STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 23-33
October 5, 2023
Washington County, Custodian
Justin Holder, Complainant

The complainant, Justin Holder, challenges the $7,602.95 estimated fee that Washington County ("County") has charged for responding to his Public Information Act ("PIA") request for sewer and water system related agreements between the County and fifteen different subdistricts. In response, the County argues that we should dismiss the complaint as premature or, in the alternative, find that the estimated fee is reasonable. As explained below, we conclude that the County's estimated fee is unreasonable and order that it be reduced to $758.16.

Background

In March 2023, the complainant sent a PIA request to the County seeking "the 'agreements' to operate, construct and maintain a sewer/water system" that were made between the County and fifteen sanitary subdistricts and "signed and sealed on or before December 31, 1993." The County, through counsel, acknowledged the request and provided an estimated fee of $7,602.95 for production of the records. The County explained that the records were stored in boxes labeled for each subdistrict, and that it anticipated that it would take two County employees, paid at a combined hourly rate of $104.15, two and a half hours each to search through the boxes for each of the fifteen subdistricts to locate responsive records. The County further explained that the first two hours of search time were free,[1] and that that estimate did not include fees for any legal review that might be required. The County asked the complainant to pay a "deposit" in the amount of the total estimated fee—i.e., $7,602.95.[2]

[1] "The 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." Md. Code Ann., Gen. Provisions § 4-206(c).

[2] The County's math appears to be wrong here. To arrive at the $7,602.95 estimated fee, the County multiplied $104.15 per hour by five hours to arrive at an estimate of $520.75 per each of the fifteen boxes. But, given that the County is using a "combined hourly rate," it should have multiplied that rate by two and half hours—or, in the alternative, simply added together the product of each individual's salary multiplied by two and half hours of work. Thus, the estimated fee was essentially erroneously doubled, and should have been $3,697.33.

After receiving the County's estimated fee, the complainant requested a fee waiver. The complainant also advised that he was "very familiar" with the way the records were kept in the boxes for each subdistrict, and that he believed that he would be able to search the records himself in much less time. Accordingly, the complainant requested that the County allow him to inspect the records in person and scan the responsive agreements with his phone.

The County denied the complainant's fee waiver request. Regarding the complainant's request to inspect and scan the records in person, the County maintained that it would still be necessary to charge the fee. This was so, the County explained, because an employee would need to "pre-scan" the boxes to remove or redact any privileged or exempt material, and because an employee would have to be present to "monitor" the complainant while he inspected the records. The County asked the complainant to pay "a portion of the deposit previously requested."

The complainant, in further correspondence with the County, contended that it would not take him longer than two hours to search through the subdistrict boxes. Noting that on a prior occasion he had searched through a different subdistrict's boxed records, the complainant explained that he knew "how the files in the 15 boxes will be kept," and that the section he was interested in was "relatively small (4 or 5 files)." The complainant also disputed the County's assertion that there might be privileged or confidential information in any of the responsive agreements.

The correspondence continued. In a third letter, the County stated again that it would need to "pre-screen" the boxes to make sure that any privileged or exempt information was removed prior to the complainant's inspection. The County also reiterated that a County employee would need to monitor the complainant during the inspection process, as was done when the complainant previously inspected the records for a different subdistrict. The County also advised that it was able to locate a copy of the agreement for one of the subdistricts—Cloverton—in "another file maintained by the County which was more readily accessible when compared to the fifteen boxes of sewer agreements." Thus, in light of the fact that the box for the Cloverton subdistrict would not need to be searched, the estimated fee was reduced to $7,082.20. The County asked the complainant to advise if he "intend[ed] to submit a deposit and to proceed with [his] request."

The complainant responded to the County's third letter that same day, stating that he was "100% certain" that he could search the fifteen boxes and find the responsive agreements in one hour or less. He also asked the County to advise which County employee would be "assigned to supervise [his] search at the rate of $150/hour." The County sent a fourth and final letter in response in which it directed the complainant to its previous letters and advised that, once the complainant paid the deposit, the County would begin to "pre-screen the records in anticipation of [his] search."

At this point, the complainant contacted the Ombudsman to assist in resolving the fee dispute. Ultimately, however, the Ombudsman issued a final determination stating that the dispute was not resolved and the complainant filed this complaint in which he continues to challenge the County's fee as excessive. The County responds first by asking that we dismiss the complaint as premature, and second by asserting that the estimated fees it has charged are reasonable. In reply, the complainant urges us to review the fee. He argues that the County's application of a "combined" hourly rate to the total number of hours the County believes it will take to search each box is erroneous, and that the actual estimated fee should total less than $4,000. He also questions whether it is reasonable to anticipate that it will take five hours to search each box for the specific records he seeks in his PIA request. Finally, the complainant suggests that we have authority to review the County's fee waiver denial.

Analysis

The PIA authorizes us to review and resolve complaints that allege certain violations of its provisions, including that a custodian "charged an unreasonable fee under § 4-206 of [the PIA] of more than $350." § 4-1A-04(a)(1)(ii).[3] Before a complaint may be filed, a complainant must attempt to resolve a dispute through the Public Access Ombudsman and receive a final determination that the dispute was not resolved. § 4-1A-05(a). Once a complaint is properly filed, we must determine whether the alleged violation of the PIA has occurred and issue a written decision. § 4-1A-04(a)(2). In making this determination, we consider the complaint, the response, and any other relevant information before us. *See, e.g.*, 4-1A-06(b)(2) (allowing the Board to request additional information including information about "the basis for the fee that was charged"). If we find a violation, we must order the remedy provided by the PIA. *See, e.g.*, § 4-1A-04(a)(3)(ii) ("[I]f the Board finds that the custodian charged an unreasonable fee," the Board must order the custodian to "reduce the fee to an amount determined by the Board to be reasonable and refund the difference.").

Ordinarily, a custodian must permit inspection of public records with the "least cost and least delay." § 4-103(b). However, when the amount of labor required to respond to a PIA request exceeds two hours, § 4-206(c), the PIA allows a custodian to charge a reasonable fee for "the search for, preparation of, and reproduction of" the responsive records, including "staff and attorney review costs," if attorney review is necessary, § 4-206(b).[4] To be "reasonable," a fee must bear a "reasonable relationship to the recovery of actual costs incurred by a governmental unit." § 4-206(a)(3). The fee for any staff or

[3] Statutory citations are to the General Provisions Article of Maryland's Annotated Code, unless otherwise indicated.

[4] A custodian may charge the actual cost of reproduction—e.g., the cost of photocopies or USB drives—regardless of how long it took to prepare the response.

attorney time must be prorated for "each individual's salary"—not including benefits or other incidental costs, PIACB 22-06, at 5 (Jan. 18, 2022)—and the "actual time attributable to the search for and preparation of a public record," § 4-206(b)(2). While the PIA does not expressly authorize it, the Supreme Court of Maryland has suggested that a custodian may properly "require pre-payment of fees or a commitment to pay fees when the cost of processing a PIA request is likely to be substantial." *Glass v. Anne Arundel County*, 453 Md. 201, 212-13 (2017).

Turning to the estimated fees challenged in this complaint, we start with the County's argument that the complaint is premature and thus warrants dismissal. We disagree. We are empowered to review allegations that a custodian has "charged" an unreasonable fee higher than $350. § 4-1A-04(a)(1)(ii). As we have explained somewhat recently, the operative word there is "charged"; it does not matter whether the fee represents an actual fee for work already performed or an estimated fee for work anticipated. *See* PIACB 22-07, at 4-5 (Feb. 3, 2022). The County seems to suggest that because it asked that the complainant submit a "deposit" that did not include fees for legal review, that it somehow had not "charged" him a concrete fee for responding to his PIA request. We see absolutely no distinction there. What matters is that the County demanded that the complainant pay, in its words, a "deposit" of $7,602.95 (later reduced to $7,082.20) or else the County would not produce the responsive records. And, as the County itself explains, it "provided a detailed breakdown" of the estimated costs that that "deposit" represents—i.e., the amount of search time anticipated and the hourly rate at which that search time would be charged. These are the very costs that § 4-206 permits. In our view, the County has clearly "charged . . . [a] fee under § 4-206." § 4-1A-04(a)(1)(ii).

The only question before us then, is whether that fee is reasonable. We think it is not. First, as explained *supra*, note 2, the County's method of calculating the estimated fee for search time grossly inflated that number. The County explained that it would need two employees to spend two and a half hours each searching through the fourteen boxes of records.[5] The County combined the hourly rates of those employees *and* the total amount of time that they would spend searching the boxes to arrive at the $7,082.20 estimated fee set out in its May 23, 2023, letter. More specifically, the County multiplied the $104.15 "combined hourly rate" by five hours of search time per box to arrive at a per-box estimate of $520.75. It then multiplied that per-box estimated fee by fourteen boxes, and subtracted $208.30 to account for the two hours of free labor that the PIA provides. Given that the combined hourly rate represents the pay of the two employees, the County should have multiplied that hourly rate by two and half hours, not five.[6] Otherwise, the fee represents

[5] Per the County's May 23, 2023, letter, we understand that one responsive agreement out of fifteen has been produced, and thus there are fourteen boxes—one for each subdistrict—left to search for the remaining responsive agreements.

[6] As noted in more detail below, we asked the County to provide more information about the basis for the fee charged. *See* § 4-1A-06(b)(2)(iii). In response to our questions about the County's

the work of five hours per box for each employee, not two and a half. Thus, assuming no other issues, the estimated fee should be $3,436.95.

But, there are other issues. First, because the submissions left some questions unanswered, we asked the County to provide more information about the basis for the fee, § 4-1A-06(b)(2)(iii), including the job titles and annual salaries of the employees assigned to the response, an estimate as to how many records each of the fifteen boxes holds, and an explanation as to how those boxes are organized. We also asked the County to explain why it was necessary to assign such highly paid employees to perform the search. In response, the County advised that the Director of the Division of Environmental Management ("Division Director"), who earns $147,260 annually, and an Allocation/Permits Specialist ("Permits Specialist") earning $60,655 annually would search the boxes for the responsive agreements. Regarding the volume of records and their organization, the County indicated that the boxes are "standard [B]anker[s] [B]oxes" with the subdistrict number written on them, and that the contents of the box are unknown unless opened. The County explains that the boxes may contain, e.g., construction files or financial files.[7] As to why highly paid employees are necessary, the County states that the Division Director's "insight" is needed to "assist" the Permits Specialist in "determining what is disclosable and what is not under the guidelines of the PIA."

With this additional information, we have concerns about the reasonableness of the County's estimated fee. To start—and with emphasis on the PIA's provision that records should be produced with "the least cost and least delay," § 4-103(b)—we think it is inappropriate to assign the Division Director, who is compensated at an hourly rate of $70.80, to perform half of the search when his stated role is to provide "insight" as to whether the responsive agreements are disclosable. Rather, the Permits Specialist—whom the County clearly believes is competent and capable of searching for the agreements—should do the bulk of the work and seek the Division Director's "insight" once those agreements have been located. *See* PIACB 21-16, at 6 (July 30, 2021) (explaining that, although not a hard-and-fast rule, generally "an agency should utilize the lowest-paid employee available and capable of producing the response"); *cf., e.g.*, PIACB 21-12, at 6-

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apparent calculation error, the County simply responded that the complainant "will be charged the actual time each employee spends searching the records." While we are glad to know that the County intends to comply with § 4-206(b), this response does not resolve the problem with the County's calculation of the "deposit" it demanded that the complainant pay.

[7] Based on the County's response here, it is less clear to us whether the files for each subdistrict are contained wholly within one box, or whether there are multiple boxes for each subdistrict. In its response to the complaint, however, the County indicates that "any potentially responsive records are contained within fifteen boxes labeled by reference to the names of [the subdistrict] projects." We thus operate under the assumption that there is one box for each subdistrict—for a total of fourteen boxes to search, *see supra*, note 5—and that each box may contain certain records grouped together, e.g., construction or financial files.

7 (May 27, 2021) (finding that staff paid $25 per hour, and not an attorney compensated at $325 per hour, should have been tasked with reviewing and sorting out duplicative and non-responsive records). As we see it, the Permits Specialist's hourly rate of $29.16 is a more appropriate one to use, particularly for purposes of calculating the "deposit" that the County requires the complainant to pay.

We also take issue with the County's time estimate, which should track the amount of time that the County anticipates it will actually take to respond to the PIA request. *See* § 4-206(b)(2) (staff costs must be based on "actual time attributable to the search"). While we are mindful that we are usually not in a position to micromanage or second-guess a custodian's search and retrieval process, here we have some serious concerns about the County's estimation that it will take a total of five hours to search one Bankers Box for the responsive water and sewer agreement. The nature of the responsive records is relevant to whether that time estimate—and, ultimately, the estimated fee—is reasonable. *See, e.g.*, PIACB 22-06, at 7-8 (Jan. 18, 2022) (noting that the fact that a requester was "not seeking the actual records from the files themselves," but rather only the "name of the officer that is the subject of the file" was important). The complainant has not requested all records related to the subdistrict water and sewer projects—or even many of those records. Rather, he has requested only the agreements between the County and the subdistrict related to each water and sewer project. Agreements that, according to the complainant's prior experience searching a similar box, may be contained within one of four or five files. Thus, it seems that most of the records in the boxes need not be scrutinized. No disclosure determinations need to be made for any records that are not the agreements themselves.[8] And, assuming that the agreements are not at the very back of the box, once an agreement is found, presumably the rest of the box need not be searched.

This brings us to the more difficult question. Though it may be easy to say that the County's five-hour per-box time estimate appears somewhat excessive, it is not as easy to determine what a more reasonable time estimate might be. However, we bear in mind that this is an estimated fee, properly charged "when the cost of processing a PIA request is likely to be substantial," *Glass*, 453 Md. at 212-13, and that the County will be able to charge the complainant for any actual costs—including the Division Director's review of the responsive agreements—that exceed the "deposit" he has paid, § 4-206(b). Thus, in

[8] As indicated above, the complainant asserted that he is "very familiar" with the records related to these subdistrict water and sewer projects and suggested that it might reduce the cost if he were to search through the boxes himself. Such method may not be as economical as the complainant believes, given that, in this scenario, where the complainant has access to *all* of the records, the County may well need to screen out records that are exempt from inspection under the PIA. It is telling, however, that the County's time estimate did not appear to change as between the two methods, even though an in-person inspection arguably might require closer scrutiny of the non-agreement records. This causes us to further question whether the County's five-hour per-box time estimate is reasonable.

light of the nature and volume of the records requested, and given the PIA's purpose to promote access to public records, we think it is reasonable at this stage to anticipate that it will take a Permits Specialist an average of two hours—at the most—to search each box for the responsive agreements. Charged at a rate of $29.16 per hour, and accounting for the two hours of free labor the PIA requires, § 4-206(c), that time estimate results in an estimated fee of $758.16.

We turn briefly to the complainant's contention that we may review the County's denial of his request for a fee waiver. The section of the PIA to which the complainant cites—§ 4-1A-04(a)(3)(iii)—details the remedies related to a custodian's failure to respond to a PIA request within certain time limitations. Under those circumstances, § 4-1A-04(a)(3)(iii)(2) gives us discretion to order a custodian to waive all or part of the fee associated with responding to the request, so long as our written decision includes our reasons for doing so. Thus, our ability to order a fee waiver is tied to a very narrow set of circumstances—i.e., the custodian must have wholly failed to respond to a PIA request in the first place, with the Ombudsman unable to resolve the lack of response. *See, e.g.*, PIACB 24-07 (Sept. 6, 2023). Here, the County responded to the complainant's PIA request—the disputed issue is the fee. Thus, § 4-1A-04(a)(3)(iii) is not implicated. We simply lack authority to review the County's fee waiver denial. *See* PIACB 23-05, at 4 n.5 (Nov. 23, 2022).

Finally, we note some broader observations based on the submissions for this complaint. Our State's Supreme Court has on several occasions explained that it is important for PIA requesters and custodians to work together in good faith in order to "approximate[] the purpose and policy of the PIA." *Glass*, 453 Md. at 233. "[I]f initial collaborative efforts between an applicant and a custodian" are not successful then, as we note above, "the parties may attempt to resolve their dispute with the assistance of the Ombudsman." *Baltimore Police Dep't v. Open Just. Baltimore*, —Md.— (2023), 2023 WL 5616318, at *6. At the end of the day, "[t]he MPIA depends upon collaboration." *Id.* at *5. Here it seems that the complainant's suggestions as to how he might reduce the burden on the County (and also the cost) were met with no genuine collaborative efforts on the County's part. Going forward, the County should work with the complainant in good faith to respond to his PIA request "with the least cost and least delay." § 4-103(b).

Conclusion

Based on the submissions, including the additional information about the basis for the fee provided by the County, we conclude that the "deposit"—i.e., the estimated fee—that the County has asked the complainant to prepay—i.e., "charged"—is unreasonable and direct the County to reduce that "deposit" to $758.16. Once the work is complete, and should the actual costs of responding to the complainant's PIA request exceed the deposit paid, the County may charge the complainant for that overage. Of course, if the actual cost is less than the deposit, the County must refund the complainant the difference. To ensure

an accurate accounting of the costs detailed in § 4-206(b), the County should carefully track the amount of time each individual employee spends working on the response.

Public Information Act Compliance Board

Michele L. Cohen, Esq.
Samuel G. Encarnacion
Debra Lynn Gardner
Nivek M. Johnson
Deborah Moore-Carter