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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 23-09

December 28, 2022

Office of the Public Defender (Montgomery County), Custodian
Ricardo Cunningham, Complainant

Since June of 2019, the complainant, Ricardo Cunningham, has sent at least four Public Information Act (“PIA”) requests to the Office of the Public Defender (“OPD”) in Montgomery County seeking records related to criminal case number 124430C. In May of this year, the complainant contacted the Public Access Ombudsman and asserted that the OPD had not provided a final written response to his requests as required by the PIA. On September 29, 2022, the Ombudsman issued a final determination stating that the dispute was not resolved. The complainant then filed his complaint with this Board. After considering the complaint and the OPD’s response, we conclude that the OPD violated the PIA by failing to respond to the complainant’s PIA requests within the statutory timelines. However, given that the OPD has now issued a written response, we order no further relief.

Background

In 2014, the complainant was charged by indictment with certain crimes. Initially an attorney from the OPD represented the complainant, but the case was paneled to a private attorney due to a conflict of interest.¹ Since his conviction, in 2018, the complainant has sought records related to his case by various means, including by submitting requests under the PIA and by filing motions to compel production of his file in the Montgomery County Circuit Court. In June of 2019, the complainant sent a PIA request to the Montgomery County office of the OPD asking for records used as evidence in the case against him as well as records related to various negotiations and court proceedings. In December of 2019, the complainant wrote a letter to the OPD and indicated that he had not yet received any records. In that letter, the complainant asked the OPD to contact his panel attorney about obtaining the records from his case file. The district public defender responded in a letter dated January 3, 2020, and advised that “[a]lthough neither [the discovery or transcripts] are subject to an MPIA request from the Office of the Public

¹ District public defenders are required to maintain a confidential list of private attorneys who are available to represent indigent individuals who otherwise qualify for representation by the OPD. *See* Md. Code Ann., Crim. Proc. § 16-208; *see also* COMAR 14.06.02 (regulations governing panel attorneys).

Defender,” he would attempt to obtain the records, if available, from the complainant’s panel attorney and provide them to the complainant.

In September of 2020, however, the complainant’s panel attorney assured the OPD via email that he had provided the complainant with everything in his possession requested by the complainant. Then, in June of 2021, the complainant filed a motion to compel production of his “client file,” a motion that the OPD opposed on grounds that the complainant’s panel attorney had already provided the discovery material “in compliance with the rules of professional conduct.”² Following that motion, in September 2021 and February 2022, the complainant again sent PIA requests to the OPD seeking certain records from his case file. When the OPD did not respond, the complainant sought dispute resolution assistance from the Public Access Ombudsman, who was not able to resolve the dispute within the 90-day timeframe provided by statute.³ *See* § 4-1B-04(b).⁴

In his complaint, the complainant disputes the OPD’s assertion that he has been provided with the records he seeks. He contends that, if this were the case, he would “not be continuously wasting time trying to obtain t[he] material.” In response, the OPD notes that there was a leadership change in the Montgomery County office in May of 2022, and that the complainant had been “litigating issues surrounding his file” for some time prior to that shift. The OPD explains that, when a case is paneled for conflict of interest reasons, panel attorneys keep their own files which the OPD cannot access. Thus, the OPD states that it does not have a file for the complainant in its Rockville office. Regarding whether and how it responded to the complainant’s PIA requests, the OPD explains further that it sent its response to the Ombudsman on September 28, 2022, but “failed to realize that [the OPD] needed to respond directly to [the complainant].” The OPD ultimately mailed its response on September 30, 2022.⁵ Though the OPD takes responsibility for the error, it does not believe that there is anything further that it can do for the complainant at this point.

Analysis

We are charged with resolving complaints that allege certain violations of the PIA, including that a custodian failed to respond to a request for public records. *See* § 4-1A-

² The chronology outlined here is based largely on the supporting documents attached to the complainant’s complaint. We are unable to determine how the circuit court ruled on the complainant’s motion to compel.

³ Though the complainant initiated dispute resolution in May of 2022, the 90-day deadline did not begin to run until July 1, 2022, when the statute imposing that time limitation became effective. *See* 2021 Md. Laws, ch. 658.

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

⁵ The complainant states that he received this mailed response on October 6, 2022.

04(a)(1)(iii). Before a complainant may file a complaint with this Board, however, he or she must attempt to resolve the dispute through the Public Access Ombudsman. § 4-1A-05(a)(1). If the Ombudsman is unable to resolve the matter, a complainant may file a complaint within 30 days of receiving the Ombudsman’s final determination stating such. § 4-1A-05. If, after reviewing the complaint and the response, 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). For example, if we determine that a custodian “failed to respond to a request for a public record within the time limits established under § 4-203(a) or (d),” we must order the custodian to “promptly respond.”⁶ § 4-1A-04(a)(3)(iii)(1).

A custodian in receipt of a PIA request is required to grant or deny that request “promptly, but not more than 30 days after receiving the [request].” § 4-203(a)(1). A custodian who “reasonably believes that it will take more than 10 working days to produce the public record” must state so in writing within 10 working days of receiving the request. § 4-203(b)(2). The custodian must also explain the reason for the delay, provide an estimate as to the amount of time it will take to produce the response and, if applicable, provide an estimate of the range of fees that may be charged. *Id.* A custodian who denies a request to inspect public records must, within ten working days of the denial, provide a written statement giving the reason for the denial, the legal authority for the denial, notice of remedies for review of the denial, and a brief description of the undisclosed records that, without disclosing protected information, allows the requester to “assess the applicability of the legal authority for the denial.” § 4-203(c)(1)(i). For discretionary denials, a custodian must also explain why redaction “would not address the reasons for the denial.” § 4-203(c)(i)(2). In all cases, a custodian must “allow inspection of any part of the record that is subject to inspection.” § 4-203(c)(1)(ii).

Sometimes a requester may send a PIA request to the wrong custodian. Or, the request might be sent to the correct custodian who, after a diligent search, is unable to locate any responsive records. The PIA accounts for these scenarios. Section 4-202(c) requires non-custodians, within ten working days of receipt of a PIA request, to provide the requester notice that they are not the custodian of the records sought and the name of the custodian and location of the record, if known. Under § 4-202(d), when a custodian “determines that the record does not exist, the custodian shall notify the [requester] of this determination . . . immediately,” if such determination is reached on initial review of the request, or “promptly after the search is completed but not more than 30 days after receiving the [PIA request].”

⁶ The statute also provides us with discretion to order that a custodian waive all or part of the fee the custodian may be entitled to charge, but “only if the written decision includes the Board’s reasons for ordering the waiver.” § 4-1A-04(a)(3)(iii)(2). We have no indication that any fees were charged or contemplated here, thus this provision is not implicated.

Turning to the complainant's PIA requests to the OPD, we start by addressing the OPD's statement, contained in its January 3, 2020, letter to the complainant, that the discovery records and transcripts sought by the complainant are not "subject to an MPIA request from the Office of the Public Defender." The OPD does not, in its response to the complaint here, dispute that it is an agency subject to the PIA. And, it is possible that this statement was intended to convey that, because the complainant's case was handled by a panel attorney, the OPD was not the correct custodian. However, given the ambiguity of the statement, we emphasize that the OPD, as a "unit . . . of the State," § 4-101(k), is clearly an agency in possession of public records subject to the PIA. *See, e.g., Harris v. Baltimore Sun Co.*, 330 Md. 595 (1993) (concerning a PIA request to the OPD); 68 Md. Op. Att'y Gen. 330, 331-32 (1983) (trial transcript in the custody of the Public Defender is a public record subject to inspection under the PIA).

Taking each of the PIA requests for which we have documentation in turn, it is plain that the OPD did not respond within the time limitations provided in the PIA. A timely response to the request dated June 23, 2019, would have been sent within 30 days of the OPD's receipt of that request—i.e., somewhere around July 23, 2019, with a few days added to account for the time it took for the complainant's regular-mailed request to reach the OPD. There is no indication that a response was sent in that timeframe. Then, in response to the complainant's December 27, 2019, follow-up letter in which the complainant stated that he had not "received [his] discovery material," and asked that the OPD "just get [him] the material,"⁷ the OPD sent the letter dated January 3, 2020, mentioned above. While that letter was sent within the applicable timelines, it did not provide a substantive response that conformed to the PIA. Rather, the letter ultimately advised that the OPD had "reached out" to the complainant's panel attorney and would follow up once the panel attorney responded. Finally, we have no indication that the OPD sent timely responses to the PIA requests the complainant sent on September 19, 2021, or February 6, 2022.

Indeed, it was only after the Ombudsman intervened that the OPD sent, on September 30, 2022, a response to the complainant's PIA request that satisfies—albeit just barely—the PIA. Notably, the substantive response letter was not actually addressed to the complainant; rather, it was addressed to the Ombudsman's Administrative Officer. But, the response sent to the complainant disclosed the one responsive record that was

⁷ Though this letter does not mention the PIA, it nevertheless qualifies as a PIA request that would trigger the response obligations outlined in §§ 4-202 and 4-203. Section 4-202(a) requires a "person or governmental unit that wishes to inspect a public record" to "submit a written application to the custodian," but does not specify that the PIA must be explicitly invoked in that written application. *See also* Robert N. McDonald, *Maryland Public Information Act: Maxims, Myths and Misunderstandings*, 44 Md. Bar J. 4, 8 (June 2011) (noting that many requests to State agencies cite the federal Freedom of Information Act, and that "nothing in the PIA requires that the requester cite the statute").

apparently in the OPD’s physical custody at the time—namely its opposition to the complainant’s motion to compel—and explained that the OPD had “nothing else to provide [the complainant] that is responsive to his request.”⁸ Although the complainant appears to take issue with the response provided, his concerns are more properly characterized as a dispute about the *content* of the OPD’s response rather than the lack of a response altogether. *Compare, e.g.*, § 4-1A-04(a)(1)(i) (permitting Board review of complaints that a custodian denied inspection of a record in violation of the PIA), *with* § 4-1A-04(a)(iii) (permitting Board review of complaints that a custodian failed to respond to a PIA request); *see also* PIACB 23-05 (Nov. 23, 2022) (treating a custodian’s assertion that it had no responsive records as a denial of inspection for purposes of Board review). Because the complainant has not attempted to resolve this specific dispute through the Ombudsman, we cannot resolve this aspect of his complaint. *See* § 4-1A-05(a) (complaint may be filed if the complainant has attempted to resolve “the dispute” through the Ombudsman, and the Ombudsman has issued a final determination stating that “the dispute” was not resolved).

⁸ The day after it sent its response to the complaint under the statute’s 30-day deadline, *see* § 4-1A-06(b)(1), the OPD sent a “supplement” to that response consisting of seven pages of records related to the complainant’s case that the State Records Center (“SRC”) in Jessup sent to the OPD, and which the OPD received on November 29, 2022. Reiterating that the OPD has “no file for [the complainant] in [its] Rockville office,” the OPD stresses that the records—which contain an entry of appearance for the complainant’s private panel attorney—confirm that the OPD “did not maintain a criminal case file for [the complainant] because his case was paneled.” While all of this may be true, it nevertheless remains that the OPD should have provided these records to the complainant in response to his many PIA requests. The OPD is the custodian of the records, not the SRC, which is operated by the Department of General Services. *See* § 4-101(d), (f) (“custodian” includes the “official custodian,” which the PIA defines as a “an officer or employee of the State . . . who is responsible for keeping a public record, whether or not the officer or employee has physical custody and control of the public records”); Maryland Dep’t of Gen. Servs., Record Management, <https://dgs.maryland.gov/Pages/RecordsManagement/index.aspx> (last visited Nov. 29, 2022) (noting that the SRC “provides secure, climate-controlled and affordable *storage* of non-permanent State, county and local records,” (emphasis added)). The fact that an agency’s public records may be located offsite—i.e., here, not in the “Rockville office”—does not relieve a custodian of the duty to produce those records if they are responsive to a PIA request. *See, e.g., Glass v. Anne Arundel County*, 453 Md. 201, 235-36 (2017) (explaining, regarding an argument that archived emails stored by an office of information technology were “discarded” records, that “a more apt analogy would be a County warehouse,” and that “[w]hile a requestor might submit a PIA request to the supervisor of a County warehouse for access to records stored at the warehouse, inevitably that request would be forwarded to, and handled by, a custodian at the agency to whom the records belonged”).

Conclusion

We find that the OPD violated § 4-203(a) of the PIA by failing to respond to the complainant's PIA requests within the applicable time limitations. However, given that the OPD has now provided a conforming response, and has not charged any fees for that response, we can order no other relief.

Public Information Act Compliance Board

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