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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 23-25

July 24, 2023

Baltimore Police Department, Custodian
Luis Sims, Complainant

In a request sent under the Maryland Public Information Act (“PIA”), Luis Sims, the complainant, asked the Baltimore Police Department (“BPD”) to produce records from the internal affairs investigative files of four police officers. After months of correspondence and one round of mediation through the Public Access Ombudsman, the BPD ultimately charged the complainant an estimated fee of \$5,391.80 for the records. The complainant disputed the fee on various grounds and sought the assistance of the Ombudsman a second time. The Ombudsman issued a final determination stating that the disputes were not resolved, and the complainant then filed this complaint with our Board. In response, the BPD argues both that we lack jurisdiction to resolve the complaint and that the fee is reasonable. The BPD also indicates that it now has the ability to perform certain aspects of the work in-house, thus reducing the fee to \$1,616.80. As discussed in more detail below, we conclude that the modified fee of \$1,616.80 is reasonable as the PIA defines the term, but also provide guidance regarding some of the broader issues raised by this matter.

Background

The fee disputes presented here began in November of 2021, when the complainant submitted a PIA request to the BPD for “any internal affairs investigation files” of four police officers involved in his criminal case. On July 12, 2022,¹ the BPD sent summary sheets for each Public Integrity Bureau² (“PIB”) file to the complainant. However, those records did not provide the complainant with all of the information he sought.

¹ The BPD acknowledged receipt of the complainant’s PIA request in a letter dated December 21, 2021, and advised that, due to the Covid-19 pandemic, the BPD was “working under a state of emergency and under staffed,” thus “response[s] to document requests may take longer than normal.”

² As explained in the BPD’s response to the Board complaint, the Public Integrity Bureau “conducts BPD’s internal affairs investigations and is the entity responsible for internal investigations of police misconduct.”

Thus, the complainant contacted the Ombudsman on August 10, 2022, disputing that the BPD's production was incomplete because the summary sheets did not constitute the full PIB files he requested. The matter closed as resolved after the BPD sent the complainant a letter providing a fee estimate of \$6,660.93 for production of the full PIB files. The estimate included a detailed breakdown of the costs associated with process, and the BPD demanded prepayment before work would begin. Before the Ombudsman's final determination issued, the complainant sent the BPD an indigency-based fee waiver request, on October 4, 2022.

On December 27, 2022, the BPD sent the complainant a letter in which it granted a partial fee waiver, reducing the estimated fee to \$5,391.80 which, as explained below, represented the cost of an outside vendor. Three days later, the BPD sent another letter in which it produced a CD containing more detailed summaries of the PIB files pulled from the BPD's IPro database.³ The BPD did not charge a fee for these more detailed summaries, which it advised totaled 184 pages. In January 2023, the complainant reached out to Ombudsman again, stating that he had not received a response from BPD regarding his request for a fee waiver,⁴ and contending that the \$6,660.93 fee was excessive. Ultimately, the Ombudsman issued a final determination stating that those disputes were not resolved.

The complainant then filed this complaint in which he continues to dispute the BPD's estimated fee. Citing *Baltimore Action Legal Team v. Office of the State's Attorney of Baltimore City*,⁵ the complainant challenges the BPD's refusal to fully waive the estimated fee and argues that cost to the agency cannot be the only factor a custodian considers before denying a fee waiver request. Additionally, the complainant contends that the disclosure of the PIB records would shed light on public controversy regarding the officers in his case.

The BPD responds by arguing that, because the complainant challenges only the BPD's decision as to his request for a fee waiver, the Board does not have jurisdiction to

³ IPro is a database and software system that the BPD uses to track and manage IAD investigations. See Baltimore Police Dep't, Misconduct & Discipline, <https://www.baltimorepolice.org/transparency/accountability/misconduct-discipline> (last visited July 5, 2023) (click on "Intake" expander, which notes that, after receiving a complaint, the PIB "creates a digital casebook in IPro").

⁴ As noted above, it appears that the BPD responded to the complainant's request for a fee waiver in the letter dated December 27, 2022—i.e., before the complainant's January 2023 request for mediation. Given that the complainant is incarcerated, it may be the case that the BPD's December 27 letter did not reach him before he sent his request for assistance to the Ombudsman. Based on the information before us, we understand that the complainant continued to dispute the BPD's refusal to fully waive the fee.

⁵ 253 Md. App. 360 (2021).

resolve the complaint. The BPD also argues that its estimated fee in this case is reasonable because, due to staffing limitations and a heavy volume of PIA requests, the BPD must utilize an e-discovery vendor to assist in the response to the complainant's PIA request. In the cost breakdown that it provided, the BPD explained that there are eight responsive PIB files, each of which contain an estimated average of 94 pages, for an estimated total of 752 records in need of review and possible redaction. The BPD further estimated that it will take the contract attorney—paid at a rate of \$43 per hour—one hour to review 20 pages, or 37.6 hours to review all 752 responsive records. Thus, the total cost of attorney review is \$1,616.80. In addition, the BPD assessed \$3,775.00 in “monthly data charges,” for a total estimated fee of \$5,391.80.

In a reply received by the Board on June 21, 2023, the complainant continues to press his contention that the BPD's actions in regard to the estimated fee contravene the PIA. The complainant argues that, in enacting the PIA, the Legislature intended that citizens in Maryland be accorded wide-ranging access to public information concerning the operation of government agencies. He also reiterates that the cost to the agency cannot be the only consideration in a denial of a fee waiver request.⁶

Analysis

We are authorized to review complaints alleging certain violations of the PIA, including that a records custodian has charged an unreasonable fee higher than \$350 for public records. § 4-1A-04(a)(1)(ii).⁷ The PIA defines a “reasonable fee” as “a fee bearing a reasonable relationship to the recovery of actual costs incurred by a governmental unit” when the unit responds to a PIA request. § 4-206(a)(3).

Reasonable fees may include “the actual costs of the search for, preparation of, and reproduction a public record”—e.g., media and copying costs, and the costs of staff and, if necessary, attorney review. § 4-206(b). The cost of any staff or attorney time must be “prorated for each individual's salary”—not including benefits or other incidental costs, PIACB 22-06, at 5 (Jan. 18, 2022)—and the “actual time attributable to the search for and preparation of a public record,” § 4-206(b)(2). Ordinarily a custodian must allow for inspection of public records with the “least cost and least delay,” § 4-103(b), and generally should not charge a requester for duplication of effort, such as multiple reviews of the same record, *see* PIACB 17-18, at 3 (Aug. 31, 2017) (“[D]uplication of effort should not be

⁶ The complainant's reply appears to contain additional allegations about the BPD's production that are not related to the fee. Because they were not presented for mediation, we cannot consider them. *See* Md. Code Ann., Gen. Provisions § 4-1A-05 (complaint may be filed if the complainant attempted to resolve the dispute through the Ombudsman and received a final determination that the dispute was not resolved).

⁷ Statutory references are to the General Provisions Article of Maryland's Annotated Code, unless otherwise indicated.

charged to the requester.”); *see, e.g.*, PIACB 21-13, at 4-5 (June 3, 2021) (finding General Counsel’s “second layer of review” of records already prepared by an Associate General Counsel duplicative and therefore concluding that the charge for General Counsel’s review was unreasonable); PIACB 16-05, at 3 (June 1, 2016) (reducing the fee where “a number of records underwent multiple reviews and were produced in multiple copies”); *see also* PIACB 22-09, at 6 (Mar. 21, 2022) (clarifying that attorney review is not necessarily duplicative). If we conclude that a custodian has charged an unreasonable fee, we will “order the custodian to . . . reduce the fee to an amount determined by the Board to be reasonable and refund the difference,” if applicable. § 4-1A-04(a)(3)(ii).

Turning to the complaint before us, the BPD contends in its response that we lack jurisdiction to resolve this complaint because the complainant has not alleged that the fee is unreasonable. Rather, the BPD maintains, his complaint is rooted in the BPD’s denial of his fee waiver request, an allegation that we are not authorized to review or resolve. Thus, the first question we must ask is whether the complainant has sufficiently alleged a violation of the PIA that is within our jurisdiction. In answering this question, we are mindful that the complainant is *pro se* and presently incarcerated, and we will therefore afford his complaint liberal construction. *See* PIACB 22-08, at 2 (Feb. 23, 2022) (citing *Douglas v. State*, 423 Md. 156, 182 (2011)). Though the BPD is correct that the narrative of the complaint appears to focus almost solely on the BPD’s actions regarding the complainant’s request for a fee waiver, and does not explicitly allege that the \$5,391.80 fee is unreasonable, the complainant also attaches the Ombudsman’s final determination to his complaint. That final determination indicates that the issue of “excessive” fees was one of the disputes left unresolved by mediation and, as the complaint lays bare, the fee continues to act as a barrier to the complainant’s access to the records. Construing the complaint and its attachments broadly and liberally then, we find that the complainant has sufficiently challenged the reasonableness of the fee itself. We will thus review the fee.

We turn now to that fee. Based on the information submitted by the BPD in response to the complaint, we had some questions and concerns about its \$5,391.80 estimated fee. To address those concerns, we asked the BPD to provide more information about the basis for the estimated fee. *See* § 4-1A-06(b)(2)(iii) (allowing the Board to request more information about “the basis for the fee that was charged”). In particular, we noted that an initial letter explaining the fee appeared to contain a calculation error that grossly overestimated the number of hours it would take the BPD to respond to the complainant’s PIA request—2,082 hours versus 37.6 hours. We were concerned that, if the use of the outside vendor was based on an incorrect 2,082-hour estimate, it might be difficult for the BPD to justify the use of that vendor. *See* PIACB 20-04, at 2 (Nov. 25, 2019) (noting that not every outside vendor’s cost may be recovered from a requester, e.g., “where 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”). In addition, assuming that 37.6 hours was correct, we questioned the \$3,775.00 fee for

“monthly data charges” that the BPD passed along to the complainant. *See* PIACB 17-18, at 4 (Aug. 31, 2017) (explaining that “[t]o the extent that the agency pays a flat rate to the vendor regardless of the work performed” it may be that the use of that vendor “does not have a ‘reasonable relationship to the recovery of actual costs incurred’ by the agency and should not be charged at all”).

In response to our questions, the BPD first confirms that the correct time estimate is 37.6 hours to review and redact the approximately 752 pages of responsive records the BPD expects its search to produce.⁸ To justify its resort to an outside vendor for that lower time estimate, the BPD explains that it received 1,615 PIA requests during the six months between August 1, 2022, and January 31, 2023, and that its “PIA caseload averages approximately 269 requests per month and 62 requests per week.” The BPD maintains that, “in light [of] the volume, staffing constraints, and the mandates of the PIA, BPD did not have the resources to divert nearly one full week of a staff member’s time to process a single PIA request.” Based on these representations, the use of an outside vendor appears reasonable. To support the \$43 hourly rate charged for the contract attorney’s time, the BPD provides a copy of a “good faith estimate” prepared by the vendor that indicates that the rate for the “review attorney” is \$43 per hour. That hourly rate is also within the range of the hourly rates of the BPD and Law Department staff working on the response, as provided in its December 27, 2022, letter—and lower than the \$50 per hour charged for a managing attorney in the Law Department. Thus, it is not clear that the review and redaction work would actually be less expensive if done “in house.” PIACB 20-04, at 2 (Nov. 25, 2019). In light of this additional information provided by the BPD, it does not seem that the \$1,616.80 estimated fee for review and redaction time runs afoul of § 4-206(b). Rather, that fee appears to bear a “reasonable relationship to the recovery of actual costs” that the BPD anticipates it will incur in responding to the complainant’s PIA request.

Regarding the “monthly data charges,” the BPD explains that they consist of the vendor’s use of certain software, the cost of server rental and data storage, and the time of an “e-discovery project manager” that conducts the initial set-up and provides technical support. The BPD asserts that the \$3,775.00 fee is attributable solely to the work necessary for the complainant’s PIA request. While the “monthly data charges” fee still seems quite high for a response that is estimated to take less than a work week to process, the BPD advises that it now has the capacity to host the responsive records in-house such that the contract attorney can access them. Thus, the BPD indicates that it will no longer charge

⁸ Section 4-351(a)(4) of the PIA, which concerns “records . . . relating to an administrative or criminal investigation of misconduct by a police officer”—the type of records at issue here—contains mandatory redaction provisions. *See* § 4-351(d)(1) (requiring a custodian to redact from “a record described in subsection (a)(4) . . . medical information of the person in interest” (i.e., the police officer subject to the investigation), “personal contact information of the person in interest or a witness,” and “information relating to the family of the person in interest”). Careful review of records subject to § 4-351(a)(4) is thus necessary.

the \$3,775.00 fee for “monthly data charges,” and accordingly reduces the estimated fee to \$1,616.80 which, as discussed above, does not appear to raise reasonableness concerns. We therefore do not address whether the fee for “monthly data charges” is reasonable.

Notwithstanding our conclusion that the \$1,616.80 modified estimated fee is reasonable, we share some broader observations and guidance as to this matter. First, we note that the fee, which started at \$6,660.93, was significantly reduced nearly nine months after it was first assessed and largely only due to the complainant’s consistent efforts. No doubt other less persistent requesters would have balked at that higher fee and simply abandoned their public records pursuits. And, even despite those efforts, the lower fee likely remains an absolute bar to the complainant’s access to these records, given his incarcerated status. We are mindful that we do not have authority to review a custodian’s decision to deny a request for a fee waiver. *See* PIACB 22-08, at 3-4 (Feb. 23, 2022); PIACB 16-08, at 1-2 (May 19, 2016); *see also* PIACB 23-05, at 4 n.5 (Nov. 23, 2022) (noting that the recent amendments to the PIA expanding our jurisdiction did not confer jurisdiction to review denials of requests for fee waivers). At the same time, in circumstances such as these, where an indigent requester’s access to public records is hindered by the imposition of even modest fees, we encourage custodians to grant indigency-based fee waivers when properly requested under § 4-206(e). As one scholar has explained, the purpose of open records laws, “to provide citizens with access to government records, supports granting fee waivers to indigent [people] because, whereas denying a non-indigent [person’s] fee-waiver request merely determines that [they] will bear the cost of access to agency records, denying an indigent [person’s] fee-waiver request determines that [they] will have not access to the agency records at all.” John E. Bonine, *Public-Interest Fee Waivers Under the Freedom of Information Act*, 1981 Duke L. J. 213, 260 (1981).

Conclusion

We have construed the complaint broadly and liberally, and find that it sufficiently alleges that the \$5,391.80 estimated fee charged by the BPD is unreasonable. However, in light of the BPD’s reduction of the fee to \$1,616.80, we limit our review to that lower fee and conclude that it is reasonable under § 4-206(a)(3) and (b). But, given that that lower fee will likely remain a barrier to the complainant’s access to the records, we encourage the BPD to reconsider its refusal to waive the full fee on the basis of indigency.

Public Information Act Compliance Board*

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