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October 11, 2018

Renee Lauber, DCTA Planner
Dane County Towns Association
1252 Morrison Court
Madison, WI 53703

**Re: Public Records Laws
Recent Attorney General Interpretation
Legal Recommendations**

Dear Ms. Lauber:

The best practices concerning public records changed in some respects in recent weeks. These are issues that affect municipal government every day, so it is important to be aware of these changes, and consider whether these changes affect your members' municipal practices. I am writing to provide an update and recommendations as follows:

On or about August 8, 2018 the Wisconsin Attorney General's office issued an opinion concerning fees that are charged under the Wisconsin public records laws. A copy of that opinion is attached to this letter. I am writing to highlight two issues from the letter.

1. *Photocopy Fee: DOJ's "rule of thumb" has changed.* Before I describe what has changed, let me describe what has not changed concerning public records fees. The State statute regarding fees for public records that can be charged has not changed. For decades, since the law was created, copy fees could only recover the "actual, necessary and direct cost" of reproduction. (Wis. Stats. §19.35(3)(a)). For decades the Department of Justice provided this guidance to municipalities on this point:

OLD POLICY:

"DOJ's policy is that photocopy fees should be around 15 cents per page, and that anything in excess of 25 cents may be suspect." (DOJ Public Records Compliance Guide, 2004, and for years prior and since.)

The League of Wisconsin Municipalities has suggested a 25 cents per page rule of thumb at least since 1993, and probably since long before that time. (League Opinion Public Records Number 74, April 5, 1993.) For many years, municipalities throughout the State have used this guidance to establish copying charges of 25 cents or less per page. In more recent years, some of my clients have increased that fee above 25 cents per page.

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That 25 cents per page guidance from the DOJ has changed. The current advisory from the Department of Justice abandons the rule of thumb. Instead, the current advisory says:

NEW POLICY:

“The DOJ recommends that authorities re-evaluate their copying fees especially if new copiers have been leased or purchased since the creation of a fee schedule. Copying fees should be based on the actual costs of the copy machine or contract, and the actual cost of paper. As a best practice, but especially when a requestor requests it, authorities should itemize all expenses, including but not limited to copying, postage, and location costs
....”

To underscore this point, the Department of Justice describes in the opinion their calculation of their own fees. The DOJ charges 1.35 cents per page for black and white photocopies. For electronic copies, the Department of Justice charges no fee for paper documents that are scanned to digital for electronic distribution. (Note: such scanning is not required.) The DOJ charges no fee for electronic documents that are sent electronically. For digital records that are provided in a physical format, the Department of Justice charges the actual cost of the physical medium, whether it is a DVD or flash drive.

The Department of Justice only considered the cost of the paper and the cost of its copy machine contract when calculating the actual, necessary and direct costs of providing paper copies of records. Certainly municipalities have other costs, and notable among them is the cost of staff time associated with the response. This raises a significant question of whether staff time can be included in this calculation of the photocopying fee. I will turn to that next.

The relevant statute allows municipalities to charge the actual, necessary and direct cost of “reproduction and transcription” and “photographing and photographic processing.” (§19.35(3)(a) and (b), Wis. Stats.) The Wisconsin Supreme Court interpreted this statute to prohibit charging the cost of staff time incurred redacting a record in the case of *Milwaukee Journal Sentinel v. City of Milwaukee*, 341 Wis. 2d 607 (2012). The lead opinion made this statement in the case:

“We read “reproduction” in Wis. Stats. §19.35(3)(a) to refer to rote, ministerial tasks that do not change the content of the record. Examples of “reproduction” under the law might occur when the custodian prints out a copy of a record that is stored electronically, or makes a photocopy of a record that is stored in hard copy.” (Id. at ¶ 31.)

The focus of the case was location fees, not charges for copies, but the analysis of the Court and the analysis of the concurring opinions appear to assume that staff time, if it is charged at all is charged as a location fee and not as a photocopy fee. The lead opinion notes that the Circuit Court allowed staff time to be included in the calculation (Id. at ¶ 3), but the decision was not upheld. Also, in her concurring opinion Justice Roggensack notes that “a cost of \$50 *in staff time* is sufficient to trigger” the location fee, which again

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assumes it is only included in the location fee, not the photocopy fee.¹ (Id at ¶ 75.) The lead opinion also makes this statement:

“We make clear that *Osborn* and *WIREDATA* should not be read broadly to allow an authority to impose fees for *all* “actual, necessary and direct” costs of complying with any public records request. The legislature carefully provided that an authority may charge a fee not exceeding the actual, necessary, and direct costs of *four specific tasks*: (1) “reproduction and transcription”; (2) “photographing and photographic processing”; (3) “locating”; and (4) “mailing or shipping.” See Wis. Stat. § 19.35(3)(a)-(d).” (Id. at ¶ 54, emphasis in original.)

The Court does not allow municipalities to recover all of its actual costs. This leaves significant doubt about the inclusion of staff time in the calculation of the photocopy fee. The fact that the DOJ did not include staff time in its calculation of copy charges apparently takes the position that staff time should not be included.

Recommendation: I recommend that your members review the fees that they charge for copies of public records. I also recommend that your members document how this calculation has been made, because it is likely that when disputes arise they will be asked to prove how they calculated this number. They will have the least risk of challenge if they analyze their costs in the manner described by the Department of Justice, namely:

- a. Calculate the cost to the municipality of a piece of paper.
- b. Calculate the cost to the municipality of a copy machine and a copy service contract, and divide that into a per page value based upon actual usage data.
- c. Add together the conclusions the municipality has reached in a. and b., which result is the amount they should charge for photocopies that they provide on paper to public records requesters for paper records.
- d. For electronic records that the municipality provides in a physical form to requesters, the above-noted fee would apply when they print the documents and provide them on paper.

¹ It is worth noting that numerous statements were made in the Court’s decision that are very critical of the current state of the public records law, and urging for legislative correction. Justice Roggensack said in her concurring opinion, joined by Justices Prosser, Ziegler and Gableman, that the Court’s decision will result in either taxpayers paying costs of voluminous public records requests, which in her analysis would have been \$375,000 in a prior *Osborn* case heard by the Court, or requests would go unmet because municipalities would not have the staff available who could provide the response. Justice Prosser in a concurring opinion said, “I am joining Justice Roggensack’s concurrence because it graphically illustrates the potential downside of this decision and a need for the legislature to reexamine the law.” Justice Prosser also acknowledges in his concurrence that “Some public records requests may harass public officials or units of government,” and “The ability to impose charges reflecting the actual costs of compliance has sometimes served as a brake on malicious, frivolous or unreasonable requests.” This opinion of the Department of Justice dramatically exacerbates these concerns.

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- e. Note that in general municipalities are not obligated to change the form of a public record. For example, if they have a record on paper, they have no obligation to scan the document and provide it electronically. Moreover, I urge caution in that regard due to the precedent municipalities would establish if they would begin such a practice.
 - f. For electronic records municipalities provide electronically by email, it is difficult to justify any fee.
 - g. For electronic records municipalities provide on a DVD or flash drive, they should charge the actual cost of that physical medium.
2. *Charge Location Fee at the rate of the lowest paid capable employee.* The Attorney General has taken the position in this new analysis that when location costs are incurred (which can only be charged if they are in excess of \$50 per Wisconsin Statutes §19.35(3)(c)), the municipality should not give that task to high paid personnel except to the extent it is necessary to do so. The Attorney General concludes:

“Therefore, authorities should limit the amount of time spent by specialized personnel to *only* that time required to perform the specialized portion of the location task, thereby minimizing the time spent using specialized and costly personnel. Moreover, even if the lowest paid employee capable of reviewing and locating responsive records within the search result is *not* actually doing the reviewing and location, authorities should still always utilize the *rate of pay* of the lowest paid employee *capable* of reviewing and locating responsive records within the search results.”

We encounter many records requests for documents that can only be located by certain custodians, because only those certain custodians know where to look. Many times, those custodians are department heads, which have relatively high hourly rates of pay. This guidance from the Department of Justice means that we can continue to charge the location fees of those department heads when it is necessary for them to locate the documents. The guidance goes further to say that once the documents are located, however, any refinement of the initial search should be done at the rate of pay of the lowest capable employee who does or could do the work.

Recommendation: When your members receive requests for documents that will require substantial time to locate, such that their costs exceed \$50, they will now need to ensure that the costs charged do not exceed the rate of pay of the lowest capable employee who could do the work. Municipalities should be prepared to justify the payments that they require for location fees accordingly.

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This correspondence is intended to provide an update on certain issues, and it should not be read as answering any particular questions that you may have, which may involve additional considerations. If you should have any questions or concerns regarding this matter, please do not hesitate to contact me.

Yours very truly,

MUNICIPAL LAW & LITIGATION GROUP, S.C.

Eric J. Larson

Eric J. Larson

EJL/egm
Enclosure

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