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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 23-14

April 17, 2023

Frederick County Sheriff's Office, Custodian
Nate Jones (Washington Post), Complainant

In November of 2022, Nate Jones, the FOIA Director at the Washington Post, sent a Public Information Act ("PIA") request to the Frederick County Sheriff's Office ("FCSO") seeking records related to immigration detainees housed in FCSO facilities. Two months later, in January of 2023, the FCSO responded that, under the Memorandum of Agreement ("MOA") between the FCSO and the U.S. Immigration and Customs Enforcement ("ICE"), the complainant would "need to go directly to ICE to get t[he] information." Dissatisfied with the FCSO's response, the complainant sought dispute resolution through the Office of the Public Access Ombudsman. The Ombudsman was unable to resolve the dispute. In a complaint filed with this Board, the complainant now challenges the FCSO's denial of access to the records. As explained below, we conclude that the FCSO's response, in which it effectively denied inspection of the records, did not comply with the provisions of the PIA.

Background

In his PIA request to the FCSO, the complainant sought "[a]ll records on specific 287(g)¹ Detainers/Detainees in [the FCSO's] possession." Providing a date range of January 1, 2021, to the date of fulfillment of the request, the complainant specified the information he was requesting:

- The date each individual was detained;
- Each individual's name;
- Each individual's date of birth;
- The reason (alleged crime) that each individual was detained;

¹ "287(g)" refers to the section of the federal Immigration and Nationality Act that allows the Director of ICE to enter into agreements with state and local law enforcement agencies which, in turn, authorize certain designated officers of those agencies to perform limited immigration enforcement. See 8 U.S.C.A. § 1357(g) (providing for performance of immigration officer functions by State officers and employees); see also U.S. Immigration and Customs Enforcement, Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act, <https://www.ice.gov/identify-and-arrest/287g> (last visited Feb. 23, 2023).

- The case number for each charged individual;
- The date that each individual was released;
- The date that each individual was transferred to a different agency;
- The date that each individual was transferred to the federal Immigration and Customs Enforcement agency; and
- Any other information on the Detainers/Detainees in [the FCSO's] possession.

The complainant attached a “subset of data” that the FCSO had previously provided to him showing that there were 1,751 immigration detainers lodged as of June 2, 2021.

The FCSO did not produce any records. Instead, on January 12, 2023, the FCSO sent the complainant an email stating that, pursuant to the MOA² between the FCSO and ICE, the complainant would need to make his request directly to ICE. In that same email, the FCSO provided the complainant with contact information for media inquiries at ICE. Believing that the FCSO wrongfully denied him inspection of the records, the complainant sought dispute resolution through the Public Access Ombudsman. On January 31, 2023, the Ombudsman issued a final determination stating that the dispute was not resolved. The complainant then timely filed this complaint.

The complainant alleges that the FCSO erroneously denied his PIA request by directing him to contact ICE. He contends that the records he seeks are in the FCSO's custody and that the PIA requires that the FCSO release all non-exempt portions of those records.

Citing various sections of the ICE MOA, the FCSO responds that the FCSO is not the “official custodian” of the records that the complainant requested. Because the FCSO is not the “official custodian,” the FCSO argues further, § 4-202(c)³ of the PIA simply required the FCSO to provide the complainant notice of this fact and, if known, the name and location of the “official custodian”—which, the FCSO points out, is what it did in its January 12, 2023, email to the complainant. In addition, the FCSO contends that the records the complainant seeks are subject to § 4-301(a)(2)(ii), which requires a custodian to deny inspection if it would be “contrary to . . . a federal statute or a regulation that is issued under the statute and has the force of law.” In reply, the complainant points to the broad definition of “public record” and maintains that the Sheriff is indeed the “official custodian” of the records he has requested. And, while conceding that “some information about the [FCSO's] work with ICE could be properly withheld under [§] 4-301(a),” the

² See Memorandum of Agreement between the United States Immigration and Customs Enforcement and the Frederick County Sheriff's Office (Feb. 5, 2008), <https://www.ice.gov/doclib/287gMOA/frederickcountysheriffsoffice.pdf> (“ICE MOA”).

³ Statutory citations are to the General Provisions Article of Maryland's Annotated Code, unless otherwise specified.

complainant contends that the records here fall outside of the MOA and, therefore, application of that PIA provision is improper.

Analysis

The PIA authorizes us to review and resolve complaints that allege certain violations of its provisions, including allegations that a custodian “denied inspection of a public record in violation of [the PIA].” See § 4-1A-04(a)(1)(i). Before a complainant may file a complaint with this Board, he or she must attempt to resolve the dispute through the Public Access Ombudsman. § 4-1A-05(a)(1). If the dispute is not resolved, the complainant may file a complaint within 30 days of receiving the Ombudsman’s final determination stating such. § 4-1A-05(b)(5). If, after we review the complaint and response, we conclude that a violation of the PIA has occurred, we must issue a written decision and order an appropriate remedy, as provided by the statute. § 4-1A-04(a)(2), (3). In cases where we determine that a custodian wrongfully denied inspection of public records, we must “order the custodian to . . . produce the public record for inspection.” § 4-1A-04(a)(3)(i).

The PIA instructs that “[e]xcept as otherwise provided by law, a custodian shall allow a person or governmental unit to inspect any public record at any reasonable time.” § 4-201(a)(1). The PIA defines the terms “custodian” and “public record.” A custodian is “the official custodian”⁴ or “any other authorized individual who has physical custody and control of a public record.” § 4-101(d). A public record is the “original or any copy of *any* documentary material” that is “made” or “received” by a “unit or an instrumentality of the State or of a political subdivision . . . in connection with the transaction of public business.” § 4-101(k)(1) (emphasis added).

These broad definitions are consonant with § 4-103’s rule of construction, which recognizes that “[a]ll persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees,” and thus commands that “unless an unwarranted invasion of the privacy of a person in interest would result, [the PIA] shall be construed in favor of allowing inspection of a public record, with the least cost and least delay to the person or governmental unit that requests the inspection.” § 4-103; *see also Glenn v. Maryland Dep’t of Health & Mental Hygiene*, 446 Md. 378, 385-86 (2016) (“[T]he PIA was established with the over-arching purpose of allowing oversight of the government, resulting in a strong practice of disclosure.”). At the same

⁴ An “official custodian” is the “officer or employee of the State or a of a political subdivision who is responsible for keeping a public record, whether or not the officer or employee has physical custody and control of the public record.” As the PIA Manual explains, “[o]ften, the ‘official custodian’ will be the head of the agency.” *Maryland Public Information Act Manual* (17th ed. July 2022), at 1-9 (“PIA Manual”). So, in the case of a sheriff’s office, the “official custodian” is likely the sheriff him or herself.

time, the PIA also provides exceptions to disclosure—i.e., instances in which a custodian either must or may deny inspection of certain records, or of certain information contained in public records. See §§ 4-301 through 4-358. A custodian who denies inspection must explain the reason for the denial, provide the legal authority relied upon, and provide enough information about the record to “enable the [requester] to assess the applicability of the legal authority for the denial.”⁵ § 4-203(c)(1). When the application of an exemption is challenged, a custodian has the burden of justifying the denial of access to the public record. § 4-362(b)(2)(i); see also *Lamson v. Montgomery County*, 460 Md. 349, 367 (2018) (explaining that a reviewing court must “determine whether the agency’s rationale for denying the request is sufficient”).

In this case, nobody disputes that the FCSO is a “unit . . . of the State or of a political subdivision,” § 4-101(k)(1)(i), and therefore also a custodian of public records. If the records at issue here were “made” or “received” by the FCSO “in connection with the transaction of public business,” *id.*, then they are public records for purposes of the PIA and the FCSO must allow inspection, “[e]xcept as otherwise provided by law,” § 4-201(a)(1). Looking to the PIA request, it is clear that many of the responsive records are indeed records that would be made or received by the FCSO in connection with transacting public business. For example, the FCSO should have records reflecting the date that each individual immigration detainee was detained by FCSO officers and the date that the detainee was either released or transferred to a different agency. In turn, the FCSO should also have records reflecting certain basic information about those individual detainees—e.g., their names, dates of birth, and the reason for detention.⁶ And, even if ICE generated and/or also maintains some of the responsive records, that fact would not transform the FCSO into a non-custodian or relieve it of its duty to respond to the complainant’s PIA request in the manner required by the PIA—including the obligation to disclose responsive records unless the PIA or other law either prohibits disclosure or allows discretionary withholding. *Cf. Ireland v. Shearin*, 417 Md. 401, 410 (2010) (explaining that “[b]ecause [the warden of a prison] [wa]s a custodian of the requested documents, he was not authorized to direct [the requester] to other [prison] departments,” but rather was obligated to “collect and assemble the requested records”).

It is certainly true that federal law may sometimes require that a custodian deny inspection of state public records. See § 4-301(a)(2)(ii) (a custodian must deny inspection if “the inspection would be contrary to . . . a federal statute or regulation that is issued under

⁵ In addition, when a custodian denies inspection under § 4-343—which governs discretionary denials, or circumstances in which a custodian *may* deny inspection if disclosure would be contrary to the public interest—the custodian must also explain “why redacting the information would not address the reasons for the denial.” § 4-203(c)(1)(i)(2)(B).

⁶ The MOA cited by the FCSO in its letter denying the complainant’s PIA request makes this even more clear, as it requires the FCSO to “track[] and maintain[] accurate data and statistical information for [its] 287(g) program.” ICE MOA at 8.

the statute and has the force of law”); *see, e.g.*, 92 Md. Op. Att’y Gen. 137, 146 (2007) (explaining that the PIA “incorporates any restrictions” that the federal Family Educational Rights and Privacy Act placed on disclosure of public records held by a county school board). But, the MOA between ICE and the FCSO does not constitute a “federal statute” or a federal regulation with the force of law. While it might be the case that there *are* federal statutes and regulations that apply to some of the records responsive to the complainant’s PIA request,⁷ the FCSO cannot simply cite to its MOA with ICE in an effort to “kick the PIA responsibility [up] the chain of command.” *ACLU v. Leopold*, 223 Md. App. 97, 125 (2015). The ICE MOA cannot and does not obviate the FCSO of its duties under the PIA when presented with a request for public records that fall within the scope of the MOA.

Moreover, we note that the ICE MOA does not even appear to oblige the FCSO to simply refer all those who submit PIA requests for immigration-related records directly to ICE. Rather, the MOA provides that the FCSO “agrees to coordinate with ICE regarding information to be released to the media regarding actions taken under this MOA.” ICE MOA at 10; *see also* ICE MOA at 17 (providing “public information points of contact” for both the FCSO and ICE). This does not seem to be an arrangement unique to the agreement between ICE and the FCSO, as cases from other states refer to this type of “coordination” between ICE and local law enforcement agencies that entered into similar § 287(g) agreements. For example, *Cowlitz County v. Univ. of Washington*, detailed communication between county sheriff’s office and ICE regarding a series of public records requests for immigration detainee-related information. Case No. 3:19-cv-06250-RBL, 2020 WL 1890616 at *1-2 (W.D. Wash. Apr. 15, 2020). Similarly, in *Voces De La Frontera v. Clarke*, a custodian in a sheriff’s office explained, when presented with a public records request for copies of immigration-related forms, that she “was unable to immediately provide the requested forms” because “she needed to speak with ICE.” 891 N.W.2d 803, 806 (Wis. 2017); *see also, e.g.*, *ACLU v. County of Hudson*, 799 A.2d 629, 637-38 (N.J.

⁷ See, for example 8 C.F.R. § 236.6, which prohibits “any state or local government entity . . . that houses, maintains, provides services to, or otherwise holds any detainee on behalf of [ICE]” from “disclos[ing] or otherwise permit[ting] to be made public the name of, or other information relating to, such detainee.” Courts in other states have found that this federal regulation, as applied via their state open records laws, precludes disclosure of information falling under the regulation’s purview. *See, e.g.*, *Voces De La Frontera v. Clarke*, 891 N.W.2d 803, 815 (Wis. 2017); *Comm’n’s Correction v. Freedom of Info. Comm’n*, 52 A.3d 636, 650 (Conn. 2012); *ACLU v. County of Hudson*, 799 A.2d 629, 645 (N.J. Super Ct. App. Div. 2002); *see also* Ky. Op. Att’y Gen. 17-ORD-159, 2017 WL 3567955 at *4 (Aug. 10, 2017) (concluding that disclosure of certain immigration detainee forms was “prohibited pursuant to 8 C.F.R. § 236.6 as incorporated into the Open Records Act by operation of [one of its provisions]”). *But see ACLU v. Calhoun County Sheriff’s Office*, 983 N.W.2d 300, 306-08 (Mich. 2022) (holding that 8 C.F.R. § 236.6 did not serve as a basis for exempting public records from disclosure because “a regulation is not a statute,” and the exemption to Michigan’s state Freedom of Information Act used only the word “statute,” and not “statute or regulation,” or “statute or court rule”).

Super Ct. App. Div. 2002) (noting that INS—ICE’s predecessor—had “directed the Passaic County Sheriff’s Department not to release any information regarding INS detainees committed to the Passaic County Jail”). In these cases, it was the local law enforcement agency—and not ICE—who ultimately responded to the public records requests and disclosed certain records and/or explained why other records could not be disclosed. *See, e.g., Cowlitz County*, 2020 WL 1890616 at *1-2 (after consultation with ICE, sheriff’s office released some records but withheld others); *Voces De La Frontera*, 891 N.W.2d at 806 (sheriff’s office provided redacted versions of certain records).

As a final note, we perceive no issue with the ICE MOA’s provision that the FCSO coordinate with ICE regarding the release of any records related to immigration enforcement—after all, ICE is far more likely to be aware of the *federal* limitations on the disclosure of this sort of information. However, the MOA does not serve to preempt the PIA’s definitions of “custodian” or “public record,” or the obligations that the PIA places on records custodians. We see no need to determine whether or not the FCSO is the “official custodian” of the records the complainant seeks; it is clear that there are, within the FCSO, “authorized individual[s] who ha[ve] physical custody and control” of at least some of those records—i.e., “custodians.” § 4-101(d)(2). Because the FCSO is *a* custodian of the records—although granted, perhaps not the *only* custodian—a response pursuant to § 4-202(c) was improper. Contrary to the FCSO’s position, that section of the PIA does not refer at all to “official custodians,” but rather to the “custodian” which, under the PIA, is defined more broadly. *Cf.* 65 Md. Op. Att’y Gen. 365, 369-70 (1980) (concluding that a city official who may or may not have had actual authority to obtain certain personnel records was nevertheless a “custodian” of those records within the meaning of the PIA).

As we see it, the FCSO’s response to the complainant’s PIA request did not conform to the requirements of the PIA. Instead of simply directing the complainant to contact ICE to request the records he seeks, the FCSO should have “coordinated” its response to the PIA request with ICE. Ultimately, the FCSO—and not ICE—was responsible for producing records and/or explaining why responsive records were not disclosed. However, because we lack specific information about the nature and content of the responsive records in the FCSO’s custody, we do not order the wholesale production of those responsive records. Instead, we direct the FCSO to coordinate its response to the complainant’s PIA request with ICE, and to produce all responsive records and information that are not exempt from disclosure under the PIA’s provisions, including § 4-301(a)(2)(ii).⁸ In doing so, the

⁸ We briefly address the federal law that the FCSO contends precludes disclosure here. First, the FCSO points to two federal statutes, cited in the PIA Manual, that relate to “homeland security matters”—6 U.S.C.A. §§ 482(e) and 673(a)(1)(E). Section 482 generally governs the sharing of “homeland security information,” which is narrowly defined to relate to terrorist activity. *See* 6 U.S.C.A. § 482(f)(1). Section 673 protects voluntarily shared “critical infrastructure information,” which is also narrowly and technically defined. *See id.* §§ 671(3), 650(4). We doubt that either of these federal statutes would bar disclosure of all or most of the records here. The FCSO also cites two cases in which records similar to the ones requested by the complainant

FCSO must be mindful of the timelines outlined in § 4-203, and the procedures for approvals and denials of PIA requests provided in that same section.

Conclusion

The FCSO's denial of inspection here did not comply with the provisions of the PIA. But, mindful that the PIA contains exemptions that are mandatory for certain records or information, we do not order the FCSO to produce any records at this time. Rather, the FCSO must coordinate its response with ICE, and then disclose to the complainant all non-exempt records or information responsive to his PIA request.

Public Information Act Compliance Board

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were sought under the federal Freedom of Information Act ("FOIA"). We note that, in both cases, the government disclosed a lot of the responsive immigration detainee-related information; the issue in both cases was whether the *names* of the detainees were improperly withheld (both courts concluded that they were not). *See Tuffly v. U.S. Dep't Homeland Sec.*, 870 F.3d 1086, 1091, 1096 (9th Cir. 2017) (noting that ICE released certain detainees' "educational history, race, religion, medical conditions (including psychiatric disorders), and arrest and conviction records, if any"); *Ctr. for Investigative Reporting v. ICE*, No. 1:18-cv-01964 (CJN), 2019 WL 6498817 at *1-2 (D.D.C. Dec. 3, 2019) (noting that ICE produced "several Excel spreadsheets containing responsive information," and later agreed to also produce "the names of businesses and non-profit organizations that provided [immigration detainee] bonds"). Finally, the FCSO argues that the federal Privacy Act, codified in 5 U.S.C.A. § 552a, shields the records from disclosure. We note first that the Act applies only to certain records of an "individual," a term that is specifically defined to mean "a citizen of the United States or an alien lawfully admitted for permanent residence." 5 U.S.C.A. § 552a(a)(2). Moreover, the Act contains numerous exceptions to the general rule against disclosure, including when disclosure is "required under section 552 of this title"—i.e., under FOIA—and when disclosure would be "to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable." *Id.* § 552a(b)(2) and (5); *see also Cochran v. United States*, 770 F.2d 949, 954-55 (D.D.C. 2000) (discussing the interplay between FOIA and the Privacy Act).