STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 21-16

July 30, 2021

City of Hagerstown, Custodian
New York University School of Law Civil Rights Clinic, Complainant

The complainant is the Supervising Faculty of the New York University School of Law Civil Rights Clinic ("Clinic"). In February of this year, a legal intern at the Clinic submitted a Public Information Act ("PIA") request for certain records in the possession of the City of Hagerstown ("City") and its police department. Initially, the City estimated that it would cost $10,000 to respond to the request. After discussions between the parties, the complainant revised the request and the City provided a new estimate of $1,600-1,800. The complainant alleges that this estimate is unreasonable. The City, through counsel, responded.

Background

On February 24, 2021, the Clinic submitted a PIA request to the City seeking a variety of records related to the City's voluntary and mandatory Crime-Free Housing programs, including material provided to participants and trainers, records relating to the "chronic nuisance property" designation, and information and data regarding landlords and evictions. The City acknowledged receipt of the request on February 26, 2021. Noting that "at first blush [the request] appears to be an extremely substantial one," the City asked the Clinic to clarify the relevant timeframes. In response, the Clinic sent an amended request to the City on February 28, 2021, wherein it provided timeframes for some of the records sought and clarified that it was seeking the "most recent versions" of the material provided to participants and trainers. The revised request also refined the scope of records sought related to chronic nuisance properties.

The City responded to the Clinic's PIA request on March 11, 2021. It indicated that it expected the review process to take approximately 360 hours of staff time and estimated that the total cost for providing responsive records would be around $10,000. The estimate included costs for the time of two police officers and one administrative assistant: one officer would spend 118 hours on the response at a rate of $26.81 per hour; a second officer would spend 120 hours at a rate of $25.27; and the administrative assistant would spend 120 hours at a rate of $24.88.[1] The City advised that the first twenty pages of documents were provided free of charge; page 21 would cost $1.25, and each additional page thereafter would cost $0.25. The City estimated that total

[1] The City advised that two hours' labor would be provided free of charge. *See* Md. Code Ann., Gen. Provisions § 4-206(c).

copying costs would amount to about $800. To move forward, the City asked for an "initial deposit" of $5,000. The City suggested that the Clinic might again narrow the request so that the City could "provide [it] with the most pertinent information . . . while decreasing the costs[.]"

The Clinic did not remit payment for the initial deposit requested by the City. Instead, the parties discussed the request and the City's response via a telephone call, during which the City learned more about the documents the Clinic sought and provided the Clinic with a better understanding of the "voluminous number of documents that exist." After that phone call, on March 24, 2021, the City provided the Clinic with a revised estimate of $1,600-1,800 and explained that it would likely take the lieutenant responsible for pulling the records and preparing them for inspection about 40 hours to do so, and that the final page count might well exceed 100 pages. On April 5, 2021, the Clinic requested that the City waive the fees associated with responding to the PIA request. The City denied the fee waiver request on April 13, 2021, reiterated that the estimated cost for responding to the Clinic's PIA request was $1,600-1,800,[2] and asked the Clinic for a "down payment" of $800 to begin the process of retrieving and preparing the requested records.

Again, the Clinic elected not to remit payment. It now challenges that the City's $1,600-1,800 estimated fee is unreasonable under the PIA.[3] Pointing out that the revised request contained only seven "questions"—three of which sought a single document and three of which "requested materials that are supposed to be publicly available but instead remain under the actual and exclusive control of the City"—the complainant characterizes the City's fee estimate as "exorbitant." The complainant alleges that the estimate "export[s] onto [the Clinic] . . . significant costs stemming from the City and the [police department's] mismanagement of their own records." Noting that the bulk of the costs are related to the staff hours the City believes will be necessary to search for and prepare the records, the complainant alleges that these "substantial" time expenditures arise from the City's "own lack of careful record keeping." The complainant asserts that the City conceded as much during their phone call when a City representative explained that certain responsive information "was never collected in any readily available document or series of documents," and, regarding different information, that the City's record keeping was "scattered and generally incomplete." The complainant also argues that allowing an agency to pass the cost of "faulty record keeping" on to organizations such as the Clinic is counter to the public interest and the PIA's general purpose because the Clinic will use the requested records to provide the public with a better understanding of the operation and effects of City's Crime-Free Housing ordinance.

The City responds that the Crime-Free Housing program "accumulates a copious amount of records year-over-year." After negotiations, the City agreed to produce a spreadsheet containing some of the information responsive to the Clinic's request but explained that such a spreadsheet

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[2] This estimate apparently excluded one of the Clinic's enumerated requests, specifically "question 3"—a request for "[a]ny records, such as maps, letters, memoranda or communications indicating the distribution or number of 'qualifying calls' between 2014-2019 as defined in Hagerstown, Md. Code § 95-2 (2014)."

[3] The complainant properly does not ask us to review the City's denial of the Clinic's fee waiver request, as we lack jurisdiction to do so. *See* Md. Code Ann., Gen. Provisions §§ 4-1A-04, 4-1A-05(a), 4-206; PIACB 16-08 at 1-2 (May 19, 2016).

could not be pulled from an existing database; instead, the City would need to compile the information from separate folders. In defense of its estimate, the City notes that the request "either seeks numerous records spanning multiple years, or seeks a spreadsheet based off of information that is stored in separate locations." The City further explains that the Crime-Free Housing program was created and administered by an employee who has since retired, and that this employee maintained all program-related records in separate folders organized by the addresses of the properties involved rather than a single, searchable database. To respond to the Clinic's request, a City employee must therefore manually open each folder to search for responsive records, which could include police call logs, records, reports, and correspondence to and from the property owners. All responsive records must then be reviewed as part of preparing the response.

The City also indicates that, at this point, it has compiled the requested records and that it took a patrol officer 40 hours to do so at a rate of $22.20 per hour. These records, the City advises, can be provided electronically to avoid reproduction fees. Thus, the City estimates that, excluding the two hours' free labor that the PIA requires it to provide, the cost for producing records responsive to the Clinic's request will cost $843.60.

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).[4] 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 its provisions generally 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).

Often, complaints to this Board concern fee estimates, rather than fees charged for work already performed. Our ability to review a fee estimate typically depends on whether the estimate is a precise figure that is based on a breakdown of anticipated actual costs, and whether the custodian has demanded prepayment. *Compare, e.g.*, PIACB 17-04 at 3-4 (Nov. 22, 2016) (declining to review fee estimate where estimate was a broad range and observing that "an agency may not have enough precise information to identify its actual costs"), *with* PIACB 21-01 (Oct. 5, 2020) (fee estimate was precise figure and agency required prepayment); PIACB 20-13 (June 22, 2020) (same). In a practical sense, where 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). A requester who is unable or unwilling to pay the required estimate may well simply forego obtaining the requested records and have no other opportunity to challenge the basis for the costs assessed. Here, we note that the City has asked the Clinic for a "down payment" of $800. While the estimate

[4] Unless otherwise indicated, all citations are to the General Provisions Article of Maryland's Annotated Code.

challenged—$1,600-1,800—is somewhat akin to the "broad range" we declined to review in PIACB 17-04 (Nov. 22, 2016), the City's range is based on a more precise breakdown of time expenditures and individual prorated salaries than were involved in the 2016 case. *See id.* at 2 (noting that the estimated hours of search and preparation were uncertain and that the search involved records held by five different divisions). And, in any event, the City has now also provided what appears to be a final or near-final assessment of costs based on the actual amount of time it took a patrol officer to search for and compile the requested records. We will, therefore, review the fee estimates challenged here.

From a fee perspective, this case had a somewhat promising start. The Court of Appeals has described a "productive response to a PIA request" as an "iterative process in which the agency reports on the type and scope of the files it holds that may include responsive records, and the requestor refines the request to reduce the labor (and expense) of searching those records." *Glass v. Anne Arundel Co.*, 453 Md. 201, 233 (2017). "When the requestor and agency work together, the process approximates the purpose and policy of the PIA." *Id.* From the submissions, it appears that the Clinic and the City engaged in the "iterative process" that courts encourage; indeed, the process resulted in a significant decrease in the City's estimated fee, from $10,000 to $1,600-1,800. And, though the City's final or near-final estimate of $843.60 represents a further decrease in cost, we presume, based on the Clinic's arguments, that the complainant challenges this figure as well. We will, therefore, review both the initial estimate and the final or near-final cost.

The Clinic's primary argument is that the fee estimates are unreasonable because they include costs that flow from poor record keeping. In other words, had the City kept its records in a more organized and centralized fashion, it would not have needed to expend 40 hours searching for and retrieving the records the Clinic seeks. Fewer search hours would have produced a lower fee. This argument raises interesting questions about the intersection between the fees assessed under the PIA and an agency's obligations regarding records management. The PIA does not speak explicitly to those obligations, although its general purpose of providing individuals with access to government records with "the least cost and least delay," § 4-103(b), certainly implies a duty to keep records in a manner that will effectuate that purpose. In Maryland, a variety of provisions, including statutes, regulations, and locally-enacted law, govern records management and retention. For example, § 10-610(a)(1) of the State Government Article requires that "[e]ach unit of the State government shall have a program for the continual, economical, and efficient management of the records of the unit." Similarly, Maryland regulations require agencies—defined to include "all political subdivisions"—to "establish and maintain a records management program" and to prepare records inventories and retention schedules, which must be approved by the State Archivist. *See* COMAR 14.18.02.02(B)(1), .04(C), .07. One of the purposes of these regulations is to "[a]ssure public access to the records of government." COMAR 14.18.02.01(E). At the local level, some city ordinances and town charters contain provisions that touch on records management. *See, e.g.*, Charter of the Town of Boonsboro, § 602(c)(4) (2020) (clerk shall "[m]aintain an orderly record and filing system of all official town documents").

In a certain sense, the Clinic's argument strains the narrow scope of our jurisdiction. We are charged with determining whether an agency has assessed a reasonable fee—as the PIA defines it—for responding to a PIA request. We are not charged with evaluating whether and to what extent an agency has complied with whatever records management laws it must comply with. And, while we might envision a scenario where the submissions clearly demonstrate an egregious failure to keep records in an orderly way such that the fees assessed for search and retrieval are grossly

inflated by the amount of time it takes agency employees to sort through their mess of records, this case does not present such a scenario. *Cf.* PIACB 19-04 at 2 (Nov. 27, 2018) (noting that complaints about the volume and content of records are generally not within Board's limited jurisdiction unless clearly tied to a fee's reasonableness). Here, the City has explained that the records the Clinic seeks were kept in separate folders according to the address of the property involved, rather than a single, searchable database. While it might be true that the records could have been kept in a different way that would have facilitated faster access to the records when faced with a request like the one the Clinic has made, it appears that these records were maintained in an organized and methodical way. Given our mandate, and the PIA's relatively narrow definition of reasonableness, it is simply not our role to second-guess how the City chose to organize and manage these records or to speculate as to how a different management system might possibly have produced a lower fee. *Cf.* PIACB 19-06 at 2 (Nov. 27, 2018) ("We urge custodians to employ those electronic search and retrieval tools that will most accurately and efficiently locate responsive records. However, absent an obvious failure to use such tools when they are readily available, we are not in a position to micromanage a custodian's electronic search and retrieval process."); *see also, e.g.*, PIACB 20-13 at 2 (June 22, 2020) (accepting custodian's explanation that it did not have the "listing or file" that requester sought; rather "compiling all of the requested information w[ould] require a manual review of a large number of paper files").

The complainant also argues that permitting agencies to pass the costs of any inefficiencies in records management on to organizations like the Clinic is counter to the public interest given the manner in which the records will be put to use—e.g., here, providing Hagerstown residents and the public at large with more information about how the City's Crime-Free Housing ordinance operates. Although the public interest is certainly relevant to whether or not an agency should grant a fee waiver, § 4-206(e)(2)(ii), it does not factor into a determination of whether or not the fee itself is reasonable under the PIA. Unlike the federal Freedom of Information Act ("FOIA") and some other states' fee schemes, Maryland does not distinguish between types of requesters or their purposes for seeking records when it comes to assessing costs for responding to PIA requests. *Compare, e.g.*, 5 U.S.C.A. § 552(a)(4)(A)(ii)(I)-(III) (permitting agencies to charge different fees for responding to FOIA requests based on whether records: (1) are requested for commercial use; (2) are not sought for commercial use and request is made by an "educational or noncommercial scientific institution whose purpose is scholarly or scientific research" or a "representative of the news media"; or (3) do not come under either (1) or (2)) *and* Ariz. Rev. Stat. Ann. §§ 39-121.01(D)(1), 39-121.03 (permitting custodian to charge requester for cost of copying and postage unless request is made for commercial purpose, in which case custodian may also charge a "reasonable fee for the cost of time, materials, equipment and personnel in producing" the record), *with* § 4-206(b) (permitting custodian to charge a "reasonable fee" for "search for, preparation of, and reproduction of a public record" as well as "staff and attorney review costs," and making no distinction between type of requester or purpose of request).

In our view, the fee estimates provided by the City are reasonable under the fee provisions in Maryland's PIA. Based on the Clinic's February 28, 2021, PIA request, we understand that the City's response included the following records (and excluded one record for which the request was apparently dropped during negotiations, *see supra* note 2):

- The most recent version of materials provided to trainers in the voluntary Crime-Free Housing Seminar or any similar training programs associated with the Voluntary Crime-Free Multi-Housing program;

- The most recent version of materials used in the mandatory Crime-Free Housing Seminar or any similar training programs associated with the Crime-Free Housing ordinance;
- A record listing the properties, with their addresses, designated as chronic nuisance properties;
- A record indicating the total number of "Multi-Unit Residential Structures" for years 2018-2021;
- A record indicating the landlords who have participated in the Voluntary Crime-Free Multi-Housing program or any associated seminars from 2014-2020, including dates of participation where available; and
- A record indicating the number and geographic location of evictions related to the Crime-Free Housing ordinance, "criminal activity," or "nuisance" from the years 2014-2020.

In its complaint, the Clinic asserts that its revised PIA request contained only seven questions. It asserts that the response for three of those questions could be satisfied with a single document—specifically, the records related to the number of multi-residential structures, participating landlords, and evictions—and that the response for three of the other questions—specifically the training material and the list of properties designated as a chronic nuisance property—should be publicly available.

First, we do note that, by ordinance, the City is required to "maintain and annually publish a list of those properties currently deemed chronic nuisance properties as a result of HPD qualifying calls by street address and property owner." Hagerstown, Md. Code § 95-4 (2020). Thus, the record responsive to this portion of the request should be easily and readily produced at minimal—if any—cost. However, while the *answers* to the Clinic's questions about the number of multi-unit residential structures, the landlords participating in the City's Crime-Free Housing programs, and the evictions related to those programs might be provided with a single document, this does not necessarily mean that the *records* needed to produce those answers are not voluminous or that they are all contained in the same electronic database or physical place. Indeed, the City has represented that the volume of records is substantial and that they are not all centralized. We have no reason to question those representations, nor its representation that it took a patrol officer 40 hours to search for and prepare the responsive records. Thus, we find that the City's final or near-final fee of $843.60 is reasonable.

Turning to the earlier estimate challenged by the Clinic, we are mindful that the City's initial $1,600-1,800 estimate (and request for an $800 "down payment") was based on the anticipation that a lieutenant compensated at a higher rate of pay would perform the tasks necessary to respond. The City indicates that it is of the position that "preparation of these records is appropriately completed by sworn law enforcement" and explains that, due to staffing shortages, it did not believe it would be feasible to task a patrol officer with responding to the request. Certainly, the PIA's mandate that a response ordinarily be produced with the "least cost and least delay," § 4-103(b), generally means that an agency should utilize the lowest-paid employee available and capable of producing the response. But this is not a hardline rule, and there will be times when an agency's staffing or budget constraints might require the use of higher-compensated staff in order to timely respond to a PIA request. And, there will also be times when the use of a

higher-compensated employee might actually enable a more efficient and accurate response. *See, e.g.*, 20-13 at 2 (June 22, 2020) (accepting explanation that use of a corporal, rather than an employee with a lower hourly rate, was appropriate because the corporal was more familiar with the requested records and a less experienced employee would likely take longer to search for and review the records). As we see it, the submissions generally demonstrate that the City is cognizant of its responsibility to do all it can to minimize the costs of responding to a PIA request. Both the City and the Clinic engaged in the type of open communication and give-and-take that is encouraged by the courts and, based on those negotiations, the City arrived at its $1,600-1,800 initial estimate. Given what we have before us, we cannot find that this initial estimate was unreasonable as the PIA defines it.

Conclusion

Having considered the submissions and arguments made by the Clinic and the City, we find that the initial $1,600-1,800 estimate and the City's final or near-final fee of $843.60 both bear a "reasonable relationship" to the actual or anticipated actual costs incurred by the City in responding to the Clinic's PIA request and are therefore reasonable.

Public Information Act Compliance Board

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