

February 23, 2022

Mr. Andrew J. Ford

Assistant County Attorney

Office of the County Attorney

12 E. Church Street Frederick, MD 21701

Via email: aford@frederickcountymd.gov

Re: PIA Requests dated October 4, 2021, and October 5, 2021

Dear Mr. Ford,

Thank you for your letter of October 27, 2021, in response to Envision Frederick County's Public Information Action request for any non-disclosure agreements with any entity, draft or final, that were proposed, discussed or signed by any of the Frederick County Officials.

In your response, you indicated you must deny our request pursuant to the Public Information Act, Annotated Code of Maryland, General Provisions Article ("GP") §4-335.

Upon further research into the Maryland Public Information Act Manual (16th Edition, September 2021) (https://www.marylandattorneygeneral.gov/OpenGov%20Documents/PIA_manual_printable.pdf), Chapter 3, §4-335, Section F States the following:

"F. Inspection of "Any Part" of the Record that Is Not Exempt

The fact that some portions of a particular record may be exempt from disclosure does not mean that the entire record may be withheld. *Blythe v. State*, 161 Md. App. 492, 519. Indeed, a custodian who denies a request for inspection must, among other requirements, "allow inspection of any part of the record that is subject to inspection." GP § 4-203(c)(1)(ii) (emphasis added). In other words, if a record contains exempt and non-exempt material, the custodian must permit inspection of the non-exempt portion of a record, typically by redacting the exempt material. GP § 4-203(c)(1)(ii). And a custodian who denies a request for inspection under one of the discretionary exemptions above must provide a written "explanation of why redacting information would not address the reasons for the denial." GP § 4-203(c)(1)(i)2."

Per the above, the County is required to provide an explanation for the denial, which you have not provided. Furthermore, if the non-disclosure agreement was to contain one or more trade secrets; confidential commercial information; confidential financial information; confidential geological information or confidential geophysical information, the County is not at liberty to withhold the entire agreement. While GP §4-335 prevents the County from disclosing the information made confidential, it does not prevent the County from disclosing the rest of the agreement. The County should redact the text of the agreement that constitutes the confidential information listed in GP §4-335 and make the rest of the agreement available for public inspection and copying.

Therefore, we respectfully submit to you again, the following:

Amended Public Information Act Request

Pursuant to the Maryland Public Information Act, Md. STATE GOVERNMENT Code Ann. § 10-611, et seq., ENVISION FREDERICK COUNTY, INC. hereby requests the following:

DEFINITIONS:

(A) Any reference to Frederick County, or a department or subdivision thereof, includes any person working for Frederick County, the department or subdivision whether an elected official, official, or employee.

(B) Agreement refers to any non-disclosure agreements between Frederick County and any entity, including agreements and drafts that were not agreed on.

REQUESTS:

Copies of any non-disclosure agreements, with any entity, draft or final, that were proposed, discussed, or signed by any person working in an official capacity for Frederick County, its departments or subdivisions therein, whether an elected official, official, or employee.

Please limit this request to agreements from the years 2019 through 2021.

This request is limited to the non-disclosure agreements themselves. We are not, at this time, seeking materials covered by the NDAs. The exception to this would be an NDA which covers itself.

FEE WAIVER:

ENVISION FREDERICK COUNTY, INC. is a non-profit, non-partisan organization founded on the principle that informed public discourse and active engagement of individuals and groups in our civic life are essential to our mutual well-being and prosperity. Founded by committed community advocates with a record of service to our community, Envision Frederick County engages the community in discussion, education, and action. Envision Frederick County is a 501(c)(3) organization.

Pursuant to Md. STATE GOVERNMENT Code Ann. § 10-621(e), Envision Frederick County hereby requests that all fees associated with these disclosures be waived. Applicant has very limited resources and the cost of copying and the related fees would be prohibitive. Disclosure is in the public interest because the use of Non-disclosure Agreements are matters of widespread citizen and media interest. Public interest in NDAs, including their use in governmental activities, raise possible questions about the government's integrity which can, in turn, affect public confidence in the government.

The level of public interest in NDAs is evidenced by a growing body of national journalism on the subject. (See: Washington Post, 2/15/19, "Google reaped millions of tax breaks as it secretly expanded its real estate footprint across the us", Forbes Magazine, 8/19/21, "Data in the dark: How big tech secretly secured 800 million in tax breaks for data centers", The New York Times, 6/29/21, "How Amazon, Google and Other Companies Exploit NDAs".)

Locally, the issue of NDAs and their effect on governmental operations has already been raised at an open meeting of the Frederick County Council (9/7/21). Questions regarding the existence and impact of

NDA's has also been raised at a recent Frederick County Planning Commission meeting (9/15/21, see also the submitted written public comments).

"The purpose of the Maryland Public Information Act is virtually identical to that of the [Freedom of Information Act] FOIA: to provide the public the right to inspect the records of the State government or of a political subdivision. Moreover, the historical development of portions of the MPIA parallel those of its federal counterpart. Under these circumstances, the interpretation of the FOIA by federal courts is persuasive." *Police Patrol Sec. Sys. v. Prince George's County*, 378 Md. 702, 724, 838 A.2d 1191, 2003 Md. LEXIS 823 (Md. 2003) (internal citations omitted.)

FOIA law dictates that "documents shall be furnished without charge or at a charge reduced ... if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." *Larson v. CIA*, 843 F.2d 1481, 1482-1483, 269 U.S. App. D.C. 153, 1988 U.S. App. LEXIS 4615, 15 Media L. Rep. 1961 (D.C. Cir. 1988). The Court of Special Appeals has endorsed this reasoning, "moreover, the federal Freedom of Information Act contains a similar fee waiver provision at 5 U.S.C. § 552(a)(4) which has been liberally construed in favor of the media or other requesters who will provide broad public dissemination of the information sought." *Baltimore v. Burke*, 67 Md. App. 147, 156, 506 A.2d 683, 1986 Md. App. LEXIS 297 (Md. Ct. Spec. App. 1986).

NDA's directly impact the operations and activities of the County government. A contract between the County (signed by a County official) and a private company is part and parcel of government operations.

When an NDA is a fundamental part of an economic development effort it is clearly a government 'activity.'

By disclosing the actual text, and development, of the NDA's the County will certainly contribute to a greater public understanding of County operations and activities. T

Given that there has been no public disclosure thus far of the NDA's entered into by any person working for Frederick County, the department or subdivision whether an elected official, official or employee, a release of the requested documents will significantly increase public understanding and appreciation of County government operations and activities.

Documents responsive to this request will be widely publicized and distributed by Envision Frederick County. Envision Frederick County intends to post the raw documents, and relevant commentary, on the Envision web site, post to relevant social media sites (Facebook, LinkedIn, Twitter, etc), directly email to parties supportive of Envision's work, brief local and national journalists, and introduce them into the record during official county government meetings. Envision Frederick County intends to widely distribute the produced materials to journalists and the public so that the electorate can make informed choices about government projects affected by extant NDA's.

Envision Frederick County has no commercial interest in the requested disclosures.

The burden of this request on the County is negligible. Given the relative rareness of NDA's in the normal activities and operation of county government there should be little difficulty recalling the existence and location of responsive documents.

Disclosure is in the public interest and any associated fees should be waived. Please inform us of your determination regarding the fee waiver request prior to beginning any copying or document review. If it would minimize costs for applicant to send a representative to inspect the records prior to copying, then please inform us of how we may do that.

Sincerely,

Linda Norris-Waldt
Executive Director Envision Frederick County, Inc.

cc. Elizabeth Bauer, Board Chair