



# County Supervisors A S S O C I A T I O N of arizona

## **2015 Legislative Policy Statement** **11<sup>th</sup> Annual CSA Legislative Summit** **Mohave County, Arizona** **October 13-15, 2015**

### **A. What is the legislative proposal?**

This proposal is to allow governmental entities, including counties, to recover actual costs for the time it takes employees to search for, gather and produce documents in response to public records requests.

Everyone familiar with government appreciates and applauds Arizona's public records law, A.R.S. § 39-121 et. seq., as a valuable tool in assuring government transparency. When enacted, Arizona's public records were mostly paper copies of documents stored in file folders and filing cabinets. The task of creating, retaining and filing official public records fell on a relative handful of government employees. A person making a request to inspect records would make an appointment to review documents in folders and cabinets that might contain documents that pertained to the request. If they saw documents that interested them, they would request copies. Governmental entities could charge for the costs of making those copies. Although public records statutes do not directly address the issue, courts have ruled, and the Attorney General has opined, that governmental entities cannot ask to be reimbursed for the time spent searching for the records requested. (See Atty Gen Ariz Agency Handbook § 6.5.5 "An agency may charge a fee it deems appropriate for copying records, including a reasonable amount for the cost of time, equipment, and personnel used in producing copies of records, but not for costs of searching for the records").

Fast forward to 2015. In the digital age, the number of documents has exploded. And along with this, given emails and other electronic documents, the number of employees who create, retain and file documents that are deemed "public records" has also exploded. As a result, a public records request that takes a few minutes (or less) to generate and send by email, can cause dozens of government employees to drop what they are doing in order to engage in electronic (and paper copy) searches for documents. (Note that unlike the original process in which a requester would review documents in a hardcopy file, a responsible governmental entity cannot give a requester access to government computers to perform a search for electronic documents). Someone then needs to coordinate and gather these documents. Someone else will need to review these documents, sometimes numbering in the hundreds and thousands, for privacy and confidential information (eg., personal identifying information, or information made confidential by statute). These will then need to be redacted. Unless the reviewing employee has special software that enables electronic redaction, these will need to be printed and redacted by hand. If the process used by the governmental entity entails printing the electronic documents, the end result will be hundreds to thousands of printed copies that the requestor will review; the requestor will then take copies of none to all of the documents, depending upon how many they find interesting—paying a small fee for the copied documents. If the process is to retain the documents in electronic format—which is sometimes possible, sometimes not—the documents likely will be delivered electronically to the requestor at no cost, since there is essentially no recoverable cost to emailing electronic documents.

Below is an example of a public records from a former indigent defense contract attorney, that resulted in approximately 8,000 to 10,000 pages of copied documents. It took countless hours for all the employees involved to search and gather the documents. It took an attorney in the



# County Supervisors ASSOCIATION of arizona

County Attorneys Office three full days to review and redact them. The requestor reviewed the documents and took none of them.

**From:** Nancy Bourke [mailto:nbourke36@gmail.com]

**Sent:** Friday, March 13, 2015 10:47 PM

**To:** Lemons, Kim A

**Cc:** Brenda Stickler

**Subject:** PRR

Hello Ms. Lemons,

Please consider this email a public records request not being made for a commercial purpose. I am not yet requesting photocopies of any of the following documents; only inspection.

1. List of all Indigent Defense Coordinator ("IDC") contracted attorneys as of 1/1/2014 for:
  - a. misdemeanor cases
  - b. felonies
2. Any attorneys added to the IDC contract since 1/1/2014 for:
  - a. misdemeanor cases
  - b. felonies
3. All attorneys removed from the IDC contract since 1/1/2014 including:
  - a. each removal initiated by the attorney and reason(s) given
  - b. each removal initiated by Cochise County Procurement or any other person or entity and reason(s) given
4. All complaints leveled against IDC contract attorneys brought to IDC's attention by the complainant or any other source since 1/1/2014 including those from:
  - a. assigned clients
    - i. during representation
    - ii. post representation
  - b. judges
  - c. other attorneys
  - d. all others
5. All other comments (not complaints) or compliments regarding IDC contract attorneys brought to IDC's attention by the commentor or any other source since 1/1/2014 including those from:
  - a. assigned clients
    - i. during representation
    - ii. post representation
  - b. judges
  - c. other attorneys
  - d. all others
6. All BOS agenda items from 3/1/14 to date of fulfillment of request.
7. All BOS meeting minutes from 3/1/14 to date of fulfillment of request.
8. All communications from or to Judge James Conlogue or his office regarding Nancy Bourke from 2/1/14 to the date of fulfillment of this request.
9. All communications from or to Judge James Conlogue or his office regarding State v. Riley, CR201400093.
10. All communications from or to Judge Charles Irwin or his office regarding Nancy Bourke dated 3/1/14 to the date of fulfillment of this request.
11. All communications from or to Judge Charles Irwin or his office regarding In the Matter of Aileen Luna, JV201400028.
12. All communications from or to the Cochise County Board of Supervisors or its staff regarding Nancy Bourke dated 1/1/14 to the date of fulfillment of this request.
13. All communications from or to the Cochise County Board of Supervisors or its staff regarding State v. Riley, CR201400093 and In the Matter of Aileen Luna, JV201400028.



# County Supervisors ASSOCIATION of arizona

14. All communications from or to the Indigent Defense Coordinator or her staff regarding Nancy Bourke dated 1/1/14 to the date of fulfillment of this request.
15. All communications from or to the Indigent Defense Coordinator or her staff regarding State v. Riley, CR201400093 and In the Matter of Aileen Luna, JV201400028.
16. All communications from or to the Cochise County Attorney or his staff regarding Nancy Bourke dated 1/1/14 to the date of fulfillment of this request.
17. All communications from or to the Cochise County Attorney or his staff regarding State v. Riley, CR201400093 and In the Matter of Aileen Luna, JV201400028.
18. All communications from or to the Cochise County Procurement Department or its staff regarding Nancy Bourke dated 1/1/14 to the date of fulfillment of this request.
19. All communications from or to the Cochise County Procurement Department regarding State v. Riley, CR201400093 and In the Matter of Aileen Luna, JV201400028.
20. All communications between the Greenlee County Attorney or its staff regarding Nancy Bourke, regardless of date, with:
  - a. the Cochise County BOS and/or its staff
  - b. the Cochise County IDC and her staff
  - c. the Cochise County Attorney and his staff
  - d. Judge James Conlogue and his office
  - e. Judge Charles Irwin and his office
  - f. Cochise County Procurement and its staff
21. Records of telephone calls to/from phone numbers associated with the BOS and/or its staff with all other people and entities listed anywhere in this PRR for the period of 3/1/2014 to the date of the fulfillment of this request.
22. Records of telephone calls to/from phone numbers associated with IDC and/or its staff with all other people and entities listed anywhere in this PRR for the period of 2/1/2014 to the date of the fulfillment of this request.
23. Records of telephone calls to/from phone numbers associated with the CAO and/or its staff with all other people and entities listed anywhere in this PRR for the period of 2/1/2014 to the date of the fulfillment of this request.
24. Records of telephone calls to/from phone numbers associated with Judge James Conlogue and his staff with all other people and entities listed anywhere in this PRR for the period of 2/1/2014 to the date of the fulfillment of this request.
25. Records of telephone calls to/from phone numbers associated with the Judge Charles Irwin and his staff with all other people and entities listed anywhere in this PRR for the period of 2/1/2014 to the date of the fulfillment of this request.
26. Records of telephone calls to/from phone numbers associated with Cochise County Procurement and its staff with all other people and entities listed anywhere in this PRR for the period of 3/1/2014 to the date of the fulfillment of this request.
27. All communications from the following regarding procedures for appointment of Public Defender's Office attorneys, Legal Defender's Office attorneys, and contract attorneys from 2/1/2014 to the date of the fulfillment of this request from:
  - a. IDC and its staff
  - b. BOS and its staff
  - c. CAO and its staff
  - d. Judge James Conlogue and his staff
  - e. Judge Charles Irwin and his staff.
  - f. Procurement and its staff.
28. Any and all communications regarding fulfillment of this PRR by:
  - a. IDC and its staff
  - b. BOS and its staff
  - c. CAO and its staff



- d. Judge James Conlogue and his staff
- e. Judge Charles Irwin and his staff.
- f. Procurement and its staff.

Necessary redactions will be acceptable if explained.

Thank you,

Nancy Bourke, Esq.

4036 La Linda Way

Suite C

Sierra Vista, AZ 85635

As a second example, just one records request from a member of the public, Beau Hodai—who has made eight (8) requests since the beginning of 2015—took a Deputy County Attorney, the Sheriff’s Liaison, prosecutors and staff more than two months to research, redact, and respond to, resulting in 1,750 pages of documents, for which he paid \$525. Letters from and to Mr. Hodai’s attorney and Deputy County Attorney Lauri Owen will give you a flavor of the difficulties involved in dealing with some public records requests.

As a third example, an attorney purportedly working on a scholarly article requested every record related to every election challenge question that has passed through the County Attorney’s office. The request took two months to research and compile by two Deputy County Attorneys and staff, and resulted in thousands of pages from files from all over the computer and file room. One attorney spent hours each day reviewing and redacting documents. These documents were provided electronically so there was no cost to the requestor.

Numerous other similar examples could be provided. Cumulatively, the cost of responding to public records request has skyrocketed.

#### **B. Describe the problem and explain how the proposal solves it.**

The basic problem is that, in the digital age, public records requests can be made with relatively little time, effort, thought or cost to requestors, but that can cost government thousands and thousands of man hours to search, gather, coordinate and redact—all at taxpayer expense.

Previous ideas that have been floated about how to deal with this problem have focused on giving government the authority to deny records requests that are excessively or unduly burdensome. There are numerous problems with this approach, eg.: i) too much discretion on the part of government, with highly variable definitions of “excessively or unduly burdensome” from agency to agency; ii) a public records request might not be excessively or unduly burdensome (however that might be defined), whereas the problem is really that the same individual makes numerous successive requests that are excessively or unduly burdensome.

A better, more objective approach is to require requestors to reimburse the governmental entity for the employee time spent searching, gathering, coordinating and redacting documents. This would cause potential requestors—especially the frequent requestors—to be more thoughtful about what kind of documents they would really want to review. This approach also would be consistent with the general good government philosophy of requiring those who seek government services to pay for them, rather than other taxpayers subsidizing their activities.

This approach could be accompanied by an allowance for no charge for the first X number of hours of search, gathering and redaction time, per request or per year. This would allow members of the public who rarely or infrequently make requests, or who make narrow, focused



requests, to avoid costs. It would also encourage frequent requestors to be more thoughtful about the scope of their requests.

Note that the federal Freedom of Information Act (FOIA) contains provisions for the cost of search time. Here is the language of a FAQ from the FOIA website:

There is no initial fee required to submit a FOIA request, but the FOIA does provide for the charging of certain types of fees in some instances. For a typical requester the agency can charge for the time it takes to search for records and for duplication of those records. There is usually no charge for the first two hours of search time or for the first 100 pages of duplication.

Following are the proposed changes to Arizona's public records statutes, with language eliminated in strikethrough and the added subsection 39-121.04 in blue:

39-121.01. Definitions; maintenance of records; copies, printouts or photographs of public records; examination by mail; index

A. In this article, unless the context otherwise requires:

1. "Officer" means any person elected or appointed to hold any elective or appointive office of any public body and any chief administrative officer, head, director, superintendent or chairman of any public body.

2. "Public body" means this state, any county, city, town, school district, political subdivision or tax-supported district in this state, any branch, department, board, bureau, commission, council or committee of the foregoing, and any public organization or agency, supported in whole or in part by monies from this state or any political subdivision of this state, or expending monies provided by this state or any political subdivision of this state.

B. All officers and public bodies shall maintain all records, including records as defined in section 41-151.18, reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities which are supported by monies from this state or any political subdivision of this state.

C. Each public body shall be responsible for the preservation, maintenance and care of that body's public records, and each officer shall be responsible for the preservation, maintenance and care of that officer's public records. It shall be the duty of each such body to carefully secure, protect and preserve public records from deterioration, mutilation, loss or destruction, unless disposed of pursuant to sections 41-151.15 and 41-151.19.

D. Subject to section 39-121.03:

1. Any person may request to examine or be furnished copies, printouts or photographs of any public record during regular office hours or may request that the custodian mail a copy of any public record not otherwise available on the public body's website to the requesting person. ~~The custodian may require any person requesting that the custodian mail a copy of any public record to pay in advance for any copying and postage charges. The custodian of such records shall promptly furnish such copies,~~



~~printouts or photographs and may charge a fee if the facilities are available, except that public records for purposes listed in section 39-122 or 39-127 shall be furnished without charge.~~

2. If requested, the custodian of the records of an agency shall also furnish an index of records or categories of records that have been withheld and the reasons the records or categories of records have been withheld from the requesting person. The custodian shall not include in the index information that is expressly made privileged or confidential in statute or a court order. This paragraph shall not be construed by an administrative tribunal or a court of competent jurisdiction to prevent or require an order compelling a public body other than an agency to furnish an index. For the purposes of this paragraph, "agency" has the same meaning prescribed in section 41-1001, but does not include the department of public safety, the department of transportation motor vehicle division, the department of juvenile corrections and the state department of corrections.

3. If the custodian of a public record does not have facilities for making copies, printouts or photographs of a public record which a person has a right to inspect, such person shall be granted access to the public record for the purpose of making copies, printouts or photographs. The copies, printouts or photographs shall be made while the public record is in the possession, custody and control of the custodian of the public record and shall be subject to the supervision of such custodian.

E. Access to a public record is deemed denied if a custodian fails to promptly respond to a request for production of a public record or fails to provide to the requesting person an index of any record or categories of records that are withheld from production pursuant to subsection D, paragraph 2 of this section.

#### [39-121.04 Request for copies, printouts or photographs; non-commercial requests](#)

(1) Each public body shall provide access to and, upon request, provide copies of public records for non-commercial public records requests as follows:

A. Each public agency may require reimbursement for the cost of copying records, including electronic records, including a fee not to exceed the actual cost of time, equipment, and personnel used in producing copies of records subject to public disclosure, including the time to search for, gather, coordinate and redact the records requested.

B. Fees for maps, blueprints, computer imaging, plats, or other records that require special expertise to produce for inspection, or duplicate, may include the actual rate of compensation for the trained personnel required to produce the records for inspection or duplication.

C. Payment of fees may be required prior to incurring extraordinary costs to produce public records for inspection, and prior to making or delivering copies.

### **C. What is the fiscal impact to the state or county budgets of the proposal?**

This proposal would significantly reduce staff time in responding to public records requests—staff time of those whose records are being requested, as well as the time of



# County Supervisors

A S S O C I A T I O N  
o f a r i z o n a

employees charged with the responsibility of coordinating requests and reviewing/redacting documents.

**D. What is the preliminary analysis of the political environment and stakeholders' and affiliates' comments?**

I am sure that those members of the public who frequently make requests will howl. This will likely include newspapers and other media, although frankly these organizations, while making numerous requests, for the most part make fairly focused requests. It's the self-appointed watchdogs, with a great deal of time on their hands, who typically engage in the broad, sweeping, costly fishing expeditions. Arizona's public records laws, as interpreted over the years, has given frequent requestors a sense of entitlement to free government document search and gathering service. The watchword is the commonly used term "transparency." But note that this proposal does not reduce transparency in government; rather, it shifts the cost from taxpayers to those who are requesting the service.

**E. Who is the primary county contact information for the proposal (name, phone, email and other relevant information)?**

**Name:** Britt Hanson, Chief Civil Deputy, Cochise County Attorney

**Phone:** 520/432-8755

**E-mail:** [bhanson@cochise.az.gov](mailto:bhanson@cochise.az.gov)