STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 23-03
November 2, 2022
City of Takoma Park, Custodian
Michaela Kelinsky (Neighborhood Development Company), Complainant

The complainant, Michaela Kelinsky, on behalf of the Neighborhood Development Company ("NDC"), sent a Public Information Act ("PIA") request to the City of Takoma Park ("City") seeking records of communications between "all current elected officials and all current and former employees of the City" and 37 named individuals, "[a]ny other person in the Office of the Comptroller of Maryland," and "[a]ny other person in the Maryland Department of Transportation," concerning a certain parking lot redevelopment. The complainant asked for records spanning January 1, 2014, to the date of the City's response. Before the City issued a final response, a dispute emerged regarding the way in which the City proposed to search for responsive records. The complainant attempted to resolve her dispute through the Office of the Public Access Ombudsman. On August 3, 2022, the Ombudsman issued a final determination stating that the dispute was not resolved. On September 1, 2022, the complainant, through counsel, filed a complaint asking this Board to direct the City to conduct its search in a certain manner. The City, also through counsel, responded on October 3, 2022. For the reasons provided below, we conclude that we lack jurisdiction to review and resolve this complaint.

Background

The complainant is the Senior Vice President of the NDC, a real-estate development company that aims to "develop exciting residential and commercial properties that cultivate vibrant communities."[1] In August 2016, the NDC and the City entered into an agreement to redevelop a certain City-owned parking lot into a commercial retail project. According to the complainant, the project was "controversial" and was opposed by certain people, including some members of the City Council, State Comptroller Peter Franchot, and the Montgomery County Executive. In June 2021, the City disapproved the project's site plan, in part because, the complainant explains, the State Highway Administration ("SHA") refused the NDC a necessary permit. The NDC sent a PIA request to the SHA for records related to the project and, in response, the NDC obtained records of emails that the complainant maintains "suggest[ed] [that] Comptroller Franchot attempted to influence the SHA's decision."

[1] For more information, see Neighborhood Development Company, https://neighborhooddevelopment.com/ (last visited Oct. 17, 2022).

Later, in January 2022, the complainant sent a PIA request to the City and indicated that the request was directed to current elected officials, and current and former City employees. The request asked for records of certain communications between the elected officials and employees and 37 named individuals, as well as any other persons in the Comptroller's Office or the State Department of Transportation, and that were in "paper, electronic, digital, or other form," concerning the development project that was the subject of the 2016 agreement. The request expressly stated that it included any communications that might be found in private email or telephone accounts. The City acknowledged the request on February 8, 2022, and provided an estimated fee of $3,374.38. The City also indicated that, in preparing the response, the elected officials would be "required to conduct searches of their personal email accounts."

Following the City's acknowledgement, the complainant asked the City to use an independent third party to conduct the search, at the NDC's expense. When the City declined to do so, the complainant sought dispute resolution through the Ombudsman, who was unable to resolve the matter.[2] The complainant now asks this Board to order the City to "conduct a search of the Mayor's and City Councilmembers' private email, text and voice mail accounts by using an independent IT company, at NDC's expense."

The City raises three arguments in response to the complainant's complaint. First, the City argues that this Board lacks jurisdiction to resolve the complaint. Second, the City argues that the complainant is entitled to a "reasonable search," and that the search the City proposes is a reasonable one. Finally, the City argues that the method the complainant proposes raises "substantial privacy concerns." Given our conclusion, discussed below, that we do not have jurisdiction to review and resolve the complaint, we will address only the first contention.

Analysis

The PIA charges us with reviewing and resolving complaints alleging certain violations of its provisions, including that a custodian wrongfully denied inspection of records, charged an unreasonable fee higher than $350, or failed to respond to a request for public records. *See* § 4-1A-04(a).[3] Before filing a complaint, a complainant must attempt to resolve his or her dispute through the Office of the Public Access Ombudsman and receive a final determination from the Ombudsman that the dispute was not resolved. § 4-1A-05(a). If, after reviewing the complaint, the response, and any additional submissions before us, we conclude that a violation of the PIA

[2] Specifically, the final determination indicates that the dispute at issue was "the City's declination to use an independent third party to search for potentially responsive communications located on the personal devices of elected officials." We note that, ordinarily, communications between the Ombudsman and parties involved in mediated dispute resolution are confidential. *See* Md. Code Ann., Cts. & Jud. Proc. §§ 3-1801(c)(1), 3-1803(a)(1); COMAR 14.37.03.01A. However, the law allows the Ombudsman to transfer "basic information about a dispute," including "the nature of the dispute" to the Board so long as "appropriate steps have been taken to protect the confidentiality of communications made or received in the course of attempting to resolve the dispute." Md. Code Ann., Gen. Provisions § 4-1B-04(d)(3).

[3] Citations are to the General Provisions Article of Maryland's Annotated Code, unless otherwise stated.

has occurred, we are to issue a written decision and order an appropriate remedy, as provided by statute. § 4-1A-04(a)(2), (3). For example, if we find that a custodian has denied inspection of a public record in error, we must order that the custodian "produce the public record for inspection." § 4-1A-04(a)(3)(i). Or, if we conclude that a custodian has failed to respond to a PIA request, we are to order the custodian to "promptly respond."[4] § 4-1A-04(a)(3)(iii)(1).

The City argues that we cannot consider this complaint because the issue—that of whether the City must use a third party to conduct a search for responsive records—falls outside the scope of the Board's statutorily granted jurisdiction. The City also points out that the statute does not provide for the remedy that the complainant seeks, namely an order directing the City to permit the NDC to pay for a third party to search the elected officials' private devices for public records responsive to the NDC's PIA request. In a reply filed on October 18, 2022, the complainant argues that the City has "constructively, if not literally," denied inspection of the requested records because it has "designed a search method that is not reasonably designed or calculated to uncover responsive records." Specifically, as the complainant sees it, the City plans to "allow the Parties of Interest to be the sole reviewers of their respective private email accounts and phones, and to be the sole arbiters of which, if any, of those communications will be turned over." Because, the complainant explains further, its PIA request was made in the context of "possible wrongdoing" by the City, the elected officials cannot be trusted to produce "anything reflecting negatively" on them.

The plain language of our statute does not appear, on its face, to grant us authority to review complaints about the sufficiency of a custodian's search for responsive records. Rather, it empowers us to resolve complaints alleging, among other things, that a custodian "denied inspection of a public record in violation of this title." § 4-1A-04(a)(1)(i). At the same time, we recognize that the PIA's provision for judicial review, § 4-362(a)(1), contains similar language and yet courts have considered whether a custodian's search was sufficient. *See* § 4-362(a)(1) (permitting review "whenever a person or governmental unit is denied inspection of a public record or is not provided with a copy, printout, or photograph of a public record as requested"). For example, in *Short v. Bishop*, the Court of Special Appeals construed an allegation that the custodian had "denied [the requester] inspection of records that likely exist, but that the [custodian] could not find" as "a contention that the [custodian] did not adequately search for records." No. 0496, Sept. Term 2015, 2015 WL 916429, at *5 (Md. Ct. Spec. App. Mar. 9, 2016) (unreported); *see also, e.g., Glass v. Anne Arundel County*, No. 2077, Sept. Term 2015, 2016 WL 7265908, at *3, *8-9 (Md. Ct. Spec. App. Dec. 15, 2016) (unreported)[5] (reviewing an allegation that a custodian failed to conduct a reasonable search for responsive records and affirming the trial court's conclusion that the searches were reasonable); *Sinclair Broadcast Grp. v. Baltimore City Bd. of Sch. Comm'rs*, No. 24-C-17-006516, 2019 WL 2247799, at *2, *14 (Cir. Ct. Balt. City Mar. 5,

[4] In such cases, the statute also gives us discretion to order the custodian to waive all or part of the fees associated with the response, but only if our written decision includes our reasons for doing so. § 4-1A-04(a)(3)(iii)(2).

[5] Both the complainant and the City cite *Glass v. Anne Arundel County*, 453 Md. 201 (2017) to support their respective positions. Over the course of several years, Mr. Glass initiated numerous PIA lawsuits in the circuit court, many of which were appealed. This particular unreported opinion relates to a different lawsuit than the one considered by the Court of Appeals in 2017.

2019) (reviewing the sufficiency of the custodian's search in a case alleging only "Improper Denial of Access to Records"). In these cases, then, an inadequate search might be thought of as tantamount to a constructive denial of access to records.

But, there is one significant factual difference between the cases noted above and the circumstances presented in the complainant's case, one that we think is determinative. In all of the cases cited above, the allegations of inadequate searches were raised *after* the custodian had either denied inspection of responsive records or represented that no responsive records were found. In those cases, there was *some* sort of factual basis, rooted in the custodian's response, from which to claim that the custodian's search was insufficient. Here, no search has occurred at all yet. The City has not denied inspection—literally or constructively—of any records. And any review by us of whether a custodian's search was "reasonably calculated to uncover responsive records," *Glass v. Anne Arundel County*, 453 Md. 201, 212 (2017), must be conducted in the context of an actual denial of inspection—either because an exemption was applied or because the custodian has indicated that records do not exist—not an anticipated one.

At this point, the complainant only speculates that the City's proposed search method will lead to the withholding of certain records, namely records that might reflect poorly on the City or other elected officials in their handling of the NDC's development agreement. But that speculation is not enough to amount to an actual or even constructive denial of inspection. *Cf. American Oversight v. U.S. Dep't of Health & Hum. Servs.*, No. 17-827, slip. op., 2022 WL 1719001, at *11 (D.D.C. May 27, 2022) (noting, in a post-production challenge to an agency's search for responsive records, that "'purely speculative claims about the existence and discoverability of other documents,' cannot rebut reasonably detailed agency affidavits related to the adequacy of the search" (quoting *SafeCard Servs. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)). To find a constructive denial at this point would amount to our presuming, based on the complainant's description of the circumstances surrounding her PIA request, that the elected officials tasked with searching their own private devices will blatantly disregard what the PIA requires. This we cannot do. *Lerch v. Maryland Port Auth.*, 240 Md. 438, 457 (1965) ("There is a strong presumption that public officers properly perform their duties.").

Conclusion

Based on the submissions, we conclude that we lack jurisdiction to consider the complainant's allegations, and we therefore dismiss the complaint.[6] Given that the City has neither searched for, nor produced, any responsive records at this point, we cannot find that the City has "denied inspection of a public record in violation of [the PIA]." § 4-1A-04(a)(1)(i). In light of this conclusion, we decline to consider whether or not the City's proposed search method is

[6] Of course, it remains perfectly appropriate for a requester to take concerns regarding a custodian's proposed search method to the Ombudsman for mediated dispute resolution. The Ombudsman has authority over a wide variety of PIA-related disputes. *See* § 4-1B-04(a) ("[T]he Ombudsman shall make reasonable attempts to resolve disputes between applicants and custodians," including disputes over, e.g., the application of an exemption, overly broad requests, the amount of time needed to produce records, or requests for fee waivers.).

reasonable or whether the NDC's request to allow a third party to search the elected officials' private devices implicates security concerns.

Public Information Act Compliance Board

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