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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 20-05

November 7, 2019
Baltimore County Police Department, Custodian
Michael Redding, Complainant

The complainant, Michael Redding, alleges that the Baltimore County Police Department (“County PD”) charged an unreasonable fee when it provided an estimated fee range of \$2,665 to \$3,315 to respond to his Public Information Act (“PIA”) request for the contents of his investigative file. Mr. Redding made his PIA request through an attorney, but files his complaint with the Board *pro se*. The County PD responded through its attorney and referred the Board to its fee letter to Mr. Redding’s attorney, which contains a breakdown of the estimate. The County PD also provided additional information on the basis for its fee estimate, and its general fee-charging practices.

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.” § 4-1A-05(a).¹ The law defines a reasonable fee as “a fee bearing a reasonable relationship to the recovery of actual costs incurred by a governmental unit.” § 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.” § 4-1A-04(a)(3).

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, e.g.*, PIACB-17-04 at 3 (Nov. 22, 2016). For example, where a fee estimate constitutes a wide range and is subject to revision once the work to respond to the request has been performed, our ability to order the fee reduced to a reasonable amount is constrained. *Id.* Nonetheless, we have 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). Here, the fee

¹ References are to the General Provisions Article of the Annotated Code of Maryland, unless otherwise indicated.

estimate comprises a range—from \$2,665 to \$3,316—and it is not clear from the materials before us the prepayment amount the County PD desires from Mr. Redding. Nonetheless, because the County PD has based its fee estimate on a preliminary review of the records responsive to the request, and because it has provided a detailed breakdown of the potential response costs, we believe we can provide an opinion as to the reasonableness of the estimated fee.

Under the PIA’s definition of “reasonable fee,” a governmental agency may recover only the actual costs it incurs in producing the requested public record. § 4-206. “Actual costs” may include “the search for, preparation of, and reproduction of a public record . . . including media and mechanical processing costs.” § 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 time is included in the calculation of actual costs, staff salaries must be prorated to an hourly rate and reflect the actual time they spent on the production. § 4-206(b)(2). That the PIA permits an agency to recover only actual costs ensures that agencies will not ordinarily profit from fees charged for public records. *See, e.g.*, PIACB 18-08, 3 (Mar. 7, 2018); 71 *Opinions of the Attorney General* 318, 329 (1986).

Here, the complainant requested from the County PD his entire investigative file, which comprises approximately 927 pages of paper records, and electronic records on 26 Compact Discs (“CDs”). The County PD’s estimate is based upon the staff time necessary to search for and review these responsive records, beyond two uncharged hours, and the amount it will charge to copy both the paper records and the electronic records on CD. Specifically, the County PD detailed its estimate to respond to the request as follows:

- Staff costs: \$1,372.50 to \$2,022.50
 - Legal review of the 927 paper records = \$722.50 (14.45 hours x \$50/hour)
 - Legal review of the files on 26 CDs = \$650 to \$1,300 (13 to 26 hours x \$50/hour)
- Reproduction costs: \$1,362
 - Copies of paper records: \$354 (708 pages² x \$0.50/page)
 - Copies of CDs: \$1,008 (26 CDs x \$42/CD)
- Total estimated cost: \$2,734.50 to \$3,384.50³

² Based on its preliminary review of the 927 responsive paper records, the County PD anticipated that 219 pages were privileged or confidential and would not be released.

³ The County PD’s slightly lower estimated fee range of \$2,665 to \$3,315 appears to have resulted from a calculation error: it claims that the total cost for producing the paper records—including the legal review time (\$722.50) and the copying costs (\$354)—is \$1,007. But that sum is actually \$1,076.50.

The County PD 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 staff time required to process the response.

We review the staff costs and the reproduction costs in turn. Turning to the staff costs, the County PD's response states that the \$50 per hour for its attorney's review time is lower than her actual salary. It also explains that the 14.45 hours for review of the paper records is based on an estimate of one minute of review per page, though the actual amount of time could be more or less, depending on the particular page.⁴ With regard to the review of the electronic records on CD, the response explains that CDs usually contain photographs, and/or audio and video recordings, and that reviewing these types of records can be quite time-consuming depending on the format and age of the particular file. The County PD claims that its estimate of 13 to 26 hours for review of all files on the 26 CDs is conservative. Based on the materials before us, we conclude that the estimated fee range of \$1,372.50 to \$2,022.50 for staff time appears to be reasonable. The estimated legal review time does not appear to be inflated, given the volume of paper and electronic records and the complexity of an investigative file. Moreover, the hourly charge appears reasonable in that it is lower than the actual salary of the County PD's attorney.

We next turn to the estimated reproduction costs, and are more hesitant to find them reasonable. As a preliminary matter, we urge custodians to offer to provide applicants with electronic copies of responsive records whenever that format will be less costly than paper copies. *See* PIACB 19-01 at 3 (Sept. 24, 2018) (encouraging this practice); GP § 4-103(b) (the PIA should be construed in favor of disclosing public records "with the least cost and delay"). Here, for example, the County PD anticipates providing the complainant with the responsive electronic records on CDs; it likely could scan the responsive paper records onto a CD as well, for a fraction of the cost it is charging for paper copies. Although there may be more staff time involved with this method, we suspect it will result in a lower overall fee in situations like this where there are voluminous paper records and the agency is charging a relatively high per page copying fee.

That said, we are skeptical of the County PD's \$42 per CD reproduction cost. Although we credit the estimated time it will take to review the electronic files on the 26 CDs, as explained above, the basis for the separate \$42 per CD reproduction charge is unclear to us. That amount likely is not the actual cost of the CD itself, which we assume is much lower than \$42 per CD. And, if the \$42 per CD includes the anticipated time it takes staff to copy electronic files onto the CD, this fact should be disclosed and categorized as staff time. Otherwise, the agency runs the risk of charging a "flat fee" for CDs that does not reflect the actual costs incurred by the agency. In PIACB 19-12 at 3, n. 4 (Aug. 7, 2019), we explained that although a per-page (or per-CD) fee

⁴ One minute per page multiplied by 927 pages is 927 minutes, or 15.45 hours. The County PD's estimate of 14.45 hours reflects the fact that it would provide the complainant with one hour for free here, which, when added to the hour already spent on the County PD's preliminary review of the responsive records, comprises the two free hours to which the complainant is entitled pursuant to § 4-206(c).

might simplify an agency's fee calculation, and might even result in a lower fee than calculating actual costs,

the PIA does not specify this method as permissible. Instead, the statute repeatedly notes the ability of a governmental unit to recover "actual costs" incurred. For a governmental unit to use a per-page fee in accordance with the PIA, we believe that documentation needs to be kept by the agency to substantiate . . . whether the per-page fee reasonably reflects the actual costs of the agency.

(quoting PIACB 17-06 at 3-4 (Nov. 28, 2016)) (internal modifications and ellipses omitted).

We conclude that the \$42 per CD reproduction charge is not reasonable on its face, and the County PD has not explained how that charge reflects its actual costs in providing CDs to Mr. Redding. Accordingly, the County PD must either eliminate the CD reproduction charges from its fee estimate, or modify its per CD charge to an amount that accurately reflects the actual costs it incurs in providing those CDs to Mr. Redding.

Conclusion

As explained above, we find that although most of the components of the County PD's fee estimate appear to reflect a reasonable fee under the PIA, the amount it is charging for CD reproduction must either be eliminated or modified to accurately reflect its actual costs in providing those CDs to the complainant. Furthermore, we encourage the agency to consider whether its costs could be reduced by providing the complainant with electronic copies of the responsive paper records, so long as that method is acceptable to the complainant. Finally, we commend the County PD's attorney for her apparent willingness to work with this requestor—and others who request investigative files—to narrow the scope of the request and thus reduce fees. To the extent that the Office of the Public Access Ombudsman may be helpful in this effort, we are taking the liberty of referring the parties to that Office.

Public Information Act Compliance Board

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