Can labor fees be charged when a requestor only wants to inspect?

Analysis of how production fees were incorporated into the Tennessee Public Records Act

September 2019

By Deborah Fisher, Executive Director

Tennessee Coalition for Open Government

Sept. 3, 2019

In 2010, the Office of Open Records Counsel addressed the question of whether labor fees can be charged if a requestor only wants to view public records — not get copies.

The short answer from the Open Records Counsel was no — a custodian cannot charge labor fees associated with producing records in response to a citizen's request to view public records.[1]

The question arose because of a provision added to the law in 2008 that stated:

> A records custodian may require a requestor to pay the custodian's reasonable costs incurred in producing the requested material and to assess the reasonable costs in the manner established by the office of open records counsel pursuant to § 8-4-604 (Tenn. Cod Ann. Section 10-7-503 (a)(7)(C)(1).

The Office of Open Records Counsel examined the public chapter creating this new provision, Public Chapter 1179, Acts of 2008,[2] and pointed out that the chapter also established a new provision that specifically prohibited charges for viewing a public record *and* a provision that specified that the "reasonable charges" established by the office were only to be applied when a person requested copies of public records.

Charging citizens fees for public records is a contentious issue, not just in Tennessee but across the country. Some states mandate that the government will provide public records for free, or at only the cost of paper and ink to make the copies. Others allow hourly labor fees to produce records, with maximum rates and prohibitions for charging for some types of labor, such as attorney review.

There is no one way that fees are handled by all states and the federal government. But the basic tension is the same: Some in government argue that citizens should pay for the time it takes their employees to provide access to public records, while others argue that making public records accessible to its citizens is already an important part of the job of government employees, and fees effectively block access to government documents by making them too expensive to get.

State laws usually reflect some compromise, and Tennessee is no different.

This analysis attempts to show how Tennessee incorporated production fees into the law for copies of public records, and the limits placed around such fees.

Authorization for fees found under "reasonable rule" statute

In 1998 — in contrast to now — there was no Office of Open Records Counsel. And there was no Schedule of Reasonable Charges outlining how charges could be assessed.

There was no authorization in the statute that spoke to fees for public records in general. However, some fees were authorized and set by statute for specific types of public records, such as certain court documents.

What did exist for all other public records were these two provisions within the Tennessee Public Records Act:

---

1 Tennessee. Office of Open Records Counsel. *Advisory Opinion 10-06: Labor Charges for Inspecting Public Records.* By Elisha D. Hodge. Sept. 3, 2010 <https://www.comptroller.tn.gov/content/dam/cot/orc/documents/oorc/advisory-opinions/10-06_CCA_Inspection.pdf>

2Tennessee. 105th General Assembly Public Acts. *Public Chapter No. 1179, Acts of 2008 .* Effective July 1, 2008. <https://publications.tnsosfiles.com/acts/105/pub/pc1179.pdf>

> [A]ll state, county and municipal records and all records maintained by the Tennessee performing arts center management corporation ... shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law — T.C.A. § 10-7-503(a)
>
> In all cases where any person has the right to inspect any such public records, such person shall have the right to take extracts or make copies thereof, and to make photographs or photostats of the same while such records are in the possession, custody and control of the lawful custodian thereof or such custodian's authorized deputy; provided, that the lawful custodian of such records shall have the right to adopt and enforce reasonable rules governing the making of such extracts, copies, photographs or photostats. —T.C.A. §10-7-506 (a)

The Attorney General had interpreted § — 506(a) in a 1980 opinion[3], which gives insight into how authority for fees was derived under under the "reasonable rules" language.

The question was whether a county could charge more for a tape of registered voters than the actual cost required to copy it.

The AG said that the law required permanent voter registration records to be made available for public inspection. And because a person had a right to inspect such records, § — 506(a) meant that a person could get copies, provided that the custodian could have "reasonable rules governing the making" of such copies.

The AG said § — 506(a) "does not require the custodian to copy any records for citizens, merely to make them available for copying. However, should the custodian deem it appropriate for his office to copy records…. a reasonable fee covering the cost of the copying can be charged…"

"It is the opinion of this office that a county may charge only as much as reasonably approximates the actual cost of copying such tape."

1998: TN Supreme Court allows fees to create list from database

It is within this context that the Tennessee Supreme Court in 1998 made a ruling *Tennessean v. Electric Power Board of Nashville*.[4]

The Tennessean newspaper had requested from Nashville Electric Service a list of customer names, addresses and telephone numbers. The utility had this information in electronic data, but not in a paper record and not in an electronic format with those three fields. A computer program would have to be written to extract and marry data in such a way to create the requested list.

NES did not think it should have to create the list from its data, arguing such a list did not already exist and would amount to creating a new record, which it was not required to do. But if the utility did have to create a list, it sought to charge the newspaper the cost of notifying its customers that the records were being requested and the cost of the computer programming to extract the information and convert it into a list.

---

[3] Tennessee, Office of the Attorney General. *Opinion No. 80-455*. Sept. 19, 1980. <http://tennessee.nfoic.net/files/2019/08/op80-455-fees-related-to-cost-of-copying-copy.pdf>

[4] *Tennessean v. Electric Power Bd.,* 979 S.W.2d 297, 301 (Tenn.1998) <http://tennessee.nfoic.net/files/2019/08/1998-Tennessean-v-Electric-Power-Bd-of-Nashville-TSC.pdf>.

The Court in its 1998 ruling rejected the utility's contention that it did not have to create the list. It was an important decision regarding public access to government information in an electronic database.

In considering the charges, the Court ruled that the utility could assess the charges of extracting the data to create a list, but said it could not charge the newspaper for notification of its customers.

The Supreme Court looked at T.C.A. § 10-7-506(a) in making its decision, which said that when a person had a right to inspect public records, they also had a right to "make" copies — provided that the government had a right to adopt rules governing "the making of such extracts, copies, photographs or photostats."

There was no question that the Tennessean wanted to extract information from a database and get a copy of that information.

In rejecting the cost of notifying customers, the Court said:

> We think the language and meaning of Tenn.Code Ann. § 10–7–506(a) is plain: that an agency may enforce reasonable rules "governing the making of such extracts, copies, photographs or photostats." Those actual costs incurred by NES for disclosing the material requested by The Tennessean are recoverable under this statute. In contrast, there is no authority under the Act allowing an agency to establish rules that would substantially inhibit disclosure of records. Moreover, limiting an agency to rules that govern only the actual "making" of the extracts, copies, photographs or photostats is consistent with the legislative policy in favor of the fullest possible public access.

The Tennessee Supreme Court went on to repeat its holding from a 1986 public records case:

> Our review is governed soley by the language in the Public Records Act and the clear mandate in favor of disclosure. We do not question the sincerity or intention of NES in making a policy that is, on the surface, in the interests of its customers' privacy or safety. Yet these and any other matters of public policy that may affect the rights of access under the Public Records Act may not be adopted ad hoc by a government agency without action by the legislature. As we said in *Holt*: It is the prerogative of the legislature to declare the policy of the State touching the general welfare. And where the legislature speaks upon a particular subject, its utterance is the public policy ... upon that subject.

Thus, the Tennessee Supreme Court had determined that § — 506(a) allowed for recovery of costs associated with making the "extracts, copies, photographs or photostats" that a citizen was entitled to under § — 506(a).

The Court did not address recovery of costs associated with making records available for viewing only. This was not an issue in the case.

2001: AG says no provision allows for research or location fees *per se*

A few years later in 2001, the Tennessee Attorney General was asked to answer six questions relevant to charging requestors and access to inspect records.[5] In contrast to the court's opinion in 1998, some of these questions dealt specifically with charges related to "the right to inspection" of records that is allowed under T.C.A. § 10-7-503(a):

---

[5] Tennessee, Office of the Attorney General. *Opinion No. 01-021, Providing Access to Public Records.* Feb. 8, 2001. <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2001/op01-021.pdf>.

1. Do the provisions of Tenn. Code Ann. § 10-7-503(a) permit a local government body to charge a fee to recoup the cost of providing access to public records during business hours?

2. Does Tenn. Code Ann. § 10-7-503(a) or other pertinent portions of the public records statutes permit the charging of a fee by local governments to recoup the costs for researching and/or locating non-current public records for review by a citizen of the State of Tennessee?

3. Would the institution of fees to view records of any type, current or non-current, constitute the refusal of the "right of inspection" clause in Tenn. Code Ann. § 10-7-503(a), thereby preventing a citizen from exercising his right as a resident of the State of Tennessee?

4. Does Tenn. Code Ann. § 10-7-503(a) or other pertinent sections of the statutes permit a local government to require a resident of the State of Tennessee to first schedule an appointment with a local government before he is allowed to inspect a public record maintained by said government?

5. If a local government chooses to store a record in a format accessible only via a computer, videotape player or audiotape player, is it incumbent upon the local government to provide a means of accessing such record on-site at the designated local government office? Would refusal or failure to provide the appropriate device violate Tenn. Code Ann. § 10-7-503 or other pertinent sections of the public records statutes?

6. Aside from specific real estate records, the product of Geographic Information System records and law enforcement records, what portion of the public records statute authorizes the charging of a fee for copying or duplicating routine local government records?

Here are the Attorney General's answers:

1. No. Tenn. Code Ann. § 10-7-503(a) does not authorize a local government body to charge a fee for allowing inspection of a public record.

2. We are not aware of any provision in Title 10, Chapter 7 of the Code that would allow a local agency to charge a research and/or location fee *per se*.

3. Conditioning the right to inspect a public record upon the payment of a fee unauthorized by state law would be tantamount to denying the right of inspection that is set forth in Tenn. Code Ann. § 10-7-503.

4. No statute expressly requires a citizen to make an appointment in order to inspect public records. If an agency required a citizen to make an appointment for this purpose, and the citizen challenged such requirement in court, the court might not view the requirement as tantamount to a denial of access to public records if the agency could articulate a reasonable basis for the appointment requirement. Absent a reasonable basis for the requirement, a court could conclude that the agency was merely using it to delay access.

5. We think a court would hold that it would violate the Public Records Act if a record could not be inspected because the records custodian failed or refused to provide a means by which to inspect the record.

6. Tenn. Code Ann. § 10-7-506(a) allows "reasonable rules governing the making of . . . extracts, copies, photographs or photostats." Under this provision, a local government may generally recoup its costs for supplying *requested copies*. [emphasis added]

In its discussion, the Attorney General looked at § —503(a) allowing for personal inspection and said:

> Under the terms of this statute, the custodian of a public record may not charge a fee for allowing inspection during business hours, unless some other provision of state law provides otherwise. Thus, a local government body would need to be able to point to a provision of state law other than Tenn. Code Ann. § 10-7-503(a) in order to charge a fee for allowing inspection of a public record.

The AG referenced the *Tennessean* case from a few years earlier and noted the Supreme Court allowed fees associated with writing a program to extract data to produce a list in the exact format requested by the newspaper.

> It is unclear exactly what costs an agency might recover from a requestor under this statute, which the Court has not construed in the context of paper records. But agency rules designed to recover an agency's actual costs in making extracts, copies, photographs or photostats in response to a public records request should be upheld under Tenn. Code Ann. § 10-7-506(a).

In its discussion on the sixth question about authorization for a fee for copying government records, and what was reasonable under the law, the AG pointed again to the "reasonable rules" in § —506 and said said:

> This Office has concluded that the custodian of records may charge only as much as reasonably approximates the actual cost of copying a record…The Public Records Act contains a narrow provision allowing fees that reflect actual development costs of certain maps or geographic data…Outside of this provision, or some other applicable exception, a local government may generally not charge more than its actual cost to copy public records.

The AG had concluded that fees for providing access to public records during business hours were not allowed under § —503(a), but a government entity could charge fees under § — 506(a) to make copies for the requestor. If a government entity had to write a computer program to extract data to create a list in the exact format requested by a citizen, it could charge for programming. However, those fees were limited to the actual cost to make copies of public records and no provision in state law allowed research or location fees, *per se*.

The opinion that fees were limited to the "actual cost of copying" was in line with a previous AG opinion in 1980.

2008: New law allows production fees when someone requests copies

Public Chapter No. 1179, which became law on July 1, 2008, made substantial changes to the Tennessee Public Records Act.

It added important provisions requiring a custodian to promptly make available public records for inspection, and set a time limit of seven days to respond to a request. It also required denials for access to public records to be in writing and to include the basis for the denial. It provided statutory authority for the Office of Open Records Counsel, outlined its duties, and created a separate Advisory Committee on Open Government that could provide written comment to the General Assembly on proposed legislation regarding the open records and open meetings laws.

Some lawmakers who carried the bill are still in politics today, including state Sen. Randy McNally, R-Oak Ridge, who is now in the highest leadership position of the Senate as lieutenant governor.

McNally and now-deceased state Sen. Joe Haynes, D-Nashville, carried the bill in the Senate. State Rep. Steve McDaniel, R-Parkers Crossroads, sponsored the bill in the House.

Both had been on a special joint study committee that had been appointed by the House and Senate leadership to study potential changes to the open records and open meetings laws.

The 18-member committee met over two years and included lawmakers, citizens, journalists and representatives from the attorney general's office, the governor's office and five government associations. McNally chaired the joint committee, which split into two subcommittees, one to focus on open meetings laws and the other on public records. McDaniel chaired the subcommittee on public records.

The bill as filed by McNally and McDaniel in 2008[6] contained the recommendations from the written report of the joint committee.[7]

However, both McNally and McDaniel decided to introduce their bill with an amendment that only put forth the recommended changes in the public records laws. Their amendment tracked the study committee's recommendations on public records with only one change — it recommended a requirement of a five-day response instead of a four-day response to public records requests.

McNally's amended bill made it through all Senate committees and passed easily on the Senate floor. It contained no language about charging fees for public records.

However, the amendment on the House side never made it out intact.

McDaniel's bill was assigned to the House State and Local Government Committee. Its chairman was longtime state Rep. Ulysses S. Jones, D-Memphis (now deceased) who had also been on the study committee, serving on the open meetings subcommittee.

Jones was a career employee of the city of Memphis in its fire department. The city's mayor was Willie Herenton who at the time was under federal investigation and was facing intense scrutiny by local news media.

Jones held a marathon session on the bill for the full committee on April 29 that lasted nearly four hours, with several recesses. He gave an example of a public records request to the city of Memphis from the Commercial Appeal newspaper that a Memphis city attorney testified took about 270 hours to fulfill. He argued strongly that government should be able to charge for the time their employees spent responding to requests.[8]

Other issues were discussed. One proposal was a new provision that would require public records custodians to notify public officials when records that pertained to them were requested.

In relation to fees for public records, committee members chewed over several ideas, not all of which were adopted. For example, they discussed the idea of charging news media for records, but not charging citizens who were not members of the press and asking citizens to sign an affidavit that the records would not be going to the news media.

---

[6] Tennessee 105th General Assembly. *S.B. 3280 and H.B. 3637. Bill History*. Accessed online. <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB3280&GA=105>.

[7] *Report of the Joint Study Committee on Open Government.* Nov. 2017. Accessed via Tennessee Municipal League website. <https://www.tml1.org/sites/default/files/tml/pdf/Report_of_the_Joint_Study_Committee_on_Open_Government.pdf>.

[8] Tennessee 105th General Assembly. *House State and Local Government Committee, Audio Tape Recordings 1-4, April 29, 2008.* Tennessee State Library and Archives.

The committee also wrestled with how to charge fees. One representative asked, "How are you going to determine actual costs? **…** You can do that in a number of different ways … You can make it unbearable on somebody to request something … You can use benefits and everything… (You) could have them work overtime."

Ann Butterworth, who had been appointed to the new Office of Open Records Ombudsman within the Comptroller's Office in the fall of 2007 with funding from the governor, testified to the committee. She explained that the current law, as interpreted by the Attorney General, only allowed charges for a copy of a public record if the government entity had a written policy and that the charge must be based on actual expenses, which had to be documented — a reference to the "reasonable rules" provision in T.C.A. § 10-7-506.

She suggested that her new office come up with reasonable fees for copies of public records that could be a "safe harbor" charge for local government so that each entity would not have to go through the "process of proving that 25 cents" per page is their cost. Those fees would be considered "reasonable."

After discussion, the legislative attorney assigned to the committee read back what the new "Amendment 1" to McDaniel's amendment would be: "We're going to require the office of open records counsel … to establish at least annually a schedule of reasonable charges for provisions of copies of open records. And then, in that, they shall consider as part of the cost — at this point all we have written down is man hours, cost of duplication, and there will be a couple of others. Then to say that the 5 hours (free before charges would accrue) that was originally proposed will be the cost until this policy is established. And then that they (the office of open records counsel) would set a safe harbor provision for any records custodian who follows the policy that is established so they couldn't have a suit against them. And then in addition they will establish a policy to deal with frequent and multiple requests for public records. And the five hours would be removed once the policy (schedule) is developed."

The committee voted to adopt the amendment as verbalized, and went on to adopt other changes dealing with different aspects, including notifying public officials about requests pertaining to them and increasing response time to seven days.

Related to fees, the language of the amendment that was attached to the bill by the House State and Local Government committee made clear that "reasonable charges" that would be established in a to-be-developed schedule could be applied when someone requested copies and could include "man hours":

> The office of open records counsel shall establish a schedule of reasonable charges which a records custodian may use as a guideline to charge a citizen requesting copies of public records pursuant to title 10, chapter 7, part 5. In establishing such a schedule, the office of open records counsel shall consider such factors as the size, by population, of the county or municipality; the complexity of the request; the man hours involved in retrieving the documents, redacting confidential information from the documents, and any other costs involved in preparing the documents for duplication; the costs of duplication; the costs of mailing such documents if the requester is not returning to retrieve the requested documents; and any other costs which the office of open records counsel deems appropriate to include in such charge.

In addition, a provision was added that prevented charges for viewing a public record:

> A records custodian may not require a written request or assess a charge to view a public record unless otherwise required by law.

Until that schedule was created, the law would temporarily allow charges for "the making of extracts, copies, photographs or photostats" at the hourly rate of a government employee, but the first five hours

would be free. Once the schedule was developed, this temporary language was to be repealed and deleted by the code commission.

However, this amendment, House Amendment 1, is not the one that eventually became law. Disagreement over notification of officials about public records requests led to a separate amendment being added when the bill was before the House Finance Budget Subcommittee.

This new amendment, House Amendment 3, tracked House Amendment 1 with some key changes. Most substantial, it stripped out the notification language.

In other changes, two items were added:

1 - The new amendment contained a paragraph that would replace the temporary provision in § 10-7-503 that was to be deleted after the schedule of reasonable charges was established. It pointed to Title 8 and said:

> A records custodian may require a requester to pay the custodian's reasonable costs incurred in producing the requested material and to assess such reasonable costs in the manner established by the office of open records counsel pursuant to § 8-4-604.

2 - The language in § 10-7-503 preventing fees for viewing a public record was repeated in an addition to Title 8 in the instructions to the Office of Open Records Counsel. In establishing a schedule, the office was to consider:

> The principles presented by the study committee created by Chapter 887 of the Public Acts of 2006:
>
> (i) The state policies and guidelines shall reflect the policy that providing information to the public is an essential function of a representative government and an integral part of the routine duties and responsibilities of public officers and employees;
>
> (ii) That excessive fees and other rules shall not be used to hinder access to non-exempt, public information;
>
> (iii) That, in accordance with § 10-7-503(a)(7)(A), no charge shall be assessed to view a public record unless otherwise required by law;
>
> (iv) That the requestor be given the option of receiving information in any format in which it is maintained by the agency, including electronic format… and;
>
> (v) That when large-volume requests are involved, information shall be provided in the most efficient and cost-effective manner, including but not limited to permitting the requestor to provide copying equipment or an electronic scanner.

When McDaniel introduced the new amendment in the Finance Budget subcommittee, he said, "The amendment makes it clear that any citizen of Tennessee will be able to inspect public records and with that I move the amendment."

This amendment, Amendment 3, contained the language that eventually became the law.

The General Assembly had spoken: These new "reasonable charges" to pay a custodian's actual costs in producing requested material could include man hours, but would only be allowed for a citizen *requesting copies* of public records. No charges were allowed when a citizen simply wanted to view a public record unless specifically authorized elsewhere in the law.

Reaching compromise

It was, in effect, a compromise.

McDaniel noted as much when the bill came to the floor of the House on May 20:

"The legislation as amended contains recommendations made by the open government study committee that met for several months in 2006 and 2007. The bill as amended also reflects the agreements with Tennessee Municipal League, the County Commissioners Association, County Officials Association, the Tennessee School Boards Association, the Tennessee Press Association and the Tennessee Coalition for Open Government. And all had a part in this, as did the state and local government committee…"[9]

Open government advocates had not wanted to allow labor fees at all. The legislative study committee that had met for two years did not recommend them, having run out of time before they could reach agreement on how fees could be assessed.

The committee instead had recommended in its report that the issue of fees allowed under the "reasonable rules" provision be sent to the new Office of Open Records Counsel and soon-to-be-established Advisory Committee on Open Government to hammer out — with the hope of reaching agreement across a broad cross section of stakeholders that included several types of government entities and members of the public.

It was a thorny issue. Members of the press and citizen groups worried that labor fees could be easily and unreasonably inflated and ultimately undermine the right of access created in the public records law.

Those in government worried about requesters who made "frivolous" requests or intentionally wasted time of employees. While some thought providing public records was already part of government's general duty to its citizens, paid for by taxpayers, others thought citizens should pay a fee for the service to defray the cost.

For the press who was deeply interested in the legislation and open government advocates, the legislation could only be supported if inspection remained free.

Frank Gibson, then the executive director of Tennessee Coalition for Open Government, says he remembers being called into Chairman Jones's office about the bill. Present was Jones, the House State and Local Government Committee's legislative lawyer and a representative from the Tennessee Municipal League. Jones explained his plan for fees. Gibson said the press and TCOG would oppose the bill unless inspection remained free and insisted on language that said no fees could be charged for viewing public records.

By expressly prohibiting charges for inspection, citizens could still know what their government was doing through its public records, even if they could not afford the price of walking out of the office with copies.

The House approved House Amendment 3 on May 20, and Jones withdrew the previous amendment, Amendment 1. In the Senate, McNally, satisfied that the major disagreements over the bill had been worked out, moved on the Senate floor to concur with House Amendment 3 and the Senate adopted the new language as its own.

---

[9] Tennessee 105th General Assembly. *House Session, Audio Tape Recording H-97, May 20, 2008.* Tennessee State Library and Archives.

The legislation was signed by Gov. Phil Bredesen on June 19.

2010: Can labor fees be charged for inspection? OORC says no

Only two years later, in 2010, the Office of Open Records Counsel was asked to issue an advisory opinion on the question: "Can a fee be assessed for labor associated with gathering records responsive to a public records request when the requestor only wants to inspect the records?"

A requestor had asked to view records from Corrections Corporation of America which operated state prisons. (CCA had been found to be subject to the Public Records Act by the courts as a functional equivalent of government in its operations of state prisons and county jails.)

The Office of Open Records Counsel consisted of Butterworth and Elisha Hodge, now the Open Records Counsel. Both had been present during the House State and Local Government committee debate in 2008. Hodge reviewed Public Chapter 1179 and said:

> When the Tennessee Public Records Act (hereinafter referred to as the "TPRA") was amended in 2008 with the passage of Public Chapter 1179, Acts of 2008 (Attached "Exhibit 3"), several significant changes were made. First, the General Assembly declared through language that is clear and unambiguous that 'A records custodian may not … assess a charge to view a public record unless otherwise required by law.'
>
> …As is clearly indicated by the language of this provision (T.C.A. § 8-4-604), the Schedule of Reasonable Charges is only applicable when copies or duplicates or records are requested.

The Office concluded:

> Based upon the above-cited provisions and based upon the fact that this office is unaware of any other provision that would allow CCA to charge a fee *for the inspection* [emphasis added] of the requested records, it is the opinion of this office that CCA cannot assess Mr. Friedmann a fee "to cover CCA's production costs in excess of one hour." As is clearly indicated by the language in the above-cited statutory provisions and the language developed by this office, the Schedule of Reasonable Charges is only applicable when copies or duplicates or records are requested. However, if Mr. Friedmann determines that he wants copies of all the records or a portion thereof after he inspects them, CCA is permitted to assess him the cost of the requested copies, as well as a fee for labor that is proportional to the time that it took to locate, retrieve, review, redact, and copy or duplicate any of the records for which he requests a copy, as long as the fee is calculated in accordance with the Schedule of Reasonable Charges.

Their understanding of the law was clear. The Schedule of Reasonable Charges states on the very first page that the Schedule may be applied when charging "citizens requesting copies of public records" and that "Records custodians may not charge for inspection of public records except as provided by law."

2015: Bill to allow fees for inspection dropped after state hearings

In 2015, McDaniel, the sponsor of the 2008 legislation, and state Sen. Jim Tracy who had signed on as a co-sponsor in 2008, introduced new legislation, S.B. 328 / H.B. 315, to allow a custodian to assess a reasonable charge for producing a record for inspection. The bill deleted the provisions added in 2008 that prohibited fees for viewing a public record.[10]

---

[10]Tennessee 109th General Assembly. *S.B. 0328 and H.B. 0315. Bill History*. Accessed online. <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB0328&GA=109>

They said they were bringing the bill at the request of the Tennessee School Boards Association. Now able to charge labor fees for time spent producing copies, some government entities wanted to charge labor fees to produce records for people who wanted to view public records.

The bill sought to delete the T.C.A. § 10-7-503(a)(7)(a) provision that said "A record custodian may not require a written request or assess a charge to view a public record unless otherwise required by law" and replace it with a provision that said, "A records custodian may assess a reasonable charge in producing the record viewing if the records custodian incurs costs."

The bill also proposed to change § 8-4-604(a)(1)(A) from "A schedule of reasonable charges which a records custodian may use as a guideline to charge a citizen requesting copies of public records pursuant to Title 10, Chapter 7, Part 5" to "A schedule of reasonable charges which a records custodian may use as a guideline to charge a citizen requesting inspection or copies of public records."

It also would eliminate the repeat of the T.C.A. § 10-7-503 provision in the Schedule of Reasonable Charges statute T.C.A. § 8-4-604(a)(1)(A)(ii) that said, "That, in accordance with § 10-7-503(a)(7)(A), no charge shall be assessed to view a public record unless otherwise required by law."

In essence, all the pieces of 2008 act that expressly prohibited charges for inspection would be eliminated and replaced with new language allowing charges for inspection. The lawmakers proposed allowing the first hour of labor and the first 25 pages for inspection free of charge.

The outcry in opposition was swift and loud, and by March 2015, Tracy and McDaniel put the brakes on the bill and instead asked the Office of Open Records Counsel and the Advisory Committee on Open Government to study the issue of free inspection of public records and hold hearings.

"What this will do is undertake a review of the issues surrounding inspection of public records, with the directive that providing the information to the public is essential," Tracy told the Senate State and Local Government Committee before taking the bill off notice.

The Office of Open Records Counsel in September held hearings in Knoxville, Nashville and Jackson in which 72 people spoke.[11] The office also developed a survey completed by 407 members of the public and 253 government respondents respectively.

The office's 35-page report[12] was filed on Jan. 15, 2016, and concluded that most comments received during the hearings and through online comment submissions opposed any fees for inspection.

Overall, the public wanted more transparency, not less.

The "public's participation and comments in the surveys and hearings indicate an overwhelming concern, by citizens and government representatives, to maintain, and a desire to increase transparency of government," the report said.

---

[11] Tennessee Comptroller of the Treasury. *Audio recordings of Tennessee Office of Open Records Counsel Public Hearings in Knoxville, Nashville, Jackson Sept. 15-17, 2015.* Tennessee Comptroller's YouTube Channel. <https://www.youtube.com/watch?v=CeeWXcK-n-o&t=6s>; <https://www.youtube.com/watch?v=PylAhlelbwI&t=1s>, <https://www.youtube.com/watch?v=n0wc5zyz3KY>

[12] Tennessee. Office of Open Records Counsel. *Report to General Assembly: Issues Surrounding Fees for the Inspection of Open Records.* By Ann Butterworth, Open Records Counsel. Jan. 15, 2016. <http://tennessee.nfoic.net/files/2019/08/2016ReportonFeesforInspectionofOpenPublicRecords.pdf>.

News coverage of the hearings also captured the overwhelming opposition to changing the law to allow fees to inspect public records.[13] The bill's proposal was debated in the press.[14] And a Vanderbilt University poll[15] conducted in November found that 85 percent of Tennesseans thought inspection of public records should remain free.

Several comments from the hearings and sent into the Office of Open Records Counsel were included in the report. Among them:

> "If government adds fees as on obstacle to look at those records...or keep them hidden away . . .the cost of that kind of secrecy is high," — Demetria Kaladimos WSMV
>
> "Charging for access to knowledge is tantamount to hiding that knowledge from the people who cannot or will not pay for something they already are entitled to by virtue of paying taxes." Pandora Vreeland
>
> "Charging fees to view the records would limit access to those records to those who can afford to view them, and such limitations would be antithetical to our democracy." Delta Anne Davis, Southern Environmental Law Center
>
> "To allow such fee charging would create another coffer subject to misuse by the extra staff required to implement and could hinder those with limited means to protect themselves re: records created about them." Franklin D. Stidham
>
> "Imposing a fee would be a step in the wrong direction. Even today citizens are sometimes made to feel that they are the 'enemy' when they request public records. Instead of creating a new barrier with a fee, we need to be looking for ways to remove existing bureaucratic obstacles. We all need to work at creating a climate where members of the public and government officials realize we are on the same team and wear the same color jersey." Helen Burns Sharp

Not everyone opposed fees. The Office of Open Records Counsel said a minority of commenters believed costs related to preparing records for inspection, including time spent retrieving, reviewing and redacting, should be passed on to the requestor.

On Jan. 14, 2016, McDaniel withdrew his bill killing the legislation. Tracy said he had no plans to pursue a change in the law either.

---

[13]Fisher, Deborah. *News stories on state hearings on proposed public record fees.* Tennessee Coalition for Open Government. Sept. 17, 2015. <http://tcog.info/news-stories-on-state-hearings-on-proposed-public-record-fees/>.

[14] NewsChannel 5 OpenLine *TN Open Records Laws Pt.1-Pt. 5.* Oct. 5, 2015. Via NewsChannel 5 YouTube channel. <https://www.youtube.com/watch?v=8WHogjlltj0>, <https://www.youtube.com/watch?v=CK8QphqcGQY>, <https://www.youtube.com/watch?v=Djn0wTYlnbU>, <https://www.youtube.com/watch?v=X0VpiADpFEs>, <https://www.youtube.com/watch?v=PR6MpPLbx6I>.

[15] Vanderbilt University Center for Study of Democratic Institutions. *12th Vanderbilt University Poll, November 11-23, 2015*. By John G. Geer and Joshua D. Clinton. Dec. 4, 2015. <https://www.vanderbilt.edu/csdi/fall2015pollslidefinalfinal.pdf>.

Conclusion

In the years since the Schedule of Reasonable Charges was established[16], and government entities have been authorized to charge citizens hourly rates to produce copies of public records, it is not abnormal to see charges priced in the hundreds, even thousands of dollars.

The highest charges often come when custodians send records to their attorney to review and redact, if necessary, before release, increasing the hourly rate passed on to the requestor. Sometimes the records are given to other highly paid public officials to review before release, such as a schools superintendent.

In 2013, the Department of Children's Services priced copies of public records related to 200 deaths and near-deaths of children under their watch at nearly $56,000, saying they would have to pay employees to drive records more than 7,000 miles from all parts of the state to hand-deliver them to Nashville for copying, and pay paralegals for 600 hours of redactions.[17]

There is little a person can do to contest production fees concerning the government entity's method of compiling records or who is assigned to the task. A citizen can hire an attorney and try to contest the fees in court, further driving up their costs. But most people faced with high fees either negotiate for fewer records than originally sought, walk away entirely or change their request for copies to a request to inspect.

Some government officials take issue with the legal stoplight that prevents charges for inspection. But many in the public who request public records have come to view the compromise of 2008 as a shield against excessive fees that otherwise would shut down access to public records entirely.

As attested to in statewide hearings just four years ago, it's a shield that citizens overwhelmingly want to keep.

About the author: Deborah Fisher is executive director of Tennessee Coalition for Open Government, a non-profit organization founded in 2003 which conducts research and education about access to public records, governing body meetings and court proceedings and documents. She spent 25 years as a news reporter and editor working in community newspapers, most recently at The Tennessean.

---

[16] Tennessee, Office of Open Records Counsel. *Schedule of Reasonable Charges*. <https://www.comptroller.tn.gov/content/dam/cot/orc/documents/oorc/policies-and-guidelines/ScheduleofReasonableCharges.pdf>.

[17] The Associated Press. *State: $56k to copy child death records for media.* Kingsport Times News. Feb. 5, 2013. <https://www.timesnews.net/News/2013/02/05/State-56k-to-copy-child-death-records-for-media>.