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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 21-13

June 3, 2021

Housing Opportunities Commission of Montgomery County, Custodian
Molly Hauck, Complainant

The Housing Opportunities Commission of Montgomery County (“HOC”) estimated that it would cost \$496 to respond to the complainant’s Public Information Act (“PIA”) request. The complainant has alleged that this fee estimate is unreasonable. The HOC, through counsel, responded.

Background

On March 13, 2021, the complainant submitted a PIA request to the HOC seeking the following:

- All procurement documents from any date related to matters in which Jackie Simon was a vendor or prospective vendor, including RFPs, project descriptions, solicitations, bids, price quotes, lists of bid responses, agreements, or invoices; and
- Any correspondence or documents from late 2013 or early 2014 regarding Jackie Simon as a commissioner candidate, including calendar entries or notes regarding any interviews or meetings between Jackie Simon and HOC staff or commissioners from the same time period.

On March 29, 2021, the HOC sent the complainant a “ten-day” letter¹ and indicated that there were thirteen documents that were potentially responsive to the first part of the request, and 283 emails and 258 calendar events that were potentially responsive to the second part of the request. The HOC also indicated that it would take more than ten working days to produce the records and estimated that the response would be complete in forty days. In the same letter, the HOC denied the complainant’s request for a fee waiver and estimated that it would cost \$496 to search for, prepare, and produce the records responsive to the complainant’s request. The HOC

¹ If a custodian believes that it will take more than ten working days to produce the requested records, the custodian must notify the requester of this in writing within ten working days of receipt of the request. Md. Code Ann., Gen. Provisions § 4-203(b)(2).

explained that it calculates staff costs at \$31 per hour, which is lower than the hourly rate staff would be paid if the rate was calculated based on their actual salaries.

On April 12, 2021, the HOC sent a second letter following the complainant's participation in an online HOC Community Forum on April 7, 2021. The letter acknowledged the complainant's view that she was seeking the information in the public interest and not for personal gain, and her representation that she did not have sufficient funds to pay the estimated fee. The letter also noted the complainant's expressed belief that the HOC was charging a high fee to prevent her from getting the information because the HOC has something to hide. The HOC again denied the complainant's request for a fee waiver, taking the position that a requester bears the burden of explaining in detail why a fee waiver would be in the public's interest and that conclusory statements did not suffice to meet that burden. The HOC further explained that indigency was another basis for a fee waiver and provided the complainant with a link to the affidavit she could submit if she met the definition of indigency and wished to obtain a fee waiver on that basis. Noting that the first two hours of the search and preparation process are provided at no cost to the requester, the HOC also suggested that the complainant could prioritize documents so that the HOC could begin reviewing them and produce as many responsive documents as possible within that two-hour time frame. Finally, the HOC indicated that the complainant could submit additional information regarding her fee waiver request and ask that the HOC reconsider its decision.

The complainant submitted her complaint to us on April 23, 2021, and alleged that the \$496 fee estimate was unreasonable. The HOC responded on May 4, 2021. It indicated that the majority of the complainant's PIA request was being handled by an Associate General Counsel who was responsible for requesting the documents from the appropriate departments, completing an initial review for responsiveness, determining whether any exemptions apply, and making any necessary redactions. The HOC estimated that the Associate General Counsel would spend sixteen hours on these tasks. The HOC also indicated that General Counsel was then responsible for a "second layer of review," and that she expected that it would take her two hours to complete this review. These two hours were the two hours of uncharged time.

The HOC contends that the eighteen-hour estimate is realistic and reasonable, explaining that there are a total of 554 potentially responsive documents that require review, evaluation, and possible redaction. The HOC also points out that it voluntarily chooses to lessen the financial burden on requesters by calculating costs using the \$31 per hour rate rather than each individual's higher prorated salary. The lower rate apparently represents the amount that HOC would have to pay an outside company for assistance with the response.

Analysis

We are 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).² A reasonable fee is "a fee bearing a reasonable relationship to the recovery of actual costs incurred by a governmental unit," § 4-206(a)(3), and should reflect "the actual costs of the search for, preparation of, and reproduction of a public record in standard format, including media and

² Citations are to the General Provisions Article of Maryland's Annotated Code, unless otherwise indicated.

mechanical processing costs,” § 406(b)(1)(ii). Staff and attorney costs are “actual costs” and must be “prorated for each individual’s salary and actual time attributable to the search for and preparation of a public record under this section.” § 4-206(b)(2). The PIA instructs that its provisions should be “construed in favor of allowing inspection of a public record, with the least cost and least delay to the person or governmental unit that requests the inspection.” § 4-103(b). If we find that a custodian charged an unreasonable fee under § 4-206, we must “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).

Although fee estimates can present challenges for review, *see, e.g.*, PIACB 17-04 at 3 (Nov. 22, 2016), we have evaluated the reasonableness of a fee estimate where the estimate constitutes a precise figure based on a breakdown of anticipated costs and the custodian has required prepayment of the estimate before providing the records. *See, e.g.*, PIACB 21-01 at 3 (Oct. 5, 2020); PIACB 20-13 at 2 (June 22, 2020). If the parties’ submissions give us “no reason to doubt” an estimate, PIACB 20-13 at 2, the Board will not disturb it. If, on the other hand, the submissions show that an estimate is not reasonably related to the actual costs of a response, we will instruct the agency to modify or eliminate that portion of the estimate that does not accurately reflect the agency’s actual costs. *See, e.g.*, PIACB 20-05 at 3-4 (Nov. 7, 2019) (finding no clear basis for \$42 per CD reproduction charge and instructing agency to either eliminate from fee estimate or modify charge to reflect actual costs). Any conclusions about the reasonableness of a fee estimate for tasks not yet performed do not change the fact that the final fee for tasks *actually* performed must bear a reasonable relationship to the actual costs incurred by the agency. *See* PIACB 21-01 at 3 (“[F]inal assessments of costs must be based on the time actually expended, at the rates of the staff who expended it.”). In this case, the HOC has provided sufficient detail about how it arrived at its fee estimate. And, while the ten-day letter did not explicitly demand prepayment, it was implicit in the follow-up letter sent to the complainant on April 12, 2021 that the HOC will not proceed with production of the requested records unless the estimate is paid.

At the outset, we note that the HOC’s use of a standard hourly rate to assess staff and attorney costs does not necessarily comport with a strict reading of the statutory provision regarding these costs. *See* § 4-206(b)(2) (staff and attorney review costs shall be prorated for individual’s salary and actual time attributable to search and preparation). However, in this case, to the extent that the hourly rates charged to do not track the actual prorated hourly salary of the staff fulfilling the response, the deviation favors the complainant.³ *Cf.* PIACB 17-06 at 4 (Nov. 28, 2016) (noting that use of separate fees to calculate search, preparation, and copying costs would yield a higher fee than the per-page cost assessed and explaining that “[t]o the extent that the fee charged might not be reasonably related to [the agency’s] actual costs, it errs in favor of the applicant and, therefore satisfies the goal of the PIA that an agency not profit from the fee charged”). The rate charged by the HOC for staff and attorney time—\$31 per hour—amounts to an annual salary of \$64,480, assuming a full forty-hour work week. In 2019, the overall average salary of full-time permanent Montgomery County employee was \$82,258, an amount that clearly exceeds what the HOC charges for staff and attorney time. Montgomery County Maryland,

³ It might also be helpful to think about an agency’s decision not to assess the full amount of staff or attorneys’ prorated salaries as a form of partial fee waiver. *See* § 4-206(e); *cf.* PIACB 19-11 at 1 (July 19, 2019) (agency granted partial fee waiver). It is, in effect, an agency’s decision to waive its right under the statute to recover the full amount of actual costs incurred.

Personnel Management Review 1-6 (April 2020) <https://www.montgomerycountymd.gov/HR/Resources/Files/Classification/Compensation%20Documents/PMR%202020%2004072020.pdf> (last visited May 11, 2021).⁴ Further, both the Associate General Counsel and General Counsel positions are positions that require advanced education and degrees, which are generally compensated at a higher rate. Given all of this, we have no reason to question the HOC's assertions that the \$31 per hour it charged for staff and attorney time in this particular case is lower than the actual prorated salary of the staff who are responsible for preparing the response to the complainant's PIA request and, in turn, no reason to believe that the HOC is turning a profit from responding to the complainant's PIA request. In this particular matter, we cannot find that the HOC's choice to assess staff costs at \$31 per hour was an unreasonable one.

Next, we turn to the HOC's estimate that it will take a total of eighteen hours to prepare its response. We begin with the precise request. Here, the complainant has requested "*all* procurement documents from *any date* related to matters in which Jackie Simon was a vendor or prospective vendor, including RFPs, project descriptions, solicitations, bids, price quotes, lists of bid responses, agreements, or invoices," and "*any* correspondence or documents from late 2013 or early 2014 regarding Jackie Simon as a commissioner candidate, including calendar entries or notes regarding any interviews or meetings between Jackie Simon and the HOC staff or commissioners from the same time period." On its face, it is clear that this request commands a fairly broad and potentially time-consuming search that is likely to result in a high volume of records, some of which are complex in nature.

In its ten-day letter, the HOC advised that its search produced thirteen potentially responsive records falling under the first part of the complainant's request—i.e., 13 "RFPs, project descriptions, solicitations, bids, price quotes, lists of bid responses, agreements, or invoices." These are no doubt some of the more complex records that might require a comparatively significant amount of time to review. The HOC also advised that there were 283 potentially responsive emails and 258 potentially responsive calendar events falling under the second part of the complainant's request. While the HOC does not provide any information as to the nature of the emails and calendar events—e.g., whether some or many of them are lengthy or an idea as to how many might be subject to a privilege such as the attorney-client or deliberative process privilege—the sheer amount here, 541 emails and calendar events, suggests that significant review time might be necessary. The HOC has estimated that it will take an Associate General Counsel sixteen hours to collect, review, and potentially redact all of these records. Based on the submissions, we cannot find that this sixteen-hour time estimate is unreasonable.

In addition to the sixteen hours it estimates Associate General Counsel will spend responding to the complainant's PIA request, the HOC estimates that General Counsel will spend

⁴ As we understand it, the HOC employees are not Montgomery County employees because the HOC is not a county agency. But, because the HOC is an "instrumentality" of the State, it is subject to the PIA. See § 4-101(j)(1)(i); *City of Baltimore Dev. Corp. v. Carmel Realty Assoc. et al.*, 395 Md. 299, 335-36 & n.26 (2006). Given that the HOC is engaged in public service, it is reasonable to believe that its employees are compensated similarly to those in the public sector. See Housing Opportunities Commission, About HOC, <https://www.hocmc.org/about-hoc/about-us.html> (last visited May 11, 2021) ("The mission of the Housing Opportunities Commission is to provide affordable housing and supportive services that enhance the lives of low- and moderate-income families and individuals throughout Montgomery County[.]").

two hours conducting a “second layer of review.” These two hours, the HOC maintains, are the two fee hours it must provide under the PIA. Given the HOC’s assertions that Associate General Counsel will make determinations as to whether any exemptions apply and make any necessary redactions to the records, presumably this “second layer of review” is more a check on the Associate General Counsel’s work. Put differently, the General Counsel would be duplicating the review already performed by the Associate General Counsel to ensure that she made no errors. We have, in the past, cautioned agencies that “any duplication of effort should not be charged to the [requester].” PIACB 19-01 at 3 (Sept. 24, 2018); *see also* PIACB 16-05 at 3 (June 1, 2016) (noting that “a number of records underwent multiple reviews” and reducing the fee to “account for that duplication of effort”). Additionally, it strikes us that this “second layer of review” is more related to employee supervision and/or training rather than solely a function of preparing a response to a PIA request. Thus, while the HOC is certainly free to review work already performed in response to a PIA request, it cannot assess the requester the cost of that secondary review. Accordingly, the HOC may not attribute the two free hours to which the complainant is entitled to the General Counsel’s second, duplicative review and must instead subtract them from the sixteen hours it estimates Associate General Counsel will spend searching and preparing the response. We therefore order the HOC to reduce its fee estimate from \$496 to \$434 to reflect fourteen hours’ chargeable time.

Of course, the final costs actually assessed must be based on the time actually spent by staff and attorneys on (non-duplicative) search and review tasks associated with the preparation of the response in this case. PIACB 21-01 at 3 (Oct. 5, 2020). Should that amount of time exceed the estimated fourteen hours’ chargeable time, then the HOC is free to assess the complainant any additional actual costs associated with that additional time. In that same vein, if the amount of time spent is less than the fourteen hours’ chargeable time reflected in the modified estimate, the HOC must refund the complainant the difference.

Finally, we note that the submissions suggest that the complainant firmly believes that the HOC acted unreasonably when it denied her request for a fee waiver. Indeed, given the relative lack of attention paid by the complainant in her submissions to the actual rate charged and estimate of time required as compared to the fee waiver issue, this appears to be her central complaint with the HOC’s response. Such allegation is, of course, beyond our jurisdiction to consider. *See* §§ 4-1A-05(a), 4-206; PIACB 16-08 at 1-2 (May 19, 2016) (“We thus have the authority to consider, and determine, whether the fee that a custodian has charged bears a reasonable relationship to the actual costs of fulfilling the requester’s request.”). However, the Public Access Ombudsman does have jurisdiction to mediate disputes about fee waivers, should the parties in this case be willing to participate. § 4-1B-04(a)(6). And, given that the complainant’s submissions tend to signal a certain degree of suspicion as to the reasons why the HOC denied her request for a fee waiver and provided the fee estimate that it did, mediation in this case might be an appropriate and potentially fruitful avenue for the complainant to pursue. *See* PIACB 17-07 at 2 (Feb. 28, 2017) (“[W]hen cost is not the only issue, and particularly when distrust is present, we encourage both the requester and the custodian to seek the Ombudsman’s services and to proceed in good faith.”).

Conclusion

We find that the \$31 per hour rate charged for staff time in this particular matter is reasonable, and that HOC’s estimate of the amount of time it will take to conduct the search,

review, and preparation of the response to the complainant's PIA request is also generally reasonable. However, to the extent that the \$496 fee estimate reflects costs assessed for a secondary review of the records, we find it unreasonable and order that it be reduced by \$62 to \$434 to remove the portion of the estimate attributable to duplicative effort.

Public Information Act Compliance Board

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