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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 19-12

August 7, 2019
State Department of Assessments and Taxation
Steve Thompson, Complainant

The complainant, Steve Thompson, alleges that SpecPrint—a private company that sells electronic databases comprised of data obtained from the State Department of Assessments and Taxation ("SDAT")—charged an unreasonable fee to provide him with a detailed database of every business entity in Maryland in a "machine-readable, structured-data format." SDAT, in its initial response to the complaint and its supplemental answers to questions from the Board, explains that it does not maintain the business data it collects in the format requested by Mr. Thompson, but instead provides that data to SpecPrint, which then compiles the data into a manipulable electronic database that it sells to the public for a set price of $2,100. Of this $2,100, SpecPrint takes $845, and SDAT takes $1,255. SDAT explains that this practice is explicitly sanctioned by § 4-205 of the Public Information Act ("PIA").[1] In response to Mr. Thompson's request for a fee waiver, SpecPrint agreed to forego its own $845 cut of the fee, but SDAT insists on collecting its $1,255 portion. For the reasons that follow, we conclude that SDAT must evaluate the portion it receives from the sale to determine if it reflects the agency's actual costs in responding to Mr. Thompson's request to SpecPrint.

Background

Among its other duties, SDAT is responsible for registering business entities in Maryland. On SDAT's website, the public may search for any registered business entity by name or partial name, and then see details about the business, including its articles of formation, principal address, registered agent, status, etc. SDAT explains that when a business initially registers with it—or files updates— SDAT staff manually enter the information into a mainframe computer repository that feeds the online search function.

For many years, SDAT has had a contract with SpecPrint, a private company, whereby SDAT provides its business entity data, among other data, to SpecPrint, and SpecPrint compiles that data into a searchable and manipulable database that it sells to the public for a set price. The current price for SpecPrint's database of all corporate entities in Maryland is $2,100. Pursuant to its agreement with SpecPrint, SDAT receives $1,255 of each sale, and SpecPrint receives $845.

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[1] All citations are to the General Provisions Article of the Annotated Code of Maryland (2015 and Supp.), unless otherwise indicated.

In 2011, the General Assembly added amendments to the PIA related to the disclosure of electronic records, and explicitly recognized SDAT's practice of providing data it collects to a private contractor, who then formats the data and sells it to the public. *See* 2011 Md. Laws Ch. 536 (now codified in § 4-205 of the General Provisions Article). In relevant part, the amendments required "the custodian of a public record [to] provide an applicant with a copy of the public record in a searchable and analyzable electronic format if: (i) the public record is in a searchable and analyzable electronic format" and "(ii) the applicant requests a copy of the public record in a searchable and analyzable electronic format." § 4-205(c)(1). However, the specific exemption for SDAT provided that

> [SDAT] is not required to provide an applicant with a copy of the public record in a searchable and analyzable electronic format if [SDAT] has provided the public record to a contractor that will provide the applicant a copy of the public record in a searchable and analyzable electronic format for a reasonable cost."

§ 4-205(c)(2). The exemption says nothing about SDAT's ability to collect a portion of the proceeds from the contractor's sale of the electronic record.

Analysis

We first address whether we have jurisdiction to consider the fee in this matter. This Board is authorized to resolve complaints "alleging that a custodian charged an unreasonable fee under § 4-206" of the PIA. § 4-1A-04. *See also* § 4-1A-05 (authorizing an applicant to file a complaint if "(1) a custodian charged a fee under § 4-206 [of the PIA] of more than $350; and (2) the complainant alleges in the complaint that the fee is unreasonable"). Section 4-206 of the PIA, in relevant part, permits "the official custodian" to charge a "reasonable fee" for searching for, preparing, reviewing, and reproducing requested records. § 4-206(b). "Reasonable fee," in turn, means "a fee bearing a reasonable relationship to the recovery of actual costs incurred by a governmental unit." § 4-206(a)(3).

The scenario we are presented with is unusual within the PIA's fee scheme. The requested database is produced and sold by SpecPrint, a private contractor, whereas the raw data is gathered and provided to the contractor by SDAT, a governmental agency. The plain language of the PIA's exemption for SDAT in § 4-205(c)(2) undoubtedly permits this relationship—it authorizes SDAT to provide public data to a private contractor, and explicitly permits that contractor to sell the data in a searchable and analyzable electronic format for a "reasonable cost." § 4-205(c)(2). The exemption, thus, explicitly permits the *contractor* to charge a fee for the database, but it does not authorize SDAT to collect a fee beyond what is authorized by the PIA.

In this case, because SpecPrint has waived its portion of the fee, we do not need to consider whether we have jurisdiction over that portion.[2] We do, however, have jurisdiction to review the

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[2] This case is different from our previous cases that have dealt with fees charged by third-party vendors. *See, e.g.*, PIACB 19-01 (Sept. 24, 2018); PIACB 17-18 (Aug. 31, 2017); PIACB 17-07 (Feb. 28, 2017). In all of those instances, the agency's fee—or estimated fee—included amounts attributable to outside contractors who would be assisting the agency in responding to the PIA request. 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

$1,255 amount SDAT will receive from SpecPrint's sale of the record to Mr. Thompson. In our view, this "revenue" from SpecPrint's database sale is, quite simply, a fee that SDAT will receive from a request for public data, even if that data is formatted and sold by a private contractor. The fact that a third party collects the fee for SDAT does not change the reality that SDAT is charging a fee for its public information. And because neither the exemption in § 4-205(c)(2)—nor any other authority we have been shown—authorizes SDAT to collect revenue from the sale in a way that contravenes the PIA's default fee provisions, those provisions apply.[3]

We thus turn our attention to whether SDAT's $1,255 fee for the requested database constitutes a "reasonable fee" under the PIA. 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." GP § 4-206(b)(1). When staff time is included in the calculation of actual costs, their salaries must be prorated to an hourly rate and reflect the actual time they spent on the production. GP § 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). We add that the PIA's fee provision also promotes transparency, by ensuring that agencies will not levy hidden fees—or otherwise unexplained fees—for the production of public records.

In its supplemental response, SDAT informs us that the fee it receives from each SpecPrint sale is used to offset the cost of providing the data to SpecPrint. According to SDAT, the cost to provide the data to SpecPrint is entirely separate from SDAT's costs in gathering the data as part of its regular business and making that data available through the search function on its website. In other words, SDAT apparently incurs certain costs that are solely attributable to its provision of data to SpecPrint for SpecPrint's sale to the public. In our view, the PIA would permit SDAT to recover costs it incurs *that are solely attributable to specific requests* for SDAT data, even where that data is formatted by and requested from SpecPrint. For example, on one hand, if SDAT transfers data to SpecPrint each time someone requests that data from SpecPrint, then SDAT arguably could recover those transaction costs under the PIA. On the other hand, if SDAT shares its data with SpecPrint routinely and automatically through some kind of network interface—independent of any particular requests for that data—SDAT likely could not assign costs to specific requests. Moreover, in that scenario, SDAT's costs likely are minimal, or at least difficult to particularize.[4]

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agency's actual cost in responding to a PIA request." PIACB 19-01 (internal quotation marks and citations omitted). Here, the contractor, not the agency, is in the position of producing and charging for the requested record directly, while the agency receives a portion of that fee indirectly.

[3] Moreover, we have reviewed the legislative history of § 4-205(c)(2) and have not found any indication that the Legislature intended for SDAT to receive revenue from the contractor's sale of the formatted data. *See* Bill Files for House Bill 37 and Senate Bill 740, 2011 Leg., Reg. Sess. At most, the amendment appears to have been aimed at relieving the administrative burden on SDAT if it directly was required to produce its massive data cache each time someone requested it.

[4] We will not speculate further on the costs SDAT may or may not incur here, but we note the situation may be somewhat similar to the "flat fee" scenario we considered in PIACB 17-06 (Nov. 28, 2016).

Regardless, we do not have enough information to determine whether SDAT incurred—or will incur—any actual costs attributable to Mr. Thompson's request, much less whether SDAT's $1,255 fee is reasonably related to those costs. Accordingly, SDAT should evaluate whether it has incurred—or will incur—any actual costs in response to Mr. Thompson's request to SpecPrint. If not, SDAT should refrain from charging—or collecting—any fee for the request. If so, SDAT should explain to Mr. Thompson how any fee it ends up collecting is reasonably related to its actual costs, as permitted by the PIA.[5]

Conclusion

For the reasons above, we conclude that we have jurisdiction to review the $1,255 amount SDAT intends to receive from SpecPrint's sale of the database requested by Mr. Thompson. However, we have insufficient information to determine whether SDAT has incurred—or will incur—actual costs to respond to Mr. Thompsons's request to SpecPrint, let alone whether the $1,255 fee is reasonably related to those costs, as permitted by the PIA. Accordingly, we advise SDAT to evaluate its costs, and to only charge for costs that are clearly attributable to Mr. Thompson's request to SpecPrint.

Public Information Act Compliance Board

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There, we were faced with an agency's fee of $2.00 per page, which ultimately resulted in a much lower fee to the requester than the calculation of actual costs, including staff and attorney time and copying costs. We nonetheless added a note of caution to this approach, explaining that although

> [w]e understand that using a per-page fee calculation simplifies the determination of the fee for an agency . . . 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 the hourly rates of employees, the time expended, and the copying charges. Only with this information can an evaluation be made regarding whether the per-page fee reasonably reflects the actual costs of the agency.

PIACB 17-06 at 3-4. Similarly here, SDAT would need to keep documentation showing how any fee it receives for a SpecPrint database comprised of its data reflects SDAT's actual costs in providing that data to SpecPrint in response to a particular request.

[5] Of course, any fee based upon staff time must reflect two free hours. See GP § 4-206(c).