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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB-19-01
September 24, 2018

Montgomery County Department of Transportation
(Christine Ramirez, Complainant)

The complainant, Christine Ramirez, alleges that the Montgomery County Department of Transportation (“MCDOT”) charged an unreasonable fee when it requested pre-payment of \$2,500 to respond to her May 23, 2018 Public Information Act (“PIA”) request. MCDOT estimated that amount as the cost of responding to her request for “all historical road remediation records” for a specific neighborhood in Bethesda, including “the dates and locations where a hot asphalt mix was applied.”

According to the complaint, MCDOT’s estimated fee is unreasonable because road maintenance records are not unique and should be readily available to the agency. MCDOT responded that the request encompasses 22 separate roads, and the relevant maintenance and resurfacing records span the years 1950-2018. The records from 2008-2018 are kept in digital format and have already been shared with the complainant, but the records from 1950-2008 “are in paper form and would need to be pulled, researched, and processed from the County’s archival system.” According to MCDOT, it would need to pull 1,276 files from the archives, and also “would need to coordinate with several other agencies to pull utility work and overall work histories for each street,” resulting in approximately 300 additional pages of documents. MCDOT’s response detailed the number of hours, by employee position title and task, necessary to respond to the request, and provided the hourly rate for those employees. That figure is \$1,119.40. MCDOT also estimated \$236.40 for making copies of the anticipated 1,576 pages, at a rate of 15 cents per page, and an additional \$355 for 10 hours of a contract employee’s time, resulting in a total of \$1,710.80. MCDOT explained that the remainder of the \$2,500 fee—\$789.20—comprised “salary hours, materials, as well as overhead.”

The Board requested additional details from MCDOT about this \$789.20 miscellaneous or “overhead” figure. MCDOT provided a supplemental response, and explained that the contract employee it specified in the estimate is paid \$35.50 per hour—resulting in the \$355 charge for 10 hours of that individual’s time—but that the agency actually pays \$99 per hour to the contractor’s

employer, with whom MCDOT has a contract.¹ Accordingly, in its “overhead” figure, MCDOT factored in an additional \$635 for the contract employee’s 10 hours (\$990 minus the \$355 already itemized for the contractor’s hourly pay rate).² MCDOT also estimated \$100 “for fuel and motor-pool expenses in relation to County vehicles that would be used for onsite inspection of the 22 neighborhood streets” encompassed by the PIA request. MCDOT explained that onsite inspection of the roads would be necessary to cross-check certain road repairs/maintenance with the archival repair/maintenance records. MCDOT thus detailed \$735 of the \$789.20 miscellaneous or “overhead” figure in its supplemental response; it did not account for the remaining \$54.20.

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-05.³ 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, e.g.*, PIACB-17-04, 3 (November 22, 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). 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)

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’s review and action. *See* PIACB-17-04 at 3. Specifically, assessing the reasonableness of a fee estimate is difficult because it ultimately may not reflect the actual costs incurred by a governmental unit, and this fact hinders the Board’s ability to direct a reduction or refund of the portion of a fee that appears to be unreasonable. *See* PIACB-18-08, 3 (March 7, 2018). For this reason, we have dismissed other complaints regarding an estimated fee as premature. *See, e.g.*, PIACB-18-02 (October 6, 2017).

However, we have also suggested that “when a governmental unit requires payment of the estimated fee prior to providing the records, this Board could consider the matter under the auspices of the governmental unit having charged a fee. Typically, the estimated fee in those instances is a precise figure, rather than a range.” PIACB-17-04 at 3, n.3. That is the case here: MCDOT has charged the complainant a precise fee based on set rates, and has required prepayment of that fee before it will

¹ In its supplemental response, MCDOT claimed that it pays \$99 per hour for this contractor’s services, but the contract provided to us by MCDOT states that the agency pays \$95 per hour. We discuss this discrepancy in our analysis below.

² MCDOT incorrectly calculated the difference between the contract rate of \$99/hour multiplied by 10 hours (\$990) and the pay rate of \$35.50/hour multiplied by 10 hours (\$355)—it reached the figure of \$680, but the correct figure is \$635.

³ Citations to GP reflect references to Md. Ann. Code, General Provisions (2014, 2017 Supp.).

undertake the work necessary to provide the records responsive to her PIA request. Accordingly, we believe MCDOT has “charged a fee” within the meaning of GP § 4-206, and that we are in a position to examine whether that fee is “reasonable” under the PIA. We address MCDOT’s particular fee itemizations in turn.

a. *Copying and employee costs*

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). When staff and attorney time are included in the calculation of actual costs, their salaries must be prorated to an hourly rate and reflect the actual time attributed to the search and review. GP § 4-206(b)(2). Salary should not include an employee’s benefits, and any duplication of effort should not be charged to the requester. *See* PIACB-16-05, 2-3 (June 1, 2016). Furthermore, a custodian may not charge for the first two hours of the search for and preparation of a record. GP § 4-206(c).

With regard to copies, MCDOT estimates a charge of \$236.40, based upon 1,576 pages at \$0.15 per page. On its face, this estimate appears to be reasonable. Of course, the agency should charge only for the actual number of pages it copies once it has gathered the responsive documents. Further, we encourage MCDOT to provide electronic copies instead of paper copies—such as by scanning the documents onto a CD or sending them via email—if that would be less costly to the agency and if the complainant so desires.

With regard to employee time, MCDOT estimates that 5 different employees, whose hourly salaries range from \$37.78 - \$77.14, will collectively take 20 hours—beyond two uncharged hours—to search for and prepare the records responsive to the complainant’s request, for a total of \$1,119.40. MCDOT explains that employee benefits are not included in this calculation. Based on this information, we find that this portion of MCDOT’s estimate appears to reflect a “reasonable fee” as defined by the PIA. Neither the hourly rates of MCDOT employees nor the amount of time required appear to be facially unreasonable. As discussed, MCDOT explains that the complainant’s request encompasses 58 years of archived documents, covers 22 different streets, and may include repair and maintenance records from several different agencies. Of course, we urge MCDOT to carefully and accurately track the actual time it spends on the response, and we remind the agency that any duplication of effort should not be charged to the complainant. *See* PIACB-16-05 at 3.

b. *Contractor costs*

As discussed, MCDOT is charging the complainant \$990 for 10 hours of a contractor’s time. MCDOT explains that this contractor has the title of “public outreach manager,” and has the role of PIA liaison and ultimate preparer of the documents responsive to the complainant’s request. MCDOT asserts that it pays \$99 per hour to the contractor’s employer, even though the contractor’s hourly pay rate is \$35.50. At the Board’s request, MCDOT provided the relevant contract documents.

We have previously opined that, “[a]rguably, an outside contractor’s charge is an actual cost” to an agency, PIACB-17-07, 3 (February 28, 2017), and have found “the actual hourly cost of the contractor” and “the fixed-price [hourly] cost for the contractor’s services” to be reasonably related to an agency’s actual cost in responding to a PIA request, PIACB-16-03, 2 (March 21, 2016). *See also* PIACB-17-15, 3-4 (August 31, 2017). Here, the contract documents provided to us reflect that MCDOT pays the contractor’s employer based upon the number of hours actually worked by the contractor. Accordingly, MCDOT may factor the contractor’s time as part of a reasonable fee.

However, the contract documents state that MCDOT actually pays \$95 per hour for the contractor’s services, not \$99 per hour. Thus, 10 hours of the contractor’s time is \$950, not \$990. Therefore, MCDOT should reduce its estimate by \$40 with regard to this portion of the fee.

c. Other costs

As part of its miscellaneous or “overhead” costs, MCDOT estimates \$100 “for fuel and motor-pool expenses in relation to County vehicles that would be used for an onsite inspection of the 22 neighborhood streets” encompassed by the PIA request. As discussed above, MCDOT explained that it would need to conduct an inspection of the roads in order to cross-reference certain information in the archival road repair and maintenance records.

We have not yet had the occasion to consider this kind of cost in relation to the reasonableness of a PIA fee. The PIA defines “reasonable fee” broadly, as “a fee bearing a reasonable relationship to the recovery of actual costs incurred by a governmental unit.” GP § 4-206(a)(3). Arguably, any “actual cost incurred” by the agency to respond to a PIA request—regardless of the type of cost—is compensable under this definition. The PIA further authorizes an agency to charge for “the actual costs of the search for, preparation of, and reproduction of a public record” GP § 4-206(b)(1)(ii). We can envision scenarios in which an agency’s search for records requires an employee to drive to an offsite storage location, in which case the agency’s mileage reimbursement rate would likely bear a “reasonable relationship” to the agency’s actual costs. Here, however, the connection between onsite street inspections and the retrieval of responsive records remains unclear to us. MCDOT has already identified the 22 streets encompassed by the PIA request and specified the number of records that are likely responsive. Based on the submissions, we cannot conclude that the \$100 estimated fee attributable to onsite street inspections bears a reasonable relationship to the agency’s anticipated costs of records retrieval and preparation. Accordingly, MCDOT should subtract this portion of the estimated fee. If MCDOT better explains to the complainant why onsite street inspections may yield additional and/or more accurate responsive records, the parties can at that juncture determine whether to move forward with that aspect of the search.

Finally, as we discussed above, MCDOT has not accounted for \$54.20 of its miscellaneous or “overhead” costs. Therefore, it should reduce its estimate by an additional \$54.20 with regard to this portion of its fee.

Conclusion

Based on our analysis above, MCDOT should reduce its fee estimate by \$40, for the erroneous hourly rate it charged for the contractor's time; by \$100, for the onsite street inspections; and by \$54.20, which MCDOT has not accounted for at all. In total, MCDOT should reduce its \$2,500 estimate by \$194.20, for a new estimate of \$2,305.80.

MCDOT should also keep a detailed account of the actual time its employees and contractor expend on the search for and preparation of responsive records. In the event that the employees and/or contractor expend fewer hours than estimated, and/or duplicate any efforts, the complainant is entitled to a refund of any amount she overpaid. We also encourage the parties to communicate and cooperate, to the extent possible, in order to narrow the PIA request and potentially reduce the estimated fee.

Public Information Act Compliance Board

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