19 outbreaks, and Colwell's contributions to COVID-19 research.

Turning to the second factor, on at least one occasion, the University reimbursed Colwell's travel to an EcoHealth Board event. Similarly, on several occasions, Colwell's University-funded assistant scheduled Colwell's calendar to ensure her presence at EcoHealth meetings and events. The university funding of Colwell's travel creates a connection between EcoHealth's activities and Colwell's public employment strong enough to compel disclosure of documents related to those activities. Thus, this factor weighs in favor of disclosing emails related to any trip or travel funded by the University, any corresponding research, speech or event as to that trip, and any email with Colwell's University-funded assistant, Vickie Lord, scheduling Colwell's travel to EcoHealth events.

For the third factor, emails concerning Colwell's University research and contribution to COVID-19 research sufficiently reveal an "operation of the government." The emails detail how a public research institution and its employees handled and responded to an unprecedented global pandemic. Given the MPIA's presumption in favor of disclosure to enable government

transparency, this factor weighs strongly in favor of disclosing emails related to Colwell's University and COVID-19-related research.

Finally, the email's location is never dispositive or even helpful in this context. It is undisputed these emails are located on university servers and were sent or received by Colwell's university address.

Accordingly, the University must disclose all emails that contain information on its research or teaching activities and any money its spending. But any other information in the emails must be redacted.

II. Are Attorney Fees Warranted?

USRTK next argues that they are entitled to attorney fees because the University failed to conduct a reasonable search for the requested records. USRTK asserts a reasonable search requires evaluation of records one-by-one to determine whether they are public records and whether an exemption applies. USRTK further argues that it would have been impossible for the University to review the voluminous records to determine each email was not a public record in the time period University states it conducted its search. The University, on the other hand, argues that an agency is not required to review every page for records in response to a request. And that the threshold inquiry is whether the emails are public records, not whether the University conducted an adequate search. The University claims it did just that—it first determined that the requested emails "relate to Dr. Colwell's non-University engagement" and then determined they do not relate to the transaction of public business as required by the MPIA. Compl. Exhs. D & E. The Court agrees with the University in part.

Under certain circumstances, the MPIA empowers a court to award appropriate statutory damages, actual damages, litigation costs, and reasonable counsel fees to a complainant. *Id.* §§ 4-

362(d), (f). Reasonable counsel fees or litigation costs can only be awarded if the court finds that the complainant "substantially prevailed" against the custodian. *Id.* § 4-362(f). Regarding the adequacy of a records' search, the Supreme Court of Maryland has held that the MPIA requires an agency or custodian of public records who receives a request to "conduct a search in good faith that is reasonably designed to capture all responsive records." *Glass*, 453 Md. at 232. A good faith search does not require a custodian to "robotically examine every record in its possession;" it need only focus on where the responsive records are likely to be found. *Id.* In determining the reasonableness of the search for records, a court prospectively measures by how the agency designed its efforts to find the documents—not retrospectively by the results of the search. *Id.* In other words, perfection is not required. *Id.* at 233.

Turning to this case, the University's efforts and conclusion is consistent with *Glass's* reasoning that searches be reasonable and conducted in good faith. The University states in their denial letters to USRTK that the requested emails are not public records since Colwell's connection with EcoHealth is wholly distinct from university business and the records sought relate to Colwell's non-University engagement. Taken together, the University concluded that the emails fail to "relate to the transaction of public business." Compl. Exh. D & E. Its search efforts focused on whether the emails would even be responsive to the MPIA request. By taking a categorical approach, the University reasonably avoided expending public funds for likely futile efforts and determined that responsive records likely would not be found between Colwell and EcoHealth. The University had no duty to robotically examine every record as USRTK suggests, and it was reasonable for the University to conclude these records fall outside the ambit of the MPIA.

In sum, USRTK's claim for attorney fees fails.

Accordingly, it is this ______ day of ___________ 2023, by the Circuit Court for Prince George's County, Maryland, hereby:

ORDERED, that Defendant's Motion for Summary Judgment is **GRANTED in part and DENIED in part**; and it is further,

ORDERED, that Plaintiff's Motion for Summary Judgment is **GRANTED in part and DENIED in part**; and it is further,

ORDERED, that Plaintiff's Request for Attorney Fees is **DENIED**; and it is further,

ORDERED, that Defendant shall disclose to Plaintiff, subject to the following parameters, any email to or from Dr. Rita Colwell, including attachments, CC and BCC by the following e-mail extensions and addresses:

(1) From August 1, 2012, to December 31, 2017
- ecohealthalliance.org

(2) From July 1, 2020, to November 20, 2020
- ecohealthalliance.org
- wh.iov.cn
- jmhughe@emory.edu
- bushschoolscowcroft@tamu.edu
- calisher@cybersafe.net
- asall@pasteur.sn

(3) From January 1, 2020, to November 20, 2020
- roberts@neb.com
- schekman@berkeley.edu
- lucy.stitzer@cargillinc.com
- nancy.griffin@novartis.com
- mdbacker@its.jnj.com

And it is further,

ORDERED, that the emails disclosed <u>**must only**</u> contain the following information:

(1) Teaching or research conducted by Dr Colwell or any other persons on behalf of the University;
(2) Details about any trip or travel funded by the University; or
(3) Dr. Colwell's calendar of any of the above activities

And it is further,

ORDERED, that Plaintiff carry the costs of redacting the emails for public disclosure to comply with the above parameters and ensure personal information, including but not limited to addresses, phone numbers, and social security numbers, are removed; and it is further

ORDERED, that the parties may submit by May 5, 2023, additional proposed orders in accordance with this memorandum opinion.

This case is closed statistically.

April 24, 2023

APRIL T. ADEMILUYI, Judge
Prince George's County Circuit Court

04/24/2023 12:11:31 AM