

FEE PROVISIONS IN VIRGINIA FOIA

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Section 2.2-3704(F) says, in pertinent part: “A public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records.”

The problem: The high cost of FOIA requests

Fees charged for FOIA requests have escalated steadily over the past decade or so, and they are inconsistently calculated and applied from one public body to another.

Possible causes

- The explosion of email and other electronic records.
- *ATI v. UVA*: Virginia Supreme Court case holding: “In the context of Code § 2.2-3704(F), ‘searching’ includes ‘inquiring or scrutinizing’ whether a disputed document can be released under federal and state law. Therefore, the ordinary meaning of ‘searching’ in this statutory provision permits a public body to charge a reasonable fee for exclusion review.”
- Lack of resources.

Caveat

What one requester thinks is “too expensive” may be different from someone else. It should be noted, though, that a fee must reflect the “actual cost” and be “reasonable” no matter how much the grand total is.

The impact of high fees on requesters

The amount charged for records under FOIA can be prohibitively expensive.

- Requesters have to choose between paying large sums to obtain records they are legally entitled to or giving up on a request that costs too much.
- The anticipation of high fees produces a chilling effect on future requests.

Being charged to be told “no” (records withheld and/or redacted).

Bad actors: Public body uses high fees to deter requests.

The impact on public bodies

Significant burden on employees who have multiple job duties.

Requests dropped after time expended/requesters don't pay bill.

Lack of resources to implement helpful FOIA-fulfillment software.

Bad actors: Requesters who use FOIA as a sword to stymie the work of government.

What makes up an estimate for records?

- The number of hours needed to access, duplicate, supply, or search for responsive records.
- The pro-rated salary of the individual(s) accessing, duplicating, supplying or searching for those records.
- The number of potentially responsive records to review and redact for exemptions/prohibitions.
- The number of hard copies made or other supplies used to transfer records to the requester (e.g., disks, envelopes, stamps),

What can contribute to high FOIA cost estimates¹

- Broad, wide-ranging requests that produce large volumes of records that require a high number of hours to review
- Small staffs with multiple job duties
- Duplicative and ultimately unrelated emails that must be reviewed
- No centralized electronic search capability; multiple charges for each employee/department to “self-search” for records.
- Email searches performed by IT professionals on higher end of pay spectrum
- Charges that approximate a flat fee to conduct an email search, regardless of number of email accounts are involved
- Time spent redacting records
- Time spent on exclusion review by attorneys and/or administrators on higher end of pay spectrum
- Time spent building a query for a search of email
- Charges for time to go to off-site storage facilities
- Charges to redact and then to rescan to ensure complete redaction
- Charges for employee’s time to watch while records are inspected in a government office
- Charges to write an unrequested narrative
- Charges to review policies to make sure they’re “up to date”
- Charging a requester for the same records already prepared for someone else

¹ Most of the items on this list come from actual correspondence between requesters and public bodies shared with VCOG over the past two years. Original documents can be shared upon request.

What do other states do?

Public bodies cannot charge for the labor it takes to fill records requests	Arizona, Arkansas, California, Connecticut, Illinois, Indiana, Kentucky, New Hampshire, New Jersey, New Mexico [<i>by practice, no statutory language</i>], North Carolina [<i>by practice, no statutory language</i>], Ohio [<i>by case law</i>], Pennsylvania, West Virginia
Flat per-page fee in lieu of labor charges	Connecticut, Florida, New York
No labor charges except when it requires IT "expertise"	Washington
Hourly labor charges are capped	Colorado [\$33.58], Georgia [<i>lowest paid full-time employee capable of performing task</i>], Maine [\$15], Michigan [<i>lowest paid employee rate, even if that person is not the one who performs the tasks for any given request</i>], Missouri [<i>"using employees . . . that result in the lowest amount of charges"</i>], North Dakota [\$25], Rhode Island [\$15], South Carolina [<i>lowest paid employee</i>], Tennessee [<i>"lowest practicable hourly wage"</i>]
Labor is charged only if the requester's requests have totaled 5 hours in a calendar month	Alaska

No labor charges for time to review records for exemptions (also called “exclusion review” or “privilege review”)	Alaska, Massachusetts [<i>except for records that are <u>required by statute</u> to be withheld</i>], Minnesota, New Mexico, New York, Oregon [<i>but allows labor charge for redaction</i>], South Carolina [<i>but allows labor charges for redaction</i>], Utah
Exclusion review cannot be charged above a certain rate	Michigan [<i>no more than 6 times the state minimum wage</i>]
No labor charges to search or redact	New York [<i>only to “prepare”</i>], Wisconsin
Labor or per page charges are waived for the first x-number of hours or pages	Colorado [<i>1 hour</i>], Georgia [<i>.25 hour</i>], Hawaii [<i>first \$30-\$50</i>], Idaho [<i>2 hours or first 100 pages</i>], Maine [<i>1 hour</i>], Maryland [<i>2 hours</i>], New York [<i>2 hours</i>], Rhode Island [<i>1 hour</i>], South Dakota [<i>1 hour</i>], Tennessee [<i>1 hour</i>], Texas [<i>50 pages</i>]
An entity or statute creates a fee schedule(s) for state and local public bodies	Colorado, Florida, Hawaii, Indiana, Louisiana, Pennsylvania, Tennessee, Vermont, Washington
Written policy, schedule or ordinance must be adopted in order to charge labor fees	Delaware, New Jersey [<i>only for “extraordinary expenditures” of time/effort</i>], Oklahoma, South Carolina
Statutorily imposed fees for specific types of records	California
Per-page maximum charge	New York [<i>\$.25</i>], North Dakota [<i>\$.25</i>]

Per-page minimum charge	Hawaii [\$.05]
Allows fee for electronically provided records	Illinois [<i>but still no labor</i>]
Fee waivers for specific purpose	Louisiana [<i>indigent requester</i>], Oklahoma [<i>media requester</i>]
Multiple requests from any one person/entity during a 30 day period shall be considered one request	Rhode Island
No apparent limit beyond actual cost and reasonableness of fees, and no statute, third party, ordinance or policy setting fees	Alabama, Iowa, Kansas, Mississippi, Montana, Nebraska, Virginia
Unclear	Nevada, Wyoming