



THE OPRA ALERT

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PUBLIC AGENCIES MUST CHARGE ACTUAL COSTS TO DUPLICATE GOVERNMENT RECORDS

ACTUAL COST CALCULATION INCLUDED ON PAGE 2

In Smith v. Hudson County Register, 411 N.J. Super. 538 (App. Div. 2010), the Appellate Division held that beginning July 1, 2010, unless and until the Legislature amends OPRA to specify otherwise or some other statute or regulation applies, public agencies must charge requestors of government records no more than the reasonably approximated “actual costs” of copying such records.

The Government Records Council therefore interprets the Appellate Division’s decision to require that, unless the Legislature otherwise acts to amend OPRA, after June 30, 2010 custodians must charge requestors the “actual costs” associated with photocopying government records.

The Government Records Council interprets such actual costs to be limited to the cost of paper and toner only, specifically excluding the costs of labor and other overhead expenses pursuant to N.J.S.A. 47:1A-5.b. OPRA specifically provides in N.J.S.A. 47:1A-5.b. that “the actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, **but shall not include the cost of labor or overhead expenses associated with making the copy except as provided for in subsection c. of this section.**” [Please note that subsection c. refers to special service charges.] “Overhead” is thus interpreted to mean “[b]usiness expenses (such as rent, utilities or support-staff salaries) that cannot be allocated to a particular product or service, fixed or ordinary operating costs.” Black’s Law Dictionary, (8th Ed. 1999), at 1136. See also http://www.irs.gov/pub/cmpsrc/learn_more/ab_a76_terms.pdf (explaining that “[o]verhead includes two major categories of cost, operations overhead and general and administrative overhead. Operations overhead includes costs that are not 100 percent attributable to the activity being competed but are generally associated with the recurring management or support of the activity. General and administrative overhead includes salaries, equipment, space, and other tasks related to headquarters management, accounting, personnel, legal support, data processing management, and similar common services performed external to the activity, but in support of the activity being competed.”).

Thus, public agencies may not include the costs associated with utilities, equipment, space or instruction in the computation of actual costs. Public agencies may include only the per-page costs of paper and toner in the computation of actual costs. Consistent with the Appellate Division’s decision in Smith, public agencies may calculate their per-page copy costs on an annual basis. The costs may be averaged for the copy equipment used in all agency offices.

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The GRC is conducting several OPRA training seminars over the summer and fall months. For more information on our training schedule, visit our website at <http://www.nj.gov/grc/meetings/schedule/>.

The Council held officer elections at its May 27, 2010 public meeting. Ms. Robin Berg Tabakin was elected as Chairwoman and Mr. Charles A. Richman (designee of the Lori Grifa, the Commissioner of the New Jersey Department of Community Affairs) was elected as Secretary.

ACTUAL COSTS CONTINUED

How to Calculate Actual Costs

- Custodians should contact their supplier to determine the cost of paper and toner. A supplier is wherever the agency obtains those materials – paper and toner (i.e. central purchasing unit, Staples, Office Depot, etc).
- Calculate or contact copying company to determine the agency's annual copying volume (calendar or fiscal year, however the agency operates). This does NOT only include copies pertaining to OPRA requests – this is ALL copying on all copy machines in the agency for all purposes.
- Contact copying company to determine the average paper life of one toner/ink cartridge (i.e. how many pieces of paper the ink or toner should be able to copy).
- Custodian must maintain documentation of all information provided by copying company or office supplier (i.e. contracts or correspondence from purchasing agent or copying company) regarding this calculation.
- **Actual calculation is the total cost of paper purchased for 1 year (calendar or fiscal) + the total cost of toner purchased (calendar or fiscal) ÷ the annual copying volume.**
- This calculation can be averaged for all copy machines in an agency that produce letter and legal copies. Special copiers, such as for color printing or blueprints copied in house, should be calculated separately.

The court further held that if the proposed charges are equal to or less than those enumerated rates set forth in the second sentence of Section 5.b., a complainant would have the burden of demonstrating that the agency's actual costs were indeed lower than the enumerated rates. If the challenger fails to sustain that burden, the agency will prevail and may continue to charge its existing rates. If the agency's charges exceed the enumerated rates stated in the second sentence of Section 5.b., then the agency must demonstrate that its actual costs are indeed higher than those enumerated rates and are therefore justified.

RESOURCES FOR CUSTODIANS

The following resources for records custodians are located online at <http://www.nj.gov/grc/custodians/>:

Custodian's Handbook

Redaction Guidelines

Executive Orders containing government record exemptions

Denial of Access Appeal Posters

ADDITIONAL OPRA RESOURCES

The following additional resources are located on the GRC's website at <http://www.nj.gov/grc/meetings/present/>:

Readable Version of OPRA

OPRA PowerPoint Presentation

Exemptions in OPRA Handout

Special Service Charge Handout

Useful OPRA Cases by Subject

E-Mail Retention—DARM Circular

The Government Records Council (GRC) is committed to making the Open Public Records Act (OPRA) work for the citizens of New Jersey. Since the law's inception, the GRC has worked hard to make government records more easily accessible to the public. The GRC is committed to being the facilitator of open government in New Jersey.

Created under OPRA, the Government Records Council:

- Responds to inquiries and complaints about the law from the public and public agency records custodians
- Issues public information about the law and services provided by the Council
- Maintains a toll-free help-line and Web site to assist the public and records custodians
- Issues advisory opinions on the accessibility of government records
- Delivers training on the law
- Provides mediation of disputes about access to government records
- Resolves disputes regarding access to government records



STATE OF NEW JERSEY

GOVERNMENT RECORDS COUNCIL

The GRC Council members are:

Robin Berg Tabakin

Owner of Technoforce, LLC and State
President of the New Jersey Association of
Women Business Owners

Bret Schundler

Commissioner of the New Jersey
Department of Education

Lori Grifa

Commissioner of the New Jersey
Department of Community Affairs

GRC staff members are:

Catherine Starghill, Esq. (Executive Director)

Karyn Gordon, Esq. (In-House Counsel)

Brigitte Hairston (Secretary)

Dara Lownie (Senior Case Manager)

Frank Caruso (Case Manager)

John Stewart (Case Manager/In Camera Attorney)

Harlynn A. Lack, Esq. (Case Manager/Staff
Attorney)



Government Records Council
101 S. Broad Street
P.O. Box 819
Trenton, New Jersey 08625-0819

Phone: 609-292-6830

Fax: 609-633-6337

E-mail: grc@dca.state.nj.us

www.nj.gov/grc

If you have a question regarding the
Open Public Records Act,
contact the GRC's information line
toll free at
1-866-850-0511
or
grc@dca.state.nj.us