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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB - 19-08

January 17, 2019
Baltimore City State's Attorney's Office
(Jermaine Blackwell, Complainant)

The complainant, Jermaine Blackwell, alleges that the Baltimore City State's Attorney's Office (BCSAO) charged him an unreasonable fee when it requested prepayment of \$1,275 to respond to his Public Information Act ("PIA") request for the contents of his case files. The BCSAO responded with an itemized description of the basis for the fee, detailed below.

The complainant also alleges that the BCSAO did not grant his request for a fee waiver, which he had supported with an affidavit of indigency pursuant to Md. Code, General Provisions Article ("GP") § 4-206(e). The BCSAO responded that it had considered the complainant's indigence, as well as other "public interest" factors, but that it nonetheless declined to waive the fee. We will address the estimated fee and the request for a fee waiver in turn.

Analysis

This Board is authorized to review complaints that allege: (1) that "a custodian charged a fee under § 4-206 of [the PIA] of more than \$350" and (2) that "the fee is unreasonable." GP § 4-1A-05.3. 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). 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).

a. *The BCSAO's fee estimate*

Although we have in the past explained that an agency's *estimation* of a fee—as opposed to a fee based upon actual costs incurred by an agency—presents certain difficulties for the Board, *see* PIACB-17-04 at 3 (Nov. 22, 2016), we have nonetheless reviewed the reasonableness of a fee estimate when it comprises a precise figure based upon a detailed breakdown of anticipated costs, and when the custodian requires prepayment of the estimate before providing the records. *See* PIACB 19-01 at 2-3 (Sept. 24, 2018). Because that is the case here, we will review the reasonableness of the estimated fee charged by the BCSAO.

Under the PIA, a 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 spent locating the requested records, while preparation fees include the time spent reviewing the records for any information that must be withheld or redacted. *See* PIACB 17-12 at 2 (May 18, 2017) (citing the Public Information Act Manual at 7-1 (2015)). When staff and/or attorney search and preparation costs are included in the fee calculation, their salaries must be prorated to an hourly rate, and the calculation must reflect the actual time attributable to search and preparation. *See* GP § 4-206(b)(2).

Here, the complainant requested from the BCSAO all records that pertained to him, which included documents in three case files. The BCSAO detailed its fee to respond to the request as follows:

- Paper copying costs: \$400 (800 pages x \$0.50 per page)
- Agency employee costs: \$765
 - Attorney review: \$375 (5 hours x \$75 per hour)
 - Clerk review, redaction, copying: \$390 (26 hours x \$15 per hour; 2 additional hours uncharged)
- Compact disc (“CD”) costs: \$110 (11 CDs x \$10 per CD)
- Total cost: \$1,275

The BCSAO further explained that this figure represents an estimate of the costs, and that the final fee could be higher or lower depending on the actual number of disclosable records and the actual effort required to process the response.

Based on this material, we conclude that the estimated fee appears to be reasonable in that it reflects the costs that the BCSAO anticipates it will incur in providing the responsive records. We note that the amount of employee time estimated to review the approximately 800 responsive pages does not appear unreasonable on its face—prosecutorial case files often contain information that must be withheld or redacted under various PIA exemptions, and the amount of time it may take to review approximately 800 pages for this sensitive information is likely not insignificant. However, because the fee remains subject to change once the BCSAO incurs actual costs, we remind the BCSAO to keep a detailed account of the time its employees expend on review, and to refund any amount the complainant overpays. Additionally, to the extent feasible, and if amenable to the complainant, we suggest that the BCSAO consider scanning the paper documents into an electronic format and providing them on a thumb drive or CD, so as to obviate the need to charge for paper copies.

b. *The BCSAO’s denial of the fee waiver request*

We have in the past declined to address a custodian’s refusal to grant a fee waiver request as outside of our jurisdiction. *See, e.g.,* PIACB 18-01 (Oct. 2, 2017). Under the circumstances here, however, we believe we may hazard some guidance to the agency without overstepping our bounds.

In explaining its decision to deny the complainant’s request for a fee waiver, the BCSAO acknowledged that the complainant had submitted an affidavit of indigency, but went on to state that the complainant had not provided any argument as to why waiving the fee for his case file would be

in the public interest. The agency, therefore, declined to waive the fee. Based upon our reading of the plain language of the PIA, however, we believe that the complainant’s affidavit of indigency was, by itself, a sufficient basis to grant the fee waiver request, even if the complainant did not submit any reasons why waiving the fee would be in the “public interest.”

As amended in 2015, the PIA provides that a custodian may waive a fee if the applicant requests a waiver, and if “(i) the applicant is indigent and files an affidavit of indigency, *or* (ii) after consideration of the ability of the applicant to pay the fee and other relevant factors, the official custodian determines that the waiver would be in the public interest.” GP § 4-206(e) (emphasis added). The wording of the statute here is in the disjunctive—a custodian may grant a requested fee waiver if the applicant provides an affidavit of indigency, *or* if the custodian determines the waiver would be in the public interest, after considering relevant factors, including the applicant’s ability to pay. This wording suggests that a custodian may grant a fee waiver on the basis of an affidavit of indigency alone, pursuant to GP § 4-206(e)(2)(i), without considering the relevant factors envisioned in GP § 4-206(e)(2)(ii). Accordingly, to the extent that the BCSAO may have denied the complainant’s fee waiver request because it believed it was required to evaluate public interest factors, we encourage the agency to revisit its decision.¹

Conclusion

We find that the BCSAO’s fee estimate appears to reflect a reasonable fee under the PIA, but that the agency should keep a detailed account of the actual costs it incurs when undertaking the work required to review and produce the records. We also encourage the agency to revisit its decision to deny the complainant’s request for a fee waiver, to the extent that it may have misconstrued the PIA’s fee waiver provisions.

Public Information Act Compliance Board

John H. West, III, Esq., Chair
Larry E. Effingham
Deborah Moore-Carter

¹ We recognize that, absent arbitrariness and capriciousness, and after giving due consideration, it is within the agency’s discretion whether to grant an applicant’s request for a fee waiver. *See* GP § 4-206(e) (“The official custodian *may* waive a fee under this section”) (emphasis added). *See also Action Committee for Transit, Inc., et al. v. Town of Chevy Chase*, 229 Md. App. 540, 562-63 (2016) (an agency’s decision to deny a fee waiver request under the PIA may be reviewed for arbitrariness and capriciousness).