

LAWRENCE J. HOGAN, JR.

GOVERNOR



JOHN H. WEST, III, ESQ.

Chair

BOYD K. RUTHERFORD

LT. GOVERNOR

LARRY E. EFFINGHAM

DEBORAH MOORE-CARTER

RENÉ C. SWAFFORD, ESQ.

DARREN S. WIGFIELD

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

PIACB-18-08

March 7, 2018

University of Maryland University College
(Jarrod Sharp, Complainant)

Complainant, Jarrod Sharp, alleges that the University of Maryland University College (“UMUC”) charged an unreasonable fee when it requested pre-payment of the \$2,900 it estimated as its cost of responding to his December 7 and December 15, 2017, Public Information Act (“PIA”) requests. Complainant currently has a number of PIA requests to UMUC pending, as revealed in the numerous email exchanges forwarded by the parties, but we focus our attention on the requests that form the basis of the Complaint and that resulted in the \$2,900 figure. Although we conclude that the complaint is premature, we will provide guidance on the rates quoted by UMUC.

In four separate emails sent on December 7 and December 15, 2017, Complainant requested from UMUC his employment records, and all emails and/or other documents that referred or related to him from eleven different UMUC employees for various periods of time, the earliest from January 1, 2015 to the present. UMUC responded that it would provide Complainant’s employment records free of charge; that it had aggregated his remaining requests because they were sent within a short period of time and appeared to relate to the same subject matter¹; that it denied his request for a fee

¹ In two separate requests on December 7, Complainant asked for the emails of a specific employee, and in another request on December 15, he asked for the emails of nine additional employees. Complainant contends that UMUC should not have aggregated these requests for purposes of calculating the fee. Because the requests were sent within a short period of time and cover the same subject matter, *i.e.*, emails pertaining to Complainant, it appears reasonable for

waiver; that, based upon a preliminary review, it estimated a fee range of \$3,000 - \$5,000; and that, upon prepayment of \$3,000, it would begin processing his request. In subsequent exchanges with the Complainant, UMUC provided a revised fee range estimate of \$2,900 - \$5,200. UMUC based that estimate upon an itemized description of the hourly rates of the staff, whom UMUC detailed by position, who would be needed to prepare and review the 1,810 emails that resulted from a preliminary search for responsive records. The estimate reflected subtracting two hours of the highest paid staff's time. UMUC requested pre-payment of \$2,900 and explained that once the work was completed and a precise figure was available, either a refund would be issued or an additional payment would be requested.

As explained below, we conclude that the staff time and rates used for the estimated fee charged by UMUC appear to reflect a "reasonable fee" as defined by the PIA. Because the calculation may yield a different fee once the records are prepared, reviewed, 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 guidance here are factors that UMUC may want to consider when it calculates the actual costs for responding to the request.

Analysis

As a preliminary matter, we address Complainant's contention that UMUC should not have denied his request for a fee waiver. We have explained previously to this very Complainant that this Board does not have the statutory authority to evaluate the denial of a fee waiver. See PIACB-17-17, 1 (dated August 8, 2017). The Public Access Ombudsman can address that issue if the parties so desire.

This Board is authorized only 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, 2 (dated November 22, 2016), and PIACB-16-09, 2 (dated June 15, 2016). The law defines a reasonable fee as "a fee bearing a reasonable

the agency to have aggregated them. See Public Information Act Manual, 7-1 – 7-2 (2015) (although an agency should not artificially aggregate separate requests to increase the fee, it is reasonable for the agency to do so when the requestor may have "attempt[ed] to artificially break a large request into a series of smaller requests to obtain two free hours for each request").

² Citations to GP reflect references to Md. Ann. Code, General Provisions (2014, 2017 Supp.).

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 reflect 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, 2-3 (dated June 1, 2016). In any event, a custodian must not charge for the first two 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 Opinions of the Attorney General* 318, 329 (1986).

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, e.g., PIACB-18-01, 3 (dated October 2, 2017); PIACB-17-18, 4 (dated August 31, 2017). 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, including the previous two complaints from this Complainant. See PIACB-18-02, 5 (dated October 6, 2017), and PIACB-17-15, 4 (dated August 31, 2017).³

Here, the Complainant asked UMUC for emails and other documents, from eleven agency employees, which pertained to him. The agency requested prepayment of \$2,900 to search for, prepare, and review the 1,810 emails that resulted from a preliminary search for responsive records. This figure represents the lowest end of the fee estimate

³ 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. Here, based upon the materials submitted by the parties, including copies of email exchanges, it appears that the Complainant is unwilling to modify the request that underlies his complaint.

range. In the materials provided by UMUC in its response to this Complaint, we note that the agency based its estimate on a detailed break-down of the staff necessary to perform a task related to the response, and the time estimates and hourly rates for each staff. The staff positions include system engineer, associate general counsel, deputy general counsel, general counsel, and ombudsman, with hourly rates ranging from \$0 for the ombudsman to \$119.30 for the general counsel. Two hours, at the rate of \$119.30, were subtracted from the total. The agency explained that the hourly rates do not include benefits.

The hourly rates used for UMUC staff appear to be reasonable, as does the estimate of time required to review the preliminary pool of responsive emails. We remind the agency that any duplication of effort should not be charged to the requester. See PIACB-16-05, 3 (dated June 1, 2016). Further, we are mindful that a pool of emails from numerous agency employees that relate to the same narrow topic possibly contains a great deal of duplicative material. Therefore, the review time might be expected to diminish as a result. We urge UMUC to carefully and accurately track the actual time spent on the response.

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. The salary rates and time estimates presented by UMUC appear to be reasonable, but the agency must keep detailed records regarding the actual time spent by each person to ensure an accurate calculation when the work is performed. 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. Because we have already opined on the reasonableness of UMUC's rates, Complainant should submit a new complaint only if he has grounds to believe that UMUC staff spent an unreasonable number of hours on the work needed to respond to his request.

Public Information Act Compliance Board

John H. West, III, Esq., Chair
Larry E. Effingham
Deborah Moore-Carter
René C. Swafford, Esq.
Darren S. Wigfield