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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB-18-02
October 6, 2017

Maryland Department of Transportation
State Highway Administration
(Jarrod Sharp, Complainant)

Complainant, Jarrod Sharp, alleged that the Maryland Department of Transportation, State Highway Administration (MDOT/SHA) charged an unreasonable fee when its custodian requested a pre-payment of \$12,442.92 for the public records he requested under the Public Information Act (PIA).¹ The agency's records custodian responded with an itemized description of the hourly rates of staff and the estimated time to compile and prepare the materials for disclosure. The agency also 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.

Along with its response, MDOT/SHA identified the positions held by the individuals participating in the search, preparation, and production of the records, confirmed that the hourly rates do not include benefits, and confirmed that the contractor's hourly rate derives from an existing contract term. Moreover, the custodian of records explained that the agency has received the same request from the Complainant five times since March 2017, each time requesting "any and all SHA e-mails that contain text which refers or relates to Jarrod Sharp." The agency emphasized its repeated efforts to modify the request so that it would be manageable and cost effective, and its commitment to continue doing so. As further explanation of its cost, the agency described the challenge of responding to the request—first, it

¹ The Board notes that the complaint was submitted previously, but when the agency responded, the estimated cost remained under the threshold for this Board's jurisdiction based on the Complainant's modified records request. At that time, the Board dismissed the matter as not within its jurisdiction and believed that the parties had resolved their dispute.

must restore emails from multiple types of backups of 18 servers for over 10,000 employees; then, the emails must be searched, reviewed, and prepared for release.

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). 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-05.² 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 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

² Citations to GP reflect references to Md. Ann. Code, General Provisions (2014, 2016 Supp.).

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 asked MDOT/SHA multiple times for “any and all SHA e-mails that contain text which refers or relates to Jarrod Sharp.”³ The agency requested pre-payment of an estimated cost for searching, compiling, and reviewing the requested documents. 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 \$26.82 to \$64.61. The time estimates range from 3 minutes to 8 hours for staff, with the most time spent by the individuals with the lower hourly rates. Overall, the rates appear to be reasonable, with the main variable appearing to be the time that will be needed to gather, review, and prepare the records that respond to the request.

Due to the timeframe for the search (January 1, 2015 through July 24, 2017), the Board understands that some of the retrieval requires use of a contractor. The agency relies on its contract documents for the contractor’s hourly rate of \$216. 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. Although the documentation supplied by the agency includes some hourly rates, none of the information reflects the hourly rate of \$216 for the contractor’s work, so we renew our caution from our previous opinion regarding the contractor’s cost.⁴ The estimate also shows approximately 57 hours of

³ The agency’s response to the complaint indicated that the Complainant has submitted 20 PIA requests to the agency since March 4, 2017, including the five requests for the emails described in this matter.

⁴ Recently, we explained that the absence of an hourly rate in the contract made it difficult for this Board to determine whether the rate was reasonable, because the contract showed a flat fee that could represent multiple individuals, rather than anyone in particular. *See* PIACB-17-15 and PIACB-17-18 (both dated August 31, 2017). In those opinions, we instructed MDOT either to omit the contractor from the cost calculation or to substantiate the hourly rate in a way that shows a clear connection between the fee charged and the agency’s actual cost. Doing so would conform with the PIA’s requirement that there be a correlation between the fee and the cost to the agency to respond to a request for public records. We also noted that MDOT’s situation differed 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

the contractor's time. The Board realizes that this is an estimate that may change when the actual work is performed, but the lack of further explanation from the agency to support the figure makes it appear to be excessive.⁵

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, we renew our caution to the agency and emphasize the need to substantiate the contractor's hourly rate in a way that shows a clear connection between the fee charged and the agency's actual costs incurred in order to respond to the information request. Typically, this would derive from the hourly rate established by a contract with a vendor applied to the number of hours of work performed. In this case, the contract provided by the agency indicates an established annual fixed cost that MDOT/SHA pays the contractor regardless of the amount of work performed. The terms of the contract do not indicate a separate charge for the vendor to provide the requested public information to MDOT/SHA beyond the annual costs that the agency already has incurred independent of this (or any other) PIA request. If the vendor cannot charge MDOT/SHA an additional fee for the work of responding to the PIA request, then MDOT has incurred no actual cost that may be passed on to the requestor.

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 dismiss a complaint as premature, we often recommend that the parties discuss a modification of the request to adjust the estimated fee or to consult with the Public Access Ombudsman. By engaging in a discussion that clarifies the records

hourly rate, the Board could evaluate the reasonableness of the rate and the estimated hours. *See* PIACB-17-07 (dated February 28, 2017).

⁵ In other matters involving the same agency, the estimated time was 2 hours and 8 hours, respectively. *See* PIACB-17-15 and PIACB-17-18.

that the requester seeks as well as the capabilities of the agency, the participants often achieve an outcome that better satisfies both of them.

In fact, the PIA is designed to create a balance between the public's access to records that relate to the operation of the government and the limited resources that many agencies experience, which may hinder their response to those requests. Within this context, the Legislature created this Board to resolve complaints that a fee was unreasonable. When the rates used by an agency are reasonable, a high fee may be the product of a request for records that is too broad. In those situations, the Board's decision will not resolve the dispute. Instead, the requester has a responsibility to submit a clear request for records and, if the request is too broad, the requester remains in the best position to narrow the request. We recognize that MDOT/SHA has expressed its willingness to work with the Complainant to achieve a satisfying result and that he has chosen not to do so. This Board encourages the Complainant to revisit his decision to "hold fast" to the request and to consider working with the agency to achieve a less costly result.

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, as long as the agency makes 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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