

LARRY HOGAN
GOVERNOR

BOYD K. RUTHERFORD
LT. GOVERNOR



JOHN H. WEST, III, ESQ.
CHAIR

MICHELE L. COHEN, ESQ.
CHRISTOPHER EDDINGS
DEBORAH MOORE-CARTER
DARREN S. WIGFIELD

STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 22-13

May 6, 2022

Baltimore County Police Department, Custodian
Evin Scribner, Complainant

Complainant Evin Scribner requested police body-worn camera (“BWC”) footage related to his own case from the Baltimore County Police Department (“BCPD”). The BCPD estimated that it would cost \$988.05 to produce the records, and required that the complainant pay ten percent of that fee—or \$98.81—in advance before it would begin processing his request. The complainant has alleged that the estimated fee is unreasonable. The BCPD responded with further explanation of how the fee was calculated, and invited the complainant to narrow his request. For the reasons explained below, we ultimately conclude that the hourly rate upon which the estimated fee is based is not reasonably related to the recovery of anticipated actual costs, and therefore order that the estimated fee be reduced to \$858.76.

Background

As best we can tell from the submissions before us, on March 10, 2022, the complainant submitted a Public Information Act (“PIA”) request to the Baltimore City Police Department (“BPD”) seeking BWC footage related to an incident that occurred on January 15, 2021, in Owings Mills. The BPD forwarded the request to the BCPD, presumably because the BPD was not the custodian of the records the complainant sought. Upon receiving the request, the BCPD conducted a preliminary search and determined that there were fifteen videos from ten different officers responsive to the request. Altogether, the videos totaled 223 minutes in length. The BCPD estimated that it would take 28.23 hours of staff time, charged at \$35 per hour, to review and prepare the video for production.

By letter dated March 16, 2022, the BCPD advised the complainant that it anticipated completing his request by March 28, 2022. The letter also indicated that it would not charge for the first two hours needed to search for the records,¹ and that the rate for attorney review was set

¹ See Md. Code Ann., Gen. Provisions § 4-206(c) (The 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.”).

at \$60 per hour. The BCPD stated that “county policy” required prepayment of the fee.² According to the letter, the total estimated fee amounted to \$988.05, of which the complainant was required to pay \$98.81 in advance.

The complainant filed his complaint with this Board on March 18, 2022. He alleges that the \$988.05 estimated fee is unreasonable because he was the defendant in the case to which the BWC footage relates, and he desires access to the footage for “civil circumstances.” The BCPD responds that the request is broad and that the amount of responsive material is “quite voluminous.” The BCPD suggests that the complainant might narrow his request in order to reduce the cost estimate. To aid in such effort, the BCPD has attached a chart that outlines the responsive BWC videos and, should the complainant wish to narrow his request, asks that he specify which videos he wants. The chart provides the name of the officer related to each of the fifteen BWC videos, the length of each video, and brief description of the officers’ involvement—e.g., “[r]esponds, is cancelled en route,” or “[p]risoner security while he attempts to reach an attorney by phone.”

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).³ The law allows records custodians to charge a “reasonable fee,” which the PIA defines as “a fee bearing a reasonable relationship to the recovery of [the] actual costs” a government agency incurs when responding to a PIA request. § 4-206(a)(3). Reasonable fees may include media and copying costs, and 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 for the same purposes, *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).

Though the PIA does not explicitly permit it, many agencies will require prepayment of an estimated fee before they will begin the work of responding to a PIA request. *See Glass v. Anne Arundel County*, 453 Md. 201, 212-13 (2017). We have concluded that, under such circumstances, it is irrelevant—at least as far as our authority to resolve a complaint is concerned—that the fee is an estimated fee; what matters is that the custodian has “charged” a fee within the meaning of § 4-206. *See* § 4-1A-04(a)(1) (Board must “receive, review, and . . . resolve complaints . . . alleging that a custodian *charged* an unreasonable fee under § 4-206”) (emphasis added); *see also* PIACB

² Based on the BCPD’s March 16, 2022, letter to the complainant, that policy appears to be that, when a fee estimate exceeds \$100, the agency requires a “10 percent non-refundable deposit before [the] request will be processed.” Once the deposit is received, the agency will begin processing the request and the requester “will be sent a final cost minus [the] deposit that will be due before any video is released.”

³ Statutory references are to the General Provisions Article of Maryland’s Annotated Code, unless otherwise indicated.

22-07 at 4-5 (Feb. 3, 2022) (addressing our authority to review estimated fees under certain circumstances). Thus, where a custodian has provided a relatively detailed estimate of the costs that would be associated with preparing a response, but has neither demanded prepayment, nor expressed an expectation that payment will be made, we have declined to issue a binding resolution because the custodian has not “charged” that fee. *See, e.g., id.* at 5-6 (concluding that the agency had not charged a fee because it intended to deny the complainant’s request for records, and had provided the fee estimate for informational purposes, should a court order that records be produced); PIACB 21-15 at 4-5 (July 6, 2021) (declining to fully review or modify estimated fee because prepayment was not demanded, but providing guidance concerning ultimate calculation of actual costs).

This case presents a question we have not encountered before—namely, whether we have authority to review and resolve a complaint when the total estimated fee is higher than \$350, but the amount required in advance is less than \$350. While § 4-1A-04 (which governs our general powers and duties) does not refer to a specific fee threshold, § 4-1A-05 (which provides requirements for filing complaints) permits an applicant to file a written complaint only if “a custodian charged a fee under § 4-206 . . . of more than \$350.” Here, the complainant’s complaint alleges that the total estimated fee of \$988.05 is unreasonable, yet, arguably, the fee actually “charged” by the BCPD at this point is \$98.81.

At the same time, the prepaid portion of the estimated fee is necessarily based on the total estimated fee. In a certain sense, that total fee has been charged, but payment of only a portion of it is required to trigger work on production. Assuming that the Board has the information necessary to evaluate the reasonableness of total estimated fee—i.e., a sufficiently precise breakdown of the anticipated costs permitted by § 4-206—any reduction in the fee would also reduce the portion that the complainant must prepay. To the extent that our review is designed in part to alleviate unreasonable financial barriers to access to public records, review in circumstances like those presented here is consistent with our purpose and our past reasoning. *See, e.g.,* PIACB 22-06 at 4 (Jan. 18, 2022) (noting that if we declined to review estimated fees when prepayment is required, requesters who are unable or unwilling to pay those estimated fees would not have another opportunity to challenge the fee); *see also Hearing on S.B. 695 Before the Senate Educ., Health, & Env’t Affairs Comm., 2015 Leg., Reg. Sess., at 00:46:15, 01:22:00 (Mar. 6, 2015)* (statement of Sen. Jamie Raskin) (explaining that “people feel, at least, like they are being charged exorbitant amounts of money, oftentimes before they get the documentary information that they’re seeking,” and, later, suggesting that “just by having a Board that looks at the fee disputes, we will take care of the vast majority, if not all of the disputes, that happen”). We also note the BCPD’s indication that the ten percent “deposit” on the estimated fee is “non-refundable,” which may further deter requesters from pursuing their records requests in the face of an estimated fee that they believe is unreasonable. Given all of these considerations, we conclude that, where a custodian has provided an estimated fee that is based on a detailed breakdown of anticipated costs, and the custodian requires prepayment of all or a portion of that fee before beginning work on the response, we will review the reasonableness of that total estimated fee, even if the portion required in advance is \$350 or less. If we determine that the estimated fee is unreasonable based on the information before us, we will order a reduction.

Turning to the \$988.05 estimated fee at issue here, we first look at the hourly rates—\$35 for staff and \$60 for an attorney—that the BCPD has used to calculate the estimated fee. The BCPD’s indication, in its March 16, 2022, letter to the complainant that the “fee rate is *set* at \$60 per hour for an attorney” gives us some pause. As discussed above, the PIA requires that staff and attorney time be charged at prorated hourly rates 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). Benefits are not to be included. *See* PIACB 16-06 at 2-3 (June 1, 2016). Thus, if the actual attorney working on a response to a PIA request is paid less than a prorated salary of \$60 per hour, then the BCPD must use that actual prorated salary in its calculation. The same applies for the salaries of staff who work on the response.

Given the ambiguity in the BCPD’s responses to the complainant’s PIA request and his subsequent fee complaint, we have asked the BCPD to provide us with more information about the hourly rates it charges. In response, the BCPD explains that its Technology Unit is tasked with handling all PIA requests for BWC footage, and that the actual salaries of the employees searching, redacting, and preparing the video for release range from \$47,825 to \$78,717, annually—or \$22.99 to \$37.84 per hour.⁴ The BCPD indicates that it ultimately uses the actual hourly rate of the actual employee who works on the response to calculate the actual cost assessed, once the records have been compiled and prepared. Because, this explanation did not shed light on why the BCPD used a rate of \$35 per hour to calculate the estimated cost in the complainant’s case, and, in turn, the deposit that he must prepay, we requested additional explanation. The BCPD further responds that the \$35 per hour rate “is used for estimates, being the average hourly rate of our video technicians.” While taking the average of the range of salaries of the employees who might be tasked with searching for and preparing the records is certainly a reasonable way to calculate the hourly rate used for purposes of an estimated fee, it is not clear from the information we have whether the \$35 per hour rate is the average of the *actual* salaries of each individual video technician, or whether that hourly rate is itself an estimate. Given that the BCPD has provided us with precise information about the salary range of the video technicians, we think it is more “reasonable”—i.e., that it would bear a more “reasonable relationship to the recovery of actual costs,” § 4-206(a)(3), that the BCPD *anticipates* it will incur—to use that precise salary information to calculate an average hourly rate for purposes of the estimated fee. In this case, then, that average hourly rate appears to be \$30.42.⁵

We next turn to the amount of time that the BCPD estimates it will take to search for and prepare the responsive BWC footage. First, we note that the estimate is precise—28.23 hours. In response to our request for more information, the BCPD explains that, to review BWC footage, an

⁴ Based on the annual salary information provided, the BCPD calculated the hourly rates at \$23.58 to \$38.81. We arrive at slightly different numbers by dividing the annual salaries by 52 (representing weeks per year), and then dividing that result by 40 (representing working hours per week).

⁵ Because it does not appear that the estimated fee here included attorney costs, we do not address those costs, beyond stressing that they must be based on the actual salary of the individual attorney who works on the response, and the actual amount of time that attorney spends working on the response. § 4-206(b)(2). The BCPD’s response to our request for more information indicates to us that the BCPD’s practice—as far as assessment of actual costs is concerned—adheres to this requirement.

employee must go frame by frame and redact any information that cannot be released. *See, e.g.*, § 4-329 (custodian must deny inspection of a part of a public record that contains “medical or psychological information about an individual, other than an autopsy report of a medical examiner”); Md. Code Ann., Cts. & Jud. Proc. (“CJP”) § 3-8A-27(a)(1) (police records “concerning a child” are confidential and cannot be divulged except by court order or pursuant to certain statutory exceptions).⁶ Given the nature of the work involved, the Technology Unit came up with an average amount of time that is used to calculate the estimated costs of responding to requests for BWC footage. That average is eight hours of review and redaction per one hour of video footage, an average that appears reasonable to us. Here, the responsive BWC footage totaled approximately 223 minutes. Thus, the estimated time expenditure of 28.23 hours for review and preparation of the responsive footage also appears reasonably related to the BCPD’s anticipated actual costs. In light of our determination that \$30.42 represents a reasonable hourly rate for purposes of calculating the estimated fee and deposit charged, we order that the estimated fee be reduced to \$858.76, *see* § 4-1A-04(a)(3), and accordingly, that the required deposit be reduced to \$85.88 per the County’s policy. Of course, the fee ultimately assessed must, as the BCPD indicates it will, be based on the *actual* amount of time the video technician spends reviewing and preparing the responsive BWC footage, and the *actual* prorated salary of that technician.

Lastly, we commend the BCPD’s efforts to assist the complainant in narrowing his request so as to reduce the fees, and encourage the complainant to work with the BCPD to that end. While we don’t presume to know what records are important to the complainant, it might be that there is footage of a particular officer or officers that is more relevant to his purposes, or that he may be less interested in footage of officers who—at least according to the BCPD’s descriptions of their involvement—were apparently called to the scene, but ultimately did not respond. In any event, we emphasize, as we have in the past, the Court of Appeals’s observation that “a productive response to a PIA request is often 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 requester refines the request to reduce the labor (and expense) of searching those records,” and that “[w]hen the requester and agency work together, the process approximates the purpose and policy of the PIA.” *Glass*, 453 Md. at 233.

Conclusion

The submissions do not indicate precisely how the rate of \$35 per hour used to arrive at the estimated fee is reasonably related to the BCPD’s anticipated actual costs. Based on the information provided by the BCPD concerning the salaries of the employees who are likely to work on the response to the complainant’s PIA request, we conclude that a reasonable hourly rate for purposes of calculating the estimated fee is \$30.42. We further conclude that the BCPD’s

⁶ We note that the Office of the Attorney General has concluded that CJP § 3-8A-27(a)(1)’s confidentiality provision applies only to “police records concerning a matter that could bring the child within the jurisdiction of the juvenile court,” and therefore generally would not automatically prohibit disclosure—or require redaction of—a record in which a child is identified as a victim or witness of, e.g., a traffic accident. 85 Md. Op. Att’y Gen. 249, 249 (2000). Of course, a custodian has discretion to preclude inspection of such information if inspection would be “contrary to the public interest.” §§ 4-343, 4-351.

estimated time expenditure of 28.23 is reasonable in light of the work necessary to review and redact the BWC footage. Given our conclusions, we therefore order that the estimated fee be reduced to \$858.76.

Public Information Act Compliance Board

John H. West, III, Esq., Chair

Michele L. Cohen, Esq.

Christopher Eddings

Deborah Moore-Carter

Darren S. Wigfield