

JACOB KOGAN,

Plaintiff,

v.

NAGARAJ K. NEERCHAL,

Defendants.

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IN THE

CIRCUIT COURT

OF MARYLAND

FOR

PRINCE GEORGE'S COUNTY

Case No.: CAL 14-02375

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**MOTION TO DISMISS OR, IN THE ALTERNATIVE,  
FOR SUMMARY JUDGMENT**

Pursuant to Md. Code Ann., St. Gov., § 10-623(b)(1), Rules 2-322(a) and 2-501(a), and as a pleading to the Complaint in lieu of an answer, Defendant Nagaraj K. Neerchal moves to dismiss or, in the alternative, for summary judgment on Plaintiff Jacob Kogan’s Complaint filed pursuant Md. Code Ann., St. Gov., § 10-623(a) seeking production of documents pursuant to the Maryland Public Information Act<sup>1</sup> (the “PIA”) and, in support States:

**FACTS**

Plaintiff is a Professor in the Department of Mathematics & Statistics, University of Maryland, Baltimore County. Complaint, ¶ 2. Defendant, Nagaraj K. Neerchal, Ph.D., is the Chair of the Department of Mathematics & Statistics, University of Maryland, Baltimore County. *Id.*, ¶ 3. Pursuant to a September 9, 2013, PIA request for information, Plaintiff sought production of documents from Dr. Neerchal relating to “University Authorities approvals” of two documents. *Id.*, ¶ 8. The two documents identified were:

- A. March 1999 Department of Mathematics and Statistics Statement of Performance Expectations.

<sup>1</sup> Md. Ann. Code, St. Gov. §§ 10-601, *et seq.*, unless otherwise stated, all code sections cited refer to the Maryland Annotated Code.

B. April 28, 2010 Addendum to the Statement of Performance Expectations.

*Id.*, ¶ 8. According to Plaintiff, the 1999 Statement of Performance Expectations and the 2000 Addendum to the Statement, required approvals by “the appropriate Dean”, the Provost and the UMBC Faculty Senate (the “Approval Documents”). *Id.*, ¶10. Plaintiff claims that Dr. Neerchal has “wrongly denied” Plaintiff access to these Approval Documents and suffered damages because of the wrongful denial. *Id.*, ¶ 1, 15-18.

In addition to his formal PIA request on September 9, 2013, Plaintiff made several other requests to Dr. Neerchal for the Approval Documents. *Id.*, ¶¶ 7, 8 9, 10 12. Prior to his September 9, 2013 PIA request, Plaintiff made informal requests for the Approval Documents on July 15, 2013, July 19, 2013, and August 20, 2013. *Id.*, ¶¶ 7, 8 9.<sup>2</sup> On September 19, 2013 and September 26, 2013, Plaintiff made follow-up requests to his September 9, 2013 PIA request. *Id.*, ¶¶ 10, 12.

In response to Plaintiff’s requests, Dr. Neerchal provided all responsive documentation and provided explanations as to why certain documentation did not exist and asserted that all responsive documents had been produced. *Id.*, ¶¶ 11, 13, 14. Preliminarily, on July 19, 2013, and response to Plaintiff’s original request, Dr. Neerchal informed Plaintiff that “with the help of Deneen and Janet”, Dr. Neerchal was “trying to locate the information [Plaintiff] requested.” *Id.* ¶ 8, Complaint Exhibit 2. Subsequently, on September 11, 2013, Dr. Neerchal provided documentation in compliance with Plaintiff’s request including certain Approval Documents from 1999 and, additionally, notes from faculty meetings held in March and April, 2010. *Id.*, ¶ 11, Complaint Exhibit 6, page 2. On October 9, 2013, and in response to Plaintiff’s September

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<sup>2</sup> In these pre-PIA requests, and in addition to the “approval” documents, Plaintiff also requested a copy of documents relating to the approval of the “Faculty Comprehensive Review Check List”. Complaint, ¶¶ 7, 8, 9 and Complaint Exhibits 1, 2, 3. In his September 11, 2013 response, Dr. Neerchal explained that no approval “was required or sought” for the Check List. *Id.*, Complaint Exhibit 6.

19, 2013 and September 26, 2013 requests, Dr. Neerchal provided an additional September 23, 2010 e-mail he determined responsive to Plaintiff's requests. In doing so, Dr. Neerchal informed Plaintiff that:

You now have all the records responsive to your record requests. No record has been denied. I can only provide you what documents exist, and I have done so.

*Id.*, ¶ 13, Complaint Exhibit 8, page 2. Finally, on November 18, 2013, Dr. Neerchal again informed the Plaintiff that he "tried my best to provide all the documentations you have requested." *Id.*, ¶ 14.

Plaintiff contends that Dr. Neerchal's failure to produce the Approval Documents constitutes a denial of requested documents. *Id.*, ¶¶ 11, 13, 14, 16. Plaintiff asserts that the Approval Documents are required to exist pursuant to UMBC's Faculty Handbook. *Id.*, ¶ 10. Although alleging that the Approval Documents are required to exist, Plaintiff does not allege and provides no extrinsic evidence to demonstrate that the Approval documents actually exist or would be within the physical custody and control of Dr. Neerchal. *Id.*, ¶¶ 7-14, Complaint Exhibits 1, 3, 4, 7.

In response to Plaintiff's requests, Dr. Neerchal conducted a search that he believed to be reasonably calculated to find all relevant and responsive documents. Nagaraj K. Neerchal, Ph.D. attached and incorporated as **Exhibit 1**, at ¶ 1. Dr. Neerchal's search was based on his knowledge of UMBC policies, procedures and personnel of UMBC and the Department. *Id.*, ¶ 18. In conducting his search, and because the process known as "Faculty Comprehensive Review" is also known as the "Post Tenure Review", Dr. Neerchal searched and instructed others to search for documents specific to Plaintiff's requests and for documents that may bear a different name but relate to the same information. *Id.*, ¶ 5. To the best of Dr. Neerchal's

personal knowledge, Dr. Neerchal searched all records and archives likely to contain documents responsive to Plaintiffs requests. *Id.*, ¶ 18.

In conducting his search, and to the extent possible, Dr. Neerchal reviewed records and archives both within and outside his Department. *Id.*, ¶¶ 7-16. Preliminarily, Dr. Neerchal searched the Department's password protected area of the UMBC website. *Id.*, ¶ 7. Further, because he had only been the Department Chair since 2006 and the requests sought documents going back to 1999, Dr. Neerchal contacted the former Department chairs to determine if they had any responsive documentation. *Id.*, ¶¶ 8-10. Dr. Neerchal also contacted the administrative assistant for the Faculty Senate and requested the individual to search for any documents responsive to Plaintiff's requests. *Id.*, ¶¶ 12-14. Finally, Dr. Neerchal thoroughly searched his archived emails, including his archived "Inbox", "Sent" and "Trash" sub-files, for the six years prior to Plaintiff's requests to determine if he had any documents responsive to Plaintiff's requests. *Id.*, ¶ 16.

#### STANDARD OF REVIEW

##### *A. Motion To Dismiss*

A claim may be properly dismissed when the alleged facts and reasonable inferences, even if proven, would still fail to afford relief to the plaintiff. *Hogan v. The Maryland State Dental Ass'n.*, 155 Md. App. 556, 561 (2004) (citing *Bobo v. State*, 346 Md. 706, 709 (1997); *Morris v. Osmose Wood Preserving*, 340 Md. 519 (1995)). In reviewing a motion to dismiss, the Court will "assume the truth of all well pleaded relevant and material factual allegations in the complaint as well as any reasonable inferences that might be drawn from those allegations." *Id.* (citing *Allied Inv. Corp v. Jasen*, 354 Md. 547, 555 (1999) (other citations omitted)). In doing so, "[t]he Court is limited to examining only the sufficiency of the allegations in the pleading and whether it pleads a legally sufficient claim." *Howard County v. Connolley*, 137 Md. App. 99,

114 (2001); *Porterfield v. Mascari II, Inc.*, 347 Md. 402, 414 (2003). The facts alleged in the complaint and “comprising the cause of action must be pleaded with sufficient specificity.” *Adamson v. Correctional Med. Servs.*, 359 Md. 238, 246 (2000). “Bald assertions and conclusory statements by the pleader will not suffice.” *Id.*

*B. Motion For Summary Judgment*

Maryland Rule 2-501(a) provides that “[a]ny party may file at any time a motion for summary judgment on all or part of an action on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law.” To determine if a real dispute as to a material fact exists, the trial court must look to “the pleadings, depositions, admissions and affidavits” and bare allegations by the non-moving party unsupported by the record will not suffice to defeat a motion for summary judgment. *Lynx, Inc. v. Ordnance Products, Inc.*, 273 Md. 1, 8-9 (1974). Further, in opposing a motion for summary judgment, a party “cannot merely allude to the existence of a document and thereby hope to raise the specter of dispute over a material fact which would defeat a motion for summary judgment”. *Beatty v. Trailmaster Prods., Inc.*, 330 Md. 726, 738 (1993).

ARGUMENT

**Dr. Neerchal conducted a search reasonably calculated to produce the documents requested and, because all responsive documents have been produced, there has been no wrongful denial of public documents.**

Plaintiff’s belief that “there must be other documents responsive to his [PIA] requests” is insufficient “to create a material factual dispute necessitating a trial.” *Re: Allnutt, et al. v. U.S. Dept. of Justice, et al.*, 99 F. Supp. 2d 673, 676 (D. Md. 2000)(citing *Spannaus v. Central Intelligence Agency*, 841 F. Supp. 14, 19 (D.D.C. 1993)). Rather, the standard is whether the custodian has demonstrated that the search conducted for responsive documentation was

“reasonably calculated to uncover all relevant documents.” *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1246-47 ( 4<sup>th</sup> Cir. 1994)(citing *Weisberg v. United States Dep't of Justice*, 240 U.S. App. D.C. 339, (D.C. Cir. 1984)). In this matter, as demonstrated by the documentation submitted with the Complaint and search conducted by Dr. Neerchal, the production requirements of the PIA have been met. Plaintiff’s assertions that documents have been “wrongfully denied” are erroneous as a matter of law and, thus, Plaintiff’s Complaint should be dismissed or, in the alternative, summary judgment should be granted in favor of Dr. Neerchal.

The PIA provides for the public’s “access to information about the affairs of government and the official acts of public officials and employees.” St. Gov., § 10-612(a). Generally, in order to obtain public records, a person must submit a written application to a “custodian” of that record. *Id.*, at § 10-614(a)(1). A “custodian” is only responsible for producing those public records over which the designated individual has “physical custody and control.” *Id.*, at § 10-611(c). The identified custodian must grant or deny inspection of the requested documents. *Id.*, at §10-614(b)(1). If a custodian “determines that the record does not exist,” the custodian shall notify the applicant of this determination within thirty days if the custodian reached this determination “after a search for potentially responsive documentation”. St. Gov., § 10-614(a)(4).

Both the PIA and Maryland case law are silent on how extensive a search the custodian must perform to determine whether or not responsive documents exist. In such cases, and for the PIA, Maryland courts look to guidance from the Federal Courts’ interpretation and application of the Freedom of Information Act<sup>3</sup> because the PIA’s purpose “is virtually identical to that of the FOIA”. *Fioretti v. Maryland State Bd. of Dental Examiners*, 351 Md. 66, 76 (1998). Using the Federal standard, the “touchstone” for determining if a custodian complied

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<sup>3</sup> 5 U.S.C. § 552 (1995)

with the PIA is examining “the reasonableness of the [custodian’s] search”. *Re: Allmutt, et al.*, 99 F. Supp. 2d at 676.

A custodian “is not charged with unearthing every potentially responsive document”, but, instead, must conduct a search “reasonably calculated to find all relevant documents.” *Id.* A “necessary corollary to this standard” is that the custodian’s efforts “are not necessarily impugned by proof that a reasonable search did not uncover a particular relevant document.” *Id.* Further, an applicant for records under the PIA “cannot undermine the reasonableness of the [custodian’s] search by mere speculation that uncovered documents may exist”. *Id.* In support of the custodian’s assertion that a reasonable search was conducted, the custodian should set the “search terms and the type of search performed” and affirmatively state that “all files likely to contain responsive materials” were searched. *Ethyl Corp.*, 25 F.3d at 1246.

In this matter, Dr. Neerchal’s search for documents responsive to Plaintiff’s request constituted a “search reasonably calculated to find all relevant documents”. Even without Dr. Neerchal’s affirmative description of the search conducted, the Complaint fails to allege facts demonstrating that Dr. Neerchal violated any duty imposed upon him by the PIA. Further, as demonstrated by his affirmative statements, Dr. Neerchal searched for documents outside his physical possession, outside his Department’s possession and affirmatively stated that, to the best of his knowledge, he searched all records and archives “likely to contain responsive materials.” In contrast, Plaintiff’s bare allegations that the Approval Documents are required to exist is simply legally insufficient grounds for judicial relief under St. Gov., § 10-623(a). Because the Complaint is insufficient on its face, or, in the alternative, based on the affirmative statements by Dr. Neerchal demonstrating that no genuine dispute of a material fact exists, the Complaint must be dismissed or, in the alternative, Dr. Neerchal should be granted a summary judgment.

On its face, the Complaint demonstrates that the production made by Dr. Neerchal in response to Plaintiff's PIA request was "reasonably calculated to find all relevant documents". *Re: Allnutt, et al.*, 99 F. Supp. 2d at 676. Even before receiving the *formal* PIA request, Dr. Neerchal enlisted the help of others to assist him in his attempt "to locate the information [Plaintiff] requested." *Id.* ¶ 8, Complaint Exhibit 2. Dr. Neerchal provided substantive responsive documentation to Plaintiff *two days* after Plaintiff's formal PIA request, and, as part of the production, described how the documents were relevant to Plaintiff's requests. *Id.* ¶ 11, Complaint Exhibit 6. Further, less than 30 days after the formal PIA request, Dr. Neerchal provided additional documentation and affirmatively stated that Plaintiff had "all the records responsive to [Plaintiff's] record requests", that "[n]o record has been denied", and that Dr. Neerchal "can only provide" Plaintiff the "documents [that] exist". *Id.*, ¶ 13, Complaint Exhibit 8. Finally, in November, 2013, Dr. Neerchal reiterated that he "tried [his] best to provide all the documentations you have requested." *Id.*, ¶ 14, Complaint Exhibit 9. Accordingly, on the face of the Complaint, Dr. Neerchal's actions complied with his duty under the PIA to conduct a reasonable search for responsive documents. *Re: Allnutt, et al.*, 99 F. Supp. 2d at 676.

The search actually described by Dr. Neerchal demonstrates not only that it was reasonable on its face but that it was conducted with the specific intent to "all files likely to contain responsive materials" were searched. *Ethyl Corp.*, 25 F.3d at 1246. In searching for relevant documents within his Department, Dr. Neerchal searched the Department's UMBC password protected website, spoke with former Chairs of his Department, and searched his e-mail files from the prior six years. Neerchal Affidavit, ¶¶ 7-10, 16. Further, Dr. Neerchal tasked the Department's Assistant Director for Programs and Finance "to search all available documents related to Department faculty meetings for information related to the documents identified in



[Plaintiff's] document requests. *Id.*, ¶ 15. Outside of his Department, Dr. Neerchal enlisted as the assistance from the staff of UMBC's Faculty Senate. *Id.*, ¶¶ 12-14. Finally, Dr. Neerchal conducted the search based on his personal knowledge and, based on that knowledge, "all files and archives likely to contain materials responsive to [Plaintiff's] requests were searched." *Id.*, ¶ 18.

Plaintiff's claim that he was *denied* documents is based solely on his fervent belief that certain documents must exist. Compliant, ¶¶ 10, 11, 13, 14. The Complaint makes *no* allegation that documents Plaintiff was "wrongly denied" *actually exist* only that they are, apparently, required to exist. *Id.*, ¶¶ 7-18. Because Dr. Neerchal is "not charged with unearthing every potentially responsive document", the mere fact that a particular document was not produced is not indicative, in and of itself, that Dr. Neerchal violated his duties under the PIA. *Re: Allnutt, et al.*, 99 F. Supp. 2d at 676. Further, the mere fact that certain documents are required to exist "cannot undermine the reasonableness of the [custodian's] search by mere speculation that uncovered documents *may* exist". *Id.* (emphasis added). In the Complaint, Plaintiff's allegation that the documents are required to exist barely rises to the level of "speculation" because the Complaint simply fails to reasonably assert that the Approval Documents actually exist.

Based on the Complaint and the record in this matter, Plaintiff's is simply not entitled to relief under St. Gov., § 10-623(a). On the face of the Complaint, Plaintiff's claims that he was wrongly denied public documents are simply "bald assertions and conclusory statements" and insufficient to state a claim as a matter of law. *Adamson v. Correctional Med. Servs.*, 359 Md. 238, 246 (2000). Alternatively, in his fervent belief that the Approval Documents must exist because there is a requirement to that effect, Plaintiff "merely allude[s] to the existence of a

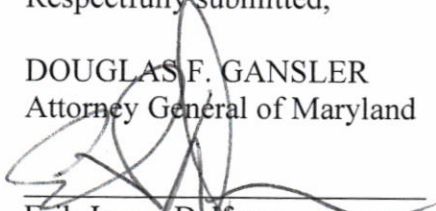
document” and “hope[s] to raise the specter of dispute over a material fact” but his allusion to spectral documents is simply insufficient to demonstrate a genuine dispute of a material fact. *Beatty v. Trailmaster Prods., Inc.*, 330 Md. 726, 738 (1993).

CONCLUSION

For the foregoing reasons, Dr. Neerchal requests that the Complaint be dismissed for failing to state a claim for relief as a matter of law, or, in the alternative that he be granted a summary judgment as the record fail to demonstrate a dispute of a material fact.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3<sup>rd</sup> day of April, 2014, a copy of the foregoing Motion To Dismiss Or, In the Alternative, For Summary Judgment was mailed, first-class, postage prepaid, to: Jacob Kogan *pro se* Plaintiff, 10114 Treetop Lane, Lanham Maryland 20706.



Erik James Delfosse