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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB-17-06
November 28, 2016

Complainant, James Tanner, filed a complaint asserting that the fee charged by the Baltimore County Police Department (BCPD) was unreasonable. The complaint derives from the \$2.00 per page fee charged by BCPD for the records Complainant has requested, for a total cost of \$4,554. The BCPD provided a detailed list of the records along with the charge to Complainant on September 14, 2016. The complaint was timely filed with this Board on October 14, 2016.

As explained below, we conclude that the fee charged by BCPD is a “reasonable fee” as defined by the Public Information Act (PIA). Nonetheless, we advise that custodians who charge flat per-page fees must be able to show that the flat rate reflects the actual costs of producing the records.

Background

Between March 2011 and May 2016, Complainant submitted nine requests for records to BCPD. Five requests were for the same materials, which include 18 groups of records from a police investigative file, and the fee charged remained \$4,554 for each of those requests. In each instance, Complainant did not pay the fee and did not receive the records.

Complainant submitted the most recent request to BCPD on July 23, 2016. On August 8, 2016, BCPD identified the prior requests, listed the records, and explained that the cost of producing those records would be \$4,554.¹ A supplemental spreadsheet dated September 14, 2016, described the records that respond to Complainant’s request: 1,810 pages of records (of which 1,626 are available and 184 were redacted); 33 compact discs (of which 32 were available and

¹ For 1,626 pages at \$2.00 per page for copies, the cost would be \$3,252. The balance appears to be for the 32 compact discs.

1 was unavailable for release). The spreadsheet included an index of the information on the 32 compact discs. BCPD asked Complainant to modify the request as a means of reducing the cost of the copies.

The BCPD stated that \$2.00 per page charge derives from a number of considerations. First, the investigative file requested by Complainant includes notes, memoranda, and copies of documents that BCPD considers to be evidence in a criminal investigation. To avoid an improper release of confidential information, an attorney assigned to BCPD must review the records prior to disclosure. The legal review occurs both before and after the materials are redacted—before to identify materials that require redacting and after to confirm that the redaction has occurred accurately.

Next, the investigative files are kept in a separate location, which increases the search and preparation time for the response to a records request. The hourly rates of the employees working on the request include \$24.70 (staff) and \$40.00 to \$60.00 (attorney) per hour.² Since the first request in 2011, BCPD's per page fee has increased, but BCPD charged its fee based on \$2.00 per page, which had been in effect since 2000.

As explained by BCPD, the total cost would be much higher if the hourly rates of the individual employees who collected, reviewed, and prepared the records were considered in calculating the fee. For the 2016 request, one employee spent 29 hours responding to the request at an hourly rate of \$24.70. Reducing this time by 2 hours yields a cost of \$666.90. The attorney review for redactions took 80 hours. At the attorney's hourly rate of \$60.00, the cost for review and preparation includes \$4,800.00.³ During the past few years, the cost of reproducing the compact disc has increased as well to \$42.00 per disc. If the costs for copying, searching, and

² BCPD indicated that the hourly rate for a previous attorney was \$40.00, but the rate for the current legal counsel is \$60.00 per hour.

³ If the earlier attorney's hourly rate is used, the cost for the attorney review would be \$3,200. Combined with the other figures (\$666.90 for staff and \$905 for copies at 50 cents per page), the total fee is \$4,771.

preparation of the records had been tallied separately, the charge would have been \$7,715.90.⁴

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-05.⁵ 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. Here, the custodian has crafted a fee that combines copying costs and review time into a rate that simplifies the calculation. The question then becomes whether this synthesis of permitted components of a governmental unit’s actual costs is reasonable under the PIA.

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). In any event, a custodian must not charge for the first 2 hours of the search for a record. GP § 4-206(c).

We understand that using a per-page fee calculation simplifies the determination of the fee for an agency. Under current law, however, we must express our concern that doing so also has some risks. The primary concern is that the statute does not specify this method as permissible. Ordinarily, the Legislature

⁴ BCPD calculated a total actual cost of \$7,715.90 based on \$4,800 attorney time, \$666.90 for 27 hours of staff time, \$1,344 for compact disc reproduction, and \$905 for copies of 1,810 pages at \$.50 per page (the current copying charge for other departments in the County).

⁵ All GP references are to Md. Ann. Code, Gen. Provns. (2014, 2015 supp.) unless otherwise noted.

includes the options for calculating costs that it views as permissible. Instead, the statute repeatedly notes the ability of a governmental unit to recover “actual costs” incurred, and addresses copying costs separately from search and preparation costs.

From this perspective, using a per-page fee does not illustrate whether a requester received the first 2 hours of search and preparation time at no charge, and it does not reflect the required prorating of the salaries of staff and attorneys involved in a response by the actual time they spent searching for and preparing records for disclosure. 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 of the actual costs of the agency. Unless and until the Legislature recognizes this method of calculating a fee, these risks remain.

Based on the specific facts in the present case, we conclude that the \$2.00 per page fee charged by BCPD is reasonable. The use of separate fees to calculate the copying cost, search and preparation yields a much higher cost than the per-page fee.⁶ To the extent that the fee charged might not be reasonably related to BCPD’s actual costs, it errs in favor of the applicant and, therefore, satisfies the goal of the PIA that an agency not profit from the fee charged. *See* 71 Op. Att’y Gen. 318, 329 (1986).

For the reasons stated, we conclude that BCPD charged a reasonable fee and did not violate the PIA.

Public Information Act Compliance Board

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⁶ In its response, BCPD mentioned the repeated requests from Complainant and the numerous times in which BCPD retrieved and reviewed the records. We take this opportunity to remind 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. *See* PIACB-16-05 (dated June 1, 2016). The information provided in BCPD’s response appears to calculate only the time spent during the 2016 search and preparation of the records.