

June 10, 2014

Wisconsin Department of Justice
Legal Services Division
P.O. Box 7857
Madison, WI 53707-7857

To whom it may concern,

I am writing on behalf of the Gannett Wisconsin Media Investigative Team, which represents 10 daily newspapers around the state. In the course of filing hundreds of records request with entities around the state over the last several years, we have run into multiple entities that have attempted to charge a per-page “copy” fee for electronic records. This has been imposed in cases where a PDF, for example, was forwarded via email without ever being printed, or where a spreadsheet was sent and a cost calculated based on an arbitrary assigning of a page-count. (Note the page-count would change dramatically for a large spreadsheet based on margins and sizing choices, making this a far from consistent application of fees.) I have responded to attempts to charge this fee with the potentially relevant portion of state statute:

19.35(3)(a) An authority may impose a fee upon the requester of a copy of a record which may not exceed the actual, necessary and direct cost of reproduction and transcription of the record, unless a fee is otherwise specifically established or authorized to be established by law.

However, I have found Marinette County unwilling to flex on what we consider an arbitrary and unauthorized attempt to collect fees, so I am writing to request the DOJ weigh in on the matter. I believe a written response/informal opinion would help lend clarity on this increasingly common element of public records fees, both in this situation and other similar ones. I am not aware of any specific DOJ guidance on these types of fees.

Laura Mans, assistant finance director of Marinette County, noted in a 6/9/2014 email to me that, “Marinette County charges .25/copy for paper as well as electronic reports.” Specifically, in response to a request for overtime/comp payouts for county employees, Finance Director Patrick Kass said the county will charge the .25/page rate for a 209-page report that would be provided via email. The same rate was to be charged for a 104-page report on health care costs. The county also seeks to charge \$4.75 for 19 “pages” of employee records that were provided via email from Kass on 5/29/2014. Those “pages” consisted of seven PDF pages and a spreadsheet that they calculated to equal 12 pages (documents attached). I ask that you address these elements separately, as the PDF pages appear to be photocopies of documents that were at some point physically printed, while the spreadsheet was purely electronic and would have required no physical printing at any point.

Gannett Wisconsin Media does not believe charging “copy” fees for electronic records — especially spreadsheets — is authorized as “actual, necessary and direct costs,” since no physical printing is required and the task involves merely a few clicks of the mouse to attach and forward a file via email. It also imposes an unfair burden on those seeking large files, as any de minimis cost involved would be equal for a spreadsheet of 2 “pages” or 1,000 “pages,” but the requestors would be responsible for tremendously disparate fees.

Thank you in advance for your time and consideration.

Eric Litke
Reporter
Gannett Wisconsin Media Investigative Team



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Kevin M. St. John
Deputy Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

Mary E. Burke
Assistant Attorney General
burkeme@doj.state.wi.us
608/266-0323
FAX 608/267-8906

July 11, 2014

Mr. Eric Litke
Investigative Reporter
Gannett Wisconsin Media
632 Center Avenue
Sheboygan, WI 53081

Dear Mr. Litke:

You have requested guidance about the appropriate copying fees an authority may charge for electronic records provided in response to a public records request. In particular, you ask about “per page” copy fees charged for PDF records not printed in order to respond to a public records request, and spreadsheets for which a per page cost is calculated based on non-standard pagination criteria chosen by the authority.

The Legislature authorized public records authorities to charge copying fees to requesters in Wis. Stat. § 19.35(3)(a). “An authority may impose a fee upon the requester of a copy of a record which may not exceed the actual, necessary and direct cost of reproduction and transcription of the record, unless a fee is otherwise specifically established or authorized to be established by law.” *Id.*

“Reproduction” means the act, condition, or process of producing a counterpart, image, or copy. It is a rote, ministerial task that does not alter a record or change the content of the record. Instead, “reproduction” means only copying the record. *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 31, 341 Wis. 2d 607, 815 N.W.2d 367 (Abrahamson, C.J., lead opinion).

Your inquiry involves three different categories of electronic records. The first category consists of records that already exist in the electronic format in which they are to be produced. The second category consists of records that exist in paper or some other non-electronic format, and must be converted to an electronic format in order to produce them electronically to a

requester.¹ The third category consists of records that already exist in one electronic format, but are converted to a different electronic format for provision to a requester.

Typical procedures and costs for each of these categories are discussed below. Reproduction of some records for provision to a requester in electronic format may entail other, less common costs. Discussion of all possible costs that may be entailed in reproduction and disclosure of electronic records is beyond the scope of our response to your inquiry. Whether less common costs may be charged to a requester should be analyzed the same way as the more typical costs discussed below—by determining whether they are actual, necessary, and direct costs of reproducing responsive records for disclosure to a requester in electronic format.

The first category is records that already exist in the electronic format in which they are to be produced to the requester. Whether the records exist in a paginated format (*i.e.*, PDF or Word copies of board minutes) or an unpaginated format (*i.e.*, spreadsheet) generally does not affect the cost of reproducing these records for a public records response. Similarly, the size of the responsive electronic file generally does not affect the cost of reproducing these records. The reproduction process is the same regardless of the type of electronic records involved or the size of the responsive electronic files. Generally, there is no need to reformat unpaginated electronic records like spreadsheets into an artificially paginated electronic records in order to respond to a public records request. All that needs to be done is to enter the computer commands necessary to transfer copies of the responsive records from the electronic location where they are stored to the electronic medium that will be used to produce the records to the requester. Email messages may be copied onto a thumb drive, for example, or PDF records may be attached to an email message for transmission to the requester.

Staff time usually is the key component in calculating the allowable reproduction cost for these records. Depending on how the electronic records are to be produced, the cost of a flash drive, CD, or other media also may be involved. Less frequently, the authority will incur other costs for computer run time or other uncommon charges. The actual, necessary, and direct cost of reproduction for records already existing in the electronic format in which they are to be produced therefore generally consists of: (a) personnel cost of the time required—perhaps only seconds—to electronically copy the records onto a medium like an email message, a CD, or a flashdrive for transmission to the requester, and (b) in some circumstances, the cost of the medium used to produce the records. When applicable, necessary computer run time and other costs also may be charged to the requester. Authorities or their records custodians should consult their financial officers about how to determine the actual, necessary, and direct costs of personnel time, electronic media, and other applicable costs.

¹Although the Wisconsin public records law does not require an authority to convert existing records into a different format requested by a public records requester, the authority may elect to do so.

The second category is paper or other records that do not already exist in an electronic format. The reproduction process for these records is similar to conventional photocopying. Someone must physically feed the records into a scanning device, which produces an electronic file rather than another paper copy. Related costs are similar to those of conventional photocopying, too. Scanning incurs machine usage costs in addition to personnel costs. Unlike photocopying, however, scanning does not involve costs for paper, ink, or toner; therefore, the per page cost for scanning usually is slightly lower than the per page cost for photocopies.

The resulting electronic records then must be copied onto some medium for transmission to the requester. This process, and related costs, are the same as discussed above for records that already existed in the electronic format in which they are to be reproduced to the requester. Authorities or their records custodians therefore should consult their financial officers to determine the actual, necessary, and direct per page cost for record reproduction by scanning paper or other records into an electronic format, as well as the actual, necessary, and direct costs for the personnel time, electronic media, and other applicable costs of producing the electronic records to the requester.

The third category is records that already exist in one electronic format but are converted to a different electronic format for production to a requester. After the records have been converted to the new format, they need only—as in the first category—be copied onto some electronic media for transmission to the requester. Applicable costs generally consist of the personnel time necessary to convert the records from one electronic format to another, the personnel time necessary to copy the resulting records to the electronic media used to transmit the records to the requester, and any costs of the medium used to transmit the electronic records. Computer run time and other less common costs also may be involved. As above, authorities or records custodians should consult their financial officers to determine the actual, necessary, and direct costs for these components of reproducing electronic records responsive to a public records request.

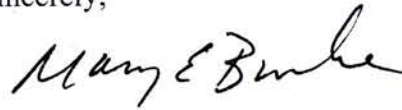
Finally, a question sometimes arises about how to allocate costs when the same records are requested by multiple requesters. If multiple requesters ask for the same records while any necessary scanning or conversion process is underway, the Department of Justice recommends dividing the scanning or conversion costs equally among those requesters. If one or more requesters request the records later, however, those original scanning and conversion costs no longer constitute the “actual, necessary and direct” costs of producing the records that now exist in electronic form. Later requesters should be charged only the costs of reproducing existing electronic records.

I hope this information is helpful to you and the authorities to which you and your colleagues submit public records requests.

Mr. Eric Litke
July 11, 2014
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This information provided in this letter does not constitute a formal or informal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

Sincerely,

A handwritten signature in black ink that reads "Mary E. Burke". The signature is written in a cursive, flowing style.

Mary E. Burke
Assistant Attorney General

MEB:cla