**STATE OF MARYLAND**
**PUBLIC INFORMATION ACT COMPLIANCE BOARD**

**PIACB 24-03**
**October 6, 2023**
**Office of the State's Attorney for Howard County, Custodian**
**Eric Beasley, Complainant**

The Office of the State's Attorney for Howard County ("HCSAO") estimated that it would cost $53,746 to respond to complainant Eric Beasley's Public Information Act ("PIA") request for "all documents, e-mail, phone logs, and electronic files" created by a specific Assistant State's Attorney ("ASA") over a period of about seventeen months. The complainant alleges that this estimated fee is unreasonable. As explained below, we generally agree.

## Background

The State charged the complainant with certain crimes in 2022. Though the conduct occurred in Frederick County, the HCSAO prosecuted the case due to a conflict. At a hearing on April 13, 2023, the ASA handling the case stated that he had "gotten FOIA[1] . . . requests, it's fine, he can have all my emails, it's great." The "he," of course, being the complainant. The following day, the complainant sent a PIA request to the HCSAO for "[a]ll documents, e-mails, phone logs, and electronic files" created by that ASA "between November 11th, 2021, to present."

The HCSAO acknowledged the PIA request on May 1, 2023. The HCSAO stated that it would take thirty to sixty days to process the request given its "broad nature" and the HCSAO's expectation that "a significant portion" of the records would be privileged under the work product doctrine. The HCSAO also advised that the cost "may be significant," and asked whether the request was limited to the documents related to the complainant's case. If that were so, the HCSAO explained, then it anticipated providing non-privileged records within two weeks. The complainant responded that the request had been "escalated to the Judiciary,"[2] and that he was "willing to discuss terms of settlement of [his] lawsuit directly with Mr. Gibson," the State's Attorney for Howard County.

[1] The Freedom of Information Act, or "FOIA," is the PIA's federal counterpart. *See* 5 U.S.C.A. § 552.

[2] On April 28, 2023, the complainant filed suit in the Circuit Court for Howard County under case number C-13-CV-23-000356. Given that the HCSAO did not communicate the estimated fee until May 15, 2023, we presume that the fee dispute was not at issue in that litigation. In any

Then, on May 15, 2023, counsel for the HCSAO sent the complainant a letter containing the fee estimate at issue. That letter explained that the ASA had sent approximately 140,000 emails during the timeframe identified in the PIA request, and that many were likely protected by the work product doctrine and other privileges, as well as subject to other mandatory exemptions in the PIA. Thus, the HCSAO maintained, all of the 140,000 emails would need to be reviewed. The HCSAO indicated that a Deputy State's Attorney, paid at a rate of $77 per hour, could review about 200 emails per hour. Accounting for the two free hours that the PIA provides, the HCSAO advised that the estimated cost of responding to the request was $53,746, and $.25 per page for copies.[3] The HCSAO asked that the complainant pay the full estimated fee in advance and, in light of the cost, asked whether the complainant might want to revise his request.

The complainant did not revise his PIA request. Instead, he contacted the Ombudsman for assistance in resolving his disagreement with the HCSAO regarding the estimated fee. However, the Ombudsman was unable to resolve the dispute. The complainant then filed this complaint challenging the fee. In his complaint, the complainant alleges that, at the April 13 hearing, the ASA "consented to the release of all of his emails," and that review is not necessary because the ASA "made an explicit waiver of privilege" regarding those emails. To support his allegation, the complainant attaches the relevant excerpt from a transcript of that hearing.

In response to the complaint, the HCSAO maintains that no waiver of privilege or fees occurred at the April 13 hearing, and that the HCSAO's estimated fee is reasonable in light of the breadth of the complainant's PIA request. The HCSAO attaches an affidavit from the ASA who stated that the complainant could "have all [his] emails" in which that ASA avers that he intended that statement to mean that the complainant could have all non-privileged emails related to the complainant's case. The affidavit also indicates that the ASA does not have authority to waive fees for PIA requests. Given the nature of the records—the "overwhelming majority" of which, the HCSAO points out, do not relate to the complainant's case—the HCSAO contends that careful review is necessary. The HCSAO explains that the responsive records potentially contain exempt material such as attorney work product, criminal history record information, inmates' case records, arrest warrants, records of ongoing investigations, and certain 911 communications. The HCSAO also notes that, while the request asks for a broad range of records—all "documents, emails, phone logs, and electronic files"—the ASA's comment was, in any event, limited to email.

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event, the online court records indicate that the circuit court dismissed the complaint, with prejudice, on September 22, 2023.

[3] The HCSAO's May 1, 2023, letter also indicated that the cost did not include any other documents created by the ASA and that "[i]n theory, every case handled by [that ASA] since November 2021 must be searched."

As to the $53,746 estimated fee itself, the HCSAO contends that it is reasonable as the PIA defines the term. Emphasizing that a preliminary search turned up 140,000 emails potentially responsive to the complainant's PIA request, the HCSAO explains that each of the emails must be reviewed to determine whether they contain exempt material, including material that must be withheld under the PIA. The HCSAO indicates that the review will be conducted by one employee—a Deputy State's Attorney paid at a rate of $77 per hour—to avoid multiple employees reviewing the same material. The HCSAO advises that the hourly rate is based on salary alone, and does not include benefits. As detailed in the May 15 letter, the HCSAO explains that the Deputy State's Attorney anticipates reviewing an average of 200 emails per hour, for a total of 698 hours of review work—hence the $53,746 estimated fee. The HCSAO argues that the ASA's comments at the hearing "should not be interpreted as a waiver of fees for a subsequent PIA [request] . . . that grossly expanded the scope of documents contemplated to be produced," and reiterates that the ASA "intended to provide non-privileged emails in [the complainant's] criminal case."

The complainant has much to say in reply, some of which is discussed in more detail in the analysis below. First, the complainant challenges the HCSAO's intimation that there are 140,000 *discrete* emails in need of review. The complainant points out that, given the time parameters of his PIA request, that number works out to an average of nearly 270 emails per day, which the complainant contends is simply an unrealistic number of emails for the ASA to have sent and received. It is far more likely, the complainant argues, that the trove of 140,000 emails contains numerous duplicates and emails of a non-privileged administrative nature, such as the notifications sent by the Maryland Electronic Courts every time an attorney files or is served with court documents. To support this argument, the complainant attaches the HCSAO's 852-page response to one of the complainant's prior PIA requests,[4] and stresses that one email was reproduced 48 times and another 46 times.

The complainant also maintains that a Deputy State's Attorney who is paid $77 per hour should not be tasked with preparing the response to his PIA request. Reiterating his belief that many of the 140,000 emails will be duplicates and/or of a clearly non-privileged nature, the complainant maintains that a lower-paid employee should be assigned to sift through those emails to remove duplicates and that the only emails the Deputy should review are those that actually present disclosure questions.[5]

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[4] The complainant also provided the PIA request, which was dated March 29, 2023, and sought "[a]ny and all emails, phone logs, communication logs, or other records of communication" between the ASA and the complainant's defense attorney, "[a]ny and all emails" sent by the ASA between July 1 and July 13 containing certain words, and "[a]ny and all phone logs (sent or received calls) created by a device used by [the ASA]" that communicated with five specific phone numbers between January 1, 2020, and the date of the PIA request.

[5] The complainant's reply also contains waiver arguments as to why the HCSAO should turn over all responsive records without redaction. Given that this is a fee dispute, and not a dispute about

## Analysis

We are authorized to review and resolve complaints that allege certain violations of the PIA, including that a custodian "charged an unreasonable fee under § 4-206 of [the PIA] of more than $350." § 4-1A-04(a)(1)(ii).[6] Before filing a complaint, a PIA requester 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 conclude that a custodian has charged an unreasonable fee, then we must 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)(ii).

Though, ordinarily, a custodian must permit inspection of public records with the "least cost and least delay," § 4-103(b), the PIA permits a custodian to charge a "reasonable fee" for searching for and preparing responsive records when the search and preparation time exceeds two hours, § 4-206(b) and (c).[7] The PIA defines a "reasonable fee" as one that bears a "reasonable relationship to the recovery of actual costs incurred" by responding to a PIA request. § 4-206(a)(3). Generally, actual costs include the cost of search time and time spent preparing the records for inspection—e.g., redacting exempt material—and the cost of reproduction. § 4-206(b)(1). The cost of staff time must be calculated by prorating "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). When necessary, attorney review time must also be calculated in that way. *Id.* Whenever possible, a custodian should take advantage of available means of reducing the amount of time employees must spend reviewing records for release. *See, e.g.*, PIACB 21-01, at 2 (Oct. 5, 2020) (noting that a custodian returned "approximately 3,511 potentially responsive emails, which [was] further narrowed to 305 through an electronic de-duplication process in order to reduce review time"). In addition,

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what records should or should not be disclosed, we do not address those arguments beyond the point to which they relate to the fee itself. The reply also contains allegations about the ASA, including an assertion that he has violated the Maryland Attorneys' Rules of Professional Conduct and other allegations aimed at the ASA's character. Needless to say, such allegations are far beyond the scope of this complaint and our jurisdiction; we do not consider them.

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

[7] 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).

although not a hard-and-fast rule, a custodian "should utilize the lowest-paid employee available and capable of producing the response." PIACB 21-16, at 6 (July 30, 2021).

With this background in mind, we turn to the fee dispute here. The complainant alleges, essentially, that because the ASA said, at a hearing related to the complainant's criminal case, that the complainant could "have all my emails," the HCSAO need not review *any* of those emails and must, instead, simply turn over *all* of them free of charge. The complainant appears to contend that no review is necessary because the ASA "made an explicit waiver of privilege." While the complainant's argument is not entirely preposterous—at least not as to any privileges held by the ASA in relation to his emails—we need not resolve that broad allegation. This is because, as the HCSAO points out, given the nature of a prosecutor's job, there is likely content in those emails subject exemptions in the PIA, e.g., information about open and ongoing investigations, § 4-351(a),[8] "medical or psychological information about an individual," § 4-329(b)(1), or "criminal history record information,"[9] § 4-301(a)(2). Or, there may be content subject to privileges held by others, e.g., other attorneys' work product. §§ 4-343, 4-344. The ASA's statement, though perhaps recklessly worded, cannot "waive" a mandatory PIA exemption or privilege held by another. *See Caffrey v. Dep't Liquor Control for Montgomery County*, 370 Md. 272, 303 (2002) (explaining that the court could not interpret a county charter provision as waiving a mandatory denial in the PIA, and that county "cannot permit, by waiver of its interests, the release of those records [subject to mandatory denials] in the control of a County custodian"). Thus, we have no quarrel with the HCSAO's position that it must review the potentially responsive emails to determine what can and cannot be disclosed.

Nor do we need to resolve the question of whether "all emails" meant only the emails related to the complainant's case or every single email sent or received by the ASA during the relevant timeframe. Regardless of what the ASA may or may not have contemplated when he stated that he complainant could have "all of [his] emails," the subsequent PIA request was not limited to only those emails relevant to the complainant's criminal case, and nothing precluded the complainant from framing his request as he did. We agree with the HCSAO, however, that the ASA's statement does not foreclose the HCSAO's ability, under § 4-206(b), to charge a "reasonable fee" for production of records responsive to that request. The ASA did not say that the complainant could have "all of

[8] Section 4-351(a) is a discretionary exemption, meaning that a custodian must explain why inspection would be "contrary to the public interest" in order to justify withholding. § 4-343. However, in the context of open and ongoing investigations "the reason why it is in the public interest to withhold the contents of an investigative file is obvious, i.e., disclosure almost always would interfere with law enforcement proceedings." *City of Frederick v. Randall Family, LLC*, 154 Md. App. 543, 566 (2004) (internal quotations omitted).

[9] A 2007 opinion of Maryland's Attorney General provides detailed background about "criminal history record information," disclosure restrictions in State and federal law, and its relation to the PIA. *See* 92 Md. Op. Att'y Gen. 26 (2007).

[his] emails *for free*" or "*without charge*." After the ASA made the statement at the April 13 hearing, the complainant sent a request for records under the PIA. Section 4-206 is part of the PIA, and it was not rendered inapplicable by virtue of the ASA's comments.

So, the only remaining question is whether the HCSAO's $53,746 estimated fee is reasonable as defined by § 4-206(a)(3). Because the submissions raised some questions, we asked the HCSAO to provide more information about the basis for the estimated fee. *See* § 4-1A-06(b)(2)(iii) (allowing the Board to request information about "the basis for the fee that was charged"). Specifically, we asked the HCSAO to explain why it was necessary to assign a Deputy State's Attorney paid at an hourly rate of $77 prepare the response, and why an employee or attorney compensated at a lower hourly rate could not be used. We also asked whether the 140,000 potentially responsive emails found by the IT department were unique or whether they were likely to contain duplicates. In the event that the records were likely to contain duplicates, we asked whether the IT department could utilize electronic de-duplication processes to narrow the number of emails in need of review. *See, supra,* PIACB 21-01, at 2 (Oct. 5, 2020); *see also* PIACB 21-15, at 5 & n.5 (July 6, 2021).

In response, the HCSAO explains that the Deputy State's Attorney can "more efficiently review documents to determine what can be produced and what needs redaction" given his "years of experience in responding to [PIA] requests and his executive responsibilities within the office." While acknowledging that the Deputy's hourly rate is higher than that of line prosecutors', the HCSAO maintains that the total charge will nonetheless be "significantly lower" than if a line prosecutor were to prepare the response. This due in part to the HCSAO's contention that the Deputy would need to review that line prosecutor's work to "check for accuracy and compliance with the [PIA]." In advancing this argument, the HCSAO notes that many of the records likely contain content subject to the attorney work product and deliberative process privileges, as well as information that cannot be disclosed under the Criminal Law and Criminal Procedure Articles. And, the HCSAO states, it would take longer for a line prosecutor to conduct the review, given that court obligations limit the time such prosecutors have in the office.

As to the question regarding duplicative records, the HCSAO represents that "[u]nfortunately, the Howard County Department of Information Technology (HCDoIT) does not have the capability to produce email to the State's Attorney without duplicates." But, the HCSAO explains, the estimation that the Deputy State's Attorney could review 200 emails per hour—or 3.3 emails per minute—took into account the fact that there would be "some duplication of email." Thus, according to the HCSAO, the issue of duplicate records was already factored into the $53,746 cost estimate.

We address each aspect of the HCSAO's fee in turn, starting with the amount time—698 hours—the HCSAO anticipates will be necessary to review the 140,000 potentially responsive records. We start by noting the very broad nature of the complainant's PIA request. He has asked for "*all* documents, e-mails, phone logs, and electronic files" created

by an ASA who handles 50-75 criminal matters per year and that were "generated between November 11, 2021" to the date of the PIA request, April 14, 2023. The request thus appears to ask for nearly every single written record created by the ASA over a period of one year, five months, and three days. Given the time parameters and the nature of the ASA's work, it is not surprising that such a broad request would generate a high preparation fee. But, at the same time, we tend to agree that the collection of 140,000 potentially responsive emails will contain many duplicates, and that the actual number of unique emails requiring closer scrutiny is much lower than 140,000. Our inclination is only further cemented upon review of the 852-page response that the HCSAO produced earlier this year. The number of unique email communications contained in that response is relatively small as compared to the production itself.

This brings us to the issue of de-deduplication. The HCSAO contends that HCDoIT cannot provide the responsive emails without duplicates present and that it factored the duplication issue into its review time estimate—i.e., that the Deputy would be able to review 200 emails per hour. The complainant strenuously disputes the HCSAO's contention and offers several "indicators" that the HCSAO and HCDoIT uses Office 365 and is thus "readily capable" of de-duplicating the 140,000 responsive emails.[10] Further, noting the high volume of duplicates present in the HCSAO's prior PIA production, the complainant argues that the HCSAO's time estimate is inflated.

While we find it somewhat curious that HCDoIT is incapable of performing de-deduplication of the email extracted from the ASA's account, we do not need to resolve that factual issue. We think that the HCSAO's 200-email per hour estimate properly accounts for email duplication given the nature of the PIA request here, which is different from the complainant's prior PIA request in important ways. The prior request was limited in part to communications between the ASA and the complainant's own defense attorney. And, the portion of the prior PIA request that may have returned a broader array of records not related to the complainant's case—e.g., the request for "[a]ny and all emails" sent by the ASA containing the words "indictment" or "Frederick"—was time limited to a period of less than two weeks. Here, however, the complainant's PIA request calls for production

[10] The complainant argues that we have "regular[ly]" held that "de-duplication is required by the custodian of record[s] before charging fees." This is an overstatement. While an agency should certainly use every means available to narrow the pool of responsive records in an effort to reduce the time necessary for review, we have never said that a custodian may not charge for the time it may take to narrow that pool. Use of email de-duplication technology is a fast way to accomplish such narrowing, but we have—in a decision for a complaint filed by this complainant—acknowledged that not every agency has "the staff and/or budget to conduct a more sophisticated search of an email archive." PIACB 21-12, at 7 (May 27, 2021). At the same time, when a production of potentially responsive records contains many duplicate records and part of the response preparation includes the removal of those duplicate records, an agency should utilize the lowest paid staff available to perform that removal.

of email completely unrelated to his own case over a period of close to eighteen months. In our view, the request at issue here is far more likely to return email that must be either withheld entirely or redacted, thus increasing the review time. As we see it, an average review rate of 200 emails per hour seems reasonable.

The Deputy's $77 hourly rate presents a more difficult question. The HCSAO maintains that it must assign the task of preparing the entire response to the Deputy because of his years of experience and executive responsibilities. The HCSAO states that, even if a lower-paid employee prepared the response, the Deputy would still need to review that employee's work to "check for accuracy and compliance with the [PIA]." In addition, the HCSAO contends that it would take longer for a lower-paid employee to prepare the response. Countering the HCSAO's claims, the complainant takes the position that our past decisions require that the HCSAO assign the work of responding to his PIA request to a less highly compensated employee. Though not without some hesitation, we agree with the complainant.

As discussed above, the PIA must be construed in favor of disclosure "with the least cost and least delay" to the requester. § 4-103(b). We have said before that, in general, this means that the employee tasked with reviewing all of the potentially responsive records:

> Ordinarily should be the lowest compensated staff that is available and that is competent and capable of performing the tasks necessary to respond fully and accurately to a PIA request—i.e., identifying and removing duplicate records and records that are non-responsive, identifying and removing those records that are clearly privileged or exempt, and making any necessary redactions of clearly privileged or exempt material from otherwise disclosable records.

PIACB 21-14, at 5 (July 23, 2021). While we have also recognized that there will be "times where it makes more sense for a higher-paid staff member to review the potentially responsive records," *id.* at 5 n.6, the HCSAO has not justified that scenario here. As noted above, we agree that the 140,000 potentially responsive emails are likely to contain a large quantity of duplicate email and email that is clearly of a non-exempt administrative nature. We see no reason why a Deputy paid $77 per hour must be the employee to review those records, especially given that there are other, lower-paid attorneys who could perform the work of both sifting out duplicate records *and* reviewing those that remain for legal privileges and exemptions.[11] To the extent that the Deputy feels the need to review *all* of that attorney's work, it seems to us that that review is more in the nature of supervision or

[11] Assignment of a line prosecutor may, as the HCSAO indicates, result in a longer processing time. It may be that production on a "rolling basis"—i.e., as batches of the response are ready for release—is appropriate.

oversight, and not primarily the work of responding to the complainant's PIA request. *See* PIACB 21-13, at 4-5 (June 3, 2021) (concluding that an agency could not charge for General Counsel's "second layer of review" of an Associate General Counsel's work because it was not "solely a function of preparing a response to a PIA request").

Thus, we determine that §§ 4-103(b) and 4-206(b) preclude the HCSAO from using the Deputy State's Attorney compensated at an hourly rate of $77 to prepare the entire response to the complainant's PIA request. Instead, the HCSAO should assign a lower-paid employee—e.g., a junior attorney—to work on the response. We encourage the HCSAO to assign the work of weeding out duplicate and clearly non-privileged records to a non-attorney or administrative employee, as that is likely to reduce the cost further. The HCSAO may charge an estimated fee based upon the employees' pro-rated salaries and the amount of time, less two hours, § 4-206(c), that the HCSAO anticipates it will take for those employees to prepare the response (i.e., a total of 698 hours). In our view, this represents a more reasonable estimated fee. *See* § 4-1A-04(a)(3)(ii) (requiring, if the Board finds that a custodian charged an unreasonable fee, that the Board "reduce the fee to an amount determined by the Board to be reasonable").

Even with the significant reductions likely to result from our conclusions above, the estimated fee for the complainant's PIA request will be substantial and, in all likelihood, cost-prohibitive. We note, as we have many times before, the words of our state's Supreme Court: "In practice, a productive response to a PIA request is often an iterative process in which the agency reports on the type and scope of the files its holds that may include responsive records, and the requestor refines the request to reduce the labor (and expense) of searching those records." *Glass v. Anne Arundel County*, 453 Md. 201, 233 (2017). Given the litigious history between these parties and the tone of the submissions—the complainant's in particular—we are not optimistic that such an iterative process is possible here. When given an opportunity to narrow his request to those records related to his criminal case, the complainant apparently declined to do so, stating only that he had "escalated" the matter to the courts. That is certainly within the complainant's prerogative. But, the PIA does not require the HCSAO to bear the cost of responding to the complainant's broad PIA request.

## Conclusion

Resolution of this complaint was not an easy task, and we have little doubt that our decision here will not resolve the deeper issues between these parties. That said, we conclude that the $53,746 estimated fee that the HCSAO has charged is not reasonable. While the 698 hours that the HCSAO anticipates it will take to review the potentially responsive records appears reasonable in light of the nature and high volume of the records (even accounting for the likelihood that many of them will not require intensive review because they are duplicates or are clearly non-exempt), we find that it is not reasonable to assign a Deputy State's Attorney paid $77 per hour to prepare the entire response. Rather,

the HCSAO must utilize the lowest-compensated employee available and competent to prepare the response. We encourage the HCSAO to assign a non-attorney employee to review the records for duplicates and those that are clearly non-exempt, but, given that the complainant has asked for records of an ASA and that a number of exemptions and legal privileges are likely implicated, it is appropriate for the HCSAO, in its discretion, to assign an attorney to the job.

**Public Information Act Compliance Board**

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