

LAWRENCE J. HOGAN, JR.
GOVERNOR

BOYD K. RUTHERFORD
LT. GOVERNOR



JOHN H. WEST, III, ESQ.
Chair

LARRY E. EFFINGHAM
DEBORAH MOORE-CARTER
RENÉ C. SWAFFORD, ESQ.
DARREN S. WIGFIELD

STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 20-04

November 25, 2019
Montgomery County, Custodian
Bernadette Fowler Lamson, Complainant

The complainant, Bernadette Fowler Lamson, alleges that Montgomery County (“County”), charged her an unreasonable fee of \$3,468.75 to respond to her May 10, 2019 Public Information Act (“PIA”) request for various records pertaining to her employment with the County for the time period of July 2017 through March 2018. The County, through outside counsel, responded with the basis for the fee, as follows:

Copies: \$162.75 (1,085 pages at \$0.15 per page);

Labor: \$3,306 (10.7 hours of outside counsel’s time to review the documents, at \$380 per hour—two hours were not charged, as required by the PIA);

Total: \$3,468.75.

The complainant makes a number of allegations as to why this fee is unreasonable. First, she contends that the PIA does not permit a custodian to recover costs for reviewing responsive documents for legal privileges. Second, she argues that, even if the PIA does allow a charge for such review, it does not permit a custodian to outsource that review to an expensive outside contractor and then charge the requestor for that expense. Third, Ms. Lamson alleges that the outside counsel here had already performed much of the relevant document review in connection with other legal matters, so it should not have charged for duplicate work. We address each contention in turn.

In our view, the plain language of the PIA permits a custodian to recover the actual costs it incurs in reviewing responsive records for privilege and confidentiality. The PIA permits a custodian to charge a “reasonable fee,” which is defined as “a fee bearing a reasonable relationship to the recovery of actual costs incurred by the governmental unit.” § 4-206.¹ Explicitly included in the “actual costs” a custodian may recover are “*staff and attorney review costs*,” which must be “prorated for each individual’s salary and actual time attributable to the search for and preparation of a public record.” § 4-206(b)(2) (emphasis added). Many of our opinions finding that a fee or fee estimate appears to be reasonable include a custodian’s charge for legal review of the responsive records. *See, e.g.*, PIACB 19-11 (August 16, 2019); PIACB 19-08 (January 17, 2019). The complainant has not

¹ All references are to the General Provisions Article of the Annotated Code of Maryland.

pointed us to any authority that would cast doubt on this reading of the PIA. Accordingly, we do not find any merit in the complainant's allegation on this front.

Next, the complainant alleges that the County is not permitted to pass on to her the cost of the outside contractor who undertook the work to respond to the PIA request here. As a general matter, we have approved a custodian's recovery of contractor costs, as long as those costs are directly attributable to the response. *See, e.g.*, PIACB 19-01 (Sept. 24, 2018); PIACB 17-18 (Aug. 31, 2017); PIACB 17-07 (Feb. 28, 2017). In PIACB 19-01, for instance, 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 agency's actual cost in responding to a PIA request." PIACB 19-01 (internal quotation marks and citations omitted).

That is not to say that, on a case-by-case basis, 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. *See* § 4-103(b) (Explaining that the PIA "shall be construed in favor of allowing inspection of a public record, *with the least cost and delay*" to the requestor) (emphasis added). That does not appear to be the case here, however.

The parties agree that Ms. Lamson's employment with the County has been the subject of certain administrative grievance processes and a related PIA lawsuit that made its way to the Court of Appeals. *See Lamson v. Montgomery Cty.*, 460 Md. 349 (2018). It is not our role to rehash any of these matters or investigate the minutiae of the various discovery and PIA requests involved in them. Rather, it suffices to say that the outside counsel that responded to the PIA request at issue here is the same counsel that has represented the County in these other matters. According to counsel's response to the present complaint, the reason it—and not County employees—worked on responding to the instant PIA request is because it "has been assisting the County in responding to Complainant's administrative and other matters for the past several years," and, therefore, engaging outside counsel was actually "the most efficient and cost-effective means of response for both the County and Complainant." That is, because the complainant's present PIA request pertained to many documents that were already familiar to outside counsel in relation to other matters involving the complainant, it was more efficient for outside counsel to respond than for the County to start from scratch.

On the Board's request, outside counsel provided an affidavit detailing the work performed to respond to the PIA request and the amount actually charged to the County for that work. The affidavit states that counsel spent 11 hours responding to the request, including conducting a search of the electronic discovery management system, reviewing the responsive records for legal privileges, preparing a privilege log, and otherwise managing the preparation of the final response. The affidavit also states that other employees of the outside counsel's firm spent an additional 3 hours on the response. In total, outside counsel charged the County \$5,400 for the work performed in responding

to Ms. Lamson's May 10, 2019 PIA request. As noted above, Ms. Lamson was charged \$3,306 of this total.

Based on the submissions before us, we do not find that the fee charged Ms. Lamson to respond to her May 10, 2019 PIA request is unreasonable. Although we understand that some of the requested documents may already have been reviewed by outside counsel in the context of other administrative or judicial actions, it appears that Ms. Lamson's present PIA request did not perfectly coincide with any previous document requests, and that, therefore, outside counsel was required to run new search parameters and review a unique pool of documents comprising more than 1,000 pages. It also makes sense to us that outside counsel was likely in a better position than the County, based on the circumstances here, to most efficiently respond to the request. Even if the outside counsel's hourly rate is higher than a similarly-situated County employee, the fact that outside counsel had ready access to the responsive documents based upon its representation of the County in other matters involving the complainant means that it likely was able to perform the work necessary to respond to the request in less time and with less duplicated effort than if the County responded on its own.

Conclusion

Based on the materials before us, we do not find that the County's fee of \$3,468.75 is unreasonable. We decline to review other matters that are not within our jurisdiction, such as the thoroughness of the County's response, or the documents that are or are not in the possession of outside counsel. To the extent that the parties have disputes on these and other fronts, they may benefit from seeking the Public Access Ombudsman's assistance.

Public Information Act Compliance Board

John H. West, III, Esq.
Larry E. Effingham
Rene C. Swafford, Esq.