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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 24-08
September 28, 2023
Wicomico County, Custodian
Bradley Johnson, Complainant

Early this year, the complainant, Bradley Johnson, sent a detailed Public Information Act (“PIA”) request to Wicomico County (“County”) seeking numerous records related the County’s investigation into and actions taken regarding flooding issues at the complainant’s property. The County produced records in response to the request, but the complainant alleges that additional responsive records exist and that the County has not produced them. In response, the County asserts that all responsive records have been located and given to the complainant. We conclude that the County failed to adequately search for electronic records responsive to the complainant’s PIA request and explain further below.

Background

The complainant is a property owner in Wicomico County. According to the complaint, a development project occurring on property adjacent to the complainant’s has caused damage, including flooding damage, to the complainant’s property. The complainant sent the PIA request at issue here in an effort to collect records related to the County’s investigation into those issues, and to actions that the County has taken (or not taken) to remedy the problem and enforce certain permitting and regulatory requirements. Specifically, the complainant requested:

All information including emails, reports and summaries of site visits related to the "flooding issue" investigated by County personnel at 4721 Tyaskin, Road . (2) The date County personnel visited the property at 4721 to assess the "flooding issue" (3) A summary of the investigation performed by County personnel that found "the flooding of your office is do to a low spot on your property, the shallow foundation, and the encroaching marsh." (4) All records and documents, both internal and external, including emails, letters and phone notes related to investigations of established or potential permit

violations associated with the development project at 47[25] Tyaskin Road.¹ (5) Summaries of all enforcement actions taken due to permit violations associated with the development project at 47[25] Tyaskin Road (6) A copy of the site plan(s) used by County personnel to locate non-tidal wetlands, Chesapeake Bay Critical Areas and setback from the unconfined well located at 4721 Tyaskin, Road, prior to the issuance of construction, flood plain and septic permits. (7) Summaries of field inspections done to ensure compliance with flood plain and Critical Area permit requirements.

The County responded to the PIA request on February 3, 2023, by producing copies of an elevation plat and aerial photos, as well as copies of four emails and one letter. The County indicated that those records were responsive to the first three parts of the complainant's PIA request. Regarding the remaining parts of the request, the County indicated that it had "no records regarding building permits, enforcement actions, critical area analysis or field inspections for 4747 Tyaskin Road."

Realizing that the request sent in January contained a critical typo in one of the addresses, the complainant sent another PIA request in March with the correct addresses. The County indicated that the responses to the first three parts of the request were the same as provided in its February 3 response to the original request, and that the County still had no records responsive to parts 4 and 5 of the request. As for parts 6 and 7, the County disclosed a "Chesapeake Bay Critical Area Certificate of Compliance for Building Permit approved 12/29/21," and a "FEMA Final Inspection Checklist dated September 15, 2022," respectively.

Shortly thereafter, in April, the complainant contacted the Public Access Ombudsman for assistance because he believed that the County had not produced all records responsive to his PIA request. During the course of mediation, the County produced additional public records, including use and occupancy and floodplain related certificates, a building inspection record checklist, and an additional FEMA final inspection checklist. Ultimately, however, the Ombudsman issued a final determination stating that the dispute was not resolved, and the complainant then filed this complaint.

The complaint alleges that the County has not responded to the complainant's request for public records. Addressing the different parts of his request in turn, the complainant provides reasons in support of that allegation. First, as to the first three parts of his request, which related to the County's investigation into the "flooding issue" on the complainant's property, the complainant points out that a letter sent to him by the County's

¹ The complainant notes that his original PIA request contained a typo in one of the relevant addresses, which he later corrected. We have corrected that typo with brackets here. We have also included bolding to better distinguish the various parts of the request.

attorney prior to the PIA request specifically references such an investigation.² However, the complainant contends that the records the County produced refer to a 2017 investigation related to flooding on the east side of his property. The complainant argues that these records are not responsive because the development project is located on property adjacent to the west side of his property, and the records contain no references to an investigation into the impact of that project. In addition, the complainant notes that tax records show that the company that owns the property with the development project did not purchase that property until 2018.

Next, the complainant challenges the County's representation that it has no records responsive to the fourth and fifth parts of his PIA request—i.e., the request for records related to “investigations of established or potential permit violations” and “summaries of all enforcement actions taken due to permit violations” associated with the development project adjacent to the complainant's property. Arguing that the County is not “using good faith efforts to respond” to this part of his PIA request, the complainant explains that the Chief Building Inspector left him a voicemail in 2020 indicating that there were “a lot of things” to be “taken care of” at the adjacent property before a certificate of occupancy would issue. The complainant maintains that the County issued a Stop Work Order, and that, at the least, it should have a copy of that order and any records related to the permit problems that led to its issuing.

Regarding the sixth part of his PIA request—the request for a copy of the “site plan” the County used to locate “non-tidal wetlands, Chesapeake Bay Critical Areas and setback from the unconfined well” on the complainant's property—the complainant argues that the records the County provided are not responsive. The complainant maintains that responsive records should exist because a June 6, 2023, letter sent by a County health officer refers to a “site plan” that was developed for a septic permit. The complainant also contends that “site plans” are required in order to obtain several different kinds of permits.

Finally, the complainant contends that the County's response to his request for “summaries of field inspections done to ensure compliance with flood plain and Critical Area inspections” (the seventh part of the PIA request) is also non-responsive. This is

² That letter, dated December 19, 2022, was apparently sent after the complainant contacted employees in various departments about the flooding on his property. The letter indicated that the issue was “investigated by County personnel,” who “determined that the flooding of [the complainant's] office is due to its location in a low spot on [the] property, the shallow foundation, and the encroaching marsh.” The letter further indicated that the flooding was “not due to any actions by past or present County personnel,” and that, to the extent that the complainant had a “flooding claim against adjoining landowners,” the claim would be civil in nature. The letter also advised the complainant that “County personnel w[ould] not be communicating with [him] to have further discussions about [his] office flooding issue.”

because, the complainant points out, the FEMA checklists produced do not “address potential Critical Area violations.”

In response to the complaint, the County advises that “to the extent that [responsive records] exist, Wicomico County has provided the requested documents” to the complainant. The County attaches its various responses to the complainant’s January and March PIA requests. In addition, the County indicates that the complainant is “aware that Maryland Department of the Environment has documents related to wetlands, critical areas, and floodplains,” and that “the Maryland Department of Health regulates septic approvals,” thus suggesting that responsive records may be in the custody of other agencies.

In his reply, the complainant reiterates his arguments that the County’s response to his PIA request was largely non-responsive and that the County has failed to produce all responsive records.

Analysis

Section 4-1A-04(a)(1)(i) of the PIA authorizes us to review and resolve allegations that a custodian improperly denied inspection of public records. We have interpreted that provision to include certain “constructive denials”—i.e., allegations that a custodian has denied inspection of public records by virtue of conducting an inadequate search that fails to locate all responsive records. *See, e.g.*, PIACB 23-05, at 4-5 (Nov. 23, 2022). If, after reviewing a complaint and the information before us, we conclude that a violation of the PIA has occurred, we must issue a written decision and order the remedy provided by the PIA.³ § 4-1A-04(a)(2) and (3). For example, if we find that a custodian has “denied inspection of a public record in violation of [the PIA],” then we must order the custodian to “produce the public record for inspection.” § 4-1A-04(a)(3)(i).

Upon receipt of a PIA request, a custodian “must conduct a search in good faith that is reasonably designed to capture all responsive records,” and use “methods that can be reasonably expected to produce the information requested.” *Glass v. Anne Arundel County*, 453 Md. 201, 232 (2017) (quotations and citations omitted). A proper search “should be focused on where responsive records are likely to be found.” *Id.* Maryland’s Supreme Court has explained that “[a] search may be reasonable and adequate without being perfect,” and that reasonableness should be “measured prospectively by how the agency designed the effort to find responsive records.” *Id.* Reasonableness is also “measured against the specificity of the request and the willingness of the requester to focus a request to improve the efficiency of the search.” *Id.* at 233.

³ Before filing a complaint, a PIA requester must first attempt to resolve the dispute through the Public Access Ombudsman and receive a final determination from the Ombudsman that the dispute was not resolved. § 4-1A-05(a).

Because the County’s response to the complaint lacked information about how it conducted the search for responsive records, we asked the County to provide that information. Specifically, we asked the County to indicate where it expected responsive records to be located, where the County searched for the records, and what search terms the County used to locate any digital or electronic records. In response, the County advised that Planning and Zoning staff searched “the paper files which would contain the responsive records in the Planning and Zoning Department,” and that no other County department would have responsive records. In addition, the County asserts that all responsive records “would be located in the paper files and not in a digital or electronic format,” thus implying that the County did not search any electronic records.

Generally, we give due regard to the fact that records custodians are far more familiar with how their records are organized and kept than we are. *See, e.g.*, PIACB 21-16, at 4-5 (July 30, 2021) (addressing records management in the context of fees). The County’s representation that it expected to locate records within the Planning and Zoning Department’s files seems reasonable in light of the records that the PIA request sought—i.e., various records related to problems that the complainant alleges were caused by the development of property adjacent to his. To the extent that the County’s search of those paper files failed to produce records that the complainant expected to receive, we note that the sufficiency of a search is not evaluated “by its success in locating every responsive record.” *Glass*, 453 Md. at 232. Our Board is not designed to “second-guess how an agency maintains its records, or to ‘micromanage’ its search and retrieval process,” PIACB 22-06, at 7 (Jan. 18, 2022), or determine, on a record-by-record basis, what specific records an agency should or should not have in its possession.⁴ Based on the information before us, it appears that the County “focused on where responsive [paper] records [were] likely to be found,” *Glass*, 453 Md. at 232, and thus conducted a sufficient search for those records.⁵

⁴ To this end, the submissions tend to demonstrate that the complainant is really seeking answers from the County as to what has or has not been done to address certain issues on his property, as well the complainant’s allegations of permitting violations on the adjacent property. In this regard, the PIA may be a blunt tool and may not yield the answers he is looking for. *Cf.* PIACB 23-23, at 5 n.5 (June 20, 2023) (noting that a custodian’s “only obligation under the PIA is to search for and provide any existing public records that may respond” to certain questions posed by the requester, and that a custodian is “not obligated to create new records that answer those questions to the [requester’s] full satisfaction”).

⁵ After we received the parties’ submissions—i.e., the complaint, the County’s response, and the complainant’s reply—and the County’s response to our request for more information, the parties continued to engage in communications regarding the County’s efforts to locate responsive records. When the complainant inquired as to whether the Health Department’s records had been searched, the County advised that its Health Department (“WCHD”) is “a branch of the Maryland Health Department [or, “MDH”], a State agency,” and that therefore, “[i]nformation regarding the septic system and the well location fall within the purview of [MDH] and would be the subject of a [PIA] request to that State agency.” The complainant contended in response that the County

We reach a different conclusion regarding the County’s search—or lack thereof—of its electronic records. The complainant’s PIA request asked for records that would reasonably be kept in electronic form. For example, the request asked for “[a]ll information, *including emails*, reports and summaries of site visits related to the ‘flooding issue’ investigated by the County” at the complainant’s property, and “[a]ll records and documents . . . *including emails* . . . related to investigations of established or potential permit violations” associated with the development project. Given that the request explicitly sought emails, the County should have conducted a search of the relevant email accounts and archives.⁶ In our view, the County’s failure to do so led to an inadequate search for potentially responsive records. We thus direct the County to search the email accounts and archives that may contain responsive records and produce any additional non-exempt records to the complainant for inspection. § 4-1A-04(3)(i). The County should advise the complainant of what terms and queries it uses to conduct this search.

Conclusion

Based on what is before us, we conclude that the County’s search for responsive records in paper form was sufficient. However, because the County appears to indicate that it did not conduct a search for electronic records—despite the fact that the PIA request explicitly sought electronic records—we find that the search as a whole was inadequate. To the extent that the County’s inadequate search led to a failure to produce responsive records, the County has constructively denied the complainant’s PIA request in error. To remedy the problem, we direct the County to search the relevant email accounts and archives and to produce any non-exempt responsive records to the complainant.

Public Information Act Compliance Board

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“continues to obfuscate and respond in bad faith to my request for additional information to verify Wicomico County followed all regulations regarding the development project” adjacent to his property, and attached the County’s response to a prior PIA request that contained records related to a septic system. This exchange illustrates our point, *supra*, note 4, that the PIA may not be an effective means of getting “information to verify Wicomico County followed all regulations regarding the development project” adjacent to the complainant’s property. Without resolving whether the WCHD is a State or local agency, we note that the WCHD’s website contains contact information for “Public Information Officers.” See Wicomico County Health Department, Contact Us, <https://www.wicomicohealth.org/contact-us/> (last visited Sept. 19, 2023).

⁶ We note that the County produced records of email in its February 3, 2023, response to the complainant’s original PIA request. It is unclear whether the County kept these emails in hardcopy form in its paper files, or whether the County did in fact search certain email accounts to produce these records.

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