



November 6, 2017

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Re: Public Information Act Request

Dear Mr. McCarthy, Mr. Bor, Ms. Feinberg, Ms. Baker, Ms. Holland, Ms. Taylor, Mr. Davis, Ms. Rogers, and Mr. Cole,

This is a public information request on behalf of the American Civil Liberties Union Foundation of Maryland, pursuant to the Maryland Public Information Act (MPIA), Md. Code, Gen. Prov. §§ 4-101 et seq. This request relates to the proposal that the City of Baltimore and State of Maryland jointly submitted on October 18, 2017 in response to Amazon's Request for Proposals (RFP) seeking submissions from Metropolitan Statistical Areas regarding the site for Amazon's second headquarters. See https://images-na.ssl-images-amazon.com/images/G/01/Anything/test/images/usa/RFP_3._V516043504_.pdf.

We seek a complete copy of the electronic version of the Proposal that Amazon required all respondents to submit, including, but not limited to, the written responses to the RFP questions.

We understand that a previous MPIO request that the Baltimore Sun submitted to the Baltimore Development Corporation seeking the same information was denied on the basis that the Baltimore Development Corporation was not the custodian of the record. I. Duncan, *Baltimore bid to woo Amazon was produced on the public dime, but city lawyers say it's in the hands of a private firm*, The Baltimore Sun, November 2, 2017, <http://www.baltimoresun.com/news/maryland/investigations/bs-md-ci-sun-investigates-amazon-submission-20171102-story.html> (“*Baltimore Bid*”). To put it mildly, we do not find it credible that the Baltimore Development Corporation (BDC) does not have a copy of what has been publicly described as the City’s “top priority” for the five weeks leading up to its submission, and an effort that BDC publicly claimed to have orchestrated, on direct instructions from the Mayor. S. Gantz, *Local, state officials invest hundreds of hours to bid on Amazon's HQ2*, The Baltimore Sun, Oct. 16, 2017, <http://www.baltimoresun.com/business/bs-bz-amazon-effort-20171013-story.html>. In any event, even if the BDC could be so irresponsible and poorly organized to have not retained a copy of the proposal that it worked so hard to put together, it is inconceivable that no *other* City agency, office, or official possesses a copy of the proposal. If it is accurate that the BDC has not retained a copy of the proposal but any other office within the City government does, it is the City’s obligation under the MPIO is to inform the requestor of which City office *does* have the requested record, rather than playing a shell game and forcing the requestor to guess where the record may reside. Md. Code, Gen. Prov. § 4-202(c). But notwithstanding this rule, given the City’s response to the Baltimore Sun’s MPIO request, we have broadened the list of entities from whom we are requesting the proposal. In the event that we have not properly guessed which office or offices are in possession of a copy of the proposal, we expect that, as the law requires, each of the recipients of this request will consult with appropriate City officials to determine where the proposal (or any copies of it, including any that have been deleted) exists and disclose it.

We also understand that the City Solicitor’s Office has more broadly claimed that the proposal was not actually submitted by the City, but was instead “submitted and retained by the developer of Port Covington.” *Baltimore Bid*. This is transparently false. But even if this were true, it would not obviate the City’s obligations under the MPIO. *See, e.g., Glass v. Anne Arundel County*, 453 Md. 201, 235 (2017) (holding that the police department was still the custodian of electronic records that were stored with the county’s office of information technology; noting that there was no evidence that OIT had authority or ability to make required decisions re inspection/withholding because police department had the relevant knowledge); *Ireland v. Shearin*, 417 Md. 401, 411 (2010) (prison warden was official custodian, and responsible for responding appropriately to MPIO request, even though other prison offices had physical control of requested records; a custodian can comply by causing others to produce records rather than gathering himself); *Competitive Enterprise Institute v. Office of Science and Technology Policy*, 827 F.3d 145, 150 (C.A.D.C. 2016) (“If a department head can deprive the citizens of their right to know what his department is up to by the simple expedient of maintaining his departmental emails on an account in another domain, [FOIA’s] purpose is hardly served. It would make as much sense to say that the department head could deprive requestors of hard-copy documents by leaving them in a file at his daughter’s house and then claiming that they are under her control.”); *In Defense of Animals v. National Institutes of Health*, 543 F. Supp. 2d 70, 78 (D.D.C. 2008) (records in physical control of private lab were still subject to NIH FOIA request because records were essential to care of NIH-owned chimpanzees, and NIH could access records at any time).

In any case, it is apparent that whatever Sagamore Development Corporation's role in the proposal was, the proposal is clearly at least *also* a proposal by the City and State, if only because Sagamore Development Corporation does not have the authority to make commitments on behalf of the residents of the City of Baltimore and State of Maryland to provide "mind boggling" incentives measured in the billions of dollars of public monies as part of the proposal. S. Gantz and E. Cox, *Maryland's incentive package for Amazon HQ2 measured in the billions of dollars*, The Baltimore Sun, Oct. 18, 2017, <http://www.baltimoresun.com/business/bs-bz-amazon-ceremony-20171018-story.html> (quoting Gov. Hogan). In addition, the proposal was also repeatedly described by Mayor Pugh at the public ceremony announcing its submission as a "collaborative effort" of the City and other entities, and described it as "Baltimore's proposal," not Sagamore Development Corporation's. https://www.youtube.com/watch?v=xgOHCnD_OPA. And the proposal was physically signed by Mayor Pugh herself at that same ceremony, which is totally inconsistent with the City Solicitor's description of the proposal as one made by Sagamore Development Corporation, and not the City. Finally, the terms of the RFP itself state that it is to be submitted "on behalf of your metropolitan statistical area (MSA), state/province, county, city and the relevant localities therein" which is also inconsistent with the claim that this is exclusively a Sagamore Development Corporation proposal.

We anticipate that we will want copies of some or all of the records sought. Pursuant to Md. Code, Gen. Prov. § 4-206(e), we request that all fees related to this request be waived. The American Civil Liberties Union Foundation of Maryland is a non-profit 501(c)(3) organization. We request this information in furtherance of the ACLU's longstanding commitment to open and transparent government, and to inform the public regarding the public subsidies that have been offered as part of the proposal. This request meets the criteria for a fee waiver under MPIA, and fees associated with similar requests are regularly waived for the ACLU. In addition, the ACLU has a limited ability to pay for the copying and other charges associated with MPIA requests. *See generally* Office of the Attorney General, *Maryland Public Information Act Manual*, 7-3 - 7-4 (14th ed. 2015) (discussing criteria for waiver of fees under the MPIA). If the request for a waiver of fee is denied, please advise us in writing of the reason(s) for the denial and of the cost, if any, for obtaining a copy of the requested documents.

If you determine that some portions of the requested records are exempt from disclosure, we will expect, as the Act provides in Md. Code, Gen. Prov. § 4-203(c)(1)(ii), that you provide us with any portion of the records that are subject to inspection. If all or any part of this request is denied, please provide us with (1) the reasons for the denial, (2) the legal authority for the denial, (3) a brief description of the record that will enable the us to assess the applicability of the legal authority for the denial, and (4) notice of the available remedies. Md. Code, Gen. Prov. § 4-203(c)(1)(i).

It is essential that this request be fulfilled within 30 days, as required by Md. Code, Gen. Prov. § 4-203(a). Further, if you anticipate that it will take more than 10 days to produce the records, we expect a response within 10 days addressing (1) the amount of time that you anticipate it will take to produce the record, (2) an estimate of the range of fees that may be charged to comply with the request; and (3) the reason for the delay. Md. Code, Gen. Prov. § 4-203(b)(2). If we do not receive notice within the required time period, we will treat your failure to respond as a denial and seek appropriate relief.

Thank you for your time and attention to this matter, and we look forward to receiving your response. Please feel free to contact us with any questions or concerns.

Sincerely,

David Rocah
Senior Staff Attorney

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