

IN THE CIRCUIT COURT FOR BALTIMORE CITY

ST. PAUL PLAZA OFFICE
TOWER, LLC, *et al.*,

Plaintiffs,

v.

DEPARTMENT OF GENERAL
SERVICES, *et al.*,

Defendants.

Case No. 24-C-10-009242 OG

HEARING REQUESTED

**PLAINTIFFS' MEMORANDUM
IN SUPPORT OF MOTION TO COMPEL DEFENDANTS DGS and MDOT
TO COMPLY WITH COURT ORDER AND PRODUCE DOCUMENTS**

Now come the Plaintiffs, by their counsel, Alan M. Rifkin, Scott A. Livingston, M. Celeste Bruce, Michael D. Berman, and Rifkin, Livingston, Levitan & Silver, LLC, and in support of their motion to compel Defendants DGS and MDOT ("the State Agencies") to comply with this Court's Order; the parties' oral and written agreement; and the Maryland Rules requiring that the State Agencies produce documents on August 29, 2011, state as follows:

**STONEWALLING BY DGS AND MDOT VIOLATES THE MARYLAND
DISCOVERY RULES, THEIR AGREEMENTS AND THIS COURT'S ORDER**

This lawsuit, brought by a group of downtown commercial property owners and businesses, challenges, among other things, the *ultra vires* and unlawful actions of the State Agencies, including the secretive process that entitled certain select persons and entities to be "awarded" the rights to a \$1.5 billion State construction project without compliance with the State's competitive bidding laws. While the State Agencies have repeatedly proffered to this Court, governmental

bodies, and publicly that the State Center Project has been entirely transparent, the State Agencies now refuse to produce to Plaintiffs a single document. Even after good faith discussions between the parties, the State Agencies continue to violate the Maryland discovery rules, their agreement with Plaintiffs to produce documents, and this Court's Scheduling Order.

Almost six months ago, on March 7, 2011, Plaintiffs served Requests for Production of Documents on the State Agencies.¹ Pursuant to this Court's suggestion, the parties met, conferred, and agreed upon a proposed Scheduling Order to be jointly submitted to the Court for consideration. That joint submission included an agreement that the State Agencies would respond to Plaintiffs' request for production of documents by August 29, 2011. By order dated August 15, 2011, this Court incorporated the parties' jointly submitted milestone dates and proposal into its Pre-Trial Scheduling Order ("Scheduling Order"). The Scheduling Order plainly and unequivocally states that: "In addition, the following discovery deadlines are *imposed by agreement of the parties*: . . . Defendants *shall* respond to Plaintiffs' initial discovery requests (subject to ongoing supplementation) no later than 8/29/11." [Emphasis added].²

Nevertheless, as of the date of this motion, DGS and MDOT have failed and refused to produce a single document and have never requested an extension of

¹ Attached hereto as Exhibits A, B, C and D are copies of the two Requests for Production of Documents and Plaintiffs' Notices of Service.

² A copy of the Scheduling Order is attached as Exhibit E.

time.³ This motion requests an order compelling DGS and MDOT to comply with their agreement, the Maryland Rules and the Scheduling Order. The State's non-compliance jeopardizes the entire schedule, is prejudicial to Plaintiffs and is disruptive of the Court's schedule. Although Plaintiffs would be within their rights to seek terminating and case-dispositive sanctions, this motion simply asks that DGS and MDOT abide by their agreement and this Court's Order.

"Stonewalling is simply the failure or refusal to provide discoverable information properly requested by the opposing party." F. Hare, et al., FULL DISCLOSURE: COMBATING STONEWALLING AND OTHER DISCOVERY ABUSES (ABA 1994), xxxi. "The parties to both sides of the 'v.' – and society as a whole – have an important stake in the success of the discovery process: If discovery does not serve to bring forth the truth, the whole truth, and nothing but the truth, our system of civil justice cannot function." *Id.* at xxxv. "Our entire system of jurisprudence is based on adequate disclosure; take that card from the bottom of the pyramid, and we must be prepared to re-build the entire foundation of that system." Milberg LP and Hausfeld LLP, "E-Discovery: The Fault Lies Not in Our Rules. . .," 4 Fed.Cts.L.Rev. 1, 5 (2011).

It is *impossible* for DGS and MDOT to contend – as they apparently do now – that they do not have a single, responsive, non-confidential document in their possession, custody, or control. Their failure to produce those concededly *public* documents, as agreed and *ordered*, is nothing less than impermissible stonewalling.

³ DGS and MDOT have stated that they intend to move for a protective order.

DGS and MDOT are pulling the card from the bottom of the pyramid.

DGS and MDOT's current litigation position is in marked contrast to their prior, public representations. For example, in their December 9, 2010, White Paper⁴ at 12, DGS and MDOT wrote: "In sum, the State Center Project has been one of the most scrutinized *and transparent* development projects in the State." [Emphasis added]. The White Paper at 11 also states: "The Mayor's office and the Baltimore Development Corporation were also invited and attended the meetings of the Executive Committee⁵ to ensure a full *and transparent process regarding all significant decision made regarding the project.*" [Emphasis added]. And, it asserts at 12 that: "In addition to the above items, the State staff submitted a series of *publicly available presentations and reports* to the State legislature and the BPW. The developer also posted significant information on the Project over time on a website, www.statecenter.org.to ensure a transparent process." [Emphasis added]. At page 9 of the White Paper, DGS and MDOT wrote that the State Center Project "continues to be a model for a . . . transparent process. . . ."

Similar representations have been made to this Court. During the April 6, 2011, hearing, Counsel for the State Agencies proffered in open court that:

. . . over the last seven years, the State Center project has proceeded in an open and a transparent manner in the following ways. . . . There have been countless neighborhood meetings surrounding the project to get buy-in from community groups and those who will be directly impacted by the construction, and then living next to this new project.

⁴ A genuine and authentic copy of the White Paper is attached as Exhibit F.

⁵ The Court may judicially notice that the State Center Executive Committee includes legislators, other public officials, and lay representatives. Md. Rule 5-201.

There have been countless newspaper and other press accounts of the progress of this.

Tr., pp. H-16-17 (Emphasis added). Counsel for the State Agencies also stated: "So now we've talked about *the open and transparent way in which the State conducted its review and approval of the project up to December of 2010.*" *Id.* (Emphasis added).

DGS and MDOT made similar statements to the Board of Public Works. On July 28, 2010, they told BPW of an "extensive community involved process." BPW Tr., 33, 43. Many of the documents that DGS and MDOT seek to mark as confidential are presumably posted on the State Center, LLC, web site⁶ and were part of that "community involved process."

Despite these disclosures and recent public statements about "transparency," the State Agencies now refuse to produce a single document, asserting improperly that "all" documents in their custody and control are unilaterally deemed to be "confidential" and absent Plaintiffs' acceptance of the State Agencies' unilateral designation of confidentiality as to "all" documents that no documents will be produced. That position is neither factually nor legally supportable. Literally, hundreds, if not thousands of documents have been placed in the public domain, presented to governmental bodies, distributed to the press, and/or posted on the State Center website. Those documents and supporting materials cannot seriously be claimed to be confidential by the State Agencies. Surely, countless other documents are similarly public. In fact, if the State Agencies' suggestion that the

⁶ <http://statecenter.org/resources>.

project has been transparent is to be believed, then the presumption should be that all documents in their custody and control are not confidential. Moreover, the State's position must have arisen overnight. It was never mentioned when the parties met, conferred and agreed to the proposed joint Scheduling Order. It was never mentioned when the Scheduling Order was proposed to this Court. In fact, it was never mentioned until precisely one week before the State Agencies' August 29, 2011, production date.

RULE 2-431 GOOD FAITH CERTIFICATE AND FACTS

The undersigned certifies that despite good faith attempts to discuss this dispute with counsel for DGS and MDOT, Plaintiffs are unable to reach agreement with the State Agencies on the disputed issues. The most recent discussion was by telephone between Kathleen E. Wherthey, Esquire, counsel for DGS and MDOT, and Michael D. Berman, Esquire, counsel for Plaintiffs, on August 31, 2011, in the late afternoon.

The discovery requests at issue were served on March 7, 2011. On August 22, 2011, at 3:19 p.m., shortly before the August 29, 2011, document production date, DGS and MDOT requested that Plaintiffs agree that *every* document produced by every party in this lawsuit be deemed presumptively confidential, without exception.⁷

Because of the sweeping overbreadth of that suggestion -- given that this case concerns the expenditure of substantial public resources on an allegedly

⁷ A copy of DGS and MDOT's August 22, 2011 request is enclosed as Exhibit G.

"transparent" public project, on August 26, 2011, Plaintiffs replied that they would not agree to such an over-broad request. Instead, Plaintiffs suggested: "[W]e would be pleased to discuss with you on a document-by-document basis any documents that you contend merit such protection and your legal basis for such protection."⁸ DGS and MDOT's response was to insist on their initial proposal that *every* document be deemed presumptively confidential.⁹

Despite this stone wall, Plaintiffs again attempted to discuss this matter, suggesting that "each party be authorized and permitted to make good faith, document-by-document determinations regarding whether a document contains confidential, proprietary information and, if so, designate that document as 'confidential,' subject to challenge by the opponent. . . ."¹⁰

When DGS and MDOT did not respond and failed to produce even a single document on August 29th as ordered by the Court, Plaintiffs again attempted to resolve the dispute in good faith, stating: "We again remind you that document production is overdue and suggest an immediate conference to discuss these matters."¹¹ Plaintiffs then called counsel for DGS and MDOT to discuss this matter on August 31, 2011. Counsel for DGS and MDOT stated that there appeared to be no middle ground. Faced with an impasse, this motion followed.

As the Court is aware, in this lawsuit Plaintiffs challenge a \$1.5 billion, 28 acre, two-million square foot, multi-year, multi-phase, complex State construction

⁸ A copy of Plaintiffs' August 25, 2011, email is attached as Exhibit H.

⁹ A copy of DGS and MDOT's August 26, 2011, email is attached as Exhibit H.

¹⁰ A copy of Plaintiffs' August 29, 2011, email is attached as Exhibit I.

¹¹ A copy of Plaintiffs' August 30, 2011, email is attached as Exhibit J.

project to lease and redevelop the land at State Center and then rent it and the new buildings back as tenants, at above-market rates. Plaintiffs also challenge the secret "swap out" of principals in the development entity and the fact that there has never been a competitive sealed procurement process to safeguard the expenditure of taxpayer funds. See Amended Complaint at ¶¶1-243.

Many of the challenged decisions were made in secret. The overwhelming preponderance of relevant documents is in the possession, custody, and control of DGS and MDOT. This includes, but is not limited to, internal email and memoranda concerning the acts and omissions at issue, as well as correspondence between DGS/MDOT, on the one hand, and State Center, LLC, and other agencies and consultants, on the other.

REASONS TO COMPEL COMPLIANCE WITH COURT ORDER

A. The State Agencies Cannot Violate This Court's Order and Their Agreements

First, production should be compelled because DGS and MDOT promised and agreed to produce documents on August 29th, the Maryland Rules require it and the Court ordered it. Failure to produce those documents not only violates the Order, it jeopardizes all future milestone dates in the Scheduling Order. It is well-established that "the government is subject to discovery like any other litigant." G. Sisk, LITIGATION WITH THE FEDERAL GOVERNMENT MANUAL (Foundation 2000), 51; *United Medical Supply Co., Inc. v. United States*, 77 Fed.Cl. 257 n. 7 (Fed.Cl. 2007)(when government comes into court it has same duty as a private litigant).

In fact, as the enforcer of law, the government should take its duties “more seriously than any other litigant.” *United Medical*, 77 Fed.Cl. at n. 7. Where the government has treated discovery deadlines as “moveable goal posts,” it has been sanctioned. *In Re: Fannie Mae Securities Litigation*, 552 F.3d 814, 818 (D.C. Cir. 2009)(affirming contempt sanction). “It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government. . . .” *Heckler v. Community Health Svcs. Of Crawford Co., Inc.*, 467 U.S. 51, 52 n. 13 (1984)(citation and quotation omitted). For DGS and MDOT to say to these Plaintiffs, “[t]he joke is on you. You shouldn’t have trusted us,’ is hardly worthy of our great government.” *Id.* (citation and quotation omitted).

B. The State’s “Public Information Act” Rationale Has No Basis

As set forth in the good faith discussions, see Exhibit H, DGS and MDOT have offered one, and only one, “reason” for their refusal to produce a single document. They rely on the alleged burden of applying the confidentiality exceptions from disclosure contained in the Maryland Public Information Act (“MPIA”), stating that “not every document generated or received by a State agency is a public record subject to public disclosure under the Maryland Public Information Act.”

The basic proposition put forth by DGS and MDOT, that the MPIA applies to civil discovery, was rejected last year by the Maryland federal court. There, as here, the State argued that the MPIA excused it from producing documents in discovery.

The Court responded “there is no legal justification for claiming that the MPIA is a privilege that would warrant refusal to produce documents. . . .” *Mezu v. Morgan State Univ.*, 269 F.R.D. 565, 576 (D. Md. 2010), *subsequent decision on other grounds*, 775 F.Supp.2d 801 (D.Md. 2011). The MPIA does not create any new privilege in civil discovery. *Id.* In fact, the *Mezu* Court squarely held that the MPIA does not bar discovery of otherwise discoverable documents. *Id.* at 576. The argument now pressed by DGS and MDOT should be rejected for the same reasons that the same argument was rejected in *Mezu*. The discovery rules “trump” any MPIA exemption from disclosure and DGS/MDOT’s PIA-based argument fails.

C. The State’s Alleged Lack of Resources Is Pretextual

*Nowhere do DGS or MDOT explain how or why, on August 22, they suddenly determined that they lack the resources to do what they promised the Court they would do in the proposed scheduling order filed on or about July 26, 2011.*¹² DGS and MDOT *represented to the Court* that they would produce documents on August 29th. At the time that they made that representation, they had been in possession of Plaintiffs’ document requests for several months.

DGS and MDOT’s untimely assertion of an alleged lack of resources to respond to discovery in connection with this \$1.5 billion project should also be rejected for several other reasons. First, Rule 2-432(a) states that a failure to respond to a document request “may not be excused on the ground that the discovery sought is objectionable unless a protective order has been obtained under

¹² A copy of that proposed order, signed by all counsel, is attached as Exhibit K.

Rule 2-403." Additionally, DGS and MDOT have represented to the Plaintiffs that responses to similar requests under the MPIA would cost \$52,500 if the State hired outside, contract employees to do the work.¹³ In a case challenging a \$1.5 billion project, that is not beyond the State's means.

Second, DGS and MDOT had and have many resources and other options. For example, they could demand that State Center, LLC, their private-sector partner, assist. Under §1.1.6 of the Master Development Agreement ("MDA"), for example:

Throughout the development of the Project, *Developer shall provide DGS with details of construction progress.* These submissions to DGS must ultimately include building footprints, site plans, preliminary conceptual designs, exterior treatments, preliminary conceptual landscaping and infrastructure drawings, and financial elements such as pro formas and projections (accompanied by detailed and, to the extent then practicable, objective information concerning the feasibility of each Phase, including the feasibility of achieving the projected objectives with the exercise of Developer's commercially reasonable efforts) Developer will provide DGS with any additional information that DGS may reasonably request to assist DGS in evaluating its rights under any Phase Ground Lease or any Occupancy Lease. [Emphasis added].

Under §5.4, "[d]eveloper will, upon request, provide DGS with copies of Construction Drawings and Specifications to facilitate DGS's decision-making with regard to State space needs per Phase. . . ." In short, many of the requested documents could be obtained by DGS and MDOT through the simple expedient of a phone call to their private developer on this \$1.5 billion project.

¹³ A copy of MDOT's email is attached as Exhibit L.

CONCLUSION

There is, and can be, no justification for this wholesale refusal to produce documents.¹⁴ In light of the Maryland Rules, *Mezu*, and DGS and MDOT's violation of a Court order, Plaintiffs would be fully justified in requesting preclusive sanctions or entry of a default against DGS and MDOT. Md. Rule 2-432(a) and 2-433. Instead, however, Plaintiffs seek at this time only the lesser relief of an order compelling discovery.¹⁵

"Affording parties full discovery promotes the fair resolution of disputes by the judiciary. *This court has vigorously sought to ensure that lawsuits are decided by what the facts reveal, not by what facts are concealed.* Discovery is thus the linchpin of the search for truth, as it makes a trial less of a game of blind man's bluff and more a fair contest with the issues and facts disclosed to the fullest practicable extent." *State v. Lowry*, 802 S.W.2d 669, 671 (Tex. 1991)(internal citations and quotations omitted)(emphasis added). Among the primary reasons for the Maryland Rules governing discovery is discouraging gamesmanship and secrecy. "[E]ffective discovery is crucial. . . ." P. Grimm, C. Fax, P. Sandler, MARYLAND DISCOVERY PROBLEMS AND Solutions (MICPEL 2008), xii.

Here, DGS and MDOT have treated agreed-upon dates, subsequently

¹⁴ DGS and MDOT have objected to specific document requests. Those overbroad and general objections will be the subject of a separate motion to compel and are not at issue here. Nothing contained therein, however, would justify the *wholesale* refusal to produce even a single page on August 29, 2011. In short, neither DGS nor MDOT contends, or could contend, that it has objected to production of every requested document.

¹⁵ Plaintiffs have offered, and reiterate, their willingness to agree to a document-by-document designation of confidentiality, without prejudice to the recipient's right to challenge any such designation. Plaintiffs' objection is to DGS and MDOT's request that "all" documents be deemed presumptively confidential, even those that have been published in the news media.

incorporated into a Court order, as "moveable goal posts." Absent an order to compel the State to do what it agreed and is obligated to do, Plaintiffs will be prejudiced, the Scheduling Order disrupted, this case derailed, and, justice will be denied.

REQUEST FOR HEARING

Plaintiffs request a hearing on their Motion to Compel DGS and MDOT to Comply With Court Order and Produce Documents.

Wherefore, Plaintiffs request that this Court order DGS and MDOT to produce all documents that are not subject to a specific, timely, and proper objection, within three days, and for other such other and further relief as the Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2^d day of September, 2011, a copy of the foregoing was served, via first-class mail, postage prepaid, and via email, on the following:


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