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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 21-14

July 23, 2021

Montgomery County Public Schools, Custodian
Dr. Safa Rifka, Complainant

During the month of March, 2021, the complainant submitted three separate Public Information Act (“PIA”) requests to Montgomery County Public Schools (“MCPS”). For one request, MCPS initially estimated that its response would cost \$843.73. The complainant modified his request, which resulted in an increase in the fee estimate to \$1,360.32. For the second request, MCPS initially estimated that it would cost \$865.62 to respond, but later revised that fee to \$16,524.60. For the third request, MCPS estimated that the response would cost \$725.21. The complainant has alleged that these fee estimates are unreasonable. MCPS initially responded by asking that we consider the information provided to the complainant in previous correspondence between MCPS and the complainant, and later, after the Board requested it, provided factual information about the fee estimates it sought to charge.

Background

On March 7, 2021, the complainant submitted a PIA request (“FY21-193”)¹ to MCPS seeking “any emails, notes, texts, files, phone calls, notes of phone calls, etc.” between eight individuals from January 1, 2020, until the present time. MCPS sent the complainant a letter on March 22, 2021, and estimated that the total fee to respond to the request would amount to \$843.73. MCPS explained how it arrived at this estimate: six hours’ work by an IT systems engineer (at \$59.26 per hour); three hours’ work by an attorney (at \$54.08 per hour); three hours’ work by a communications supervisor (at \$52.86 per hour); five hours’ work by a communications specialist (at \$33.47 per hour). MCPS indicated that two hours of work performed by a communications assistant would be free of charge. MCPS advised the complainant that it would not proceed with his request when it received payment of the estimated fee.

Following receipt of MCPS’s letter, the complainant revised the timeframe of his request in FY21-193, shortening it from January 1, 2020 to present, to May 1 through November 15, 2020. On April 8, 2021, MCPS sent the complainant a letter containing a revised fee estimate of \$1,360.32. MCPS’s new estimate was based on an anticipation that it would take an IT systems engineer four hours of work (as opposed to six hours), and eight hours’ work each by an attorney

¹ MCPS labeled the complainant’s requests in the following way: March 7, 2021, “FY21-193”; March 12, 2021, “FY21-200”; and March 16, 2021, “FY21-204.” We will adopt the same references.

(previously three hours), a communications supervisor (previously three hours), and a communications specialist (previously five hours). The hourly rates remained the same as indicated in MCPS's March 22, 2021, letter, and MCPS continued to indicate that two hours of work by a communications assistant would be done free of charge. MCPS did not explain why the time estimates changed given the narrowed timeframe, which sought emails, notes, texts, files, phone calls, and notes of phone calls over a period of five and a half months as opposed to fourteen.

On March 12, 2021, the complainant submitted a PIA request ("FY21-200") for "any communications [emails, notes, phone calls, ledgers]" that contain the word "Rifka" between at least twenty-two individuals² from October 1, 2018, until the present time. In a letter dated March 25, 2021, MCPS estimated that it would cost \$865.62 to respond and provided the following time estimates: four hours' work by an IT systems engineer; four hours' work by an attorney; four hours' work by a communications supervisor; six hours' work by a communications specialist. The hourly rates charged were the same as in FY21-193. MCPS indicated that two hours of work performed by a communications assistant would be free of charge. As it had with FY21-193, MCPS advised the complainant that it would begin work on his request when it received payment of the estimated fee.

The complainant submitted payment for the \$865.62 estimate in FY21-200 via check. MCPS acknowledged receipt of payment in a letter dated April 8, 2021, but advised that, after a preliminary search, it had determined that it would take "significantly more time to review, redact and prepare potentially responsive documents for disclosure." Accordingly, MCPS revised its fee estimate to \$16,524.60. MCPS increased the estimates for the amount of time it would take an attorney, a communications supervisor, and a communications specialist to respond to 116 hours each. Again, MCPS asked for prepayment of the full estimate.

Finally, on March 16, 2021, the complainant submitted a PIA request ("FY21-204") for the "telephone logs and ledgers and all related notes, emails, messages, and all attachments" between two individuals on twenty-four specific dates occurring between April and September 2020. In a letter dated March 29, 2021, MCPS estimated that it would cost \$725.21 to respond and explained that the estimate was based on: four hours' work by an IT systems engineer; three hours' work by an attorney; three hours' work by a communications supervisor; five hours' work by a communications specialist. The hourly rates charged were the same as those charged in FY21-193 and FY21-200. Two hours of work by a communications assistant would not be charged. As with the complainant's two previous requests, MCPS required prepayment of the fee estimate before it would proceed with fulfilling the request.

On April 26, 2021, the complainant submitted his complaint alleging that this "series" of fee estimates is unreasonable. MCPS responded on May 17, 2021, and asserted that it had "provided all appropriate documents for multiple requests from [the complainant] up to May 3." As to the request in FY21-200 specifically, MCPS acknowledged that the complainant had paid the fee estimate of \$865.62, but said that work had not begun and that MCPS planned to refund the amount to the complainant. MCPS asked that we "consult" with the complainant regarding a letter sent to him by MCPS on May 3, 2021.³ MCPS did not provide any additional factual

² Included in the list of individuals was "[a]ny Optimal Health employee or independent contractor."

³ The May 3, 2021, letter indicated that the complainant has submitted at least twenty-seven PIA requests since July 2020, asserts that MCPS has provided over 7,000 pages of documents in response, and indicates that MCPS "considers its obligations under the MPIA to have been met

information about how it arrived at its fee estimates. On May 25, 2021, we sent an email to MCPS asking that it provide more information, including the basis for the hourly rates charged, information about the tasks it expected each particular staff member to perform, and information about how it calculated the estimated amount of time each particular staff member would expend. We also asked for more specific information about why the estimated time expenditures increased in FY21-193 and FY21-200. MCPS did not respond to this request. We sent a second request for more information on June 10, 2021;⁴ MCPS provided some of the additional information requested on June 22, 2021. The complainant provided a reply to MCPS's responses on June 25, 2021, wherein he suggested, among other things, that MCPS should provide all records potentially responsive to FY21-193 and FY21-200 to the Board for review. The complainant also asked for information about the "cost-accounting system" MCPS uses for purposes of responding to PIA requests. Based on the information we have received, we will review the complainant's allegations separately as to each PIA request below.

Analysis

We are 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), and should reflect "the actual costs of the search for, preparation of, and reproduction of a public record in standard format, including media and mechanical processing costs," § 4-206(b)(1)(ii). Staff and attorney review 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." § 4-206(b)(2). The PIA instructs that its provisions must be "construed in favor of allowing inspection of a public record, with the least cost and least delay to the person or governmental unit that requests the inspection." § 4-103(b). If we find that a custodian charged an unreasonable fee under § 4-206, we must "order the custodian to reduce the fee to an amount determined by the Board to be reasonable and refund the difference." § 4-1A-04(a)(3).

Fee estimates—as opposed to fees charged for work already performed—can present challenges for review, and we have on occasion dismissed complaints about fee estimates as prematurely made. *See, e.g.*, PIACB 17-04 at 3-4 (Nov. 22, 2016). In other cases, where the custodian has asked for prepayment of a precise figure based on a breakdown of anticipated actual costs—as is the case here—we have been able to evaluate the reasonableness of a fee estimate. *See, e.g.*, PIACB 21-01 (Oct. 5, 2020); PIACB 20-13 (June 22, 2020). In these cases, if the parties' submissions give us no reason to doubt an estimate, the Board will not disturb it. If, on the other hand, the submissions show that an estimate is not reasonably related to the anticipated 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). 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 (Oct. 5, 2020) ("[F]inal

and will not respond to any further MPIA requests." The letter also advised that MCPS would send certain documents to the complainant in the future without the need for a request.

⁴ On June 10, 2021, we also issued a Statement of Delay, citing our need for more information from MCPS. Md. Code Ann., Gen. Provisions § 4-1A-07(c)(1).

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

assessments of costs must be based on the time actually expended, at the rates of the staff who expended it.”). If that final fee deviates from the estimate paid, then a custodian may assess any additional actual costs incurred or, if the final cost is less than the estimate paid, must refund the requester the difference.

I. The PIA Requests

A. FY21-193

The complainant alleges that MCPS’s revised fee estimate of \$1,360.32 to produce records of “any emails, notes, texts, files, phone calls, notes of phone calls, etc.” between eight individuals that occurred between May 1 and November 15, 2020, is an unreasonable fee. Previously the complainant requested such records spanning a longer timeframe—January 1, 2020, to present—and was provided a lower fee estimate of \$843.73. MCPS explained that, after it provided the first estimate, its IT department determined that each of the eight relevant electronic mailboxes would need to be searched and records extracted separately. Further, the general counsel’s office indicated that a significant amount of redaction would be required because the complainant was requesting records produced by attorneys. MCPS explained that, after the complainant narrowed the timeframe, the search was performed and produced 1,988 pages worth of documents that would need review and that the larger estimate was based on “the increase in the estimate of hours that the Attorney, Communications Specialist and Communications Supervisor would spend on reviewing that large amount of documentation.” As indicated above, MCPS estimated that the attorney, the communications specialist, and the communications supervisor would each spend eight hours reviewing these documents.

MCPS also provided additional information about what PIA response-related tasks the attorney, communications specialist, and communications supervisor are expected to perform. The communications specialist is “responsible for converting the documents produced from the IT search and then reviewing every page for redaction and preparing draft MPIA response letters.” The communications supervisor “oversee[s] both the Communications Assistant and Communications Specialist, and reviews all completed MPIA response letters and potentially responsive documents,” and “collaborates with various MCPS departments” to ensure compliance with the PIA. The attorney conducts the “[f]inal legal review to ensure compliance with the PIA.”

We have some concerns about the fee estimate MCPS has required the complainant to pay. Initially, we observe that an estimate of eight hours to review 1,988 pages of records is not, on its face, an unreasonable one. The estimate anticipates that the individual reviewing all of the records for responsiveness and redactions will review about four pages per minute. Given that at least some of the individuals subject to the PIA request appear to work for the same agency and that employees often engage in group communications via email, it is likely that at least some of the individual emails produced from each individual mailbox will be duplicative. Thus, presumably the staff member reviewing these 1,988 pages of documents would also be responsible for removing duplicate records from the collection. Based on these facts, we cannot find the time estimate related to the communications specialist—the individual MCPS has indicated is responsible for converting the records and “reviewing every page for redaction”—is unreasonable. There are concrete, sufficient facts on which to base the estimate. *See* PIACB 21-01 at 3 (Oct. 5, 2020) (“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[.]”). MCPS has indicated that the communications specialist’s prorated salary (which properly excludes benefits) is \$33.47 per hour. That prorated salary multiplied by the eight hours MCPS anticipates the communications specialist will spend on the review results in a cost estimate of \$267.76 related to that particular staff member’s time.

The reasonableness of the cost estimated for the communications specialist's time notwithstanding, MCPS's explanation of the tasks it expects its other staff to perform causes us to question whether the estimate bears a "reasonable relationship," § 4-206(a)(3), to the anticipated costs of fulfilling the PIA request and also whether MCPS is providing responsive records with "the least cost," § 4-103(b), as the PIA requires it to do. MCPS has indicated that the communications supervisor and the attorney are both responsible, although perhaps in slightly different ways, for ensuring that MCPS complies with the PIA. Ensuring that the various departments and employees of an agency comply with the PIA, while certainly important, is not necessarily an "actual" cost of responding to a particular PIA request. Under the PIA, "actual costs" include those costs incurred in "the search for, preparation of, and reproduction of a public record," as well costs that result from "staff and attorney review" necessary to respond to a particular PIA request. § 4-206(b). While presumably the "final legal review" performed by MCPS's attorney pertains to a particular PIA request, it is not at all clear to us that the communications supervisor's "collaborat[ion] with various MCPS departments to ensure . . . Maryland Public Information Act compliance" does. To the extent that any part of the time expenditure allocated to the communications supervisor reflects duties performed in furtherance of training, oversight, and/or more general PIA compliance, it cannot qualify as an actual cost of responding to the complainant's PIA requests and is therefore unreasonable.

Further, we note that, under the process described by MCPS, each response to a PIA request appears to undergo three separate, full reviews. First, the communications specialist reviews the records produced by the search and makes any necessary redactions. Then, the communications supervisor "reviews all . . . potentially responsive documents." Finally, the attorney conducts a "[f]inal legal review to ensure compliance with the Maryland Public Information Act." As we see it, a routine and automatic second and third review of the same collection of responsive records is not a cost that may properly be passed on to a requester. *See* PIACB 19-01 at 3 (Sept. 24, 2018) ("[D]uplication of effort should not be charged to the requester."); PIACB 17-06 at 4 n.6 (Nov. 28, 2016) ("[W]here multiple employees review the same material, only one person's time should be part of the fee charged to the [requester]"); *see, e.g.*, PIACB 21-13 at 4-5 (concluding that a "second layer of review" conducted by a second attorney was more related to employee supervision and thus not a reasonable cost related to responding to a PIA request).

In our view, the staff responsible for reviewing all of the records produced by a search ordinarily should be the lowest compensated staff that is available and that is competent and capable of performing the tasks necessary to respond fully and accurately to a PIA request—i.e., identifying and removing duplicate records and records that are non-responsive, identifying and removing those records that are clearly privileged or exempt, and making any necessary redactions of clearly privileged or exempt material from otherwise-disclosable records.⁶ Based on MCPS's response, it appears that the communications specialist fills this role here. While reviewing the

⁶ This is not a *per se* rule, of course, and we understand that the search and review process will vary depending on the particularities of the PIA request and the resources of the responding agency. There will no doubt be times where it makes more sense for a higher-paid staff member to review the potentially responsive records. For example, in PIACB 20-13 at 2 (June 22, 2020), we found it reasonable that a higher-paid corrections employee was tasked with reviewing the records because he was most familiar with their nature and substance and because his "experience [was] necessary in order to efficiently review the large volume of potentially responsive paper records, and a 'less experienced' employee would likely take longer than 30 hours and result in a higher cost." Ultimately, what matters is that a custodian devise a search and review process that will provide responsive records "with the least cost and least delay." § 4-103(b).

records and preparing the response to a PIA request, the communications specialist should flag only those records for which there is a genuine question of whether a privilege or exemption applies and provide those records to an attorney for legal review. MCPS may then assess the cost of the actual amount of time the attorney spends reviewing those questionable records and charge the requester that fee. Of course, MCPS is free to have its communications supervisor and attorney, who are both compensated a much higher rate than the communications specialist, review the entire set of responsive records already reviewed and redacted by the communications specialist, but it cannot charge a requester for those wholly duplicative reviews. To us, this practice appears to be more a function of employee supervision and oversight than a necessary cost incurred by responding to a particular PIA request. Thus, insofar as the fee estimate in FY21-193 reflects the anticipated costs of a duplicative review by the communications supervisor and attorney, we find that it is unreasonable.

Having concluded that the \$1,360.32 fee estimate as a whole is unreasonable, we are charged with determining, as best we can, an amount that does represent a reasonable fee. § 4-1A-04(a)(3). We have already determined that the portion of the fee estimate that relates to the communications specialist's time—\$267.76—appears reasonable. Further, the submissions give us no reason to question the four hours' time estimated for the IT systems engineer to "writ[e] a program unique to each request [that] searches the requested databases," and to "extract[] those [responsive] documents to provide to the Communications Specialist"; thus, the \$237.04 attributable to his or her time also appears reasonable.⁷ However, given that the tasks and responsibilities MCPS attributes to the communications supervisor appear to be either duplicative of work already performed or more properly viewed as related to employee oversight and general PIA compliance, we find that is unreasonable to charge the complainant costs related to this individual at this point.

The attorney's work presents a more difficult question. MCPS has indicated that it expects that a significant number of the 1,988 pages worth of responsive records will require redaction because some of the records were produced by attorneys.⁸ Such records are also more likely to contain potentially privileged communications and perhaps present questions about whether or not they are subject to disclosure. While, for the reasons explained above, we do not believe it is reasonable to assess costs at the estimate stage for attorney review of all 1,988 pages worth of

⁷ Additionally, it appears from the information provided by MCPS that the search has already been completed. Thus, we expect that the four hours attributed to the IT systems engineer represents the four hour he or she actually spent writing the program and extracting the records. We also expect that the four hours represents "time that [the IT systems engineer] was actively engaged in the search for records," and not "time in which the records may have been downloading or uploading, but in which [the engineer was] free to undertake duties unrelated to the PIA response." PIACB 19-14 at 3 (Aug. 19, 2019).

⁸ In his June 25, 2021, reply to MCPS's supplemental response, the complainant suggests that we review all 1,988 records potentially responsive to FY21-193 and all 30,070 such records for FY21-200. We decline the complainant's invitation. First, it is our understanding that these records have not undergone review to determine whether any of them are exempt from disclosure. Moreover, we do not believe that our current powers and duties contemplate this sort of deep meddling into an agency's response process in order to review a fee *estimate*. Cf. PIACB 19-06 at 2 (Nov. 27, 2018) ("[A]bsent an obvious failure to use [certain efficiency maximizing] tools when they are readily available, we are not in a position to micromanage a custodian's electronic search and retrieval process."). We reach the same conclusion regarding the complainant's suggestion that MCPS should provide detailed information about its "cost-accounting" system.

documents that the communications specialist has already reviewed, it is certainly reasonable to expect that at least a portion of those records will be provided to the attorney to determine whether they should be disclosed or not. In its revised estimate, MCPS allocated the same amount of time—eight hours—for attorney review as it did for the communication specialist’s review. In light of the fact that the attorney (1) should review fewer records, (2) should not be responsible for winnowing out duplicative and clearly non-responsive records, and (3) should not be making the bulk of the redactions, eight hours appears to us an excessive estimate. At the same time, we are mindful that an attorney might have unique and time-consuming tasks, such as performing legal research to determine whether or not a record is privileged or otherwise subject to an exemption. Based on the information before us, we think it is reasonable, for purposes of charging a fee estimate, to anticipate that an attorney will spend six hours reviewing records identified as questionably subject to disclosure in response to the complainant’s PIA request.⁹ Thus, we determine that an estimated fee of \$324.48 for attorney time one that is reasonably related to anticipated actual costs. Of course, the actual time spent by the attorney might exceed six hours; if it does, MCPS is free to assess the cost of the additional time. But, for purposes of estimating a reasonable fee that MCPS intends to charge prior to commencing work on this PIA request, six hours appears to us appropriate.

In sum, we find that the \$1,360.32 estimated fee charged by MCPS to respond to the complainant’s PIA request in FY21-193 is unreasonable. We have determined that \$829.28, which represents reasonable anticipated costs of work performed by an IT systems engineer, a communications specialist, and an attorney, is a reasonable estimate. We therefore order MCPS to reduce the prepaid fee required by \$531.04. And, again, we stress that the “final assessment[] of costs must be based on the time actually expended, at the rates of the staff who expended it.” PIACB 21-01 at 3 (Oct. 5, 2020). If other staff not accounted for in this reduced estimate perform work that is non-duplicative and attributable to this PIA request—e.g., if the communications supervisor contributes in ways other than MCPS has indicated he or she will—then MCPS may of course include the costs of those employees’ time in its final assessment.¹⁰ And, if those final, actual costs surpass the amount of the estimate paid, MCPS may charge the complainant for the additional cost. Conversely, if the actual costs are less than the estimate, MCPS must refund the complainant the difference.

B. FY21-200

We have similar concerns regarding the \$16,524.60 fee estimate provided for FY21-200. In this request, the complainant sought records of “any communications [emails, notes, phone calls, ledgers]” that contain the word “Rifka” between at least twenty-two individuals from October 1, 2018, until the present time. MCPS explained that, after the complainant paid the initial

⁹ We note that is ratio of eight hours for the communications specialist’s time to six hours for the attorney’s time is similar to the one provided in MCPS’s first estimate.

¹⁰ We observe that MCPS has consistently attributed two hours’ work to a communications assistant and has indicated that these are the two free hours’ labor that the statute requires a custodian to provide. § 4-206(c). Given that nearly all of the other time expenditure allocations changed between requests and between estimates and revised estimates, we have some concern that MCPS might not be carefully considering the anticipated amount of time the communications assistant will spend responding to each request. Of course, any failure to do this might well err in favor of the complainant. In any event, MCPS should track the assistant’s time just as carefully as it tracks the time of its other employees.

fee estimate of \$865.62, IT “wrote the program to search the database where the documents are contained” and that the search resulted in “30,070 documents which would then have to be reviewed by an Attorney, a Communications Specialist and a Communications Supervisor.” In turn, MCPS estimated that each of these three staff would spend 116 hours “to review that massive amount of documents for redaction.”

MCPS has indicated that the tasks and responsibilities of the IT systems engineer, the attorney, the communications specialist, and communications supervisor are the same tasks and responsibilities they had in responding to FY21-193, described above. Thus, our conclusions about the reasonableness of the estimate as it pertains to each of these staff members are similar. It appears that the search and extraction process has been completed, and MCPS has indicated that that process took four hours, at a cost of \$237.04, of the IT systems engineer’s time. Nothing in any of the information provided to us causes us to question this number. And, as with FY21-193, we find that the estimated time expenditure attributed to the communications specialist—the individual responsible for reviewing all of the documents provided by IT and applying redactions—is reasonable. 116 hours to review and redact 30,070 documents again equates to roughly four pages per minute. For purposes of providing an estimate, this time expenditure and resulting \$3882.52 cost appears sound. However, as with FY21-193, we cannot find that the time expenditure attributed to the communications supervisor for conducting a second, duplicative review and ensuring PIA compliance among MCPS’s various departments clearly represents a chargeable actual cost of responding to this particular PIA request or that it adheres to the PIA’s mandate that records be provided with “the least cost,” § 4-103(b), to the requester. Based on the factual information before us, we find that it is unreasonable for MCPS to assess the complainant costs related to that individual’s time at this point. And, while it is not reasonable for MCPS to assess costs for an attorney to review the exact same collection of records already reviewed and redacted by the communications specialist, we recognize that, given the sheer volume of responsive records, there are bound to be a substantial number that will require an attorney to determine whether or not all or part of the record is exempt from disclosure. Thus, it is reasonable for MCPS to anticipate that it will incur actual costs for attorney review in responding to FY21-200 and to include them in its fee estimate.

Having concluded that the \$16,524.60 fee estimate is unreasonable, we turn to the question of what figure represents a fee estimate that MCPS may properly require the complainant to prepay. We have determined that the cost estimates related to the IT systems engineer and the communications specialist—\$237.04 and \$3,882.52, respectively—are reasonable. As with FY21-193, the anticipated costs of the attorney’s time are more difficult to determine. Although MCPS has not indicated, as it did for FY21-193, whether it expects a significant number of these 30,070 records to require redaction, we note that all six of the individuals identified as attorneys subject to the complainant’s PIA request in FY21-193 are also included in his PIA request in FY21-200. Thus, it is reasonable to expect that there will be substantial volume of records that will need legal review to conclusively determine whether all or part of those records are subject to disclosure. That said, for the reasons explained above regarding FY21-193, we do not find it reasonable to allocate to the attorney, for purposes of a fee estimate, the same amount of time—116 hours—that it will take the communications specialist to review *all* 30,070 records. Instead, given the similarity of the requests we apply the same ratio of communication specialist time to attorney time as we did for FY21-193. Hence, we determine here that it is reasonable to anticipate an attorney will spend 87 hours reviewing records flagged by the communications specialist as presenting a question about disclosure; this amounts to \$4,704.96. As with FY21-193, MCPS has not provided us with any indication that the communications supervisor will undertake any non-duplicative review or perform any other tasks relevant to this specific PIA request. Rather, it appears to us that the communications supervisor is responsible for oversight of other employees tasked with responding to this PIA request and other general PIA compliance. For these reasons,

we cannot find it reasonable to assess the complainant costs related to the communications supervisor for purposes of a fee estimate.

In total, we determine that \$8,824.52 is a reasonable fee estimate for a response to the PIA request in FY21-204 and order MCPS to reduce its fee estimate by \$7,700.08. Should the actual costs of producing a response exceed \$8,824.52, MCPS may assess the additional cost. Conversely, if actual costs are lower, then MCPS must refund the complainant the difference.

C. FY21-204

MCPS estimated that it would cost \$725.21 to respond to the complainant's request for "telephone logs and ledgers and all related notes, emails, messages, and all attachments" between two individuals on twenty-four specific dates occurring between April and September 2020. For reasons slightly different than those provided for FY21-193 and FY21-200 above, we cannot find that this fee estimate is reasonable.

When a requester files a complainant alleging that a custodian has charged an unreasonable fee higher than \$350 to respond to a PIA request, a custodian must provide a written response to that complaint within fifteen days of receiving notice of the complaint. § 4-1A-06(b)(1). If the Board requests it, the custodian must include an explanation of the "basis for the fee that was charged." § 4-1A-06(b)(2). When the Board is unable to resolve a complaint based on the written submissions, it has the discretion to hold an informal conference to hear from the parties or any other individual who might have information relevant to the complaint. § 4-1A-07(b). If a written response is not received within forty-five days after notice of the complaint is sent, "the Board shall decide the case on the facts before the Board." § 4-1A-06(c).

Here, notice of the complaint was sent to MCPS, along with the attachments submitted by the complainant, on April 27, 2021. When the Board sent this notice, it asked that MCPS provide a detailed explanation of the basis for the fees charged for all three of the complainant's PIA requests. MCPS's initial response, sent on May 17, 2021, did not provide this explanation. Instead, MCPS indicated that it believed it had fulfilled its obligations under the PIA and that it planned to refund the complainant the fee estimate he had paid in FY21-200, and asked that we "consult" with the complainant regarding the letter MCPS sent to him on May 3, 2021. On May 25, 2021, the Board again asked MCPS to explain the basis of the fee estimates it sought to charge the complainant and provided a list of specific information the Board needed to resolve the complaint, including the tasks it expected each of the five staff involved in responding to perform, and an explanation of how MCPS calculated at their time expenditure estimates. MCPS did not respond. On June 10, 2021, the Board contacted the parties and indicated its intent to hold an informal conference; the Board also suggested that an informal conference might not be necessary if MCPS supplied responses to specific questions regarding the basis for the fee estimates it charged, including the anticipated nature and volume of responsive records for each of the three PIA requests and—as requested before—the tasks it expected each of the five staff involved to perform for each response.

On June 22, 2021, MCPS responded and provided some of the additional information we requested. For instance, we now have more factual information about the PIA-related duties and responsibilities of the five MCPS employees identified in MCPS's fee estimates. However, despite our explicit request, MCPS did not indicate how many potentially responsive records it expected the search in FY21-204 to produce. By providing no information at all about how many records might be responsive to the request in FY21-204, we find that MCPS has largely failed to justify the fee estimate it charged for this request. We therefore cannot find that the fee estimate is reasonable under the PIA.

In these circumstances, it is particularly difficult for us to determine a reasonable fee, as § 4-1A-04(a)(3) requires us to do. We note that the request involved here is somewhat similar in nature to the requests in FY21-193 and FY21-200, where MCPS estimated that its IT systems engineer would spend four hours creating specific queries and extracting the records the queries produced. We find that estimate reasonable here as well. But, without knowing how many records the communications specialist might need to review, and whether or not a significant number of those records might require further legal review, we cannot determine a reasonable estimate of costs for these individuals' time. Given that we are concerned with a fee estimate here, rather than an assessment of actual costs already incurred, and that MCPS is free to charge the complainant for additional actual costs incurred once work on the response is complete, we conclude that MCPS's failure to sufficiently explain the basis for the the estimated costs related to the communications specialist's and attorney's tasks precludes it from requiring the complainant to prepay those costs.¹¹ Thus, we determine that a reasonable fee estimate for FY21-204 is \$237.04 and order that MCPS reduce the estimate it charged the complainant by \$488.17.

II. Broader Concerns

It is clear that there is a history between these parties. According to MCPS's May 3, 2021, letter, these three PIA requests represent a rather small fraction of the requests this complainant has made over the last year.¹² While we are not unsympathetic to the burden that frequent and overly-broad requests can place on an agency, this case calls to mind the following passage:

¹¹ We recognize that the PIA permits us to "state that the Board is unable to resolve the complaint." § 4-1A-07(c)(2). We also recognize that the Open Meetings Act ("OMA") contains a similar provision, § 3-207(c)(2), and that, when faced with insufficient factual information, the OMA Compliance Board ("OMCB") generally invokes this provision. *See, e.g.*, 14 OMCB 75, 76 & n.3 (2020) (noting that "[i]n addressing complaints for the purpose of providing advice to public bodies, we do not apply a burden of proof," and that "when we could draw conflicting inferences from the submissions, or when we do not have enough information to reach a conclusion, we state our inability to resolve the complaint instead of presuming compliance"). Despite the similarities between our enabling statute and the OMCB's enabling statute, *see* §§ 3-201 *et seq.*, we decline to apply § 4-1A-07(c)(2) in the same way. Unlike the OMCB, which is purely advisory, our Board is charged with making factual and legal determinations that affect the parties' rights and remedies—i.e., a custodian's right to asses a particular fee and a requester's ability to recoup any unreasonable fees assessed. *Compare* § 3-209 ("The opinions of the [OMCB] are advisory only.") *and* § 3-210 ("Except as provided in § 3-211 of this subtitle, [which requires a public body to announce any violations and orally summarize the OMCB's opinion at its next open meeting], the [OMCB] may not require or compel any specific actions by a public body."), *with* § 4-1A-04(a) (requiring the PIA Compliance Board to review and resolve complaints, issue a written opinion as to whether a violation occurred and, if it finds that a custodian charged an unreasonable fee, order the custodian to reduce the fee to an amount determined reasonable). Thus, though our jurisdiction to resolve PIA-related disputes may be limited, we have a certain amount of enforcement authority within that limited jurisdiction. Further, in our view it would defeat the purpose of the PIA's extra-judicial review scheme if a custodian could wholly circumvent review of the fees it has assessed by simply declining to engage with the process and failing to provide necessary information that only it possesses.

¹² In its brief initial response to the complaint in this matter, MCPS asked that we "consult" with the complainant regarding the letter MCPS sent to him on May 3, 2021. *See supra*, note 3. The issues MCPS raised in this letter are not within our jurisdiction to review. *See* §§ 4-1A-04(a); 4-

It is often true that a requestor is at a disadvantage in formulating a PIA request because the requestor does not know what records the agency keeps or how it keeps them. It is part of every agency's mission to be as transparent as the State's sunshine laws, including the PIA, require it to be. A public records request is not an occasion for a game of hide and seek. For that reason, if possible, an agency should in good faith provide some reasonable assistance to the requestor in refining the request for the records the requestor seeks. Of course, nothing requires the requestor to accept such assistance.

It is also sometimes the case that a requestor, suspicious of the particular agency or of government in general, submits a broadly-worded request, intending to afford the agency no excuse for not producing for the records the requestor really wants. Literal compliance with such a request, however, would often require such a diversion of resources and agency time as to amount to a huge expense. **In practice, a productive response to a PIA request is often an iterative process in which the agency reports on the type and scope of the files it holds that may include responsive records, and the requestor refines the request to reduce the labor (and expense) of searching those records.** When the requestor and agency work together, the process approximates the purpose and policy of the PIA. When they do not, what results is the requestor insisting on what, to the agency, is an unbounded and unreasonable search and the agency insisting on what, to the requestor, is an unbounded and unreasonable fee.

Glass v. Anne Arundel Co., 453 Md. 201, 232-33 (2017) (emphasis added). In the additional information it provided on June 22, 2021, MCPS explained that, after the search program was written for the request in FY21-200 “it became clear that because of the overly broad nature of the request to include ‘any Optimal Health Employee’ or ‘independent contractor’ [the search] produced thousands of contractors” and a number of employees with common names, and thus resulted in over 30,000 potentially responsive records. It is not clear to us whether MCPS communicated these significant issues stemming from the overbreadth of the request to the complainant or not. In any event, at this point what is clear is that, as regards this particular requester and this particular agency, the process is not “approximat[ing] the purpose and the policy of the PIA.” *Id.* at 233. Rather, to MCPS, this requester is “insisting on . . . an unbounded and unreasonable search,” while to this requester, MCPS is asking him to prepay an “unbounded and unreasonable fee.” *Id.*

We recognize that our resolution of this complaint is not likely to improve the state of affairs between the parties. The tension and frustration between them is obvious, and their disputes include issues that are beyond our jurisdiction to address. It might be that the issues between the parties—including the fee disputes—are more appropriate for mediation with the Public Access Ombudsman. Though participation in mediation is voluntary and the Ombudsman does not have authority to compel any action from either party, she does have jurisdiction to mediate a much wider range of PIA-related disputes and issues than we do, § 4-1B-04(a), and has wider discretion

1A-05(a), 4-206; PIACB 16-08 at 1-2 (May 19, 2016) (“We thus have the authority to consider, and determine, whether the fee that a custodian has charged bears a reasonable relationship to the actual costs of fulfilling the requester’s request. . . . The statute does not authorize us to order other actions.”). We do note however, that we are unaware of any provision in the PIA that permits a custodian to simply choose to ignore a request. *See* § 4-203(c)(2) (“A custodian may not ignore an application to inspect public records on the grounds that the application was intended for purposes of harassment.”).

to propose more creative solutions. Further, the emotional posture of these matters at this point might make mediation a more fruitful avenue to pursue than Board review. PIACB 17-07 at 2 (Feb. 28, 2017) (“[W]hen cost is not the only issue, and particularly when distrust is present, we encourage both the requester and the custodian to seek the Ombudsman’s services and to proceed in good faith.”). As we have observed before, “[t]he Ombudsman, as mediator, is best positioned to provide a neutral perspective . . . and to help parties engage in a constructive give-and-take on what options might be both feasible and reasonable.” *Id.* We understand that the parties may have already engaged the Ombudsman’s services; we encourage them to take full advantage of what the program has to offer.

Conclusion

Based on all of the facts before us, we find that the fee estimates charged in FY21-193, FY21-200, and FY-204 are unreasonable to the extent that they do not reasonably reflect anticipated actual costs of responding to the PIA requests. We have, as best we could based on the information provided to us, determined reasonable fee estimates as follows and order MCPS to reduce the estimated fees charged to these amounts: (1) \$721.12, for FY21-193; (2) \$8,824.52, for FY21-200; and (3) \$237.04, for FY21-204. While preparing the responses, MCPS should carefully track the tasks that each employee performs and the amount of time expended on those tasks. If the final costs related to those tasks and time expenditures surpass the estimates paid, MCPS may charge the complainant the excess fees. If those final costs are less than the estimates paid, it must refund the complainant the difference.

Public Information Act Compliance Board

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