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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 22-05

December 10, 2021

Housing Opportunities Commission of Montgomery County, Custodian
Karen Lundregan, Complainant

Over the course of several weeks in August, the complainant submitted nearly a dozen Public Information Act (“PIA”) requests seeking various records from the Housing Opportunities Commission of Montgomery County (“HOC”). For one of those requests, the HOC estimated that it would cost \$1,550 to respond and required full payment of the estimate before it would continue to process the complainant’s request. During the process of responding to the complainant’s requests, disputes arose. The parties first attempted to resolve their disputes through the Office of the Public Access Ombudsman. However, on October 20, 2021, the complainant filed a complaint alleging that the HOC’s \$1,550 fee estimate was unreasonable. The HOC, through counsel, responded.

Background

Through her PIA requests, the complainant has sought records related to the Montgomery County Attorney’s (“County Attorney”) representation of the HOC, medical records, compliance department records, and records related to a termination proceeding. Because the fee estimate assessed pertains only to the requests for records related to the County Attorney’s representation of the HOC, we will focus our discussion of the facts on those particular requests.

First, on August 2, 2021, the complainant asked for any “agreement” between the County Attorney and the HOC as to “legal representation” and “[a]ny other clarification, documentation, binding agreement, etc. you can provide to me to show a ‘valid’ reason” why the County Attorney would represent the HOC. The complainant asked that the response be provided “both electronically and physically.” The HOC responded on August 16, 2021, and indicated that the search had returned one responsive document, which the HOC attached and sent electronically

along with its response letter.¹ The HOC also advised that, because the total search time was less than two hours, no fees would be charged.²

Then, on August 17, 2021, the complainant wrote a letter to the HOC to “follow[] up” regarding the HOC’s “initial response” to the complainant’s “initial” PIA request sent on August 2, 2021 (“First Supplemental Request”). The complainant asked the HOC to consider her letter as a PIA request for “further documentation/questions as to agreements” between the County Attorney and the HOC. To that end, the complainant sought: (1) information as to how often the agreement had been “invoked” in the last five years; (2) an explanation of the “specific circumstances under which this agreement can be invoked”; (3) “any side agreements or documents that describe the conditions under which the agreement can be invoked”; and (4) “any requests from [the HOC] to the . . . County Attorney to invoke the agreement dated within the past 5 years.” The HOC responded to the complainant’s First Supplemental Request on August 19, 2021. Noting that the PIA does not require an agency to create records in response to a PIA request, the HOC advised that it did not have any records responsive to the complainant’s First Supplemental Request. The HOC further advised that the complainant would not be charged for “the time associated with this supplement[al] request,” but that “any further supplemental requests or new requests that are related to this request will be subject to HOC’s standard fees.”

Finally, on August 20, 2021, the complainant sent a PIA request for “specific documents regarding agreements” between the County Attorney and the HOC (“Second Supplemental Request”). In particular, the complainant’s Second Supplemental Request sought:

- (1) Correspondence between the HOC and the County Attorney regarding requests for the Agreement “to be invoked and/or implemented from January 15, 1987 . . . through present day,” including “emails, letters, online requests, notes from phone calls, inter office notes, inter office emails, or any other correspondence,” as well as the “dates and times of phone calls made, etc. and pertinent notes, emails, etc. as a result”;
- (2) Any correspondence between the HOC and the County Attorney in which the HOC asked that the Agreement “be invoked between Karen Lundregan and [HOC],” including “emails, letters, online requests, notes from phone calls, inter office notes, inter office emails, or any other correspondence,” as well as the “dates and times of phone calls made, etc. and pertinent notes, emails, etc. as a result”;
- (3) “Specific documentation [and] correspondence” between the HOC and the County Attorney “showing instances where this Agreement was invoked from January 15, 1987 through present day,” including “emails, letters, online requests, notes from phone calls, inter office notes, inter office emails, or any other

¹ Per the HOC’s August 19, 2021, response sent to the complainant regarding a supplemental request, it appears that the responsive document was a copy of a Participating Agency Agreement dated January 15, 1987. Like the parties, we will refer to this document as the “Agreement.”

² Section 4-206(c) of the General Provisions Article states that “[t]he 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.”

correspondence,” as well as the “dates and times of phone calls made, etc. and pertinent notes, emails, etc. as a result”;

(4) “Correspondence/documents” between the HOC and the County Attorney “showing instances where this Agreement was invoked regarding Karen Lundregan,” including “emails, letters, online requests, notes from phone calls, inter office notes, inter office emails, or any other correspondence,” as well as the “dates and times of phone calls made, etc. and pertinent notes, emails, etc. as a result”;

(5) Any “side agreements or documents that describe the conditions under which the Agreement can be invoked, from the period of January 15, 1987 through present day”;

(6) “Correspondence/documents” between the HOC and the County Attorney regarding “fee/payment arrangements for legal representation, etc. from January 15, 1987 through present day,” including “emails, letters, online requests, notes from phone calls, inter office notes, inter office emails, or any other correspondence,” as well as the “dates and times of phone calls made, etc. and pertinent notes, emails, etc. as a result”;

(7) Copies of “cancelled checks, receipts, statements, invoices, whether physical, online, written etc.” from the HOC to the County Attorney related to the “fee/payment arrangements for legal representation”;

(8) “Correspondence/documents” between the HOC and the County Attorney regarding the Agreement as it pertains to “fee/payment arrangements for legal representation, etc. from January 15, 1987 through present day,” including “emails, letters, online requests, notes from phone calls, inter office notes, inter office emails, or any other correspondence,” as well as the “dates and times of phone calls made, etc. and pertinent notes, emails, etc. as a result”;

(9) Copies of “cancelled checks, receipts, statements, invoices, whether physical, online, written etc.” from the HOC to the County Attorney related to the “Agreement regarding fee/payment arrangements for legal representation.”

The HOC responded to the complainant’s Second Supplemental Request the same day it was sent, August 20, 2021. In its response, the HOC indicated that it expected the search to “return a substantial number of documents and require an extensive amount of staff time,” given the “vague and overly broad nature (e.g., requesting documents from 1987 – 2021)” of the Second Supplemental Request. The HOC’s “preliminary estimate” was that it would take 50 hours to respond. Based on that prediction, and on the \$31 per hour that the HOC charges for response time, the HOC arrived at its \$1,550 estimated fee and advised that it would not continue to process the complainant’s request until the fee estimate was paid. The HOC suggested that the complainant might narrow the scope of her request—and thus reduce the estimated fee—to include only records created in the last five years.

The complainant filed her complaint on October 20, 2021. She alleges that the HOC, “knowing full-well” that she has a voucher and therefore also that she makes less than 50% of the

Family Median Income, has required her to pay a fee of at least \$1,550 before it will provide the records she has requested. In response, the HOC asserts that the fee estimate is reasonable in light of the “broad and vague nature” of the complainant’s Second Supplemental Request. The HOC expects the search to return “thousands of emails,” many of which may be privileged and therefore require redaction. The HOC also indicates that the response would involve several different departments within the HOC—e.g., Information Technology, Finance, and Risk Management. The HOC advises that it “chooses to lessen the burden on the public by opting to not calculate costs based on each individual’s salary, but to instead charge the much lower rate of \$31/hour,” which apparently represents the rate at which the HOC would have to pay an out-of-house company to process and complete PIA requests. The HOC states that fees would be “markedly higher” if the actual hourly rates of its attorneys were charged.³

Analysis

We are authorized to review and resolve complaints that allege that a records custodian has charged an unreasonable fee higher than \$350 to respond to a request for public records. § 4-1A-05(a).⁴ 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 it should not exceed “the actual costs of the search for, preparation of, and reproduction of a public record in standard format,” § 4-206(b)(1)(ii). “Actual costs” include media and copying costs, as well as staff and attorney time, 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). If we conclude that a custodian has charged an unreasonable fee as the PIA defines it, we are to “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).

Though the fee provisions of the PIA might arguably be read to assume that fees are assessed after the records have been compiled and are ready for production, many of the complaints to this Board involve fee estimates assessed for work not yet done. *See, e.g.*, PIACB 21-01 (Oct. 5, 2020); PIACB 20-13 (June 22, 2020). In those cases where a custodian has required prepayment of an estimated fee that is based on a breakdown of anticipated actual costs, we will evaluate the estimate’s reasonableness because, in a practical sense, the agency has “‘charged a fee’ within the meaning of GP § 4-206.” PIACB 19-01 at 3 (Sept. 24, 2018); *see also* PIACB 17-04 at 3 n.3 (Nov. 22, 2016) (“[W]hen a governmental unit requires payment of the estimated fee prior to providing the records, this Board could consider the matter under the auspices of the governmental unit having charged a fee.”). Under these circumstances, a requester who is unable or unwilling to pay a fee estimate would have no other opportunity to challenge that fee—no records would be produced and no actual costs would be assessed. However, in those instances where prepayment

³ On November 12, 2021, the complainant submitted a reply to the HOC’s response which makes further arguments as to why the HOC should grant her a fee waiver, an issue that is, as discussed below, outside of this Board’s very narrow jurisdiction. We note that the complainant’s reply contains other non-fee-related allegations that are similarly beyond our authority to consider. Thus, for purposes of resolving this matter, we will focus our attention on the allegation raised in the initial complaint and the HOC’s responses thereto.

⁴ Unless otherwise indicated, citations are to the General Provisions Article of Maryland’s Annotated Code.

is not required, there are other avenues to pursue. Work on the response could proceed with the understanding that the requester will pay the fees for the actual cost of production and, when those actual costs are assessed, the requester could file a complaint with the Board if those costs exceed \$350 and the requester believes that they are unreasonable. Here, the HOC has explicitly required that the complainant pay the \$1,550 estimated fee before it will begin work on the response to the complainant's Second Supplemental Request. We will, therefore, review the submissions before us and determine whether the estimated fee is reasonable as the PIA defines the term.

Preliminarily, the complainant's primary grievance appears to be the HOC's refusal to fully waive the \$1,550 in costs that the HOC anticipates it will incur as a result of responding to the complainant's Second Supplemental Request. In support, the complainant asserts that she receives a housing voucher and thus necessarily has an income of less than 50% of the Family Median Income. We simply lack jurisdiction to consider the complainant's arguments to this effect. *See* §§ 4-1A-04(a), 4-1A-05(a), 4-206; PIACB 16-08 at 1-2 (May 19, 2016). To the extent that the complainant has alleged that the \$1,550 fee estimate is unreasonable, we must determine whether the estimate is reasonably related to the actual costs that the HOC expects to incur during the search for and preparation of responsive records. § 4-206(a)(3). The complainant's income level or indigency are not relevant to whether the fee estimate is reasonable as narrowly defined in the PIA.

We first note that we recently reviewed a different complaint involving the HOC and concluded that the \$31 per hour it charged in that case in order to assess staff and attorney costs was reasonable. *See* PIACB 21-13 at 3-4 (June 3, 2021) (finding no reason to question the HOC's assertions that the rate charged was lower than the actual prorated salaries of attorneys responding to the PIA request in light of the average salary of a full-time county employee). Given that the same attorney is responding to the complainant's PIA requests in this case, we see no need to revisit that conclusion here.

Next, we turn to whether the HOC's estimate that it will take 50 hours is reasonable. We start with the language of the complainant's Second Supplemental Request, and the nature and volume of records sought. First, the complainant seeks numerous different types of records—specifically “letters, emails, online requests, notes from phone calls, inter office notes, inter office emails, or any other correspondence.” The variety of records alone suggests that the search process might be time-intensive, requiring the HOC to search not only—as the HOC points out in its response—across multiple departments, but within multiple records management systems, e.g., email servers, computer hard drives, or hardcopy files. Second, the complainant has asked for “correspondence/documents between” the HOC and the County Attorney related to the County Attorney's legal representation of the HOC. Given that at least portions of such documents are likely subject to the attorney-client privilege, it is reasonable to believe that the review and redaction process might take more time as compared to a request that does not so clearly seek records that are likely privileged. Finally, and perhaps most significant to our determination, is the temporal breadth of the complainant's Second Supplemental Request. She seeks records spanning nearly 35 years. In light of the numerous types of records sought, their likely privileged nature, and the lengthy period of time over which the complainant seeks to have the HOC search, we cannot conclude that the HOC's 50-hour estimate is unreasonable. *Compare, e.g.,* PIACB 21-08 at 3-4 (Dec. 1, 2020) (reviewing a complaint involving a similarly broad request and finding it

reasonable to estimate that it would take 62 hours of staff time to search for and review responsive records).

Finally, we address an issue that the submissions touch on briefly—i.e., the HOC’s decision to aggregate the complainant’s initial request, First Supplemental Request, and Second Supplemental Request for purposes of providing the required two free hours of labor, though we recognize that the complainant has not necessarily argued that the fee estimate is unreasonable because of that decision. The PIA Manual suggests that, where a requester has “attempt[ed] to artificially break a large request into a series of smaller requests in order to obtain two free hours searching for each request,” then it might be “reasonable for the agency to aggregate those requests as a single request with the appropriate fee.” Office of the Attorney General, Maryland Public Information Act Manual (16th ed. 2021) at 7-2. At the same time, “nothing in the Act prohibits a requester from making multiple requests, and an agency should not artificially aggregate separate requests to increase the fee so as to discourage those requests.” *Id.* at 7-2 – 7-3. With this guidance in mind, we have determined that “where multiple requests are submitted by the same requester to the same agency within a short timeframe, and where those requests seek records that are very similar in nature and substance, aggregation of those requests will generally be reasonable insofar as any fees assessed are concerned.” PIACB 21-12 at 4 (May 27, 2021).

In this case, we find that, on the whole, it was not unreasonable for the HOC to aggregate the complainant’s initial request, First Supplemental Request, and Second Supplemental Request. The requests all clearly seek records that are substantively the same—namely those relating to the Agreement and to the County Attorney’s legal representation of the HOC. And, they were all submitted fairly close in time, over a period of less than three weeks. Moreover, the complainant herself characterized her First Supplemental Request as a “follow-up” to the HOC’s “initial response,” which suggests that she herself regarded the First Supplemental Request as a continuation of her initial request. However, we caution that the HOC—and all agencies—must carefully track the actual time spent responding to PIA requests, not only for purposes of assessing the *actual* costs upon completion of a response, PIACB 20-13 at 2 (June 22, 2020), but also, in circumstances where requests are aggregated, for purposes of ensuring that a requester receives the two free hours of labor that are due. Here we have no argument or indication that the HOC spent less than two hours in total responding to the complainant’s initial request and her First Supplemental Request. Rather, the HOC indicated that the response to the complainant’s initial request took “less than two hours.” Regarding the response to the First Supplemental Request, the HOC simply advised that, as indicated earlier, it did not charge the complainant for the time associated with responding to the First Supplemental Request, but that it would charge her the standard fees going forward for “any further supplemental requests or new requests that are related to this request.” But, in the event that the responses to both the complainant’s initial request and First Supplemental Request did in fact take less than two hours’ total time, then the HOC must credit any time remaining against the time it takes to respond to the Second Supplemental Request.

Conclusion

We find that the \$31 per hour that the HOC charges for staff and attorney search and review time in this case is reasonable. We also find that the 50 hours the HOC estimates it will take to search for, review, and prepare responsive records is reasonable. Accordingly, the \$1,550

estimated fee is also reasonable as the PIA defines the term. Of course, the HOC must carefully track the actual time it takes each individual staff member to respond to the Second Supplemental Request and, in the event that the actual costs are lower than the anticipated costs, the HOC must refund the complainant the difference.

Public Information Act Compliance Board

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