



14 January 2013

The Honorable John F. Sorey III, Mayor  
City of Naples  
735 8th Street South  
Naples, FL 34102

Re: Proposed Changes to City's Public Record Fee Policies

Dear Mayor Sorey:

We have reviewed Resolution 13, the City Council's proposed changes to its public records fee policy. It is our position that these changes violate the public records law, and we strongly urge the Council to take appropriate action to address the legal deficiencies contained in the Resolution.

Section 119.07(4), F.S., requires an agency to furnish copies of public records "upon payment of the fee prescribed by law." Those agencies that do not have statutorily prescribed fees, including the City of Naples, are legally bound by the fees authorized by s. 119.07(4) which contains three fee provisions that would apply to public records provided by the City:

- Section 119.07(4)(a) allows an agency to charge 15 cents per page for copies up to 8 ½ x 14 inches, plus an additional 5 cents for a two-sided copy. For all other copies – larger sized paper, for example, or a DVD – an agency may charge the actual cost of duplication, which is defined in s. 119.011(1) as the cost of the material and supplies used to duplicate the record; labor costs and overhead are specifically *excluded* from those costs that may be passed on to the requestor.
- Section 119.07(4)(c) authorizes the City to charge \$1 per copy for certified copies of public records.
- Section 119.07(4)(d) says that if the "nature or volume" of a public records request requires an extensive use of the City's resources, whether personnel or information technology or both, the City may charge a *reasonable fee* based on actual costs incurred. It should be noted that the extensive use fee cannot be automatically imposed and if the City charges for personnel time, the City can charge no more than the hourly rate, including benefits, of the lowest paid person capable of performing the task. *See Carden v. Chief of Police*, 696 So. 2d 772, 773 (Fla. 2d DCA 1996); and *Board of County Commissioners of Highlands County v. Colby*, 976 So. 2d 31 (Fla. 2d DCA 2008).

Resolution 13 authorizes a fee of 25 cents for each one-sided copy of public records that are 11 x 17 inches in size, and 30 cents for each double-sided page of the same dimensions. It should be noted that this fee is statutorily – and legally – permissible *only if* it equals the actual cost of duplication. *See* s. 119.07(4)(a), F.S. At first glance, charging 25 cents for a one-sided copy of a public record that is 11 x 17 inches seems unreasonable since the cost of a one-sided page of only slightly smaller dimensions is 15 cents per page. Without further explanation and justification, a 10-cent spike in the price between the two sizes appears to be both disproportionate and arbitrary.

Importantly, the same statutory guidelines that apply to traditional paper copies also apply to CDs and DVDs. Section 119.011(12), F.S., defines "public records" to include tapes, files, sound recordings, and "other material, regardless of the physical form, characteristics, or means of transmission". The fee to be charged for a CD or a

DVD can be no more than the *actual cost* of the CD or DVD, which is generally less than a dollar. *See ss. 119.011(1) and 119.07(4)(a)3*. If copying a public record to a CD or DVD requires an extensive use of the City's resources, then the City may charge an extensive use fee in addition to the actual cost of the material used to duplicate the record. The City's proposed fee policy includes a flat fee of \$10 for each CD or DVD in direct contradiction of those fees authorized under s. 119.07(4)(a). The simple fact that a public record is copied to a CD or DVD does not allow the automatic imposition of a special service fee. *See, e.g., AGO 88-23*.

"Providing access to public records is a statutory duty imposed by the Legislature upon all record custodians and should not be considered a profit-making or revenue-generating operation." *2012 Government-in-the-Sunshine Manual*, p. 163 (citing AGO 85-03). Florida's courts have emphasized that excessive charges for copies of public records could well serve to inhibit citizens requesting copies of public records. *See Carden v. Chief of Police*, 696 So. 2d 772, 773 (Fla. 2d DCA 1996). Such fees can, and often do, create insurmountable barriers to those seeking to exercise their constitutional right of access to the records of their government, and in the case of the fee changes proposed by Resolution 13, can be a violation of chapter 119.

Similarly, Resolution 13 proposes changing the definition of what is an extensive use of the City's resources, shortening the time from the current 30 minutes to 15 minutes, a change that undoubtedly will dissuade citizens from exercising their constitutional rights and discourage public records requests because of potentially high costs. While some courts have held that 15 minutes is legally acceptable, such definitions must be justified and it is our position that the proposed change to the City's policy does not serve the public interest. This dramatic change in the definition will surely raise many questions from those whom you and your fellow council members were elected to serve, and the City should be prepared to fully and firmly justify the proposed change.

This Wednesday evening, the Council has the opportunity to transform the City of Naples into a paragon of open government. The Council should not squander this opportunity by implementing policies and costs that not only violate the law, but also act to discourage transparency by closing the doors of government to the people. The First Amendment Foundation hopes the Council will reconsider Resolution 13 and instead implement policies that comply with both the letter and the spirit of Florida's famed sunshine laws.

We greatly appreciate your attention to our concerns, Mayor Sorey. Should you have any questions or need additional information or clarification, please do not hesitate to contact us.

Sincerely,

Barbara A. Petersen

Barbara A. Petersen, President

Cc: Gary Price, Vice Mayor  
Teresa Heitmann, Council Member  
Margaret "Dee" Sulick, Council Member  
Bill Barnett, Council Member  
Doug Finlay, Council Member  
Sam Saad III, Council Member  
Jon Kaney, General Counsel, First Amendment Foundation