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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB-17-12
May 18, 2017

Baltimore County State's Attorney's Office
(Charles Dante Patterson, Complainant)

Complainant, Charles Patterson, alleged that the Baltimore County State's Attorney's Office (BCSAO) charged an unreasonable fee when its custodian requested a pre-payment of \$1,145 for the contents of his case file, which he requested under the Public Information Act (PIA). The BCSAO's custodian responded with an itemized description of the basis for the cost that included the per-page fee for copies; the per CD/DVD cost; the hourly rates for clerical staff and attorney time; and the estimated pages and hours needed to respond to the request. The BCSAO further explained that the figure represented an estimate of the costs, and that the eventual fee could be higher or lower than the pre-payment amount.

The initial complaint included an allegation that the BCSAO denied a fee waiver request.¹ The matter was referred to the Public Access Ombudsman for assistance with that issue. Upon completion of that process, a renewed complaint was submitted to the Public Information Act Compliance Board (Board).

As explained below, we conclude that the rates used for the estimated fee charged by BCSAO appear to reflect a "reasonable fee" as defined by the PIA. Because the calculation may yield a different fee once the records are gathered, prepared, and copied, the Board views the estimate as premature and, therefore,

¹ The custodian included a detailed explanation of the BCSAO's denial of the fee waiver request based on the provision in the statute that existed before 2015, which considered the ability of an applicant to pay, along with the public interest in waiving the fee. Although this issue is not within the Board's jurisdiction, we note that the General Assembly amended the law, effective October 1, 2015, to allow an agency to waive its fee based on an applicant's request and a showing of the applicant's indigence OR that the waiver would serve the public interest. See General Provisions Article § 4-206(e) (2014, 2016 Supp.), hereinafter "GP".

cannot evaluate it further for purposes of ordering a reduction or a refund. As discussed below, there are several factors that the BCSAO may want to evaluate when it calculates the actual costs for responding to the request.

Analysis

This Board is authorized to review complaints that allege: (1) that “a custodian charged a fee under § 4-206 of [the Public Information Act] of more than \$350” and (2) that “the fee is unreasonable.” GP § 4-1A-05. This provision limits our authority to the question of whether the fee that a custodian has charged is a “reasonable fee,” as defined by the PIA. *See* PIACB-17-04 (dated November 22, 2016), and PIACB-16-09 (dated June 15, 2016). 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).

The 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 for locating the requested records, while preparation fees include the time spent reviewing records for any items that require withholding. *See* Public Information Act Manual 7-1 (2015). When staff and attorney review costs are included in the calculation of actual costs, their salaries must be prorated to an hourly rate and consider the actual time attributed to the search and review. GP §4-206(b)(2). We have explained in a prior opinion that the salary does not include an employee’s benefits, and that duplication of effort should not be charged to the requester. *See* PIACB-16-05 (dated June 1, 2016). In any event, a custodian must not charge for the first 2 hours of the search for a record. GP § 4-206(c). Although the law allows an agency to recover its costs, the focus on actual costs ensures that an agency does not profit from the fee charged. *See* 71 Op. Att’y Gen. 318, 329 (1986).

Here, the BCSAO custodian has calculated its fee based on the following figures:

Copying costs	50 cents per page for 1500 pages
CD/DVDs	\$5.00 each for 14 CD/DVDs
Clerical staff	\$25 per hour (review, redaction, and copying)

estimated time: 6 hours minus first 2 hours = 4
hours x \$25

Attorney review \$75 per hour x 3 hours

The total fee of \$1,145 reflects an estimate of the time the agency will need to gather, prepare, and provide the records, plus copying costs. The custodian indicated that the actual amount could be greater or less than the estimated amount.

The BCSAO provided supplemental information explaining the rates used for its calculations. The copy costs of 50 cents per page reflect paper, ink cartridges, machine usage, electricity, and staffing for making the copies. The BCSAO noted that redacted pages often require multiple copies, but that only the final redacted page is included in the calculation. A similar consideration accompanied the \$5.00 per CD/DVD rate. While these rates may reflect reasonable costs, we cannot discern whether the amounts include staff time. If they do, then the additional charge for staff time should not be charged. Alternatively, the rate per copy or CD/DVD could be reduced to remove the staff time.

For the staff rates, the BCSAO indicated that the highest rate for its law clerks is \$44.94 per hour, which is greater than the \$25.00 per hour used for the estimate. For its attorney rate of \$75.00, the BCSAO considered the range of attorney rates in the Office, which range from \$59.35 to \$107.13. The \$75.00 rate used to calculate costs is less than the average rate of \$83.24 per hour. In explaining the rates, however, the BCSAO mentioned that it included salary and benefits to discern the hourly rate used for PIA requests. We previously reduced an hourly rate that included benefits, and suggest that BCSAO review its hourly rates to ensure that only the salary is considered. *See* PIACB-16-05 (dated June 1, 2016).

As we have explained previously, the PIA does not require this Board to evaluate an estimated fee, but instead, mandates that we review whether a governmental unit has charged a fee under GP § 4-206 that was unreasonable. *See* PIACB-17-04 (dated November 22, 2016). In part, an estimated fee does not reflect the actual costs incurred by a governmental unit and hinders this Board's ability to direct a reduction or refund of the portion of a fee that appears to be unreasonable. For this reason, we have dismissed other complaints regarding an estimated fee as premature. *See* PIACB-17-04; *see also* PIACB-17-07 (dated February 28, 2017).

When we have dismissed a complaint on this basis, we have recommended that the parties discuss a modification of the request to adjust the estimated fee or to consult with the Public Access Ombudsman, if possible. We understand that these options were pursued prior to the current complaint.

For the reasons stated, we cannot say that the fee is unreasonable based on the information available at this juncture and the rates used by the BCSAO, which appear to be reasonable. The Complainant's focus on his inability to pay the fee addresses the waiver denial and is not relevant to whether the costs included in the fee bear a reasonable relationship to the agency's actual costs. Because the amount remains subject to change once the actual costs are incurred, this Board cannot determine whether the fee should be reduced. The complaint, therefore, must be dismissed as premature. Once a more precise figure exists, the Complainant may submit a new complaint to this Board in accordance with the statute.

Public Information Act Compliance Board

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