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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 24-10
November 13, 2023
City of Frederick, Custodian
Janet Jones, Complainant

The City of Frederick (“City”) charged the complainant estimated fees of \$1,900, \$3,000, and \$370 for responses to three Public Information Act (“PIA”) requests. The complainant, Janet Jones, has alleged that these fees are unreasonable under the PIA. The City disagrees. We conclude that certain aspects of the City’s estimated fees are unreasonable insofar as they assume the use of overtime to prepare the entirety of each response. We thus direct the City to adjust its estimated fees as detailed below.

Background

Between April 22 and 28, 2023, the complainant sent five PIA requests to the City seeking various financial records from the City’s Department of Housing and Human Services (“DHHS”). The estimated fees charged by the City for three of those requests are at issue here. The first, labeled R000100-042423 (“R100”), asked for an “[i]temized list and copies of cancelled checks for all donations received by [the] City for Frederick and placed into [DHHS] funds (departments 6111 and 6112) from January 1, 2022 to present.” The City sent the complainant a letter providing an estimated fee of \$1,900, which represented the cost of thirty-eight hours, charged at \$50 per hour, to “search, review and upload each responsive document.” The City explained the complainant’s options for responding to its letter, one of which included that the complainant could “accept and agree to pay the estimated cost.”

The second PIA request, labeled R000109-042823 (“R109”), sought an “[i]temized list of assets, along with the required documentation to show purchase and ownership, for those assets that were claimed by the City of Frederick on the City of Frederick’s most recent financial report related to the DHHS/CAA Foodbank Program.” For that request, the City provided an estimated fee of \$3,000—forty hours of staff time, charged at \$75 per hour, to search for and review records of “supporting documentation.” The City also provided the complainant with “the responsive asset listing,” presumably at no charge. Again, the City explained that one of the complainant’s options was to accept and pay the estimated fee.

In her third PIA request, labeled R000110-042823 (“R110”), the complainant asked for an “[i]temized list of assets, along with the required documentation to show purchase and ownership, for those assets that were claimed by the City of Frederick on the City of Frederick’s most recent financial report related to the DHHS Community Health Center Program—department 6112.” The City sent the complainant a letter in which it advised that it had “uploaded the responsive asset listing,” and that the estimated fee for the “[s]upporting documentation” was \$375, which represented five hours of staff time charged at \$75 per hour. As with the first two requests, the City advised that the complainant had the option of accepting and agreeing to pay the estimated fee.

Rather than paying the estimated fees or modifying her requests in response to the cost estimates—another option provided by the City—the complainant contacted the Ombudsman in an effort to address what the complainant believed were excessive fees charged by the City for responses to her PIA requests. Ultimately, the Ombudsman was unable to resolve the fee issues with respect to these three PIA requests.¹ The complainant then filed this complaint, which she indicates is “being filed due to excessive fees as listed in the [Ombudsman’s] Final Determination letter.” .

In response, the City advises that given the volume and complexity of the records that the complainant has requested, the City anticipates that a substantial amount of time will be necessary to search for the records and prepare them for inspection. The City further explains that the PIA requests “encompass multiple assets for entire City programs and departments to include multiple years of invoices, proof(s) of purchase, ownership records, and other documentation.” The City asserts that it cannot “divert the amount of time needed to produce the records to an hourly employee without incurring overtime expenses.” Thus, the City intends to assign the task of preparing the response to the Budget Director, who is exempt from overtime.

To support its position, the City attaches an Excel spreadsheet containing the breakdown of the cost estimates for R100, R109, and R110. The spreadsheets provide four hourly rates: (1) \$76/hour; (2) \$48.08/hour; (3) \$64.90/hour; and (4) \$37.34/hour. The spreadsheet also details the various unique tasks associated with responding to each PIA request—e.g., for R100, the spreadsheet indicates that the City will spend time locating and copying checks (an estimated 200 of them), redacting bank information, and conducting legal review. For R109 and R110, the spreadsheet indicates that the City expects to spend time researching the assets to “determine vendors and costs included in each,” locating and retrieving invoices, and conducting legal review. The spreadsheets

¹ The complainant sought mediation regarding disputes for all five PIA requests. Two of those disputes were resolved. Accordingly, the Ombudsman issued a final determination indicating that the matter as a whole was “partially resolved.” See Md. Code Ann., Gen. Provisions § 4-1B-04(b) and (c) (requiring the Ombudsman to issue final determinations); COMAR 14.37.02.11 (governing final determinations). The disputes in R100, R109, and R110 remained unresolved.

provide the estimated time expenditures for each task—e.g., for R100, ten minutes to locate and copy each of the 200 checks—and indicates that the bulk of the time spent responding to the three PIA requests will be charged at the \$76 per hour rate, which is presumably the rate of the Budget Director. Notably, the spreadsheets also indicate that each of the estimated fees have been discounted to some degree—specifically, for R100, from \$2,905 to \$1,900; for R109, from \$4,331 to \$3,000; and for R110, from \$417 to \$375.

In reply, the complainant argues that each fee is excessive. As to the \$1,900 estimated fee for R100, the complainant suggests that the City can simply contact the bank and request copies of the canceled checks. In addition, the complainant contends that the City is charging the cost of multiple employees reviewing the same record. Regarding the requests seeking records related to assets, the complainant points out that the City is obligated to list its assets on its annual financial reports and should thus have access to the information as a “back up to [the] financial reports.” The complainant argues that it should not take the City 58 hours to “produce something that the City should already have prepared for previous year financial reports.”

Broadly, the complainant charges that “[t]he City’s inefficiencies should not be a barrier to transparent government.” The complainant takes issue with the high hourly rates and argues that there is “no legitimate reason that a bookkeeper cannot assist with contacting the bank to request copies of cancelled checks, or retrieving invoices,” and that these tasks need not be done by an employee paid at a rate of \$76 per hour.

Analysis

We are authorized to review and resolve complaints that allege certain violations of the PIA, including that a custodian “charged an unreasonable fee under § 4-206 of [the PIA] of more than \$350.” § 4-1A-04(a)(1)(ii).² If, after consideration of the complaint and all information before us, we determine that the alleged violation of the PIA has occurred, we must issue a written decision and order a statutory remedy.³ § 4-1A-04(a)(2) and (3). When we conclude that a custodian has charged an unreasonable fee, we must direct 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).

Generally, the PIA requires a custodian to permit inspection of non-exempt public records with the “least cost and least delay.” § 4-103(b). However, the PIA also permits a custodian to charge a “reasonable fee” for searching for and preparing responsive records

² Statutory citations are to the General Provisions Article of Maryland’s Annotated Code, unless otherwise indicated.

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

when that search and preparation time exceeds two hours.⁴ § 4-206(b) and (c). A “reasonable fee” is a fee that bears a “reasonable relationship to the recovery of actual costs incurred” by the agency responding to a PIA request. § 4-206(a)(3). Actual costs can include the cost of search time and time spent preparing the records for inspection—e.g., redacting exempt material—and the cost of reproduction. § 4-206(b)(1). The cost of staff and any necessary attorney review time must be calculated by prorating “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). In order to provide responsive records “with the least cost,” § 4-103(b), a custodian ordinarily “should utilize the lowest-paid employee available and capable of producing the response,” PIACB 21-16, at 6 (July 30, 2021). At the same time, we have recognized that sometimes providing records efficiently and with the “least delay,” § 4-103(b), will mean that higher-paid staff must prepare the response, *see, e.g.*, PIACB 20-13, at 2 (June 22, 2020).

The parties’ written submissions left a few questions unanswered, so we asked the City to provide more information about “the basis for the fee that was charged.” § 4-1A-06(b)(2)(iii). Specifically, we asked the City to provide the job titles and annual salaries for the four individuals listed on its cost spreadsheet, and to indicate how the City calculated the hourly rates for those individuals. We asked how much overtime the City expected a lower-paid employee to incur, and how those overtime rates would be calculated. We also asked the City to explain how the responsive records are stored and how it determined the anticipated search times—e.g., that for R100 it will take ten minutes to locate and copy each check, or that for R110 it will take sixteen hours to locate and retrieve the relevant invoices. Finally, we asked why the City anticipated that it will take two minutes to redact bank information from each check, and to explain what information will be redacted and how (e.g., by hand or electronically).

In response to our questions, the City advises that the four individuals listed on the cost spreadsheet and their respective annual salaries are: (1) the Director of Budget and Administration, \$166,986; (2) the Manager of Budget, \$108,706; (3) the Director of Finance, \$145,328; and (4) a Paralegal II, \$81,978. All hourly rates were calculated as “straight time” without benefits and, though a 5.54% cost of living increase took effect on July 1, 2023, the hourly rates were not adjusted to reflect that increase. We note that the hourly rates shown on the City’s cost spreadsheet are indeed lower than the hourly rates as

⁴ While the PIA does not expressly authorize it, the Supreme Court of Maryland has suggested that a custodian may properly “require pre-payment of fees or a commitment to pay fees when the cost of processing a PIA request is likely to be substantial.” *Glass v. Anne Arundel County*, 453 Md. 201, 212-13 (2017). In light of this common practice, we have previously determined that we have authority to review estimated fees charged before work is actually completed. *See, e.g.*, PIACB 22-07, at 4-5 (Feb. 3, 2022).

calculated using the current salary information provided by the City. Thus, we have no concerns regarding the how the City calculated the hourly rates.

We turn next to how the City intends to apply those hourly rates to the ultimate fee calculation—i.e., how it plans to assign the work of responding as between the employees earning those hourly rates. In its response to the complaint, the City contends that the “volume and complexity” of the responsive records in combination with “staffing constraints and the regular daily workload of the respective custodial departments” means that it cannot assign work on the response to an “hourly employee” without that employee incurring overtime. When asked to provide more information about this contention, the City first advises that overtime rates are calculated at 1.5 times an employee’s hourly rate. The real issue, the City explains further, is that it “simply do[es] not have lower paid staff available to dedicate to a PIA response of this volume,” because these employees “need to spend their entire 40-hour work week on their required daily duties” and “do not have additional time available.” Thus, “any time they were to spend on a PIA response would be above their regular hours and thus require the City to pay them overtime.” By assigning “primarily more senior, FLSA-exempt staff,” the City will have “the flexibility to get the work done in a timely fashion without having to provide additional compensation.” Put in simple terms, to avoid resort to overtime pay, the City proposes using highly compensated employees—one of whom is paid at more than twice the hourly rate of a paralegal—to prepare the response.

In our view, the City falls short in its justifications for assigning highly paid employees to do the lion’s share—approximately 94 hours of an anticipated total 107 hours of work, according to the City’s spreadsheet—of responding to the complainant’s PIA requests. First, responding to PIA requests is part of every agency’s “required daily duties” in a broad sense. Addressing the legislative intent of the PIA, the Supreme Court of Maryland has explained that “the PIA involves a tradeoff in which state and local agencies incur additional expense for the benefit of a private right of access to government records.” *Ireland v. Shearin*, 417 Md. 401, 410 (2010); *see also* PIACB 22-06, at 5 (Jan. 18, 2022) (noting that “the Legislature has made the work of discretionary disclosure of police misconduct records part of the ‘duties and functions’ of law enforcement agencies”). *Shearin* further explained that “[t]he ‘broad remedial purpose’ of the Act places a larger burden on the state agencies to organize and provide access to information at the request of any individual desirous of such records.” 417 Md. at 410.

While the use of some overtime may, in some limited circumstances, be necessary, the assumption that *all* of the PIA-related work performed by hourly employees will need to be charged at overtime rates is inconsistent with the purpose of the PIA to provide “all persons” with “access to information about the affairs of government and the official acts of public officials and employees” with “the least cost and least delay.” § 4-103; *see also* PIACB 17-17, at 4 (Aug. 8, 2017) (“Although we understand that the work may involve some overtime, we are reluctant to condone the automatic use of the overtime rate before

the work has been performed, especially where the agency has demanded prepayment of the higher amount.”). If the PIA does not permit the City to proceed on the assumption that a lower-paid hourly employee would need to do all of the response work during overtime hours, then the City’s rationale for assigning (very highly paid) overtime-exempt employees falls apart.⁵ Thus, in our view, the City must assign lower-paid hourly employees to prepare the responses to the complainant’s PIA request, and may not “automatically” charge overtime rates for purposes of the estimated fee.⁶ PIACB 17-17, at 4 (Aug. 8, 2017).

Next, we address the City’s responses to our questions regarding how the various responsive records are stored. The answers to those questions bear on the soundness of the City’s time estimates—i.e., the amount of time that the City anticipates it will take to respond to each of the PIA requests. The City advises that the hard copies of checks deposited into City accounts are kept in file cabinets and organized by date of deposit. The City notes that there might be “hundreds of checks per day for all City activity,” and that “[e]ach day’s cash receipt would need to be pulled and the check located in a file and copied.” The City does not have a “master record of all deposited checks.” Regarding the responsive invoices, which constitute the “documentation to show purchase and ownership of” assets and which the City advises are stored in boxes, the City explains that each of the assets could have more than one invoice and that some “large projects” might have twenty or more invoices. The City suggests that if the complainant limited her requests to assets acquired in the last five years, then the amount of time necessary to locate and copy the invoices would be “greatly reduced.”

⁵ In any event, we suspect that 1.5 times the rate of a lower-paid hourly employee is likely to be lower than hourly rate of the very highly compensated employees—e.g., the Director of Budget and Administration (\$76/hour) and the Director of Finance (\$64.90/hour)—that the City intends to have complete the bulk of the responses. We note that 1.5 times the hourly rate of the paralegal assigned to perform legal review is \$56.01. We also note that the hourly rates of the Director of Budget and Administration and the Director of Finance fall, unsurprisingly, at the highest end of the City’s civilian pay scales, meaning that there should be many employees earning far less than those hourly rates. See City of Frederick, FY 2024 Civilian Pay Scales, <https://www.cityoffrederickmd.gov/DocumentCenter/View/21619/FY24-Civilian-Pay-Scale> (last visited Nov. 8, 2023).

⁶ It may be the case that those employees incur *some* overtime while preparing the responses, in which case the City may properly charge the complainant for staff time at those higher rates (for the work actually done during overtime only) given that, for purposes of the PIA request, that overtime rate constitutes the “individual’s salary” under § 4-206(b)(2). See PIACB 17-17, at 4 (Aug. 8, 2017) (allowing that responding to the PIA request at issue “may involve some overtime”). In addition, the City and the complainant may wish to negotiate “an appropriate timeframe for performing the work,” *id.*, such as production of records on a “rolling basis,” PIACB 24-03, at 8 n.11 (Oct. 6, 2023).

We start with a preliminary observation about our role. We are not charged with evaluating the sufficiency or efficiency of an agency’s record-keeping practices. *See* PIACB 21-16, at 4-5 (July 30, 2021); *see also* COMAR 14.18.02 (containing regulations related to record retention and management, which are generally overseen by State Archives and the Records Management Division of the Department of General Services). Thus, absent a case “where the submissions clearly demonstrate an egregious failure to keep records in an orderly way such that the fees assessed for search and retrieval are grossly inflated,” PIACB 21-16, at 4-5 (July 30, 2021), we ordinarily cannot consider the effect of any alleged records management “inefficiencies” on an estimated fee—e.g., whether, had the City kept a “master record of all deposited checks,” the search for responsive checks would take less time. Here, neither the estimated search times nor the City’s description of how the responsive records are stored suggest that sort of egregious failure.

Thus, the question is whether those estimated search times appear reasonable in light of the City’s more detailed explanation of what the search for responsive records will entail. We take each PIA request in turn. First, for R100, the City anticipates that there are approximately 200 checks responsive to the request for “copies of cancelled checks” for all donations received by the City and put into certain DHHS funds over a period of about sixteen months. To find the responsive checks (i.e., checks that were deposited into DHHS funds) amongst all the others, the City explains that an employee must pull the “cash receipts” for the relevant days and then locate the responsive checks in the filing cabinets and copy them. The City expects these tasks to take ten minutes per check, or just over thirty-three hours. Mindful that we generally refrain from any attempt to “micromanage” an agency’s search and retrieval process, PIACB 22-06, at 7 (Jan. 18, 2022), we think that this time estimate appears reasonable in light of the additional information that the City has provided. The City also estimates that it will take two minutes per check—or just under seven hours total—to redact bank routing and account numbers using Adobe PDF software, and one minute per check for “legal review.” Although we question to some degree whether it will really take one full minute to review each check once the exempt financial information is redacted, we find these estimates, on the whole, reasonable as well.

We turn next to R109 and R110, which seek “itemized list[s] of assets” claimed by the City and related to certain DHHS programs, and the “documentation”—i.e., invoices—that shows purchase and ownership of those assets. The City indicates that there are forty-four assets relevant to R109, which asks about assets related to the “DHHS/[Community Action Agency] Foodbank Program,” and seven relevant to R110, which asks about assets related to the “DHHS Community Health Center Program.” In response to our request for more information, the City noted that “many of these assets are very old,” and an employee will have to “dig through many boxes of old invoices to find them.”⁷ Thus, for R109, the

⁷ The Foodbank program appears to date back to at least 1984. *See* Frederick Community Action Agency, <https://www.cityoffrederickmd.gov/DocumentCenter/View/11714/FCAA-History->

City anticipates that it will take forty hours to “[r]esearch assets to determine vendors and costs included in each” and sixteen hours to then locate and retrieve the invoices. For R110, the City anticipates three hours of research and two hours for location and retrieval. The City also expects to spend two hours on “legal review” for R109 and one hour for R110. The City did not provide a precise estimation of the number of actual invoices, explaining instead that some assets may have more than one invoice associated with them. For “large projects,” the City indicates that the number of associated invoices could exceed twenty.

Again, we “give due regard” to the fact that custodians are “far more familiar” than we are with “the volume and content” of their records, and the manner in which they are actually stored and organized. PIACB 22-06, at 7 (Jan. 18, 2022). Thus, while we have some concern that, e.g., forty hours may be an excessive estimate as to the amount of time it will actually take to “[r]esearch assets to determine vendors and costs” for the forty-four assets relevant to R109, based on the information we have we cannot “conclusively dismiss as unreasonable,” *id.*, the City’s time estimates for R109 and R110.

In sum, to the extent that the City has calculated its estimated fees based on an assumption that lower-paid hourly workers would need to prepare the responses entirely during overtime hours, the City’s estimated fees are unreasonable. Rather than assigning highly-paid overtime-exempt City officials to work on the responses, the City must assign lower-paid hourly employees and use those employees’ salaries (without overtime) to calculate the estimated fees. Given the information we have, and the limitations of our Board, we cannot conclude that the time estimates used to calculate the estimated fees are unreasonable. The City must, of course, carefully track who does the work and how long it takes to ensure that the final fees are accurate. Mindful of the uncertainties on both sides of the coin here—i.e., that some overtime might be necessary, thus increasing the cost of labor, but also that some tasks might not take as long as the City anticipates, thus decreasing the cost—it may be appropriate for the City to ask the complainant to pay a portion of the estimated fee (as opposed to the entire amount) in advance. Finally, we encourage the parties to work together as suggested *supra*, note 6, to minimize both the cost to the complainant and the burden on the City. For instance, as suggested by the City, the complainant might narrow her request to assets more recently acquired by the City, at least initially.

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[2018#:~:text=The%20early%201980's%20saw%20an,health%20care%20and%20related%20services">2018#:~:text=The%20early%201980's%20saw%20an,health%20care%20and%20related%20services](#) (last visited Nov. 8, 2023) (indicating that “a Soup Kitchen and a Foodbank” were established in 1984, and that in 2006, the Community Action Agency purchased and opened a new “foodbank facility”).

Conclusion

The assumption that all work necessary to respond to a PIA request will need to be performed during overtime hours is contrary to the purpose and intent of the PIA. Thus, we direct the City to assign the work for the complainant's PIA requests to lower-paid hourly employees. The City may not use their overtime rates for purposes of calculating and charging the estimated fee, though if those employees ultimately end up performing *some* of the work during overtime hours, those hours may be charged at the overtime rates for purposes of the final fee. Accordingly, and consistent with § 4-1A-04(a)(3)(ii), which requires us to "reduce the fee to an amount determined . . . to be reasonable," the City must provide the complainant with revised estimated fees based on those lower hourly rates and the time estimates already reflected in the City's cost spreadsheet.⁸ Should the complainant have concerns about the reasonableness of the City's revised estimated fees, she may again avail herself of the PIA's alternative dispute resolution scheme. See § 4-1B-04 (governing the Ombudsman's resolution of disputes) and § 4-1A-04 (governing Board review of certain disputes left unresolved after mediation through the Ombudsman).

Public Information Act Compliance Board

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⁸ In addition, the City may not charge for the first two hours needed to search for and prepare the records. § 4-206(c).