IN THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY

ENERGY POLICY ADVOCATES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. C-02-CV-22-001100**
	)	
ANNE ARUNDEL COUNTY, MARYLAND	)	**HEARING REQUESTED**
	)	
Defendant.	)	

PLAINTIFF'S OPPOSITION TO MOTION TO STRIKE

NOW COMES the Plaintiff, Energy Policy Advocates, by and through undersigned counsel, and opposes the Defendant's Motion to Strike. A memorandum of law is attached hereto.

REQUEST FOR HEARING

Pursuant to Md. Rule Civ. P. 2-311 (f), Plaintiff requests to be heard on the Motion to Strike.

Respectfully Submitted this the 29th day of August, 2022.

ENERGY POLICY ADVOCATES
By Counsel:

/s/ Matthew D. Hardin
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Certificate Of Service

I hereby certify that on this the 29th day of August, 2022 I deposited a true and correct copy of the foregoing in the U.S. Mail, postage prepaid, addressed to the following counsel of record for the defendant:

Philip E. Culpepper, Esq.
Supervising County Attorney
M. Book McKay, Esq.
Assistant County Attorney
Anne Arundel County Office Of Law
2660 Riva Road, 4th Floor
Annapolis, Maryland 21401

I further certify that I sent a courtesy copy to their attention via email addressed to pculpepper@aacounty.org and lwmcka21@aacounty.org. I also e-served the document through the Court's e-filing system.

/s/ Matthew D. Hardin
Matthew D. Hardin

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Plaintiff,	)	
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Defendant.	)	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO STRIKE

In this case, Anne Arundel County ("the County") seeks to strike almost the entirety of the Plaintiff's Complaint (specifically, paragraphs 7 through 38, inclusive), ostensibly because the Plaintiff's allegations are immaterial.[1] But the allegations are actually central to the Plaintiff's Public Information Act claims, and this Court should deny the Motion to Strike on that basis.

STANDARD OF REVIEW

Md. Rule 2-322 (e) vests this Court with the discretion to strike "any insufficient defense or any improper, immaterial, impertinent, or scandalous matter stricken from any pleading."

[1] In support of its argument, the County thrice characterizes the facts stated in the Complaint as "conspiracy" theorizing (Plaintiff's "unspecified conspiracy," "immaterial conspiracy allegations," and "irrelevant, immaterial and impertinent allegations about a conspiracy of a secret cabal of entities funding climate change lawsuits"). In fact, the entity cited by County officials in the one record at issue in this matter, and its role in the hardly "unspecified" operation Plaintiff describes, were the subject of widespread reporting in English-language news outlets mere days after the County made these claims. See, e.g., Thomas Catenacci, "Leonardo DiCaprio funneled grants through dark money group to fund climate nuisance lawsuits, emails show," Fox News, August 15, 2022, https://www.foxnews.com/politics/leonardo-dicaprio-funneled-grants-dark-money-group-fund-climate-nuisance-lawsuits-emails-show, Chris Jewers, "Leonardo DiCaprio's non-profit foundation 'funneled grants through dark money group to fund lawsuits against oil companies over climate change deception', according to claims," Daily Mail, August 15, 2022, https://www.dailymail.co.uk/news/article-11112651/Leonardo-DiCaprios-non-profit-foundation-funneled-grants-dark-money-group.html.

As the Maryland Court of Special Appeals has explained:

> "The decision to grant a motion to strike lies within the trial court's discretion… Such discretion, however, is not unlimited and the courts must be cognizant of the rule that, in deciding a motion to strike… they should afford 'great liberality in the allowance of amendments in order to prevent the substantial injustice of a cause from being defeated by formal slips or slight variances.' ... Absent prejudice to the defendant, the motion to strike ordinarily should be denied…"

Patapsco Assocs. Ltd. P'ship v. Gurany, 80 Md. App. 200, 204, 560 A.2d 611, 613 (1989) (internal citations omitted).

It appears to be the unanimous sentiment of the Maryland courts that to grant a motion to strike in the absence of prejudice to a Defendant is an abuse of judicial discretion.[2] See, e.g., *First Wholesale Cleaners, Inc. v. Donegal Mut. Ins. Co.*, 143 Md. App. 24, 792 A.2d 325, 2002 Md. App. LEXIS 41 (2002) (the court abused its discretion in granting a motion to strike where word "prejudice" did not even appear anywhere in an insurer's motion to strike and the insurer failed to show any prejudice to their cause) and *Garrett v. State*, 124 Md. App. 23, 720 A.2d 1193, 1998 Md. App. LEXIS 195 (1998) (holding that there was no "tangible detriment" from an improper pleading).

ALLEGATIONS AT ISSUE

The County seeks to strike the paragraphs of the Plaintiff's Complaint which detail the public interest in the document at issue in this case, the reason that document was created, and why the County would be discussing a California charitable foundation now shown to have been (and which possibly still is) financing the climate litigation campaign filed by the law firm to which the County has promised a massive "contingency fee" for this work despite public

[2] Federal courts in Maryland agree. See, e.g., *Hare v. Family Publications Service, Inc.*, 342 F. Supp. 678, 685 (D. Md. 1972) ("…before a motion to strike will be granted[,] the allegations must be both immaterial and prejudicial").

officials having a broad fiduciary duty to carry out their responsibilities in a manner that is faithful to the public trust that has been reposed in them. These paragraphs speak for themselves, and they make risible the County's theory that the relationship between records sought and the public interest in an action seeking to enforce the Public Information Act must now be purged from the record.

ARGUMENT

The allegations at issue are neither immaterial nor scandalous. Instead, they shed light on the public record that is at issue in this case, including why it was created and for what purpose. Plaintiff's allegations serve to demonstrate and highlight the public interest in release of those records by this Court, and the Court should allow them to stand.

I. The Allegations in Paragraphs 7 through 38 are not "Wholly Immaterial" to Plaintiff's Claims.

The Defense argues that Plaintiff's allegations about the public's interest in the record at issue, in this Public Information Act case, are "wholly immaterial" to the Plaintiff's Complaint. Such an argument is baseless.

Maryland Rule 2-303(b) states that "Each averment of a pleading shall be simple, concise, and direct... A pleading shall contain only such statements of fact as may be necessary to show the pleader's entitlement to relief or ground of defense." The appellate courts have interpreted this rule to require that their review of the legal sufficiency of a Plaintiff's allegations will "begin and end" with an examination of the "four corners" of the Complaint. *Wheeling v. Selene Fin. LP*, 473 Md. 356, 375, 250 A.3d 197, 208 (2021). "The Court has no authority, discretionary or otherwise, to rule upon a question not raised by the pleadings…" *Early v. Early*, 338 Md. 639, 658, 659 A.2d 1334, 1343 (1999).

The allegations in paragraphs 7 through 38 relate to how and why the record at issue in this case was generated, which is not only of public interest *per se* but is particularly important given public officials' fiduciary responsibilities. Insofar as the County's chief defense (or even its only defense) is that the record at issue is protected by the attorney-client privilege, Plaintiff has set forth facts to support its arguments for how that privilege either never existed or was waived. The Maryland Court of Appeals has adopted an 8-point test for the existence of attorney-client privilege. The privilege arises:

> "(1) Where legal advice of [any] kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his insistence permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection [may] be waived."

E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc., 351 Md. 396, 415, 718 A.2d 1129, 1138 (1998).

It is therefore the County's burden in this case (as both the proponent of a privilege and as a defendant in a Public Information Act case) to establish that the communication involved "legal advice… from a professional legal adviser in his capacity as such." Plaintiff has therefore taken pains to plead facts which tend to suggest that the record in question did not involve the provision of legal advice, but rather financial or political advice. Indeed, it seems likely that the document at issue in this case imparted a key fact to County officials — knowledge or suspicion[3] that their law firm was already being privately paid by the Resources Legacy Fund to file

[3] The prospect that this was occurring had been the subject of an article by George Mason Law School Professor Michael Krauss in Forbes in July 2022, but, as Plaintiff states in its Complaint, there had been no confirmation until a recent production in open records litigation in California. See Michael Krauss, "Using Charitable Funds To Subsidize "Legislation Through Litigation," Forbes, July 28, 2020, https://www.forbes.com/sites/michaelkrauss/2020/07/28/using-charitable-funds-to-subsidize-legislation-through-litigation/?sh=44c270ae3342.

"contingency fee" climate lawsuits (of which the County's was at the time only the latest). Further, it is the County's burden to establish that the communications were at the client's insistence permanently protected and that the protection of the privilege was not waived. Plaintiff has therefore pleaded facts which suggest that a third party may be involved in the records at issue or in the campaign of litigation that gave rise to such a record, such that waiver of any applicable privilege is a possibility or even a probability.

This suit arose because the County asserts the existence of a privilege, which it argues shields certain records from disclosure. The Plaintiff has taken care to plead facts which show that privilege either never existed due to the nature of the record at issue, or that the privilege may have been waived due to the involvement of third parties in the campaign that gave rise to the record's creation. Plaintiff also pleaded facts to illuminate the overwhelming public interest in the record at issue. Although it is unsurprising that the County disagrees with Plaintiff's assertions, it cannot be seriously argued that the assertions are immaterial to the legal issues at hand.

II. The County has not Adequately Alleged any Arguments other than Purported "Immateriality" of the Allegations at Issue.

The County's motion begins with its argument that "Paragraphs 7 through and including 38 of the Complaint are wholly immaterial to the question" at issue in this litigation. Mot. to Strike at p. 3. The County then goes on to hint that the allegations at issue are "baseless, improper, impertinent and immaterial conspiracy allegations." Mot to Strike at pp.3-4. But the County never develops its latter argument, and it is therefore waived.

"A written motion and a response to a motion shall state with particularity the grounds and the authorities in support of each ground." Md. Rule 2-311. "The Court has no authority, discretionary or otherwise, to rule upon a question not raised by the pleadings, and of which the

parties therefore had neither notice nor an opportunity to be heard." *Early v. Early*, 338 Md. 639, 658, 659 A.2d 1334, 1343 (1999). The County hints that it believes the allegations in paragraph 7 through 38 of the Complaint are more than irrelevant, and rise to the level of being "impertinent," or even conspiratorial (subsequent reportage notwithstanding). But the County has not fleshed out its argument such that the Plaintiff can intelligently respond to these additional allegations.

To the extent that the County's Motion to Strike is based on any argument other than the alleged irrelevance or immateriality of the paragraphs at issue, this Court should deny the County's Motion for failure to develop such arguments or afford the Plaintiff a further opportunity to counter specific assertions of "impertinent" or otherwise "improper" allegations.

III. The County Admits Plaintiff's Allegations are Indisputably Material in the Context of an Award of Attorney's Fees.

The County admits at p. 4 of its Motion to Strike that "public interest" in a case or the records at issue in a case is relevant "when the Court is determining whether an MPIA litigant is entitled to an award of attorney's fees after finding that a custodian wrongfully withheld a document." The County then argues that because the Court has not yet ruled Plaintiff is entitled to the underlying records, Plaintiff has therefore not proven its entitlement to attorney's fees.

The County is putting carts before horses and mixing up the various stages of this case. The Maryland Court of Appeals has held that:

> "Although Maryland abandoned the formalities of common law pleading long ago, it is still a fair comment to say that pleading plays four distinct roles in our system of jurisprudence. It (1) provides notice to the parties as to the nature of the claim or defense; (2) states the facts upon which the claim or defense allegedly exists; (3) defines the boundaries of litigation; and (4) provides for the speedy resolution of frivolous claims and defenses … Of these four, notice is

paramount."

Scott v. Jenkins, 345 Md. 21, 27-28, 690 A.2d 1000, 1003 (1997). A Complaint necessarily initiates the case and sets forth each and every ground for relief which is available to the Complainant, such that the Defendant is on notice of the allegations and can respond to them. The County inverts the order of these proceedings by attempting to argue that not every fact in the Complaint is relevant to every one of Plaintiff's claims. Even assuming, *arguendo*, that the County is correct, Plaintiff is still entitled to (or even *required* to) set forth facts in support of *all* of its claims.

In this case, Plaintiff seeks an award of attorney's fees. Complaint, Prayer for Relief, ¶ F. The County admits that the public interest is a relevant factor for this Court to consider in determining whether to award Plaintiff its fees. Mot. to Strike, p. 4. Plaintiff is therefore not only permitted to set forth facts demonstrating its entitlement to such fees, but is actually *required* to put the Defendant on notice as to what it asserts is the basis of its entitlement to relief. Had Plaintiff failed to apprise the County of the public interest in this case in its pleadings, the County could then have argued, citing controlling appellate precedent, that the issue of attorney's fees was not properly before this Court and that the Court was powerless to grant Plaintiff the relief it sought. *Early v. Early*, 338 Md. 639, 658, 659 A.2d 1334, 1343 (1999) ("The Court has no authority, discretionary or otherwise, to rule upon a question not raised by the pleadings, and of which the parties therefore had neither notice nor an opportunity to be heard.").

In this case, the Plaintiff is diligently following the rules of pleading, including by putting the County on notice of the factual and legal basis of the Plaintiff's claims for both equitable and monetary relief. Had the Plaintiff not provided the County with notice of its claims, it is

doubtless the County would have objected that there was no "public interest" in the document at issue in this case and that Plaintiff is therefore entitled to no relief.

CONCLUSION

For the reasons stated herein, the Court should deny the County's Motion to Strike, and allow the parties to develop the factual record for an eventual ruling on the merits.

REQUEST FOR A HEARING

Pursuant to Md. Rule Civ. P. 2-311 (f), Plaintiff requests to be heard on the Motion to Strike.

Respectfully submitted this the 29th day of August, 2022,

ENERGY POLICY ADVOCATES
By Counsel

/s/ Matthew D. Hardin
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I hereby certify that on this the 29th day of August, 2022 I deposited a true and correct copy of the foregoing in the U.S. Mail, postage prepaid, addressed to the following counsel of record for the defendant:

Philip E. Culpepper, Esq.
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M. Book McKay, Esq.
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