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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB-17-17
August 8, 2017

Department of Labor, Licensing and Regulation
Maryland Real Estate Commission
(Jarrod Sharp, Complainant)

Complainant, Jarrod Sharp, alleged that the Maryland Real Estate Commission of the Department of Labor, Licensing and Regulation (agency or DLLR) charged an unreasonable fee when its custodian requested a pre-payment of \$62,525.50 for the public records he requested under the Public Information Act (PIA). The agency's records custodian responded with an itemized description of the hourly rates of staff and the estimated time to compile and prepare the materials for disclosure. The agency explained that the figure represented an estimate of its costs, and emphasized its interest in conferring with the Complainant to find a means of fulfilling his request without undue burden on the agency's staff.

The initial complaint was filed with both this Board and the Public Access Ombudsman, and included an allegation that the agency denied a fee waiver request. This Board can review only whether the fee charged is reasonable, and does not have the authority to evaluate the denial of a fee waiver. The Ombudsman can address that issue during the course of any efforts to resolve the dispute that occur.

As explained below, we conclude that the rates used for the estimated fee charged by the DLLR appear to reflect a "reasonable fee" as defined by the Public Information Act (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, cannot evaluate it further for purposes of ordering a reduction or a refund. As discussed below, there are several factors that the DLLR

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 Complainant asked DLLR for “any and all records, documents, and/or e-mails that refer, relate, and/or discuss ‘front foot fees’ and/or ‘front foot benefits.’” The materials submitted by the parties reflect that the original request included no time frame or regional limitation, but was modified to focus only on Montgomery County, Dan Ryan Builders, and the period from January 1, 2016 through April 2017. We understand from the Washington Suburban Sanitary Commission’s (WSSC) website that front foot benefit charges are assessed

beginning in the year following completion of water and/or sewer main construction that connects improved, or abuts unimproved, properties. The assessment is required by law to repay funds borrowed by WSSC for water and/or sewer main construction. The charge usually appears on the property tax bill for 20 years, but may be paid in full at any time. The FFBC assessment is determined by multiplying property footage by the rate per foot for the property classification, and the rates are updated annually. See <https://www.wsscwater.com/customer-service/rates/front-foot-benefit-charges.html>.

The DLLR regulations governing its costs appear in the Code of Maryland Regulations (COMAR) §§ 09.01.04.13D, 09.01.04.14A and 09.01.04.14E. Those provisions establish the copying costs as 25 cents per page and allow the hourly rate of the individual(s) performing the work to be applied to the time spent preparing the response. The regulations are consistent with the PIA in requiring that the first 2 hours be performed at no charge.

Based on the regulations, the DLLR provided a detailed explanation of its estimate:

Hourly rate	\$ 36.25	Administrative Specialist rate x 1.5 to reflect anticipated overtime
Review of 1,140 case files	\$ 61,987.50	
	Estimate 90 minutes per case for 1,710 hours x \$ 36.25	
Review of 4 binders of final orders	\$ 435.00	
	Estimate 3 hours per binder for 12 hours x \$ 36.25	
Review of emails	\$ 580.00	
	Estimate 16 hours x \$36.25	
Review of minute books	\$ 108.75	
	Estimate 90 minutes per binder for 2 binders—3 hours x \$ 36.25	
Review of correspondence not in case files	\$ 2,414.25	
	Estimate 66.6 hours x \$ 36.25	

For the staff rates, the DLLR used the hourly rate for an Administrative Specialist, which we estimate to be about \$ 24.15. This rate in itself seems reasonable. We note that DLLR explained its use of \$ 36.25 per hour to reflect its inability to perform the work during regular business hours. Neither the PIA, nor

the agency's regulations, address overtime in the context of responding to a PIA request. Using the overtime rate in this instance has increased the estimate significantly. Although we understand that the work may involve some overtime, we are reluctant to condone the automatic use of the overtime rate before the work has been performed, especially where the agency has demanded prepayment of the higher amount. Instead, we view the PIA as requiring that the records be produced with the least cost. GP § 4-103. This may require negotiation of an appropriate timeframe for performing the work (for example, the agency may need more than 30 days to compile the records for release). Alternatively, modifying the request to a more manageable volume could allow the work to be performed during regular work hours. We caution the agency to avoid relying solely on the overtime rate, and encourage DLLR to perform as much work as possible during business hours to minimize the eventual actual cost.

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 remain available and encourage the parties to engage in the appropriate discussion. Here, the high fee derives directly from the volume of materials requested and the amount of time that DLLR anticipates it will need to prepare its response, which suggests that some communication between the parties might lead to a reduction in the fee.

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 DLLR. The main caveat is that the agency should explore means of charging the regular hourly rate and limit the hours that truly require the overtime rate. The rates themselves appear to be reasonable, but the agency needs to make a greater effort to reduce the

anticipated overtime expense. Because the amount remains subject to change once the actual costs are incurred, this Board cannot determine whether the fee should be reduced, other than the guidance provided regarding the overtime rate. 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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