STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 24-14
November 14, 2023
Montgomery County Council & Office of the Montgomery County Executive, Custodian
Caleb Michaud, Complainant

This complaint asks us to decide whether records containing information about certain social media accounts used by public officials are subject to the Public Information Act ("PIA"). In January of this year, complainant Caleb Michaud sent a PIA request seeking "a listing for each of [fifteen specific] Twitter[1] handles that shows which accounts they have blocked," including Twitter handles belonging to Montgomery County Executive Marc Elrich, County Council President Evan Glass, and County Councilmember Will Jawando. The Office of the County Executive ("OCE") provided the requested information for the County Executive's official Twitter account, but advised that "@marc_elrich is a private campaign Twitter account and therefore is not subject to the MPIA." The County Council ("MCC") responded in similar fashion regarding the "personal" Twitter accounts for Council President Glass and Councilmember Jawando. The complainant contends that these accounts are subject to the PIA because they are used in a public and official capacity. As explained below, we disagree and conclude that the MCC and MCE did not violate the PIA.

Background

Earlier this year, the complainant sent a PIA request to an attorney in the Office of the Montgomery County Council asking for a list showing which accounts each of fifteen different Twitter handles had blocked. The Twitter handles identified in the request, which the complainant characterized as having "demonstrated conducting substantial county and local government business that would qualify them as falling under the domain of MPIA," included all but one of the eleven County Councilmembers. In addition, the complainant requested the blocked account information for two handles belonging to Montgomery County Executive Marc Elrich, and additional handles belonging to Council President Evan Glass and Councilmember Gabe Albornoz.

[1] During the course of this dispute, Twitter was rebranded and the social media platform is now called X. *See* Kate Conger, *So What Do We Call That Bird App Now?*, N.Y. Times, Aug. 3, 2023, at B1. For purposes of this decision, we will refer to the platform by its former name, Twitter, for clarity and consistency.

The attorney for the MCC responded and provided information for seven of the Councilmembers—including information related to the Twitter handle for the eleventh Councilmember not identified in the complainant's PIA request. The OCE responded separately and advised that "[n]o accounts are blocked by @MontCoExec," and that "@marc_elrich is a private campaign Twitter account and therefore is not subject to the MPIA."

About a week later, the complainant followed up with the MCC to ask whether there was information about the seven accounts for which a response had not been provided. The attorney for the MCC advised that she would follow up with staff in an effort to provide the information. A few days later the MCC provided information about the Twitter handles of two additional Councilmembers and indicated that the accounts @amfriedson and @willjawando were "personal" and thus the MCC did not have information about them. The MCC promised to "follow up again on the remaining accounts." Soon thereafter, the MCC advised that the Twitter handle @CMEvanGlass had no blocked accounts and that the handle @EvanMGlass was "personal."

The complainant disagreed with the position taken by the MCC and the MCE—i.e., that the Twitter handles @marc_elrich, @evanmglass, and @willjawando belonged to personal and/or campaign accounts and therefore records related to those accounts were not public records for purposes of the PIA. The complainant attempted to resolve his disputes through the Public Access Ombudsman, but the Ombudsman ultimately issued final determinations stating that the disputes were not resolved.[2]

The complainant then filed this complaint with our Board. He alleges that the MCC and the MCE have wrongfully withheld the lists of users blocked by the Twitter handles @marc_elrich, @evanmglass, and @willjawando. He argues that those Twitter accounts are not personal or campaign accounts, but rather official accounts belonging to public officials, and that it is important to know whether public officials are restricting access to content and dialogue. To support his argument that the Twitter handles are "being used in support of a public and official capacity," the complainant provides a detailed analysis of the handles' presentations and content. He notes that all accounts share government information, solicit input from the public, and, to varying degrees, use those accounts to "retweet" posts from their "official" Twitter accounts. In the complainant's view, the "transaction of public business" includes activity such as "notification of the public, creating public awareness, and soliciting public input and feedback."

[2] The Ombudsman opened two separate mediation files—one for the MCC and one for the MCE—and therefore issued two final determinations. The complainant, however, filed only one Board complaint for both. Had he filed two complaints, we likely would have consolidated them in any event because the complainant is the same, the dispute is the same, and the custodians are part of the same county government. *See* COMAR 14.02.01.04 (permitting consolidation of complaints).

In response to the complaint, the MCC and MCE maintain that their responses to the complainant's PIA request were "timely and appropriate under the PIA." The MCC and MCE first point out that all of the handles link to the political campaigns of the elected officials; they do not link to County websites or contact information. They also indicate that those accounts were not created or maintained by the County and County employees cannot access them. To further support their position, the MCC and MCE point to cases addressing when social media activity may constitute "state action" for purposes of suits under § 1983,[3] and argue that the tests applied in those cases are instructive in the context of public records requests for social media-related records. Noting that the Sixth and Ninth Circuit Courts of Appeal have applied slightly different tests for what constitutes state action, the MCC and MCE argue that the Twitter handles at issue here do not qualify under either test. In particular, the MCC and MCE stress that the handles contain numerous "non-County related campaign and personal tweets" and that the accounts are "not geared toward County business." The MCC and MCE also emphasize that the officials did not create or maintain the Twitter accounts as part of their official duties, that no law or policy compels them to do so, and that the County has neither authorized, nor has access to, the accounts. In addition, the MCC and MCE cite to state cases that have concluded that similar social media records are not public records and urge us to find the same here.

In his reply, the complainant first notes that each of the Twitter handles specifies the owner's official position—e.g., the handle for @marc_elrich states that he is the Montgomery County Executive. The complainant also elaborates on his argument that the accounts are transacting public business, contending that "the use of county resources, such as the creation of graphics or videos, and posting these to an account represents the transaction of public business." He also takes issue with the MCC and MCE's argument that the accounts are "not overwhelmingly geared toward conducting County business," suggesting that that threshold is met "when an individual after viewing the timeline could conclude that they should contact the [account owner] for county related issues or subscribe to the account to receive important information from a county official." To that end, the complainant provides screenshots of recent posts concerning what he views to be "official business." As to the fact that the accounts contain personal posts, the complainant points out that many public officials—including Governor Wes Moore—post personal content to "further drive engagement with the account and increase the likelihood of engagement on postings related to official business." The complainant argues that the presence of personal content is not determinative.

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[3] Section 1983 provides a civil right of action for the deprivation of rights by a person acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia." 42 U.S.C.A. § 1983; *see also Lindke v. Freed*, 37 F.4th 1199, 1202 (6th Cir. 2022), *cert. granted*, 143 S. Ct. 1780 (Apr. 24, 2023) (No. 22-611) (explaining that courts have interpreted § 1983 to mean that "a defendant must be acting in a state capacity to be liable under the statute," and the question "turns on whether a defendant's actions are 'fairly attributable to the State,'" (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)).

In sum, the complainant argues that the blocked account listings he has requested are subject to the PIA because the Twitter accounts at issue "have not been used solely to campaign or to share family photos," but to "complete common and defined duties of an elected official."

Analysis

We are authorized to review and resolve complaints alleging certain violations of the PIA's provisions, including that a custodian wrongfully withheld public records. *See* § 4-1A-04(a)(1)(i).[4] Before filing a complaint, a complainant must attempt to resolve a dispute through the Public Access Ombudsman and receive a final determination that the dispute was not resolved. § 4-1A-05(a). Once a complaint is filed, we must review the submissions and determine whether the alleged violation occurred and issue a written decision. § 4-1A-04(a)(2). If we find a violation, the PIA directs us to order a specific remedy, depending on the nature of the violation. § 4-1A-04(a)(3). When we determine that a custodian has denied inspection of a public record in error, we must order the custodian to "produce the public record for inspection." § 4-1A-04(a)(3)(i).

Absent an "unwarranted invasion of the privacy of a person in interest,"[5] the PIA requires that its provisions "be construed in favor of allowing inspection of a public record, with the least cost and least delay." § 4-103(b); *see also Office of the Governor v. Washington Post Co.*, 360 Md. 520, 544 (2000) ("[T]he statute should be interpreted to favor disclosure."). The PIA defines "public record" broadly. A public record is "the original or any copy of any documentary material" that is "in any form," and that is made or received by a unit or instrumentality of the State or a political subdivision "in connection with the transaction of public business." § 4-101(k). The Supreme Court of Maryland has explained that "[t]his definition is in line with the purpose of the MPIA generally" and that, "[b]ecause the MPIA is designed to grant access to documents regarding the affairs of government and the official acts of public officials, it follows that the definition of a public record should be broad enough to cover a wide range of document types." *Lamson v. Montgomery County*, 460 Md. 349, 362 (2018). "[T]he mere physical location of a record"—in *Lamson*, a supervisor's private journal—"is not necessarily dispositive of its characterization." *Id.* at 365; *see, e.g.*, *Competitive Enter. Inst. v. Office of Sci. & Tech. Pol'y*, 827 F.3d 145, 146 (D.C. Cir. 2016) ("[A]n agency cannot shield its records from search or disclosure under FOIA[6] by the expedient of storing them in a private email

[4] Statutory citations are to the General Provisions Article of Maryland's Annotated Code, unless otherwise specified.

[5] A "person in interest" is the "person or governmental unit that is the subject of a public record." § 4-101(g)(1).

[6] FOIA, or the Freedom of Information Act, is the PIA's federal counterpart. *See* 5 U.S.C.A. § 552.

account."); *see also Washington Post Co.*, 360 Md. at 538 n.8 (noting that information about the content of personal telephone calls placed by employees from their offices may not constitute public records subject to the PIA, though information about "time spent and charges incurred" for those calls would likely qualify as public records).

Though the law surrounding government use of social media platforms is still developing, it is clear at this point that a government agency's use of social media like Twitter can generate public records that the agency must retain and, in many cases, disclose. *See, e.g.*, Ky. Op. Att'y Gen. 22-ORD-184 (Sept. 7, 2022), 2022 WL 4294444, at *1-2 (records related to the Secretary of State's Twitter account were public records where account "use[d] the Secretary's official title" and was "embedded on the homepage of the Secretary's official website"); *see also* C.J. Griffin, *The Legal Implications of Governmental Social Media Use*, 317 N.J. Law. 16, 16-17 (Apr. 2019) (explaining that social media platforms "can be powerful and effective tools for government agencies that want to provide information directly to the public about their services, emergencies, or community events," and that "[w]here a government agency or its department creates a social media account in its name to communicate with the public, that account is undoubtedly a 'government record' subject to [New Jersey's open records laws]"). Although it may have been enacted before the advent of social media, the PIA's definition of public record certainly captures records generated by an agency's use of, e.g., Twitter or Facebook—i.e., "documentary material . . . in any form"—so long as those records are made or received by the agency "in connection with the transaction of public business." § 4-101(k)(1).

More difficult questions arise, however, regarding social media accounts that are created by public officials of their own accord, as appears to be the case here. Given that public records may exist on private devices and within private accounts, *see Lamson*, 460 Md. at 362, it seems relatively uncontroversial that public records that might be found within a government official's private or personal social media account are subject to inspection according to the PIA's provisions. For instance, had the County Executive and another government official exchanged discrete "direct messages"[7] concerning County business through Twitter, those messages would be disclosable under the PIA, unless an exemption applied. In such a hypothetical, those direct messages are similar to emails that meet the PIA's definition of public record but are stored within an official's private account. *See Competitive Enter. Inst.*, 827 F.3d at 146. At the same time, at least one state court has recognized that "email differs from social media as a method of communication," and has suggested that "[w]ooden application of principles extracted from . . . email cases to social media activity may be unwise." *Penncrest Sch. Dist. v. Cagle*, 293 A.3d 783, 793 (Pa. Commw. Ct. 2023). And, in any event, the complainant here has not asked for direct

[7] Direct messages exchanged through Twitter are "one-on-one private conversations, or between groups of users that are only visible to the intended recipients." *Sublet v. State*, 442 Md. 632, 638 n.8 (2015) (internal quotation marks and citation omitted).

messages. Rather, he has asked for lists of Twitter accounts that the three identified Twitter handles—@marc_elrich, @evanmglass, and @willjawando—have blocked. This puts us in even murkier waters.

Both parties urge resort to federal cases examining social media use in the context of § 1983 actions, e.g., claims that a government official has violated an individual's First Amendment rights by blocking them from accessing or posting to that official's social media account. Given that there is little in the way of case law addressing requests for blocked account information under FOIA or state open records laws,[8] such cases likely provide broad principles that may be useful in determining whether the blocked account lists that the complainant has requested fit the PIA's definition of public record. In particular, these cases may be relevant to whether these lists were made or received "by a unit or an instrumentality of the State or of a political subdivision . . . in connection with the transaction of public business." § 4-101(k)(1)(i).

Two recent cases illustrate the two different approaches taken by federal circuit courts of appeal to determine when a public official's social media activity constitutes "state action" for purposes of § 1983.[9] In one case, the Sixth Circuit considered whether the City Manager for Port Huron, Michigan acted under color of state law when he blocked an individual who posted critical comments from further commenting on a Facebook page that the City Manager maintained and had created prior to being appointed to his official position. *Lindke v. Freed*, 37 F.4th 1199, 1201-02 (6th Cir. 2022), *cert. granted*, 143 S. Ct. 1780 (Apr. 24, 2023) (No. 22-611). The "About" section of the Facebook page referred to the City Manager's official position, but also described him as "Daddy to Lucy, Husband to Jessie." *Id.* at 1201. All of the contact information, including email and physical

[8] *Wyoming Borough v. Boyer* involved a request for, among other things, "[a]ll comments made and removed or blocked" from a Facebook page belonging to the Mayor of the borough, and the "procedure for blocking or removing comments." 299 A.3d 1079, 1081 (Pa. Commw. Ct. 2023). There the court reviewed a trial court's reversal of a determination by Pennsylvania's Office of Open Records that the records sought were subject to disclosure. *Id.* at 1080-81. *Boyer* remanded the case to the trial court to "determine whether the documents requested . . . are 'records,' and therefore subject to disclosure" in light of an analytical framework set out in another open records case involving social media. *Id.* at 1086. Notably, that case, *Penncrest Sch. Dist. v. Cagle*, relied in part on federal § 1983 cases, explaining that "[a]lthough Section 1983 differs from [Pennsylvania's Right to Know Law], both analytical frameworks address whether a public official's action is taken in his or her official capacity." 293 A.3d 783, 795-96 (Pa. Commw. Ct. 2023).

[9] Both cases are currently pending in the U.S. Supreme Court. The Court heard oral arguments on October 31, 2023. *See* Supreme Court of the United States, Argument Audio, https://www.supremecourt.gov/oral_arguments/argument_audio/2023 (last visited Nov. 8, 2023). The Supreme Court's resolution of the cases may have implications for our decision in this case.

addresses, was governmental in nature and, though the City Manager "shared photos of his daughter's birthday, his visits to local community events, and his family's weekend picnics," he also shared information related to his official duties, e.g., "the administrative directives he issued as city manager" and "policies he initiated for Port Huron [regarding the Covid-19 pandemic] and news articles on public-health measures and statistics." *Id.*

The Sixth Circuit ultimately concluded that the City Manager's Facebook page was "personal" and that no § 1983 liability could arise from any actions he might take regarding that page. *Id.* at 1207. To reach this conclusion, the Sixth Circuit reasoned that a public official's social media activity is state action only when he or she "operates a social-media account either (1) pursuant to his [or her] actual or apparent duties or (2) using his [or her] state authority." *Id.* at 1204. The court found that the City Manager's Facebook page "neither derives from the duties of his office nor depends on his state authority." *Id.* It was important to the court that no law compelled the City Manager to operate the page and that government funds were not used to maintain it. *Id.* at 1204-05. In addition, the court stressed that the City Manger "created the page years before taking office," and that there was "no indication that his successor would take it over." *Id.* at 1205. The court distinguished § 1983 cases involving police officers and those cases' focus on an officer's appearance, suggesting that officers' "exude" authority when they wear their uniform, display their badges, or inform others that they are police officers. *Id.* at 1206. In contrast, the City Manager, the court said, "gains no authority by presenting himself as the city manager on Facebook," in that "[h]is posts do not carry the force of law simply because the page says it belongs to a person who's a public official." *Id.*

The Sixth Circuit also explicitly recognized that its test "part[ed] ways with other circuits' approaches to state action in this novel circumstance." *Id.* The court explained that "[i]nstead of examining a page's appearance or purpose, we focus on the actor's official duties and use of government resources or state employees." *Id.* This approach, the court continued, "offer[s] predictable application for state officials and district courts alike, bringing the clarity of bright lines into a real-world context that's often blurry." *Id.* at 1206-07.

Facts similar to those in *Lindke* confronted the Ninth Circuit in *Garnier v. O'Conor-Ratcliff*, but—as foreshadowed in the Sixth Circuit case—the court reached a different result. 41 F.4th 1158 (9th Cir. 2022), *cert. granted*, 143 S. Ct. 1779 (U.S. Apr. 24, 2023) (No. 22-324). That case involved Facebook and Twitter accounts created by two candidates to "promote their campaigns" for positions on a school district's Board of Trustees. *Id.* at 1163. Notably, those pages were created "[i]n addition to their private Facebook pages, which they shared only with family and friends." *Id.* at 1163. Once elected, the trustees "used their public social media pages to inform constituents about goings-on at the School District and on the [District's] Board, to invite the public to Board meetings, to solicit input about important Board decisions, and to communicate with parents about safety and security issues a the District's schools." *Id.* Like the Facebook

page at issue in *Lindke*, the pages listed the trustees' government contact information. *Id.* at 1164. Two parents posted lengthy and repetitive critical comments on the trustees' pages and, "[a]fter deleting or hiding the [parents'] repetitive comments for a time," the trustees' blocked the parents entirely, thus prompting the § 1983 suit. *Id.* at 1163.

The Ninth Circuit held that "given the close nexus between the Trustees' use of their social media pages and their official positions," they were "acting under color of state law when the blocked the [parents]." *Id.* at 1170. To get to that conclusion, the Ninth Circuit rejected the Sixth Circuit's approach, *id.* at 1176-77, and instead asked whether the trustees had "used their social media accounts as an 'organ of official business.'" *Id.* at 1177 (quoting *Campbell v. Reisch*, 968 F.3d 822, 826 (8th Cir. 2021)). The court stressed that the trustees "purported to act in the performance of their official duties through the use of their social media pages," and that the content of the pages was "overwhelmingly geared to providing information to the public about the Board's official activities and soliciting input from the public on policy issues relevant to the Board decisions." *Id.* at 1171 (cleaned up). The court also found that the presentation of the pages "as official outlets facilitating [the trustees] performance of their Board responsibilities had the purpose and effect of influencing the behavior of others." *Id.* (internal quotations omitted). Altogether, the Ninth Circuit explained that "[b]y representing themselves to be acting in their official capacities on their social media pages and posting about matters that directly related to their official Board duties, the Trustees exercised power possessed by virtue of state law and made possible only because they were clothed in the authority of state law." *Id.* at 1173 (cleaned up).

We take these cases one-by-one in an effort to assess whether County Executive Elrich's, Council President Glass's, or Councilmember Jawando's use of their non-County Twitter accounts constitutes "state action"—or, in the language of the PIA, whether the "documentary material" in those accounts was made or received "by a unit or an instrumentality" of the County, § 4-101(k)(1)(i). Looking to *Lindke* first, we agree with the MCC and MCE that, under that case, these Twitter accounts are "personal" in nature. We are unaware of any provision of law that requires these elected officials to maintain Twitter accounts, and there is no indication that government funds or resources are used to manage or maintain the accounts identified in the complaint. All of the accounts predate the officials' election to their current offices and, presumably, the officials will continue to maintain these same Twitter accounts after they leave office. This is in contrast to, e.g., the official Twitter handle for the Montgomery County Executive, which does not even contain the current County Executive's name—rather, it is "@MontCoExec." And, while the Councilmembers' County Twitter handles—@CMEvanGlass and @CMWillJawando—do contain the members' names, it is probably fair to assume that those handles will not travel with the members once they leave office and that, if anything, new "@CM" accounts will be created for the members who succeed them. Further, the information about each of the Twitter handles does not link to official County websites or contact information, and the handles themselves are not linked from or embedded in the

officials' County webpages.[10] Notably, the social media account in *Lindke*—where the court found no state action—*did* link to the city's website and listed the City Manager's official government contact information. *See Lindke*, 37 F.4th at 1201. Thus, under the principles articulated in *Lindke*, we would find no "state action," which suggests that the blocked account lists that the complainant has requested are not public records subject to the PIA.

But *Lindke* is not the only case available to inform the analysis. *Garnier*, unlike *Lindke*, does not necessarily "bring[] the clarity of bright lines," 37 F.4th at 1207, and instead employs a standard more reminiscent of Justice Potter Stewart's "I know it when I see it" test for obscenity, *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Under *Garnier*, we look at whether these officials "purported to act in the performance of their official duties through the use of their [Twitter accounts]," and whether the content of those accounts is "overwhelmingly geared toward providing information to the public" about the County Executive's and Councilmembers' "official activities" or toward "soliciting input from the public on policy issues relevant to [their official] decisions." 41 F.4th at 1171 (cleaned up).

We start by noting some key differences between the accounts at issue here and those in *Garnier*. While the handles here provide the officials' job titles—e.g., that the owner of @EvanMGlass is the Montgomery County Council President—they do not bear the same indicia of official authority that the *Garnier* accounts did. In that case, one of the trustees "described herself as a 'Government Official,' listed her 'Current Office' as President of the PUSD Board of Education, and provided a link to her PUSD official email address." *Id.* at 1164. The other trustee "described his Facebook as 'the official page for T.J. Zane, Poway Unified School District Board Member, to promote public and political information.'" *Id.* Even more, the Facebook and Twitter accounts in *Garnier* were created

[10] *See* Montgomery County, MD Government, Office of the County Executive, https://www.montgomerycountymd.gov/exec/index.html (last visited Oct. 25, 2023); Montgomery County Council, Evan Glass, Council President, Resources, https://www.montgomerycountymd.gov/glass/resources.html (last visited Oct. 25, 2023); Montgomery County Council, Will Jawando, About Will, https://www.montgomerycountymd.gov/jawando/ (last visited Oct. 25, 2023). The complainant points out that Councilmember Jawando's "official" Twitter handle—@CMJawando—was not created until February of this year, after the complainant sent his PIA request. The complainant suggests that the "official" account was created to thwart his PIA request and argues that @willjawando—the Twitter handle at issue here—was effectively Councilmember Jawando's "official" Twitter account at the time of his request. We note that the versions of Councilmember Jawando's County webpage archived in the months immediately prior to February 2023 contain no links to Twitter at all. *See, e.g.*, Montgomery County Council, Will Jawando, About Will, (Dec. 8, 2022, 8:11 a.m.), https://web.archive.org/web/20221208081131/https://www.montgomerycountymd.gov/jawando/.

"[i]n addition to the [trustees'] private [social media] pages," *id.* at 1163, thus those accounts provided the only means for the greater public to engage with the trustees through social media. Here, however, the Twitter accounts identified in the complaint *are* the purportedly private accounts. They exist in addition to the "official" accounts—which have apparently not blocked anyone. Nobody seems to dispute that those "official" accounts are subject to the PIA.

After reviewing the accounts with particular attention to the owners' posts and other content, we conclude that the handles @evanmglass and @willjawando do not bear the same "close nexus" between the Councilmembers' "use of their social media pages and their official positions" as the Ninth Circuit found in *Garnier*. *Id.* at 1170. Instead, they appear to us to be the personal Twitter accounts of people who serve as elected officials, and accounts that are also used to some degree for purposes of campaigning.[11] While the content of the Twitter pages clearly demonstrates that Mr. Glass and Mr. Jawando are interested in Montgomery County politics and invested in its citizens, they have not "clothed their pages in the authority of their offices and used their pages to communicate about their official duties." *Id.* at 1172. Many of the posts are more personal in nature—posts about old friends, anniversaries, family members' birthdays, or attending concerts. And, we tend to agree with the MCC and MCE that most of the posts that do relate to Council or County business seem more geared toward touting the members' accomplishments or simply informing citizens, and do not necessarily transact the business of the Council itself. *See, e.g.*, *Campbell v. Reisch*, 986 F.3d 822, 824, 827 (8th Cir. 2021)[12] (Twitter account was "more akin to a campaign newsletter" where the elected official posted "about her work as a state representative and posted pictures of herself on the House floor or standing with other elected officials"); *see also Wyoming v. Boyer*, 299 A.3d 1079, 1084 (Pa. Commw. Ct. 2023) ("A post does not necessarily prove, support, or evidence a transaction or activity of an agency if it is merely informational in nature."). Thus, we would not find that the Councilmembers' social media activity regarding these Twitter handles constitutes "state action" under *Garnier*.

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[11] Though he has now withdrawn from the race, earlier in May Councilmember Jawando announced his bid for U.S. Senate. *See* Erin Cox, *Montgomery County Councilman Will Jawando Drops Out of Md. Senate Race*, Wash. Post (Oct. 23, 2023, 12:05 p.m.), https://www.washingtonpost.com/dc-md-va/2023/10/20/will-jawando-leaves-maryland-senate-race/. Thus, in recent months, the posts and content of the Twitter handle @willjawando have been very campaign-focused. When reviewing the content of Mr. Jawando's Twitter page for purposes of this decision, we focused in particular on content posted prior to and around the time of the complainant's PIA request.

[12] Though the outcome in *Campbell* was different than in *Garnier*, the latter court recognized that "*Campbell* expressly applied the approach adopted" by the Second and Fourth Circuit Courts of Appeal—the approach that *Garnier* ultimately adopted as well. *Garnier*, 41 F.4th at 1176.

Though the content for the Twitter handle @marc_elrich seems substantively different from the content for @evanmglass and @willjawando, we reach a similar conclusion for that handle. As all parties point out, the posted content there consists largely of re-posts of content from @MontCoExec, and contains far fewer posts that appear personal in nature. However, looking at the content and activity as a whole, we think that this handle too lacks the "close nexus" between Mr. Elrich's use of the account and his official duties as County Executive. *Garnier*, 41 F.4th at 1170. Instead, he uses the account in a manner that is similar to the way the elected official in *Campbell* used hers. That elected official "tweeted about her work as a state representative and posted pictures of herself on the House floor or standing with other elected officials," "tweeted about specific legislation . . . testifying before the state senate, and about times when the governor and lieutenant governor visited her district," and "used her Twitter page to engage in discourse about political topics and/or to indicate her position relative to other government officials." *Campbell*, 986 F.3d at 824. Looking at the Twitter account as a whole the same way that *Garnier* did, the Eighth Circuit found that the state legislator "used the account in the main to promote herself and position herself for more electoral success down the road," *id.* at 826, and that the account was therefore "more akin to a campaign newsletter," thus the legislator's activity with regards to that account did not constitute "state action," *id.* at 827.

The content of @marc_elrich bears a striking similarity to what the Eighth Circuit described in *Campbell*. For example, recent re-posts report: "Good news! Our streak of AAA bond ratings continues 51 years in a row!" or "Today's signing on the Rent Stabilization Bill in MOCO marks a historic day where close to 400,000 families will have a sense of stability in their housing." As in *Cambpell*, posts like these "tout [his] record because they show voters that [he is] actively advancing [his] . . . agenda and fulfilling campaign promises."[13] *Id.* at 826. Other posts show Mr. Elrich appearing at community events with other elected officials, e.g., "Thanks to D20 precinct officials for organizing Democracy Can be a Walk in the Park! Great to see @jamie_raskin and so many other elected leaders and residents for great conversations!" Posts like these, which document past events, do not suggest that the Twitter account is serving as "an organ of official business." *Id.*

Review of the Twitter account's activity in the months leading up to and around the November 2022 election—when Mr. Elrich was running for re-election as County Executive—is even more telling. Not only are there are comparatively fewer re-posts of @MontCoExec, many of the posts are centered on active campaigning (e.g., door-knocking), endorsements, and getting out the vote. And, as is the case with recent posts

[13] Notably, the URL for Mr. Elrich's campaign website is https://www.marcelrich.org/*housing*, (emphasis added). Many of the posts and re-posts are focused on accomplishments in the area of housing—e.g., one that reports, "Last week we broke ground on Montgomery County's largest affordable housing project with nearly 200 units that are ALL deeply affordable. . . . Thanks @AHCInc & Habitat for Humanity of Maryland for your partnerships."

and re-posts, many focus on Mr. Elrich's accomplishments during his first term as County Executive—that "Montgomery County's $5.3 million loan helped redevelop affordable housing units and produce new homes in Rockville," for instance. Given that "[r]unning for public office is not state action" but rather "a private activity," *id.* at 825, the test in *Garnier* would lead us to conclude that Mr. Elrich's activity with regards to his @marc_elrich Twitter handle does not constitute "state action."[14]

For purposes of the PIA, the real question here is whether these Twitter accounts were used primarily as "instrumentalities" of the County government, and not for personal or campaign purposes. Thus, in addition to the federal cases discussed above, which certainly inform the analysis, we are also guided by the Maryland cases that address what it means to be an "instrumentality" of the State or a political subdivision. Those cases too support the conclusion that the blocked account lists for the Twitter handles at issue do not constitute public records for purposes of the PIA. In order to determine whether the Baltimore Development Corporation ("BDC") was an "instrumentality" of Baltimore City and thus subject to the PIA, the Supreme Court of Maryland observed that "[i]nstrumentality is defined as 'the quality or state of being instrumental' and instrumental is defined as 'serving as a means, agent, or tool.'" *City of Baltimore Dev. Corp. v. Carmel Realty Assocs.*, 395 Md. 299, 333 (2006) (quoting *Merriam Webster's Collegiate Dictionary* 607 (10th ed. 1998)). The court examined the functions and duties of the BDC—which included planning and implementing "long range development strategies throughout the City of Baltimore on behalf of the City of Baltimore" and being "responsible for Urban Renewal Plans, Planned Unit Developments, Industrial Retention Zones, and Free Enterprise Zones on behalf of the City"—and concluded that "the plain language of the statute, in its ordinary and popular meaning" made the BDC an instrumentality of the City. *Id.* at 334.

City of Baltimore Dev. Corp. explained that "[t]here is no one factor" that will "determine whether an entity is an instrumentality of the state," and that "all aspects of the relationship between the entity and the state or political subdivision" must be examined. *Id.* In that case, it was important that the Mayor appointed BDC's Board members and had the power to remove them and fill vacancies, that City officials were permanent members of the Board, that a "substantial portion" of BDC's budget came from the City, and that the BDC was authorized to perform "traditionally governmental functions." *Id.* at 335; *see also* 106 Md. Op. Att'y Gen. 100, 105-06 (2021) (citing cases and explaining that many factors are relevant to determining whether an entity is a "unit or instrumentality" of government, including whether the entity was "created by the government," "serves a

[14] Recognizing that we are concerned here with public records and not necessarily First Amendment issues, we nevertheless note the *Campbell* court's observation that the state legislator had a "First Amendment right to craft her campaign materials," and thus also to "control who gets to speak or what gets posted" on her campaign Twitter account. 986 F.3d at 827-28.

'public purpose,'" "performs a 'traditionally governmental function,'" "is subject to government control," or receives "funding, staffing, or other resources" from the government).

Applying the factors above, it is clear that the Twitter handles @marc_elrich, @evanmglass, and @willjawando do not function as units or instrumentalities of the Montgomery County government such that the blocked account lists the complainant has asked for are rendered public records under the PIA. All of the accounts predate the officials' election to their current offices; the accounts were not created by the government or pursuant to a legal obligation connected to public office. And, though the accounts certainly serve a "public purpose" to a certain degree—providing information to the public about recent legislation or upcoming County events is no doubt a public service—they also serve significant personal and/or campaign purposes as well. Further, the public service that the accounts provide is not one that is all that unique to elected office. *Cf. Manhattan Cmty. Access Corp. v. Halleck*, 136 S. Ct. 1921, (2019) (explaining that "it is not enough that the function serves the public good or the public interest in some way," but that "to qualify as a traditional, exclusive public function within the meaning of our state-action precedents, the government must have traditionally *and* exclusively performed the function," (emphasis original)). Anyone, including the public at large, can post content like that to a social media page. In fact, many of the challenged Twitter handles' re-posts appear to come from constituents and community organizations. Finally, we have no indication that the Twitter accounts are subject to any control by the County Council or the Office of the County Executive, or that those government bodies contribute any funding, staffing, or other resources for the accounts' maintenance. Thus, we find that the blocked account lists were not made or received "by [a] unit or instrumentality" of the County government "in connection with the transaction of public business," § 4-101(k)(1)(i), and are therefore not public records subject to inspection under the PIA.

In reaching this conclusion, we stress that the resolution of questions like these—of whether and when purportedly private transactions may nevertheless be attributed to the government in such a way that the PIA reaches records related to those transactions—is heavily dependent on the particular facts of each matter. *See A.S. Abell Pub. Co. v. Mezzanote*, 297 Md. 26, 35 (1983) (explaining that "there is no single test" for determining whether an entity is an agency or instrumentality of the State and that "[a]ll aspects of the interrelationship" between the State and the entity must be examined); *cf. Garnier*, 41 F.4th at 1169 ("[D]etermining whether a public official's conduct constitutes state action is a process of sifting facts and weighing circumstances." (quotations omitted)). Thus, our decision should not be read to suggest, e.g., that in every instance where there exists an "official" social media account subject to the PIA, we would find that any additional accounts operated by the government officials or employees to which those "official" accounts pertain are outside the scope of the PIA.

Conclusion

Based on the submissions and the legal principles and standards discussed above, we conclude that the accounts for the Twitter handles @marc_elrich, @evanmglass, and @willjawando are not "units or instrumentalities" of government. The elected officials' activity with regard to those accounts would not constitute "state action" under the tests outlined in the analogous federal § 1983 cases, and that activity does not suggest that the accounts serve as an instrumentality of their elected offices. Rather, the accounts are in the nature of personal and/or campaign accounts. Thus, the lists of Twitter accounts that those handles have blocked—which are records *about* the handles themselves—are not public records for purposes of the PIA. The MCC and MCE did not violate the PIA when they denied the complainant's request to inspect those records.

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