



WASHOE COUNTY

Integrity Communication Service

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STAFF REPORT

BOARD MEETING DATE: December 14, 2021

DATE: Thursday, December 09, 2021

TO: Board of County Commissioners

FROM: County Manager's Office

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 establishes a fee to cover personnel costs for staff time that exceeds 10 hours in filling any particular request, establishes a reduced hourly rate for staff time that can be charged, and provides an ability to waive all or a portion of fees. (All Commission Districts) **FOR POSSIBLE ACTION**

SUMMARY

Nevada law and the county's existing Public Records Request Policy allow 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 takes into account the Board's comments at the October 12, 2021 meeting item on this matter, maintains consistency with other jurisdictions in the State of Nevada, and promotes general access to records. The proposal creates a standing waiver of fees for staff time up to 10 hours; staff time will only be charged to the extent it exceeds 10 hours. The proposal also creates a standing waiver for staff hourly rates that exceed that of an Office Assistant I; only the rate of an Office Assistant I, currently \$18.71, will be charged for staff time. The proposed resolution also includes an ability to waive fees entirely.

AGENDA ITEM # _____

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.

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 10, 2020. The Truckee Meadows Fire Protection District adopted a public records policy and 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.
- August 26, 2021. The Washoe County District Board of Health adopted a public records policy and 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 some requests, 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 and related entities 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.

The proposed resolution establishes a uniform fee schedule for all county departments under the umbrella of the Manager's Office. Elected officials can adopt the same fee schedule for their departments at their discretion.

Responding to Public Records Requests

Since 2019, the county has attempted to route public records requests through Washoe 311. The county's website directs members of the public to submit records requests to Washoe 311. Washoe 311 is the county's non-emergency customer service center. Once Washoe 311 receives a public records request, the request is routed to the appropriate department. The department then gathers any responsive records, and Washoe 311 provides the public records response.

However, some members of the public submit records requests—either verbally or in writing—to individual county employees. Some of these requests are not accounted for in Washoe 311's records. Sometimes, requests are handled by the individual employees or departments who received the request. It is unknown how many public records requests were received and responded to by individual employees or departments and not accounted for by Washoe311. From October 2020 to October 2021, Washoe311 tracked 1,170 public records requests.

Additionally, county resources are expended for requests directed to its related entities like the Truckee Meadows Fire Protection District and the Washoe County Health District. The county's technology services department assists in gathering electronic records including emails for the county and its related entities like Truckee Meadows Fire Protection District and the Washoe County Health District. The District Attorney's Office provides any requested legal review for all three entities. When a request seeks email records, the county's practice has been for technology services to gather the emails and, if needed, for the District Attorney's Office to review the emails for any privileged or confidential information.

Excessive and Unduly Burdensome Public Records Requests

The county and related entities have experienced excessive and unduly burdensome records requests or series of requests. Examples are as follows:

Individual #1

In 2021, Individual #1 has so far sent at least 38 records requests to the county and related entities like the Health District. *See Summary of Individual #1's 2021 Public Records Requests*, Exhibit 1. Individual #1 also sent at least 4 requests to resend records already provided to the Individual. Individual #1 has sent a records request, then made second records request for a copy of their first records request. Presumably, the individual already had a record of the first request, and was simply sending the second request to harass and consume staff time. Similarly, Individual #1 left a voicemail on a county answering machine, then sent a records request for a copy of the Individual's voicemail.

Individual #1's requests are at times very broad, and Individual #1 has refused to narrow requests. Individual #1 often made multiple separate requests in one day, or multiple requests over consecutive days. Individual #1's requests include various time ranges, including 5 years of records, 10 years of records, and 20 years of records. For example, one request uncovered 57,000 potentially responsive records, seeking "Copies of all emails to or from any County employee (including County Commissioners) to or from anyone that mentions or references the terms or words "asbestos" or "NESHAP" within said emails during the years 2017, 2018, 2019 2020, and 2021." For another request, the individual was provided over 9,300 records.

Individual #1 also made retaliatory records requests for staff employment files. In one request to an employee, Individual #1 demanded "provide me with your entire experience, education, and employment records." In another retaliatory request sent to a specific employee, Individual #1's demands included the following: "copies of any time sheets, activities calendars, vehicle logs, scheduling notes, appointment books, work diaries, and/or sign in and out sheets. Include any and all documents that reflect how, where, on what, and with who you spent your work hours during the proceeding (sic)_ 24 month period."

Individual #1 has been sent tens of thousands of records this year. Individual #1 has an extensive history of making broad and numerous records requests— the above outline is limited to their requests in 2021.

Individual #2

In 2020, Individual #2 engaged in a series of excessive and burdensome public records requests to the county and related entities like Truckee Meadows Fire District. *See Summary of Individual #2's 2021 Public Records Requests, Exhibit 2.*

Individual #2's requests were extremely broad, and Individual #2 refused to narrow the requests. Individual #2 requested thirty years of records in three separate requests, and requested 10 years of records in another request. One of Individual #2's requests sought "all public records of telephone, text, fax, email, and all other public records, to include employee records, related to Charles Moore for the last 30 years with the Truckee Meadows Fire Protection District, or similar agency." This request captured nearly 300,000 emails and was expected to take 10 full days just to load the emails into an inbox to begin review for confidentiality.

Public records requests were just one tool Individual #2 used to harass staff. In another instance, Individual #2 emailed an employee a youtube.com link. That employee had worked with Individual #2 to get Individual #2's public records requests processed. The link lead to a video showing that Individual #2 had secretly filmed the employee at the employee's workplace.

The above information regarding Individual #1 and #2 outline the rare occurrence where public records requests are exploited. Though all members of the public have a right to request public records, a fee schedule will ensure no individual has the ability to singlehandedly financially drain and paralyze county departments.

Existing Public Records 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 would be the “list of fees” for county departments. The proposal 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.

Ability to Charge for Staff Time

As set forth in the October 12, 2021 staff report, Nevada law allows entities to charge staff time as an actual cost. In 2019, the Nevada Legislature enacted substantial changes to public records laws through SB 287. NRS 239.005(1) now allows governmental entities to charge for *any* actual costs incurred as a result of public records requests.

The Nevada Legislature specifically contemplated the ability to charge staff time in SB 287. The original draft of the bill included language stating that actual costs “does not include...any overhead costs of the governmental entity and any labor costs incurred by a governmental entity in the provision of a public record” SB 287, *as introduced*. In Amendment 1075, **the sentence prohibiting charges for personnel costs was removed** from the bill.

Discussing the removal of the prohibition on charges for personnel costs, Senator Shieble stated the following:

“In the spirit of transparency, one of the areas we had difficulty with was **whether or not overhead, personnel, and labor costs should be included in the definition of actual costs**. You will notice that section 3, subsection 1 does not address that question specifically **because it was our determination that in some cases it is appropriate**, and in a lot of cases it is not. It is certainly not appropriate for a government agency to depend on fees for providing public records in order to pay their power bill and in order to make up any portion of their annual budget. However, when a public record request comes in that is incredibly onerous or incredibly large- we heard testimony on the Senate side about organizations that for legitimate reasons were requesting tens of thousands of documents, and cities, counties, and local jurisdictions had to call their employees in over the weekend

to work on a Saturday. Or they had to invest in another printer in order to leave the copier in the copy room available for all of their daily functions and still be able to complete a project of copying 10,000 pages of some other record. So **we want to make sure they are able to account for those costs**, and that is why we came to the decision we did in section 3, subsection 1.” *Minutes of the Meeting of the Assembly Committee on Government Affairs*, p. 4 (June 3, 2019 80th Leg)(emphases added).

Describing the original draft of SB 287, and the version of the bill ultimately signed into law, Senator Scheible stated: “...they are very, very different. I should not say very different, but there are significant changes.” *Minutes of the Meeting of the Assembly Committee on Government Affairs*, p. 3 (June 3, 2019 80th Leg).

It is extremely common to consider legislative history when conducting statutory analysis. At the October 12, 2021 county commission meeting, a party in opposition stated that SB 287’s legislative history was “entirely irrelevant” because the plain language of the statute was not ambiguous. “A statute is ambiguous if it is capable of being understood in two or more senses by reasonably well-informed persons.” *D.R. Horton, Inc. v. Eighth Judicial Dist. Court ex rel. County of Clark*, 123 Nev. 468, 476, 168 P.3d 168 731, 737 (2007). The fact that an opposing organization and county staff disagree on the meaning “actual costs,” supports the notion that there is ambiguity. Moreover, the statutes do not state that “staff time” cannot be charged as actual cost. There is no express prohibition on the practice in the law; the statute is silent on that exact issue. A review of the legislative history sheds light and makes clear that actual cost fees can include staff time.

Moreover, in May 2020, the Interim General Counsel for the Office of Governor Steve Sisolak came to the same conclusion. *See* Exhibit 3. Interim General Counsel analyzed the issues of whether fees can be charged to produce public records and whether those fees can include the cost of labor. The memorandum addressed a request that “can be described as nothing less than onerous.” The Interim General Counsel opined “that charging the cost of overhead, personnel, and labor costs back to the requesting party is wholly consistent with the legislative intent of SB 287, and Nevada’s public records laws.”

Charges for staff time as set forth in the proposed resolution is consistent with the Nevada law.

Other Local Governmental Entities in Nevada

Governmental Entities within the State of Nevada have varying fee schedules. Some entities have updated their fee schedules to include staff time. Some have not yet updated their fee schedules to reflect the 2019 legislative changes.

The City of Las Vegas, City of Henderson, and Washoe County School District charge for staff time in their fee schedules. The Washoe County School District charges for staff time in excess of 2 hours, but does not list specific hourly rates. The City of Las Vegas charges \$32 per hour after ten hours—the first ten hours have no charge. Exhibit 4. The City of Henderson charges for staff time in excess of ten hours. Exhibit 5. However, the City of Henderson breaks down its actual cost for staff time as follows: technical staff at \$47 per hour, professional staff at \$73 per hour, and legal staff at \$129 per hour.

The consensus in Southern Nevada appears to be a policy of charging for staff time in excess of 10 hours based on the fee schedules explained above.

2-Hour Cutoff and Standing Waiver up to 10 Hours

As set forth below and presented at the October 12, 2021 meeting, the county's position remains that staff time exceeding 2 hours is an "actual cost." However, a general waiver of staff time up to 10 hours would promote uniformity throughout the State of Nevada. A general waiver of staff time up to 10 hours would also further ensure that most public records requests are fulfilled without staff time charges.

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.

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.

Even though the county begins incurring actual costs of staff time at 2 hours, the proposed resolution would only charge for staff time that exceeds 10 hours. At 10 hours, staff will have spent at least one full working day fulfilling a public records request—as explained in

the October 12, 2021 staff report, the majority of requests take less than *two hours* to fulfill. Waiving up to 10 hours of staff time limits potential financial consequences of records requests, which further promotes public access to records.

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.

The majority of public records requests are reasonable requests by individuals simply exercising their right to access public records. *See Washoe 311 tracking from Oct. 2020-21*, Exhibit 6. Only a few requests may result in staff time charges under the proposed resolution. If staff time is charged, it is charged at a reduced hourly rate. The charge can also be waived.

The proposed resolution is an appropriate, necessary, and modest fee schedule that balances the county’s need to recoup costs in some cases with the county’s desire to promote and preserve the general public’s access to records. Public records requests have increased—the requests tracked by Washoe311 show 759 requests for the year 2020, and 980 requests from January to October 2021. *See Washoe311 2021 Tracking by Department*, Exhibit 7.

FISCAL IMPACT

The fiscal impact is unknown at this time. Actual costs to respond to public records requests will be 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.”