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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 23-05

November 23, 2022

Prince George's County Police Department, Custodian
Michael Brochu, Complainant

In February of 2022, the complainant, Michael Brochu, sent a Public Information Act (“PIA”) request to the Prince George’s County Police Department (“PGPD”) seeking specific records related to a search of his house conducted pursuant to a search warrant. While the PGPD responded and produced records, the complainant alleged that the PGPD failed to produce any records responsive to his specific request, even though it had such records in its custody. The complainant attempted to resolve his dispute through the Office of the Public Access Ombudsman. On August 31, 2022, the Ombudsman issued a final determination stating that the dispute was not resolved. The complainant then filed a complaint with this Board, which we received on September 21, 2022. The PGPD, through counsel, responded. As explained more fully below, we conclude that the PGPD has not wrongfully denied inspection of public records.

Background

The complainant is an inmate committed to the Maryland Division of Correction. In February of this year, he contacted the PGPD and, under the PIA, requested specific records related to items that were seized from his residence pursuant to a search warrant executed in 2012. In particular, the complainant sought “chain of custody reports/files to include when items were withdrawn from, and returned to, the evidence unit/storage and by whom,” “photos obtained from cameras [and] film,” and “testing, and investigative notes/results on [the items seized].” The complainant listed nine specific item numbers to which his request pertained.

In response, on May 23, 2022, the PGPD produced records from the file for “Case No. 12-214-0737.”¹ According to the complainant, the records provided did not contain any of the specific information that he had asked for in his PIA request. The complainant thus sought assistance from the Public Access Ombudsman. During the course of their

¹ The PGPD’s response letter indicated that portions of the records were redacted pursuant to certain exemptions contained in the PIA. Those redactions are not at issue in this complaint.

attempt to resolve the dispute, the PGPD sent the complainant a second letter indicating that “after an extensive search using the information [the complainant] provided,” the PGPD had concluded that it did not have records responsive to the complainant’s specific request for chain of custody reports, photos, or testing and investigative notes and results. The letter also explained that, in 2012, a “technical issue” caused the deletion of all of the digital evidence that the PGPD had stored at that time. On August 31, 2022, the Ombudsman issued a final determination stating that she was unable to resolve the dispute between the complainant and the PGPD.²

In his complaint, the complainant alleges that the PGPD is withholding the records and information that he requested. To support his allegation, the complainant attaches several records related to his case: (1) an “Investigator’s Activity Summary” detailing certain investigative actions taken in February 2013; (2) an email exchange between the complainant’s defense attorney and the prosecutor dated July 2014; (3) a crime scene report regarding the August 3, 2012, execution of a search warrant at the complainant’s residence and property records regarding the items seized during that search; and (4) a serology report dated May 13, 2013, containing the results of serology testing performed on some of the seized items.³ The complainant maintains that these records “prove” that the PGPD has withheld records from him.

In response, the PGPD asks that we dismiss the complaint as not within our jurisdiction. The PGPD contends that, given its assertion that it does not possess the records that the complainant seeks, it has not denied inspection of any records. Instead, the PGPD maintains that it performed a reasonable search for records and suggests that the complainant is simply “not satisfied with the documents he received.” The PGPD also

² The final determination indicates that the dispute at issue was the complainant’s “concern that there remain[ed] records in [the] PGCPD’s custody that were not produced in the . . . response,” and that, at the conclusion of the mediation, the complainant continued to “believe[] that there are additional files in [the PGPD’s] possession that are being hidden.” Ordinarily, mediation information and 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); COMAR 14.37.03.01. 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 It is not clear to us which, if any, of the attached records were provided by the PGPD in its May 2022 response to the complainant’s PIA request. Regarding the investigative summary, crime scene report, property records, and serology report, the complainant states that they “were never acknowledged or delivered as requested.” The complainant provides no information about the records’ provenance or how he came to possess them.

clarifies that it “does not dispute [that] the documents existed at one point,” but reiterates that those documents are no longer in its custody.

Analysis

We are authorized to consider and resolve complaints that allege certain violations of the PIA. Those violations are specifically enumerated in the statute, and include allegations 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)(1),⁴ as well as an allegation by a custodian that a PIA requester’s request is “frivolous, vexatious, or in bad faith,” § 4-1A-04(b)(1). Before a complainant may file a complaint with this Board, however, he or she must attempt to resolve the dispute through the Office of the Public Access Ombudsman and subsequently receive a final determination from the Ombudsman stating that the dispute was not resolved. § 4-1A-05(a). If, after we review the complaint, the response, and any additional submissions, we conclude that a violation of the PIA has occurred, we must issue a written decision and order an appropriate remedy, as provided by the statute. § 4-1A-04(a)(2), (3). Thus if, for example, 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).

The PGPD urges us to dismiss this complaint because, it argues, the complainant’s allegation is not within our jurisdiction. The PGPD repeatedly stresses that it does not have the records that the complainant seeks and that it cannot deny inspection of records that the PGPD does not have. We note, however, that the precise allegation raised in the complaint is that “the PGPD has and is withholding requested files and information.” Thus, at its core, the allegation is essentially that the PGPD has “denied inspection of a public record in violation of [the PIA],” § 4-1A-04(a)(1)(i), even if only constructively. To us, it is significant that the statute uses the words “denied inspection,” and not language that is narrower, such as “improperly applied an exemption.” After all, a custodian’s assertion that he or she does not possess the records is, practically speaking, just as much a denial of access to those records as an assertion that a requester may not see them because the records are exempt from disclosure under the PIA. This is particularly true when, as is the case here, a custodian acknowledges that the records did or do exist, but asserts that they cannot be found.

Caselow supports an interpretation of the statute that does not limit the phrase “denied inspection,” as used in § 4-1A-04(a)(1)(i), to the application of an exemption alone. For example, in *Ireland v. Shearin*, the Court of Appeals considered a case involving an inmate’s PIA request for certain records related to the operations of a correctional facility. 417 Md. 401, 403-05 (2010). The request was directed to the warden’s office,

⁴ Citations are to the General Provisions Article of Maryland’s Annotated Code, unless otherwise stated.

which responded by instructing the inmate to send his requests “directly to the department [within the facility] in which the issue is relevant.” *Id.* at 405. The inmate filed a complaint in circuit court alleging that the warden had “improperly denied his request under the PIA.” *Id.* The circuit court, without an opinion, granted the warden’s motion to dismiss the complaint on grounds that the warden “had not withheld disclosure in violation of the PIA and could not have denied [the inmate’s] request because the requested documents were not maintained by the Warden’s Office, but rather were housed in other . . . departments.” *Id.* at 405-06. The Court of Appeals eventually vacated the circuit court’s judgment, holding that the warden had “improperly denied [the inmate’s] PIA request for documents” *not* by incorrectly applying an exemption, but by “directing [him] to other departments.” *Id.* at 412; *see also Action Comm. for Transit v. Town of Chevy Chase*, 229 Md. App. 540, 558 (2016) (“In their complaint, ACT and Ross alleged, in effect, that the Town denied them access to public records by arbitrarily denying their meritorious requests for fee waivers.”).⁵ Notably, the PIA’s provision for judicial review contains language substantially similar to that found in § 4-1A-04(a)(1)(i). *See* § 4-362(a)(1) (allowing that “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, the person or governmental unit may file a complaint with the circuit court,” (emphasis added)).

As we see it, this case presents circumstances that are materially different from those present in PIACB 23-03 (Nov. 2, 2022), where we concluded that we lacked jurisdiction to resolve a complaint about a custodian’s *proposed* search method. Unlike the facts presented here, no search had taken place—thus we determined that the complaint amounted to only speculation that the custodian’s proposed search method would lead to the denial of inspection of records. *Id.* at 4. Here, though, the search has been conducted and has resulted in the PGPD’s representation that it has no records responsive to the complainant’s PIA request for certain specific records related to his case. Thus, the complainant’s allegation that the PGPD has denied inspection is similar to the one raised in *Short v. Bishop*, where 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). We too, then, will consider the complainant’s allegation as an assertion that the PGPD constructively denied inspection by conducting an inadequate

⁵ Despite the appellate courts’ willingness to construe the denial of a fee waiver as a denial of inspection, the legislative history of the recent amendments to the PIA makes it clear that we do not have jurisdiction to review a custodian’s decision to deny a request for a fee waiver. As introduced, House Bill 183—the legislation that expanded the scope of our jurisdiction—gave us specific authority to consider an allegation that a custodian “unreasonably failed to waive a fee under § 4-206(e) of [the PIA].” H.B. 183, 2021 Leg., Reg. Sess. (First Reader). However, during the legislative process the bill was amended to remove that specific provision. *See* Amend. No. 276480/1, H.B. 183, 2021 Leg., Reg. Sess., at 1 (House Health & Gov’t Operations Comm.).

search for responsive records. *See* PIACB 23-03 at 4 (suggesting that, under certain circumstances, “an inadequate search might be thought of as tantamount to a constructive denial of access to records”).

In *Glass v. Anne Arundel County*, the primary case in Maryland that addresses a custodian’s duties related to a search for records, the Court of Appeals explained that a search under the PIA must be “reasonably calculated to uncover responsive records,” and cannot be judged by “whether [the search] locates every possible responsive record.” 453 Md. 201, 212 (2017). Ultimately, “what the PIA requires is a *reasonable* search designed to locate all records responsive to the particular PIA request, not a perfect search that leaves no stone unturned.” *Id.* at 233 (emphasis original); *see also Maryland Public Information Act Manual* (17th ed., July 2022), at 2-5 to 2-6 (addressing a custodian’s obligations related to a search for records responsive to a PIA request). A “reasonable” search does not require a custodian to “robotically examine every record in [the agency’s] possession, running up an extravagant fee and diverting public resources in furtherance of a futile effort.” *Glass*, 453 Md. at 232. Instead, “the search should be focused on where responsive records are likely to be found.” *Id.*

Though the PGPD’s response to the complaint indicates that it undertook two different searches for records responsive to the complainant’s PIA request, and characterizes those searches as “extensive,” we requested more information from the PGPD as to how it conducted those searches. *Cf. Short*, 2016 WL 916429, at *6 (finding an affidavit insufficient to support summary judgment where it did not “describe[] the method for searching files or the subject matter of the files searched” and remanding for the circuit court to reconsider and determine if the custodian could “provide sufficient documentation for the search conducted”).

In response to our request, the PGPD’s counsel explained that when the PGPD first received the complainant’s PIA request, it retrieved the complainant’s full case file from the Child and Vulnerable Adult Unit, as that is where responsive records would be located. The PGPD advises that it produced that full case file, with redactions. After it learned of the specific records that the complainant believed should have been produced but were not, the PGPD contacted the Commander of the Child and Vulnerable Adult Unit to ask whether those records might be located elsewhere. Noting the age of the investigation, the Commander was unable to offer any clues. Nevertheless, the PGPD rescanned the case file and searched the laptops of the detectives involved with the case. This second search did not produce any additional responsive records.

In our view, the PGPD conducted an adequate search, and therefore did not constructively deny the complainant inspection of the records that he requested. The additional information provided by the PGPD makes it clear that it undertook a diligent effort to search for the specific records responsive to the complainant’s PIA request. It searched for those records in the place they were likely to be located—the complainant’s

case file. And, when the complainant indicated his belief that there were responsive records in the PGPD's custody that it had not produced, the PGPD again checked the case file and expanded the scope of its search to include the laptops of the detectives involved in the case. Thus, its efforts are similar to those the Court of Special Appeals recently found sufficient. In *Harris v. Wicomico County*, the court found no evidence of a "fail[ure] to make a diligent effort to search for the records" where the custodian testified that he had produced the entire case file, which is where he expected responsive records would be located. No. 673, Sept. Term 2019, 2020 WL 4515787, at *2 (Aug. 5, 2020) (unreported). Notably, in *Harris*, a chain of custody log suggested that the State's Attorney's Office had, at one point, possessed the requested records, but the Court of Special Appeals found that the trial court properly accepted testimony that the records were no longer in the case file, which had been produced in its entirety. *Id.*

It is not entirely clear to us exactly how the complainant intended the records attached to his complaint to support his argument that the PGPD denied access to the records he requested. One possible purpose of those records might be to show that testing or analyses were performed on the items of evidence in question after 2012—when the PGPD says the "technical issue" caused deletion of digital records and evidence—and therefore the PGPD should have records of the results. For example, the Investigator's Activity Summary indicates that, in February 2013, the investigator obtained a search warrant for the complainant's laptop computer. The 2014 email exchange between the prosecutor and the complainant's attorney appears to refer to the results of the execution of that search warrant.⁶ However, as with the chain of custody log in *Harris*, that these records *should* exist somewhere does not necessarily mean that the PGPD's search for them was inadequate. The issue of whether the PGPD should have certain records in its possession—i.e., whether it has followed record retention policies and practices—is generally not for us to decide. *See, e.g.*, PIACB 21-16 at 4-5 (July 30, 2021) (explaining, in the context of an allegation that an agency's poor record management led to high fees, that "[w]e are not charged with evaluating whether and to what extent an agency has complied with whatever records management laws it must comply with"). Here we are concerned only with whether the PGPD conducted a "reasonable search designed to locate all records responsive to the [complainant's] PIA request," and whether that search was "focused on where responsive records are likely to be found." *Glass*, 453 Md. at 232-33 (emphasis omitted). We find that it was.

⁶ We note that, in its responses to the complaint and to our request for more information, the PGPD suggests that the complainant submit a PIA request for the specific records he seeks to the Office of the State's Attorney for Prince George's County. *Cf.* § 4-202(c) (requiring, when a PIA request is submitted to a non-custodian, that the non-custodian notify the requester of "the name of the custodian" and "location or possible location of the public record," if those things are known.)

Conclusion

Based on the information before us, including the additional detail about the search process provided by the PGPD, we find that the PGPD conducted a sufficient search for records responsive to the complainant's PIA request. Accordingly, we conclude that the PGPD did not wrongfully deny the complainant inspection of the records he seeks.

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