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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 25-14
October 31, 2024

Department of Public Safety and Correctional Services, Custodian
Madeleine O'Neill, Complainant

Complainant Madeleine O'Neill sought, under Maryland's Public Information Act ("PIA"), certain records related to prison suicides from the Department of Public Safety and Correctional Services ("DPSCS"). After the complainant pursued dispute resolution assistance through the Public Access Ombudsman, DPSCS charged a \$1,840 estimated fee for production of responsive records, demanding prepayment of \$1,500. The complainant challenges that fee, as well as DPSCS's failure to respond to her PIA request within the PIA's time limitations. After review of the submissions, we find that DPSCS has failed to demonstrate that this estimated fee is reasonable under the PIA. We also find that DPSCS violated the timing limitation in § 4-203(a)¹ and, based on the circumstances described in the record, order that DPSCS waive any fee it may otherwise be entitled to charge. We explain in more detail below.

Background

On February 12, 2024, the complainant sent a PIA request to DPSCS asking for a copy of a "corrective action plan" that DPSCS implemented in 2014 to address "suicide risk factors" among prisoners and certain emails exchanged with specific DPSCS staff between January 2014 and the end of July 2016 that were related to prisoner suicides. The complainant included specific search terms in her request, e.g., "single-celling, single cell policies & any related terms/phrases in connection with suicide." DPSCS contacted the complainant shortly thereafter and explained that its system had "limitations on complex search terms that make up more than one word," and asked that she "[p]lease provide more singular type words" that DPSCS could use to search. The complainant responded by asking DPSCS to "search for 'hanging' and variations on the word, such as 'hanged,' as well as 'bedsheet,' 'sheet' and 'bedpost.'" The complainant also advised that the term "single-celling" was important to her PIA request and asked DPSCS to "figure something out," noting that DPSCS was "probably better equipped" to "determine the best search term . . . since you work in the agency." DPSCS's PIA coordinator responded that he would "work with our team to figure out the best way to get [the] PIA request resolved."

¹ Statutory citations are to the General Provisions Article of Maryland's Annotated Code unless otherwise indicated.

On February 28, 2024, DPSCS sent the complainant an email in which it explained that the IT team had “run the search of the keywords” and returned 26,414 matches, which would yield a reproduction fee of \$13,207. DPSCS asked the complainant how she would like to proceed. In response, the complainant asked if it would be possible to “limit the search to just emails that contain the word ‘suicide’ to keep the cost lower.” The complainant advised that she was “not abandoning the rest of this MPIA request,” but rather “just suggesting a limited version so that [she could] make more tailored requests based on what comes back.” After searching only the term “suicide,” DPSCS reported that it found 8,617 results, thus lowering the fee to “around \$4,308.50.”

At that point, the complainant asked DPSCS to “clarify why there is a copy fee when [she was] requesting digital files.” DPSCS responded that the reason for the fee was that “the PIA manual specifies that fees can be charged for search, preparation, or reproduction of a record,” and specifically referenced Chapter 7 of the PIA Manual. The complainant then asked DPSCS to “put this MPIA request on hold” so that she could “discuss payment option with [her] editors.” DPSCS advised that it would put the request on hold until March 15, 2024.

On March 7, 2024, the complainant asked whether DPSCS could “cross reference the search terms to limit the number of responsive emails.” As example, the complainant suggested that DPSCS “take the emails that came back from the search term ‘suicide’ and then search for ‘hanged’ or ‘bedsheet’ within that responsive group of emails.” DPSCS replied that it was not possible to do that kind of “compound search.” The complainant then asked whether DPSCS could do “AND” searches, e.g., “‘suicide’ AND ‘bedpost.’” DPSCS replied that it was not. The complainant asked DPSCS to “clarify what search parameters **are** possible,” asking if it was “really the case that DPSCS can only search for individual words in emails.” Although recognizing that this seemed to be what DPSCS was telling her, the complainant expressed disbelief that this was “actually how the technology works.” DPSCS responded that it was “looking into this” and would “get back to [her] soon.”

On April 1, 2024, the complainant sent an email to DPSCS to ask if she could “submit a slightly amended version” of her PIA request, “in an effort to be more specific in the search.” After DPSCS responded that she could, the complainant sent, on April 8, 2024, a revised PIA request for “[e]mails for the date range 1/1/2015 – 12/31/2016 to or from” two specific DPSCS staff, “along with any other relevant medical/mental health/administration staff, that contain the term ‘epidemic.’” On April 22, 2024, DPSCS sent the complainant an email to inform her that DPSCS was “experiencing significant delays in fulfilling [her] request due to ongoing efforts to finalize a contract with a specialized company.” DPSCS explained that the company would “assist [DPSCS] in extracting the emails relevant to [her] request.” DPSCS advised that it was “currently procuring the necessary software to facilitate the completion of [her] request,” and that it hoped to have the response complete by the end of May.

On May 30, 2024, the complainant contacted DPSCS to check on the status of her PIA request, noting that DPSCS had previously indicated that it would be complete by the end of May. It does not appear that DPSCS responded to this email. On June 3, 2024, the complainant sent another email to DPSCS asking it to advise as to the status of her request. It does not appear that DPSCS responded to this email, either.

The complainant contacted the Public Access Ombudsman on June 3, 2024, for dispute resolution assistance.² While the matter was with the Ombudsman, DPSCS issued a fee letter containing an estimated fee of \$1,840. DPSCS demanded prepayment of \$1,500 for work to begin. At the end of August, the Ombudsman issued a final determination stating that the disputes addressed in mediation were partially resolved. The final determination indicated that the “dispute regarding the agency’s failure to issue a final response and produce the requested records was partially resolved by the agency’s fee estimate,” and that the dispute regarding the fee was not resolved.

The complainant then filed this complaint with our Board. The complainant prefaces her complaint by noting that she had to “dramatically narrow [her] request” in the face of DPSCS’s repeated claims that it “could not perform basic search functions for employee emails.” The complainant also contends that DPSCS failed to communicate throughout the process “even as the MPIA response deadline came and went.” The complainant attaches DPSCS’s fee letter, which she states she only received through the Ombudsman’s office, and not from DPSCS. The complainant argues that the fees are “unreasonable given the extreme delay in DPSCS’s responses,” stressing that almost seven months have passed since her initial PIA request and that DPSCS has provided “no responsive documents or even a formal response.” Contending that there is “significant public interest in the information requested,” the complainant states that “the fee requested is too expensive to be feasible for a news organization.”

We forwarded the complaint to DPSCS by email on September 4, 2024, and requested a response to the complaint by October 4, 2024. *See* § 4-1A-06(b)(1) (“The custodian . . . shall file a written response to the complaint within 30 calendar days after receiving the complaint.”). When DPSCS failed to respond by the deadline, we sent a follow-up email advising that, if DPSCS did not respond to the complaint by October 11, 2024, we would issue a decision based on the information submitted by the complainant.³ *See* § 4-1A-06(c) (requiring, if no written response to a complaint is received, that we “decide the case on the facts before the Board”).

² The Public Access Ombudsman is charged with making “reasonable attempts to resolve disputes between applicants and custodians relating to requests for public records.” § 4-1B-04(a). Before filing a complaint with our Board, a complainant must attempt to resolve the dispute through the Ombudsman and receive a final determination that the dispute was not resolved. § 4-1A-05(a).

³ We note that the complainant objected to any extension of time for DPSCS to respond to the complaint.

On October 9, 2024, we received an email from DPSCS in which it stated that it was “[r]e sharing [its] reasoning for remaining firm in [the] request for pre-payment.”⁴ In that email, DPSCS advises that “the sensitive nature of these correspondences contain protected personal information (PPI) and medical records which require a legal eye to review and redact.” DPSCS asserts that its IT department “can identify the requested emails by keyword search,” but that the Attorney General’s office “uses a vendor, who charges by the hour, for this type of work”—presumably meaning legal review. DPSCS represents that “[t]hat office simply does not have the people power to reasonably provide keyword search, eDiscovery review for MPIA requests of this nature, without exception.” DPSCS states that it has “received communication back from [the vendor],” and that prepayment of \$1,500 is required for that vendor to “begin reviewing/redacting those emails.”

In reply, the complainant makes four points. First, she stresses that she has still not received a final response from DPSCS, or even formal notice that DPSCS was asking her to prepay the estimated fee. Second, the complainant states that DPSCS has “a long and well documented history of failing to respond to MPIA requests.” The complainant notes regarding a previous complaint she filed with our Board, that we ultimately ordered that DPSCS waive fees for responding. According to the complainant, she pointed this out to DPSCS, but DPSCS still refused to waive this fee. Third, the complainant advises that she is now working as a freelance journalist, and that she has “absolutely no ability to pay any fee for these records,” arguing that “[r]equesting \$1,500 from a member of the public for 4 hours of legal review is excessive on its face.” Finally, the complainant asks our Board to order that DPSCS provide the records as soon as possible, emphasizing that it has been eight months since DPSCS received her original PIA request.

Analysis

We are authorized to resolve complaints that allege certain violations of the PIA, including that a custodian failed to respond to a PIA request within certain statutory timeframes. *See* § 4-1A-04(a)(1)(iii). If we conclude that the alleged violation of the PIA has occurred, we must issue a written decision and order a remedy as provided in the PIA. § 4-1A-04(a)(2) and (3). For example, when we determine that a custodian has failed to respond to a PIA request within the statutory time limitations, we must order the custodian to “promptly respond” and may exercise discretion to order the custodian to waive any fees associated with responding. § 4-1A-04(a)(3)(iii).

A custodian must grant or deny a PIA request “promptly,” but no longer than thirty days after receipt of the request. § 4-203(a)(1). If the custodian “reasonably believes that it will take more than 10 working days to produce the public record” he or she must state

⁴ We are not entirely sure what DPSCS means by “re sharing.” We have no record of DPSCS sharing the reasoning behind its fee with this Board prior to its October 9, 2024, email.

so in writing within ten working days of receiving the request. § 4-203(b)(2). This is commonly referred to as a “ten-day letter.” The custodian must also provide certain information to the requester in a ten-day letter, including the reason for the delay and “an estimate of the range of fees that may be charged to comply with the request.” *Id.* The time limitations provided in § 4-203 may, with the requester’s consent, “be extended for not more than 30 days.” § 4-203(d)(1). Under § 4-203(b)(3), a custodian’s failure to “produce the public record in accordance with [subsection (b)] constitutes a denial of an application that may not be considered the result of a bona fide dispute,” unless the custodian has sent a ten-day letter, if required, and “is working with the [requester] in good faith.”

Ordinarily, a custodian must allow inspection of public records “with the least cost and least delay.” § 4-103(b). At the same time, the PIA allows a custodian to charge a “reasonable fee” for searching for, preparing, and reproducing public records in response to a PIA request. *See* § 4-206. The PIA defines a “reasonable fee” as one that bears a “reasonable relationship to the recovery of actual costs incurred by a governmental unit” in responding to a PIA request. § 4-206(a)(3). A custodian may not, however, “charge a fee for the first 2 hours that are needed to search for a public record and prepare it for inspection.” § 4-206(c). In order to provide responsive records “with the least cost,” § 4-103(b), a custodian should “utilize the lowest-paid employee available and capable of producing the response,” PIACB 21-16, at 6 (July 30, 2021); *see, e.g.*, PIACB 24-23, at 13-14 (Feb. 14, 2024) (concluding that it was not reasonable to charge for an attorney to prepare an entire response when the agency had paralegals on staff).

Sometimes it may be necessary for an agency to use an outside vendor to assist with certain aspects of preparing responses to PIA requests. *See, e.g.*, PIACB 23-25, at 5 (July 24, 2023) (concluding that use of a contract attorney to review responsive records was reasonable given the high volume of PIA requests that the agency received and the agency’s staffing constraints, but also noting that the contract attorney’s hourly rate was close to the hourly rates of in-house staff); PIACB 20-04, at 2 (Nov. 25, 2019) (finding it reasonable for an agency to use outside counsel to review responsive records when counsel was already familiar with those records through prior representation of the agency). Those vendor costs may qualify as “actual costs” for purposes of calculating the fee under § 4-206. However, vendor costs should only be included when the agency can “substantiate the hourly rate in a way that shows a clear connection between the fee charged and the agency’s actual cost.” PIACB 17-18, at 4 (Aug. 31, 2017). Further, “[t]o the extent that the agency pays a flat rate to the vendor regardless of the work performed,” it may well be that the vendor fees do not “have a ‘reasonable relationship to the recovery of actual costs incurred’ by the agency and should not be charged at all.” *Id.* And, when an agency “has the capability and resources to perform response-related work ‘in house’ for less expense than engaging a contractor,” that agency should not charge a requester for the contractor’s “costlier fee.” PIACB 20-04, at 2 (Nov. 25, 2019); *see also* § 4-103(b) (custodian normally must allow inspection of public records with “the least cost and least delay”).

After review of the submissions, we find that DPSCS has failed to show that the \$1,840 estimated fee is justified under the PIA. DPSCS's fee estimate letter, which the complainant attaches with her complaint, indicates that a vendor will spend an estimated four hours working on the response at an hourly rate of \$460. We have several concerns about this letter. We recognize that we have said in the past that it may be appropriate for an agency to pass on the cost of an outside vendor to a PIA requester when those costs can be directly attributed to work on a specific PIA request. PIACB 17-18, at 4 (Aug. 31, 2017). DPSCS states in its response (and without any other evidence) that the Attorney General's office "uses a vendor, who charges by the hour," presumably in an attempt to attribute the use of the vendor directly to the complainant's PIA request. But, we have also said that such costs are unlikely to be reasonable when an agency can perform the work in-house for less cost. PIACB 20-04, at 2 (Nov. 25, 2019). The only information we have regarding why use of *this vendor*—who apparently charges \$460 *per hour*—is necessary is DPSCS's bald assertion that the Attorney General's office "simply does not have the people power to reasonably provide keyword search, eDiscovery review for MPIA requests of this nature, without exception."

Thus, based on the record here, we find that DPSCS has failed to demonstrate that the \$1,840 estimated fee is reasonable as the PIA defines the term. DPSCS has not provided any information about how many potentially responsive records there are. DPSCS has not explained in any detail whatsoever the limitations it faces that make the use of a contractor necessary here, nor has it explained who will conduct the review⁵ or why the hourly rate is so high.⁶ Nor has DPSCS provided any information as to what its four-hour time estimate is based upon. In short, DPSCS has provided no evidence to substantiate its apparent assertion that the vendor's \$1,840 estimated fee is "reasonably related" to the "actual costs" that DPSCS anticipates it will incur. § 4-206(a)(3).

The submissions demonstrate that the complainant went to great lengths to accommodate what appear to be significant limitations on DPSCS's ability to search email records. DPSCS told the complainant that it could only search using "singular type words." Thus, the complainant provided one word—"epidemic"—and narrowed the relevant timeframe by six months. The language of the narrowed PIA request seems to fall within scope of what DPSCS said it could do, thus it is unclear at best why an outside vendor is

⁵ Based on the language of the complainant's PIA request, which asked for communications with "relevant medical/mental health/administration staff," we credit DPSCS's assertion that the responsive records will need careful review and possibly redaction.

⁶ We note that the Baltimore Police Department has apparently also used an "e-discovery vendor" at times, but that the contract attorneys from their vendor charge as little as \$43 per hour. See PIACB 23-25, at 3 (July 24, 2024).

necessary. Even assuming that the outside vendor would provide legal review only,⁷ as stated above, DPSCS not provided any specific or particularized explanation for why, e.g., counsel or other legal professional—e.g., a paralegal—assigned to represent DPSCS could not spend four hours reviewing the responsive records. See § 4-103(b) (ordinarily inspection of public records must be provided with the “least cost and least delay”). DPSCS’s representation that, “without exception,” the Attorney General’s office “simply does not have the people power,” without any further detail or evidence to support it is wholly insufficient.

Further, and broadly speaking, it cannot be that an agency can simply contract out all of its PIA work to a vendor that charges a high hourly rate—one that is ten times the amount many government administrative professionals are paid—and simply pass that cost along to the requester. Such a scenario would effectively gut § 4-206(c)’s requirement that an agency provide the first two hours of labor for free, assuming our previous suggestion that that provision does not apply to vendor fees holds. See PIACB 17-07, at 3 (Feb. 28, 2017).⁸ And even if DPSCS did not charge for the first two hours, it would effectively mean that any PIA request that took longer than two hours to fulfill could cost in the neighborhood of \$460 per hour. It goes without saying that, at such a price tag, many would be cut off from access to public records, thus undermining the entire purpose of the PIA that people have “access to information about the affairs of government and the official acts of public officials and employees.” § 4-103(a).

We also find, based on this record and the Ombudsman’s final determination that the dispute regarding the timeliness of DPSCS’s response was “partially resolved,” that DPSCS violated § 4-203(a) of the PIA by failing to “grant or deny” the complainant’s PIA

⁷ In this regard, we note DPSCS’s representation, in its April 22, 2024, email to the complainant, that it was “experiencing significant delays” because of DPSCS’s “efforts to finalize a contract with a specialized company” to “assist us in extracting the emails relevant to your request.”

⁸ Though it is not necessary to our decision here, we take this opportunity to state that we would likely find that DPSCS must apply § 4-206(c) to the estimated fee here. This of course does not mean that the *vendor* must absorb the cost, but rather that DPSCS, and not the complainant, would be required to foot the bill for the first two hours needed to “prepare” the records for inspection. § 4-206(c). We note that, in our 2017 decision, the complainant provided information that the private vendor “likely maintained a database from which the information could be extracted with much less effort and cost than the method proposed by the County.” PIACB 17-07, at 1 (Feb. 28, 2017). Thus, the use of a vendor was potentially *cost saving* in the first instance. We also said that we did not accept the “proposition that the PIA requires outside contractors to forego their contracted-for profit when assisting in the production of records or government units to subsidize that cost.” *Id.* at 3. However, in our view, the PIA could require the custodian, and not the requester, to pay for the first two hours of the vendor’s work, especially in situations where the vendor charges by the hour and the custodian has not expended time searching for and preparing the records.

request “promptly, but not more than 30 days after” DPSCS received the request. We acknowledge that, after DPSCS first received the complainant’s PIA request in February, it appeared to engage in an iterative process with the complainant, as evidenced by the communications they exchanged regarding DPSCS’s search capabilities—although it was largely the complainant who did the work of probing DPSCS’s search limitations and suggesting alternative approaches. However, after the complainant sent her amended (and significantly narrowed) PIA request, on April 8, 2024, it appears that DPSCS’s sole communication to her was its April 22, 2024, email that production of records would be “significantly delay[ed],” and that it expected the response to be complete by “the end of May.” Thus, on June 3, 2024, when the complainant contacted DPSCS for a status update, fifty-six days had already elapsed since the complainant sent her amended request—and this obviously does not account for the fact that she submitted her original PIA request in February.

We are mindful that we do not have jurisdiction to review and resolve PIA disputes that are resolved through mediation with the Ombudsman. § 4-1A-05(a). However, in our view, the fee letter that DPSCS provided as a result of mediation was not a “grant or denial” of the complainant’s PIA request, especially not in light of the lapse in communication following her amended request. We suspect that this might be why the Ombudsman considered the timeliness dispute only “partially resolved.” We also observe that the basis stated for the fee in the letter, quoting \$460 per hour, was wildly inconsistent with the bases for the previous fee estimates DPSCS provided, which appeared to account only for reproduction costs. To us, this suggests that the fee issue is not what has prevented DPSCS from timely responding and producing records. Indeed, on February 12, 2024, DPSCS advised that the search returned “26,414 matches,” and that “[w]ith the \$.50 copy fee that DPSCS charges, that would total around \$13,207.” And, on March 6, 2024, DPSCS told the complainant that a narrowed search “came back with 8,617 results,” and that “[w]ith the \$.50 copy fee that DPSCS charges, that would total around \$4,308.50.” When the complainant stressed that she sought digital copies and asked why she was being charged reproduction fees, DPSCS only stated that “the PIA manual specifies that fees can be charged for search, preparation, or reproduction of a record”—notwithstanding the fact that DPSCS’s estimates appeared to be based solely on reproduction charges and that, like in its response to this complaint, DPSCS provided no detailed information about its anticipated search and preparation costs or ever responded directly to the complainant’s inquiry regarding reproduction costs in the context of her request for digital records.

These circumstances, coupled with the fact that DPSCS sent a late response to this complaint only after we followed up, make it hard to escape the sense that DPSCS simply does not take the complainant’s PIA request seriously. Thus, for all of these reasons, in addition to ordering DPSCS to “promptly” respond to the complainant’s PIA request, we

exercise our discretion under § 4-1A-04(a)(3)(iii)(2) and order that DPSCS waive any fee it may otherwise be entitled to charge for that response.⁹

Conclusion

Based on the submissions, we find that DPSCS has failed to show that its \$1,840 estimated fee is reasonable under the PIA. We also find that DPSCS violated § 4-203(a) of the PIA by failing to grant or deny the complainant's PIA request promptly but not more than thirty days after receiving the request. We thus direct DPSCS to respond to the complainant's request promptly, but no later than within three business days of receipt of this decision and order. For the reasons discussed above, we also order that DPSCS waive any fee it may otherwise be entitled to charge.

Public Information Act Compliance Board

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

⁹ Because we order waiver of the fee and DPSCS has not provided sufficient information from which we could do so, we do not delve further into the proper calculation of what would constitute a reasonable fee in this case. See § 4-1A-04(a)(3)(ii) (ordinarily requiring the Board to “reduce the fee to an amount determined by the Board to be reasonable”).