

Highlights From The PIA Compliance Board's Opinions

August 14, 2019

The Public Information Act Compliance Board is holding its annual meeting at 1 pm on Monday, August 19th at 200 St. Paul Place, Baltimore, Maryland 21202. In advance of the meeting, we wanted to highlight some of the Board's most pertinent opinions about PIA fees, roughly categorized by key topic (PIA fees are currently the only matter within the Board's jurisdiction). You can find more information about the Board, including a link to all the Board's opinions, [here](#).

Contractor Fees

An agency fee may include amounts charged by contractors who assist in the agency's PIA response, but those charges must actually be attributable to the response. For example, on one hand, an agency that has a flat annual/monthly rate with a vendor—regardless of the amount of work performed—arguably would not be incurring any additional costs from that contractor to respond to a PIA request, and so should not include the contractor's charge. See [PIACB 17-18](#) (Aug. 31, 2017). On the other hand, an agency may seek to recoup the cost of a contractor who charges by the hour for work actually performed. See [PIACB 16-03](#) (Mar. 21, 2016); [PIACB 19-01](#) (Sept. 24, 2018).

An agency may not indirectly collect a fee from a contractor who directly sells public records to a requestor, unless the agency can show how the fee it collects is reasonably related to its actual costs in providing the requested information to the contractor. See [PIACB 19-12](#) (Aug. 7, 2019).

Furthermore, unlike agency fees, a contractor's fee may include a profit margin. See [PIACB 17-07](#) (Feb. 28, 2017) (“we do not accept Complainant's 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. Here, we have assumed that this vendor's hourly rate reflects its contracted-for profit.”).

Actual Costs

The PIA allows an agency to recover only its actual costs in responding to a PIA request. This means it should not make a profit off of PIA responses, should not charge “hidden” fees for records, and should not otherwise receive revenue from the provision of public information that is not directly attributable to its costs in providing the information to the requestor. See, e.g., [PIACB 19-12](#) (Aug. 7, 2019).

Salary costs, as envisioned in GP § 4-206(b)(2), should not include benefits. See [PIACB 16-05](#) (June 1, 2016).

An agency must carefully and accurately track the actual time, labor, and materials spent on a PIA response in order to show how the fee is reasonably related to the agencies actual costs. See, e.g., [PIACB 18-08](#) (Mar. 7, 2018).

Arguably, any “actual cost incurred” by the agency to respond to a PIA request—regardless of the type of cost—is compensable under the PIA's definition of reasonable fee. But the connection between the cost and the response must be clear. See [PIACB 19-01](#) (Sept. 24, 2018).

“Tying a fee to the volume and content of records produced is an unreliable guide to the fee’s reasonableness for any number of reasons. For example, a custodian may spend time searching for records that ultimately do not exist, or expend labor retrieving and reviewing records that end up being confidential. The PIA clearly envisions that an agency is entitled to reimbursement for search and review time, regardless of the outcome. See GP § 4-206(b).” [PIACB 19-04](#), n. 2 (Nov. 27, 2018).

An agency should not charge for any duplicative efforts in the PIA response, such as where two attorneys review the same content. See [PIACB 16-05](#) (May 31, 2016); [PIACB 17-06](#) (Nov. 28, 2016).

Use of Flat Fees

An agency that bases its fee on a “per-page” fee or other flat fee must be able to document that the fee reasonably reflects the actual costs to the agency of responding to the request. See [PIACB 17-06](#) (Nov. 28, 2016) (approving a fee based upon a \$2.00 per page calculation because the agency could show that its actual costs—including staff and attorney time and copying costs—actually resulted in a higher amount).

Overtime Costs

An agency typically should not charge for overtime costs; because the PIA requires records to be produced with the least cost, see GP § 4-103, the agency should instead seek to perform the work during normal business hours, even if the agency needs to negotiate a response timeframe that is beyond 30 days. See [PIACB 17-17](#) (Aug. 8, 2017).

Fee Estimates

The Board may review a fee estimate for reasonableness where an agency demands payment of the estimate before undertaking the work to respond to the request. In such a scenario, although the amount is liable to change upon finalization, the estimate should reflect the actual costs the agency anticipates incurring. See, e.g., [PIACB 19-01](#) (Sept. 24, 2018).

Electronic Records

An agency was ordered to refund a portion of its fee where database logs revealed that much less time was spent searching the database for responsive records than was charged to the requestor. [PIACB 19-06](#) (Nov. 27, 2018).

The Board would not “second-guess the manner in which the IT Director utilized the software capabilities that were available to him” in searching for requested electronic records, and likewise declined to “micromanage a custodian’s electronic search and retrieval process.” [PIACB 19-06](#). However, the Board “urge[d] custodians to employ those electronic search and retrieval tools that will most accurately and efficiently locate responsive records.” *Id.*

~This summary provided by Jeffrey P. Hochstetler, counsel to the PIA Compliance Board.