



## *How Much is Too Much*

*Department of Justice Releases Position on Fees Charged to Public Records Requesters*

*—Andrew T. Phillips, von Briesen & Roper, s.c.*

**I**n August of 2018, the Wisconsin Department of Justice (DOJ) released a statement relating to the charges that an authority (*i.e.*, a governmental entity having custody of a public record) may impose for locating and copying records pursuant to a public records request. DOJ's statement can be found here: [bit.ly/publicrecordsfees](http://bit.ly/publicrecordsfees).

DOJ's statement serves as a reminder that there are many different categories of fees that an authority can seek upon receiving a public records request and there are also categories of fees that an authority may not seek. The following are the types of fees authorities may impose:

- **Copy and transcription fees:** An authority may charge the “actual, necessary, and direct cost” of reproduction and transcription unless a fee is otherwise specifically established or authorized to be established by law.
- **Costs of a computer run:** If there are computer programming expenses associated with responding to a request, an authority is permitted to seek reimbursement of the “actual, necessary, and direct cost” of such expenses.
- **Photography and photographic reproduction fees:** If an authority provides a photograph of a record, because the form of the record does not permit copying, the authority can seek reimbursement of the “actual, necessary, and direct cost” of such expenses.
- **Mailing and shipping fees:** The “actual, necessary, and direct cost” of mailing or shipping records responsive to a request may be charged to the requester.
- **Location costs:** If it costs an authority \$50.00 or more to locate a record responsive to a particular request, the authority may seek reimbursement of its “actual, necessary, and direct” location costs (*i.e.*, the amount of staff time it took to locate records responsive to a request). An authority must utilize the lowest paid staff member capable of locating records responsive to the request at hand. “Locating” a record means to find it by searching, examining, or experimenting. Once a record is located and deemed responsive, the authority's subsequent review of the record for purposes of redaction, as well as time spent making any redactions, do not constitute location costs and cannot be recouped from the requester.

With the exception of location costs, if any of the aforementioned fees exceed \$5.00 for a particular public records request, an authority is permitted to require prepayment of such fees prior to responding to the public records request. Best practice dictates an authority seek prepayment via written correspondence to the requester, and that such correspondence indicate the records request will not be processed until prepayment is received. Prepayment should be promptly sought so the requester is aware the authority received the request and to ensure timely fulfillment of the request occurs.

While the Public Records Law provides for a host of fees that can be recouped, if an authority determines it is in the public interest to fulfill a particular request at no charge, the authority is legally permitted to waive any and all costs associated with responding to such request.

As DOJ indicates, an authority may charge a requester only the “actual, necessary, and direct costs” associated with many aspects of responding to public records requests. DOJ is encouraging all authorities, including counties, to review their current charges associated with responding to public records requests and, if necessary, modify their fee schedule to ensure that requesters are charged only for those costs determined to be actual, necessary, and direct.

DOJ recently undertook a study of its actual, necessary, and direct costs associated with responding to a records request and published a new fee schedule based upon the results of the study, a copy of which can be found here: [bit.ly/DOJfeeschedule](http://bit.ly/DOJfeeschedule). According to DOJ’s schedule, the department will charge a fee of \$0.0135/page for black and white copies and \$0.0632/page for color copies of records.

It is important to note that DOJ’s rates are not applicable to all authorities and are limited to DOJ based on DOJ’s accounting to not exceed their actual, necessary, and direct costs. Counties (and other authorities) may have different and higher costs than DOJ, and counties are not required to adopt DOJ’s fee schedule, nor are counties required to revise their current schedule. However, DOJ’s statement suggests that greater scrutiny will be given to the fees being charged requesters. Counties should take this opportunity to review their current fee schedule with corporation counsel to ensure compliance with statutory requirements and applicable guidance issued by the Attorney General. The Wisconsin Counties Association continues to work with other public entity associations to obtain further guidance from DOJ and will keep you apprised as those efforts progress.

Issuing debt is no trivial matter. Even the simplest of transactions requires compliance with many regulatory and statutory mandates. Counties need counsel to ensure that financial transactions will comply with the law, and that understand how to best work with financial advisors to satisfy short and long-term capital needs. The Government Finance Team of von Briesen’s Government Law Group has the background and experience in all aspects of government finance to be your transaction solution. We understand government finance law and more importantly, we know county government.

To learn more about how our Government Law Group can assist you with your Government Finance issues, please contact Andy Phillips at [aphillips@vonbriesen.com](mailto:aphillips@vonbriesen.com).

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