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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 24-98
September 3, 2024
Baltimore Police Department, Custodian
John Davis, Complainant

The complainant, John Davis, alleges that the Baltimore Police Department (“BPD”) constructively denied a Public Information Act (“PIA”) request for records of communications related to a criminal case by failing to uncover responsive records. The BPD responds first that we lack jurisdiction to entertain the complaint and second that it properly responded that the BPD was unable to locate responsive records, based on the language of the PIA request. After consideration of the submissions, we find that the BPD’s search for responsive records was insufficient and direct the BPD to conduct another search using the parameters outlined below.

Background

We take the following facts from the submissions. On February 11, 2024, the complainant sent a PIA request to the BPD via email:

Under the PIA I’d like to request all emails and communications the BPD has in regards to CC 230105740 and criminal case 4B02470094. These records will most likely be with the BPD fraud unit, south south [sic] west district,^[1] and Officer Elkner from 2023 until 2024.

On February 21, 2024, the BPD acknowledged receipt of the PIA request and provided the name of the Document Compliance Unit (“DCU”) staff member to whom the request had been assigned. In that email, the BPD also stated that it could take longer than ten working days to provide a response and that the DCU would contact the complainant regarding possible costs or requests for clarification, if necessary. Shortly thereafter, the assigned DCU employee contacted the complainant and explained that the BPD did not have enough information to process the request and asked the complainant to “provide the sender or recipient names of the individuals you are requesting all emails and communications the BPD has in regards to CC 230105740 and criminal case 4B02470094.” The complainant

¹ On February 19, 2024, the complainant sent a second email stating that “there were a few typos with this request” and that he “meant the Southwestern District.”

responded: “Could you be more specific? I thought I was clear by indicating the southwest district, fraud unit, and [O]fficer Elkner.” It does not appear that the BPD responded.

The assigned DCU employee contacted the Baltimore City Law Department, which conducts searches for Baltimore City agencies’ emails, on March 5, 2024, to “submit an email search request to the Law Department’s e-Discovery manager.” The search request was for “all of Officer Elkner’s emails for keywords ‘CC 230105740’ and ‘criminal case 4B02470094’ from 2023 until 2024.” After the Law Department advised that no records were found, the DCU employee sent the BPD’s response to the PIA request to the complainant. That response, sent by email on March 20, 2024, stated that “[a]fter a diligent search by the BPD, no responsive emails were located.” The complainant responded with two emails sent that same day. The first stated “I believe that information is correct as CC 230105740 explicitly states that the case was under review by ASA Saleem Safdar. Please conduct a more adequate search.” The second email stated that “[t]he report also says it was forwarded to the fraud unit twice.” On March 24, 2024, the complainant sent a third email asking for an update and asking the BPD to “please refer to the actual report that says it was forwarded to the fraud unit.” The complainant attached a police report to that email. It appears that the BPD did not respond to these emails.

The complainant ultimately filed this complaint with our Board alleging that the BPD has constructively denied his PIA request.² The complainant states that he “submitted a good faith PIA request to obtain Leibowitz/Elkner records related to the BPD’s fraud unit obstructing an investigation,” and accuses the BPD of refusing to “engage in good faith dialogue” and “attempt[ing] to conceal the public records.” The complainant maintains that it is “impossible” that no responsive records exist because “the police report indicates certain records were forwarded via email and fax to another unit” and the complainant “called to confirm with the police officer that they were in fact emailed and faxed.” The complainant also contends that “there is a police misconduct complaint against Elkner, so, accordingly, the BPD concealed the existence of public records.”

In response, the BPD first argues that our Board lacks jurisdiction to resolve this complaint because it has not denied the complainant’s PIA request; rather, the BPD argues, it simply was not able to find any responsive records. Noting that the Office of the Attorney General has used the term “constructive denial” to refer to a custodian’s failure to timely

² The PIA requires a complainant to first attempt to resolve a dispute through the Public Access Ombudsman before a complaint may be filed. See Md. Code Ann., Gen. Provisions § 4-1A-05. The complainant provides a document titled “Statement of Ombudsman Conflict Precluding Mediation” which indicates that the complainant requested mediation on April 8, 2024. See COMAR 14.37.02.07C(3) (providing that, “[i]f the Ombudsman is unable to proceed in a neutral, impartial, and independent manner,” then the Ombudsman must withdraw from the mediation and issue a final determination “stating that the dispute was not resolved through the Ombudsman due to conflict”).

respond to a PIA request, the BPD contends that its response to the PIA request should not be construed as a constructive denial either because the complaint “does not allege that the BPD’s failure to respond within the PIA’s time limits is tantamount to a denial of [the] request” but instead alleges that the BPD “did not produce records that [the complainant] believes exist.”

The BPD also maintains that it conducted a sufficient search based on the information that the complainant provided. Describing the complainant’s PIA request as “a broad request for all emails and communications related to two criminal cases,” the BPD argues that the DCU employee “began the iterative process” by asking the complainant to provide “the sender or recipient names of the individuals [he was] requesting.” The BPD explains that, while the complainant wanted a search of the “southwest district, fraud unit, and [O]fficer Elkner,” the Law Department is unable to search all BPD emails or the emails of entire units—instead, it must search an officer’s or employee’s email account “separately using keywords and a date range.” Thus, the BPD argues, its search of Officer Elkner’s email account was reasonable “[g]iven the limitations of BPD’s search capabilities and the substance of [the PIA] request.” The BPD asserts that it “conducted a reasonable search that was reasonably calculated to uncover responsive records,” and therefore did not violate the PIA.³

In a reply, the complainant reiterates his position that the BPD constructively denied inspection of public records. The complainant asserts that the BPD failed to “respond in full despite having provided them the requested information, and then subsequently conceal[ed] the existence of other records.” Stressing that he provided the BPD a copy of “the police report”—presumably one related to the criminal case number identified in the PIA request—the complainant states that the report “clearly lists the officers’ names, to include Cruz-Vega, Burch, and Bass,” who are “all officers located at the southwestern district police station.” The complainant also references another matter we considered involving the BPD and a strikingly similar PIA request, and accuses the BPD of “contradict[ing] itself as the BPD was easily able to find those custodians in William Hernandez’ complaint.” The complainant suggests that this is evidence that the BPD is “knowingly and willingly lying and concealing records.”

³ The BPD also suggests that, in the event that we find that its search was inadequate, “an appropriate remedy would be to order BPD to conduct an additional search for emails using different parameters provided by [the complainant].” Because any responsive email communications would need review for exemptions to disclosure, the BPD states that “after conducting its updated search, BPD would first report to [the complainant] the number of potentially responsive records.” “Depending on the number of records, BPD would then either release the disclosable records, if any, or provide [the complainant] a cost estimate to search for, review, redact, and produce the records.”

Analysis

The PIA directs us to review and resolve complaints alleging certain violations of its provisions, including that a custodian improperly denied inspection of public records. § 4-1A-04(a)(1)(i).⁴ We have construed this section to reach allegations that a custodian has conducted an inadequate search that failed to locate all responsive records—i.e., alleged constructive denials. See, e.g., PIACB 24-08 (Sept. 28, 2023). If we determine that a custodian has denied inspection of a public record in error, we must order the custodian to “produce the public record for inspection.” § 4-1A-04(a)(3)(i). When we find that a constructive denial results from an inadequate search, we may direct the custodian to conduct another search and “produce any non-exempt responsive records.” PIACB 24-08, at 6 (Sept. 28, 2023).

“Except as otherwise provided by law,” the PIA requires a custodian to “allow a person or governmental unit to inspect any public record at any reasonable time.” § 4-201(a)(1). Thus, a custodian who receives a PIA request must “conduct a search in good faith that is reasonably designed to capture all responsive records” and that uses “methods that can be reasonably expected to produce the information requested.” *Glass v. Anne Arundel County*, 453 Md. 201, 232 (2017) (quoting *Oglesby v. Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)). A search “should be focused on where responsive records are likely to be found.” *Id.* When assessing the reasonableness of a search after-the-fact, the focus is on “how the agency designed the effort to find responsive records” and not on “its success in locating every responsive record.” *Id.* Our State Supreme Court has explained that “[i]n practice a productive response to a PIA request is often an iterative process in which the agency reports on the type and scope of the files it holds” and the requester “refines the request to reduce the labor (and expense) of searching those records.” *Id.* at 233.

We first address the BPD’s argument that we lack jurisdiction over the complaint because the BPD has not denied inspection of any records and the complainant does not properly allege a constructive denial. We have disagreed with similar arguments in the past and do here as well. In PIACB 23-03, at 3 (Nov. 2, 2022), we explained:

The plain language of our statute does not appear, on its face, to grant us authority to review complaints about the sufficiency of a custodian’s search for responsive records. Rather, it empowers us to resolve complaints alleging, among other things, that a custodian “denied inspection of a public record in violation of this title.” § 4-1A-04(a)(1)(i). At the same time, we recognize that the PIA’s provision for judicial review, § 4-362(a)(1), contains similar language and yet courts have considered whether a custodian’s search

⁴ Statutory citations are to the General Provisions Article of Maryland’s Annotated Code unless otherwise stated.

was sufficient. See § 4-362(a)(1) (permitting review “whenever a person or governmental unit is denied inspection of a public record or is not provided with a copy, printout, or photograph of a public record as requested”). For example, in *Short v. Bishop*, the [Appellate Court of Maryland] construed an allegation that the custodian had “denied [the requester] inspection of records that likely exist, but that the [custodian] could not find” as “a contention that the [custodian] did not adequately search for records.” No. 0496, Sept. Term 2015, 2015 WL 916429, at *5 (Md. Ct. Spec. App. Mar. 9, 2016) (unreported); see also, e.g., *Glass v. Anne Arundel County*, No. 2077, Sept. Term 2015, 2016 WL 7265908, at *3, *8-9 (Md. Ct. Spec. App. Dec. 15, 2016) (unreported) (reviewing an allegation that a custodian failed to conduct a reasonable search for responsive records and affirming the trial court’s conclusion that the searches were reasonable); *Sinclair Broadcast Grp. v. Baltimore City Bd. of Sch. Comm’rs*, No. 24-C-17-006516, 2019 WL 2247799, at *2, *14 (Cir. Ct. Balt. City Mar. 5, 2019) (reviewing the sufficiency of the custodian’s search in a case alleging only “Improper Denial of Access to Records”). In these cases, then, an inadequate search might be thought of as tantamount to a constructive denial of access to records.

And, in PIACB 23-05, at 3 (Nov. 23, 2022), we reasoned that it was “significant that the statute uses the words ‘denied inspection,’ and not language that is narrower, such as ‘improperly applied an exemption.’” We noted that “a custodian’s assertion that he or she does not possess records is, practically speaking, just as much a denial of access to those records as an assertion that a requester may not see them because the records are exempt from disclosure under the PIA.” *Id.* Thus, as we have with other complaints, we will treat the complainant’s allegation that the BPD conducted an inadequate search as a constructive denial of the PIA request.

Turning next to the allegation itself, we find that the BPD did not conduct an adequate search for records responsive to the PIA request. We agree with the BPD that the complainant’s PIA request was broad—it sought “all emails and communications,” over the span of a year, regarding a criminal case. While the number of responsive communications might not be too voluminous, the request essentially asked the BPD to search all of the communications held by an entire district and unit to find them. Thus, the BPD properly asked the complainant for additional information—i.e., the “sender and recipient names of the individuals” engaging in the communications. This is because, as the BPD explains in its response to the complaint, the BPD does not have the capacity to search *all* of the southwest district’s emails or *all* of the fraud unit’s emails. However, when the complainant responded asking the BPD to be more specific, the BPD did not advise the complainant of that fact or that, without additional names, the BPD would not be able to search for communications in the southwest district or fraud unit other than Officer Elkner’s. Instead, it conducted a more limited search of Officer Elkner’s emails

alone, seemingly disregarding that there were likely additional officers or employees with responsive communications.

We are mindful that the complainant did not necessarily fully engage in the “iterative process” either. He argues repeatedly that the BPD should have been able to discern additional names from the police report related to the case number identified in the PIA request, which, the complainant stresses, he provided to the BPD.⁵ But, based on the submissions, it appears that the complainant did not send that report to the BPD until March 24, 2024—well after the BPD had asked him for more information, and after the PIA response letter issued. Assuming the complainant was in possession of the police report when the BPD sent its email of February 26 asking for “the sender or recipient names of the individuals,” the complainant could have provided the names he now lists—“Cruz-Vega, Burch, and Bass”—at that time. Or, at the very least, he could have provided the BPD with the police report in response to its February request for more information.

However, given that the PIA must be interpreted to favor disclosure, § 4-103(b), we find that the onus was ultimately on the BPD to respond when the complainant asked that it be “more specific” about its request for additional information. The BPD should have explained the limitations on its capacity to search by keyword at that point, and not after a complaint was filed with our Board. *See Glass*, 453 Md. at 232 (noting that “[i]t is often true that a requestor is at a disadvantage in formulating a PIA request because the requestor does not know what records the agency keeps or how it keeps them,” and that an agency should therefore “provide some reasonable assistance to the requestor in refining the request for the records the requestor seeks”). As provisions such as § 4-103(b) and cases like *Glass* make clear, a custodian and requester do not have equivalent burdens under the

⁵ The complainant also suggests that, because the BPD was ultimately able to determine the relevant officer names for a similar PIA request, the BPD is now “lying” when it states that it was unable to do so here, when it was responding to this PIA request. We reject that argument. The BPD’s response to this complaint defends the search conducted in February and March of 2024, for this PIA request by this complainant. PIACB 24-82, the matter to which the complainant refers, was a complaint involving a different PIA request (notably, sent on the same day, February 11, 2024) for records related to the same criminal case identified in the complainant’s PIA request. Similar to its response here, the BPD’s response to that complaint (PIACB 24-82) indicated that, while processing the request, the BPD was “unable to identify a specific email custodian based upon [the PIA request].” Thus, *at the time it was conducting the searches for both requests*, it appears that BPD did not have the relevant officer names. In its response to PIACB 24-82, which was submitted to our Board on May 9, 2024, the BPD also indicated that “the BPD has *since* identified four officers involved with the CC# 231015740 and CC# 220407983.” Notably, the BPD’s email to this complainant asking for additional information was sent in February. Thus, we do not find any inconsistencies between the BPD’s responses to the two matters that might suggest that the BPD is being untruthful when it states that it believed it could not, without more information from the requesters, identify the relevant officers in February and March of this year.

PIA. When the iterative process breaks down through the fault of the custodian, as it did here, the custodian has failed in the duty to “allow a person or governmental unit to inspect any public record at any reasonable time,” § 4-201(a), with “the least cost and least delay to the person or governmental unit that requests the inspection,” § 4-103(b).

Though on balance we conclude that the BPD’s search was insufficient, we do not agree with the complainant’s assertions that the BPD is “knowingly and willingly lying and concealing records,” or otherwise engaging in deceitful or malicious practices. We are aware that there is a broader context surrounding this particular request, *see* PIACB 24-82, at 2 n.4 (May 22, 2024), and that those circumstances may explain, to some extent, the apparent lapses in communication that led to the insufficient search. However, a custodian’s duties to search for and provide disclosable records for inspection are clear, such circumstances notwithstanding. *See, e.g.*, § 4-203(c)(2) (“A custodian may not ignore an application to inspect public records on the ground that the application was intended for purposes of harassment.”).

Conclusion

Based on the information before us, we find that the BPD conducted an insufficient search for records responsive to the complainant’s PIA request. We therefore direct the BPD to conduct a second search, this time searching the email accounts of the officers identified by the complainant. The BPD must disclose any non-exempt responsive records to the complainant in accordance with the timelines provided in § 4-203 of the PIA.

Public Information Act Compliance Board*

Sareesh Rawat, Chair
Samuel G. Encarnacion
Debra Lynn Gardner
Nivek M. Johnson

* Board Member Quinton M. Herbert did not participate in the deliberation, preparation, or issuing of this decision.