



**State of New York
Department of State
Committee on Open Government**

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FOIL AO 19886

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The Committee on Open Government is authorized to issue advisory opinions. The ensuing advisory opinion is based solely upon the information presented in your correspondence.

Dear:

This is in response to your request for an advisory opinion addressing the Town of Marlborough's December 18, 2025, letter regarding the format and cost of records you requested. Having reviewed that letter, we offer several comments.

In our opinion, the Town's comments in Section "1. Format of production (electronic vs. paper)" are inconsistent with the requirements of FOIL. Section 89(3)(b) provides

All entities shall, provided such entity has reasonable means available, . . . respond to such requests by electronic mail, using forms, to the extent practicable, . . . and provided that the written requests do not seek a response in some other form.

Therefore, if the request seeks an electronic response and the agency has the ability to produce records electronically, it must. The Town suggests that its policy that "[r]ecords maintained only in paper form will be made available for inspection and/or copying in paper form," and "[r]ecords maintained electronically, will be produced electronically where it is reasonable and practicable to do so, taking into account (among other things) the need for any lawful redactions, file size/technical constraints, and the manner in which the records are maintained," are consistent with the requirements of § 89(3)(b). We respectfully disagree. In our opinion, refusing to scan paper documents is inconsistent with this requirement because an agency may scan most paper documents with the same effort as copying the records. In 2025, it would be, in our opinion, unreasonable for a municipality to not possess a scanner, as most printers are also scanners and most hand held cell phones are also scanners. Additionally, agencies may use one of any number of software products that permit electronic redaction. If an agency chooses not to purchase such software and instead chooses to print electronic records in order to perform redactions, it still must rescan the records and produce them in electronic form. Under such circumstances, we do not believe a fee for those records would be appropriate.

The Town additionally states that "email response is not the only lawful method of electronic production and is not always practicable for large productions." In our opinion, if a request seeks to have the records provided by email, the agency must do so unless email transmission is not

possible due to file sizes. Under those circumstances, it would be consistent with the requirements of FOIL to provide the records by web-portal, web-based share drive, or external media (e.g. flash drive). If the agency provides the records by external media source it may charge for the actual cost of the piece of media.

Section “2. Fees and the Town’s estimate” of the Town’s response is also inconsistent with the fee provisions authorized by FOIL. The Town states that it “prepared copies totaling 342 pages, and that preparation time exceeded two hours; the Town therefore provided an estimate reflecting (i) \$0.25 per page and (ii) labor for preparation time beyond two hours.” Unless a statute prescribes a different fee, FOIL contains two fee structures for preparing copies of records – one for paper photocopies up to 9x14 inches, and one for everything else. § 87(1)(b)(iii). *Those two fee structures cannot be combined.* When an agency is preparing a copy of any record other than a photocopy (e.g., audio, video, scanning, maps, blueprints, databases, etc.), the law permits the agency to charge the “actual cost of reproduction.” *Id.*

In determining the actual cost of reproducing a record, an agency may include only:

- i. an amount equal to the hourly salary attributed to the lowest paid agency employee who has the necessary skill required to prepare a copy of the requested record;
- ii. the actual cost of the storage devices or media provided to the person making the request in complying with such request;
- iii. the actual cost to the agency of engaging an outside professional service to prepare a copy of a record, but only when an agency's information technology equipment is inadequate to prepare a copy, if such service is used to prepare the copy; and
- iv. preparing a copy shall not include search time or administrative costs, and no fee shall be charged unless at least two hours of agency employee time is needed to prepare a copy of the record requested. A person requesting a record shall be informed of the estimated cost of preparing a copy of the record if more than two hours of an agency employee's time is needed, or if an outside professional service would be retained to prepare a copy of the record.

§ 87(1)(c).

Therefore, if it takes more than two hours to prepare the electronic copies, the agency may charge the requestor an hourly rate of the lowest paid employee with the skills necessary to perform that task. The agency may also charge for the actual cost of any storage device, such as a flash drive. However, it may not charge a per page fee and for the “actual cost of reproduction.” It may charge

the per page fee for paper copies, which were not requested here, or the “actual cost of reproduction” for electronic records.

When charging for the “actual cost of reproduction” of electronic records, the agency is required to inform the requestor of the estimated cost before incurring the costs. When an agency fails to provide the estimated cost of preparing electronic records in advance, they would be unable to require payment in the event that the requestor decides not to accept the records and unable to withhold future requests pending payment of that fee. However, if the requestor still wants to obtain copies of the records, and the fee charged is consistent with that permissible under the statute, the agency could still require payment. Under the circumstances of your request, the fees charged are inconsistent with the statute and, in our view, the Town may not condition release of the records upon payment of such fees. It would be permissible, however, for the Town to charge “an amount equal to the hourly salary attributed to the lowest paid agency employee who has the necessary skill required to prepare a copy of the requested record” if it takes more than two hours to scan or otherwise format the records into readable electronic records. *Id.*

Sincerely,

s/Christen L. Smith
Senior Attorney