STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by THOMAS C. HORNE ATTORNEY GENERAL December 2, 2013	No. I13-012 (R13-018) Re: Charging Copying Fees Under Arizona's Public Records Law

To: Dennis Wells
Arizona Ombudsman-Citizens' Aide

Questions Presented

You asked for clarification as to what constitutes appropriate fees for inspecting and copying public records under Arizona Revised Statutes ("A.R.S.") § 39-121. Specifically, you requested guidance as to the following:

1. May a public body charge a copying fee for a public records request if the requesting party has not specifically asked for a copy of the record but the public body must make a copy to allow for inspection?

2. May a public body charge a copying fee when a requesting party copies public records using a personal device, provided that the copying is not disruptive to public business?

Summary Answers

1. No. Pursuant to Arizona's public records law, a member of the public is entitled to inspect public records at all times during a public body's office hours. Although a public body

may charge a fee to copy and mail public records when that action is requested, the statute does not expressly permit charging a fee when the requesting party wants merely to inspect public records. If, for whatever reason, the public body must make a copy of a public record to properly provide the record to the requesting party for inspection, then charging a copying fee is not appropriate.

2. No. A public body may charge copying fees under Arizona's public records law only if the public body itself makes the copies using public resources and furnishes them to the requesting party. In the event that a member of the public seeks to inspect public records and make copies using his or her own personal device, Arizona's public records law does not allow a public body to charge a fee.

Background

Arizona's public records law requires that "[p]ublic records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours." A.R.S. § 39-121. The public records law applies to any agency, branch, department, board, bureau, commission, council, or committee of the State or any political subdivision of the State. A.R.S. § 39-121.01(A)(2).[1] The purpose of Arizona's public records law is to "open government activity to public scrutiny." *Lake v. City of Phx.*, 222 Ariz. 547, 549, ¶ 7, 218 P.3d 1004, 1006 (2009) (emphasis and internal quotation marks omitted).

In addition to the public's right to inspect public records at all times during office hours, Arizona's public records law allows public bodies to provide copies of public records upon

[1] Arizona's public records law applies to any officer of any "public body." A.R.S. § 39-121.01(A)(1). The statute defines the term "public body" to include "this state, any county, city, town, school district, political subdivision or tax-supported district in this state, any branch, department, board, bureau, commission, council or committee of the foregoing, and any public organization or agency, supported in whole or in part by monies from this state or any political subdivision of this state, or expending monies provided by this state or any political subdivision of this state." A.R.S. § 39-121.01(A)(2). Because the statute uses the term "public body," this Opinion refers throughout to the rights and responsibilities of Arizona's "public bodies" under the Arizona public records law.

request. A.R.S. § 39-121.01(D). Public bodies may charge certain fees when responding to a request for copies of public records. A public body may charge different fees depending on whether the requesting party intends to use the public records for a "commercial" or a "noncommercial" purpose. *Compare* A.R.S. § 39-121.01(D) *with* A.R.S. § 39-121.03(A). The law defines a "commercial purpose" as "the use of a public record for the purpose of sale or resale," use of the record to obtain "names and addresses from public records for the purpose of solicitation," or "for any purpose in which the purchaser can reasonably anticipate the receipt of monetary gain from the direct or indirect use of the public record." A.R.S. § 39-121.03(D).

When a requesting party intends to use the public records for a commercial purpose, the public body may charge fees for all of the following:,

> 1. A portion of the cost to the public body for obtaining the original or copies of the documents, printouts or photographs.
>
> 2. A reasonable fee for the cost of time, materials, equipment and personnel in producing such reproduction.
>
> 3. The value of the reproduction on the commercial market as best determined by the public body.

A.R.S. § 39-121.03(A). In contrast, A.R.S. § 39-121.01(D) provides that when a requesting party does not intend to use the public record for a commercial purpose, the custodian may charge fees only for "copying and postage." Because you do not specify that you are asking about a request for public records intended for a commercial purpose, this Opinion addresses only issues related to appropriate fees for responding to requests for public records that are not intended to be used for a commercial purpose.

Analysis

Section 39-121.01(D) provides as follows:

> Any person may request to examine or be furnished copies, printouts or photographs of any public record during regular office

> hours or may request that the custodian mail a copy of any public record not otherwise available on the public body's website to the requesting person. The custodian may require any person requesting that the custodian mail a copy of any public record to pay in advance for any copying and postage charges. The custodian of such records shall promptly furnish such copies, printouts or photographs and may charge a fee if the facilities are available, except that public records for purposes listed in section 39-122 or 39-127 shall be furnished without charge.

This plain language indicates that a public body may charge a fee for responding to a public records request for a noncommercial purpose for (1) postage charges to mail copies of public records to the requesting party or (2) copying public records and furnishing them to the requesting party if the proper facilities are available.

The questions addressed here concern the scope of what it means to "copy" a public record so that a fee is appropriate. Under the first question, if the requesting party wants only to *inspect* specific public records, but the public body must first print a paper copy of the record to enable the requesting party to inspect the record, does this qualify as a "copy" of the record so that a copying fee is appropriate? The second question is whether a public body may charge a fee for "copying" the record when the requesting party wants to copy the record using his or her own personal device?

A. A public body may not charge a copying fee when a member of the public asks only to inspect the record.

When a member of the public asks to inspect a public record during office hours, the custodian of the record may need to print out a paper copy to facilitate inspection. For example, a public body may keep certain records in electronic format that are not easily accessible for inspection by a requesting party. *See Lake*, 222 Ariz. at 551, ¶ 14, 218 P.3d at 1008 (acknowledging a public body's right to store public records in electronic format). Or the record may require redactions prior to public inspection, and redaction may necessitate copying the

document. *See Phx. Newspapers, Inc. v. Ellis*, 215 Ariz. 268, 273, 159 P.3d 578, 583 (App. 2007) (providing that if portions of a public record merit confidentiality, redaction of that information is appropriate before allowing inspection).

To determine whether a public body can impose a fee for inspecting public records, we examine the language of Arizona's public records statutes, which is the best and most reliable index of their meaning. *N. Valley Emergency Specialists, L.L.C. v. Santana*, 208 Ariz. 301, 303, ¶ 9, 93 P.3d 501, 503 (2004). Pursuant to A.R.S. § 39-121.01(D)(1), if the requesting party specifically asks the custodian to "mail a copy" of the public record, the custodian may charge postage and copying fees. Additionally, the statute authorizes the custodian to "charge a fee" for "furnish[ing] . . . copies, printouts or photographs" if the necessary "facilities are available." *Id.* Accordingly, although the law explicitly authorizes a public body to pass along the cost of making copies of public records, it does not explicitly authorize charging a fee for taking the necessary measures to make public records available for inspection.

The Arizona Court of Appeals previously analyzed Arizona's public records law and distinguished a public body's right to impose a fee for making copies on the requesting party from the right to charge the requesting party for costs that the public body incurs in locating and preparing the public record.[2] In *Hanania v. City of Tucson*, 128 Ariz. 135, 136, 624 P.2d 332, 333 (App. 1981), the court determined that the public records law allowed a public body to charge a fee for copying a public record, but not for searching for or retrieving the record. *Id.*; *see also* Ariz. Att'y Gen. Op. I86-090 (confirming that amendments to Arizona's public records law did not authorize a public body to charge a copying fee for searching for records). Under *Hanania*, if a public body cannot charge a fee for searching for or retrieving a public record for

[2] The court in *Hanania* examined a version of Arizona's public records law that predated significant 1977 revisions, but those revisions do not affect the court's analysis for purposes of this Opinion.

inspection, then a public body likewise cannot pass on the cost of its decision to copy a record to facilitate inspection. The purpose of Arizona's public records law is to allow members of the public open access to inspect public records during regular office hours. This purpose would be hindered by imposing fees on members of the public who travel to a public office solely to inspect a public record.

This conclusion is consistent with the Ohio Supreme Court's interpretation of Ohio's public records law. In *State ex rel. The Warren Newspapers, Inc. v. Hutson*, 640 N.E.2d 174, 177 (Ohio 1994), the court interpreted Ohio's public records law to mean that public agencies could not impose fees for having to make internal copies to allow a member of the public to inspect certain records. The court analyzed Ohio Revised Code ("O.R.C.") § 149.43, which required that "'[a]ll public records shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours.'" 640 N.E.2d at 177 (quoting Ohio Revised Code § 149.43(B)). Although Ohio's law allowed fees for copying records, a newspaper publisher who asked to inspect police department public records challenged the department's decision to charge the publisher a fee for the copies that had to be made to redact the original records. *Id.* at 178. The court concluded that the fact that the department needed to make internal copies to make redactions did not support charging copying fees to the publisher, who wanted only to look at the records: "The right of inspection, as opposed to the right to request copies, is not conditioned on the payment of any fee under [O.R.C.] 149.43." *Id.*

So it is under Arizona's public records law, which does not condition the right to inspect records on the payment of a fee either. A public body in Arizona therefore cannot charge copying fees to recoup the cost of copies made internally to allow a member of the public to inspect the records.

B. A public body may not charge a fee for a member of the public to use a personal device to copy public records.

The above analysis also supports the conclusion that a public body may not charge a fee for a member of the public to use a personal device to copy public records. Because the public body may only charge copying costs and not inspection fees, then the public agency may not charge copying costs when it makes public records available to a requesting party who copies those records with his or her own personal device. This conclusion is also supported by A.R.S. § 39-121.01(D)(3).

Arizona's public records law includes a separate provision addressing a custodian's responsibilities in the event that a party requests a copy of a public record and the custodian "does not have facilities for making copies." Section 39-121.01(D)(3) provides as follows:

> If the custodian of a public record does not have facilities for making copies, printouts or photographs of a public record which a person has a right to inspect, such person shall be granted access to the public record for the purpose of making copies, printouts or photographs. The copies, printouts or photographs shall be made while the public record is in the possession, custody and control of the custodian of the public record and shall be subject to the supervision of such custodian.

Section 39-121.01(D)(3) addresses situations in which copying facilities are not available. Unlike the language in section 39-121.01(D)(1), this provision does not explicitly allow the public body to charge a fee when a member of the public must make his or her own copies of public records for lack of "facilities." Section 39-121.01(D)(3) therefore expresses a legislative intent to not authorize a fee for a member of the public to make his or her own copies of public records. When a public body has the facilities to copy records, but the requesting party would rather make copies using a personal device (to avoid a fee), this legislative intent must govern to avoid an absurd result, i.e., charging a fee for a service (copying) that the public body does not provide. *See Norman v. State Farm Mut. Auto Ins. Co.*, 201 Ariz. 196, 200, ¶ 12, 33

P.3d 530, 534 (App. 2001) (holding that statutory interpretation requires that courts "do not conclude that the legislature intended an absurdity").

Interpreting sections 39-121.01(D)(1) and 39-121.01(D)(3) to preclude copying fees in this circumstance also comports with attorney general opinions from other jurisdictions. *See, e.g.*, Ala. Att'y Gen. Op. 2009-076 ("[I]t is the opinion of this Office that the regular copying fee for public records cannot be charged to individuals using personal cameras or other electronic devices."); La. Att'y Gen. Op. 08-0179 ("[T]he right of a public entity to charge a fee for producing copies does not entitle a public entity to charge a fee for requestors to view and scan the documents themselves."); Ohio Att'y Gen. Op. 2004-011 ("A person who is using a digital camera, which is not provided by [the public body], to make copies of records is akin to someone who is merely inspecting the records. The [public body] is providing no photocopying or other service for which he may charge . . . ."); Okla. Att'y Gen. Op. 06-35 ("If a person copies a record using his or her own personal recording device we find no statutory authority for the agency maintaining such records to charge a fee for such service.").

For these reasons, a public body cannot charge a copying fee when a member of the public inspects a record and makes a copy of the record using his or her own personal device.[3]

. . . .

. . . .

[3] The specific question posed, and this Opinion, assume that the requesting party's use of a personal device to make copies is not "disruptive to public business." Nothing in this Opinion should be construed to permit a person to use a personal device to make copies when the custodian determines that such use would disrupt public business. Moreover, this Opinion does not require a public body to permit the use of a personal copying device that could destroy, damage, or alter the public documents. *Cf. Adams Cnty. Abstract Co. v. Fisk*, 788 P.2d 1336, 1339-40 (Idaho App. 1990) (precluding a public agency using a personal copying device to copy a public record prior to the record being transferred to microfilm in part because the physical handling of the original document risks altering or damaging the record); *Moore v. Bd. of Chosen Freeholders of Mercer Cnty.*, 184 A.2d 748, 754 (N.J. Super. Ct. App. Div. 1962) (noting that the public's right to use personal copying devices to copy public records includes a limitation that the device's "performance be such as not to damage or impair the records"); *Matte v. City of Winooski*, 271 A.2d 830, 832 (Vt. 1970) (recognizing the importance of preserving public records and noting that a custodian of public records has the discretion to decide how best to preserve records).

Conclusion

Arizona's public records law allows a public body to impose copying fees in response to public records requests for noncommercial purposes. Under that law, a public body can impose copying fees to offset copying costs only when a requesting party asks the public body to furnish copies of records. A public body should not impose copying fees on a party making a public records request when the requesting party asks only to inspect records or uses a personal device to make his or her own copies.

Thomas C. Horne
Attorney General