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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB-17-18
August 31, 2017

Maryland Department of Transportation
State Highway Administration
(Sarah Gentner, Complainant)

Complainant, Sarah Gentner, alleged that the Maryland Department of Transportation, State Highway Administration (MDOT/SHA) charged an unreasonable fee when its custodian requested a pre-payment of \$3,139.65 for the public records she requested under the Public Information Act (PIA). Part of the Complainant's concern is that, although she reduced her request from searching the records of 14 individuals to only 3, the cost estimate did not appear to reduce in proportion to those figures. The agency's records custodian responded to the complaint with an itemized description of the hourly rates of staff and the estimated time to compile and prepare the materials for disclosure. The agency explained that the figure represented an estimate of its costs, and that once the work is completed and a precise figure is available, either a refund would be issued or an additional payment would be requested.

The Board requested additional information from the agency to clarify some of the information contained in the initial response. Specifically, the Board asked for the positions held by the individuals participating in the search, preparation, and production of the records, whether the hourly rates included benefits, confirmation that the contractor's hourly rate derived from an existing contract term, and further details to explain why the reduced scope did not yield a greater reduction in the cost estimate. In a supplemental response, MDOT/SHA submitted a list of the position titles to accompany the hourly rates, confirmed that the hourly rates did not include benefits, and verified that the contractor's rate derives from an existing contract. The agency also explained that, although the number of individuals identified for the search had changed, the level of effort remained

significant due to the nature of the records requested. The preparation includes reviews by subject matter experts and legal counsel to determine appropriate redactions to protect confidential information, and these individuals have a higher hourly rate than the public information representative, which increases the cost estimate.

As explained below, we conclude that the rates used for the estimated fee charged by the MDOT/SHA appear to reflect a “reasonable fee” as defined by the Public Information Act (PIA), with the caveat described in this opinion regarding the contractor’s cost. Because the calculation may yield a different fee once the records are gathered, prepared, and copied, the Board views the estimate as premature and, therefore, cannot evaluate it further for purposes of ordering a reduction or a refund. Included in our analysis are several factors that the MDOT/SHA may want to consider when it calculates the actual costs for responding to the request.

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-05.¹ This provision limits our authority to the question of whether the fee that a custodian has charged is a “reasonable fee,” as defined by the PIA. *See* PIACB-17-04 (dated November 22, 2016), and PIACB-16-09 (dated June 15, 2016). The law defines a reasonable fee as “a fee bearing a reasonable relationship to the recovery of actual costs incurred by a governmental unit.” GP § 4-206(a)(3).

The reasonable fee may include “[t]he actual costs of the search for, preparation of, and reproduction of a public record in standard format, including media and mechanical processing costs.” GP § 4-206(b)(1). Search fees reflect the time for locating the requested records, while preparation fees include the time spent reviewing records for any items that require withholding. *See* Public Information Act Manual 7-1 (2015). When staff and attorney time are included in the calculation of actual costs, their salaries must be prorated to an hourly rate and

¹ Citations to GP reflect references to Md. Ann. Code, General Provisions (2016 Repl. Vol.).

consider the actual time attributed to the search and review. GP §4-206(b)(2). We have explained in a prior opinion that the salary does not include an employee's benefits, and that duplication of effort should not be charged to the requester. *See* PIACB-16-05 (dated June 1, 2016). In any event, a custodian must not charge for the first 2 hours of the search for a record. GP § 4-206(c). Although the law allows an agency to recover its costs, the focus on actual costs ensures that an agency does not profit from the fee charged. *See* 71 Op. Att'y Gen. 318, 329 (1986).

Here, the Complainant initially asked MDOT/SHA for extensive materials that included the emails of 14 agency employees that may have related to the Complainant. The agency requested pre-payment of an estimated cost of \$4,893.82 to search, compile, and prepare the appropriate response to her request. In an effort to reduce the cost, the Complainant modified her request to obtain the emails of only 3 of the 14 individuals. The cost estimate was modified to \$3,139.65. Complainant contends that the average cost per person searched was \$225.25, and that it should be the same rate for searching the records of 3 people, or \$675.75. The agency responded that the anticipated cost for searching, compiling, and reviewing the requested documents does not reduce in direct proportion to the number of individuals considered, because the level of effort required to collect, review, and redact the records remains similar.

In response to the complaint before this Board, MDOT/SHA provided details regarding the individuals that would perform a task for the response and time estimates for each individual. The positions include staff, administrative aides, directors, and counsel, with hourly rates ranging from \$26.75 to \$64.61. For copies, the agency charges 25 cents per page. Although the agency provided to the Complainant the per-page copy charge and the total estimated fee of \$3,139.65, its explanation to the Board reflects the positions held by the 21 people who would have a task to perform to respond to the request, along with their hourly rates, and an estimate of the time to perform their tasks. The time estimates range from 3 minutes to 6 hours. As explained by MDOT/SHA, the sensitive nature of the materials requested require greater involvement by subject matter experts and legal counsel to protect the Complainant's privacy. The hourly rates used for MDOT/SHA staff appear to be reasonable.

The Board understands that some of the retrieval requires use of a contractor. The agency has a flat-fee contract with the vendor and divided the annual fee by 2080 hours to arrive at an hourly rate of \$217, which the agency then reduced to \$216 for the estimated contractor time. The absence of an hourly rate in the contract makes it difficult for this Board to determine whether the rate is reasonable.² The flat fee might contemplate multiple individuals under the contract, yet only one person may be needed to perform the work for the pending response.

To the extent that the agency pays a flat rate to the vendor regardless of the work performed, there is an argument to be made that the use of the contractor does not have a “reasonable relationship to the recovery of actual costs incurred” by the agency and should not be charged at all. *See* GP § 4-206(a). Under the PIA, there must be a correlation between the fee and the cost to the agency to respond to a request for public records. For this reason, the agency should either omit the contractor from the cost calculation or substantiate the hourly rate in a way that shows a clear connection between the fee charged and the agency’s actual cost.

As we have explained previously, the PIA does not require this Board to evaluate an estimated fee, but instead, mandates that we review whether a governmental unit has charged a fee under GP § 4-206 that was unreasonable. *See* PIACB-17-04 (dated November 22, 2016). In part, an estimated fee does not reflect the actual costs incurred by a governmental unit and hinders this Board’s ability to direct a reduction or refund of the portion of a fee that appears to be unreasonable. For this reason, we have dismissed other complaints regarding an estimated fee as premature. *See* PIACB-17-04; *see also* PIACB-17-07 (dated February 28, 2017). When we have dismissed a complaint on this basis, we have recommended that the parties discuss a modification of the request to adjust the estimated fee or to consult with the Public Access Ombudsman.

² The present situation differs from that presented in PIACB-17-07, in which the agency asked the contractor for an estimate of time and had a contract that included an hourly rate for the work to be performed. Because the contract included a specific hourly rate, the Board could evaluate the reasonableness of the rate and the estimated hours.

For the reasons stated, we cannot say that the fee for the agency's staff costs is unreasonable based on the information available at this juncture and the rates used by the MDOT/SHA. The rates themselves appear to be reasonable, but the agency needs to make sure to keep accurate records regarding the actual time spent by each person to ensure an accurate calculation when the work is performed. Moreover, the agency needs to revisit its charge for the contractor's time, as discussed in this decision, and make the appropriate revision. Because the amount remains subject to change once the actual costs are incurred, this Board cannot determine whether the fee should be reduced. The complaint, therefore, must be dismissed as premature. Once a more precise figure exists, the Complainant may submit a new complaint to this Board in accordance with the statute.

Public Information Act Compliance Board

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