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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 22-08

February 23, 2022

Office of the Baltimore County State's Attorney, Custodian
Avar Tunstall, Complainant

The complainant, Avar Tunstall, sent a Public Information Act ("PIA") request to the Office of the Baltimore County State's Attorney ("BCSAO") seeking all records related to his criminal case, 03-K-08-005016. In its response, the BCSAO advised that it had compiled the responsive records and that the records would be produced upon payment of a \$595 fee. The complainant has filed a complaint that states that he is unable to pay the fee. As explained below, we conclude that we lack authority to review and resolve the complaint.

Background

In October of 2021, the complainant sent his PIA request for all records related to case number 03-K-08-00516. The BCSAO responded on December 9, 2021, and indicated that it had compiled responsive records and that, with the exception of those records being withheld pursuant to certain exemptions in the PIA, the records would be produced when the complainant paid the associated fee of \$595. The response explained that the BCSAO charged \$25 per hour for clerical time and \$75 per hour for attorney time. For reproduction, the BCSAO charged 50 cents per page for copies and \$5 for each copy of a CD/DVD. The response further explained that the relevant file contained approximately 1,276 pages and 28 CDs/DVDs. The BCSAO estimated that it would take the clerk six hours, beyond the first two free hours,¹ to review, remove, redact, and copy the documents in the file, and an attorney four hours to review the clerk's work.

After receiving the BCSAO's response letter, the complainant filed his complaint, which requests that "this Office review [his] request" and states that the complainant is unable to pay the \$595 fee. In response, the BCSAO stands by the fee explanation provided in its December response to the complainant's PIA request and points out that the \$595 fee assessed is lower than the actual costs to the agency as reflected in the breakdown of costs included in the December letter.² In a reply, the complainant contends that the BCSAO's \$595 fee related only to production

¹ See Md. Code Ann., Gen. Provisions § 4-206(c), "[t]he official custodian may not charge a fee for the first 2 hours that are needed to search for a public record and prepare it for inspection."

² The costs indicated in the December letter for copies of the paper records, copies of the CDs/DVDs, and for clerk and attorney review time add up to \$1,228.

of the records on CDs/DVDs, which he is not permitted to possess in prison.³ The complainant also seeks to have all fees waived on grounds that he is indigent and has no other means of income.

Analysis

We are authorized to review and resolve complaints that allege that a records custodian has charged an unreasonable fee higher than \$350 to respond to a request for public records. § 4-1A-05(a).⁴ Among other things, a complaint must identify the custodian and “describe the action of the custodian, the date of the action, and the circumstances of the action.” § 4-1A-05(b). The PIA provides a specific definition of “reasonable fee”: it is “a fee bearing a reasonable relationship to the recovery of actual costs incurred by a governmental unit” when it responds to a PIA request. § 4-206(a)(3). Reasonable fees may include “the actual costs of the search for, preparation of, and reproduction of a public record,” including media and copying costs, as well as the cost of staff and attorney review, which must be “prorated for each individual’s salary and actual time attributable to the search for and preparation of a public record.” § 4-206(b). Ordinarily, public records should be provided with the “least cost and least delay,” § 4-103(b), and a custodian generally should not charge for duplication of effort—e.g., for multiple reviews of the same record, *see* PIACB 21-13 at 5 (June 3, 2021); PIACB 16-05 at 3 (June 1, 2016). If we conclude that a custodian has charged an unreasonable fee as the PIA defines it, we are to “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).

In its response to the complaint, the BCSAO points out that the complainant “doesn’t actually assert [that] the fee is unreasonable but just that he is unable to pay the fee.” This raises a preliminary question of whether the complainant has met the pleading requirements provided in the statute such that we may review and resolve his complaint. We start by noting that the complainant is *pro se* and that he is presently incarcerated. We also note the Maryland appellate courts’ general “practice to construe liberally filings by *pro se* inmates, particularly when the statute involved is remedial,” *Douglas v. State*, 423 Md. 156, 182 (2011), as the PIA provisions for review by this Board are. We will therefore afford the complainant’s complaint liberal construction. Looking to § 4-1A-05(b)’s complaint requirements, we conclude that the complainant has satisfied what that particular section of the statute demands. The complainant has identified the custodian and, by attaching the BCSAO’s response to his PIA request, he has sufficiently “described the action,” “the date of the action,” and the “circumstances of the action.”

³ The BCSAO’s December 9, 2021, response letter, which was attached to the complainant’s original complaint, does not support this contention. Though it is true that the math does not add up, so to speak, the letter clearly states that there are “approximately 1,276 pages in [the] file and 28 CDs/DVDs,” directs the complainant to send payment of \$595, and states that “[a]t the time of payment, the State will reproduce and mail *those records*.” (Emphases added). We will therefore proceed on the assumption that the BCSAO has charged a fee of \$595 for production of all the responsive records, and not just the CDs/DVDs.

⁴ Statutory references are to the General Provisions Article of Maryland’s Annotated Code, unless otherwise indicated.

§ 4-1A-05(b)(2). In addition, the complaint is signed and was filed within 90 days after the complained of action. § 4-1A-05(b)(3) and (5).⁵

However, § 4-1A-05(b) is not the only section relevant to the Board's authority to review a complaint. Section 4-1A-05(a) permits an applicant to "file a written complaint with the Board seeking a written opinion and order from the Board if," the fee charged is more than \$350 and "the complainant alleges in the complaint that the fee is unreasonable." We recognize that a complainant may not always have the detailed information about a fee that is necessary, in some circumstances, to evaluate whether the fee is indeed reasonable in the specific way that the PIA defines the term. *Cf.* 6 *OMCB Opinions* 74, 76 (2009) (noting that it is "normally the public body rather than the complainant that has the necessary details to allow [the Open Meetings Act Compliance Board] to evaluate whether or not a violation of the Open Meetings Act occurred"). But here the complainant has not alleged, even in the abstract, that the fee the BCSAO has charged is unreasonable; rather, he alleges that he is "unable to pay the fees and need[s] any assistance this [Board] can offer." Nor does the complainant's reply address the BCSAO's contention that the \$595 fee is, at least as far as actual costs are concerned, actually too low. Instead, the complainant asserts that he is indigent and that he "seek[s] to have all fees waive[d]" because he has "no other means of income." The submissions thus demonstrate that the complainant's allegation is not that the \$595 fee itself is unreasonable or unfounded, but that the BCSAO should not charge him a fee in the first place because he lacks the means to pay it. As a result, the complainant has not met what § 4-1A-05(a) requires in order for us to review and resolve his complaint.⁶ *Cf. Hyman v. State*, 463 Md. 656, 675 (2019) ("[C]onstruing [a] petition liberally does not require reading content into it.").

Though the BCSAO's response to the fee complaint indicates that the complainant had not, prior to filing his complaint, requested a waiver of the fee, the heart of the complainant's dispute

⁵ Section 4-1A-05(b)(4) requires a complainant to include a copy of the original request for records "if available." We understand that inmates in particular may not have their original records requests on hand, or have access to means to copy them.

⁶ Though we ultimately conclude that we lack authority to order a binding resolution of the complaint here, we nevertheless have guidance based on the BCSAO's response. First, to the extent that the response suggests that the BCSAO consistently charges rates of \$25 per hour for clerk time and \$75 per hour for attorney time, regardless of the actual salaries of the particular clerk and particular attorney who perform the work, the BCSAO's practice does not comport with the PIA. The PIA requires costs to be assessed based on "each *individual's* salary and actual time attributable to the search for and preparation of a public record." § 4-206(b)(2) (emphasis added). If the actual clerk doing the work of responding is paid less than a prorated salary of \$25 per hour, then the BCSAO must use that actual prorated salary in its calculation. The same applies for the salary of the attorney who actually works on the response. We also note that benefits are not to be included when determining the hourly rate. *See* PIACB 16-05 at 2-3 (June 1, 2016). Second, we caution that, when providing already-compiled and redacted records to an attorney for review, a custodian should seek review of "only those responsive records that genuinely present a question of whether or not an exemption applies." PIACB 21-15 at 6 (July 6, 2021). This is so to minimize the amount of time necessary for review by an attorney that is often compensated at a much higher rate of pay, and to avoid duplication of effort.

is his contention that the BCSAO should not have charged him *any* fee, period. To the extent that the complainant asks us to review the BCSAO's apparent declination to waive the fees associated with his PIA request, we lack authority to do so. *See* §§ 4-1A-04(a), 4-1A-05(a), 4-206; PIACB 16-08 at 1-2 (May 19, 2016). We note, however, that the Public Access Ombudsman is authorized to "make reasonable attempts to resolve disputes between applicants and custodians," including disputes related to a denial of a request for a fee waiver. § 4-1B-04(a)(6). Given the less formal nature of the Ombudsman's dispute resolution practices, and the fact that the BCSAO has indicated that it would not be inclined to grant a request for a fee waiver, the complainant may wish to seek the services of the Ombudsman.

Conclusion

The complainant has not alleged, either explicitly or implicitly, that the \$595 fee the BCSAO has charged is unreasonable. Instead, he takes issue with the fact that the BCSAO has charged a fee in the first place. Because we are not empowered to review and resolve complaints about fee waivers, we dismiss the complaint.

Public Information Act Compliance Board

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