

TAKING THE SHOCK OUT OF FOIA CHARGES

A GUIDE TO ALLOWABLE CHARGES FOR RECORD PRODUCTION UNDER THE FREEDOM OF INFORMATION ACT

I. INTRODUCTION

Charges for producing records under FOIA are often the source of confusion and misunderstanding. There are those who believe the government works very hard to charge as much as possible for producing requested records. At the same time, others believe that government should provide records free of charge. Many times these disparate views result in FOIA lawsuits.

FOIA provides the general rule:

A public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records. No public body shall impose any extraneous, intermediary or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body.

FOIA does not, however, provide a practical business model to address the everyday challenges of correctly assigning a value to the work that goes into the production of a record. It should be the goal of government and requester alike to keep production costs as low as possible. This can best be achieved through clear communication and adherence to the concept that FOIA permits *cost recovery*, but not *revenue generation*.

A wise person once queried, "How many times does the public have to pay for the records?" It is without question that public money pays for the creation and maintenance of public records as well as the operation of government generally. It is likewise without question that FOIA specifically authorizes public bodies to charge for the production of records. Keep in mind that the public's right to know as expressed in FOIA is no less than the everyday application of a government of, by, and for, the *people*.

This document provides guidance about how to correctly assess charges under FOIA to ensure compliance with the letter and the spirit of the law. It also attempts to set appropriate expectations for requesters. A requester has the obligation to be reasonably specific in making a request. Charges are often the means by which a request becomes even more specific. It cannot be overstated that clear communication during the process of a FOIA request can alleviate the frustration and avoid the adversarial posture that often results. Although a public body may not

ask why the requester seeks a particular record, the public body can identify the types of records it has to assist the requester in obtaining the records desired. Efficient use of time and saving citizens' money are both goals worthy of attainment.

II. WHAT FOIA SAYS ABOUT CHARGES (§ 2.2-3704)

- Citizens may request that charges for supplying requested records be estimated in advance and if so requested, the public body must provide an estimate.
- A public body may assess a reasonable charge not to exceed its actual cost for **searching, accessing, supplying, and duplicating** the records.
- No public body may charge any extraneous, intermediary or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body.
- If the amount for production of the requested records will exceed \$200, a public body may require a deposit for the amount of its advance determination before processing the request.
- Public bodies may charge for supplying records produced from a geographic information system (GIS) at the request of anyone other than the owner of the land that is the subject of the request. However, such charges shall not exceed the actual cost to the public body in supplying such records, except that the public body may charge, on a pro rata per acre basis, for the cost of creating topographical maps developed by the public body, for such maps or portions thereof, which encompass a contiguous area greater than 50 acres.
- Before processing a request for records, a public body may require the requester to pay any amounts owed to the public body for previous requests for records that remain unpaid 30 days or more after billing.

III. COURT AND FOIA COUNCIL OPINIONS

- The Supreme Court of Virginia has held that a public body may charge for the review of public records to assure that those records are responsive, are not exempt from disclosure, and may be disclosed without violating other provisions of law. *American Tradition Institute v. Rector and Visitors of the University of Virginia*, 756 S.E.2d 435 (Va. 2014).
- The law presumes a ministerial act when assessing charges. The charges should be based on the hourly rate of salary for administrative/support staff. [Advisory Opinion (AO)-05-02, AO-49-01, AO-06-05, AO-03-12]
- Choice of (i) inspection v. receiving copies and (ii) medium in which records are produced, belongs to the requester. [AO-04-04, AO-06-09]
- Cost estimates under \$200 are not required unless requested by requester. [AO-06-05, AO-05-13]
- Allocation of fringe benefits is not a proper charge. [AO-05-02, AO-04-04, AO-06-05]
- Allocation for secondary legal review is not a proper charge (note the distinction between an initial exclusion review, for which charges are allowed, and secondary legal review, for which charges are not allowed). [AO-01-00, AO-02-07]
- Question of whether a charge is reasonable is for the courts. [AO-01-00, AO-25-01, AO-

14-02, AO-23-04, AO-06-09]

- Databases; conversion of same; copying, etc. [AO-21-03]
- Creating records that do not already exist is not required. [AO-11-00, AO-03-02, AO-04-04, AO-16-04]
- Abstracting or summarizing is not required; consent of requester required prior to assessment of any charge for abstracting or summarizing. [AO-11-00, AO-49-01, AO-11-03, AO-04-04, AO-06-05, AO-08-09]
- Advance determinations of \$200 or more; getting a deposit. [AO-21-01, AO-04-04, AO-16-04]

IV. PUTTING IT ALL TOGETHER-SOME PRACTICAL SUGGESTIONS

- Always tell requesters in advance whether there will be a charge and a general breakdown of how charges will be calculated (e.g. staff time, per page duplicating charge, etc.). This is not only a courtesy to the requester, but increases the likelihood of payment.
- Remember FOIA allows for cost recovery, **NOT** revenue generation. Actual cost is the ceiling or the maximum a public body may charge. A public body may always charge less than it costs to produce records, but it can never charge more. Yes, government has tremendous actual costs; generally, it owns the buildings and all of the equipment in the buildings and pays for the lights and the air conditioning. But FOIA limits charges to government's **actual cost in producing the requested records**. It cannot recover the cost of a new copier one FOIA request at a time.
- The choice for inspection of records versus receiving copies of records belongs to the requester.
- The choice among available production options always belongs to the requester.
- Know your actual costs--do periodic cost analysis to determine actual costs. To determine your per page copying cost, try this formula. First, calculate the copy machine maintenance 1. based on the maintenance contract per year divided by the average number of copies made per year. Second, divide the yearly toner cost by the average number of copies made per year. Third, calculate the paper costs by dividing the cost for the number of reams of paper by the number of sheets in a ream. Finally, add together the maintenance charge per copy with the toner cost per copy and the paper cost per copy to get your per page copying cost.
- If less than \$200, tender records to requestor even though requester has forgotten his checkbook--bill him and make storage of records his issue!
- If more than \$200 (\$400, \$1,500, whatever the amount of the advance determination), **DO NOT** proceed with the request. Give requester the estimate and await payment, and give opportunity for requester to narrow request. Public bodies have the right to ask for a deposit of the full amount of the advance determination. If the charge turns out to be more, the requester can still be charged--but advise him of this at the time of advance determination. If the charge turns out to be less, the public body must refund the difference. Advise the requester of this also.
- Outstanding balances--FOIA gives public bodies the discretion not to proceed with a subsequent FOIA request from the same requester where the requester owes the public body for the previous requests for records that have remained unpaid 30 days or more

after billing.

- Paper v. electronic medium—you cannot charge "paper" rates for electronic records.
- Put routinely requested records on agency websites or have extra copies available.
- Consider waiving the charges for small requests. For example, the first 50 pages are free or charges of \$50 or less are waived.
- Good records management makes for efficient processing of FOIA requests.
- The art of the deal is alive under FOIA. With the prior consent of the requestor, a public body may produce the requested records on a mutually agreed timetable and reduced charge basis, saving both time and money.

V. OTHER SPECIFIC CHARGING AUTHORITY

Generally, FOIA sets the rules for making charges for producing requested public records. There are, however, other provisions in the Code of Virginia that specify a different manner of assessing charges for producing requested public records. In the few instances described below, charges for records production are not subject to the FOIA charging rules.

- **DMV.** Sections 46.2-214 and 46.2-214.1 authorize the Commissioner of the Department of Motor Vehicles (DMV) to make a reasonable charge for furnishing records maintained by DMV and, in addition, to charge \$2 for furnishing information under Title 46.2. These sections provide, however, that no fee shall be charged to any officials, including court and police officials, of the Commonwealth and of any of the counties, towns, and cities of the Commonwealth and court, police, and licensing officials of other states and of the federal government, provided that the information requested is for official use. The fees received by the Commissioner must be paid into the state treasury and are set aside as a special fund to be used to meet the expenses of DMV.
- **Clerks of Court.** Section 17.1-275 sets the fees that may be charged by a clerk of court for services performed by virtue of his office, for making copies of court records within the control of the clerk.
- **VITA.** Section 2.2-2010 authorizes the Virginia Information Technologies Agency (VITA) to provide for the centralized marketing, provision, leasing, and executing of license agreements for electronic access to public information and government services through the Internet, wireless devices, personal digital assistants, kiosks, or other such related media on terms and conditions as may be determined to be in the best interest of the Commonwealth. VITA may fix and collect fees and charges for (i) public information, media, and other incidental services furnished by it to any private individual or entity, notwithstanding the charges set forth in § 2.2-3704 and (ii) such use and services it provides to any state agency or local government.
[Note: This section specifically provides, however, that nothing authorizing VITA to fix and collect fees for providing information services shall be construed to prevent access to the public records of any public body pursuant to the provisions of FOIA. This means, VITA licensing agreements aside, that nothing relieves any public body of its duty to provide records under FOIA and that in doing so, FOIA rules for making charges apply.]

APPENDIX

Relevant Provisions of FOIA – § 2.2-3704 (F through I)

F. A public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records. No public body shall impose any extraneous, intermediary or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body. Any duplicating fee charged by a public body shall not exceed the actual cost of duplication. The public body may also make a reasonable charge for the cost incurred in supplying records produced from a geographic information system at the request of anyone other than the owner of the land that is the subject of the request. However, such charges shall not exceed the actual cost to the public body in supplying such records, except that the public body may charge, on a pro rata per acre basis, for the cost of creating topographical maps developed by the public body, for such maps or portions thereof, which encompass a contiguous area greater than 50 acres. All charges for the supplying of requested records shall be estimated in advance at the request of the citizen.

G. Public records maintained by a public body in an electronic data processing system, computer database, or any other structured collection of data shall be made available to a requester at a reasonable cost, not to exceed the actual cost in accordance with subsection F. When electronic or other databases are combined or contain exempt and nonexempt records, the public body may provide access to the exempt records if not otherwise prohibited by law, but shall provide access to the nonexempt records as provided by this chapter.

Public bodies shall produce nonexempt records maintained in an electronic database in any tangible medium identified by the requester, including, where the public body has the capability, the option of posting the records on a website or delivering the records through an electronic mail address provided by the requester, if that medium is used by the public body in the regular course of business. No public body shall be required to produce records from an electronic database in a format not regularly used by the public body. However, the public body shall make reasonable efforts to provide records in any format under such terms and conditions as agreed between the requester and public body, including the payment of reasonable costs. The excision of exempt fields of information from a database or the conversion of data from one available format to another shall not be deemed the creation, preparation or compilation of a new public record.

H. In any case where a public body determines in advance that charges for producing the requested records are likely to exceed \$200, the public body may, before continuing to process the request, require the requester to agree to payment of a deposit not to exceed the amount of the advance determination. The deposit shall be credited toward the final cost of supplying the requested records. The period within which the public body shall respond under this section shall be tolled for the amount of time that elapses between notice of the advance determination and the response of the requester.

I. Before processing a request for records, a public body may require the requester to pay any amounts owed to the public body for previous requests for records that remain unpaid 30 days or more after billing.

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Advisory opinions of the FOIA Council are available online.