

WES MOORE
GOVERNOR

ARUNA MILLER
LT. GOVERNOR



MICHELE L. COHEN, ESQ.
SAMUEL G. ENCARNACION
DEBRA LYNN GARDNER
NIVEK M. JOHNSON
DEBORAH MOORE-CARTER

STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 23-31
September 6, 2023
Baltimore City Board of Ethics, Custodian
Fern Shen (Baltimore Brew), Complainant

The complainant, Fern Shen, alleges that the Baltimore City Board of Ethics (“BOE”) violated the Public Information Act (“PIA”) by redacting the names and addresses from a list of donors to the Mosby 2021 Trust. In response, the BOE contends that § 4-336¹ of the PIA, which concerns financial information of individuals, requires that those names and addresses be redacted. As explained below, we conclude that § 4-336 does not apply to shield the redacted information from disclosure. Accordingly, we find that the BOE violated the PIA by redacting the list of donors to the Mosby Trust and order the BOE to produce the list without redactions.

Background

In March 2023, the complainant asked the BOE to produce the list of donors to an organization called The Mosby 2021 Trust (“Mosby Trust”). The BOE obtained this list during the course of its investigation into two complaints filed against City Council President Nicholas Mosby alleging certain fundraising-related violations of the City’s Ethics Law.² In response, the BOE produced the list, but with the names and addresses of the donors redacted.³ The BOE explained that the redacted information constituted “information about the individual [donors’] financial activity,” which § 4-336 of the PIA shielded from disclosure. The complainant disagreed with the BOE’s response to her PIA request, and so contacted the Public Access Ombudsman in an effort to resolve that disagreement. The Ombudsman ultimately issued a final determination stating that the dispute was not resolved, and the complainant filed this complaint with our Board.

In her complaint, the complainant alleges that § 4-336 does not protect the donors’ names and addresses and that, therefore, the BOE improperly redacted the list of donors to

¹ Statutory citations are to the General Provisions Article of Maryland’s Annotated Code, unless otherwise indicated.

² See Ethics Board, Final Decisions, Complaint Nos. 22-0002-E and 22-0003-E, <https://ethics.baltimorecity.gov/final-decisions> (last visited Sept. 5, 2023).

³ The BOE did not redact the zip code or state.

the Mosby Trust. The complainant characterizes the donations as “campaign contributions,” and points to the Mosby Trust’s status as a tax-exempt political organization to support that characterization. The complainant argues that the General Assembly did not intend for this sort of financial information—i.e., campaign contributions—to fall within the scope of financial information that § 4-336 protects. In addition, the complainant argues that even if campaign contributions do fall within the scope of § 4-336, the BOE should disclose the names of donors who gave a total of at least \$200 during a calendar year because federal law provides that the names of those particular donors are “a matter of public record.”

The BOE’s response to the complaint is twofold. First, it maintains that § 4-336, which requires a custodian to deny inspection of “information about the finances of an individual, including assets, income, liabilities, net worth, bank balances, financial history or activities, or creditworthiness,” applies to the donors’ names and addresses. Disclosure of this information, the BOE contends, would reveal that specific individuals have “assets, income, liabilities, net worth, [or] bank balances,” and would also reveal the “financial history or activities” of those specific donors. Thus, the BOE argues that it properly redacted the names and addresses from the list of donors to the Mosby Trust. Stressing the Supreme Court of Maryland’s observation that the PIA “should not be a means of invading the privacy of individuals merely because the State has collected information about those people or their property,” *Immanuel v. Comptroller of Maryland*, 449 Md. 76, 95 (2016), the BOE contends that its redaction of the donors’ names and addresses also squares with the Legislature’s intent in enacting § 4-336’s exemption for information about an individual’s finances.

Second, the BOE rejects the complainant’s contention that the BOE must disclose the names and addresses of donors who gave more than \$200 over a calendar year because federal law makes that information a matter of public record. The BOE argues that the PIA does not require a custodian to disclose otherwise-protected information when law outside the PIA may require another entity (i.e., not the custodian) to disclose that information. Rather, the BOE contends that a custodian is obligated to disclose otherwise-protected information only if that “other law” applies directly to the custodian. Put slightly differently, unless the other disclosure law directs *the specific custodian* of the records or information at issue to disclose the responsive information, that law is essentially irrelevant to whether the information may be disclosed under the PIA.⁴

⁴ The BOE also sets forth detailed arguments as to why the City’s Ethics Law does not authorize disclosure of the donors’ names and addresses. We note that we have received two complaints about the BOE’s redaction of the list of donors to the Mosby Trust—this one and the one related to PIACB 24-01 (Sept. 6, 2023). This complainant does not contend that the City’s Ethics Law requires disclosure; rather, the complainant in PIACB 24-01 advances that argument.

In reply, the complainant reiterates her position that donations to a tax-exempt political organization “established to benefit two named candidates for political office”—e.g., the Mosby Trust—do not fall within the scope of financial information protected by § 4-336. The complainant points out that § 1-201 of the Election Law Article states that its purpose is, among other things, to “inspire public confidence and trust by assuring that . . . full information on elections is provided to the public, including disclosure of campaign receipts and expenditures,” and argues that this expression of Legislative intent is equally applicable here. The General Assembly has, the complainant argues, “repeatedly demonstrated its commitment to the transparency of campaign contributions.” Because donations to the Mosby Trust are, in the complainant’s estimation, tantamount to campaign contributions, § 4-336 does not require withholding of the names and addresses of the individuals who made those donations.

Analysis

The PIA authorizes us to resolve complaints that allege certain violations of its provisions, including that a custodian improperly redacted a public record. *See* § 4-1A-04(a)(1)(i) (authorizing review of allegations that a custodian “denied inspection of a public record” in violation of the PIA). Before filing a complaint, a complainant must attempt to resolve the dispute through the Ombudsman and receive a final determination that the dispute was not resolved. § 4-1A-05(a). Once a complaint is filed, the PIA directs us to provide specific remedies if we find a violation, e.g., that we “order the custodian to . . . produce the public record for inspection” or “promptly respond” to a request for public records. § 4-1A-04(a)(3).

“The Maryland Public Information Act establishes a public policy and a general presumption in favor of disclosure of government or public documents.” *Kirwan v. Diamondback*, 352 Md. 74, 80 (1998). Indeed, the PIA instructs that its provisions “be construed in favor of allowing inspection of a public record, with the least cost and least delay,” unless an “unwarranted invasion of the privacy of a person in interest would result.” § 4-103(b). At the same time, the PIA contains numerous exceptions to disclosure, including § 4-336(b), the exemption for “information about the finances of an individual” at issue here. Section 4-336—which is mandatory in nature—serves part of the PIA’s “dual legislative purpose” of “disclosing information about the functioning of the State government while protecting the personal individual information that the State retains.” *Immanuel*, 449 Md. at 87-88. As with any exemption, a custodian bears the burden of justifying the application of § 4-336 by explaining why the information withheld falls within the exemption. *Cf. Amster v. Baker*, 453 Md. 68, 86 (2017) (“[T]he burden is on the County to explain to the trial court what [confidential commercial or financial] information within the lease is exempt from disclosure.”). “In a doubtful case, the party requesting information under the [PIA] is favored.” *Immanuel*, 449 Md. at 88.

As noted above, § 4-336(b) prohibits disclosure of “information about the finances of an individual, including assets, income, liabilities, net worth, bank balances, financial history or activities, or creditworthiness.” Given that “the public is ordinarily entitled to know how, and to whom, the government spends its money,” the exemption is generally focused on “information unrelated to [an] individual’s financial transactions with the State itself.” Memorandum from Jack Schwartz to Principal Counsel, at 1 (July 26, 1995) (“Schwartz Memo”). For example, “[i]nformation about the value of individual [unclaimed property] accounts, even incremental information deduced from an ordered list” that is “based on value, even with the actual value removed,” constitutes information about an individual’s “assets” ordinarily protected from disclosure by § 4-336.⁵ *Immanuel*, 449 Md. at 95, 97; *see also* 77 Md. Op. Att’y Gen. 188, 189 (1992) (“It is self-evident that a list showing how much money or what type of property people have left unclaimed reveals information about the ‘assets’ of those people.”). Section 4-336 would similarly prohibit, e.g., disclosure of the identity of a lottery winner who declined to be named, given that that “individual’s ‘assets’ would include a future stream of income from the Lottery Agency.” Schwartz Memo at 1; *contra, e.g.*, Letter of Assistant Attorney General Robert A. Zarnoch to Delegate Kevin Kelly, at 2 (July 18, 2007) (concluding that records related to a licensed business’s paper gaming profits were not subject to what is now § 4-336 because the financial information “related to a licensee’s financial transactions with the government, to its public duties and responsibilities and to the receipt of public funds”).

Before addressing the parties’ arguments for and against disclosure here, we first provide some information about the disputed record and the organization to which it relates. According to the BOE’s final decision regarding the ethics complaints filed against Council President Mosby, two individuals established the Mosby Trust in May of 2021. Balt. City Bd. of Ethics, Case Nos. 22-0002-E & 22-0003-E, Final Decision, at 2 (May 12, 2022) (“BOE Final Decision”).⁶ About two months later, in July, the Mosby Trust’s attorney filed a form with the Internal Revenue Service (“IRS”) declaring that it be treated as a tax-exempt “political organization” organized under § 527 of the Internal Revenue

⁵ *Immanuel* ultimately concluded that, because the Abandoned Property Act required the Comptroller to publish “the names in alphabetical order and last known addresses, if any” of certain claimants with property valued over a specific amount, the PIA did not prohibit disclosure of that limited information. 449 Md. at 95-96. In reaching that conclusion, the Supreme Court of Maryland (then called the Court of Appeals) relied on an opinion of the Maryland Attorney General that reasoned that the Abandoned Property Act “renders two pieces of information nonconfidential: that a person owns abandoned property, and that it is worth at least \$50.” 77 Md. Op. Att’y Gen. 188, 190 (1992).

⁶ *See* Balt. City Bd. of Ethics, Final Decision, https://ethics.baltimorecity.gov/sites/default/files/Final%20Decision%2005.12.2022_Redacted%20Signatures.pdf (last visited Sept. 5, 2023).

Code. *Id.* at 3.⁷ A tax-exempt “political organization” is defined as, among other things, a “committee . . . organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.” 26 U.S.C.A. § 527(e)(1). An “exempt function” means “the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual” to certain offices, and includes “the making of expenditures relating to [those offices] which, if incurred by the individual, would be allowable as a deduction under section 162(a).”⁸ *Id.* § 527(e)(2).

A political organization that “accepts a contribution, or makes an expenditure, for an exempt function during any calendar year” must file certain reports with the IRS. *Id.* § 527(j)(2). Those reports must include the “name and address (in the case of an individual, including occupation and name of employer of such individual) of all contributors which contributed an aggregate amount of \$200 or more to the organization during the calendar year and the amount and date of the contribution,” *id.* at (j)(3)(B), and must be filed in electronic form, *id.* at (j)(7). The IRS must make the reports “available for public inspection on the Internet not later than 48 hours after” filing, and must make the database of notices and reports searchable by certain terms. *Id.* at (k); *see also* 26 U.S.C.A. § 6104(d)(7) (“Any report filed by an organization under section 527(j) (relating to required disclosure of expenditures and contributions) shall be made available to the public at such times and in such places as the Secretary may prescribe.”).

Turning to the dispute here, the BOE maintains that it properly redacted the names and addresses of the donors to the Mosby Trust because those names and addresses constitute “information about an individual’s finances” protected by § 4-336 and no law outside the PIA authorizes the BOE to disclose that information. The complainant disagrees, arguing that § 4-336 does not apply to *any* of the donors’ names or addresses, or that, if § 4-336 does apply, then law outside of the PIA—namely the Internal Revenue Code sections detailed above—requires disclosure of the names and addresses of those donors who gave \$200 or more during the calendar year. Thus, we must first determine whether the names and addresses of the donors to the Mosby Trust fall within the scope of § 4-336’s exemption for “information about the finances of an individual.” If they do, then the BOE may not disclose the donors’ names and addresses, unless other law requires it, or unless that same information is already in the public domain.

⁷ A copy of that form, Form 8871, can be found by searching the IRS’s online database for political organization forms and disclosures. *See* IRS, Basic Search, <https://forms.irs.gov/app/pod/basicSearch/search> (select Form 8871, Form 8872, and Form 990, enter “Mosby 2021 Trust” into the field for “Name of organization,” and click on “Submit Basic Search”).

⁸ For a detailed history of § 527 political organizations, see Donald B. Tobin, *Anonymous Speech and Section 527 of the Internal Revenue Code*, 37 Ga. L. Rev. 611, 620-25 (2003).

“Information about an individual’s finances” includes information about that person’s “assets, income, liabilities, net worth, bank balances, financial history or activities, or creditworthiness.” § 4-336(b). Although donations to a § 527 political organization might broadly qualify as “financial activity,” we do not think that these donations are what the Legislature intended to protect when it enacted § 4-336. To start, we note that not all monetary donations are necessarily protected by § 4-336. As the complainant points out, Maryland’s Election Law Article requires that certain campaign-related donations be reported. For example, “participating organizations,” which are defined to include § 527 organizations that make “political disbursements,” must file certain registrations or reports after the political organization makes disbursements over certain threshold amounts—i.e., more than \$6,000, \$10,000 or more, and \$50,000 or more. Md. Code Ann., Elec. Law § 13-309.2. Regulations adopted by the State Board of Elections (“SBE”) require participating organizations to disclose donor information in those reports. *See* COMAR 33.13.17.03B. The information parallels what is required by federal law, although it appears that there is no minimum threshold amount of donation that triggers disclosure. *Id.* The SBE makes those reports publicly available. *See* Maryland Campaign Reporting Information System, <https://campaignfinance.maryland.gov/Public/ViewFiledReports> (in “Committee Details” field, select “Participating Organization Committee” from the drop-down menu under “Committee Type,” and then click on “Search”). Though it is not for us to determine the extent to which the Mosby Trust may be subject to (or may have violated) State election laws, we find these provisions relevant to whether donations to a § 527 political organization fall within the scope of § 4-336.

As described above, the Mosby Trust is a § 527 political organization with federal donor disclosure obligations, *see* 26 U.S.C.A. § 527(j), whose stated purpose is “the prevention of any attempt to influence the selection, nomination, election or appointment of” specific elected officials (i.e., the Mosbys), *see* Form 8871 *supra*, note 7. Put simply, donations to that organization do not “seem to fall in the same category as information about ‘assets, income, liabilities, net worth, bank balances, financial history or activities, or creditworthiness’” that § 4-336 safeguards. *Kirwan*, 352 Md. at 85. The donations lack the same private financial character that information about “assets, income, liabilities, net worth, [and] bank balances” all share. And, while donations to a § 527 political organization might not represent the donors’ “financial transactions with the State itself,” or clearly show how “the government spends its money,” Schwartz Memo at 1, in our view, those are not exclusive of the ways in which a person’s financial activity may be so closely related to government and the public sphere as to render that information disclosable under the PIA. Campaign finance activity, for example, is not ordinarily protected financial information. We think that donations like these—donations that are made to support elected officials in their political capacities—are much more akin to that sort of financial activity, which is commonly accepted as disclosable.

We also disagree with the BOE’s assertion that disclosing the donors’ identities “would not shed any light” on the activities or workings of the BOE. As we see it, those identities are relevant to the compliance efforts undertaken by the BOE. In addition, the donations are relevant to understanding who might be seeking to curry favor with powerful elected officials. As the *Immanuel* court explained, the “legislative purpose underpinning the MPIA is that ‘citizens of the State of Maryland be accorded wide-ranging access to public information *concerning the operation of their government.*’” 449 Md. at 88 (quoting *Fioretti v. Maryland State Bd. of Dental Exam’ns*, 351 Md. 66, 73 (1998)) (emphasis original). Disclosing the identities of the donors to the Mosby Trust indeed provides the public with “information concerning the operation of their government.” We also do not view this as a situation in which disclosure would “reveal information from beyond where State activity ends and private activity begins.” *Immanuel*, 449 Md. at 93. In our view, the act of donating to a § 527 political organization does not constitute “private activity.”

In reaching our conclusion, we are mindful of § 4-103(b), which provides that “unless an *unwarranted* invasion of the privacy of a person in interest would result, this title shall be construed in favor of allowing inspection of a public record, with the least cost and least delay” to the requester. (Emphasis added). While § 4-336 may have been “intended to address the reasonable expectation of privacy that a person in interest has” in certain financial activities, *Immanuel*, 449 Md. at 82, we view the information at issue here differently than we might view, e.g., donations to charities or even donations that support certain public institutions, like the public school a child attends. To the extent that revealing the names and addresses of people who donate to § 527 political organizations in support of political candidates or elected officials causes any invasion of personal privacy, on balance it does not seem like an unwarranted one given the public’s interest in election integrity and detecting political corruption. *Cf. John Doe No. 1 v. Reed*, 561 U.S. 186, 199, 202 (2010) (concluding that “public disclosure of referendum petitions in general”—including the names and addresses of those who signed them—“is substantially related to the important interest of preserving the integrity of the electoral process,” and thus “disclosure under [Washington State’s Public Records Act] would not violate the First Amendment”).

Having concluded that § 4-336 does not apply to the names and addresses of donors to the Mosby Trust, we do not address the parties’ additional arguments. However, we feel it necessary to state that we do not agree the BOE’s narrow interpretation of § 4-328, which provides that “[u]nless otherwise provided by law, a custodian shall deny inspection of a part of a public record, as provided in [Part III,]” the part of the PIA that contains § 4-336. We disagree with the proposition that the provision applies only when the “other law” requires the specific custodian to disclose requested information. Though the BOE points to both cases and Attorney General opinions to support its contention that the “other law” language in § 4-328 “modifies the duties that fall upon the record custodian, itself, and not all parties whose information might be contained in a record held by the government,” none of those cases or opinions expressly states such and other sources suggest that the impact

of the language is broader than that. *See, e.g.*, 77 Md. Op. Att’y Gen. at 190 (opining that the Abandoned Property Act “renders two *pieces of information* nonconfidential,” (emphasis added)); *Maryland Public Information Act Manual* (17th ed. July 2022), at 3-30 (“It is important to emphasize the last phrase, ‘unless otherwise provided by law.’ Enactment of [what is now § 4-336] would have no impact whatsoever on *those personally identifiable financial records* which the Legislature has determined should be available for public inspection.” (quoting Governor’s Information Practices Commission, Final Report 534-35 (1982)) (emphasis added)). Moreover, we think that the BOE’s interpretation of § 4-328 is at odds with the PIA’s general presumption in favor of disclosure. *See* § 4-103(b).

Conclusion

Based on the parties’ submissions, we find that the BOE violated the PIA by redacting the names and addresses of the donors to the Mosby Trust. Donations to the Mosby Trust do not constitute “financial activity” as contemplated by § 4-336, thus the exemption does not apply to shield that information. We therefore direct the BOE to produce an unredacted list of donors to the Mosby Trust to the complainant.

Public Information Act Compliance Board*

Michele L. Cohen, Esq.
Samuel G. Encarnacion
Debra Lynn Gardner
Nivek M. Johnson

* Board member Deborah Moore-Carter did not participate in the preparation or issuing of this decision.