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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 21-05

December 1, 2020

Montgomery County Council, Custodian

James Shalleck (Fraternal Order of Police, Montgomery County Lodge 35), Complainant

Complainant, James F. Shalleck, on behalf of the Fraternal Order of Police, Montgomery County Lodge 35 (“FOP”), alleges that the Montgomery County Council (“County”) charged an unreasonable fee when it requested prepayment of \$4,808.08 to respond to his July 1, 2020, Public Information Act (“PIA”) request for “[a]ll emails sent or received by any email account established or maintained for Hans Reimer [sic], elected member of the Montgomery County Council from March 1, 2020 through today’s date.”

The County responded on July 13, 2020.¹ It estimated that it would take 80 hours of staff time, above the two hours not charged,² to respond to his request and provided the figure Complainant now challenges.

Complainant alleges that the fee estimate is “unreasonable and excessive for the documents requested.” He alleges that the number of hours the County estimates it will take to respond is “inflated.” To support his contention, Complainant attached an estimate that the County provided in response to a different (unrelated) PIA request for email records made by FOP in 2009. The 2009 estimate contains a much lower estimate of hours needed to respond and, subsequently, a much lower fee.

The County provided the following information in response: On July 1, 2020, FOP sent a letter containing its PIA request via email to the custodian of records for the Montgomery County Department of Technology Services. July 7, 2020, FOP transmitted its original PIA request via email to the County’s legislative attorney. The legislative attorney then asked the County’s IT staff to run a search for responsive records; the search yielded 22,969 records from Mr. Riemer’s two email accounts. The legislative attorney estimated that it would take her an average of 15 seconds to review and redact (if necessary) each email. For all 22,969 emails, this amounted to 95 hours of her staff time. She did not include in her estimate time for Councilmember Riemer and/or his staff to review the emails. The legislative attorney subtracted two hours not charged under the

¹ On August 28, 2020, we issued a statement that, due to staffing changes of the Board, the issuance of our opinion would be unavoidably delayed. *See* Md. Code Ann., Gen. Provisions § 4-1A-07(c)(1)(i).

² “The official custodian may not charge a fee for the first 2 hours that are needed to search for a public record and prepare it for inspection.” Md. Code Ann., Gen. Provisions § 4-206(c).

PIA and lowered the number to 80 hours for purposes of the estimate. The legislative attorney's hourly salary is \$60.06, not including benefits. She arrived at the \$4,804.80³ estimate by multiplying her hourly salary by the 80 hours' review time.

In support of its response the County attached seven exhibits, including Complainant's original requests, an affidavit from the legislative attorney explaining her estimate, screen shots of the initial searches indicating the number of potentially responsive emails, documentation of the legislative attorney's annual salary, and a letter containing an estimate of \$32,324.71 that the County sent to FOP in response to a second different (unrelated) PIA request for email records made in 2009. The County also indicated that it offered Complainant the option of narrowing his request.

On September 9, 2020, Complainant responded to the County's response and indicated that the County's response was "the first detailed acknowledgement of the extent of the number of emails as well as an estimated time to review such emails." On that day, Complainant amended his request to "all email correspondence, received and sent, with any employee of the Montgomery County Department of Police from March 1, 2020 through July 1, 2020."⁴

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).⁵ A reasonable fee is "a fee bearing a reasonable relationship to the recovery of actual costs incurred by a governmental unit." § 4-206(a)(3). While fee *estimates* can present challenges for review, *see, e.g.*, PIACB 17-04 at 3 (Nov. 22, 2016), this Board has evaluated the reasonableness of a fee estimate where the estimate constitutes 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 21-01 at 3 (Oct. 5, 2020); PIACB 20-13 at 2 (June 22, 2020). If the parties' submissions give us "no reason to doubt" an estimate, PIACB 20-13 at 2, the Board will not disturb it. If, on the other hand, the submissions show that an estimate is not reasonably related to the actual costs of a response, we will instruct the agency to modify or eliminate that portion of the estimate that does not accurately reflect the agency's actual costs. *See, e.g.*, PIACB 20-05 at 3-4 (Nov. 7, 2019) (finding no clear basis for \$42 per CD reproduction charge and instructing agency to either eliminate from fee estimate or modify charge to reflect actual costs). Any conclusions about the reasonableness of a fee estimate for tasks not yet performed do not change the fact that the final fee for tasks *actually* performed must bear a reasonable relationship to the actual costs incurred by the agency. *See* PIACB 21-01 at 3 ("[F]inal assessments of costs must be based on the time actually expended, at the rates of the staff who expended it.").

The PIA permits a custodian to charge a reasonable fee for "the actual costs of the search for, preparation of, and reproduction of a public record in standard format, including media and

³ In its response, the County indicates that the original estimate of \$4,808.04 was four dollars higher than it should have been.

⁴ On September 9, 2020, a copy of Complainant's response to the County's response was sent via email to the County Attorney who prepared the County's response. To our knowledge, the County has not responded.

⁵ Citations are to the General Provisions Article of Maryland's Annotated Code, unless otherwise indicated.

mechanical processing costs.” § 406(b)(1)(ii). Staff and attorney costs are “actual costs” and must be “prorated for each individual’s salary and actual time attributable to the search for and preparation of a public record under this section.” § 406(b)(2).

With the above in mind, we do not find the County’s \$4,804.80 fee estimate unreasonable. Complainant’s request for all emails sent or received by any account established for Mr. Riemer over a 4-month period was relatively broad and likely to yield a high number of responsive records, especially given—as the County in its response points out—that the requested timeframe covers a period of time when the county was shut down due to the Covid-19 pandemic, thus increasing the frequency of email communications. It is not surprising then, that between Mr. Riemer’s two email accounts, the initial search yielded close to 23,000 emails, all of which required review. The legislative attorney’s 15-second per email estimate for review and redaction purposes does not appear inflated. *See* PIACB 21-01 at 3 (“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[.]”). The County also provided documentation of the legislative attorney’s salary, which did not include benefits. *See* PIACB 17-12 at 3 (May 18, 2017) (noting that only salary, and not benefits, should be included in calculation of hourly rate). Further, the County actually *reduced* the number of hours resulting from its calculation of the estimated time for review of the 22,969 emails from 95 hours to 80 hours. Notably, the County did not include copying fees in its estimate. *See* § 4-206(b)(1)(ii) (providing for recovery of reproduction and “mechanical processing” costs). As we have in the past, PIACB 20-13 at 2-3, we encourage the County to scan the responsive records into an electronic format to reduce or avoid altogether copying costs, so long as Complainant is amenable. Given all of the information before the Board, the County’s fee estimate seems reasonable.

Notwithstanding the reasonableness of the fee estimate, the Board recognizes that Complainant, in response to the County’s detailed breakdown of the costs associated with his request, has attempted to narrow the focus of his request. Instead of seeking *all* emails sent or received by Mr. Riemer’s accounts, he now seeks only those received from or sent to any employee of the Montgomery County Department of Police over the same timeframe. To our knowledge, the County has not responded with a new estimate that reflects this narrowed focus. The Board encourages the parties to engage in further communications with the purpose of refining Complainant’s PIA request in a way that produces a lower estimated fee.

Conclusion

Based on the material before us, we find that the County’s fee estimate of \$4,804.80 is reasonable and therefore order no reductions or modifications to that estimate. However, the County’s final assessment must be based on the time actually expended and costs actually incurred. If Complainant has grounds to believe that the final fee charged is more than the costs the County actually incurred, he may file a new complaint that specifies that basis.

Public Information Act Compliance Board

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