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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB-17-04
November 22, 2016

Complainant, Brian Griffiths, on behalf of Red Maryland Network, Inc., complains that the Office of the Attorney General (Office) estimated the fee for fulfilling his April 10, 2016, request for public records in an unreasonable amount. The Office estimated that it would cost somewhere between \$1,500 to \$2,400 to gather the requested materials, review them, and make them available to Complainant. The initial estimate was provided on April 22, 2016, and modified on May 9, 2016. Complainant requested a waiver of the entire fee, which the Office denied. The Office reissued its estimated fee on July 29, 2016, after discussions with Complainant that attempted to reduce the items in the request and, in turn, reduce the fee. The complaint was timely filed with this Board on September 12, 2016.

As explained below, we dismiss this complaint as premature.

Background

Complainant submitted an initial request for records to the Office of the Attorney General on April 10, 2016. At that time, the request identified 10 categories of documents relating to the Maryland Attorney General's participation in a multi-state inquiry into ExxonMobil and climate change. The Office responded on April 22, and estimated that compiling the complete set of records would cost between \$1,500 and \$2,400. The fee range was based on a preliminary inquiry regarding the location of the records and the anticipated time to gather, review, and prepare the records for release. Complainant modified his request to limit the records sought, and the Office provided responsive records on May 9, 2016, with some redactions. Although the preparation and review process for those records took 10 hours, the Office provided the records without charge.

On May 13, 2016, Complainant renewed his request for all of the records identified in the initial request and asked for a waiver of all costs as a member of the

media. After some additional exchanges, the Office denied the waiver on July 29, 2016, and reiterated the estimate of the range of fees that may be charged to comply with the request. The Office asked Complainant how he wished to proceed and invited Complainant to modify the request or ask for mediation assistance from the Public Access Ombudsman. Complainant submitted the dispute regarding the denial of the fee waiver to the Ombudsman, and the mediation remains pending.¹

On September 12, 2016, Complainant filed a complaint with this Board claiming that the estimated range of fees is unreasonable. To allow the parties to attempt to resolve their dispute, the Board extended the time for a response from the Office, and the response was submitted to this Board on October 28, 2016. The response submitted by the Office noted that the estimated hours of search and preparation remain uncertain, and that the actual cost will not be known until the work is performed. In addition, the Office explained that the request involved records held by five divisions, each of which had multiple attorneys who might have records that respond to the request. The divisions needed to search email, network, and paper file systems for several attorneys, and at least one division handles investigative files that require extra care to review. Once all the records were gathered from the divisions, a single reviewer would need to inspect the records to ensure consistency in the release or redaction of the materials. With all the individuals to coordinate, a more precise estimate was not possible at the early stage that the Office sent its 10-day letter.

Analysis

This Board is authorized to review complaints that allege: (1) that “a custodian charged a fee under § 4-206 of [the Public Information Act] of more than \$350” and (2) that “the fee is unreasonable.” GP § 4-1A-05.² As we explained in a previous opinion, this Board’s authority is limited to the question of whether the fee that a custodian has charged is a “reasonable fee,” as defined by the Public Information Act (PIA). *See* PIACB-16-09 (dated June 15, 2016). The fee must have a reasonable

¹ The Public Information Act Compliance Board does not have jurisdiction to review waiver requests. The PIA directs the Public Access Ombudsman to make reasonable attempts to resolve disputes over a request for or denial of a fee waiver. *See* GP § 4-1B-04(a)(6).

² All GP references are to Md. Ann. Code, Gen. Provns. (2014, 2015 Supp.), unless otherwise noted.

relationship to the actual costs incurred by a governmental unit, and the law describes the elements that may be included in calculating a reasonable fee (e.g., copying, employee time for searching and preparing the records based on an hourly rate). GP § 4-206. In addition, a governmental unit must not charge an applicant for the first 2 hours of search and preparation time. *Id.*

The only reference to estimated fees appears in GP § 4-203, which addresses a custodian's responsibility for a timely response. There, a custodian who believes that a request will require more than 10 working days for a response must indicate the amount of time anticipated for the response, the reason for the delay, and "an estimate of the range of fees that may be charged to comply with the request for public records. . . ." GP § 4-203(b)(2).

The clear mandate to this Board is that it evaluate whether a governmental unit has charged a fee under GP § 4-206 that was unreasonable. The law does not direct us to the estimated fees discussed elsewhere in the PIA. As a result, we have declined to review the reasonableness of an estimated fee that does not reflect the actual costs incurred by a governmental unit. The dilemma posed by reviewing an estimated fee is heightened further by the limited action that this Board may take. Specifically, if the Board finds that "the custodian charged an unreasonable fee under § 4-206" the Board shall "order the custodian to reduce the fee to an amount determined by the Board to be reasonable *and* refund the difference." GP § 4-1A-04(a)(3) (emphasis added).

The logical inference from the language of the statute is that there has been a "charge" of fees in a dollar amount that we can evaluate for its reasonableness in light of the actual cost of producing the records.³ Thus, at a minimum, the facts need both to reflect that a governmental unit has demanded payment of a fee and to address the fee's relationship to the actual costs incurred by the governmental unit. Our interpretation of the statute to exclude our review of early-stage estimates does not leave an applicant without a remedy, as the parties may discuss modification of the

³ An argument could be made that, when a governmental unit requires payment of the estimated fee prior to providing the records, this Board could consider the matter under the auspices of the governmental unit having charged a fee. Typically, the estimated fee in those instances is a precise figure, rather than a range. The present case does not involve the issue of a demand for pre-payment of costs, so we do not reach that issue.

request to adjust the estimated fee, and they may seek the assistance of the Public Access Ombudsman to attempt to resolve their dispute. We understand that the parties in this instance have engaged in both options.

Based on the facts in this case, the Office has not yet “charged a fee,” nor has Complainant paid a fee. Instead, as part of the initial response, the Office informed Complainant of the anticipated range of fees, based on its anticipated collection and review time. The broad range of the estimate cannot be evaluated for reasonableness without knowing more about the actual time the Office will take to process the request. The response submitted by the Office shows that the estimated hours of search and preparation remain uncertain and explains why the actual cost will not be known until more of the work is performed. When the estimate is provided as part of the 10-day notice, we agree that an agency may not have enough precise information to identify its actual costs.⁴ Often, some preliminary collection of materials and review must occur before a realistic estimate of the actual costs can be calculated. In this instance, the agency can provide only general estimates of the time it anticipates it will need to review the materials.

For these reasons, we dismiss this complaint as premature. At this stage of the process, we do not have sufficient facts from which to evaluate whether the estimated fee reflects a reasonable relationship to the actual costs incurred by the Office. The lack of sufficient information, in turn, prevents us from determining an appropriate refund, even if we were to determine that the estimated fee range is unreasonable. Once the Office has charged a fee, or reached a stage in the process that yields a more precise reflection of the actual costs incurred, Complainant may re-file a complaint with this Board.

Public Information Act Compliance Board

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⁴ The result might be different if an applicant requested a record that was readily available and the estimate consisted mostly of the copying costs and some limited time for photocopying. Here, the time to review and analyze the contents of the records may take more or less time than anticipated and is not as readily estimated.