



# WASHOE COUNTY

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## STAFF REPORT

**BOARD MEETING DATE:** October 12, 2021

**DATE:** Wednesday, October 06, 2021

**TO:** Board of County Commissioners

**FROM:** Nathan Edwards, Assistant District Attorney

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**THROUGH:** Eric Brown, County Manager

**SUBJECT:** Discussion and possible approval of a resolution to establish a list of fees to be charged to cover the actual costs of providing copies of public records in accordance with Washoe County's public records policy and NRS Chapter 239, including but not limited to NRS 239.052. Among other things, the proposed resolution defines actual costs to include personnel costs for staff time that exceeds 2 hours in filling any particular request, as well as provides a limited ability for department heads to waive all or a portion of fees in extraordinary circumstances. (All Commission Districts) **FOR POSSIBLE ACTION**

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### SUMMARY

Nevada law and the county's existing Public Records Request Policy allows the county to charge actual costs incurred in producing copies of public records. Nevada law requires that a governmental entity create and post a list of fees it will charge for copies of public records. The proposed resolution creates that list of fees, which constitute the county's actual costs.

The proposed resolution also grants Records Officials limited discretion in extraordinary circumstances to waive all or a portion of fees for any request that takes more than 2 hours to fulfill. Extraordinary circumstances are based on the following factors: 1) extent to which the request will exceed the 2-hour cutoff; 2) extent to which the requestor agrees to focus the request to expedite its fulfillment; and 3) whether the request is being made in connection with educational, journalistic, or charitable purposes.

The goal of the resolution is to faithfully discharge the county's duties under NRS Chapter 239, as well as to utilize cost recovery methods provided by the legislature in that same chapter to lessen impacts on county resources.

**AGENDA ITEM # \_\_\_\_\_**

On August 26, 2021, Truckee Meadows Fire Protection District adopted a list of fees to be charged to cover the actual costs of providing records in response to public records requests in accordance with NRS Chapter 239.

County Priority/Goal Supported by this Item: Government efficiency and regional leadership through engaged employees.

### **PREVIOUS ACTION**

- July 20, 2020. The Board adopted a public records policy allowing agencies to charge a fee in the amount of actual costs incurred in providing a copy of a public record. The public records policy also allows an agency to waive all or a portion of those fees.
- November 20, 2020. The Washoe County District Board of Health adopted a list of fees to be charged to cover the actual costs of providing records in response to public records requests in accordance with NRS Chapter 239.

### **BACKGROUND**

To promote government efficiency and mitigate impacts on limited taxpayer resources caused by abusive tactics, a list of fees is necessary. Access to records and transparency in government is of the utmost importance. The majority of public records requests will not incur fees under the proposed resolution. However, some departments have been inundated with public records requests. There have been instances of a requestor failing to retrieve or open the county's response to an enormous request after county employees arduously labored to fulfill the request. Other requests are so broad that it would require one fulltime employee's dedication for several years to fulfill. For example, at least one such request captured approximately 300,000 emails, which the requestor refused to narrow. That volume alone suggested a motive of harassment rather than any genuine interest in reviewing government records; spending even 1 minute to review each of those emails would have taken roughly 5,000 hours of time, or nearly 2 and a half years of 8-hour days, 5 days a week with no vacations. Unfortunately, this is not the only recent request of this kind that the county has had to grapple with. In another case, when a requestor became dissatisfied with the response to their request, they immediately filed a new request seeking all personnel records of the county staff they blamed—a request ostensibly designed to retaliate and harass the county staff involved. The impact on county personnel and resources in these situations is massive and at times a substantial impediment to the county carrying out its duties and providing services within the community. This resolution is necessary to mitigate these effects.

### **Existing Policy**

On July 21, 2020, the Washoe County Commission adopted the newest version of its public records policy. *See* Exhibit 1. Among other things, it allowed county agencies and departments to charge for the “actual costs” incurred by them in response to individual public records requests. This mirrors changes to the public records law in NRS Chapter 239 that were adopted in the 2019 legislative session.

## **List of Fees**

To carry out a policy regarding public records fees, a governmental entity is required to create a list of applicable fees. NRS 239.052(3). A notice or sign must be posted in a conspicuous place stating the fees associated with public records or providing the location where a list of fees may be found. *Id.*

The proposed resolution adopts an “actual cost” framework based on changes to the Nevada public records law enacted in the 2019 legislative session. Specifically, the legislature in 2019 moved away from an “extraordinary use” standard by repealing NRS 239.055 and instead adopting the “actual cost” standard in NRS 239.052.

The definition of actual cost set forth in NRS 239.005(1) is not limited to hard costs, such as ink, toner, paper, thumb drives, or the like. Rather, it was written to allow recovery for *any* actual costs. This opened the door to charge for personnel costs. In fact, the original version of the bill specifically excluded personnel costs (SB 287, 2019). But the legislature removed that provision, presumably because it did not want to bar recovery of personnel costs incurred in connection with public records requests. Thus, fee charges for personnel costs are almost certainly permitted under the new law.

The statute provides additional guidance on the issue. Essentially, it says that actual costs do not include anything that would have been incurred “regardless of” the request--in other words, overhead. By extension, this means actual costs, including personnel costs, are chargeable if they are incurred “because of” a records request, as opposed to “regardless of” the request.

Public employees work for the public as a whole, and public employees are responsible to perform work in addition to responding to records requests. Nothing in NRS chapter 239 suggests the legislature intended government to expend the entirety, or even any major proportion, of its personnel time fulfilling records requests to the exclusion of other work. The 2-hour cutoff explained below balances the wording and the spirit of the law embodied by NRS Chapter 239 by assuring that employees are not consumed solely with providing records to the exclusion of the other work taxpayers rightfully expect public employees to provide.

## **2-Hour Cutoff**

Long before the enactment of the “actual cost” framework in NRS Chapter 239, Washoe County had adopted a standard for determining which personnel tasks are within the usual course of an agency’s or department’s operations. In Rule 5.6 of the Washoe County Board of Commissioners Rules of Procedure Handbook, adopted March 28, 2017, it was determined that any requests by individual county commissioners requiring more than 2 hours of staff time to complete must be supported by a majority vote of the entire commission at a duly agendized public meeting. Two hours has therefore been recognized by the county as the cutoff between usual and unusual staff work required by a request for information.

This same standard is instructive for actual costs incurred in response to public records. Like commissioner requests for information, public records requests also require dedication of staff time to compile information. It stands to reason, therefore, that 2 hours should also be the point beyond which it can be said that a department or agency is incurring costs “because of” a particular public records request, as opposed to “regardless of” that request. In other words, any staff time beyond 2 hours is the actual cost that can be billed to someone requesting public records.

The vast majority of public records requests can be filled in less than 2 hours of staff time. No charge will be made in those cases, except for hard costs discussed above. It is up to each department or agency head to make individualized determinations on a case-by-case basis how long the fulfillment of a records request will take.

Where a records request will consume less than two hours of an employee’s time, the requestor will not be charged for personnel time. This ensures that any personnel costs charged are costs only incurred as a result of the request. The 2-hour cutoff also prevents cost barriers to the vast majority of the public’s records requests.

Notably, under the old and more restrictive “extraordinary use” standard, the Nevada Attorney General’s Office analyzed a local government policy of charging for personnel time beyond 30 minutes and concluded that it was valid. *See* 32 AGO 2002. Even though this standard has been replaced, it is instructive. First, although not binding, Attorney General’s Opinions on public records law are entitled to deference under Nevada Supreme Court precedent. *See Clark Cty. Office of Coroner/Med. Exam’r v. Las Vegas Review-Journal*, 136 Nev. Adv. Op. 5 (2020). Second, the 2019 legislature’s apparent intent in replacing the “extraordinary use” standard with “actual cost” was to EXPAND the ability of local governments to charge for personnel time, not contract it. If 30 minutes was appropriate under the older and more restrictive “extraordinary use” standard, then it stands to reason that 2 hours is appropriate under the new and significantly more permissive “actual cost” standard. Indeed, it is four times as long as the 30-minute cutoff at issue in the above Attorney General’s Opinion.

### **Ability to Waive Fees**

In the existing public records policy, “An agency may waive all or a portion of a charge or fee for a copy of a public record.” The proposed resolution grants Records Officials discretion to waive all or a portion of a fee incurred by their department as a result of a public records request in extraordinary circumstances. Extraordinary circumstances are based on the following factors: 1) the extent to which the request will exceed the 2-hour cutoff; 2) extent to which the requestor agrees to focus the request to expedite its fulfillment; and 3) whether the request is being made in connection with educational, journalistic, or charitable purposes.

**FISCAL IMPACT**

The fiscal impact is unknown at this time. It is anticipated actual costs to respond to public records requests will be partially offset by fees collected.

**RECOMMENDATION**

It is recommended that the Board approve a resolution to establish a list of fees to be charged to cover the actual costs of providing copies of public records in accordance with Washoe County's public records policy and NRS Chapter 239, including but not limited to NRS 239.052.

**POSSIBLE MOTION**

Should the Board agree with staffs' recommendation, a possible motion could be:

“I move to approve the resolution to establish a list of fees to be charged to cover the actual costs of providing copies of public records in accordance with Washoe County's public records policy and NRS Chapter 239, including but not limited to NRS 239.052.”