



Complying with the New Freedom of Information Act Changes

Anne M. Seurnyck

Foster Swift Municipal Law News

January 27, 2015

The Legislature approved significant changes to the Freedom of Information Act ("FOIA"). 2014 PA 563 was recently signed by the Governor but does not become effective until July 1, 2015. However, because every public body must adopt procedures, guidelines and summaries to implement PA 563, each public body should start reviewing its procedures and policies and make appropriate changes before the deadline. Below is a brief summary of the requirements of the Act:

LABOR FEES

The Act breaks down the labor charges into several distinct categories. All labor fees must be reported to the requester on a detailed itemization sheet both with the hourly rate charged and the number of hours charged. The labor fee summary is as follows:

- **Searching for, locating and examining public records.** The public body may not charge more than the hourly wage of the lowest paid **employee** capable of searching for, locating and examining public records in conjunction with receiving and fulfilling a "granted" written request in the particular instance. The lowest paid employee hourly wage must be used regardless of whether that person actually performs the work. These labor charges must be calculated in increments of 15 minutes or more with all time rounded down. This fee may only be charged if the failure to charge such fee would result in an unreasonably high cost to the public body because of the nature of the request and the public specifies the nature of the unreasonably high costs.

AUTHORS/ CONTRIBUTORS

Anne M. Seurnyck

PRACTICE AREAS

Freedom of Information Act

Municipal & Public Entity Law

- **Separating and deleting non-exempt information from exempt.** The public body may charge the hourly rate of the lowest paid public employee capable of deleting exempt information from non-exempt information in the particular instance, which would include redacting documents. Again, this hourly wage must be used regardless of who actually performs the work. These labor charges must also be calculated in increments of 15 minutes or more with all time rounded down.
In addition, the law permits a public body to charge for certain contracted labor costs. If the public body does not employ a person capable of separating the exempt and non-exempt information, the FOIA Coordinator (on a case-by-case basis) may treat contracted costs (for example, consultants or attorneys) in the same manner as the employee costs. However, the fee sheet must clearly note the name of the person or firm and the labor costs shall not exceed 6 times the state hourly minimum wage. A public body may not charge this particular fee if it knows or has reason to know that it previously redacted the public record and still has the redacted version.
This fee may only be charged if failure to charge such fee would result in an unreasonably high cost to the public body because of the nature of the request and the public specifies the nature of the unreasonably high costs.
- **Labor costs for copying.** The public body may charge the labor costs directly associated with the duplication or publication, making digital or paper copies or transferring digital public records on nonpaper physical media or by e-mail. The format is stipulated by the requestor. For this charge, the public body may not charge more than the lowest paid employee capable of the publication and duplication in the particular instance regardless of whether that person actually does the work. Although the public body may determine the time increment, it must be rounded down.
- **Fringe Benefits/Overtime.** Overtime wages may not be charged unless agreed to by the requester and may not be included in fringe benefit calculations. The public body may also charge the actual cost or partial cost of fringe benefits, but those fringe benefit costs may not exceed 50 percent of the applicable labor charge. Further, the public body must clearly note the percentage multiplier used on the detailed itemization sheet.

ACTUAL COSTS

In addition to labor costs, the public body may charge for other costs associated with responding to a FOIA request as follows:

- For requests provided on "nonpaper physical media," the public body may charge the actual and the most reasonably economical cost of the computer discs, computer tapes or other digital or similar media. The requester may ask the public body to send the records by email, on a flash drive or other nonpaper physical media instead of paper copies. However, the public body is not required to apply this section if it lacks the "technological capability" necessary to comply with the request.
- For paper copies, the actual incremental cost of necessary duplication or publication may be charged, but may not exceed \$.10 per sheet for 8.5 x 11 or 8.5 x 14 sheets regardless of whether it is one sided or two sided. The cost for paper copies shall be noted and itemized and the cost per sheet and the number of pages provided must be included. The public body must use the most economical means available, including making two sided copies.

- For mailing costs, the public body may charge the actual costs of sending the documents, using the least expensive method. The public body may not charge for expedited shipping or insurance unless the requester asks for it.

PROCEDURES, GUIDELINES AND SUMMARIES

The public body is required to establish procedures and guidelines to implement PA 563 and create a written summary. The summary must include information on how to submit written requests to the public body and explain how to understand a public body's written responses, deposit requirements, fee calculations, and avenues for challenge and appeal. The public body must post the procedures and guidelines and its written summary on its website, if applicable, and provide free copies in both the public body's response to a written request and upon requests by visitors at the office. However, if it is posted on the website, the public body may include a website link instead of actual copies in the written response. The policy must contain a standard form for detailed itemization, with the information as required by the new law. The public body may not charge deposits or fees until the public body complies with the requirements regarding the procedures, guidelines and summaries.

DEPOSIT; PROVISION OF DOCUMENTS

The public body may require a good faith deposit, not to exceed 1/2 of the total estimated fee, if the total fee is expected to exceed \$50 before providing the public records. The request for the deposit shall include a detailed itemization of the fees. The response shall also contain a "best efforts estimate" by the public body regarding the time frame it will take the public body to provide the public records. The time frame is non-binding upon the public body but it should strive to be reasonably accurate and provide the public records in a manner based on the public policy of FOIA.

UNTIMELY RESPONSES

If a public body does not respond timely, it is not relieved from its requirement to provide the proper fee calculation and the time frame for provision of documents, but it must reduce its labor cost permitted by 5 percent for each day the public body exceeds the time permitted with a maximum 50 percent reduction. This reduction would apply if (1) the late response was willful and intentional; or (2) if the written request included language that conveyed a request for information in the first 250 words or specifically included the words, characters or abbreviations for "freedom of information," "information," "FOIA," "copy" or a recognizable misspelling, or the legal cite to the FOIA on the front of an envelope or the subject line. If the charge is reduced, the detailed itemization would include that reduction.

DOCUMENTS PUBLICALLY AVAILABLE ON WEBSITE

The new law contains provisions related to public records available on the public body's website. For example, any records available at the time of the request would be exempt from the labor costs, under Section 1(b) that relate to costs for separating and deleting information. If the FOIA Coordinator knows, or has reason to know, that the information is available on the website, the public body shall notify the requester and, if practicable,



shall include a specific webpage address where it is available. On the itemized sheet, the public body must separate the items that are available on the website from those that are not and indicate the additional charges that would be made if the person still desires to receive copies that are available on the website. If the person still insists on copies of documents in a paper format, the public body may also charge fringe benefits with a multiplier greater than the 50 percent limitation, but not to exceed the actual cost of providing the information.

ADDITIONAL PROVISIONS

- The Act adds new detail regarding requests from individuals who are indigent and receiving specific public assistance or who have facts showing inability to pay the cost because of indigency. There are new regulations regarding eligibility, notifications to the requestor and reporting the discount on the itemization sheet.
- The failure to timely respond will be considered the public body's final determination if (1) the late response was willful and intentional; or (2) if the written request included language that conveyed a request for information in the first 250 words or specifically included the words, characters or abbreviations for "freedom of information," "information," "FOIA," "copy" or a recognizable misspelling, or the legal cite to the FOIA on the front of an envelope or the subject line. If the charge is reduced, the detailed itemization would include that reduction.
- The new law gives public bodies 10 **business** days to respond to an appeal instead of 10 days as currently written.
- The public body has additional remedies with respect to subsequent written requests by people who have not paid if certain requirements apply.
- PA 563 provides some protection if the request is sent by email and ends up in the spam or junk mail folder. The request is not considered "received" until 1 day after the public body first becomes aware of the written request. The public body shall note this in its records.
- As an additional remedy in the circuit court action, the legislature has added that the public body has to pay a \$1,000 civil fine if the court determines that it has arbitrarily and capriciously violated the Act by refusal or delay in disclosing the documents in addition to an increase to a \$1,000 punitive damage.
- The new Act affirmatively states that a public body may provide records and information without a written request. If a verbal request is made for documents available on the website, an employee, where practicable, shall inform the requester of the website address.
- The legislature also added another remedy to challenge or appeal fees.
- If a court determines that a public body willfully and intentionally failed to comply with the Act or otherwise acted in bad faith, they shall order the public body to pay a civil fine of not less than \$2,500 or more than \$7,500 for each occurrence. The civil fine shall be deposited in the general fund of the state treasury.