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POSITION PAPER
OIG Access to Records

Approved by OIG Citizens-Based Advisory Board for Publishing

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Question: **Are the OIG's subpoena powers under Article X of the City Charter subject or subordinate to the provisions of the Maryland Public Information Act (MPIA)?**

Answer: **No: An OIG administrative subpoena is a compulsory, court-enforceable order that can require testimony under oath and document production. An MPIA request is a non-coercive statutory right for the public to inspect or copy government records, subject to fees and exemptions, and enforced only through civil proceedings under the MPIA. They are distinct mechanisms and cannot be treated as equivalent.**

A. Recent History: Separation of Powers

Until 2018, Baltimore City's Office of Inspector General ("OIG") was attached to the City's Department of Law ("Law Dept."). Under the Baltimore City Charter ("Charter"), the Law Dept. remains one of the "Executive Departments" that are enumerated in **Article VII**.

Council Bill 18-0199, introduced and read first time March 12, 2018 (Res. 18-008, ratified Nov. 6, 2018) sheds light on the legislative intent behind the creation of the OIG as an independent Office. It proposed that the City Charter be amended to create an "independent Office of the Inspector General." (*id*, 1, ln. 3; emphasis supplied). The unambiguous intent of the Resolution for a Charter Amendment adding "Article VII – Executive Departments} (Sections 135 to 142) to be under the new subtitle [currently, Art. X] named "Office of the Inspector General" was "establishing procedures to transition the existing Office of the Inspector General in the Law Department into the newly created Office of the Inspector General", *id.* at ln. 14-15.

Since 2018, the OIG is no longer part of an enumerated Executive Department under Art. VII. It never was associated with the Legislative Branch, either. It is an independent office within City government responsible to the citizens and overseen by an independent Oversight Board, governed by **Article X** of the Charter.

In November of 2022, 86.52% of the City's electorate voted in support of Ballot Question I, "changing the membership of the Advisory Board that appoints and removes the Inspector General for Baltimore City". According to Question I, "the Advisory Board that appoints and removes the

Inspector General for Baltimore City … would now be comprised of eleven City residents who are not elected officials, candidates for office or lobbyists, among other restrictions." Section 2. (a) {Office of Inspector General: Advisory board} now vests the 11 Members of the Advisory Board with the power to appoint an Inspector General. The Advisory Board is "entitled to the assistance of the Baltimore City Department of Human Resources for purposes of advertising a vacancy and interviewing and hiring candidates for the position of Inspector General" (§ 2 (a) (2)); in addition, "[t]he Mayor must provide the advisory board with access to City resources to facilitate the advisory board's completion of its responsibilities." (§ 2 (a) (2)). (Emphasis supplied.) This provision *de facto* eliminated elected officials (representing both the executive AND legislative branch) from supervision and oversight of the IG.[1]

B. Sources of Power to Issue Investigative Subpoenas

(1.) Authorization by Maryland Constitution and Article II of the Baltimore City Charter

The source of the OIG's power as an investigative agency power is rooted in the Charter and carries the weight/equivalency of law. Article X of the Charter in turn is derived from Title II and the Maryland Constitution:
Section 2 of Article 11-A of the Maryland Constitution requires the General Assembly to provide a grant of express powers by public general law to Charter counties, including Baltimore City. The City's express powers as enacted by the General Assembly are contained in Article II of the City Charter:

> "The Mayor and City Council of Baltimore shall have full power and authority to exercise all of the powers heretofore or hereafter granted to it by the Constitution of Maryland or by any Public General or Public Local Laws of the State of

[1] By comparison, the Ethics Board is still an enumerated Executive Department (*see* Art. VII § 105. {Board of Ethics}. Its composition, according to Art. VII § 106 (b) (2), still vests the Mayor and the City Solicitor with the power to designate a member of their respective staff to serve as voting members on the Ethics Board. However, § 111 clarifies that the other Article VII provisions governing the Ethics Board, including Board composition in Section 106, may be modified, amended, altered, clarified, or implemented by ordinance, i.e., by the City Code. The composition of the Ethics Board as outlined in Art. 8, § 3-2 of the City Code is current, notwithstanding Article VII, Section 106 of the Charter. The Code provision removes both the Mayor and the City Solicitor (and/or their respective designees) as voting members. The power to nominate new members to fill vacancies is now vested in the Mayor (3 nominations), the City Council President, and the Comptroller, with 1 nomination each. Nominees must be affirmed by the City Council.

> Maryland; and in particular, without limitation upon the foregoing, shall have power by ordinance, or such other method as may be provided for in its Charter, subject to the provisions of said Constitution and Public General Laws…"

The City is given broad police powers by Section (27) ("To have and exercise within the limits of Baltimore City all the power commonly known as the Police Power to the same extent as the State has or could exercise that power within the limits of Baltimore City"). Section (47) gives the City broad powers to legislate the general welfare and to promote good government ("To pass any ordinance … which it may deem proper in the exercise of any of the powers, either express or implied, enumerated in this Charter, as well as any ordinance as it may deem proper in maintaining the peace, good government, health and welfare of Baltimore City…"). (Emphasis supplied.)

(2.) Authorization by Article X of the Baltimore City Charter

Under the plain language of Article X, § 4 Office of Inspector General {Powers and Duties}, the OIG is clearly vested with the express authority to investigate any elected official and City employee[2] and subpoena *any* information from *any* City employee or elected official:

The statutory authority of the City's Inspector General, including the subpoena power in Section 4 (d) of Article X of the Charter, thus is derived from State public general law as enacted in the Charter's express Article II powers described above. The general subpoena power of the IG *for **any** information* extends to not merely *any* City Employee, but to any person, pursuant to Article X, § 4 (a)(2) and (d). Limitations of this expressly authorized power – such as imposed by redactions required under the relevant Maryland Public Information Act (MPIA) provisions – would be contrary to the statutory framework outlining the OIG's powers and duties to the City and its electorate.

To determine the validity of an investigatory subpoena,[3] the Maryland courts apply a threefold test: "[w]hether the inquiry is authorized by statute, the information sought is relevant to the

[2] For purposes of Art. 8 of the City Code (the "Ethics Law"), even uncompensated service on an entity's board of directors can be considered "employment" under the Ethics Law's secondary employment restrictions. *See*, Baltimore City Board of Ethics Opinion 21-004 (June 28, 2021).

[3] In *Washington Home Remodelers, Inc. v. State, Off. of Att'y Gen., Consumer Prot. Div*., 426 Md. 613 (2012), the Court of Appeals agreed with the Consumer Protection Division, holding that "the Division acted within its authority in issuing the subpoena, ... noting that it was authorized to begin an investigation and issue a subpoena 'on any complaint, even one largely based on issues outside the [Maryland Consumer Protection Act] if a potential violation of the [MCPA] also occurred.' (citation, quotations, and emphasis omitted)."

The Court explained that "an administrative prosecution is not the function and purpose of the initial investigative subpoena" and that an investigative agency such as the Consumer Protection Division "must retain the authority to obtain information that enables it to fulfill its statutory mandate[.]" *Id*. at 633. The Court noted that "the Division was authorized by CL § 13-405 to obtain

inquiry, and the demand is not too indefinite or overbroad." *Id*. at 623, (2012); *see also, Podles v. Consumer Protection Division*, 253 Md.App. 262 (2021). **Here, the OIG's subpoena fulfills all three components of that test: It is expressly authorized by statute, the information sought is relevant, and the demand is not overbroad.**

C. OIG Powers

Art. X § 4 {Office of Inspector General: Powers and Duties}, at (b) defines the {Responsibilities of Office}:

> The Office of the Inspector General is responsible for:
> (1) investigating complaints of fraud, financial waste, and abuse in City government; and
> (2) promoting efficiency, accountability, and integrity in City government.

According to (c) {Jurisdiction of Office},

> The Office of the Inspector General may investigate allegations that involve City government and potential violations of laws or regulations by any:
> (1) City elected official;
> (2) City employee;
> (3) member of a board or commission established or governed by the City Charter, City Code, or an executive order issued by the Mayor;
> (4) City contractor or person negotiating a contract with the City;
> (5) person seeking certification to provide goods or services to the City; or
> (6) external recipient of City funds, benefits, or services.

(1.) <u>The OIG's subpoena power</u>

The Charter Art. X § 4 also vests the OIG with extensive subpoena powers:

> (d) **Issuing subpoenas.**
> (1) To perform the duties of office, the Inspector General may issue a subpoena to require:
> (i) <u>any person</u> to appear under oath as a witness; or
> (ii) the production of <u>any information, document, report, record, account, or other material</u>.

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information as part of an investigation and that the Division's investigative authority flowed from CL § 13-405. *Id*." (Emphasis supplied.)

(2) The Inspector General may enforce any subpoena issued pursuant to this subsection in any court of competent jurisdiction.

(Emphasis supplied.)

The Charter extends the subpoena power of the OIG to those in its direct jurisdiction (*see*, Art. X § 4 (c)) *qua* City employees but to any person, as well as to any information etc. unconditioned on superseding "other law". That means, the subpoena is for *more* than getting government records while the MPIA *only* covers public records.

It is evident that the express intent of the Charter was to establish an OIG that was entirely independent and to vest the office with the necessary powers to perform its duties independently and without interference.

(2.) OIG subpoena power: Legislative intent

The OIG's investigative and subpoena powers contemplated by the legislature in Council Bill 18-0199, were extensive:

D. Section 137 (C) {Inspections, Investigations, and Evaluations}:

The Office of the Inspector General may conduct independent reviews of government operations, including inspections, investigations, and evaluations of:

(1) Any activities, records, or individuals involved with City contracts and procurements; or

(2) Any other official Act or Function of any Government entity under the jurisdiction of the Office.

(*id*. at 4, lns. 22-29; emphasis supplied.)

E. Section 139. {Office of the Inspector General: Access to Persons and Records; Subpoena Power}:

(B) Access to Records.

As allowed by law, the Inspector General shall have access to all records of any City entity under the Jurisdiction of the Office of the Inspector General. Officers and employees of City entities shall promptly provide to the Inspector General any information, document, report, account, or other material requested by the Inspector General, and the Inspector General is not required to obtain a subpoena for any records request made to any City entity.

(C) Subpoena Power

(1) As part of an investigation under the jurisdiction of the Office of the Inspector General, the Inspector General may issue a subpoena **independent of any further approval from the Mayor and City**

> **Council** of Baltimore, requiring any person to give testimony, or produce any document, report, record, account, or other material.
>
> (2) A subpoena issued under this subsection may be judicially enforced by the City Solicitor in any Court of competent jurisdiction.

(*id*. at 7, lns. 1-21; emphasis supplied.)

Article X's final all-encompassing "[t]o perform the duties of office, the Inspector General may issue a subpoena to require: (i) any person to appear under oath as a witness; or (ii) the production of any information, document, report, record, account, or other material" clearly demonstrates the Mayor and City Council's intent to give the OIG the most independent scope of investigatory power and oversight possible.

Moving the proposed assignation to litigate enforcement of such subpoenas in Circuit Court from the City Solicitor to the Inspector General in the final Article X suggests that the legislature considered potential conflicts of interest as it assigned that power to the OIG. The Law Dept. did not oppose that provision: In a letter dated June 15, 2018, the City Solicitor's Office "reserved comment until we review the amended version." No additional communication is on file.

In passing Article X of the City Charter, the Mayor and City Council clearly DID NOT intend to (a) interface or control record collection via the Law Dept. And clearly DID NOT (b) consider an OIG subpoena the functional equivalent of an MPIA request.

(3.) Statutory Construction

"In statutory interpretation, our primary goal is always 'to discern the legislative purpose, the ends to be accomplished, or the evils to be remedied by a particular provision, be it statutory, constitutional, or part of the Rules.' We begin our analysis by first looking to the normal, plain meaning of the language of the statute, reading the statute as a whole to ensure that 'no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory.' If the language of the statute is clear and unambiguous, we need not look beyond the statute's provisions and our analysis ends. If, however, the language is subject to more than one interpretation, or when the terms are ambiguous when it is part of a larger statutory scheme, it is ambiguous, and we endeavor to resolve that ambiguity by looking to the statute's legislative history, case law, statutory purpose, as well as the structure of the statute." *Int'l Ass'n of Fire Fighters, Local 1715 v. Mayor of Cumberland*, 407 Md. 1, 8–9 (2008). "'If the language of the statute is unambiguous and clearly consistent with the statute's apparent purpose, our inquiry as to legislative intent ends ordinarily and we apply the statute as written, without resort to other rules of construction.'" *Noble v. State*, 238 Md. App. 153, 161 (2018) (*quoting Espina v. Jackso*n, 442 Md. 311, 322 (2015)).

Maryland case law provides a method of resolving ambiguity. "The paramount object of statutory construction is the ascertainment and effectuation of the real intention of the Legislature." *Andrews & Lawrence Pro. Servs., LLC v. Mills*, 467 Md. 126, 149 (2020) (citation and quotations omitted). Emphasis supplied

"A statute is ambiguous when two or more reasonable interpretations exist". *Himes Associates, Ltd. v. Anderson*, 178 Md.App. 504 (2008). "If the language of a statute is subject to more than one interpretation, or when the terms are ambiguous when it is part of a larger statutory scheme, it is ambiguous, and courts endeavor to resolve that ambiguity by looking to the statute's legislative history, case law, statutory purpose, as well as the structure of the statute." *Jackson v. State*, 408 Md 231 (2009). "If, on the other hand, words of a statute are ambiguous, 'a court must resolve the ambiguity by searching for legislative intent in other indicia, including the history of the legislation or other relevant sources intrinsic and extrinsic to the legislative process.'" *Noble v. State* at 162 (citation and quotations omitted). "[W]hen interpreting any statute, the statute as a whole must be construed, interpreting each provision of the statute in the context of the entire statutory scheme." *Andrews*, 467 Md. at 149. *Id*. (citations and quotations omitted). (Emphasis supplied throughout.) **Here, the statutory language is clear: Article X expressly, clearly, and unambiguously vests the OIG with extensive duties and jurisdiction, including investigative and subpoena powers that are not subordinate to the MPIA. Article X does not contemplate automatic classification of an OIG subpoena as an MPIA request, even on an inter-agency level.**

F. OIG Subpoena vs. MPIA

By law, the OIG is to be independent of both the executive and the legislative in City government. However, the OIG has encountered resistance to obtaining information pertinent to its lawful investigations. Specifically, the Law Dept. has established a policy that all requests for documents are to be considered requests made under and subject to the limitations of the MPIA.
This policy is applied indiscriminately to document requests by the public and to OIG subpoenas. The City's internal guidance of May 15, 2024, "RE: City Bills-- ATTORNEY CLIENT COMMUNICATION" (herein "City's guidance") states that "[a]ny request by any City entity (agency, board, commission) to any other City [entity] is a PIA request under State law. Md. Code, Gen. Prov., §4-202.[4] In *Montgomery County v. Shropshire*, 420 Md. 362, 383 (2011) Maryland's highest court held that a request from one agency in Montgomery County to another was a PIA request as defined in the PIA statute itself. Any request from a state or federal or foreign entity for records would also be a PIA request.)" (Emphasis supplied.)

This policy fails to recognize three important issues:
(1.) The OIG does not make "requests" but demands information via subpoenas that the Office is statutorily entitled to – a clear distinction. These demands are enforceable in a court of law, which "requests" are not.

[4] MD General Provisions Code § 4-202 (2024): "(a) Except as provided in subsection (b) of this section, a person or governmental unit that wishes to inspect a public record shall submit a written application to the custodian."

(2.) Subpoenas are not the equivalent of "requests", which is precisely why not every agency has subpoena power.
(3.) The OIG is not "the public" but an agency entitled by statute to perform oversight over other government agencies and the City officials who work for them.

(1.) Scope of the MPIA

The MPIA attempts to balance the public's right to access government records with other policies that respect the privacy or confidentiality of certain information. For example, some public records are confidential under federal or state statutes, under court rules, or under various common law privileges such as attorney-client privilege and executive privilege. GP § 4-301. The MPIA itself also protects certain records from disclosure (such as adoption records, personnel records, certain personal information in Motor Vehicle Administration records). In addition, some information contained in public records must remain confidential, such as an individual's medical information, confidential commercial information and trade secrets). GP §§ 4-304 to 4-327 (Part II), §§ 4-328 to 4-342 (Part III).

Some protections may be waived. Other records may be withheld if the agency decides that disclosure of those records would be "contrary to the public interest." Examples of records subject to discretionary disclosure include investigatory records, information related to academic, licensing, and employment examinations, and documents of a pre-decisional and deliberative nature. GP §§ 4-343 to 4-357 (Part IV)." *See*, MARYLAND PUBLIC INFORMATION ACT MANUAL (19th ed., Dec. 2024) Appendix I-2.

The Maryland appellate courts have long held that there is a strong presumption in favor of disclosure, such that exemptions from disclosures "must be applied narrowly." *Blythe v. State*, 161 Md. App. 492, 51 (2005). A custodian cannot invoke a blanket exemption "to shield an entire file if the shielding of only a part of the file would suffice to serve the purpose of the exemption." *Id*; *Cranford v. Montgomery Cnty*., 300 Md. 759, 777 (1984) (explaining that the General Assembly "did not intend for custodians broadly to claim exemptions") (emphasis supplied). Rather, the custodian must "**permit inspection of any part of the record that is subject to inspection and is reasonably severable.**" *Blythe*, at 519. (Emphasis supplied)

(2.) Limitations of *Shropshire*

Shropshire's focus is the classification of a particular kind of records ("records relating to an internal investigation" as "personnel records") within the parameters of the MPIA. In that case, the Montgomery County Inspector General ("MoCo IG") had submitted **a request** to the Chief Administrative Officer of the Offices of the County Executive for numerous records."[5] *Shropshire*

[5] The then effective Montgomery County Code, Section 2–151(h) prescribes a three-step process for the MoCo IG to follow when "requesting documents – (1.) the initial request, (2.) the "appeal" to the Chief Administrative Officer, County Attorney, Council President if not timely provided, and (3.) issuing a

at 367.[6] However, a subpoena had never been issued. Nor was the respective request made under the MPIA. Thus, it does not follow that per *Shropshire* "[a]*ny* request by any City entity (agency, board, commission) to any other City [agency] is a PIA request under State law."

(3.) Waiver

At issue here is not a specific and narrow "request" for "personnel records" regarding a concluded disciplinary/personnel matter (as in *Shropshire*), but records generated in the ordinary course of City business subpoenaed pursuant to City Charter Article X Section 4 (d), the administrative equivalent of judicial subpoena power – not the MPIA – for the specific lawful purpose of collecting pertinent facts in support of an ongoing, active and confidential investigation.
In addition, according to the City's Technology Acceptable Use Policy AM-118-1, which must be signed and agreed to by all employees, the information requested via OIG subpoena often involves records that the employees affected have no reasonable expectation of privacy in VI. OWNERSHIP AND PRIVACY:

> The City owns all rights to all content created, updated, or maintained on City IT resources unless ownership rights are reserved in writing to a third party or unless federal copyright or other laws provide for different rights. Users have no expectation of privacy when using City IT resources. The City reserves the right to access and monitor all messages, files, logs, and content created using City IT resources. Communications or content may be subject to disclosure to BCIT, **the Office of Inspector General ("OIG")**, the Law Department, law enforcement, or the Department of Human Resources ("DHR"), to the fullest extent allowed by law. (Empasis supplied.)

City IT resources include devices, means of communications and applications (such as email, texts, DM's, etc.) provided, paid for, or managed by BCIT. By executing the agreement, every City employee has waived privacy and expressly consented to the disclosure of such records.

(4.) Further Distinction between MPIA Request and OIG Subpoena

Further distinguishing OIG subpoenas from MPIA request is the fact that the OIG may enforce its subpoenas directly through the Circuit Court. However, in the case of an MPIA request, the right

subpoena. The Baltimore City OIG is not subject to a similar process. This process was completely struck down and now resembles that of Baltimore City, and the MoCo IG now has access to all records.

[6] It should be pointed out that even *Shropshire* allows for disclosures *under the MPIA*: "[FN5: Section 10–616, governing "required denials," provides, in relevant part … (2) A custodian shall permit inspection by: (i) the person in interest; or (ii) an elected or appointed official who supervises the work of the individual."

to invoke judicial review is predicated on the requestor's prior appeal to and subsequent denial by the State Public Information Compliance Board.[7]

The subpoena powers delegated to the OIG do not require an appeal to the State PIA Compliance Board, but require direct enforcement by and through the Circuit Court (much like a judicial subpoena). **This is another indicia that the legislature did not intend OIG subpoenas to be considered the equivalent of MPIA requests.**

Conclusion

Subpoenas are investigative. MPIA requests are for public access. Both serve fundamentally different functions and place different obligations on the recipients: MPIA compliance is limited to record availability and applicable exceptions. OIG subpoenas may require the production of otherwise exempt documents, which are enforceable through the courts.

The Baltimore City OIG has the electorate's mandate to provide independent and objective oversight to promote accountability, transparency, and integrity in government. The ability to conduct meaningful, independent oversight requires the IG to have comprehensive, unencumbered access to documents, communications, and other materials belonging to the entities it oversees. **In other words, the OIG is to be deemed *de facto* or at least constructive co-custodian of all records and communications generated by all City employees**.

The right to comprehensive access is necessary for the OIG to fulfill its statutory functions and it includes the right of access to materials that may otherwise be confidential or privileged from disclosure without interference by third-party entities including both Executive and Legislative departments.

Subordinating the OIG's broad statutory power to issue subpoenas to the limiting provisions of the MPIA creates the appearance that OIG investigations may be vulnerable to potential partisan actors within the overseen government entity, whose perceived or real interference in investigations may chill witness participation and enable potential subjects to avoid complete scrutiny.

The need for access to otherwise protected information is essential to both the perception and reality of the IG's effectiveness. Denial of access to or redaction of potentially relevant information under the pretext of the MPIA prevents the OIG from conducting its mandated oversight functions by obstructing investigations and materially harming the public's faith in government, by sending the message that potentially inculpatory communications can be shielded from oversight.

[7] "Except as otherwise provided in Subtitle 1A of this title and subject to paragraph (3) of this subsection, an applicant, a complainant, or a custodian may appeal to the circuit court a decision issued by the State Public Information Act Compliance Board as provided under § 4–1A–10 of this title." MD General Provisions Code § 4-362 (b) (2) (2024).

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