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**STATE OF MARYLAND**  
**PUBLIC INFORMATION ACT COMPLIANCE BOARD**

**PIACB 21-01**

**October 5, 2020**

**Maryland Department of Transportation, (State Highway Administration), Custodian**  
**Justin Holder, Complainant**

The complainant, Justin Holder, alleges that the Maryland Department of Transportation's State Highway Administration ("SHA") charged an unreasonable fee when it requested prepayment of \$836.59 to respond to his Public Information Act ("PIA") requests on June 15 and 16, 2020 for all email communications between SHA employees and three specific email addresses for the past three years, and for the past four years with regard to one of the email addresses and any SHA employee, contractor, or agent. SHA responded.

As grounds for his allegation that the estimated fee is unreasonable, the complainant alleges only that the hourly rates and review time that SHA's PIA representative stated to him over the telephone were lower than the rates and time that SHA used in the written estimate contained in its 10-day letter to him. The complainant alleges that the PIA representative told him over the telephone that the cost chargeable to the complainant would be calculated at \$30.00 per hour multiplied by a review time of three minutes per email. In the 10-day letter, SHA calculated staff time at \$32.28 per hour multiplied by five minutes per email. The complaint does not contest either the 105 minutes SHA estimated for the other tasks involved in the response or SHA's decision to process the requests on a consolidated basis.<sup>1</sup>

In response, SHA provided the following information: On June 15, the complainant requested three years' worth of emails between any of SHA's approximately 3,000 employees and three particular email addresses. That day, SHA's PIA representative contacted the complainant by telephone and tried to work with the complainant to narrow the request. Instead, on June 16, the complainant broadened his request as to one of the addressees by asking for four years' worth of emails and for emails between that individual and SHA contractors and agents as well as SHA employees.<sup>2</sup> SHA treated that request as part of the first and proceeded to prepare an estimate of the cost to the complainant of responding to them. The complainant had written "No phone calls" on his June 16 PIA request. SHA sent the estimate to the complainant on June 26, 2020 without

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<sup>1</sup> Those other tasks included communicating with the requestor, drafting correspondence, and tracking the matter in its database. We do not know how much time SHA has already spent on those tasks. We also cannot tell from the response whether SHA included in this total the time it spent searching for and distilling the potentially responsive records for purposes of the estimate.

<sup>2</sup> Specifically, the complainant does not take issue with SHA's decision to consolidate the two requests and provide the complainant with two hours of response time, as opposed to four. Given the close relationship of the two requests, both in time and the records sought, nor do we.

speaking further to the complainant by telephone. After the complainant received the estimate, he called the PIA representative to ask about it.

SHA states that its written estimates are its only official estimates. In the course of preparing this estimate, SHA determined that there were approximately 3,511 potentially responsive emails, which it further narrowed to 305 through an electronic de-duplication process in order to reduce review time. SHA then predicted that reviewing each email would take 5 minutes on average, assuming that some reviews might take longer and some might take less time. Reviewing 305 emails would thus take 1,525 minutes, based on a calculation of 5 minutes per email on average. SHA explains that “these minutes may be spread across activities conducted by several staff members with varied hourly rates.” To estimate the cost, SHA used software to calculate “each staff person’s time and hourly rate” and determine a “weighted average hourly rate” of \$32.28 per hour, for a total of \$901.15. SHA credited the complainant with two free hours at the highest staff rate, estimated the total fee to be \$836.59, and asked the complainant to pre-pay it. When the complainant telephoned SHA to ask about that estimate, the PIA representative explained that it included both requests.

### **Analysis**

This Board is authorized to review complaints that allege: (1) that “a custodian charged a fee under § 4-206 of [the PIA] of more than \$350” and (2) that “the fee is unreasonable.” § 4-1A-05(a).<sup>3</sup> The PIA defines a reasonable fee as “a fee bearing a reasonable relationship to the recovery of actual costs incurred by a governmental unit.” § 4-206(a)(3). Although an agency’s estimation of a fee—as opposed to a fee based on the actual costs that the agency incurred—presents certain difficulties for our review, *see, e.g.*, PIACB 17-04 at 3 (Nov. 22, 2016), we have nonetheless reviewed complaints concerning the reasonableness of a fee estimate when the estimate comprises a precise figure based on a breakdown of anticipated costs and the custodian has required prepayment of the estimate before providing the records, *see, e.g.*, PIACB 20-13 (June 22, 2020). Where, as in PIAB 20-13, the submissions give us “no reason to doubt” an estimate, we do not disturb it; when the submissions show that the estimate is not reasonably related to actual costs, we instruct the agency to modify or eliminate the part of the estimate that does not accurately reflect the agency’s costs. *See, e.g.*, PIACB 20-05 (2019). Our conclusions regarding the reasonableness of an estimate for tasks yet to be performed do not change the fact that the agency’s final fee for the tasks that the agency actually performed must bear a reasonable relationship to the agency’s actual costs. *See, e.g.*, PIACB 201-13 (noting that, “because the fee is only an estimate, the [custodian] should closely track the amount of time actually required to search for potentially responsive records and refund any overage.”).

This matter presents the threshold question of whether a discrepancy between an oral estimate and a custodian’s written estimate in the 10-day letter is by itself proof that the estimated fee is unreasonable. We have not addressed this precise question before. However, the standards that we have set for reviewing the reasonableness of a fee estimate, as opposed to a bill for actual costs, as well as our encouragement to requestors and custodians to communicate with each other during the process, lead us to conclude that we ordinarily should not treat preliminary conversations about costs as binding estimates to which a custodian must adhere in a subsequent 10-day letter. Here, for example, the PIA representative called the requestor on the day SHA received the first request, before SHA had received the second request, and presumably before SHA had performed the search and de-duplication process for the combined requests. We would

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<sup>3</sup> References are to the General Provisions Article of the Annotated Code of Maryland, unless otherwise indicated.

not wish to discourage such initial contacts by finding an estimate unreasonable merely because the estimate given in the 10-day letter varies from an estimate given in a preliminary conversation about the breadth of the request. Thus, generally, it takes more to prove unreasonableness than the fact that the 10-day letter has stated a higher amount than an amount that a custodian mentions in preliminary communications about the scope of the search that the requestor wants the custodian to perform.

Certainly, there might be cases in which a custodian's early communications with a requestor include substantive statements probative of reasonableness or unreasonableness. This is not such a case. Here, the complainant has neither alleged that the rate and time estimates are themselves unreasonable nor disputed the facts stated in SHA's response about how SHA calculated them. Thus, although the 10-day letter meets our standards for review because it is precise and requires pre-payment, the allegations and submissions do not establish a basis for finding that the rate and time estimates were unreasonable under the PIA.

Still, we have guidance for SHA's calculation of final costs, and we will also offer suggestions for moving the complainant's PIA request forward. When a custodian is predicting staff rates and time for purposes of providing an estimate in a 10-day letter, we can see that the custodian might find it useful to refer to an electronically-generated "weighted average hourly rate" based on the rates and likely time of the various staff expected to work on the project. In calculating the final actual costs, however, the agency must keep track of the time each individual spends on the response and use each individual's own hourly salary to calculate the final fee. The same principle applies to an averaged time for staff's review of each email: For purposes of an estimate, the custodian might find it useful to gauge an average time per email based on the custodian's experience with other such reviews, but the final actual cost must be based on the time that staff actually spent on these emails.

As for moving forward, if prepayment of the amount quoted is a barrier to the processing of the PIA request, we encourage the requestor to contact the PIA Representative to explore paths for reducing the required pre-payment until there is a clearer picture of whether the predictions of a five-minute review time per email and of particular staff assignments hold true. One such path might be for the parties to agree on SHA's processing of an initial discrete sample of the emails and for the complainant to pre-pay a lower amount. The Ombudsman may be able to assist them in this regard.

### **Conclusion**

For the reasons stated above, we do not order a reduction in the estimate. However, SHA's final assessments of costs must be based on the time actually expended, at the rates of the staff who expended it. If, upon the agency's assessment of actual costs, the complainant has a basis for believing that the agency has charged more than the costs that the agency actually incurred, he may file a new complaint that specifies that basis.

Public Information Act Compliance Board

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