Public Records, charges for electronic records

Number: AGO 2013-03

Date: January 30, 2013

Subject:
Public Records, charges for electronic records

Ms. Sonja K. Dickens
City of Miami Gardens Attorney
1515 Northwest 167th Street
Building 5, Suite 200
Miami Gardens, Florida 33169

RE: PUBLIC RECORDS–ELECTRONIC RECORDS--COPIES--E-MAIL--charges for providing copies of public records by e-mail. ss. 119.01 and 119.07, Fla. Stat.

Dear Ms. Dickens:

As the City Attorney for the City of Miami Gardens, you have asked for my opinion on substantially the following question:

May the City of Miami Gardens impose a fee when documents are downloaded and submitted by electronic mail, in lieu of photocopying, to the requestor?

In sum:

The City of Miami Gardens may charge the "actual costs of duplication" for electronic mail forwarded to a public records requestor in lieu of photocopying those records. When calculating the "actual costs of duplication," charges may not be made for labor costs or associated overhead costs. However, section 119.07(4)(d), Florida Statutes, provides that if the nature or volume of public records to be inspected or copied requires the extensive use of information technology resources or extensive clerical or supervisory assistance, or both, the City of Miami Gardens may charge a reasonable service charge based on the cost actually incurred by the agency for such extensive use of information technology resources or personnel. The fact that the request involves the use of information technology resources is not sufficient to incur the imposition of the special service charge.

According to your letter, a public records request was made to the records custodian for the City of Miami Gardens for data which the city compiles and maintains in an electronic format. A further request was made to deliver the records by electronic mail to avoid the payment of copying costs. The requestor objected to the payment of any fees for costs associated with transmitting the documents by way of electronic mail.

Section 119.01(2)(f), Florida Statutes, requires:

"Each agency that maintains a public record in an electronic recordkeeping system shall provide to any person, pursuant to this chapter, a copy of any public record in that system which is not exempted by law from public disclosure. *An agency must provide a copy of the record in the medium requested if the agency maintains the record in that medium, and the agency may charge a fee in accordance with this chapter*. For the purpose of satisfying a public records request, the fee to be charged by an agency if it elects to provide a copy of a public record in a medium not routinely used by the agency, or if it elects to compile information not routinely developed or maintained by the agency or that requires a substantial amount of manipulation or programming, must be in accordance with s. 119.07(4)." (e.s.)

The statute clearly provides that if an agency maintains a record in a particular medium and that medium is requested for the copy, the agency "must provide a copy of the record in the medium requested[.]"[1] The statute also provides that "the agency may charge a fee in accordance with this chapter."

Section 119.07, Florida Statutes, provides for the inspection and copying of records and for the fees which may be charged for inspecting and copying. Subsection (4) makes general provision for fees for copying when not otherwise prescribed by law:

"(4) The custodian of public records shall furnish a copy or a certified copy of the record upon payment of the fee prescribed by law. If a fee is not prescribed by law, the following fees are authorized:
(a)1. Up to 15 cents per one-sided copy for duplicated copies of not more than 14 inches by 81/2 inches;
2. No more than an additional 5 cents for each two-sided copy; and
3. For all other copies, the actual cost of duplication of the public record.
(b) The charge for copies of county maps or aerial photographs supplied by county constitutional officers may also include a reasonable charge for the labor and overhead associated with their duplication.
(c) An agency may charge up to $1 per copy for a certified copy of a public record.
(d) If the nature or volume of public records requested to be inspected or copied pursuant to this subsection is such as to require extensive use of information technology resources or extensive clerical or supervisory assistance by personnel of the agency involved, or both, the agency may charge, in addition to the actual cost of duplication, a special service charge, which shall be reasonable and shall be based on the cost incurred for such extensive use of information technology resources or the labor cost of the personnel providing the service that is actually incurred by the agency or attributable to the agency for the clerical and supervisory assistance required, or both.
(e)1. Where provision of another room or place is necessary to photograph public records, the expense of providing the same shall be paid by the person desiring to photograph the public records.
2. The custodian of public records may charge the person making the photographs for supervision services at a rate of compensation to be agreed upon by the person desiring to make the photographs and the custodian of public records. If they fail to agree as to the appropriate charge, the charge shall be determined by the custodian of public records." (e.s.)

As no charge has been established by law for providing copies by electronic mail in lieu of

photocopying, section 119.07(4)(a)3., Florida Statutes, authorizes "the actual cost of duplication of the public record" to be charged. "Actual cost of duplication" is defined in section 119.011(1), Florida Statutes, to mean "the cost of the material and supplies used to duplicate the public record, but does not include labor cost or overhead cost associated with such duplication." You have not advised me of and I am not aware of any "actual costs of duplication" involved in forwarding copies of electronic mail in lieu of photocopying and the definition does not allow for the imposition of labor costs or associated overhead costs.

Section 119.07(4)(d), Florida Statutes, does provide that if the nature or volume of public records to be inspected or copied requires the extensive use of information technology resources or extensive clerical or supervisory assistance, or both, the agency may charge a reasonable service charge based on the cost actually incurred by the agency for such extensive use of information technology resources or personnel. When the special service charge is warranted, it applies to requests for both the inspection of and copies made of public records.[2] For purposes of the Public Records Law, "[i]nformation technology resources" means "data processing hardware and software and services, communications, supplies, personnel, facility resources, maintenance, and training."[3] The fact that the request involves the use of information technology resources is not sufficient to incur the imposition of the special service charge; rather, an extensive use of such resources is required before the special service charge is authorized.[4]

The statute does not identify the Legislature's intent as to what may constitute "extensive use" and provides no definition of the term.[5] However, in light of the lack of clear direction in the statute as to the meaning of the term "extensive," this office has suggested that agencies implement the service charge authorization in a manner that reflects the purpose and intent of the Public Records Act and does not represent an unreasonable infringement upon the public's statutory and constitutional right of access to public records. While you have not advised me whether the City of Miami Gardens has adopted a public records procedure which includes provisions for imposing the special service charge, this office would strongly encourage the adoption of such a policy for accommodating public records requests.

Your letter suggests that a request for the production of public records by electronic mail may appear to be time saving and cost effective for both the requestor and the city. However, you are concerned that an individual could make several requests a day for the production of public records by electronic mail and, in responding to each request, the city could be required to utilize an exorbitant amount of staff time to respond to such public records requests. While this office acknowledges your concerns, these are issues which arise regardless of the format in which public records are maintained or produced. Providing access to public records is a statutory duty imposed by the Legislature on all records custodians and must be accomplished in a manner that is consistent with the purpose and intent of the Public Records Law and that does not unreasonably infringe upon the public's statutory and constitutional right of access to public records.

Subsequent conversations with your office indicate that the City of Miami Gardens is currently contracting with a private entity for the storage and maintenance of certain public records, requests for proposal (RFP's) in this instance, and has been requiring that copies of the city's RFP's be obtained from the private company at a price established by that company. A request

has been received by the city for copies of these public records at the price established in the Public Records Law for public records. This is the fact situation which has prompted your question. This office has opined, in Attorney General Opinion 2002-37, that an agency may not abdicate its duty to produce public records for inspection and copying by requiring those seeking public records to do so only through its designee and then paying whatever fee that company may establish for its services. Rather, the agency is the custodian of its public records and, upon request, must produce such records for inspection and copy such records at the statutorily prescribed fee.[6]

In sum, it is my opinion that the City of Miami Gardens may charge the "actual costs of duplication" for electronic mail forwarded to a public records requestor in lieu of photocopying those records. When calculating the "actual costs of duplication," charges may not be made for labor costs or associated overhead costs. However, section 119.07(4)(d), Florida Statutes, provides that if the nature or volume of public records to be inspected or copied requires the extensive use of information technology resources or extensive clerical or supervisory assistance, or both, the City of Miami Gardens may charge a reasonable service charge based on the cost actually incurred by the agency for such extensive use of information technology resources or personnel. The fact that the request involves the use of information technology resources is not sufficient to incur the imposition of the special service charge.

Sincerely,

Pam Bondi
Attorney General

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[1] *And see* Op. Att'y Gen. Fla. 91-61 (1991) (custodian of public records must, if asked for a copy of a computer software disk used by an agency, provide a copy of the disk in its original format; a typed transcript of the disk would not satisfy the requirements of the Public Records Law).

[2] *See Board of County Commissioners of Highlands County v. Colby*, 976 So. 2d 31 (Fla. 2d DCA 2008).

[3] Section 119.011(9), Fla. Stat.

[4] *See* Op. Att'y Gen. Fla. 99-41 (1999).

[5] However, Florida courts have approved a local government's formula for calculating its special service charge based on a determination that it would take more than 15 minutes to locate, review for confidential information, copy, and refile the requested material. *See Florida Institutional Legal Services, Inc. v. Florida Department of Corrections*, 579 So. 2d 267 (Fla. 1st DCA 1991), *review denied*, 592 So. 2d 680 (Fla. 1991) (court upheld hearing officer's order rejecting inmates' challenge to Department of Correction's rule defining "extensive" for purposes of special service charge to mean it would take more than 15 minutes to locate, review, copy,

and refile requested material); and Op. Att'y Gen. Fla. 99-41 (1999).

[6] *And see* Op. Att'y Gen. Fla. 05-34 (2005) (while the property appraiser may provide public records, excluding exempt or confidential information, to a private company, the property appraiser may receive only those fees that are authorized by statute and may not, in the absence of statutory authority, enter into an agreement with the private company where the property appraiser provides such records in exchange for either in-kind services or a share of the profits or proceeds from the sale of the information by the private company).