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NEW DECISION ALERT

On July 28, 2023, the Appellate Division, Fourth Department, issued a decision interpreting the fee provisions of the Freedom of Information Law (FOIL), which we believe departs from established judicial precedent and advisory opinions and thus suggests a need for this alert. *See Aron Law PLLC v. City of Rochester*, --- N.Y.S.3d ---, 2023 WL 4837636 (4th Dep't July 28, 2023) (regarding FOIL § 87(1)(c)(i)).

In its decision, the court found that:

To the extent that responding to that part of the request may be burdensome or may require review of voluminous records (*see* Public Officers Law § 89 [3]), we note that, subject to certain limitations, FOIL permits respondent to recover the actual cost to it of “an amount equal to the hourly salary attributed to the lowest paid . . . employee who has the necessary skill required to *prepare a copy of*” the requested records (§ 87 [1] [c] [i]) or the actual cost to respondent of retaining “an outside professional service” to *prepare a copy of* the records sought (§ 87 [1] [c] [iii]).

Aron Law PLLC v. City of Rochester, 2023 WL 4837636, at *2 (emphasis added). For purposes of the FOIL fee provision cited and discussed, the court appears to equate the “review of voluminous records” with “prepar[ing] a copy of” records. Stated another way, the court’s opinion appears to be that an agency is permitted to charge a fee to a FOIL requester for the cost associated with “review of voluminous records.”

This conclusion is a significant departure from prior precedent in both the Fourth Department and other New York Appellate Divisions and the purpose of this alert is to note that this decision appears to conflict with previous appellate level decisions addressing this issue. *See, e.g., Weslowski v. Vanderhoef*, 98 A.D.3d 1123, 1127, 951 N.Y.S.2d 538, 542 (2d Dep’t 2012) (“the Freedom of Information Law (FOIL) does not permit an agency to charge for employee time spent searching for paper documents . . . given the statutory provision that ‘preparing a copy shall not include search time or administrative costs’”); *Forsyth v. City of Rochester*, 185 A.D.3d 1499, 1500, 129 N.Y.S.3d 220, 222 (4th Dep’t 2020) (despite claim of significant resources required to respond to request, “respondents may not charge petitioner a fee for the costs associated with their review” of records sought).

To be clear, until the *Aron Law* decision in July 2023, courts consistently have held that the time spent reviewing and redacting records is not “preparing a copy of a record” for purposes of the FOIL fee provisions and therefore is not a cost that may be passed along to the FOIL requester. The Committee on Open Government encourages agencies to be mindful of this judicial precedent when determining what fees may be charged for the cost of “preparing a copy of” a record.