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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 22-15

June 27, 2022

Takoma Park Police Department, Custodian
Deborah Levi, Complainant

Deborah Levi, an Assistant Public Defender and the complainant in this matter, requested certain internal affairs records related to one specific police officer from the Takoma Park Police Department (“TPPD”). The TPPD estimated that the cost for responsive records would be at least \$5,421.13, and advised the complainant that, “if [she] decide[d] to proceed with [her] request, the City is permitted to request the prepayment of fees.” The complainant has alleged that the estimated fee is unreasonable, specifically as it relates to fees for copying and legal review. As explained further below, we conclude that certain portions of the estimated fees are unreasonable, and instruct the TPPD to revisit those fees in light of the guidance provided in this opinion.

Background

On December 2, 2021, the complainant sent a PIA request to the TPPD requesting copies of all internal, citizen, or other agency complaints filed against one particular police officer. The request sought the complete investigative files related to each complaint, including reports of recorded statements, video surveillance, body camera footage, witness interviews, and photographs. The complainant also asked for the investigative findings of each complaint, correspondence from police oversight boards or commissions, and the final disposition of each case. Noting that the records would be made available to the general public, and not used for commercial purposes, the complainant asked that the TPPD inform her of the total charges in advance. The complainant also asked the TPPD to consider waiving the fees, given that the request was made on behalf of indigent clients of the Office of the Public Defender (“OPD”).

The TPPD responded, through counsel, to the complainant’s PIA request in a letter dated January 7, 2022. In that letter, the TPPD described the efforts that it would need to undertake in order to search for and prepare responsive records. Noting the subject officer’s 25-year tenure with the TPPD, the TPPD explained that the requested records might be in both paper and electronic form because the TPPD had obtained IAPro software, which enables electronic internal affairs recordkeeping, only somewhat recently, in 2014. For records contained in the IAPro database, the TPPD estimated that it would take five hours, charged at an hourly rate of \$59.49, to retrieve and transmit the records. After subtracting the two hours of free labor that the PIA requires

agencies to provide,¹ the TPPD advised that the estimated fee for searching for those records came to \$118.98.² For responsive records that pre-date the TPPD's 2014 shift to electronic recordkeeping, the TPPD estimated that it would take fifteen hours to search for, retrieve, and transmit those records, also charged at an hourly rate of \$59.49. Thus, the estimated cost of search time for pre-2014 records was \$892.35. Further, the TPPD anticipated that it would take twenty hours to make copies of those responsive records, including recordings. Charged at the hourly rate of \$59.49, the TPPD estimated it would cost \$1,189.80 to make copies, thus bringing the total search and preparation costs for pre-2014 records to \$2,082.15.

The TPPD's January 7th letter indicated that the search and preparation costs outlined above did not include fees for legal review, which would consist of a "two-stage process: (i) determining whether any exceptions to the PIA preclude disclosure; and (ii) if the footage may be disclosed, identifying and implementing any required redactions." Explaining that "[e]very document must be reviewed," and that the hourly rate of the City Attorney reviewing the documents was \$175, the TPPD estimated that it would take the attorney eighteen hours and 24 minutes to review only the records generated from IAPro, bringing the total cost for legal review of those records to \$3,220. The total estimated fee for responsive records contained in the IAPro database, then, was \$3,338.98.

The TPPD's letter did not contain the estimated cost of legal review for the paper and other tangible records pre-dating 2014. The TPPD explained that this was so "because the number of responsive records is unclear at this point." It further stated that, should the complainant "decide to proceed," the TPPD would provide her with an "approximate fee for legal review of the responsive records predating the [TPPD's] implementation of IAPro, once the number of responsive records is identified." Thus, all told, the estimated fee for responsive records spanning the officer's 25-year tenure was at least \$5,421.13. Citing legal authority, the TPPD advised the complainant that it was permitted to ask for payment of the fees in advance, and also advised her that if she believed the fees to be unreasonable, she could contact this Board.

The complainant did indeed contact this Board. In a complaint filed on March 30, 2022, she alleges that the \$5,421.13 estimated fee is unreasonable, contending in particular that the TPPD is "charging unreasonable copying fees [and] legal fees." The TPPD responded, through counsel, on April 14, 2022.³ The TPPD makes two primary arguments: (1), that we should dismiss the

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.").

² The TPPD may have made a calculation error here. At an hourly rate of \$59.49, five hours works out to—as the TPPD indicated in its January 7, 2022, letter to the complainant—\$297.45. However, if the TPPD allocated the two free hours of labor that the PIA requires to this task, leaving three chargeable hours, the estimated fee would amount to \$178.47, not \$118.98.

³ Normally, we are required to issue a decision within thirty days after the response to a complaint is filed. Md. Code Ann., Gen. Provisions § 4-1A-07(a)(2). In this case, we issued a statement of delay, citing the need for additional time to consider additional arguments of the parties and prepare an opinion. See *id.* § 4-1A-07(c)(1) (if the Board is unable to issue a decision within the

complaint as premature because the TPPD has not actually charged a fee; and (2), that the estimated fees are reasonable. Regarding its argument for dismissal, the TPPD points to several of our prior decisions in which we dismissed complaints because we found that the custodians either lacked the precise information needed to identify anticipated actual costs, and/or because the custodian had not demanded prepayment of the estimated fee. The TPPD contends that the estimated fees prepared in response to the complainant's PIA request are sufficiently similar to the estimates involved in these other cases—that is, the TPPD is unable to provide a detailed estimate for at least some of the responsive records and, in any event, has not explicitly demanded payment of the estimate in advance—such that the complaint here should also be dismissed.

As for the TPPD's second argument—that the estimated fees are reasonable—the TPPD simply asserts that the fees are reasonable based on the nature and volume of records, and on the type of staff involved in searching for and preparing the response. The TPPD explains that it conducted an initial search of its IAPro database and that the potentially responsive records found there consist of more than ten hours of video footage, 1,100 pages of records, and more than two hours of audio recordings. The TPPD has not, however, conducted a search to identify the volume of potentially responsive, pre-2014 records. These records, the TPPD states, are “stored in locked filing cabinets within a secure area,” and the TPPD staff “authorized to view those records will be required to search through numerous filing cabinets and identify the responsive records.” As to the amount of time the TPPD estimates it will take the attorney to review the IAPro-generated records, the TPPD advises that it is based on a “formula” whereby it will take one minute to review each page and at least one minute to review each minute of a video or audio recording. Regarding the hourly rates charged, the TPPD explains that, because the complainant is seeking internal affairs records, the labor must be performed by senior staff authorized to access and review such records.

In a reply filed on April 22, 2022, the complainant takes issue with several of the TPPD's contentions and argues that the TPPD has not demonstrated that the estimated fee is reasonable. She argues that the TPPD is “effectively denying requests for important public records” by virtue of not having “an effective system to identify and detect discoverable material,” and that the cost of putting such a system together should not fall on the public. The complainant also asserts that similar jurisdictions have been able to search IAPro and provide summaries of misconduct files at no cost, and that the OPD has used these summaries to make more specific requests. Turning to the estimated fee itself, the complainant contends that, to the extent that a portion of the fee was calculated without attempting to locate potentially responsive records and ascertain how many there are, that portion is “presumptively invalid.” She also stresses that the TPPD does not explain why it will take five hours to retrieve the files from IAPro, or why it will take fifteen hours to retrieve the paper and other tangible records not contained in IAPro. Similarly, she questions how the TPPD arrived at its estimate that it would take twenty hours to copy or digitize the paper records. Finally, the complainant asserts that the fee for legal review is unreasonable because it is

prescribed time periods it must state in writing its reasons for the delay and issue the decision “as soon as possible but not later than 90 days after the filing of the complaint”).

not based on “a credible number of items responsive to the request.” The complainant asks that the records be provided without a fee.^{4, 5}

Analysis

We are charged with reviewing and resolving 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-04(a); 4-1A-05(a).⁶ The PIA allows custodians to charge a “reasonable fee,” which is defined as “a fee bearing a reasonable relationship to the recovery of [the] actual costs” incurred by 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). Generally, the PIA is to be construed “in favor of allowing inspection of a public record, 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 the Board determines is reasonable and refund the difference.” § 4-1A-04(a)(3).

Though not expressly permitted by the PIA, custodians 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 involving 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). However, when an agency

⁴ We cannot order the TPPD to fully waive the fees. *See* Md. Code Ann., Gen. Provisions § 4-1A-04(a)(3) (“The Board shall . . . if the Board finds that the custodian charged an unreasonable fee under § 4-206 of this title, order the custodian to reduce the fee to an amount determined by the Board to be reasonable and refund the difference.”).

⁵ The TPPD filed a surresponse on May 3, 2022. We will address the contentions raised therein below, as appropriate. We do, however, note the TPPD’s suggestion that we should disregard the more specific challenges that the complainant raises in her reply on grounds that it would be “inequitable” to consider these more specific challenges when they were not raised in the complaint. Given that requesters do not always have the detailed information about a fee necessary to mount a particularized challenge in an initial complaint—for example, as the TPPD itself points out in its surresponse, the PIA does not require an agency to “inform a requester of the number of responsive documents when providing a requestor with a fee estimate”—and that the TPPD has been afforded the opportunity to respond to the more specific challenges through its surresponse, we do not take the TPPD’s suggestion. *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”).

⁶ Citations are to the General Provisions Article of Maryland’s Annotated Code, unless otherwise indicated.

has not asked for payment of an estimated fee in advance, or even expressed an expectation that payment of the estimated fee will be tendered at any point, we will typically decline to order any binding resolution of the complaint. *See, e.g.*, PIACB 21-15 (July 7, 2021) (providing guidance, but ordering no concrete fee reduction, where the agency did not ask for prepayment of the estimated fee); PIACB 22-07 (Feb. 3, 2022) (declining to review the estimated fee in a binding manner where the agency ultimately denied the PIA request but still provided a detailed estimated fee as a “courtesy” should a court order the agency to produce the records).

I. Review Authority

We first address the TPPD’s argument that we should dismiss this complaint as premature because the TPPD has not actually charged a fee, and because the TPPD lacks sufficient information—at least as far as the pre-2014 records that are in paper and other tangible form are concerned—to provide review-worthy estimated fees. We decline the TPPD’s invitation for several reasons. Before we explain, we briefly note some relevant facts from one of our previous matters, upon which the TPPD relies. In PIACB 21-15 (July 7, 2021), the agency sent the complainant a ten-day letter⁷ in which it provided a detailed breakdown of the anticipated costs of searching for, preparing, and reviewing records responsive to his request. Rather than requiring advance payment of its estimated fee—which amounted to \$22,890—the custodian advised that it would begin work on the response when the complainant provided written notification that he wished the agency to proceed and that he agreed to pay the actual costs of production, up to the estimated fee. *Id.* at 2. The agency’s ten-day letter made no mention of advance payment, or of the agency’s ability to request it.

Turning to the matter here, the TPPD’s January 7, 2022, letter was ambiguous (at best) as to whether or not the TPPD was requiring advance payment of the \$5,421.13 estimated fee. Immediately after providing a highly detailed explanation of the various costs that the TPPD anticipated would be associated with responding to the complainant’s request, the TPPD advised, “[a]dditionally, if you decide to proceed with your request, the City is permitted to request the prepayment of fees associated with a PIA request. *See Glass v. Anne Arundel Cty.*, 453 Md. 201, 212-13, 160 A.3d 658, 664-65 (2017).” It is difficult to see how this statement—complete with a citation to legal authority—could be interpreted as anything other than an indication of the TPPD’s intent to require prepayment of the estimated fees it had just taken pains to lay out so thoroughly. Further, the next paragraph indicates that the complainant could “*also narrow [her] request*” (emphasis added), and that if she did so, the TPPD would make another determination as to “whether any fee will need to be charged.” These two statements taken together appear to present the complainant with two options: 1) narrow her request or, 2) proceed with her original request and pay the \$5,421.13 estimated fee in advance. In our view, the January 7, 2022, letter is sufficient to establish that the TPPD has “charged” a fee under § 4-206. *See* § 4-1A-04(a)(1) (Board to review and resolve complaints alleging that a custodian “charged an unreasonable fee under § 4-206”).

⁷ See § 4-203(b)(2), requiring a custodian to provide, within ten working days after receipt of a PIA request, certain information to an applicant in writing if the custodian “reasonably believes that it will take more than 10 working days to produce the public record.”

Moreover, as already noted and as discussed further below, the TPPD's estimated fees are, for the most part, precise and are broken down according to the recoverable costs identified in § 4-206—i.e., costs for search and preparation, and for review. In addition, we do not construe the January 7th letter sent by the City Attorney on behalf of the TPPD as a ten-day letter akin to the one sent by the custodian in PIACB 21-15. The letter was sent over a month after the TPPD received the complainant's PIA request, referred to previous correspondence sent on December 14th regarding pending cost estimates, and did not address the timing of the TPPD's response. Finally, we note that the TPPD's January 7th letter closed by advising the complainant that if she "believe[d] *the fee identified* is unreasonable, [she] may contact the MPIA Compliance Board. *See GP, § 4-1[A]-01 et seq.*" (Emphasis added). To argue now that the complainant cannot resort to the remedies afforded by Subtitle 1A of the PIA is thus somewhat disingenuous.⁸ We will review and resolve the complaint.

II. Fees

Because the format of the responsive records—i.e., whether they are largely electronic records stored in the IAPro database or, instead, paper and other tangible media stored in locked filing cabinets—appears to have a significant effect on the fees associated with production, we will address each set of records separately. However, the hourly rates charged are the same regardless of when the records were generated and what form they take, so we will review those hourly rates first.

A. Hourly Rates

Regarding hourly rate of the TPPD employee, the TPPD advises that because the complainant is seeking internal affairs records, the response must be prepared by a senior employee authorized to access this type of record. Presumably, this explanation is offered to justify the relatively high hourly rate of \$59.49—a rate that amounts to an annual salary in excess of \$123,000, assuming the employee works a full, forty-hour week. The TPPD does not indicate the title or position of the senior staff who will search for and produce the records, nor does it indicate whether that hourly rate is based upon salary alone, or whether it includes additional compensation, such as benefits.

The TPPD's response also does not explicitly indicate whether there are other, lower-paid TPPD staff authorized to access the records that the complainant seeks. If such staff do exist, then the use of employees who are compensated at higher rates than other available, qualified staff does not quite reconcile with the PIA's instruction that, ordinarily, inspection of records should be permitted with "the least cost and least delay." § 4-103(b). At the same time, nothing in the plain language of the PIA explicitly *requires* an agency to task the lowest-paid qualified employee available with working on the response. *Compare* § 4-206(b)(2) (staff costs included in the calculation of actual costs must be prorated for "each individual's salary and actual time attributable to the search for and preparation of a public record"), *with, e.g.*, Idaho Code Ann. § 74-102(10)(e) (fees for labor in excess of two hours to be charged at "the per hour pay rate of the

⁸ We note that the ten-day letter involved in PIACB 21-15 (July 6, 2021) did not refer to our Board at all, and instead advised the complainant that, if he had "any questions regarding the Public Information Act process, [he could] also contact the Public Access Ombudsman."

lowest paid administrative staff employee or public official of the public agency who is necessary and qualified to process the request,” and fees for attorney time to be charged at “the per hour rate of the lowest paid attorney within the public agency who is necessary and qualified to process the public records request”), *and* Mass. Gen. Laws Ann. ch. 66 § 10(d)(ii) (if a response takes more than four hours to prepare the fee may include “an hourly rate equal to or less than the hourly rate attributed to the lowest paid employee who has the necessary skill required to search for, compile, segregate, redact or reproduce a record requested,” but that fee “shall not be more than \$25 per hour”).⁹

We have said that § 4-103(b) may, under some circumstances, restrain an agency’s ability to use staff who are compensated at the higher end of available employees, and we have interpreted that section to “generally mean[] that an agency should utilize the lowest-paid employee available and capable of producing the response.” PIACB 21-16 at 6 (July 30, 2021). But, we have also recognized that “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 that, in other instances, use of higher-compensated staff “might actually enable a more efficient and accurate response.” *Id.* at 6-7 (citing PIACB 20-13 at 2 (June 22, 2020)). Similarly, it is also the case that, when it comes to certain types of records, issues of authorization and access may dictate that only a select subset of employees are capable of working on a response to a request for those records. What remains constant, however, is that a custodian must have a legitimate reason for tasking a higher-paid employee with work on a response.

Thus, with a couple of caveats, we cannot find that the \$59.49 hourly rate charged by the TPPD for purposes of its fee estimate is unreasonable. Those caveats are: 1) that, if there is another, lower-paid employee authorized to access internal affairs records available to prepare the response to the complainant’s PIA request, then the TPPD should utilize that lower-paid employee; and 2) that the hourly rate should be based on the employee’s salary alone, and should not include overtime, indirect costs, or any other form of compensation, such as benefits. *See* § 4-206(b)(2); PIACB 22-06 at 4-5 (Jan. 18, 2022).

As for the \$175 per hour rate charged for legal review, we must find that that rate is also reasonable as the PIA defines the term. Assuming that \$175 per hour is the *actual* cost that the TPPD incurs for the City Attorney’s legal services—and we have no reason to doubt that assumption—then the PIA permits the TPPD to pass that cost onto PIA requesters. *See* § 4-206(b)(2) (attorney review costs included in the calculation of actual costs must be prorated for “each individual’s salary and actual time attributable” to work on the response); *cf. also* PIACB 20-04 (Nov. 25, 2019) (addressing an agency’s ability to recover review costs when the review is conducted by outside counsel).

⁹ Notably, the original version of the legislation that created this Board would have amended § 4-206 to provide that “the search fee . . . shall be based on the salary of the lowest-paid staff member performing the search.” S.B. 695, 2015 Leg., Reg. Sess. (First Reader).

B. Records Contained in the IPro Database

The TPPD explains that the potentially responsive records contained in the IPro database consist of 1,100 pages of documents, ten plus hours of video footage, and more than two hours of audio recordings. Based on this description of the records, the TPPD anticipates that it will take its senior-level employee five hours to “retriev[e] and transmit[.]” those records, resulting in an estimated cost of \$118.98.¹⁰ The TPPD also anticipates that it will take the City Attorney—who, as discussed above, is paid \$175 per hour—eighteen hours and 24 minutes to review the records once they are retrieved and transmitted. All told then, the estimated fee for production of responsive records contained in the IPro database amounts to \$3,338.98.

We start with the five hours the TPPD anticipates it will take to retrieve and transmit the responsive records from the IPro database. As the complainant points out in her reply, the TPPD does not explain exactly what retrieving and transmitting the documents and video and audio recordings will entail, or what different form they will take once retrieved and transmitted. We further note that the TPPD has a fairly precise understanding of the volume of potentially responsive records contained in the database, which suggests to us that the “search” component of the response regarding these particular records has been completed. And, it does not appear to us that the five hours includes any time spent assessing the records for exemptions or redactions. In light of these things, we are concerned that five hours may be an excessive amount of time to bill for simply retrieving and transmitting the records. However, we also recognize that the TPPD is far more familiar than we are with the format of the potentially responsive records, and with how they are stored and organized in the database. Thus, though we ultimately cannot say conclusively that this estimate is unreasonable, we stress two points. First, to the extent that the actual process of retrieving and transmitting the responsive records from the IPro database includes any significant time spent waiting for records to download or upload, that time generally should not be charged to the complainant. *See* PIACB 19-14 at 3 (Aug. 19, 2019) (reminding a school board that “it should only charge for time that its staff was actively engaged in the search for records,” and that “it should not, for instance, charge for time in which records may have been downloading or uploading, but in which staff were free to undertake duties unrelated to the PIA response”). Second, as always, the actual costs finally assessed must reflect only the “actual time attributable,” § 4-206(b)(2), to the retrieval and transmittal of the responsive records from the IPro database.

Turning to the fees for legal review, the TPPD explains that, generally, “the City Attorney utilizes a formula under which each page of a set of potentially responsive records will be reviewed in one minute,” while “[f]or video and audio recordings, each minute of those would require at least one minute of review.” The TPPD takes the position that the City Attorney will need to review each page of the potentially responsive documents and each minute of every recording. This is so, the TPPD maintains, because the complainant has requested internal affairs records, which “involve a determination of whether each investigation constitutes a technical infraction exempt from disclosure . . . as well as reviewing each record and implementing the statutorily required redactions.”

¹⁰ As indicated, *supra* note 2, it appears to us that the TPPD miscalculated this particular fee.

Before we make any determinations about the \$3,220 estimated fee for legal review of responsive records contained in the IAPro database, we first note that it does not appear that the TPPD has fully applied its formula to the records here. Again, the TPPD indicates that the potentially responsive records comprise more than ten hours of video footage, 1,100 pages of documents, and more than two hours of audio recordings. By our account, then, application of the TPPD's formula to all of the records would amount to 1,820 minutes (or, thirty hours and twenty minutes) of review time. But, the TPPD's estimate reflects costs based on eighteen hours and 24 minutes of legal review. Although the TPPD explains in its response that "[t]he actual cost[s] of legal review of the potentially responsive records—identified by the Department—are likely [more]¹¹ than the estimated amounts quoted in the City's response to Ms. Levi, given the voluminous number of potentially responsive records," it is not quite clear to us exactly what anticipated review costs are reflected in that eighteen-hour, 24-minute time estimate.

At the outset, we do not quibble with the TPPD's assertion that, generally, it will take counsel one minute to review one page of a record, and one minute to review each minute of an audio or video recording. For purposes of charging an estimated fee for legal review, this "formula" appears reasonably related to the costs that the TPPD can anticipate it will incur. But, although we recognize that legal review may be an entirely appropriate, non-duplicative task associated with the production of police internal affairs-related records in response to a PIA request, *see* PIACB 22-09 at 6 (Mar. 21, 2022), we are hesitant to agree with the TPPD's contention that *every single document*, and *every single minute* of an audio or video recording is likely to *require* review by its attorney. If this contention is based on the presumption that the attorney will largely be responsible for the actual preparation of the entire response, then it is one that, in our view, does not comport with the PIA. *See* PIACB 21-14 at 5 (July 23, 2021) (noting that, ordinarily, the lowest-compensated available and competent staff should be tasked with, among other things, "identifying and removing those records that are clearly privileged or exempt, and making any necessary redactions of clearly privileged or exempt material from otherwise-disclosable records").

We emphasize, as we have before, that a custodian should seek review of "only those responsive records that genuinely present a question of whether or not an exemption applies" so that the custodian can "minimize the amount of time necessary for review by an attorney that is often compensated at a much higher rate of pay." PIACB 22-08 at 3 n.6 (Feb. 23, 2022) (quoting PIACB 21-15 at 6 (July 7, 2021)); *see also* § 4-103(b) (generally inspection of records should be afforded with the "least cost and least delay"). Further, to the extent that the City Attorney's services might be viewed as like those of a legal contractor, it is unlikely that the PIA would allow the TPPD to utilize those much costlier services to perform PIA response-related tasks that could be done "in house." *See* 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.").

¹¹ The TPPD's response actually states that the actual cost of legal review likely will be "less" than estimated. We take that to be a drafting error, as we presume that the TPPD would not charge a requester *more* at the estimate stage than it anticipates it will actually cost to produce records.

With these general principles in mind, it seems unlikely that the City Attorney here will need to perform an exhaustive review of a complaint file's contents in order to determine whether or not the complaint relates to a "technical infraction," and therefore cannot be disclosed because it constitutes a personnel record. *See* §§ 4-311(c)(2); 4-351(a)(4). In fact, it may often be the case that the attorney—who is not the custodian of the records—will not need to make that determination in the first instance. Rather, it seems likely that the senior-level TPPD employee authorized to access internal affairs records (and paid at an hourly rate that is nearly a third of that of the City Attorney) should have the ability to determine—at least in fairly clear cases—which complaints pertain to technical infractions. The PIA defines a technical infraction as:

[A] minor rule violation by an individual solely related to the enforcement of administrative rules that:

- (1) does not involve an interaction between a member of the public and the individual;
- (2) does not relate to the individual's investigative, enforcement, training, supervision, or reporting responsibilities; and
- (3) is not otherwise a matter of public concern.

§ 4-101(1); *see also* House Floor Proceedings No. 36, 2021 Leg., Reg. Sess., at 00:53:20 (Apr. 1, 2021) (statement of Del. Luke Clippinger) (explaining that a technical infraction is a "small thing, I didn't pull up my socks . . . something along those lines"). Thus, if it is evident that the complaint lodged against the officer is along the lines of a uniform violation or other similar "minor" infraction of administrative rules not involving the public, it seems to us that the senior-level TPPD employee should be perfectly capable of ensuring that the records related to that complaint are not among those flagged for potential disclosure. And, even in the closer cases, where it might be necessary for an attorney to make the ultimate determination as to whether the records relate to a technical infraction, it seems to us that review of *all* records related to that complaint will not be necessary in order to make that call.

We grant that it is entirely possible that none of the complaints against the officer here actually relate to a technical infraction, and that the records related to those non-technical infractions, therefore, would fall under § 4-351's discretionary exemption for investigatory records, which the TPPD's custodian may withhold if disclosure "would be contrary to the public interest." § 4-343. And, we also recognize that the investigatory records exemption requires a custodian to redact certain information from the police misconduct records it discloses. *See* § 4-351(d)(1) (custodian must redact "medical information of the person in interest," "personal contact information of the person in interest or a witness," and "information relating to the family of the person in interest"); *see also* § 4-351(d)(2) (custodian "*may* redact the portion of a record described in subsection (a)(4)"—i.e., police misconduct records—"to the extent that the record reflects witness information other than personal contact information," (emphasis added)). But, even assuming that all of the responsive records are potentially disclosable, we tend to question whether it is reasonable to anticipate that the City Attorney will spend more than eighteen hours reviewing the records described. Again, it seems to us that the senior-level TPPD employee generally should

be as capable of identifying and applying redactions as the City Attorney would be, and should seek the City Attorney's review only for those records that present some sort of ambiguity or close question about whether or not a redaction should be applied.

In sum, we have no quarrel with the formula "generally utilize[d]" by the City Attorney for purposes of calculating an estimated fee. For the reasons outlined above, however, we do not think it is reasonable for the TPPD to base an estimated fee for legal review on the assumption that the City Attorney will be reviewing each and every document or every minute of a recording—at least not when there is an employee compensated at a far lower rate capable of identifying responsive, disclosable records, and applying redactions to clearly privileged information, such as personal contact information, or medical or family information related to the subject police officer.¹²

Here, however, the TPPD apparently did not strictly apply that formula to every page or minute of the responsive records to arrive at the \$3,220 estimated fee for legal review—instead of the more than thirty hours of legal review that that application of the formula would produce, the TPPD's estimated fee is based on eighteen hours and 24 minutes of work by the City Attorney. As stated above, even given the volume of potentially responsive records, we have concerns that that even that lower time estimate may be excessive. But, in light of the fact that it is also unclear whether that time estimate reflects a presumption that the City Attorney will be making the initial determinations about disclosure and redaction, and not simply reviewing those records where such determinations require legal advice, we are not in a position to say what a reasonable time estimate might be. *See* § 4-1A-07(c)(2) ("An opinion of the Board may state that the Board is unable to resolve the complaint."). Rather, the TPPD must revisit its estimated fee in light of the guidance above. We suspect that doing so will result in more anticipated time charged at the \$59.49 hour rate, but less anticipated time charged at the City Attorney's much higher rate.

We are mindful that, at \$175 per hour, the cost for legal review of the TPPD's records adds up quickly. The TPPD should be mindful of this as well, especially as it strives to produce its public records with "the least cost and least delay." § 4-103(b).

C. Pre-2014 Records in Paper and Other Tangible Form

Our review of the TPPD's estimated fees for production of responsive records created before 2014, and that exist in paper and other tangible form, will be more succinct. The TPPD states that it does not know how many potentially responsive records there might be because it has not conducted any search, preliminary or otherwise, to identify those records. Nevertheless, the City estimates that "it will take approximately fifteen hours to search, retrieve, and transmit those records," and that making copies of responsive records and recordings "may take approximately twenty hours." Based on the \$59.49 hourly rate of the TPPD employee performing these tasks, the TPPD "estimates that it will cost \$2,082.15 to retrieve, make copies of, and transmit the responsive records that predate the Department's implementation of IAPro." Given the lack of

¹² The PIA defines a "person in interest" as "a person or governmental unit that is the subject of a public record," § 4-101(g), so, in the context of records related to alleged misconduct of a specific police officer, that police officer is the "person in interest."

information about the volume and content of responsive records, the TPPD did not include costs for legal review in its estimated fee.

Assuming, as this opinion does, that the TPPD intends at some point to invoke its ability to require prepayment of the estimated fees for production of the pre-2014 records, those estimated fees must be reasonable—i.e., they must bear a “reasonable relationship to the recovery of [the] actual costs,” § 4-206(a)(3), that the TPPD anticipates it will incur. The TPPD must, then, have some idea as to how many responsive records there are, and what form they take. An exact page count or precise knowledge of the duration of any audio or video recordings is not necessary, but the estimated time expenditures need to be based on more than speculation, which is what we appear to have here. We therefore conclude that the \$2,082.15 estimated fee for the pre-2014 responsive records is unreasonable. This conclusion notwithstanding, however, we are unable to determine a reasonable estimated fee. *See* § 4-1A-04(a)(3) (if the Board concludes that a custodian charged an unreasonable fee, it must reduce the fee to an amount the Board determines is reasonable); § 4-1A-07(c)(2) (“An opinion of the Board may state that the Board is unable to resolve the complaint.”). If the TPPD intends to require advance payment of the estimated fees for these records, that fee must be based on—at the very least—an approximate understanding of the nature and volume of responsive records.¹³ And, if the complainant believes that those estimated or actual fees are unreasonable as defined in the PIA—and assuming that those fees are higher than \$350—then she may file a complaint stating such.

As a final point, we note that the parties may have been better served by bringing this matter to the Public Access Ombudsman, who works with requesters and custodians in an attempt to resolve PIA-related disputes in the context of voluntary, confidential mediation. *See* § 4-1B-04.¹⁴ Given the complainant’s contention, on the one hand, that the TPPD’s estimated fees lack any foundation, and the custodian’s contention, on the other, that a limiting or narrowing of the complainant’s PIA request would reduce the fees charged, it seems to us that the Ombudsman’s process—which involves a certain give and take by the parties—is much better suited to resolving the issues here.

¹³ Though it is generally not for us to resolve issues related to recordkeeping and record retention, we note that all custodians have a duty to establish and maintain “an active and continuous program for the economical and efficient management of records.” COMAR 14.18.02.05A(2). This is so, in part, to “[a]ssure public access to the records of government.” COMAR 14.18.02.01E. While we understand that the TPPD’s older internal affairs-related records may be less readily accessible than internal affairs-related records that are stored electronically, we would hope that the TPPD’s recordkeeping systems allow for it to determine, e.g., how many complaints were lodged against this particular officer prior to 2014, without having to expend a great deal of time searching.

¹⁴ On July 1, 2022, a law that expands the jurisdiction of this Board will take effect. *See* 2021 Md. Laws, ch. 658. In addition to unreasonable fees higher than \$350, that law will allow us to review complaints about denials of inspection and failures to respond, and complaints filed by custodians that a PIA request is “frivolous, vexatious, or in bad faith.” *Id.*, to be codified at § 4-1A-04(a) and (b). Under the new law, a requester or custodian must first “attempt[] to resolve the dispute through the Office of the Public Access Ombudsman” before filing a complaint with this Board. *Id.*, to be codified at § 4-1A-05(a)(2).

Conclusion

Based on the information provided, we find that the hourly rates charged by the TPPD for work performed by its employee and City Attorney are reasonable as the PIA defines the term. Though we question whether it is reasonable for the TPPD to anticipate that it will take five hours for its employee to retrieve and transmit the responsive records contained in the IAPro database, we cannot say definitively that it is unreasonable. Instead, we caution the TPPD that it may charge only for the time that its employees are actively engaged in the retrieval and transmittal process. Regarding the eighteen hours and 24 minutes that the TPPD anticipates the City Attorney will spend on legal review, we have concerns that that number may be excessive and direct the TPPD to revisit that estimate and apply the guidance provided above. Finally, we find that the \$2,082.15 estimated fee for production of records pre-dating the TPPD's acquisition of the IAPro database is unreasonable. But, because the TPPD does not have any information about the volume and content of those records, we are unable to determine what a reasonable estimated fee might be. Assuming that the TPPD intends to charge the complainant an estimated fee, we therefore direct the TPPD to ascertain, at the least, a rough approximation of how many responsive records there are and to calculate the estimated fee in light of the guidance provided in this opinion.

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