

INSTITUTE FOR CONSTITUTIONAL
ADVOCACY AND PROTECTION
Plaintiff

v.

BALTIMORE CITY POLICE
DEPARTMENT

Defendant

* IN THE
* CIRCUIT COURT
* FOR
* BALTIMORE CITY
* CASE No.: 24-C-21-000162

* * * * *

**DEFENDANT BALTIMORE POLICE DEPARTMENT'S MOTION TO DISMISS OR IN
THE ALTERNATIVE FOR SUMMARY JUDGMENT
AND REQUEST FOR HEARING**

Defendant, by and through undersigned counsel, respectfully requests a hearing on its
Motion to Dismiss pursuant to Maryland Rule 2-311 (f).

Respectfully submitted,

JAMES L. SHEA
City Solicitor



Kay N. Harding, Esq.
Assistant City Solicitor
Baltimore City Law Department
Office of Legal Affairs
100 North Holliday Street, Room 101
Baltimore, Maryland 21202
443-915-3514
kay.harding@baltimorepolice.org
Attorney for Defendant

INSTITUTE FOR CONSTITUTIONAL
ADVOCACY AND PROTECTION

Plaintiff

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BALTIMORE CITY POLICE
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
**DEFENDANT BALTIMORE POLICE DEPARTMENT'S MOTION TO DISMISS OR IN
THE ALTERNATIVE FOR SUMMARY JUDGMENT**

The Defendant, Baltimore Police Department (hereinafter "BPD" or "Defendant"), by undersigned counsel, pursuant to Maryland Rules 2-311, 2-322, 2-501, and the Maryland Public Information Act, Annotated Code of Maryland, General Provisions Article ("GP") § 4-101 *et seq.*, respectfully request that this Honorable Court dismiss the above-captioned Complaint ("Comp.") for Injunctive and Other Relief as the Plaintiff fails to state a claim upon which relief can be granted and there exists no genuine issue of material fact. Thus, the Defendant is entitled to judgment as a matter of law and submits this motion in support of its Motion to Dismiss or in the Alternative for Summary Judgment.

Respectfully submitted,



JAMES L. SHEA



Kay N. Harding, Esq. 
Assistant City Solicitor
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443-915-3514
kay.harding@baltimorepolice.org
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20TH day of April, 2021, a copy of the foregoing was sent electronically to Mathew Zernhelt, Esquire, *Attorney for Plaintiff*, mzernhelt@baltimoreactionlegal.org.


Kay N. Harding, Esq. 

INSTITUTE FOR CONSTITUTIONAL
ADVOCACY AND PROTECTION
Plaintiff

v.

BALTIMORE CITY POLICE
DEPARTMENT

Defendant

* IN THE
* CIRCUIT COURT
* FOR
* BALTIMORE CITY
* CASE No.: 24-C-21-000162

* * * * *

**DEFENDANT BALTIMORE POLICE DEPARTMENT'S SUPPLEMENTAL MOTION
IN SUPPORT OF ITS MOTION TO DISMISS OR IN THE ALTERNATIVE FOR
SUMMARY JUDGMENT**

The Defendant, Baltimore Police Department (hereinafter "BPD" or "Defendant"), by undersigned counsel, pursuant to Maryland Rules 2-311, 2-322, and 2-501, respectfully request that this Honorable Court dismiss the above-captioned Complaint ("Comp.") for Injunctive and Other Relief as the Plaintiff fails to state a claim upon which relief can be granted and because there exists no genuine issue of material fact. Thus, the Defendant is entitled to judgment as a matter of law and submits this supplemental motion in support of its Motion to Dismiss, or in the Alternative for Summary Judgment, previously filed with the Court.

FACTS AND INTRODUCTORY STATEMENT

The Defendant incorporates by reference the Facts and Introductory Statement identified in its previous filings, which is in the Court's file. As mentioned previously, BPD does not have a data base in which fee waivers are maintained or tracked. The BPD has informed the Plaintiff that it received over 2300 PIA requests from calendar year 2020 alone. In 2021, BPD has already received over 550 requests. Plaintiff has repeatedly asked BPD to estimate the number of fee

waiver request it receives and/or grants on a monthly basis. BPD had informed the Plaintiff that it does not track such information and is unable to provide an estimate responsive to its question. To determine the number of fee waiver requests received and/or granted by BPD, based on the Plaintiff's initial requests for PIA files going back to 2018, BPD would have to cull and pull approximately 6400 files. BPD offered to supply a random sampling of 50 PIA files to the Plaintiff with its current staffing capabilities, but that suggestion was rejected.

The Plaintiff has narrowed its requests and now demands 863 files, but BPD does not have the resources to complete the Plaintiff's request internally and has obtain cost estimates to hire a Contract Attorney to assist the BPD in complying with the Plaintiff's PIA requests.

The City Law Department, on behalf of the Defendant, "obtained three vendor estimates to hire a Contract Attorney to produce responsive documents. The vendor's estimates were respectfully \$45, \$49.60, and \$65. Utilizing the lowest cost estimate, it is estimated that it will take a Contract Attorney 432 hours to go through 863 files. The cost of review is based on the number of estimated hours it takes to review the files, extract responsive documents, tag, and provide the E-Discovery Manager and/or Reviewing Attorney." Exhibit 1, April 12, 2021, correspondence from Ken Hurst, attached hereto and incorporated by reference.

ARGUMENT

THE STANDARD OF REVIEW

The Defendant incorporates by reference the Standards of Review identified in its previous filings, which is in the Court's file.

I. MPIA ALLOWS FOR REASONABLE COST AND FEES

A. Reasonable Cost, Fees, and Payment

First, an agency may charge reasonable fees and cost to a requester for the time to search and prepare MPIA documents for production; however, an agency may not charge for the first two hours of search and preparation time. GP §4-206(c). As the Attorney General of Maryland has explained pursuant to GP §4-206:

an official custodian may charge reasonable fees for the search and preparation of records for inspection and copying. Search and preparation fees must be reasonably related to the actual cost to the governmental unit in processing the request. GP § 4-206(a); see also 71 Opinions of the Attorney General 318, 329 (1986) (“The goal . . . should be . . . neither to make a profit nor to bear a loss on the cost of providing information to the public.”); PIACB Opinions 19-01 (Sept. 24, 2018) (although any “actual cost incurred” by the agency to respond to a PIA request might be compensable under the PIA’s definition of reasonable fee, the connection between a particular cost and the response must be clear). The custodian may charge a “reasonable fee” to search for, prepare, and reproduce a record in a “customized” format selected by the applicant, and—as is more often the case—may charge “the actual costs” of searching for, preparing, and producing a public record in standard format. GP § 4-206(b)(1). Fees may not be charged, however, for the first two hours of search and preparation time. GP § 4-206(c).

Office of the Attorney General’s Maryland Public Information Act Manual, 7-1, (15th ed., November 2020).

Second, the Public Information Act Compliance Board (“Compliance Board”) has provided guidance to assess the reasonableness of PIA cost and fees. In PIA CB-20-05, the Board found that the Baltimore County Police Department’s charge of \$722.50 (14.45 hours x \$50/hour) for 927 pages of an investigative file was reasonable. *See*, Exhibit 2, PIA CB-20-05, *Michael Redding v. Baltimore County Police Department*, November 7, 2019), along with a collection of other similar Board decisions, attached hereto and incorporated by reference. The Compliance Board also “commend[ed] the County PD’s attorney for her apparent willingness to work with this requestor—and others who request investigative files—to *narrow the scope of the request and thus reduce fees.*” (emphasis). *Id.*; *see also* e.g. PIA CB 20-11, *Mark Flatten, v. Montgomery County Public Schools* (holding that \$296.53 for 7 hours of staff time for production of documents was reasonable- an estimate of approx. \$42 per hour); PIA CB 20-04, *Bernadette Fowler Lamson v. Montgomery County*, (finding that \$3,306.00 for 10.7 hours of *outside counsel staff time* to prepare production of documents for more than 1,000 pages was reasonable - an estimate of approx.. \$300 per hour); PIA CB 19-08, *Jermaine Blackwell v. Baltimore City State Attorney's Office*, (holding that \$765.00 for 31 hours of staff and attorney review to prepare production of documents for approximately 800 responsive pages was reasonable – an estimate of approx. \$25 per hour).

Third, an agency may also solicit the assistance of outside counsel to respond to a requester’s PIA requests when it is unable to perform the job internally. As the Attorney General of Maryland has explained pursuant to GP §4-103(b):

an agency should consider whether it can perform the work in-house for less expense. See GP § 4-103(b) (the PIA “shall be construed in favor of allowing inspection of a public record, with the least cost and delay” to the requester (emphasis added)); see also PIACB Opinions 20-04 at 2 (“[O]n a case-by-case basis, [not] every third-party vendor’s costs can be recovered from a requestor. For example, where it is clear that a custodian has the capability and resources to perform response-related work “in house” for less expense than engaging a contractor, the PIA likely would not permit the custodian to charge the requestor for the contractor’s costlier fee.”).

Office of the Attorney General’s Maryland Public Information Act Manual, 7-2, (15th ed., November 2020).

Finally, the law permits the agency to commence production of requests after full payment is received. The Court of Appeals has held that

[a]n agency may charge a reasonable fee for fulfilling a PIA request, ... Following the practice of federal agencies under FOIA, agencies sometimes require pre-payment of fees or a commitment to pay fees when the cost of processing a PIA request is likely to be substantial. See Office of the Attorney General, Maryland Public Information Act Manual (14th ed. 2015) (“PIA Manual”) at 7-2; *Ireland v. Shearin*, 417 Md. 401, 412 n.8, 10 A.3d754 (2010).

Glass v. Anne Arundel Cty., 453 Md. 201, 212–13, (2017). See also, Office of the Attorney General’s Maryland Public Information Act Manual, 7- 3, (15th ed., November 2020).

B. Defendant’s Estimated Cost and Fees are Reasonable

In the instant case, the Defendant calculated the fees based on the prorated amount of the hourly wages of all the BPD and City Law Department staff and attorney assigned to preparing a response.

The hourly rate of the individuals working on the production are as follows: Contract Attorney: \$45, Lawyer: \$41, Paralegal: \$24, and E-Discovery Project Manager \$35. The estimate is based on the number hours estimated rate of review and time it takes to produce multiplied by

the hourly cost for reviewer equaling the cost estimate. The cost is calculated using the prorated salary of each individual and the estimated time extended by each, which breaks down accordingly:

- 10 hours - Paralegal time to assist in identifying files, instructing, and/or training Contract Attorney on files: ($\$24/\text{hr.} \times 10 \text{ hours}$) = $\$240.00$.
- 432 hours - Vendor/Contract Attorney's time: ($\$45^1/\text{hr.} \times 432 \text{ hrs.}$) = $\$19,444.00$.
- 150 hours - eDiscovery Professional time - Collection/evidence repository/Production/Project Management: ($\$36/\text{hr} \times 150 \text{ hrs}$) = $\$5,400.00$
- 80 hours Reviewing Lawyer's time - ($\$41/\text{hr.} \times 80$) = $\$3,280.00$

Total: $\$28,364.00$

See, Exhibit 1, Cost Estimate.

It is estimated that it would take 240 staff hours and 432 Contract Attorney hours to produce 863 files, which calculates to approximate $\$33.00$ an hour, per file, which is reasonable because it is within the range of $\$25$ to $\$300$ per hour that the PIA Compliance Board has found in similar cases. Additionally, the hourly rate of the employees doing the work is below their actual hourly rate. GP §4-206.

The hourly rate of staff and attorneys working on a particular responsive file is based on 80% of the employees' actual salary, which conforms to the guidance set forth by the Board. *See, Exhibit 2, PIACB-060116, Bernadette F. Lawson v. Montgomery County, Office of the County Attorney*, attached hereto and incorporated by reference.

¹ The Vendor/Contract Attorney's rate was not prorated and the Contract Attorney would have to be hired from a legal staffing agency.

For the reasons set forth above, Defendant contends that its fees are reasonable and similar to the fees charged by the Baltimore County and Montgomery County governments as well as the Baltimore City State's Attorneys' Office. While the law allows for fee waivers at the discretion of the government, especially in the case of indigent requestors seeking their own records, the law does not require the government to make all of its records available for free. As Maryland's Attorney General has recognized the "goal . . . should be ... neither to make a profit *nor to bear a loss* on the cost of providing information to the public." 71 Opinions of the Attorney General 318, 329 (1986) (emphasis added). Plaintiff can reduce cost by narrowing the scope of its requests.

This is the method favored by Maryland's Highest Courts:

an agency should in good faith provide some reasonable assistance to the requestor in refining the request for the records the requestor seeks. Of course, nothing requires the requestor to accept such assistance. It is also sometimes the case that a requestor, suspicious of the particular agency or of government in general, submits a broadly-worded request, intending to afford the agency no excuse for not producing for the records the requestor really wants. *Literal compliance with such a request, however, would often require such a diversion of resources and agency time as to amount to a huge expense.* In practice, a productive response to a PIA request is often an iterative process in which the agency reports on the type and scope of the files it holds that may include responsive records, and *the requestor refines the request to reduce the labor (and expense) of searching those records.* When the requestor and agency work together, the process approximates the purpose and policy of the PIA. When they do not, what results is the requestor insisting on what, to the agency, is an unbounded and unreasonable search and the agency insisting on what, to the requestor, is an unbounded and unreasonable fee.

Glass v. Anne Arundel County, 453 Md. 201, 232-33 (2017) (emphasis added).

II. MPIO FILES ARE EASILY IDENTIFIABLE BUT RESPONSIVE DOCUMENTS ARE NOT EASILY DISCERNABLE

The Plaintiff wrongfully assumes that BPD is aware of the number of monthly fee waiver requests that it receives on a monthly basis – it does not. Plaintiff, Mot. pg. 10.

BPD has no idea how many fee waivers it receives monthly and it would not be appropriate to speculate since BPD does not track the information that the Plaintiff has requested. The Plaintiff incorrectly assumes that to cull and pull responsive documents are trivial tasks. To the contrary, the tasks are voluminous, laborious, and tedious. The e-Discovery Professional would have to forensically collect the data from BPD's electronic drive then cull with evidence software to obtain the 863 files responsive to the PIA requests because the Electronically Stored Information (ESI) is stored in an unorganized manner on the file server. Although BPD tracks all of its PIA requests, all PIAs are not in sequential order, as the Plaintiff assumes. Since the files are not all in sequential order, it takes more time to cull through and pull the responsive files. Therefore, a forensic tool will be utilized to collect the information, which would then be uploaded into a discovery software for review by the Contract Attorney.

Once the files are identified, each file may contain several pdfs or outlook emails that may or not be responsive to the Plaintiff's request, but each file would have to be opened and reviewed to determine whether its disclosure is responsive to the Plaintiff's PIA requests and tag the documents as responsive, non-responsive, privilege, and make redaction.

Once the Contract Attorney completes its task, the Lawyer will review the Contract Attorney's work. Once the Lawyer's review is completed, the eDiscovery Professional will isolate the responsive documents and prepare files for the Plaintiff.

The responsive documents will most likely be the actual PIA request and its corresponding responses. The PIA files may contain privileged and confidential information that would have to be reviewed, tagged, and appropriate redactions applied where required by law. For example, work-product emails or account number on payment checks would need to be redacted prior to

production. The responsive documents could then inform the Plaintiff on whether a fee waiver was requested, granted, or denied.

CONCLUSION

The Defendant correctly denied the Plaintiff's requests for records that do not exist. Since none of these facts are disputed, and these facts fail to state a claim upon which relief can be granted, the Plaintiff's Complaint must be dismissed, or in the alternative Defendant are entitled to judgment as a matter of law. Additionally, if the Plaintiff would like to receive the responsive files, it needs to pay \$28,364.00. Further, the Court should deny Plaintiff's request for attorney fees and dismiss the lawsuit.

Respectfully submitted,

A large black rectangular redaction box covering the signature of Kay N. Harding.

Kay N. Harding, Esq.
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Office of Legal Affairs
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443-915-3514
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Attorney for Defendant

INSTITUTE FOR CONSTITUTIONAL
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* * * * *

ORDER

Upon consideration of the Defendant's Motion to Dismiss or, in the alternative for Summary Judgment, and all matters of record; it is by the Court this _____ day of _____, 2021,

ORDERED, that the BPD's Motion to Dismiss, or in the alternative for Summary Judgment is hereby **GRANTED** in its entirety.

ORDERED, that the Plaintiff's Complaint is **DISMISSED** with prejudice.

ORDERED, that the Plaintiff's request for damages, costs, and/or attorney fees is hereby **DENIED**.

Judge, Circuit Court for Baltimore City

EXHIBIT 1



BRANDON M. SCOTT
Mayor

BALTIMORE POLICE DEPARTMENT



MICHAEL S. HARRISON
Police Commissioner

April 12, 2021

Robert Friedman, Esquire
Institute for Constitutional Advocacy and Protection
Georgetown University Law Center
600 New Jersey Avenue NW
Washington DC 20001
Rdf34@georgetown.edu

Re: MPIA 20 1690 Information related to "MPIA Fee Waivers"

Dear Mr. Robert Friedman:

You have made a request for public records pursuant to the Maryland Public Information Act (MPIA), which is the General Provisions Article, § 4-101, et seq., of the Annotated Code of Maryland for "Information Related to "MPIA Fee Waivers.

Please see below in reference to the breakdown of your request:

- *Any policy, rule, directive, guideline, or similar record governing under what circumstances BPD grants a fee waiver to individuals and/or entities who submit an MPIA request.

- * Records sufficient to show, for every MPIA request for which BPD has granted a fee waiver since January 1, 2018, the (a) identity of the requestor, (b) the subject matter of the request, and (c) the amount of the fees that were waived

- *Records sufficient to show, for every MPIA request for which BPD has denied a fee waiver since January 1, 2018, the (a) the identity of the requestor, (b) the subject matter of the request, and (c) the amount of the fees that were not waived

As mentioned previously, BPD does not have a data base in which fee waivers are maintained or tracked. Attorney Kay N. Harding has already informed you that BPD has received over 2300 PIA requests from calendar year 2020 alone. In 2021, BPD has already received over 550 requests. Please note, if your original request was demanded approximately 6400 files would have to be reviewed and several documents produced.

It has now come to my attention that you would like to narrow the scope of your requests to the following months and years: June 2018, July 2018, June 2019, July 2019, June 2020, and July 2020 - There are 863 files. As discussed with Ms. Harding, BPD would need to hire additional temporary help to be able to cull these past files and provide them to you.

Reasonable Cost and Fees

Reasonable fees and cost may be charged; however, the agency may not charge for the first two hours of search and preparation time. GP § 4-206(c). As the Attorney General of Maryland has explained in its PIA Manual:

an official custodian may charge reasonable fees for the search and preparation of records for inspection and copying. Search and preparation fees must be reasonably related to the actual cost to the governmental unit in processing the request. GP § 4-206(a); see also 71 Opinions of the Attorney General 318, 329 (1986) ("The goal . . . should be . . . neither to make a profit nor to bear a loss on the cost of providing information to the public."); PIACB Opinions 19-01 (Sept. 24, 2018) (although any "actual cost incurred" by the agency to respond to a PIA request might be compensable under the PIA's definition of reasonable fee, the connection between a particular cost and the response must be clear). The custodian may charge a "reasonable fee" to search for, prepare, and reproduce a record in a "customized" format selected by the applicant, and—as is more often the case—may charge "the actual costs" of searching for, preparing, and producing a public record in standard format. GP § 4-206(b)(1). Fees may not be charged, however, for the first two hours of search and preparation time. GP § 4-206(c).

Office of the Attorney General's Maryland Public Information Act Manual, 7-1, (15th ed., November 2020).

Due to the volume of the requests, lack of resources, and to prevent unnecessary delays in production, the City Law Department obtained three vendor estimates to hire a Contract Attorney to produce responsive documents. The vendor's estimates were respectfully \$45, \$49.60, and \$65. Utilizing the lowest cost estimate, it is estimated that it will take a Contract Attorney 432 hours to go through 863 files. The cost of review is based on the number of estimated hours it takes to review the files, extract responsive documents, tag, and provide to the E-Discovery Manager and/or Reviewing Attorney.

Your cost is based on the time it takes to produce and review the production for release. The hourly rate of the individuals working on the production are as follows Contract Attorney: \$45, Lawyer: \$41, Paralegal: \$24, and E-Discovery Project Manager \$35. The estimate is based on the number hours estimated rate of review and time it takes to produce multiplied by the hourly cost for reviewer equaling the cost estimate. The cost is calculated using the prorated salary of each individual and the estimated time extended by each, which breaks down accordingly:

- 10 hours - Paralegal time to assist in identifying files, instructing, and/or training Contract Attorney on files: ($\$24/\text{hr.} \times 10 \text{ hours}$) = \$240.00.
- 432 hours - Vendor/Contract Attorney's time: ($\$45/\text{hr.} \times 432 \text{ hrs.}$) = \$19,444.00.
- 150 hours - eDiscovery Professional time - Collection/evidence repository/Production/Project Management: ($\$36/\text{hr} \times 150 \text{ hrs}$) = \$5,400.00
- 80 hours Reviewing Lawyer's time - ($\$41/\text{hr.} \times 80$) = \$3,280.00

Total: \$ 28,364.00

It is estimated that it will take one Vendor/Contract Attorney approximately 11 weeks to produce the documents to BPD's counsel working 35 – 40 hours per week on this PIA requests.

Please note, if the cost estimate was under estimated, you will be required to pay any additional funds needed before the completion of the project. Likewise, if the cost estimate was over estimated and it took less time to review, you will be provided with a refund of any unused funds.

Redactions

Please note that the DCU is unable to describe with any specificity the types of redactions that may be needed regarding the requested documents. In the interest of transparency, the following is a general category for redactions: Privileged or confidential by law, GP § 4-301 (a)(i).

Fee Waiver Request

Your fee waiver request was reviewed and is denied.

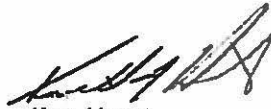
Prepayment

If you understand the potential costs of the document review, processing and would be willing to pay the cost of the document review and processing please respond back to the Document Compliance Unit. Full payment is due before any work can commence. *Ireland v. Shearin*, 417 Md. 401, 412 n.8 (2010) (prepayment of fees permissible); Remit certified check or money order in the amount of \$28,364.00 payable to the Director of Finance; mail the payment to the Baltimore Police Department's Document Compliance Unit, Legal Affairs, 242 W. 29th Street, Baltimore, Maryland 21211.

Please understand that because of COVID-19 responses to document requests may take longer than normal. However, the DCU will work diligently to respond to your request as quickly as possible. Please contact Ms. Harding if you have any further questions, concerns, or if you'd like to further narrow your requests.

Please refer to Tracking Number # MPIA 20 1690 in any subsequent correspondence in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ken Hurst', with a stylized flourish at the end.

Ken Hurst
Contract Specialist
Baltimore Police Department
Office of Legal Affairs
Document Compliance Unit

EXHIBIT 2

LAWRENCE J. HOGAN, SR.
GOVERNOR

BOYD K. RUTHERFORD
LT. GOVERNOR



JOHN H. WEST, III, ESQ.
Chair

LARRY E. EFFINGHAM
DEBORAH MOORE-CARTER
RENE C. SWAFFORD, ESQ.
DARREN S. WIGFIELD

STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 20-05

November 7, 2019
Baltimore County Police Department, Custodian
Michael Redding, Complainant

The complainant, Michael Redding, alleges that the Baltimore County Police Department ("County PD") charged an unreasonable fee when it provided an estimated fee range of \$2,665 to \$3,315 to respond to his Public Information Act ("PIA") request for the contents of his investigative file. Mr. Redding made his PIA request through an attorney, but files his complaint with the Board *pro se*. The County PD responded through its attorney and referred the Board to its fee letter to Mr. Redding's attorney, which contains a breakdown of the estimate. The County PD also provided additional information on the basis for its fee estimate, and its general fee-charging practices.

Analysis

This Board is authorized to review complaints that allege: (1) that "a custodian charged a fee under § 4-206 of [the PIA] of more than \$350" and (2) that "the fee is unreasonable." § 4-1A-05(a).¹ The law defines a reasonable fee as "a fee bearing a reasonable relationship to the recovery of actual costs incurred by a governmental unit." § 4-206(a)(3). If the Board finds that "the custodian charged an unreasonable fee under § 4-206" the Board shall "order the custodian to reduce the fee to an amount determined by the Board to be reasonable and refund the difference." § 4-1A-04(a)(3).

We have in the past explained that an agency's *estimation* of a fee—as opposed to a fee based upon actual costs incurred by an agency—presents certain difficulties for the Board. *See, e.g.,* PIACB-17-04 at 3 (Nov. 22, 2016). For example, where a fee estimate constitutes a wide range and is subject to revision once the work to respond to the request has been performed, our ability to order the fee reduced to a reasonable amount is constrained. *Id.* Nonetheless, we have reviewed the reasonableness of a fee estimate when it comprises a precise figure based upon a detailed breakdown of anticipated costs, and when the custodian requires prepayment of the estimate before providing the records. *See* PIACB 19-01 at 2-3 (Sept. 24, 2018). Here, the fee

¹ References are to the General Provisions Article of the Annotated Code of Maryland, unless otherwise indicated.

estimate comprises a range—from \$2,665 to \$3,316—and it is not clear from the materials before us the prepayment amount the County PD desires from Mr. Redding. Nonetheless, because the County PD has based its fee estimate on a preliminary review of the records responsive to the request, and because it has provided a detailed breakdown of the potential response costs, we believe we can provide an opinion as to the reasonableness of the estimated fee.

Under the PIA's definition of "reasonable fee," a governmental agency may recover only the actual costs it incurs in producing the requested public record. § 4-206. "Actual costs" may include "the search for, preparation of, and reproduction of a public record . . . including media and mechanical processing costs." § 4-206(b)(1). Search fees reflect the time spent locating the requested records, while preparation fees include the time spent reviewing the records for any information that must be withheld or redacted. *See* PIACB 17-12 at 2 (May 18, 2017) (citing the Public Information Act Manual at 7-1 (2015)). When staff time is included in the calculation of actual costs, staff salaries must be prorated to an hourly rate and reflect the actual time they spent on the production. § 4-206(b)(2). That the PIA permits an agency to recover only actual costs ensures that agencies will not ordinarily profit from fees charged for public records. *See, e.g.,* PIACB 18-08, 3 (Mar. 7, 2018); 71 *Opinions of the Attorney General* 318, 329 (1986).

Here, the complainant requested from the County PD his entire investigative file, which comprises approximately 927 pages of paper records, and electronic records on 26 Compact Discs ("CDs"). The County PD's estimate is based upon the staff time necessary to search for and review these responsive records, beyond two uncharged hours, and the amount it will charge to copy both the paper records and the electronic records on CD. Specifically, the County PD detailed its estimate to respond to the request as follows:

- Staff costs: \$1,372.50 to \$2,022.50
 - Legal review of the 927 paper records = \$722.50 (14.45 hours x \$50/hour)
 - Legal review of the files on 26 CDs = \$650 to \$1,300 (13 to 26 hours x \$50/hour)
- Reproduction costs: \$1,362
 - Copies of paper records: \$354 (708 pages² x \$0.50/page)
 - Copies of CDs: \$1,008 (26 CDs x \$42/CD)
- Total estimated cost: \$2,734.50 to \$3,384.50³

² Based on its preliminary review of the 927 responsive paper records, the County PD anticipated that 219 pages were privileged or confidential and would not be released.

³ The County PD's slightly lower estimated fee range of \$2,665 to \$3,315 appears to have resulted from a calculation error: it claims that the total cost for producing the paper records—including the legal review time (\$722.50) and the copying costs (\$354)—is \$1,007. But that sum is actually \$1,076.50.

The County PD explained that this figure represents an estimate of the costs, and that the final fee could be higher or lower depending on the actual number of disclosable records and the actual staff time required to process the response.

We review the staff costs and the reproduction costs in turn. Turning to the staff costs, the County PD's response states that the \$50 per hour for its attorney's review time is lower than her actual salary. It also explains that the 14.45 hours for review of the paper records is based on an estimate of one minute of review per page, though the actual amount of time could be more or less, depending on the particular page.⁴ With regard to the review of the electronic records on CD, the response explains that CDs usually contain photographs, and/or audio and video recordings, and that reviewing these types of records can be quite time-consuming depending on the format and age of the particular file. The County PD claims that its estimate of 13 to 26 hours for review of all files on the 26 CDs is conservative. Based on the materials before us, we conclude that the estimated fee range of \$1,372.50 to \$2,022.50 for staff time appears to be reasonable. The estimated legal review time does not appear to be inflated, given the volume of paper and electronic records and the complexity of an investigative file. Moreover, the hourly charge appears reasonable in that it is lower than the actual salary of the County PD's attorney.

We next turn to the estimated reproduction costs, and are more hesitant to find them reasonable. As a preliminary matter, we urge custodians to offer to provide applicants with electronic copies of responsive records whenever that format will be less costly than paper copies. *See* PIACB 19-01 at 3 (Sept. 24, 2018) (encouraging this practice); GP § 4-103(b) (the PIA should be construed in favor of disclosing public records "with the least cost and delay"). Here, for example, the County PD anticipates providing the complainant with the responsive electronic records on CDs; it likely could scan the responsive paper records onto a CD as well, for a fraction of the cost it is charging for paper copies. Although there may be more staff time involved with this method, we suspect it will result in a lower overall fee in situations like this where there are voluminous paper records and the agency is charging a relatively high per page copying fee.

That said, we are skeptical of the County PD's \$42 per CD reproduction cost. Although we credit the estimated time it will take to review the electronic files on the 26 CDs, as explained above, the basis for the separate \$42 per CD reproduction charge is unclear to us. That amount likely is not the actual cost of the CD itself, which we assume is much lower than \$42 per CD. And, if the \$42 per CD includes the anticipated time it takes staff to copy electronic files onto the CD, this fact should be disclosed and categorized as staff time. Otherwise, the agency runs the risk of charging a "flat fee" for CDs that does not reflect the actual costs incurred by the agency. In PIACB 19-12 at 3, n. 4 (Aug. 7, 2019), we explained that although a per-page (or per-CD) fee

⁴ One minute per page multiplied by 927 pages is 927 minutes, or 15.45 hours. The County PD's estimate of 14.45 hours reflects the fact that it would provide the complainant with one hour for free here, which, when added to the hour already spent on the County PD's preliminary review of the responsive records, comprises the two free hours to which the complainant is entitled pursuant to § 4-206(c).

might simplify an agency's fee calculation, and might even result in a lower fee than calculating actual costs,

the PIA does not specify this method as permissible. Instead, the statute repeatedly notes the ability of a governmental unit to recover "actual costs" incurred. For a governmental unit to use a per-page fee in accordance with the PIA, we believe that documentation needs to be kept by the agency to substantiate . . . whether the per-page fee reasonably reflects the actual costs of the agency.

(quoting PIACB 17-06 at 3-4 (Nov. 28, 2016)) (internal modifications and ellipses omitted).

We conclude that the \$42 per CD reproduction charge is not reasonable on its face, and the County PD has not explained how that charge reflects its actual costs in providing CDs to Mr. Redding. Accordingly, the County PD must either eliminate the CD reproduction charges from its fee estimate, or modify its per CD charge to an amount that accurately reflects the actual costs it incurs in providing those CDs to Mr. Redding.

Conclusion

As explained above, we find that although most of the components of the County PD's fee estimate appear to reflect a reasonable fee under the PIA, the amount it is charging for CD reproduction must either be eliminated or modified to accurately reflect its actual costs in providing those CDs to the complainant. Furthermore, we encourage the agency to consider whether its costs could be reduced by providing the complainant with electronic copies of the responsive paper records, so long as that method is acceptable to the complainant. Finally, we commend the County PD's attorney for her apparent willingness to work with this requestor—and others who request investigative files—to narrow the scope of the request and thus reduce fees. To the extent that the Office of the Public Access Ombudsman may be helpful in this effort, we are taking the liberty of referring the parties to that Office.

Public Information Act Compliance Board

John H. West, III, Esq.
Larry E. Effingham
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LAWRENCE J. HOGAN, SR.
GOVERNOR

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JOHN H. WEST, III, ESQ.
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DARREN S. WIGFIELD
VACANT

STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 20-11

March 30, 2020
Montgomery County Public Schools, Custodian
Mark Flatten, Complainant

The complainant, Mark Flatten, alleges that Montgomery County Public Schools ("MCPS") charged him an unreasonable fee estimate of \$442.96 to respond to his Public Information Act ("PIA") request for various records pertaining to MCPS employees who received paid time off to perform union-related work in fiscal year 2019.¹ MCPS, through counsel, responds that the original fee estimate contained an incorrect personnel charge, and that the corrected fee estimate is now \$296.53. MCPS states that this revised fee estimate is reasonable based upon the personnel time required to retrieve the records responsive to Mr. Flatten's request.

Analysis

This Board is authorized to review complaints that allege: (1) that "a custodian charged a fee under § 4-206 of [the PIA] of more than \$350" and (2) that "the fee is unreasonable." § 4-1A-05(a).² The law defines a reasonable fee as "a fee bearing a reasonable relationship to the recovery of actual costs incurred by a governmental unit." § 4-206(a)(3). If the Board finds that "the custodian charged an unreasonable fee under § 4-206" the Board shall "order the custodian to reduce the fee to an amount determined by the Board to be reasonable and refund the difference." § 4-1A-04(a)(3).

We have in the past explained that an agency's *estimation* of a fee—as opposed to a fee based upon actual costs incurred by an agency—presents certain difficulties for the Board. *See*,

¹ Mr. Flatten also alleges that he is entitled to a fee waiver. As we have explained on numerous occasions, we do not have jurisdiction over a custodian's decision to deny a fee waiver request, and therefore decline to address that aspect of the complaint. *See, e.g.*, PIACB 19-11, 1-2 (July 19, 2019). The parties may wish to consult Chapter 7 of the PIA Manual, which is available on the Attorney General's website, for more information on fee waivers and the factors that custodians should consider when determining whether to grant them.

² References are to the General Provisions Article of the Annotated Code of Maryland.

e.g., PIACB 17-04 at 3 (Nov. 22, 2016). Nonetheless, we have reviewed the reasonableness of a fee estimate when it comprises a precise figure based upon a detailed breakdown of anticipated costs, and when the custodian requires prepayment of the estimate before providing the records. *See* PIACB 19-01 at 2-3 (Sept. 24, 2018). That is the case here, so we will review the reasonableness of the estimated fee.

As a threshold matter, MCPS requests that we dismiss the complaint as moot now that the revised estimated fee is less than \$350, which is below our review threshold. We note, however, that MCPSS revised its fee estimate only in response to the complaint, so we will treat that information accordingly—that is, we will consider it as part of MCPS’s response to the complaint, not as information that deprives us of jurisdiction.

MCPS’s initial fee estimate of \$442.96 was based upon the personnel time required to search for, retrieve, and respond to the request—minus two free hours—as follows:

- \$233.34 (3 hours at \$77.78 per hour – Director, Department of Employee and Retiree Services)
- \$130.86 (2 hours at \$65.43 per hour – Coordinator, Office of Employee Engagement and Labor Relations)
- \$78.76 (2 hours at \$39.38 per hour – Communications Specialist – Office of Communications)

In response to the complaint, MCPS reviewed the estimated fee and discovered that it had overcharged for the personnel time attributed to the Department of Employee and Retiree Services. Instead of charging \$77.78 per hour for three hours of a director’s time, MCPS instead would charge \$28.97 per hour for three hours of a data support specialist’s time, bringing the revised estimate to \$296.53.

Based on the materials before us, we cannot say that this revised fee estimate is unreasonable under the PIA. Mr. Flatten’s request is broad in that it seeks information across all MCPS departments and a detailed employee-by-employee breakdown for certain employees who received paid time off for union-related activities. MCPS explains that the request will require it to “pull the raw data for 23,000+ employees, then export, review, analyze and reformat the data.” MCPS further explains that its “data system for employees is undergoing upgrades precisely because such data pulls are manually time intensive.” Mr. Flatten argues that, on the contrary, all of the information he seeks “should be readily produced in a single, simple database,” and it is therefore “difficult to believe that retrieving this information at MCPS would entail anything more than a simple search of payroll records for [a] unique payroll code denoting paid union release time, which should take no more than a few minutes.”

As we have explained in the past, “we are not in a position to micromanage a custodian’s electronic search and retrieval process,” short of an obvious failure to use readily-available

technology. *See* PIACB 19-06, 2 (November 27, 2018). Accordingly, based on the materials before us, we cannot say that MCPS's proposed response plan and resultant fee estimate is unreasonable. Of course, MCPS should keep detailed track of the actual time required to respond to Mr. Flatten's request and refund any difference between the fee estimate and the actual cost.

Conclusion

For the reasons above, we find that MCPS's estimated fee of \$296.53 appears to reflect a reasonable fee under the PIA, but is subject to revision after MCPS performs the actual work to respond to the request.

Public Information Act Compliance Board

John H. West, III, Esq., Chair
Deborah Moore-Carter
René C. Swafford, Esq.

LAWRENCE J. HOGAN, JR.
GOVERNOR

BOYD K. RUTHERFORD
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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 20-04

November 25, 2019
Montgomery County, Custodian
Bernadette Fowler Lamson, Complainant

The complainant, Bernadette Fowler Lamson, alleges that Montgomery County ("County"), charged her an unreasonable fee of \$3,468.75 to respond to her May 10, 2019 Public Information Act ("PIA") request for various records pertaining to her employment with the County for the time period of July 2017 through March 2018. The County, through outside counsel, responded with the basis for the fee, as follows:

Copies: \$162.75 (1,085 pages at \$0.15 per page);

Labor: \$3,306 (10.7 hours of outside counsel's time to review the documents, at \$380 per hour—two hours were not charged, as required by the PIA);

Total: \$3,468.75.

The complainant makes a number of allegations as to why this fee is unreasonable. First, she contends that the PIA does not permit a custodian to recover costs for reviewing responsive documents for legal privileges. Second, she argues that, even if the PIA does allow a charge for such review, it does not permit a custodian to outsource that review to an expensive outside contractor and then charge the requestor for that expense. Third, Ms. Lamson alleges that the outside counsel here had already performed much of the relevant document review in connection with other legal matters, so it should not have charged for duplicate work. We address each contention in turn.

In our view, the plain language of the PIA permits a custodian to recover the actual costs it incurs in reviewing responsive records for privilege and confidentiality. The PIA permits a custodian to charge a "reasonable fee," which is defined as "a fee bearing a reasonable relationship to the recovery of actual costs incurred by the governmental unit." § 4-206.¹ Explicitly included in the "actual costs" a custodian may recover are "*staff and attorney review costs*," which must be "prorated for each individual's salary and actual time attributable to the search for and preparation of a public record." § 4-206(b)(2) (emphasis added). Many of our opinions finding that a fee or fee estimate appears to be reasonable include a custodian's charge for legal review of the responsive records. *See, e.g.*, PIACB 19-11 (August 16, 2019); PIACB 19-08 (January 17, 2019). The complainant has not

¹ All references are to the General Provisions Article of the Annotated Code of Maryland.

pointed us to any authority that would cast doubt on this reading of the PIA. Accordingly, we do not find any merit in the complainant's allegation on this front.

Next, the complainant alleges that the County is not permitted to pass on to her the cost of the outside contractor who undertook the work to respond to the PIA request here. As a general matter, we have approved a custodian's recovery of contractor costs, as long as those costs are directly attributable to the response. *See, e.g.*, PIACB 19-01 (Sept. 24, 2018); PIACB 17-18 (Aug. 31, 2017); PIACB 17-07 (Feb. 28, 2017). In PIACB 19-01, for instance, we explained that "arguably, an outside contractor's charge [in such a scenario] is an actual cost to an agency," and found that "the actual hourly cost of the contractor and the fixed-price [hourly] cost for the contractor's services [is] reasonably related to an agency's actual cost in responding to a PIA request." PIACB 19-01 (internal quotation marks and citations omitted).

That is not to say that, on a case-by-case basis, every third-party vendor's costs can be recovered from a requestor. For example, where it is clear that a custodian has the capability and resources to perform response-related work "in house" for less expense than engaging a contractor, the PIA likely would not permit the custodian to charge the requestor for the contractor's costlier fee. *See* § 4-103(b) (Explaining that the PIA "shall be construed in favor of allowing inspection of a public record, *with the least cost and delay*" to the requestor) (emphasis added). That does not appear to be the case here, however.

The parties agree that Ms. Lamson's employment with the County has been the subject of certain administrative grievance processes and a related PIA lawsuit that made its way to the Court of Appeals. *See Lamson v. Montgomery Cty.*, 460 Md. 349 (2018). It is not our role to rehash any of these matters or investigate the minutiae of the various discovery and PIA requests involved in them. Rather, it suffices to say that the outside counsel that responded to the PIA request at issue here is the same counsel that has represented the County in these other matters. According to counsel's response to the present complaint, the reason it—and not County employees—worked on responding to the instant PIA request is because it "has been assisting the County in responding to Complainant's administrative and other matters for the past several years," and, therefore, engaging outside counsel was actually "the most efficient and cost-effective means of response for both the County and Complainant." That is, because the complainant's present PIA request pertained to many documents that were already familiar to outside counsel in relation to other matters involving the complainant, it was more efficient for outside counsel to respond than for the County to start from scratch.

On the Board's request, outside counsel provided an affidavit detailing the work performed to respond to the PIA request and the amount actually charged to the County for that work. The affidavit states that counsel spent 11 hours responding to the request, including conducting a search of the electronic discovery management system, reviewing the responsive records for legal privileges, preparing a privilege log, and otherwise managing the preparation of the final response. The affidavit also states that other employees of the outside counsel's firm spent an additional 3 hours on the response. In total, outside counsel charged the County \$5,400 for the work performed in responding

to Ms. Lamson's May 10, 2019 PIA request. As noted above, Ms. Lamson was charged \$3,306 of this total.

Based on the submissions before us, we do not find that the fee charged Ms. Lamson to respond to her May 10, 2019 PIA request is unreasonable. Although we understand that some of the requested documents may already have been reviewed by outside counsel in the context of other administrative or judicial actions, it appears that Ms. Lamson's present PIA request did not perfectly coincide with any previous document requests, and that, therefore, outside counsel was required to run new search parameters and review a unique pool of documents comprising more than 1,000 pages. It also makes sense to us that outside counsel was likely in a better position than the County, based on the circumstances here, to most efficiently respond to the request. Even if the outside counsel's hourly rate is higher than a similarly-situated County employee, the fact that outside counsel had ready access to the responsive documents based upon its representation of the County in other matters involving the complainant means that it likely was able to perform the work necessary to respond to the request in less time and with less duplicated effort than if the County responded on its own.

Conclusion

Based on the materials before us, we do not find that the County's fee of \$3,468.75 is unreasonable. We decline to review other matters that are not within our jurisdiction, such as the thoroughness of the County's response, or the documents that are or are not in the possession of outside counsel. To the extent that the parties have disputes on these and other fronts, they may benefit from seeking the Public Access Ombudsman's assistance.

Public Information Act Compliance Board

John H. West, III, Esq.
Larry E. Effingham
Rene C. Swafford, Esq.

LAWRENCE J. HOGAN, JR.
GOVERNOR

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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB - 19-08

January 17, 2019
Baltimore City State's Attorney's Office
(Jermaine Blackwell, Complainant)

The complainant, Jermaine Blackwell, alleges that the Baltimore City State's Attorney's Office (BCSAO) charged him an unreasonable fee when it requested prepayment of \$1,275 to respond to his Public Information Act ("PIA") request for the contents of his case files. The BCSAO responded with an itemized description of the basis for the fee, detailed below.

The complainant also alleges that the BCSAO did not grant his request for a fee waiver, which he had supported with an affidavit of indigency pursuant to Md. Code, General Provisions Article ("GP") § 4-206(e). The BCSAO responded that it had considered the complainant's indigence, as well as other "public interest" factors, but that it nonetheless declined to waive the fee. We will address the estimated fee and the request for a fee waiver in turn.

Analysis

This Board is authorized to review complaints that allege: (1) that "a custodian charged a fee under § 4-206 of [the PIA] of more than \$350" and (2) that "the fee is unreasonable." GP § 4-1A-05.3. The law defines a reasonable fee as "a fee bearing a reasonable relationship to the recovery of actual costs incurred by a governmental unit." GP § 4-206(a)(3). If the Board finds that "the custodian charged an unreasonable fee under § 4-206" the Board shall "order the custodian to reduce the fee to an amount determined by the Board to be reasonable and refund the difference." GP § 4-1A-04(a)(3).

a. The BCSAO's fee estimate

Although we have in the past explained that an agency's *estimation* of a fee—as opposed to a fee based upon actual costs incurred by an agency—presents certain difficulties for the Board, *see* PIACB-17-04 at 3 (Nov. 22, 2016), we have nonetheless reviewed the reasonableness of a fee estimate when it comprises a precise figure based upon a detailed breakdown of anticipated costs, and when the custodian requires prepayment of the estimate before providing the records. *See* PIACB 19-01 at 2-3 (Sept. 24, 2018). Because that is the case here, we will review the reasonableness of the estimated fee charged by the BCSAO.

Under the PIA, a reasonable fee may include “[t]he actual costs of the search for, preparation of, and reproduction of a public record in standard format, including media and mechanical processing costs.” GP § 4-206(b)(1). Search fees reflect the time spent locating the requested records, while preparation fees include the time spent reviewing the records for any information that must be withheld or redacted. *See* PIACB 17-12 at 2 (May 18, 2017) (citing the Public Information Act Manual at 7-1 (2015)). When staff and/or attorney search and preparation costs are included in the fee calculation, their salaries must be prorated to an hourly rate, and the calculation must reflect the actual time attributable to search and preparation. *See* GP § 4-206(b)(2).

Here, the complainant requested from the BCSAO all records that pertained to him, which included documents in three case files. The BCSAO detailed its fee to respond to the request as follows:

- Paper copying costs: \$400 (800 pages x \$0.50 per page)
- Agency employee costs: \$765
 - Attorney review: \$375 (5 hours x \$75 per hour)
 - Clerk review, redaction, copying: \$390 (26 hours x \$15 per hour; 2 additional hours uncharged)
- Compact disc (“CD”) costs: \$110 (11 CDs x \$10 per CD)
- Total cost: \$1,275

The BCSAO further explained that this figure represents an estimate of the costs, and that the final fee could be higher or lower depending on the actual number of disclosable records and the actual effort required to process the response.

Based on this material, we conclude that the estimated fee appears to be reasonable in that it reflects the costs that the BCSAO anticipates it will incur in providing the responsive records. We note that the amount of employee time estimated to review the approximately 800 responsive pages does not appear unreasonable on its face—prosecutorial case files often contain information that must be withheld or redacted under various PIA exemptions, and the amount of time it may take to review approximately 800 pages for this sensitive information is likely not insignificant. However, because the fee remains subject to change once the BCSAO incurs actual costs, we remind the BCSAO to keep a detailed account of the time its employees expend on review, and to refund any amount the complainant overpays. Additionally, to the extent feasible, and if amenable to the complainant, we suggest that the BCSAO consider scanning the paper documents into an electronic format and providing them on a thumb drive or CD, so as to obviate the need to charge for paper copies.

b. The BCSAO’s denial of the fee waiver request

We have in the past declined to address a custodian’s refusal to grant a fee waiver request as outside of our jurisdiction. *See, e.g.,* PIACB 18-01 (Oct. 2, 2017). Under the circumstances here, however, we believe we may hazard some guidance to the agency without overstepping our bounds.

In explaining its decision to deny the complainant’s request for a fee waiver, the BCSAO acknowledged that the complainant had submitted an affidavit of indigency, but went on to state that the complainant had not provided any argument as to why waiving the fee for his case file would be

in the public interest. The agency, therefore, declined to waive the fee. Based upon our reading of the plain language of the PIA, however, we believe that the complainant's affidavit of indigency was, by itself, a sufficient basis to grant the fee waiver request, even if the complainant did not submit any reasons why waiving the fee would be in the "public interest."

As amended in 2015, the PIA provides that a custodian may waive a fee if the applicant requests a waiver, and if "(i) the applicant is indigent and files an affidavit of indigency, *or* (ii) after consideration of the ability of the applicant to pay the fee and other relevant factors, the official custodian determines that the waiver would be in the public interest." GP § 4-206(e) (emphasis added). The wording of the statute here is in the disjunctive—a custodian may grant a requested fee waiver if the applicant provides an affidavit of indigency, *or* if the custodian determines the waiver would be in the public interest, after considering relevant factors, including the applicant's ability to pay. This wording suggests that a custodian may grant a fee waiver on the basis of an affidavit of indigency alone, pursuant to GP § 4-206(e)(2)(i), without considering the relevant factors envisioned in GP § 4-206(e)(2)(ii). Accordingly, to the extent that the BCSAO may have denied the complainant's fee waiver request because it believed it was required to evaluate public interest factors, we encourage the agency to revisit its decision.¹

Conclusion

We find that the BCSAO's fee estimate appears to reflect a reasonable fee under the PIA, but that the agency should keep a detailed account of the actual costs it incurs when undertaking the work required to review and produce the records. We also encourage the agency to revisit its decision to deny the complainant's request for a fee waiver, to the extent that it may have misconstrued the PIA's fee waiver provisions.

Public Information Act Compliance Board

John H. West, III, Esq., Chair
Larry E. Effingham
Deborah Moore-Carter

¹ We recognize that, absent arbitrariness and capriciousness, and after giving due consideration, it is within the agency's discretion whether to grant an applicant's request for a fee waiver. See GP § 4-206(e) ("The official custodian *may* waive a fee under this section . . .") (emphasis added). See also *Action Committee for Transit, Inc., et al. v. Town of Chevy Chase*, 229 Md. App. 540, 562-63 (2016) (an agency's decision to deny a fee waiver request under the PIA may be reviewed for arbitrariness and capriciousness).

LAWRENCE J. HOGAN, SR.
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JOHN H. WEST, III, ESQ.
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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

Public Information Act Compliance Board

June 1, 2016

Complainant: Bernadette F. Lamson

Custodian agency: Montgomery County

Date of original Public Information Act requests: Request #1: October 8, 2015, revised November 10, 2015; Request #2: March 7, 2016, revised March 31, 2016

Date of custodian's response to requester, with fee estimate: Request #1: November 9, 2015, revised November 10, 2015 and January 13, 2016; Request #2: March 18, 2016, revised April 7, 2016 and May 4, 2016

Date of complaint to the Compliance Board: April 11, 2016

Date of Compliance Board's conference: May 20, 2016

Fees in dispute: For Request #1, \$2,216.67; for Request #2, \$2,044.32

Date of this opinion: June 1, 2016

Compliance Board's finding: Custodian's fee for Request #1 ordered reduced to \$1,276.00 to reflect "actual salary" of staff in accordance with § 4-206(b)(2) and to account for duplication of effort; fee for Request #2 reduced to \$1,635.00 to reflect actual salary.

Refund/reduction ordered: For Request #1, \$940.00. For Request #2, \$409.00. Total refund ordered: \$1,349.00.

Opinion

Complainant Bernadette F. Lamson protested the \$4,260.99 fee that Montgomery County's records custodian charged her for responding to two records requests that her counsel made on her behalf. As explained below, we order the County custodian to refund \$1,349.00 to Lamson.

The Public Information Act ("PIA") charges us with resolving complaints that "a custodian charged an unreasonable fee under § 4-206 of [the PIA]."¹ If we find that the

¹ The PIA is codified in the General Provisions Article (2014, with 2015 Supp.) of the Maryland Annotated Code, and the citations in this opinion are to that Article.

Bernadette F. Lamson

June 1, 2016

Page 2

custodian charged an unreasonable fee, we are to “order the custodian to reduce the fee to an amount [that we determine] to be reasonable and refund the difference.” § 4-1A-04. A “reasonable fee” under § 4-206 is “a fee bearing a reasonable relationship to the recovery of actual costs incurred by a governmental unit.” Here, we will begin with the hourly rate used by the custodian to calculate the fee and then turn to the number of hours used in the calculation.

Section 4-206(b)(1) sets forth two categories of tasks for which a custodian may charge an applicant a “reasonable fee.”² Both of those categories, one for the production of records in a “customized format” and one for “standard format” productions, pertain to the “search for, preparation of, and reproduction of” the requested public records. For a standard-format production, as occurred here, the custodian may charge a “reasonable fee” for the “actual costs” of those tasks, “including media and mechanical processing costs.” § 4-206(b)(1)(ii). From this language, it might appear that the custodian may charge a requester (as this custodian did) for all of the costs associated with a particular employee’s time in preparing documents of production – that is, for the hours spent multiplied by the compensation costs, including wages or salary and benefits, for that employee. Section 4-206(b)(2), however, explicitly addresses how “staff and attorney review costs” are to be calculated. Those costs, § 4-206(b)(2) provides, “shall be prorated for each individual’s salary and actual time attributable to the search for and preparation of a public record under this section.” What is clear to us is that we should apply the word “salary” in the ordinary sense when considering “staff and attorney review” costs. And, ordinarily, the word

² Section 4-206(b) provides:

- (1) Subject to the limitations in this section, the official custodian may charge an applicant a reasonable fee for:
 - (i) the search for, preparation of, and reproduction of a public record prepared, on request of the applicant, in a customized format; and
 - (ii) the actual costs of the search for, preparation of, and reproduction of a public record in standard format, including media and mechanical processing costs.
- (2) The staff and attorney review costs included in the calculation of actual costs incurred under this section shall be prorated for each individual’s salary and actual time attributable to the search for and preparation of a public record under this section.

Bernadette F. Lamson

June 1, 2016

Page 3

“salary” does not include “benefits.”³ We have conservatively estimated benefits at 20% of the compensation rate charged for the attorneys’ time and have reduced the fee for both requests accordingly.

The next question is whether the number of hours spent on each request was reasonable. Some of the records sought in the first request consisted of email chains of communications among multiple attorneys, and each attorney reviewed each chain. As a result, a number of records underwent multiple reviews and were produced in multiple copies. To account for that duplication of effort, we have reduced the fee for the first request by an additional 28%. Our ability to assess the extent of the duplication would have been improved by details on the tasks performed by the particular attorneys, and so we encourage custodians to ask the staff who work on PIA requests to document their time.

We have not addressed, as irrelevant to our task, the parties’ many contentions regarding Lamson’s grievance against the County. Our jurisdiction is limited to the question of whether a fee is reasonable, and we encourage complainants and custodians alike to confine their submissions to the facts relevant to that inquiry.

Public Information Act Compliance Board

*John H. West, III, Esq.
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Deborah Moore-Carter
Darren S. Wigfield*

³ For example, the Bureau of Labor Statistics, in its release of the March 2016 Employment Cost Index, reported on the quarterly change in “compensation costs,” which were broken down into “wages and salaries” and “benefits.” <http://www.bls.gov/news.release/eci.nr0.htm>