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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB-18-01
October 2, 2017

Baltimore City State's Attorney's Office
(Jason Murdock, Complainant)

Complainant, Jason Murdock, alleged that the Baltimore City State's Attorney's Office (BCSAO) charged an unreasonable fee when its custodian requested a pre-payment of \$790.00 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 (black/white and color); the cost per CD; the cost per DVD; the hourly rates for lawyer time and clerk 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 Complainant requested a fee waiver that was not granted.¹ 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, cannot evaluate it further for purposes of ordering a reduction or a refund.

¹ Although the issue of fee waivers does not fall 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". The agency did not supply information that shows whether it considered the Complainant's indigence when it received his request for a fee waiver.

Nevertheless, 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’s records custodian calculated the estimated fee based on the following figures:

| | |
|---------------|----------------------------------------------------|
| Copying costs | 50 cents per page for 1500 pages (black and white) |
| | \$1.00 per page for 10 color pictures |
| | \$10.00 each for 3 audiotapes |
| | Total \$790.00 |

Although a fee schedule accompanied the agency's letter to the Complainant, it did not calculate the hourly costs, but simply noted that, after the first two hours, a clerk would spend 10 hours to review, redact, and copy the file, and an attorney would spend 1.5 hours reviewing the clerk's work. The custodian, therefore, requested pre-payment only of the copying costs of \$790.00, along with the indication that the actual amount could be greater or less than the estimated amount.

Based on the information submitted by the BCSAO, in response to the complaint before this Board, the proposed fee appears to be \$1,052.50, which includes an estimate of the time the agency will need to gather, prepare, and provide the records, plus copying costs. The staff time was calculated as follows:

| | |
|-----------------|----------------------------------------------------------------------------------------------------------------------------|
| Clerical staff | No charge for file room clerk (1.5 hours) \$15 per hour for clerk (review, scan, redact) for 10 hours Total \$150.00 |
| Attorney review | \$75 per hour (to check clerk's work) for 1.5 hours Total \$112.00 |

In further explanation of the staff time needed, the custodian explained that the file contains numerous documents with witness information, victim information, victim's family information, and other sensitive information that must be reviewed for redaction to avoid placing any of the individuals in danger. The agency did not explain what the copying costs represent (e.g. paper, ink, machine usage, electricity, staff). While the rates may reflect reasonable costs, in the event that they include staff time, a separate charge for staff time making copies should not be included.

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 seek mediation assistance with the Public Access Ombudsman.

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. The Board notes that this case highlights the dilemma often faced by inmates when seeking information regarding their criminal case or the conditions of their confinement. Many inmates cannot pay the costs for the records they seek, and many agencies exercise their discretion regarding fee waivers by denying the waiver requests more often than not, despite the language in the statute allowing a waiver upon a showing of indigence.

For the reasons stated, we cannot say that the estimated fee is unreasonable based on the information available at this juncture and the rates used by the BCSAO, which appear to be reasonable. Because the amount remains subject to change once the actual costs are incurred, this Board cannot determine whether the overall 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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