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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 21-15

July 7, 2021
City of Hyattsville, Custodian
Chuck Perry, Complainant

The City of Hyattsville (“City”) estimated that it would cost \$22,890 to respond to the requester’s Public Information Act (“PIA”) request for records of certain communications between the Hyattsville Police Department and select city officials. The complainant has alleged that this fee estimate is unreasonable. The City, through counsel, responded.

Background

On March 21, 2021, the complainant submitted a PIA request seeking the following records:

Any and all body camera recordings regarding the incidents and police interactions with Leonard Shand and Edwin Morales;

Hyattsville Police Department arrest data for 2020;

Any and all Hyattsville Police Department communication with the City Council, the City Administrator and the Mayor of Hyattsville in regard to Leonard Shand and Edwin Morales.

The complainant asked that the City inform him if it expected any fees for searching or copying the records to exceed \$25, and also requested that the City waive any fees on grounds that disclosure of the records was in the public interest.

In a letter dated April 15, 2021, the City denied inspection of the body camera footage pursuant to the discretionary exemption for investigative records, § 4-351,¹ and explained that the incidents were under active investigation. The City provided the juvenile and adult arrest totals for 2020. As for the complainant’s request for communications related to Leonard Shand and Edwin Morales, the City explained that there were approximately 4,522 responsive emails regarding Mr. Shand and 2,006 responsive emails regarding Mr. Morales. The City said that it would take more than ten working days to produce these records because each record needed to be reviewed by staff and the City Attorney to determine whether they should be disclosed. The total estimated fee for the search and review process was \$22,890. The City explained that it

¹ Unless otherwise indicated, citations are to the General Provisions Article of Maryland’s Annotated Code.

charged \$35 per hour for staff review and \$175 per hour for legal review. It further provided a “conservative estimate” that it would take one minute to review each email for a total of 109 hours. Thus, the estimated fee for legal review was \$19,075 and the estimated fee for staff review was \$3,815. The City indicated that it would resume production of the records “upon written notification from you that you wish to proceed . . . and that you agree to pay the actual cost up to the estimated cost of \$22,890.” The City also noted that, if the complainant wished to refine the scope of his request, it might allow the City to provide a speedier response and was likely to reduce the cost of that response.

The complainant submitted his complaint to the Board on May 12, 2021. He alleged that the \$22,8[9]0² estimated fee is unreasonable “due to [the] claim that each email must be reviewed at length for ‘legal reasons.’” The complainant also indicated that he had amended his request to “restrict emails to the former mayor, Candice Hollingsworth, that involve other city personnel and elected officials in regard to the Shand and Morales shooting.” The complainant attached a document titled “Response to the City of Hyattsville’s MPIA” to his complaint wherein he took issue with the City’s response to each of the three components of his PIA request. He contended that: (1) the video records of the Shand investigation should be released because the investigation is complete, and, if the Morales investigation was still underway, the City should confirm this in writing and release the video when the investigation concludes; and (2) the arrest data provided by the City was non-responsive to his request because it lacked demographic information. Finally, the complainant also reiterated that he would limit his request for communications, this time indicating that he would seek email communications between the City Administrator and staff and the former mayor, Candice Hollingsworth, regarding only the Shand shooting.

The City responded to all allegations raised by the complainant, including those regarding its decisions to deny inspection of the body worn camera footage and the complainant’s fee waiver request.³ Regarding the fee specifically—and noting that the complainant had not communicated his refined request prior to filing his complaint with the Board—the City again provided the “formula” by which it arrived at its fee estimate. The City explained that there were 4,522 emails that were identified with the keyword “Shand” and that it had conservatively estimated that it would take approximately 76 hours to review these emails. The City maintained that “[t]he emails will have to go through both a staff review and a legal review,” and that staff review would cost \$35 per hour while legal review would cost \$175 per hour. Thus, the City advised that the estimated cost for the complainant’s narrowed request was \$15,960.⁴ The City stressed that the

² The complaint states that the fee estimate was \$22,800, but the City’s response letter indicated that the estimate was \$22,890. We will review the fee estimate provided by the City.

³ The City’s application of the exemption contained in § 4-351, the sufficiency of the records produced in response to the complainant’s request for arrest data, and the City’s denial of the complainant’s request for a fee waiver are not within the Board’s jurisdiction to review. *See* §§ 4-1A-04; 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.”). We therefore confine our discussion of the City’s response to those facts relevant to the fee issue.

⁴ It is unclear to us exactly how the complainant has refined his request and whether he still seeks communications related to the Morales incident. In his actual complaint, the complainant indicated that he had “amended the request to restrict emails to the former mayor, Candice Hollingsworth, that involve other city personnel and elected officials in regard to the Shand and Morales shooting.” However, in the document attached to his complaint, he indicated that he was “willing to limit [his] request to email[] communications between the City Administrator and staff and the former mayor, Candice Hollingsworth regarding the Shand shooting.” From its response, the City appears to have interpreted the complainant’s

actual fee charged “could be higher or lower depending on the actual number of disclosable records and the actual effort required to process the response.”

On June 7, 2021, the complainant submitted a reply to the City’s response. The complainant’s reply contained further argument that the body worn camera footage should be disclosed, that the City should have known the complainant was requesting demographic data about arrests, and that the City should not have denied his request for a fee waiver. Insofar as all of these issues are clearly outside of our jurisdiction, *see supra* note 3, we will not address them. Though the complainant’s reply briefly touched on his request for communications by providing yet another iteration of refinement, his reply did not include further facts or argument specifically related to the reasonableness of the City’s fee estimate.

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). 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 mechanical processing costs,” § 4-206(b)(1)(ii). Staff and attorney review 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, generally, its provisions must 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).

Fee estimates—as opposed to fees charged for work already performed—can present challenges for review, and we have on occasion dismissed complaints about fee estimates as prematurely made. *See, e.g.*, PIACB 17-04 at 3-4 (Nov. 22, 2016). Often in these instances, “an agency may not have enough precise information to identify its actual costs,” and “some preliminary collection of materials and review must occur before a realistic estimate of the actual costs can be calculated.” *Id.* at 4. We have observed that such circumstances do not “leave a[] [requester] without a remedy, as the parties may discuss modification of the request to adjust the estimated fee, and they may seek the assistance of the Public Access Ombudsman to attempt to resolve their dispute.” *Id.* at 3-4.

In other cases, where the custodian has asked for prepayment of a precise figure based on a breakdown of anticipated actual costs, we have evaluated the reasonableness of a fee estimate. *See, e.g.*, PIACB 21-01 (Oct. 5, 2020); PIACB 20-13 (June 22, 2020). In a practical sense, where

refinement as simply eliminating the records regarding Morales, and does not indicate whether eliminating the current mayor from the search may further reduce the number of potentially responsive records. Later, in a reply to the City’s response submitted on June 7, 2021, the complainant explained that his amended request was for email communications of “the mayor at the time of the shooting, Candice Hollingsworth, and the City’s police chief during the shooting, Amal Awad,” thus potentially narrowing it even further. This case is, as the City more generally points out in its response, an illustration of the confusion that can result when requesters and custodians do not engage in the open, back-and-forth communication that often makes for a productive PIA response. In any event, regardless of our determination here, the parties are free to engage in renewed communications as to exactly what records the complainant is now seeking.

prepayment is required and the fee is precise, the agency has “‘charged a fee’ within the meaning of GP § 4-206.” PIACB 19-01 at 3 (Sept. 24, 2018); *see also* PIACB 17-04 at 3 n.3 (Nov. 22, 2016) (“[W]hen a governmental unit requires payment of the estimated fee prior to providing the records, this Board could consider the matter under the auspices of the governmental unit having charged a fee. Typically, the estimated fee in those instances is a precise figure, rather than a range.”). In these circumstances, a requester who is unable or unwilling to pay a fee estimate would have no other opportunity to challenge the fee: no records would be produced and no actual costs assessed. But, where prepayment is not required, there are other avenues to pursue. A requester could modify the request with the aim of reducing actual costs. Or, work on the response could proceed with the understanding that the requester will pay the fee assessed for the actual costs of production. *See* PIACB 21-01 at 3 (Oct. 5, 2020) (“[F]inal assessments of costs must be based on the time actually expended, at the rates of the staff who expended it.”). When those actual costs are assessed, a requester could then bring a complaint to the Board if the costs exceed \$350 and the requester believes the costs are unreasonable.

Here, the City has not demanded prepayment of its \$22,890 estimated fee; rather, it has asked for “written notification from [the requester] that [he] wish[es] to proceed . . . and that [he] agree[s] to pay the actual cost up to the estimated cost of \$22,890.” The City’s response to the complaint confirmed that prepayment was not requested. The City also suggested that, should the requester “refine the scope” of his request for email communications involving certain city officials, it would likely reduce the actual costs associated with the response. While the requester has indicated a willingness to narrow his request, it appears that he has not engaged with the City directly in this process, nor has he provided a clear indication of how he wishes to narrow his request. *See supra* note 4. At this point, given that the City has not required prepayment of the estimate for production of the requested records, that the requester has other methods available to him to attempt to reduce the fee, and that Board review remains available should the final cost assessed exceed \$350 and, in the requester’s view, be unreasonable, we dismiss this complaint as premature.

We do, however, have guidance for both the City and the requester. First and foremost, we encourage the requester and the City to work together and keep lines of communication open. This means that the requester should be willing—as he has indicated he is—to refine his request, and that the City should be willing to respond in a timely fashion to provide information about what records it expects to have in response and the reasonable costs associated with their production. Further, as noted above, there are other issues present beyond the dispute over the fee estimate. Though we lack jurisdiction to address these issues, the Public Access Ombudsman might be able to provide valuable assistance in resolving both those issues and the fee dispute through voluntary mediation. § 4-1B-04(a); *see also* 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.”).

Second, we stress that the PIA is to be “construed in favor of allowing inspection of a public record, *with the least cost* and the least delay to the person or governmental unit that requests inspection.” § 4-103(b) (emphasis added). Certain information provided in the City’s responses to both the PIA request and the subsequent Board complaint suggests that there might be ways for the City to better abide this provision. For instance, in its response to the complainant’s initial PIA request for “[a]ny and all Hyattsville Police Department communication with the City Council, the City Administrator, and the Mayor of Hyattsville in regard to Leonard Shand and Edwin Morales,” the City described the search process as follows:

The City has searched its email records for the keywords “Shand” and “Morales” to determine an approximate number of responsive email communications. There

were 4,522 emails identified with the keyword, “Shand” . . . [and] [t]here were 2,006 emails identified with the keyword, “Morales[.]”

Based on these results—6,528 emails in total—the City calculated that it would take 109 hours for staff to review the emails and 109 hours for an attorney to perform a legal review. This process of conducting separate searches for each keyword makes sense only if the City expects that there are very few emails that contain both keywords, which might not be the case here. Instead, a single search for emails that contain “Shand” OR “Morales” would reduce the risk that duplicative emails would be produced from the search and thus reduce the estimate of time necessary for review.

Additionally, given the large number of electronic mailboxes potentially within the scope of the request and the fact that employees often engage in group email communications, we have some concern that a significant number of duplicate emails might be produced even with a combined keyword search, thus increasing the amount of time spent sorting and reviewing the responsive records. Common email services enable administrators to search multiple mailboxes for multiple keywords, while ensuring that the search results do not contain duplicate messages.⁵ This functionality has been widely available for more than a decade, and it is reasonable for a records requester to expect an agency—especially those larger agencies with a high number of employee mailboxes—to make use of such features when searching for and collecting responsive records. The City’s practice of adding the results of separate searches together to arrive at its fee estimates strongly suggests that it is not making use of this de-duplication functionality, and therefore likely not providing the records “with the least cost and the least delay,” § 4-103(b), as it is required to do. While we are mindful that it is generally not our role to “second-guess the manner in which [an agency] utilize[s] the software capabilities” available to it, nor to “micromanage a custodian’s electronic search and retrieval process,” it is well within our role to “urge custodians to employ those electronic search and retrieval tools that will most accurately and efficiently locate responsive records.” PIACB 19-06 at 2 (Nov. 27, 2018). We therefore urge the City to conduct a single search of its email system for messages that contain the requested keywords and to enable any de-duplication functions available to it when exporting the results.

Finally, in its estimate, the City allocated equal amounts of time for staff and attorney review, which suggests that it expects the attorney to review the same set of records that staff has already reviewed, at five times the cost of the staff review. In our view, this is unlikely to yield a reasonable fee. In other words, it is unlikely that such a fee “bear[s] a reasonable relationship to the recovery of actual costs incurred,” § 4-206(a)(3), when preparing a response “with the least cost” to the requester, § 4-103(b). We have cautioned that custodians should not charge requesters for duplicative work, and that they should not charge for work done by outside consultants or contractors where it could be done in-house at less cost. *See* PIACB 16-05 at 3 (June 1, 2016) (noting that “a number of records underwent multiple reviews and were produced in multiple copies,” and reducing the fee to “account for that duplication of effort”); PIACB 20-04 at 2 (Nov. 25, 2019) (“[W]here it is clear that a custodian has the capability and resources to perform response-related work ‘in-house’ for less expense than engaging a contractor, the PIA likely would not permit the custodian to charge the requester for the contractor’s costlier fee.”). Thus, we have found a fee unreasonable where it reflects time spent by an attorney to review a collection of records that contained duplicates and records that were clearly not responsive. *See* PIACB 21-12 (May 27, 2021). In that case, we concluded that the custodian should have used staff time—which was charged at \$25 per hour as opposed to the \$325 per hour charged for legal review—to remove

⁵ For example, Microsoft Exchange, which is a leading email service, has offered de-duplication of discovery search results since 2010. Similarly, Microsoft’s cloud-based Outlook.com/Office 365 email service offers de-duplication as part of their built-in Content Search and eDiscovery tools.

any records that were completely duplicative and/or clearly not responsive before sending the records to the attorney for review. *Id.* at 6-7. Similarly, here, we would expect the City to use its staff time to perform the bulk of the review and send only those responsive records that genuinely present a question of whether or not an exemption applies to its attorney for legal review. And, again, the final cost assessed must be based on the actual amount of time expended by an individual charged at their actual prorated salary, which excludes benefits. *See* § 4-206(b)(2); PIACB 16-05 at 2-3 (June 1, 2016).

Conclusion

Because the City has not required prepayment of the estimated fee, we dismiss this complaint as prematurely made. However, we urge the City to be mindful of the PIA's command that public records be produced with "the least cost and least delay" to the requester. § 4-103(b). The City should maximize its use of the technology available to it in order to conduct the most efficient and accurate search possible. Following its search, the City should seek legal review of only those records that are in genuine need of it, and should keep a detailed account of the actual time that its employees and attorney spend on the search for and preparation of its response. Finally, we encourage the parties to communicate openly to narrow the parameters of the PIA request in an effort to reduce the final actual costs assessed.

Public Information Act Compliance Board

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