Chapter 7:
Fees

A. Search and Preparation Fees

Under GP § 4-206, an official custodian may charge reasonable fees for the search and preparation of records for inspection and copying. Search and preparation fees must be reasonably related to the actual cost to the governmental unit in processing the request. GP § 4-206(a); *see also* 71 *Opinions of the Attorney General* 318, 329 (1986) ("The goal . . . should be . . . neither to make a profit nor to bear a loss on the cost of providing information to the public."); *PIACB Opinions* 19-01 (Sept. 24, 2018) (although any "actual cost incurred" by the agency to respond to a PIA request might be compensable under the PIA's definition of reasonable fee, the connection between a particular cost and the response must be clear). The custodian may charge a "reasonable fee" to search for, prepare, and reproduce a record in a "customized" format selected by the applicant, and—as is more often the case—may charge "the actual costs" of searching for, preparing, and producing a public record in standard format. GP § 4-206(b)(1). Fees may not be charged, however, for the first two hours of search and preparation time. GP § 4-206(c).

Search fees are the costs to an agency for locating requested records. Usually, this involves the cost of an employee's time spent in locating the requested records. Preparation fees are the costs to an agency to prepare a record for inspection or copying, including the time needed to assess whether any provision of law permits or requires material to be withheld. *See* GP § 4-206(b)(2) (providing the method for calculating "staff and attorney review costs . . . in the calculation of actual costs"). For example, where a document contains both information that the public is entitled to see and information that the custodian may not by law release, an employee's time will be needed to prepare and copy the record with the exempt information deleted. Redaction will often be necessary where records contain investigatory or confidential financial information. In calculating the cost of employee time, the salary of each employee involved in the response must be prorated based on the actual time they spent searching

for and preparing the record for disclosure. GP § 4-206(b)(2). The prorated amount should not include benefits. *See*, *e.g.*, *PIACB Opinions* 18-08 (Mar. 7, 2018). And the applicant generally should not be charged for duplicative employee efforts. *See*, *e.g.*, *PIACB Opinions* 17-06, n.6 (Nov. 28, 2016) (reminding agencies that "they need to resist charging fees based on duplicate work. For example, where multiple employees review the same material, only one person's time should be part of the fee charged to the applicant").

The calculation is a little trickier when an agency uses an outside contractor to assist in the response, such as where an agency contracts with an information technology firm for data storage and retrieval services. The PIA Compliance Board has opined that an agency may include amounts charged by contractors but only if the charges are actually attributable to the response. *See, e.g., PIACB Opinions* 20-04 (Nov. 25, 2019). For example, an agency might retain a vendor by paying a flat annual or monthly rate—regardless of the amount of work the vendor performs during that time—and so would not incur any additional costs if that vendor assists in the PIA response. In that scenario, the agency should not charge for the contractor's work. *See PIACB Opinions* 17-19 (Aug. 31, 2017). Conversely, an agency may seek to recoup the cost of a contractor who charges by the hour, *see*, *e.g.*, *PIACB Opinions* 16-03 (Mar. 20, 2016), and that hourly rate may include the contractor's profit margin, *see PIACB Opinions* 17-07 (Feb. 28, 2017) (explaining that the PIA does not require "outside contractors to forego their contracted-for profit when assisting in the production of records or government units to subsidize that cost"). That said, an agency should consider whether it can perform the work in-house for less expense. *See* GP § 4-103(b) (the PIA "shall be construed in favor of allowing inspection of a public record, *with the least cost and delay*" to the requester (emphasis added)); *see also PIACB Opinions* 20-04 at 2 ("[O]n a case-by-case basis, [not] every third-party vendor's costs can be recovered from a requestor. For example, where it is clear that a custodian has the capability and resources to perform response-related work "in house" for less expense than engaging a contractor, the PIA likely would not permit the custodian to charge the requestor for the contractor's costlier fee.").

On a rare occasion, a requester (or group of requesters) will attempt to artificially break a large request into a series of smaller requests in order to obtain two free hours searching for each request in order to circumvent the assessment of fees. If that purpose is clear, it seems reasonable for the agency to aggregate those requests as a single request with the appropriate fee. On the other hand, nothing in the Act prohibits a requester

from making multiple requests, and an agency should not artificially aggregate separate requests to increase the fee so as to discourage those requests.

Although the PIA does not explicitly address the issue of prepayment of fees, the Court of Appeals has indicated that an agency may appropriately require such prepayment. *See Glass v. Anne Arundel County*, 453 Md. 201, 212-13 (2017) ("[F]ollowing the practice of federal agencies under FOIA, agencies sometimes require pre-payment of fees or a commitment to pay fees when the cost of processing a PIA request is likely to be substantial."); *Ireland v. Shearin*, 417 Md. 401, 412 n.8 (2010) (agency may require inmate to prepay fees for copies when inmate is unable to inspect records personally due to incarceration); *see also PIACB Opinions* 19-01 (Sept. 24, 2018) (stating that the PIA Compliance Board may review a fee estimate for reasonableness when an agency demands payment of the estimate before undertaking the work to respond to a request). Moreover, requesting prepayment of fees before providing responsive records does not amount to a denial of the request. *Glass*, 453 Md. at 236-37. In other words, beyond the two hours provided to the requester at no cost, agencies are not expected to provide further search and preparation time without an assurance that the requester will cover the government's costs. *See id*. at 233 ("An agency is not expected to divert its resources to an exhaustive search in response to a broadly worded request that the requester refuses to focus and at an expense that will not be recovered.").

In addition, following the model regulations in Appendix F, many agencies require prepayment or a commitment to pay fees prior to copying records to be disclosed. *See*, *e.g.*, COMAR 08.01.06.11D(2) (Department of Natural Resources); COMAR 09.01.04.14D (Department of Licensing and Regulation). Federal agencies typically have regulations requiring prepayment or an agreement to pay fees as a prerequisite to the processing of a request, at least when fees are expected to exceed a set amount. *See*, *e.g.*, 16 C.F.R. § 4.8(d)(3) (Federal Trade Commission); 43 C.F.R. § 2.18 (Department of the Interior); *see also Pollack v. Department of Justice*, 49 F.3d 115 (4th Cir.), *cert. denied*, 516 U.S. 843 (1995) (when requester refused to commit to pay fees in accordance with agency's regulations, agency had authority to stop processing FOIA request); *Stout v. United States Parole Comm'n*, 40 F.3d 136 (6th Cir. 1994) (an agency's regulation requiring payment of fees before release of already processed records was proper and did not violate FOIA); *Farrugia v. Executive Office for United*

States Attorneys, 366 F. Supp. 2d 56 (D.D.C. 2005) (agency may require payment of search fee before sending records to requester).

B. Reasonable Fees for Copies

An official custodian may charge a "reasonable fee" for copies. GP § 4-206(b). "Reasonable fee" is defined as "a fee bearing a reasonable relationship to the recovery of actual costs incurred by a governmental unit." GP § 4-206(a). Many agencies have standard schedules of fees for copies, and such a schedule will be reasonable if it reflects the agency's actual copying costs. For example, the Department of Agriculture charges 15¢ per page for a copy of a record. COMAR 15.01.04.14. Agencies should adopt standard copying fee schedules so that the public and agency employees know what charges will be made. Note that if another law sets a fee for a copy, printout, or photograph, that law applies. GP § 4-206(d)(1).

The PIA Compliance Board has encouraged agencies to provide electronic copies instead of paper copies if that medium is acceptable to the requester and would result in a significantly reduced fee. *PIACB Opinions* 20-05, 3 (Nov. 7, 2019) (opining that copying paper records into an electronic format might result in increased preparation time for staff but would likely "result in a lower overall fee" in situations "where there are voluminous paper records and the agency is charging a relatively high per page copying fee"). To be clear, in that event, the custodian would still be able to charge for the actual costs (including staff time over two hours) of providing the records in electronic format.

C. Flat Fees

On occasion, an agency will charge a set amount—or a "flat fee"—for a particular type of document, such as an accident report, or for each page or each CD of responsive documents, with the idea that the single flat fee will cover both the agency's reproduction costs *and* its search and preparation costs. However, if an agency decides to charge this type of flat fee—which is not expressly authorized by the PIA—the Compliance Board has recently explained that the agency must be able to demonstrate that the fee is reasonable under GP § 4-206(a), *i.e.*, that the flat fee "bear[s] a reasonable relationship to the recovery of actual costs incurred by" the agency in producing the document. *See PIACB Opinions* 17-06 (Nov. 27, 2016) (explaining that, although the PIA does not specify the use of flat fees as permissible, an agency that uses such a fee should keep documentation "to substantiate . . . whether the per-page fee reasonably

reflects the actual costs of the agency"). Thus, the Compliance Board determined that a $2.00 per-page flat fee was reasonable in a particular instance because the agency could show that its actual costs to respond to the request—including staff time and copying costs—were equivalent to, if not higher than, the flat fee. *Id.* But the Compliance Board found that a $42 per-CD charge was facially unreasonable where the agency could not explain how the charge reflected its actual costs in providing CDs to the applicant. *PIACB Opinions* 20-05 (Nov. 7, 2019).

D. Waiver of Fees

An applicant may ask the agency for a total or partial waiver of fees. Under GP § 4-206(e), the official custodian may waive any fee or cost assessed under the PIA if the applicant asks for a waiver and if (1) the applicant is indigent, as that term is defined under the Act, or (2) the official custodian determines that a waiver would be in the public interest. The use of the disjunctive in § 4-206(e) suggests that a showing of indigence alone is a sufficient basis to grant a fee waiver request. *See PIACB Opinions* 19-08, 3 (Jan. 17, 2019) (acknowledging that the Board does not have jurisdiction to decide issues related to fee waivers but encouraging the custodian to consider granting a fee waiver based on indigence).

An applicant is considered indigent for purposes of the Act if his or her family household income is less than 50% of the median family income for the state, as reported in the Federal Register. GP § 4-206(a)(2). To obtain a waiver on this basis, the applicant must submit an affidavit of indigency. GP § 4-206(e)(2). A form affidavit is contained in Appendix D.

To determine whether a waiver is in the public interest where an affidavit of indigency is not provided, the official custodian must consider not only the ability of the applicant to pay but also other relevant factors. A waiver may be appropriate, for example, when a requester seeks information for a public purpose, rather than a narrow personal or commercial interest, because the public purpose might justify the expenditure of public funds to comply with the request. For example, in one case, the Court of Special Appeals found that Baltimore City's denial of a reporter's request to waive fees was arbitrary and capricious because the City only considered the expense to itself and the ability of the newspaper to pay and did not consider other relevant factors. *City of Baltimore v. Burke*, 67 Md. App. 147, *cert. denied*, 306 Md. 118 (1986). The Court suggested that relevant factors included the public benefit in making

available information concerning one of the City's major financial undertakings and the danger that imposing a fee for information upon a newspaper publisher might have a chilling effect on the full exercise of freedom of the press. *Id.*; *see also* 81 *Opinions of the Attorney General* 154 (1996) (waiver of fee depends on a number of relevant factors and cannot be based solely on the poverty of the requester or the cost to the agency).

A custodian's decision to grant or deny a fee waiver request ultimately is discretionary, *see* GP § 4-206(e) ("the official custodian *may* waive a fee under this section" (emphasis added)), but the decision must not be made arbitrarily or capriciously. *See Action Comm. for Transit, Inc. v. Town of Chevy Chase*, 229 Md. App. 540, 561-64 (2016). Accordingly, a custodian must consider each fee waiver request on a case-by-case basis and "give appropriate consideration" to the relevant public interest factors. *Id.* at 561-63 (explaining that if a custodian's waiver decision is appealed, "the court must have sufficient information" about the "actual decision-making process by the custodian"—including the "relevant factors" the custodian considered—in order to determine that the "decision was not arbitrary or capricious"). For example, a custodian who denies a waiver request based solely on the expense to the agency has not considered "other relevant factors" as required by § 4-206(e). *Id.* at 562 (quoting *City of Baltimore v. Burke*, 67 Md. App. 147, 149 (1986)). And a custodian who denies a waiver request because of the applicant's viewpoint is "clearly" acting arbitrarily and capriciously. *Id.* at 563-64. If an applicant appeals the custodian's denial of a fee waiver, however, the Court of Special Appeals has said that the custodian is not necessarily limited to relying solely on the reasons for denial that are explicitly listed in the response letter and may instead "further develop[]" the factual record on appeal. *Id.* at 563. Otherwise, the court explained, it "would burden government units with the obligation of generating a record against the possibility that a dispute will end up in court." *Id.* at 559.

Although "the broad term 'public interest' does not permit a precise listing of relevant factors," examples include "whether disclosure of records will shed light on 'a public controversy about official actions,' or on 'an agency's performance of its public duties.'" *Id.* at 557 (quoting 81 *Opinions of the Attorney General* 154, 3 (1996)). In considering what factors are relevant when deciding whether to waive a fee, an official custodian may also find it helpful to look at case law interpreting the comparable FOIA provision, 5 U.S.C. § 552(a)(4)(A). *See id.* at 553 (noting the Maryland caselaw on the subject is limited, and citing this Manual's examination of relevant FOIA caselaw); *see*

also Final Report of the Office of the Attorney General on the Implementation of the Public Information Act, 20-23 (Dec. 2017) ("Final Report of the OAG"), https://www.marylandattorneygeneral.gov/OpenGov%20Documents/PIA_IR/Final_PIA_Report.pdf.

One consideration that is important under FOIA is whether "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). In determining whether a request meets this test, federal courts consider the following factors:

> (1) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government";
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> (2) The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities;
>
> (3) The contribution to an understanding of the subject by the general public likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding"; and
>
> (4) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

Final Report of the OAG (citing FOIA Update: New Fee Waiver Policy Guidance (Jan. 1, 1987) ("DOJ Fee Guidance"), https://www.justice.gov/oip/blog/foia-update-new-fee-waiver-policy-guidance). *See also Project on Military Procurement v. Dep't of Navy*, 710 F. Supp. 362 (D.D.C. 1989) (identifying as material factors in the decision whether to waive a fee the potential that the requested disclosure would contribute to public understanding and the significance of that contribution); *National Treasury Employees Union v. Griffin*, 811 F.2d 644 (D.C. Cir. 1987) (fee waiver requests under FOIA grounded on public interest theory must show connection between material sought and matter of genuine public concern and must also indicate that fee waiver or

production will primarily benefit public); *Crooker v. Bureau of Alcohol, Tobacco and Firearms*, 882 F. Supp. 1158 (D. Mass. 1995) (agency justified in denying request for fee where disclosure was not likely to contribute significantly to public understanding of government operations); *cf. Diamond v. FBI*, 548 F. Supp. 1158 (S.D.N.Y. 1982) (overturning agency's decision denying fee waiver when university professor sought materials for academic lectures and articles).

Under FOIA, a requester seeking a fee waiver "bears the initial burden of identifying the public interest to be served, and that public interest must be asserted with reasonable specificity. Thus, conclusory statements that the disclosure of the requested documents will serve the public interest are not sufficient." *Physician's Comm. For Responsible Med. v. Dep't of Health & Human Servs.*, 480 F. Supp. 2d 119, 123 (D.D.C. 2007); *see also Cause of Action v. FTC*, 799 F.3d 1108, 1111 (D.C. Cir. 2015) (noting that requesters are required to assert how a fee waiver would serve the "public interest," including how the information will be disseminated to the public, with "reasonable specificity"); *Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (upholding the denial of a fee waiver because the requester failed to identify, with "reasonable specificity," how the requester would disseminate the information to the public).

In determining the extent to which a requester has a commercial interest in the records sought, federal courts consider:

> (1) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so
>
> (2) The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."

Final Report of the OAG (citing DOJ Fee Guidance); *see also Larson*, 843 F.2d at 1483 (requester of information under FOIA seeking fee waiver must not have commercial interest in disclosure of information sought and must show that disclosure of information would be likely to contribute significantly to public understanding of government operations or activities); *cf. Immanuel v. Comptroller of Maryland*, 449

Md. 76, 93 (2016) (observing, in the context of a commercial request, that "[t]he MPIA is a statutory mechanism for revealing matters of governance," not information about private activity that happens to be in government records).

Finally, federal courts will also consider the burdensomeness of the request in determining whether an agency's decision to deny all or part of a waiver request complies with the federal standard. *See*, *e.g.*, *Stewart v. U.S. Dep't of Interior*, 554 F.3d 1236, 1243 (10th Cir. 2009) (stating that "the district court was correct in upholding the denial of the fee waiver because the underlying search would be unduly burdensome given the speculative nature of the records requested").

E. Fees for Judicial Records

For information regarding fees for access to judicial records, see Maryland Rules 16-904(d) and 16-905(e). *See also* Chapter 10, below.