



MEMORANDUM

TO: Mayor and Councilmembers

FROM: Howard S. Lazarus, City Administrator

SUBJECT: Council Resolution [R-19-367](#) – Resolution to Direct the City Administrator to Review the City’s Policies on Assessing Fees for Freedom of Information Act (FOIA) and Provide Alternatives and Recommendations to Council that Promote Transparency and the Public Interest

DATE: November 6, 2019

This memorandum provides a response to the subject Council resolution, which directs the City Administrator as follows:

- Work with the City Attorney to review the City’s current policies for the collection of fees for public records.
- Research current and applicable best practices – specifically in the cases of requests from sitting City Councilmembers and reputable media outlets.
- Present alternatives and recommendations for revisions to the City’s policies for Council consideration.

The information below was largely assembled by Matt Thomas in the City Attorney’s Office. Please note that the discussion presented applies to information that is properly available to the public. The City Attorney will respond separately to FOIA requests concerning documents that are protected by attorney-client privilege.

Current City Policy

Michigan’s Freedom of Information Act allows a public body to charge a fee for the costs incurred by the public body when it fulfills a request for public records. MCL 15.234 sets out what types of costs are recoverable by the public body, including labor costs, the costs of physical media and copies, and the mailing costs. The statute stipulates that if a public body wants to charge a fee, it must establish procedures and guide lines, and make that policy publically available. The City’s procedures are set out in APP 104: FOIA Procedures and Guidelines and is available on the Clerk’s website.

Both the statute and the City's current policy regarding fees already result in most FOIA requests being granted with no fee. There are two major drivers of this outcome. First, staff is required to only charge labor costs in 15-minute increments, and all partial time increments are required to be rounded down. Therefore, if a staff member does not spend at least 15 minutes on the request, that time will not be counted in the fee calculation. Second, pursuant to the policy, the City will only charge for staff time over 1 hour. When combined with the 15-minute increment requirement, requestors will only be charged for requests that take over an hour and fifteen minutes.

Only 24 of the requests received this calendar year generated a fee that was paid. Requests for the Police Department generate fees more frequently, primarily because many requests ask for available body worn camera footage and—pursuant to the City's policy—review and redaction of video is excepted from the free hour of staff time other requests receive.

Current and Applicable Best Practices

Currently, the City does not make exceptions from the fee policy based on the identity of the requestor and Council members and members of media organizations go through the full FOIA process. The City's policy vests the authority to waive fees in the City's FOIA coordinator (either the Clerk or the Chief of Police, depending on what records are sought). Section 16.13 of the policy governs the waiver or reduction of fees, and it states that the "provision of 1 free hour of staff time for search, examination, review, or the deletion or separation of exempt from nonexempt information for FOIA requests reflect the City's determination to provide reasonable quantities of public records free of charge to benefit the general public." It goes on to say that "in special circumstances" the FOIA Coordinator can waive all or a portion of the fee if it is determined that the release of the records "is in the public interest because searching for or furnishing copies of the public record primarily benefits the general public."

A survey of several other cities' FOIA policies did not reveal any explicit mention of waiving fees for requests from Council members or from members of media organizations. Staff had further discussion with other municipalities regarding requests from Council members. Representatives from Ypsilanti, Portage, and Livonia, among others treat requests from Council members in the same way as Ann Arbor. One attorney who represents multiple municipalities stated that all requests from Council members are taken to Council. If Council as a whole decides that it wants the records, then the fee is waived. Otherwise, the requests proceeds with the usual process.

Of the other Michigan municipality FOIA policies reviewed, none granted a free hour of staff time like Ann Arbor does. Holland waives the first \$10.00 fees for all requests. Ferndale, while stating that the FOIA coordinator can decide to waive fees, provides that the Ferndale Council can identify specific records that it deems should be made available for free or at a reduced cost. This is similar to what Ann Arbor has done in having votes to waive specific fees or to direct staff to publish the records requested on the City's website, negating the need for a FOIA request. Kalamazoo's policy vests the power to waive fee in the FOIA coordinator like Ann Arbor's policy, but Kalamazoo specifies that the factors that the FOIA Coordinator shall consider are:

- Whether the public record being disclosed serves the public policy purposes set forth at Section 1 of the FOIA;
- Whether the release primarily serves a private or commercial purpose;
- Whether the release implicates the rights of third persons;
- Whether waiver of the fee is in the best interest of the City; and

- The manner in which similar requests have been treated

No other city surveyed had language that departed from the statutory provisions regarding fee waivers.

Recommendations

Given the structure of the City's policy that results in the vast majority of requests being fulfilled without charging a fee, it is recommended that Council not revise the FOIA policy to provide for a waiver of fees for Council member requests or for requests from the media. The City's granting of 1 hour of free staff time is generous compared to other cities and reflects a determination that 1 hour of staff time is the proper balance between providing the public with access to public records at low or no cost and protecting the City from incurring unreasonably high costs in staff time spent on requests.

One possible change would be to formalize in the policy that any request from a Council member would be presented to Council for a decision on whether to waive the fee. The fee would still be calculated and sent to the requestor to ensure compliance with the City's statutory responsibility. Another possible change would be to provide more guidance to the FOIA Coordinator when the Coordinator is deciding whether to waive fees in a manner similar to Kalamazoo by specifying what factors Council wants the Coordinator consider based on the request itself rather than the requestor.

The Resolution asked the City Attorney and the City Administrator to consider whether to waive fees for a requests from "reputable media organizations". It is recommended that no changes be made with regard to members of the media. No other municipality was identified that carves media organizations out of the municipality's fee requirements for the release of public records. Practically it would be difficult for staff to determine what consists of a "reputable media organization." If Council wishes to move forward with this change, it is recommended that the City Attorney advise on what factors, if any, could be considered when determining whether a media organization is "reputable."

Please let me know if you have any other questions or if you would like to discuss this matter further.

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