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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 22-14

May 6, 2022

Howard County Police Department, Custodian
Deborah Levi, Complainant

The complainant, Deborah Levi, an Assistant Public Defender, sent a Public Information Act (“PIA”) request to the Howard County Police Department (“HCPD”) seeking copies of internal affairs complaints for eleven different officers, the complete investigative files for each complaint, the investigative findings, any correspondence from civilian oversight boards, and the final disposition in each case. The HCPD estimated that the cost for responsive records would be \$2,937.43, and directed the complainant to pay the fee before the HCPD would begin work to produce the records. The complainant has alleged that the fee is unreasonable. For the reasons explained below, we agree and order that the fee be reduced by at least \$564.59.

Background

On January 20, 2022, the complainant sent the HCPD a PIA request for internal affairs records related to eleven specific police officers. The request sought copies of the complaints and their complete investigative files, including “reports of recorded statements, video surveillance or body camera footage, investigative files, witness interviews, and photographs.” The complainant also sought the investigative findings, any correspondence from civilian oversight boards, and the final disposition of each complaint. In a letter dated February 10, 2022, the HCPD advised that it had searched the internal affairs records management system and located twelve files responsive to the request, and that the files would be released with some redaction. Noting that the Howard County Government had established a fee schedule governing certain fees charged by the HCPD for public records, the HCPD estimated the total cost of the response to be \$2,937.43, broken down as follows:

- Twelve “AD” summary reports, at \$10 each, for a total of \$120;
- Four incident reports, at \$10 each, for a total of \$40;
- Five 911 recordings, at \$70 each, for a total of \$350;
- Three videos, at \$70 each, for a total of \$210;
- Seventy-eight audio interviews requiring approximately 43 hours of review and redaction, assessed at \$49.01 per hour, for a total of \$2,107.43;
- Eight photographs on one CD for \$10; and

- Ten “AVL” recordings, at \$10 each, for \$100.

The HCPD indicated that there would be no cost for the first two hours of search and preparation time,¹ and that, upon receipt of payment of the full estimated fee, it would begin to prepare the records for production.

The complainant filed her complaint with this Board on March 30, 2022. She alleges that the \$2,937.43 estimated fee charged by the HCPD is unreasonable because “charging such a high fee makes the records not actually public.” In response, the HCPD explains that the employee tasked with responding to the complainant’s PIA request is a Police Service Support Specialist (“Support Specialist”). The HCPD charges an hourly rate of \$49.01 for the Support Specialist’s time, which reflects prorated salary costs of \$35.88 and FICA, healthcare, and pension costs of \$13.13. The HCPD anticipates that the Support Specialist will spend roughly 43 hours reviewing and redacting approximately 21 hours’ worth of audio interviews.² The HCPD indicates that the two free hours of labor that the PIA requires agencies to provide was exceeded during the initial review of the request and the inventory creation. Thus, the total estimated fee for staff time is \$2,107.43.

The HCPD also explains that it charges flat fees for several types of records and media contained in the files responsive to the complainant’s request. In support of that practice, the HCPD attaches Howard County Council Resolution 75-2021 (“CR75-2021”), which approved “schedules of fees and rates for functions regulated and administered by the Department of Police.” One of those schedules provides fees for certain specific “documents and information provided to the public.” Relevant here, that schedule—which the resolution indicates is “set pursuant to § 4-206 of the General Provisions Article of the Annotated Code of Maryland which provides that the official custodian may charge a reasonable fee for the search, preparation and reproduction of a public record”—permits a custodian to charge \$70 per 911 call reproduced, \$10 per police department incident report, and \$10 per CD. Based on that fee schedule, the HCPD assessed flat

¹ Section 4-206(c) of the General Provisions Article of Maryland’s Annotated Code provides that “[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 HCPD attached with its response to the fee complaint a spreadsheet with detailed information about the type of records contained in each responsive internal affairs file and, in turn, the length of each audio interview contained in the files. For several files, the spreadsheet contains a notation reading “cannot open est,” and indicates that each audio recording underneath that notation is 15 minutes long. We take this to mean that the HCPD was unable to open the audio files to determine the precise length of the recordings, and has instead estimated that the all such recordings are approximately 15 minutes long. The spreadsheet appears to calculate the estimated time expenditure for “review[ing], redact[ing], render[ing], and copy[ing]” each audio recording at twice the length of the recording itself—e.g., for a recording that is 21 minutes and three seconds long, the HCPD anticipates that it will take the Support Specialist 42 minutes to review, redact, and prepare the recording for production.

costs for twelve “AD” summary reports, four incident reports, five 911 recordings, three video recordings, and eleven CDs (eight photographs on one CD and ten with “AVL” recordings).³

Lastly, the HCPD advises that it contacted the complainant to discuss the fees and advised her that the fee for twelve internal affairs summary reports (one for each case file) would be \$120, and that those reports might assist her in narrowing her request to specific records within each file. The HCPD explains that the “retrieval, review, redaction, rendering, [and] copying of numerous different file types of audio and video files is laborious,” and that the employee tasked with these things must “possess a specific skill set and experience . . . as well as extensive knowledge of the MPIA.”

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 The law permits custodians to charge a “reasonable fee,” which the PIA specifically defines as “a fee bearing a reasonable relationship to the recovery of [the] actual costs” that 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). Notably, “[i]f another law sets a fee for a copy, an electronic copy, a printout, or a photograph of a public record, that law applies.” § 4-206(d)(1). In general, public records should be provided with the “least cost and least delay.” § 4-103(b). 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 not expressly permitted by the PIA, agencies often 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). Under these circumstances, we have concluded that we have authority to review and resolve complaints about estimated fees because the custodian has effectively “charged” a fee under § 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 22-07 at 4-5 (Feb. 3, 2022) (addressing our authority to review estimated fees under certain circumstances). Here, the HCPD has provided a sufficiently detailed breakdown of its \$2,937.43 estimated fee and has required that the complainant pay the fee in advance. We will therefore review the fee for reasonableness.

³ The spreadsheet provided in response to the fee complaint indicates charges of \$10 for CDs of each of the 78 audio interviews. However, these charges are neither reflected in the table on the spreadsheet that calculates the “total estimated fee,” nor included in the HCPD’s letter charging that estimated fee. As discussed below, should the HCPD wish to charge for the media in addition to the staff time involved in producing those audio files, the HCPD may charge only for the actual cost of a CD.

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

A. Hourly Rate

We begin by addressing a clear problem with the way that the HCPD has calculated the Support Specialist's hourly rate. The HCPD indicates that the total \$49.01 hourly rate comprises \$35.88 for the Support Specialist's salary and \$13.13 for FICA, and healthcare and pension benefits. As we have said on numerous occasions, the hourly rates for employee time must be based on salary alone, and cannot include benefits or other costs. *See* PIACB 16-05 at 2-3 (June 1, 2016) ("What is clear to us is that we should apply the word 'salary' in the ordinary sense when considering 'staff and attorney review costs.' And, ordinarily, the word 'salary' does not include 'benefits.'"); *see, e.g.*, PIACB 22-06 at 4-5 (Jan. 18, 2022) (agency could not include FICA and 25% "indirect costs" in the hourly rate of employees tasked with responding to a PIA request). This is because the statute uses a precise cost-related term—i.e., "salary"—when dictating the recoverable actual costs associated with staff time. It states that employee costs "included in the calculation of actual costs incurred . . . shall be prorated for each individual's *salary* and actual time attributable to the search for and preparation of a public record." § 4-206(b)(2) (emphasis added). Thus, the permissible hourly rate for the Support Specialist's time is \$35.88. We will reduce the estimated fee accordingly below.

B. Flat Fees

The HCPD's use of flat fees for several types of records contained in the responsive files presents a somewhat thornier issue. As noted above, under the PIA, if "another law" sets fees for copies or printouts of public records, "that law applies." § 4-206(d)(1). The first question, then, is whether CR75-2021 constitutes "other law" such that its provisions apply, regardless of whether the fees in the fee schedule otherwise conform to § 4-206. Though this precise question does not appear to have been answered before, we think the answer is no. To start, courts have held that local ordinances do not constitute "law" for purposes of § 4-301(a)(1), which requires a custodian to deny inspection of a record or part of a record if "by law, the public record is privileged or confidential." *See, e.g., Lamson v. Montgomery County*, 460 Md. 349, 364 (2018) (local personnel regulation that precluded disclosure of records disclosable under the PIA was invalid because it "impermissibly limit[ed] the application of a state law enacted by the General Assembly"); *see also Police Patrol Sec. Sys., Inc. v. Prince George's County*, 378 Md. 702, 714 (2003) ("[T]he General Assembly never intended to give counties the right to create additional or new non-disclosure exceptions not contemplated within the MPIA by declaring information 'confidential' in local laws."); *see also* 86 Md. Op. Att'y Gen. 94, 106-107 (2001) (local ordinance conferring confidentiality on certain records of a police review board did not constitute "law" for purposes of what is now GP § 4-301(a)(1)). Neither do local ordinances constitute law under § 4-304, which requires that a custodian deny inspection under certain circumstances, "[u]nless otherwise provided by law," because "[i]f a local ordinance by itself constituted other 'law' authorizing disclosure, it could thwart the sometimes delicate balance of interests struck by the Legislature." 86 Md. Op. Att'y Gen. at 107.

In our view, the reasoning that drove the conclusions above regarding §§ 4-301(a)(1) and 4-304—namely that allowing agencies to set their own "law" regarding disclosure of public records would undermine the purpose and intent of the PIA—applies with equal force to § 4-206(d)(1). In enacting § 4-206, the Legislature has expressed its intent that, generally, agencies

should not profit from responding to PIA requests. *See* 71 Md. Op. Att’y Gen. 318, 329 (1986) (opining that “the most appropriate method for arriving at a ‘reasonable charge’ is to charge the actual costs incurred” by responding to a PIA request, and that “[t]he goal in this regard should be for the State neither to make a profit nor bear a loss on the cost of providing information to the public”). If local governments were permitted to set costs for providing copies of public records without any regard for § 4-206’s requirement that those cost be reasonable as the PIA defines it, this legislative intent could be subverted easily and frequently. It is also worth noting that the General Assembly has enacted at least one statute that contains express permission to depart from the PIA’s definition of a “reasonable fee.” Section 12-113 of the Transportation Article permits the Motor Vehicle Administration to “establish and charge a fee for each record it furnishes or certifies,” and provides that “[t]he fee established and charged under this section may exceed the amounts authorized under § 4-206.” Md. Code Ann., Transp. § 12-113(a)(2) and (4). *See also* Md. Code Ann., Bus. Reg. § 8-209(b) (authorizing the Maryland Home Improvement Commission to “collect a fee of \$1 per page for each copy of a document in the Commission office”); Md. Code Ann., Health-Gen. § 4-217(c) (authorizing the Department of Health to charge certain fees for copies of certain records). The existence of such statutes suggests that, unless the Legislature has directed otherwise, when a local government establishes its own fee schedules for fees related to responding to PIA requests, those fees ordinarily may not exceed § 4-206’s requirement that they be reasonably related to the recovery of actual costs.

Having determined that a local resolution may not provide less stringent cost provisions than those contained in the PIA, next question is whether the flat fees assessed here are reasonably related to the HCPD’s recovery of the anticipated actual costs of responding to the complainant’s PIA request. Before examining the specific facts at issue in this particular case, we note that it is not uncommon for an agency to assess a flat fee for a certain type of record, e.g., an accident report. Typically, a flat fee is set to reflect the costs of both reproduction (i.e., copying and/or media) and staff time (i.e., search and review). We have previously addressed this practice and determined that, when an agency’s use of a flat fee is challenged within the context of a specific PIA request, the agency must be able to demonstrate that the flat fee is “reasonably related” to the actual costs that it has incurred or will incur in responding to that particular request. *See, e.g.*, PIACB 20-05 at 4 (Nov. 7, 2019) (concluding that a \$42 per CD reproduction charge was “not reasonable on its face” because the agency had not “explained how that charge reflects its actual costs [of] providing [the] CDs”); PIACB 17-06 at 1 (Nov. 28, 2016) (finding use of flat fee reasonable, but cautioning that “custodians who charge flat per-page fees must be able to show that the flat rate reflects the actual cost of producing the records”); *see also* Office of the Maryland Attorney General, *Maryland Public Information Act Manual* (16th ed. Sept. 2021) at 7-4 to 7-5 (discussing flat fees).

To assist our review of the flat fees here, we have asked the HCPD to provide more information about what costs the flat fees reflect and the nature of the responsive records that are subject to those flat fees. We will start with the “AD” summary reports, charged at \$10 per report. The HCPD indicates that these reports summarize the internal affairs investigation and that they typically contain a written summary of the incident under investigation, a list of alleged violations, a list of exhibits (e.g., audio or video recordings, or written statements), a list of the investigative actions taken, and the investigators’ findings and conclusions. While the length of these reports varies with each file, the HCPD advises that the average length among the reports requested here is 21 pages. According to the HCPD, the “AD” summary reports must be reviewed and potentially

redacted prior to release, and the time needed to complete the review and redaction is reflected in the \$10 estimated fee for each report. Based on this additional information, we conclude that the \$10 flat fee is reasonable for purposes of providing the estimated fee here. However, should it be the case that the reports requested are actually produced with minimal review and redaction time expended, then the HCPD must revisit the estimated \$120 total fee for the “AD” summary reports and refund the complainant any amount that exceeds the actual cost of production.

Next, we examine the flat fees charged for the four incident reports (\$10 each) and five 911 recordings (\$70 each). In response to our request for more information about these fees, the HCPD states that they were established by the County Council in CR75-2021. The HCPD indicates that the length of an incident report can vary widely, from one page to more than 100 pages, and that a requester is charged the same \$10, regardless of the responsive report’s length. Similarly, the \$70 fee for the 911 calls derives from CR75-2021. These recordings vary in length, and are ordinarily provided on a CD and accompanied by any associated computer-aided dispatch notes and a certification of the record. The HCPD did not provide any information as to the length of the incident reports or 911 recordings relevant here. Based on this information, we are less inclined to find these flat fees reasonable. First, we again emphasize that, in charging these flat fees, the HCPD, as the custodian of the records, “must be able to show that the flat rate reflects the actual cost of producing the records.” PIACB 17-06 at 1 (Nov. 28, 2016). It is certainly possible that, in some cases involving, e.g., a lengthy incident report that requires a lot of redaction, the actual cost of producing responsive reports or recordings will approximate or even exceed the flat fee charged. But, we have no indication here that this is so. And, it is equally true that some cases will no doubt involve short reports or recordings requiring minimal labor to prepare and that, in those cases, the flat fees likely would not bear a “reasonable relationship to the recovery of [the] actual costs,” § 4-206(a)(3), that the HCPD incurs to produce them. We also note the HCPD’s indication that the incident reports and 911 recordings are already contained in the relevant internal affairs files. Thus, to the extent that the flat fees established by the County Council reflect the costs of initially locating and pulling the reports and recordings from a broader system, those costs are not implicated here. Given all of these considerations, we cannot conclude that the flat fees charged for the four incident reports and five 911 recordings are reasonable.

The HCPD also assessed flat fees for three videos (\$70 each), ten “AVL” recordings (\$10 each), and for CDs (\$10 each). We address each of these in turn. First, regarding the videos, the HCPD explains that the videos were “not originated by HCPD programs,” and that the average length between the three responsive videos is eleven minutes. Though the HCPD characterizes the \$70 fee for reproduction as an estimate, it does not otherwise indicate what that estimate reflects—for example, whether it anticipates that staff will need to redact significant portions of those videos. In light of this lack of information, it is difficult to conclude that the \$70 estimated fee for production of a video averaging eleven minutes in length is reasonable. Next, the HCPD advises that the “AVL” (which stands for “automatic vehicle locating”) recordings provide information obtained from GPS satellites, including a vehicle’s location, speed, and stops. The \$10 estimated fee for these recordings, of which there are ten, is based only on the \$10 per CD fee established by CR75-2021. In other words, the HCPD is charging for media only, and not the time

it takes to produce the recordings.⁵ This brings us to the \$10 charge that the HCPD assesses, again per CR75-2021, for CDs. The HCPD is unable to state whether this flat fee is intended to reflect anything beyond the cost of the CD itself, and we doubt that the actual cost of a single CD to the HCPD is \$10. Thus, to the extent that the HCPD assesses media costs alone, it must charge only the cost actually incurred—e.g., the actual cost of a CD to the HCPD. *See* PIACB 20-05 at 4 (Nov. 7, 2019) (absent explanation of how a \$42 per CD fee represents the actual costs of providing CDs, agency must either eliminate the charges from its estimated fee or modify the per CD charge to “an amount that accurately reflects the actual costs it incurs in providing those CDs”).

C. Review and Redaction Time

Finally, we turn to the amount of time—43 hours—that the HCPD anticipates it will take the Support Specialist to review and redact the 78 audio interviews that the investigative files contain. The HCPD appears to have arrived at this estimate by roughly doubling the length of each audio recording and then adding those numbers together. As noted, *supra* note 2, the HCPD was unable to determine the length of many of the audio files and, in those cases, indicated that the audio recording is fifteen minutes long. In response to our questions, the HCPD explains further that those particular audio files require the use of specific programs in order to open them, and that the HCPD will acquire those programs “in the event that the requested records are to be released.” In the meantime, the HCPD bases its fifteen minute estimates on a “medium estimate,” noting that sixteen of the audio files identified in the “AD” summary report indicated a time of fifteen minutes or less, while 23 were over fifteen minutes. When the HCPD moved up a five-minute increment, 24 of the audio files were less than twenty minutes, while fifteen audio files were over twenty minutes. The estimated fees for all 39 as-yet unopened audio files reflect the lower, fifteen-minute time estimation. Given all of this information, the 43-hour total estimate appears a reasonable anticipation of the actual amount of time that the Support Specialist will expend to review, redact, and produce the responsive audio recordings. However, we stress that the Support Specialist must carefully track the actual amount of time he or she spends on these tasks and that, should that amount of time fall below the estimated 43 hours, the HCPD must refund the complainant any overage paid.

In light of the foregoing, we determine that, in certain respects, the \$2,937.43 estimated fee charged by the HCPD does not bear a reasonable relationship to the anticipated actual costs of responding to the complainant’s PIA request. Therefore, we must also determine, as best we can, an amount that is reasonable as the PIA defines it. *See* § 4-1A-04(a)(3). Given our conclusions regarding the hourly rate charged and the estimated time expenditures, we determine that \$1,542.84 represents a reasonable estimated fee for employee costs. As discussed above, for the flat costs assessed regarding the incident reports, the 911 call recordings, and the videos, we have concluded that the HCPD has not demonstrated that they bear a reasonable relationship to the anticipated actual cost of production. That conclusion notwithstanding, we are unable to determine

⁵ In response to our request for more information about the “AVL” recordings, the HCPD indicates that the recordings vary in size and require “extraction from the Howard County AVL server.” However, as noted above regarding the incident reports and 911 recordings, presumably there is no actual cost incurred for that extraction here, as the “AVL” recordings were already extracted for purposes of the internal affairs investigation and are contained in those files.

a precise amount that would be reasonable based on the information before us. Rather, the HCPD must revisit those fees and determine the anticipated actual costs of producing those records.

Conclusion

The \$49.01 hourly rate charged by the HCPD does not comport with the PIA because it includes more than the employee's salary. We therefore reduce that rate to \$35.88, which reflects the prorated hourly salary alone. Based on the submissions, we conclude that the HCPD's anticipated time expenditure for review of the audio files reasonable. Thus, we reduce the portion of the estimated fee that reflects employee costs to \$1,542.84. Turning to the flat fees included in the total estimated fee, we find that, in this particular case, the \$10 flat fee for the "AD" summary reports is reasonable for purposes of the estimated fee in light of the nature and volume of those responsive records and the work necessary to prepare them. We further find, however, that the submissions do not demonstrate that the flat fees for the incident reports, the 911 call recordings, or the videos, are reasonable. But, because we do not have the necessary information, we do not order a discrete reduction. Instead, the HCPD must determine the anticipated actual costs of producing those records and modify the estimate accordingly. Finally, to the extent that the estimated fee includes charges for the cost of CDs alone, those charges must reflect the actual cost of a CD to the HCPD. All told, we reduce the estimated fee by at least \$564.59, which represents the reduction of the portion of the estimated fee charged for staff time. We suspect that the total fee will be further reduced as the HCPD adjusts the flat fees assessed to reflect the anticipated actual costs of producing the responsive records.

Public Information Act Compliance Board

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