

## COMMITTEE ON OPEN GOVERNMENT

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By electronic mail only

August 13, 2020

Gideon Orion Oliver  
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The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, except as otherwise indicated.

Dear Mr. Oliver,

We are in receipt of your request for an advisory opinion regarding the fee proposed by the Kings County District Attorney's Office (the "Agency") for providing records in response to your client's Freedom of Information Law (FOIL) request. Your client seeks from the Agency a "List of IAB charges that KCDA's Law Enforcement Accountability Bureau received from the NYPD" in electronic format.

You state in your request for an opinion that the Agency has advised that "[y]our request is exceptionally voluminous requiring the production of over 80,000 pages of police disciplinary records. To complete this request, it will take our team months of work." You also state that the Agency has offered the opinion that "[t]he inability to charge a fee for redacting electronic records is nowhere to be found in the plain language of the FOIL statute." We disagree with the Agency's position on the matter of fees relating to the redaction of electronic records.

The specific language of FOIL and the regulations promulgated by the Committee on Open Government indicate that, absent separate statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of FOIL states:

Each agency shall promulgate rules and regulations in conformance with this article . . . and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to . . .  
iii. the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record in accordance with the provisions of paragraph (c) of this subdivision, except when a different fee is otherwise prescribed by statute.

The regulations promulgated by the Committee state in relevant part that:



Except when a different fee is otherwise prescribed by statute:

(a) An agency *shall not charge a fee* for the following:

- (1) inspection of records for which no redaction is permitted;
- (2) search for, administrative costs of, or employee time to prepare photocopies of records;
- (3) *review of the content of requested records to determine the extent to which records must be disclosed or may be withheld*; or
- (4) any certification required pursuant to this Part.

21 NYCRR §1401.8 (emphasis added). The Committee's regulations specify that no fee may be charged for personnel time, inspection of records or search for records, except as otherwise prescribed by statute.

In this instance, the records requested by your client appear to exist in a format other than paper records or paper records in excess of nine by fourteen inches. Under these circumstances, § 87(1)(c) of FOIL sets the parameters for calculating the "actual costs of reproducing" those records. An agency may *not* include "search time or administrative costs, and no fee shall be charged unless at least two hours of agency employee time is needed to prepare a copy of the record requested." Under circumstances in which it is estimated that more than two hours to "prepare copies," the agency may charge "an amount equal to the hourly salary attributed to the lowest paid agency employee who has the necessary skill required to *prepare a copy* of the requested record."

In sum, when more than two hours are needed to *prepare copies of records*, the agency is permitted to assess a fee based on either the hourly wage of the lowest paid employee capable of *preparing the copy of the record*, multiplied by the number of hours the employee spent preparing the record, and the cost of the storage device or media provided to the applicant, or, when the agency does not have adequate information technology equipment to prepare a copy, the actual cost of engaging an outside professional service. In the event that more than two hours of employee time is necessary to prepare a record, or if it is necessary to retain an outside professional service, the agency is required to inform the applicant prior to incurring the cost of preparing the record. See FOIL § 87(c)(1).

Your inquiry also includes the following statement attributed to the Agency: "Nowhere in the language of the regulations is there anything that states (with respect to electronic records) an agency cannot charge for time spent scanning, applying redactions or writing the determination letter<sup>1</sup> after the first two hours of employee time." In our view, this statement attributed to the Agency reflects a fundamental misunderstanding of the Law and regulations. First, you have indicated that the records requested already exist in electronic format. If this is accurate, there would be no need for the Agency to scan the records. Second, the Law and regulations clearly prohibit an agency from charging for "review of the content of requested records to determine the extent to which records must be disclosed or may be withheld." 21 NYCRR § 1401.8(a)(3). This would include the process of applying redactions, as the Committee has previously opined. See, e.g., Comm. on Open Govt. FOIL-AO-19103 (2014) (reasoning adopted in *Time Warner Cable News NY1 v. New York City Police Dep't*, 36 N.Y.S.3d 579, 596-97 (2016)). Section 87(1)(c) sets forth the "only" elements that may be considered when determining the fee that may be charged. Given the use of the word "only," it is clear that an agency may not charge for any activity not expressly listed by the statute. In our view, the physical act of redacting a record is a combination of the substantive review of the record and an administrative cost associated with FOIL, both of which may not be included in the fee charged. See, e.g., *Time Warner Cable News NY1*, 36 N.Y.S.3d at 596-97 (agency may not pass along redaction costs of electronic records to requester).

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<sup>1</sup> With respect to the Agency's assertion that it may pass along to your client the cost of preparing its statutorily-required response to the FOIL request, while an agency is obligated to provide a reason for any denial of access in writing, the activity of preparing a determination letter is clearly an administrative task associated with all agencies' FOIL obligations and in our opinion cannot be transferred to the requester.

The *Time Warner Cable News NY1* matter involved electronic records stored as video files and the Agency here attempts to distinguish between that situation and its records which are stored electronically as text files. This distinction is without merit. The fundamental fact is that the records in the *Time Warner Cable* matter and this matter are electronic records and the FOIL treats them equally with respect to the calculation of chargeable costs. Courts have not hesitated to hold that an agency may not pass along the costs associated with redacting an electronic record to the requestor. See also, e.g., *Forsyth v. City of Rochester*, --- N.Y.S.3d ----, 2020 N.Y. Slip Op. 04250 (4<sup>th</sup> Dep't. 2020)

You also attribute the following statement to the Agency: "In fact, 21 NYCRR § 1401.8(a)(1) discusses the inability to charge for employee time where there is an 'inspection of records for which no redaction is permitted,' implying that we are permitted to charge for records where redaction is permitted." Again, this statement attributed to the Agency reflects a basic misunderstanding of the Law and regulations. Section 87(2) of FOIL states that "[e]ach agency shall, in accordance with its published rules, make available *for public inspection and copying* all records" except to the extent that the agency is permitted to withhold a record or portion thereof consistent with the statute." When a record is available in its entirety, and does not require redactions, an applicant for records has the right to "inspect" the records without being required to pay a fee to the agency for copies. Title 21 NYCRR § 1401.8(a)(1) prohibits an agency from charging an applicant for the *inspection* of records when redaction of the records is not permitted. When redaction is permitted, the applicant does not have the right to inspect the originals. The language of the regulation has no bearing on fees associated with preparing a copy of the records.

Lastly, the Committee has consistently advised that an agency may require payment of the requisite fee in advance of the preparation of copies of records. However, when "an agency conditions disclosure upon payment of a fee in advance or refuses to disclose records except upon payment of fee in advance, it has the burden of 'articulating a particularized and specific justification' for the imposition of those fees' . . . and must demonstrate that the fees to be imposed are authorized by the cost provisions of FOIL." See *Weslowski v. Vanderhoef*, 98 A.D.3d 1123, 1129 (3d Dep't. 2012) (internal citations omitted).

I hope this information proves useful.

Sincerely,



Kristin O'Neill  
Assistant Director

cc: Records Access Officer, Kings County District Attorney's Office



Committee on  
Open Government