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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 24-112

October 3, 2024

Alcohol, Tobacco, and Cannabis Commission, Custodian
Elsie Bateman, Complainant

Complainant Elsie Bateman sought, under Maryland's Public Information Act ("PIA"), records from the Alcohol, Tobacco, and Cannabis Commission ("ATCC"), her former employer. After initially failing to respond to the request within the statutory timelines, the ATCC produced certain records to the complainant, although a specific record the complainant desired was not among them. The complainant alleges that the ATCC has denied inspection of this record, which she characterizes as "fictitious written discipline." In response, the ATCC first asks that we dismiss the complaint for technical reasons. In addition, the ATCC maintains that it searched thoroughly for the record, but ultimately did not find it until after this complaint was filed. The ATCC maintains that it did not violate the PIA. As detailed below, we find that the ATCC has not improperly denied inspection of records and thus has not violated the PIA.

Background

We take the following facts from the submissions, including background information the complainant provides in her complaint and information later provided by ATCC staff. In February of this year, the complainant sent a PIA request to the ATCC asking for:

Any and all handwritten and/or electronic communications, to include any and all note, cellular phone text messages (in existence or deleted) and all emails to and from the following individuals pertaining to or about ELSIE BATEMAN from the dates of July 1, 2023 to February 28, 2024.

1. Bethe.richard@maryland.gov

The ATCC sent the complainant a 10-day letter¹ on March 11, 2024, but ultimately did not produce records within the 30-day time limitation in § 4-203.² Thus, the complainant contacted the Public Access Ombudsman for dispute resolution assistance.³ While the matter was pending with the Ombudsman, the ATCC produced responsive records. The complainant, however, believed that the ATCC had withheld a certain record. Thus, she filed this complaint with our Board.

The complainant states that, in August of last year, she was “ordered to attend a ‘mandatory meeting’” so that she could be served with “a written reprimand/counseling document to sign for insubordination.” The complainant asserts that this document was “completely fabricated and untrue,” and states that she was “taken by surprise with the extreme efforts being taken to accuse [her] of something so blatantly false.” According to the complainant, she refused to sign the document, so an employee named Debbie Atkins took the form and wrote “refused to sign.” The complainant states that she was never provided a copy of the “fictitious written discipline,” either at the time or in response to her PIA request. The complainant alleges that the ATCC is “purposefully and deliberately” withholding this record.⁴

In its response, the ATCC argues that the complaint should be dismissed for technical reasons. First, the ATCC contends that, because the complaint was transmitted

¹ See Md. Code Ann., Gen. Provisions § 4-203(b)(2), which requires a custodian to notify a requester within ten working days if “the custodian reasonably believes that it will take more than 10 working days to produce the public record.” The custodian must provide certain information in that letter, including the reason for the delay and the range of any fees that may be charged for responding. *Id.*

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

³ See § 4-1B-04(a) (requiring the Ombudsman to “make reasonable attempts to resolve disputes between applicants and custodians relating to requests for public records”). Before filing a complaint with our Board, an applicant or custodian must attempt to resolve the dispute through the Ombudsman and receive a final determination that the dispute was not resolved. § 4-1A-05(a).

⁴ The complaint also indicates that the matter concerns a “failure to respond to a request for a public record within a certain statutory time limit” and “[s]poilation of evidence.” We do not review or resolve these allegations. As to the former, the Ombudsman’s final determination indicates that the dispute was resolved with the ATCC’s final response and production. We are empowered to review only allegations related to disputes that are “not resolved” after mediation through the Ombudsman. See § 4-1A-05(a). We take the complainant’s reference to “spoilation of evidence” as an allegation that the ATCC either purposefully or negligently lost or destroyed records that it should have. We lack authority to address such allegations. See PIACB 24-99, at 4 n.4 (June 14, 2024) (explaining that our Board is not empowered to enforce record retention laws).

via an email address associated with Ronald Bateman, whom the ATCC believes to be the complainant's husband, the complainant has not complied with COMAR 14.02.02.01A, our regulation governing the submission of complaints. Second, the ATCC claims that the complaint is not signed, as required by our regulations and by § 4-1A-05(b)(3). Third, the ATCC argues that, because the complainant did not attach her PIA request or the ATCC's response, the complaint does not "substantiate [the] allegations" in a way that "would enable the ATCC to respond."

The ATCC also addresses the merits of the complaint. Noting that the ATCC has "fully responded" to "no fewer than three" PIA requests from the complainant since 2023, the ATCC indicates that the record at issue is a "written document allegedly prepared in connection with an August 7, 2023 work-related meeting" between the complainant and two of her former supervisors at the ATCC. The ATCC advises that the complainant refers to the record as the "counseling memo." The ATCC asserts that it has "employed any and all reasonably available search methods" to locate the counseling memo, including "hours of detailed record searches by staff as well as contact with retired ATCC staff members in an attempt to identify alternate search terms or record locations." In its response, counsel for the ATCC maintains that the ATCC has been unable to locate the record and thus has determined that the record is "no longer in [the ATCC's] possession and cannot therefore be disclosed."

The complainant, in reply, denies that there are any defects in her complaint. Pointing out that the PIA permits a complaint to be filed by a "designated representative," the complainant provides examples of emails in which she stated that her husband, Ronald Bateman, was acting as her representative. The complainant also maintains that her complaint is signed for purposes of the PIA and our regulations, as it included, at the end of the complaint, the complainant's name and telephone number. The complainant also notes that she and the ATCC have been exchanging communications over a period of months, and that none of those communications contain a handwritten signature. Regarding the complainant's failure to attach her PIA request or the ATCC's response to her complaint, the complainant argues that COMAR regulations should not be interpreted to "create insurmountable procedural hurdles," but rather should be construed consistently with "the remedial intent of the [PIA] and related regulations, which aim to promote access to information rather than obstruct it through technicalities."

Addressing the substantive issues, the complainant reiterates that the ATCC has "still failed to produce the document that proves there was a written reprisal which was the fabricated and unjustified written reprimand notice." The complainant asserts that a "litigation hold notice" was sent to the ATCC in February of this year. The complainant also states that, on August 1, after this complaint was filed, the ATCC produced a "handwritten yellow piece of paper in the eleventh hour." The paper contained a date and time—"8/8/23" and "1:29 p.m."—the names "Elsie Debbie Lisa," and notations "refused to sign" and "no questions or suggestions." According to the complainant, the ATCC did

not explain “who produced it, who authored it, where it was located, when it was discovered, who else has copies of this document and why it was not produced in the time required by law.”⁵ The complainant asks that she be “afforded all just relief entitled to [her] by law.”

Analysis

The PIA charges us with reviewing and resolving complaints that allege certain violations of its provisions, including that a custodian improperly denied inspection of a public record. § 4-1A-04(a)(1)(i). We have interpreted this provision to include allegations that a custodian conducted an insufficient search that failed to locate all responsive records. *See, e.g.*, PIACB 24-08 (Sept. 28, 2023). If, after review of the submissions, we find that the alleged violation occurred, we must issue a written decision and order a remedy as provided in the PIA. § 4-1A-04(a)(2) and (3). When we conclude that a custodian denied inspection of a public record in violation of the PIA, we must “order the custodian to . . . produce the public record for inspection.” § 4-1A-04(a)(3)(i). In instances of flawed and inadequate searches, we may order the custodian to conduct another search and “produce any non-exempt responsive records to the complainant.” PIACB 24-08, at 6 (Sept. 28, 2023).

Section 4-201(a) generally requires a custodian to allow inspection of non-exempt public records “at any reasonable time.” Thus, when a custodian receives a PIA request, that custodian 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)). Our State’s Supreme Court has explained that the “reasonableness” of an agency’s search effort must be “measured prospectively by how the agency designed the effort to find responsive records, not retrospectively by its success in locating every responsive record.” *Id.*

We could not resolve this complaint based on the submissions alone. Therefore, we asked the ATCC to provide additional information about its search efforts, including where staff looked for records, which email inboxes were searched and what search terms were

⁵ The complainant also argues that the notation “refused to sign” on the document produced suggests the existence of the “written reprimand” she seeks. The complainant contends that “the failure to produce the original written reprimand and the unexplained related document, should warrant an inference that the missing document would have been **unfavorable** to the ATCC’s position,” and that “the missing reprimand was in fact a reprisal.” (emphasis original). We note that we are not authorized to make substantive determinations about nature of the disputed document at issue here—i.e., whether or not it was a “written reprimand”—or its implications for the ATCC’s position as to any issues not related to the PIA.

used, and whether non-electronic records were searched and how. *See* § 4-1A-06(b)(2). We also asked the ATCC to advise as to what records were produced to the complainant.⁶

The ATCC responded by providing “production notes” from Jeffrey Hann, who is the ATCC’s Assistant Director of the Legal and Legislative Division, and who is “charged with coordinating [the PIA] searches.” According to the information provided by Mr. Hann on behalf of the ATCC, the search for responsive records “was conducted primarily using an electronic records search of the google user account of *Bethe.richard@maryland.gov*,” and “included both the gmail email inbox and the google drive files for Ms. Richard’s username.” Maryland’s Department of Information Technology (“DoIT”) facilitated the search using specific keywords and date parameters.⁷ The ATCC advised that the search returned 203 email messages and one Excel workbook from the Google Drive files. Ms. Richard apparently reported that she had no text messages or other notes of communication “between herself and others related to Elsie Bateman.”

According to the ATCC, the responsive email messages were put into an Adobe PDF portfolio, and “[e]mail by email line redactions were made to remove non-responsive records . . . and line references to HR information for staff other than Elsie Bateman.” The ATCC states that it initially emailed the complainant an “encrypted multi-part zip archive” that contained the PDF portfolio file and a folder of email attachments, but that the complainant “had difficulty unzipping this zip archive.” Ultimately, the ATCC “created a single large password protected PDF file of all of the various digital documents that could be scaled down enough to fit as an email attachment,” and emailed that attachment to the complainant.

After the ATCC sent the records to the complainant, the complainant sent another PIA request. The ATCC determined that the complainant was still seeking the “counseling memo.” Thus, the ATCC asked Ms. Richard and other staff to search their files specifically for that document. The ATCC also contacted the retired Assistant Director to ask if she knew where that document might be. According to the ATCC, Ms. Richard was able to find notes saved by staff, including a handwritten log note and leave balance forms, but the specific memo was not located at that point in time.

⁶ We note that the complainant objected to our additional questions, indicating her belief that the Comptroller’s response provided sufficient detail about its search efforts.

⁷ To the extent that the ATCC’s first search appears to have focused solely on electronic records, we note that this search may have been inadequate. The complainant’s PIA request clearly asked for handwritten communications, in addition to electronic communications. Thus, by conducting the search “primarily using an electronic records search,”—i.e., one that was unlikely to uncover responsive handwritten records—the ATCC may have failed to perform a search that was “focused on where responsive records are likely to be found.” *Glass*, 453 Md. at 232.

The ATCC provided four attachments with its response to our additional questions. Three were screenshots of Ms. Richard's email inbox. The fourth attachment is a scanned PDF of a "Counseling Memorandum" dated August 8, 2023, which is consistent with the complainant's description of the record that she alleges was improperly withheld. The ATCC indicated, in its response to our questions, that "the memo has now been located," and that it was found "among a set of unrelated documents that had been stored in a locked cabinet." The ATCC explained that Ms. Richard did not "realize these employee related documents could be in that cabinet, and only discovered the single page memo when clearing out the cabinet to use for another purpose."⁸

With this additional information, we turn to the complainant's allegation that the ATCC violated the PIA by improperly withholding the counseling memo from inspection. First, we reject the ATCC's argument that the complaint suffers fatal technical errors. Based on the signature and the substantive content of the complaint, which was transmitted in the body of an email, it is clear that the complaint is from Elsie Bateman, not her husband. And, even if it was, the PIA specifies that "[a]ny applicant, the *applicant's designated representative*, or a custodian may file a written complaint" if certain prerequisites are met. § 4-1A-05(a) (emphasis added). The complainant has provided evidence that she has authorized her husband to act as a "designated representative" for purposes of her PIA request. We also reject the ATCC's contention that the complaint is not signed. The email concludes with "Respectfully, Elsie M. Bateman" and includes a phone number, which the complainant has stated is hers. We understand that § 4-1A-05(b)(3) requires that a complaint "be signed by the complainant." But, as we have stated before, "[t]he apparent purpose of the requirement is to prevent anonymous complaints." PIACB 24-06, at 5 (Sept. 6, 2023). This complainant is not anonymous. As we have before, *see id.*, we find that the typed signature in the body of this emailed complaint satisfies § 4-1A-05(b)(3)'s signature requirement.

Finally, with regard to the complainant's failure to attach the PIA request and the ATCC's response, we find that such failure does not warrant dismissal of the complaint. Though it is certainly helpful to have such documents, we do not think that their absence has unfairly hampered the ATCC's ability to respond to this complaint or our efforts to resolve it. We note that the Ombudsman's final determination, which the complainant does attach, quotes the PIA request verbatim. Given the PIA's "remedial purpose," our State's Supreme Court has instructed that its provisions be construed "liberally" to effectuate its purpose of providing access to public records. *See Kirwan v. The Diamondback*, 352 Md. 74, 81 (1998). This means we must not construe sections such as § 4-1A-05(b) in a manner

⁸ After receiving the additional information provided by the ATCC, the complainant advised our Board that she is "appalled" and suggested that the response was "no more than an attempt to influence [our] decision." The complainant also contests the authenticity of the counseling memo, stating that "[t]his is not the memo that was read and handed to [her] on August 8, 2023."

that would unduly prevent us from carrying out our duty to resolve complaints regarding access to public records.

We move next to the substantive allegation. Based on this record, we cannot find that the ATCC's search efforts led to a constructive denial or otherwise violated the PIA. To start, the language of a PIA request is relevant to the evaluation of a custodian's search for responsive records. *See Glass*, 453 Md. at 233. The complainant asked for communications that pertained to her and that were sent "to and from" the email account of Bethe Richard. The ATCC produced responsive records, but not (at that time) the counseling memo that the complainant was most interested in obtaining. According to the complainant's description of the "mandatory meeting," Ms. Richard was not present at the meeting where the complainant was presented with the counseling memo. We understand that Ms. Richard is the ATCC's current Human Resources Officer, and thus one might expect her to have in her files records related to employee discipline. However, given that Ms. Richard was not at that meeting, it is not entirely surprising that she did not immediately locate the counseling memo in her email archives or other files. Further, we note that "[a] search may be reasonable and adequate without being perfect," and that a custodian's efforts should not be measured by their "success in locating every responsive record." *Id.* at 232.

The information we have, including the additional information provided by the ATCC, also demonstrates that the ATCC continued to search for the counseling memo after it became clear that that was the record the complainant most wanted to see. Specifically, the ATCC asked Ms. Richard and other staff to search "all files" for the counseling memo. The ATCC's additional efforts also included contacting the former Human Resources Officer—whom the complainant states *was* at the mandatory meeting—to ask if she knew where the counseling memo was located. Though these searches apparently yielded the handwritten note the complainant attaches to her reply, they did not turn up the counseling memo. According to the ATCC, the disputed memo was finally located after Ms. Richard found it "among a set of unrelated documents that had been stored in a locked cabinet" as she was "clearing out the cabinet to use for another purpose." While the discovery of the counseling memo may appear expedient to some degree, and perhaps suggests a lapse in the ATCC's records management practices, we do not think it is indicative of an intent to "purposefully and deliberately" withhold that record from inspection.⁹ The ATCC did not constructively deny the complainant's PIA request.

⁹ We understand that the complainant challenges the authenticity of the counseling memo produced to her through the ATCC's response to our questions. Our Board is not designed to resolve such disputes.

Conclusion

Based on the submissions, including the additional information that the ATCC provided about its search efforts, we find that the ATCC has not violated the PIA. The ATCC conducted several searches that were reasonably designed to locate responsive records, especially as it became apparent that the complainant was interested in one record in particular—i.e., the counseling memo. Though the counseling memo was not located quickly or without continued requests from the complainant, the record here does not suggest that the ATCC knew or even suspected where the record was but deliberately failed to find it.

Public Information Act Compliance Board*

Sareesh Rawat, Chair
Samuel G. Encarnacion
Debra Lynn Gardner
Quinton M. Herbert

* For the reasons outlined briefly below, Board member Nivek M. Johnson does not join in this decision in full.

While I agree with the majority of the Board that the ATCC has not violated the PIA, I disagree with the Board's suggestion, in footnote seven, that the ATCC's first search may have been insufficient.