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A RETURN TO NOMINAL-CY: RESTORING A PROPER BALANCE FOR CORA COSTS

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EXECUTIVE SUMMARY

In 2014, Colorado's General Assembly enacted a cap on the hourly fee governments can charge for the "research and retrieval" of responsive records under the Colorado Open Records Act (CORA). The objective of the maximum hourly rate in House Bill 14-1193 was to rein in the practice, by some records custodians, of quoting requesters exorbitant sums, consequently impeding the public's ability to obtain government records.

Six years later, government bodies show a strong tendency to adopt the legislative cap as their research-and-retrieval fee, and they often multiply that rate by many hours in fulfilling requests. The result is the same problem HB 14-1193 sought to fix: unaffordable charges that stymie the public's access to public information.

This practice is out of line with judicial interpretations of CORA. Courts have viewed the open records law as striking a balance between the peoples' right to access public information and administrative burdens, but the current fee structure is unbalanced. The hourly rate charged by some governments exceeds the average salary of employees capable of performing the research and retrieval. And because CORA does not require governments to provide itemized explanations of research-and-retrieval charges, many records requesters are left unsure as to whether the fees are justified and without recourse if they are not.

This paper surveys the approaches other states have taken to strike a balance between the administrative costs of providing access to public records and the public's right to monitor the workings of government. Other states' practices provide useful guidance as to how Colorado can do better.

Colorado can and *should* do better. Colorado *must* adopt a policy that requires government entities to expressly, and specifically, justify their charges to records requesters, thereby promoting transparency and ensuring that agencies base their fees on clearly articulated administrative burdens. Further, Colorado should address out-of-control CORA charges by adopting a policy that: 1) does not charge for personnel time; 2) only charges for personnel time if a request is for a commercial purpose; or 3) allows fees for personnel time but restrains those fees to the cost of the lowest-paid employee capable of performing the task. One final proposal would create a mandatory waiver of research-and-retrieval fees only for credentialed members of the state's press corps, whose work using CORA quite clearly benefits a wider audience of Coloradans.

Note: The issue of attorney review, which also contributes to prohibitive fees for records requesters, is not directly addressed in this paper. It remains a pressing issue that requires further analysis. Also not addressed in this paper are fees related to requests made under the Colorado Criminal Justice Records Act.

INTRODUCTION

The Colorado Open Records Act (CORA) “strikes a balance between the statutory right of members of the public to inspect and copy public records and the administrative burdens that may be placed upon (government entities) in responding to such requests.”¹ However, this balance is thrown askew when governments adopt the maximum allowable hourly rate for research and retrieval and may charge hundreds or even thousands of dollars to compile, review, and redact records in response to a request. Whether or not a balance truly exists is difficult to evaluate because governments in Colorado are not required to justify their research-and-retrieval charges.

As a result, when journalists and members of the public are told that their CORA requests require many of hours of processing, they have no choice but to trust that the expensive estimate is not the consequence of the government entity’s poor record keeping or an effort by the records custodian to deter the requester. If the cost cannot be lowered by narrowing the scope of a request, or by otherwise negotiating with the records custodian, some requesters invariably decide to drop their pursuit of the records.

In 2014, the Colorado General Assembly attempted to rein in excessive and widely varying charges for accessing public records by capping the hourly rate for research and retrieval.² But six years later, it is clear that CORA’s fee provision can be used to make public records so cost prohibitive they effectively are off limits to the public. The fee provision should be reevaluated.

Requesters frequently contact the Colorado Freedom of Information Coalition about the burdensome cost of obtaining public records. Some notable examples:

- An official with History Colorado told a 9NEWS reporter it would take the agency 20 minutes per page to redact 1,200 pages of state archeologists’ records on unmarked burial sites. History Colorado wanted \$2,243.75 “just for the initial work.”³

¹ *Pruitt v. Rockwell*, 886 P.2d 315 (Colo. App. 1994).

² Jeffrey A. Roberts, *Gov. Hickenlooper signs CORA fees legislation*, COLORADO FREEDOM OF INFORMATION COALITION (May 2, 2014), <https://coloradofoic.org/gov-hickenlooper-signs-bill-standardizing-cora-fees/>.

³ Jeremy Jojola, (Oct. 16, 2019). <https://twitter.com/jeremyjojola/status/1184499482555060224>.

- The University of Colorado Boulder asked for a minimum deposit of \$815 to fulfill a Denver Post reporter's request for a *single day* of emails sent and received by the chancellor and an associate vice chancellor.
- The state Department of Revenue quoted The Denver Post \$10,000 — reduced from the agency's original estimate of \$20,000 — to provide records on the owners of Colorado's marijuana businesses.⁴
- The Denver suburb of Sheridan quoted a requester nearly \$20,000, with a \$6,750 deposit due upfront, to retrieve the city clerk's emails over the previous seven months that mentioned any of 10 specific search terms.⁵
- During the early stages of the COVID-19 pandemic, the Colorado Department of Public Health and Environment told The Denver Post it would take 691 hours of staff time, and an estimated "minimum cost" of \$20,707, to retrieve and review emails and memos that mentioned any of four specific coronavirus-related search terms.
- Colorado Public Radio spent approximately \$2,000 to obtain communications from the governor's office, the state health department and local public health agencies to help document officials' early response to the coronavirus.⁶
- In 2017, the Colorado Springs Independent asked El Paso County for three employees' emails, spanning just 30 days, regarding the functionality of a new records management system installed by the sheriff's office. The county estimated it would take five days at a cost of \$1,170 to retrieve and review the messages. The Independent decided not to pay.

Before the passage of HB 14-1193, under existing judicial precedents, CORA research and retrieval fees had to be "nominal" in comparison to the actual cost to the government for the staff time spent responding to the volume of requests.⁷ Requesters occasionally litigated whether fees were "nominal" to clarify the boundaries of this term.⁸ In 2014, as a way to standardize fees that varied widely across jurisdictions in

⁴ David Migoya, *Learning who owns Colorado's pot businesses not so easy or inexpensive*, DENVER POST (Feb. 5, 2016), <https://www.denverpost.com/2016/02/05/learning-who-owns-colorados-pot-businesses-not-so-easy-or-inexpensive/>.

⁵ Jeffrey A. Roberts, *A \$6,750 deposit to search the city clerk's emails? Records retention an issue for small governments*, COLORADO FREEDOM OF INFORMATION COALITION (Mar. 13, 2017), <https://coloradofoic.org/a-6750-deposit-to-search-city-clerks-emails-records-retention-an-issue-for-small-governments/>.

⁶ Ben Markus, *Colorado Can Learn From This Pandemic, So It Is Better Prepared For The Next*, COLORADO PUBLIC RADIO (May 11, 2020), <https://projects.cpr.org/covid-19/>.

⁷ *Black v. Sw. Water Conservation Dist.*, 74 P.3d 462, 471-72 (Colo. App. 2003).

⁸ *See Mountain-Plains Inv. Corp. v. Parker Jordan Metro. Dist.*, 312 P.3d 260, 268 (Colo. App. 2013), *see also* *Citizens Progressive All. v. Sw. Water Conservation Dist.*, 97 P.3d 308, 314 (Colo. App. 2014).

Colorado,⁹ the General Assembly amended CORA by imposing a new maximum research-and-retrieval fee of \$30 per hour — with the initial hour provided at no cost. That amount is to be adjusted every five years based on the percentage change over that period in the Department of Labor, Bureau of Labor Statistics, Consumer Price Index for Denver-Lakewood-Aurora for all items and all urban consumers.¹⁰ The current maximum rate is \$33.58 per hour.¹¹ The data presented later in this paper demonstrate that, while not *all* government entities charge the maximum rate, the vast majority adopt the maximum rate when enacting, reviewing, or revising their CORA policies. As a result, many governments charge fees that are substantial, accrue on an hourly basis into even more substantial amounts, and suppress the ability of the public to access records and advocate for the public good.

The following pages discuss the rise and interpretation of the “nominal” fee, as well as the state’s attempt in 2014 to rein in and standardize research and retrieval fees with HB 14-1193. They provide data to illustrate the fees government bodies charge and the rate at which government entities adopt the maximum allowable fees. They discuss approaches other states have taken regarding research-and-retrieval costs, and they offer recommendations for mitigating the suppressing effect of high costs on requesters, mindful of Colorado-specific constraints such as the Taxpayer Bill of Rights (TABOR).

HISTORY AND CASE LAW

I. The “nominal” fee for research and retrieval

A. The “nominal” fee in CORA’s legislative history

The notion that an agency may charge a “nominal” fee for research and retrieval in fulfilling an open records request stems from a research publication that shaped and influenced the interpretation of CORA. In 1967, Colorado’s Legislative Council appointed a committee to conduct a one-year study of public records maintained by state and local agencies to determine which records should be available to the public and which should be confidential.¹² The committee’s report culminated with a draft of suggested open records legislation.¹³

⁹ Colorado Ethics Watch, *21st Century Sunshine: Modernizing CORA*, COLORADO FREEDOM OF INFORMATION COALITION, https://coloradofoic.org/wp-content/uploads/2019/03/EthicsWatch_CORA.pdf.

¹⁰ HB 14-1193, 69th Gen. Assemb., 2d Reg. Sess. (Colo. 2014).

¹¹ Memorandum from Natalie Mullins, Dir., Colo. Legis. Council to Interested Persons (June 21, 2019), https://leg.colorado.gov/sites/default/files/images/r19-717_update_cora_fee.pdf.

¹² Colo. Legis. Council, Research Publ’n #126, Open Records for Colorado, 46th Gen. Assemb., at iii (1967).

¹³ *Id.*

Some of the committee's recommendations were carried into CORA and remain a part of the law. For example, the report recommended the legislature declare a policy "that all public records shall be open for inspection by any person at reasonable times, except as otherwise provided by this bill or as otherwise specified by law."¹⁴ The committee noted that "[this] establishes ... that in the absence of a specific statute permitting the withholding of information, a public official has no authority to deny any person access to public records."¹⁵ CORA adopts this declaration nearly verbatim: "It is ... the public policy of [Colorado] that all public records shall be open for inspection by any person at reasonable times, except as provided in this part 2 or as otherwise specified by law."¹⁶

The committee further recommended that an official custodian may make "such rules and regulations with reference to the inspection of such records as shall be reasonably necessary for the protection of such records and the prevention of unnecessary interference with the regular discharge of the duties of the custodian or his office."¹⁷ Again, the legislature implemented this suggestion: "[T]he official custodian of any public records may make such rules with reference to the inspection of such records as are reasonably necessary for the protection of such records and the prevention of unnecessary interference with the regular discharge of the duties of the custodian or the custodian's office."¹⁸

However, the legislature did not adopt all the committee's recommendations in the final drafted law. For example, an earlier draft contained a provision for inspection "without charge," but the legislature did not adopt this language.¹⁹ The committee commented that "in some cases the custodian's rules and regulations might include the establishment of nominal fees."²⁰ While the committee's proposed legislation contained fees for copying and photographing, it allowed the custodian to make rules and regulations that "could include the establishment of nominal fees in some cases. ..."²¹ While the legislature did not include this language in CORA, courts later applied it as judicial gloss in interpreting the act.

¹⁴ *Id.* at xiii.

¹⁵ *Id.*

¹⁶ COLO. REV. STAT. § 24-72-201 (LexisNexis, Lexis Advance through all laws passed during the 2019 Legislative Session).

¹⁷ *Id.* at xiv-v (1967).

¹⁸ COLO. REV. STAT. § 24-72-203(1)(a) (LexisNexis, Lexis Advance through all laws passed during the 2019 Legislative Session).

¹⁹ Colo. Legis. Council, Research Publ'n #126, Open Records for Colorado, 46th Gen. Assemb., at xiii (1967).

²⁰ *Id.*

²¹ *Id.* at xv.

B. The “nominal” fee rises from legislative history to binding case law

Through reliance on the “nominal fees” language in CORA’s legislative history, the Colorado Court of Appeals in 2003 determined that a fee for research and retrieval of public records is authorized, even though the state statute was silent on that subject.²²

In *Black v. Sw. Water Conservation Dist.*, members of a nonprofit filed an open records request seeking access to documents.²³ Disputes over the request’s fulfillment led to litigation.²⁴ Among the issues, the members alleged that the research-and-retrieval fee was invalid under CORA.²⁵ The trial court disagreed and held that the fee was valid.²⁶

The nonprofit appealed this decision to the Colorado Court of Appeals,²⁷ arguing that the trial court erred in its conclusion that a research-and-retrieval fee of \$15 per hour and \$20 per hour for exceptionally voluminous requests is appropriate.²⁸

The appellate court began its decision by looking at CORA’s text.²⁹ It immediately noted that “[t]he records custodian [may] make such rules and regulations ‘as are reasonably necessary for the protection of such records and the prevention of unnecessary interference with the regular discharge of the duties of the custodian or the custodian’s office.’”³⁰ However, because the court felt it could not decide the issue based solely on this language,³¹ it examined the legislative history and intent underlying CORA.³²

The court repeated the oft-quoted line that “[CORA] strikes a balance between the statutory right of members of the public to inspect and copy public records and the administrative burdens that may be placed upon state agencies in responding to such requests.”³³ It then turned to the legislative research document that shaped CORA, noting that, “Although the Open Records Act does not expressly require the payment of a fee to exercise the right of inspection, legislative history reflects that this omission was intentional. An earlier draft contained a provision for inspection ‘without charge,’ but this language was

²² *Black v. Sw. Water Conservation Dist.*, 74 P.3d 462 (Colo. App. 2003).

²³ *Id.* at 464-65.

²⁴ *Id.* at 465-66.

²⁵ *Id.* at 466.

²⁶ *Id.* at 467.

²⁷ *Id.* at 465.

²⁸ *Black*, 74 P.3d at 471.

²⁹ *Id.*

³⁰ *Id.* (quoting COLO. REV. STAT. § 24-72-203(1)(a) (2002)).

³¹ *Id.*

³² *Id.*

³³ *Id.* (quoting *Pruitt v. Rockwell*, 886 P.2d 315 (Colo. App. 1994)).

deleted because ‘it was felt that in some cases the custodian’s rules and regulations might include the establishment of nominal fees.’”³⁴

To contextualize the term “nominal,” the court referenced Black’s Law Dictionary.³⁵ “Nominal” is defined there as “trifling, especially as compared to what would be expected.”³⁶ The Court of Appeals decided that the legislative history and aim of CORA supported the trial court’s finding that the fee charged in that case, \$20 per hour for an “exceptionally voluminous” request, was valid.³⁷ “[T]he statute supports the court’s finding that the **research and retrieval fees were nominal in comparison to the time spent responding to the volume of requests and court orders and did not constitute a burden contrary to the spirit of the Open Records Act.**”³⁸

This decision brought the nominal fee standard from mere legislative history to a precedent binding on all Colorado trial courts.³⁹ It also established that a research-and-retrieval fee of \$15 per hour and \$20 per hour for exceptionally voluminous requests was, as of that time, permissible under CORA.⁴⁰

C. Judicial application of the “nominal” standard

Two Colorado Court of Appeals cases followed *Black* and applied its “nominal” standard to determine whether fees charged for fulfilling open records requests were appropriate.

In *Citizens Progressive All. v. Sw. Water Conservation Dist.*, the Colorado Court of Appeals held that CORA permitted a \$20 per hour research and retrieval fee.⁴¹ In that case, a citizens’ group requested records from a water district,⁴² which hired a paralegal to research and retrieve the appropriate records in fulfilling the request.⁴³ The water district charged the requesters \$723 for the paralegal’s 36.15 hours spent researching and retrieving the records.⁴⁴ The court agreed with the rationale and reasoning in *Black*, in which the court held that fees of \$15 per hour and \$20 per hour for exceptionally voluminous requests were

³⁴ *Id.* at 471 (quoting Colo. Legis. Council, Research Publ’n #126, Open Records for Colorado, 46th Gen. Assemb., at xiii (1967)).

³⁵ Black, 74 P.3d at 472.

³⁶ *Id.* (quoting *Nominal*, Black’s Law Dictionary (7th ed. 1999)).

³⁷ Black, 74 P.3d at 472.

³⁸ *Id.* (emphases added).

³⁹ *Id.* at 471-72.

⁴⁰ *Id.* at 472.

⁴¹ *Citizens Progressive All. v. Sw. Water Conservation Dist.*, 97 P.3d 308, 314 (Colo. App. 2014).

⁴² *Id.* at 310.

⁴³ *Id.*

⁴⁴ *Id.*

permissible under CORA. The holding in *Black* was dispositive — CORA permitted fees in the amounts the water district had charged.⁴⁵

In *Mountain-Plains Inv. Corp. v. Parker Jordan Metro. Dist.*, the Colorado Court of Appeals held that CORA permitted a \$25 per hour research-and-retrieval fee.⁴⁶ In that case, Mountain-Plains Investment Corp. and the Fettereses — individual citizens and property owners — submitted an open records request to the Parker Jordan Metropolitan District.⁴⁷ The district initially quoted a fee of \$16,025 to fulfill this first request.⁴⁸ Mountain-Plains Investment Corp. then submitted a second request.⁴⁹ Following a board meeting, the district said it would comply with the second request, but it needed a \$2,500 deposit and for the requesters to sign a commitment to pay \$25 per hour for the time needed to research, review, and make available the requested records.⁵⁰

In explaining why it found this fee to be reasonable, the Court of Appeals discussed *Black*.⁵¹ In *Black*, a division of this court upheld a \$15 per hour fee for research and retrieval and a \$20 per hour fee for exceptionally voluminous requests as reasonable under section 24-72-203(1)(a). Relying on CORA’s legislative history and intent, the division concluded that CORA “supports the court’s finding that the research and retrieval fees were **nominal in comparison to the time spent responding to the volume of requests ... and did not constitute a burden contrary to the spirit of [CORA]**.”⁵² The court also referenced *Citizens Progressive All.*, in which the Colorado Court of Appeals permitted a \$20 per hour research and retrieval fee.⁵³ Ultimately, the court “weighed the cost to [Mountain Plains Inv. Corp.] against the reasonable time for retrieving and reviewing the documents and found the \$25 per hour fee to be reasonable.”⁵⁴

While the court’s reasoning in *Mountain-Plains Inv. Corp.* appeared sound on its face and consistent with its precedents, the notion that a \$16,000 fee could be deemed “nominal” struck many in the public as difficult to accept.

⁴⁵ *Id.* at 314.

⁴⁶ *Mountain-Plains Inv. Corp. v. Parker Jordan Metro. Dist.*, 312 P.3d 260, 268 (Colo. App. 2013).

⁴⁷ *Id.* at 262.

⁴⁸ *Id.* at 263.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 267-68.

⁵² *Mountain-Plains Inv. Corp. v. Parker Jordan Metro. Dist.*, 312 P.3d 260, 267-68 (Colo. App. 2013) (emphases added).

⁵³ *Id.* at 268.

⁵⁴ *Id.*

II. An attempt to rein in research and retrieval fees

A. House Bill 14-1193 as introduced

As introduced, HB 14-1193 proposed a research-and-retrieval fee that included both the “nominal” language the Courts of Appeals had been using to decide its cases, as well as a maximum fee “cap” based on the state’s minimum wage.⁵⁵ In substance, it added subsection (6) to 24-72-205, C.R.S., a section titled “Copy, printout, or photograph of a public record — imposition of research and retrieval fee.”⁵⁶

Subsection (6) would have allowed a records custodian to impose a fee for the research and retrieval of public records.⁵⁷ The custodian could only impose the fee if the custodian had posted or otherwise published a written policy specifying the conditions concerning the custodian’s research and retrieval.⁵⁸ It also would have codified the nominal standard, stating that “[a]ny fee the custodian charges a requestor [sic] for the research and retrieval of public records must be nominal in comparison to the time the custodian spends responding to the volume of requests.”⁵⁹ Complementing this, the subsection also set a ceiling, wherein the custodian shall not “under any circumstances” charge an hourly rate to exceed three times the state’s minimum wage.⁶⁰

B. House Bill 14-1193 as amended and signed into law

Through a series of stakeholder meetings and further legislative amendments, the “nominal in comparison” to actual costs standard was jettisoned. Instead, CORA currently allows a records custodian to impose a fixed, capped hourly fee for the research and retrieval of public records, regardless of (and untethered to) the government’s actual costs.⁶¹ The custodian may only impose this fee if the custodian has posted or otherwise published a written policy specifying the custodian’s conditions concerning research and retrieval, including the amount of any current fee.⁶² The custodian may not charge a fee for the first hour expended in connection with research and retrieval.⁶³ However, after the first hour, the custodian may charge a fee that shall not exceed a specified statutory amount.⁶⁴

⁵⁵ HB 14-1193, 69th Gen. Assemb., 2d Reg. Sess. (Colo. 2014) (as introduced).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ COLO. REV. STAT. § 24-72-205(6)(a) (LexisNexis, Lexis Advance through all laws passed during the 2019 Legislative Session).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

The 2014 General Assembly set the initial specified statutory amount at \$30 per hour.⁶⁵ This maximum allowable rate is adjusted every five years, with the first adjustment effective on July 1, 2019.⁶⁶ The legislature based this adjustment on the percentage change over the five-year period in the Department of Labor, Bureau of Labor Statistics, Consumer Price Index for Denver-Lakewood-Aurora for all items and all urban consumers, or its successor index.⁶⁷ On June 21, 2019, the Legislative Council Staff announced that the adjustment to the maximum fee would be from \$30 per hour to \$33.58 per hour;⁶⁸ this is the current maximum allowed fee a government entity may charge for research and retrieval.⁶⁹

DATA

I. Statewide school district research and retrieval fee survey

To assess the 2014 CORA amendment's effect on research-and-retrieval fees, the author conducted a survey of existing practices across Colorado.

A. Methodology

The following provides insight into: (1) the fees that a uniform governmental entity charges for research and retrieval; (2) the rate at which these uniform governmental entities adopt the maximum allowable fee upon the enactment of or the last revision to or review of the policy; and (3) how often entities unjustifiably charge the maximum research-and-retrieval rate. School districts were selected as the uniform governmental entity because of the large sample size, as well as the strong public interest in children's education.

The analysis began with all 178 public school districts within Colorado, not including specialty or alternative educational programs. Only school districts that published their open records policies online were considered, thereby removing 41 school districts (remarkably, almost a quarter of all districts). Of the remaining 137, six had policies containing ambiguous dates of enactment, revision, or review; those six districts were also removed from the analysis, leaving 131 total school districts.

⁶⁵ HB 14-1193, 69th Gen. Assemb., 2d Reg. Sess. (Colo. 2014).

⁶⁶ COLO REV. STAT. § 24-72-205(6)(b) (LexisNexis, Lexis Advance through all laws passed during the 2019 Legislative Session).

⁶⁷ *Id.*

⁶⁸ Memorandum from Natalie Mullins, Dir., Colo. Legis. Council to Interested Persons (June 21, 2019), https://leg.colorado.gov/sites/default/files/images/r19-717_update_cora_fee.pdf.

⁶⁹ *Id.*

Two pieces of information were gathered from the 131 districts: (1) the date on which their CORA fees policy was enacted, revised, or reviewed, and (2) the fee the school district adopted for public records research and retrieval. Two quantitative analyses were performed with this data. First, an analysis was performed to examine the specific fees school districts charge, as well as the number of school districts charging each fee. The second analysis determined the rate at which school districts adopt the maximum allowable fee when enacting, revising, or reviewing their policies.

For the first analysis, the only relevant data were the fees school districts charged. These data were intended to provide a broad overview of the fees school districts charge for public records research and retrieval and to see if there is a prevailing trend.

The second analysis used both a district's adopted fee and the date of the policy's enactment, revision, or review. School districts were first placed into categories based on the date on which their policies were enacted, revised, or reviewed. The first category consisted of school districts that enacted, revised, or reviewed their policies before May 2, 2014; this corresponds to policies passed when the allowable fee was "nominal." The second category consisted of school districts that enacted, revised, or reviewed their policies on or after July 1, 2014, but before July 1, 2019; this corresponds to policies passed when the maximum fee was \$30 per hour. The final category consisted of school districts that enacted, revised, or reviewed their policies on or after July 1, 2019; this corresponds to policies passed when the maximum fee was \$33.58 per hour.

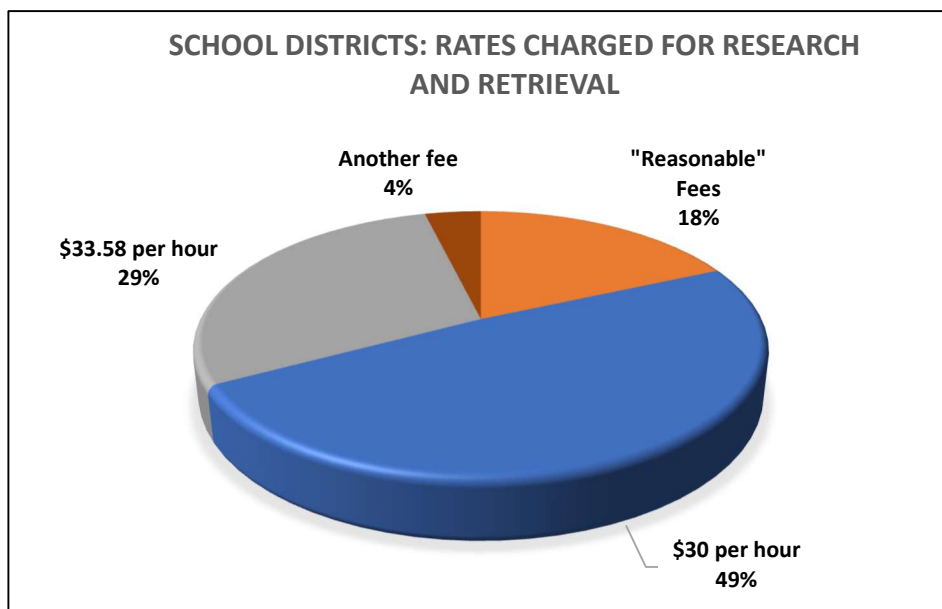
Because this analysis was intended to examine the rate at which school districts adopt the maximum allowable fee when enacting, revising, or reviewing their policies, school districts that enacted, revised, or reviewed their policies before July 1, 2014, were removed from the analysis; these districts would not have had the opportunity to change their charged fee to anything beyond a "nominal" one. Consequently, 20 school districts were removed from this secondary second analysis.

The 111 school districts with policies in the two remaining categories were then organized into sub-categories, based on whether their policies specified a "reasonable fee," \$30 per hour, \$33.58 per hour, or another amount. The sub-categories that reflected instances when the school districts charged the maximum fee for the period in which the policies were enacted, revised, or reviewed (\$30 per hour for policies on or after July 1, 2014, but before July 1, 2019, and \$33.58 per hour for policies after July 1, 2019) were then combined and summed. The remaining school districts were also summed. Each sum was then divided by the 111 school districts considered to obtain the rate at which school districts adopted the maximum rates, and the rate at which school districts did not adopt the maximum rates.

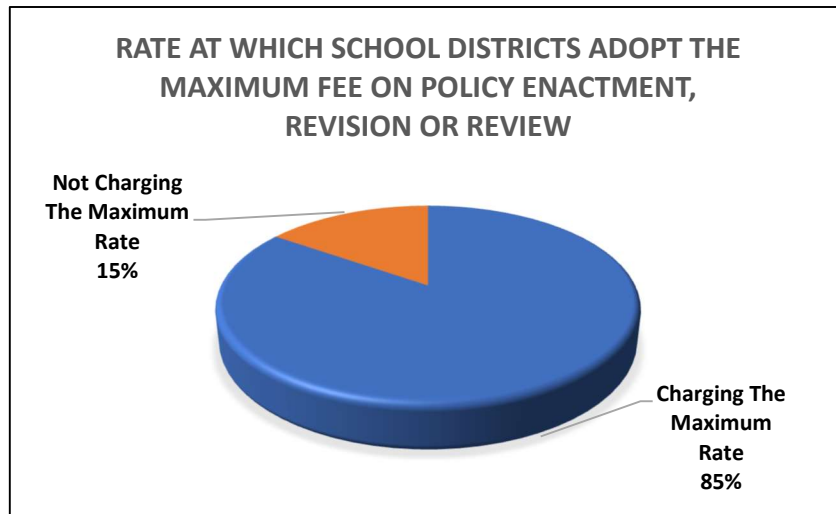
The final analysis was narrower and focused on wages and salaries of employees performing research and retrieval in districts charging the maximum rate. A CORA request was sent to all 38 districts whose policies permitted the maximum rate. Of those 38 districts, data could not be obtained from 18. Of the 20 remaining districts, seven provided vague responses, such as supplying spreadsheets with names and salaries of *all* their employees. Of the remaining 13 districts, four explained that the salary or wage depends on the nature of the request and who fulfills it. Relevant here, nine districts provided specific salaries or wages of employees performing research-and-retrieval work.

These nine informative responses were organized into three categories. The first category included districts whose employees performing research and retrieval earned less than \$33.58 per hour. The second contained districts that identified a mixture, with at least one employee earning more than \$33.58 per hour and at least one earning less. And the final category included districts whose employees earned more than \$33.58 per hour.

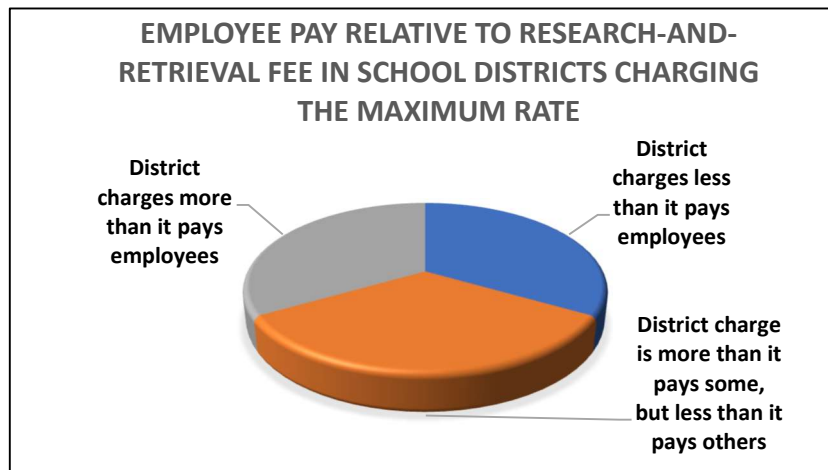
B. Data



Fee charged	# districts charging that fee
"Reasonable"	24
\$30 per hour	64
\$33.58 per hour	38
Another fee	5



Did the district adopt the maximum allowable rate when enacting, revising or reviewing policy?	# districts charging at that rate	Rate
Yes	94	85%
No	17	15%



In districts charging the maximum research-and-retrieval fee, does the district charge more than it pays its employees for doing that work?	# school districts responding
Yes, the district charges more	3
No, the district charges less	3
Mixture of employees paid more and less	3

C. Summary of findings

The data yield three conclusions. First, Colorado's school districts are divided regarding the fees they charge for research and retrieval. The prevailing trend is for school districts to charge \$30 per hour; 49 percent of the policies examined have adopted this fee. The second most popular fee is the maximum allowable rate of \$33.58 per hour; 29 percent of the school district policies examined have adopted this fee. The minority practice is to charge either a "reasonable" fee or some other amount. Eighteen percent of the school district policies examined have adopted a "reasonable" fee. Even fewer, 4 percent, adopted some other rate, ranging from \$20 per hour to \$45 per hour. It is worth noting that the \$45 per hour rate exceeds that which Colorado law permits.

The second conclusion is that Colorado school districts have a strong tendency to adopt the maximum allowable fee when enacting, revising, or reviewing their open records policies. A staggering 85 percent of school districts examined choose to adopt the maximum allowable fee for research and retrieval when enacting, revising, or reviewing their policies.

Finally, **some districts have *unjustifiably* adopted the maximum research-and-retrieval rate, paying the employees who perform research and retrieval less than the fee amount.**⁷⁰ Of districts charging the maximum allowable rate, nine responded to a CORA request with clear salary information. One-third of these responses indicated that the district pays *all* its employees performing research and retrieval less than \$33.58 per hour; among these responses, the wages were *as low as \$14.83 per hour*. One-third of the responses indicated a mixture of employees earning more and less than \$33.58 per hour. The final one-third of responses indicated that all employees conducting research and retrieval earn more than \$33.58 per hour.

In short, 29 percent of surveyed school districts charge the maximum allowable research-and-retrieval fee. However, this is a snapshot in time — the trend is for districts to adopt the maximum rate when enacting, revising, or reviewing their policies, which they do 85 percent of the time. As time passes, the number of districts charging this maximum fee will only increase. With this background, it is worth noting that of the districts that charge the maximum fee and responded to CORA requests for salary information for this survey, 33 percent stated that all their research and retrieval employees earn less than that fee

⁷⁰ The author asserts this as "unjustifiable" not because it violates the "letter" of the CORA, which clearly permits such fees, but rather, because it violates its spirit, which is to authorize the charging of search and retrieval fees only that are "nominal" in comparison to the government's actual costs. In these cases, it appears the government would yield a profit from the public's need for transparency, a deeply concerning practice that suppresses access to information for the sake of profit.

amount. In other words, **for one-third of responding districts, they may charge the public more for their employees' time to provide public records than they actually pay the employees.**

If this sampling of school districts is reflective of other government entities, then, sadly, HB 14-1193 produced unforeseen and plainly deleterious results. While the bill's proponents unquestionably sought to cement into place an upper limit on research-and-retrieval fees, in practice the bill gave governments permission to arbitrarily impose the capped rate on records requesters — and often multiply that rate by many hours. Such fees cannot be “nominal” if they exceed the government's actual costs.

ALTERNATIVE APPROACHES

I. Other states' approaches toward research and retrieval costs

No nationwide rule binds how states must approach the costs of research and retrieval associated with fulfilling open records requests. Accordingly, states have taken a variety of approaches in striking the balance between the right of the public to inspect and copy public records and the administrative burdens that may be placed upon government entities in responding to requests. These approaches include, but are not limited to: (1) not charging the requester for staff time spent researching and retrieving records; (2) charging for staff time spent researching and retrieving records when the records are sought for commercial uses; (3) charging for staff time regardless of use; and (4) charging a maximum hourly fee. The following sections examine how different states implement these approaches.

A. No charge for an agency's personnel time spent on research and retrieval

The statutes of some states do not allow government agencies to charge any requester — regardless of the requester's status or the intended use for the data — for staff time spent researching and retrieving records for open records requests. Three states following this approach are Ohio, West Virginia, and New York.

Ohio

Ohio's open records law is perhaps the least burdensome for records requesters. Ohio law states that “a public office ... shall make copies of the requested public record available to the requester at cost and within a reasonable period of time.”⁷¹ The Ohio Supreme Court has interpreted the term “at cost.”⁷² It noted that

⁷¹ OHIO REV. CODE ANN. § 149.43(B)(1) (LexisNexis, Lexis Advance through legislation passed by the 133rd General Assembly and filed with the Secretary of State through file 30).

⁷² State ex rel. Warren Newspapers v. Hutson, 640 N.E. 2d 174 (Ohio 1994).

while the federal Freedom of Information Act allows fees for duplication, search, and review time, “Ohio does not charge for search and/or review time.”⁷³ The court held that “[s]ince the [police department employees] were already compensated for performing their duties, and responding to public records requests is merely another duty, the cost set forth ... should not include labor costs regarding employee time.”⁷⁴ The Ohio Supreme Court’s 1994 interpretation of the statute has not been subsequently overturned or altered by legislative amendment. Simply put, Ohio’s courts and legislature consider records request fulfillment to be a duty of an agency’s employees and a duty for which the public already compensates employees.

Under Ohio law, “public record” includes any records kept by any public office, including but not limited to state, county, city, village, township, and school district units, and records concerning the delivery of educational services by an alternative school kept by the entity operating the school.⁷⁵ The broad definition of public record includes designated exceptions.⁷⁶ Thus, the statute has broad applicability to state and local government offices.

West Virginia

Similarly, West Virginia does not charge a research-and-retrieval fee, nor does it charge an hourly rate for its employees to fulfill records requests.⁷⁷ West Virginia premised its open records policy on the idea that “the American constitutional form of representative government holds that government is the servant of the people, and not the master of them.”⁷⁸ Its policy declares that “unless expressly provided by law, [all persons are] entitled to full and complete information regarding the affairs of government and the official acts of those who represent them. ...”⁷⁹ Following this declaration, West Virginia’s act defines “public body” and “public record.”⁸⁰ Public body includes every state office, agency, department, including the executive, legislative and judicial departments, division, bureau, board and commission; every county and city governing body, school district, special district, municipal corporation, and any board, department, commission council or agency thereof; and any other body which is created by the state or local authority or which is primarily funded by the state or local authority.⁸¹ A public record is any writing containing

⁷³ *Id.* at 180.

⁷⁴ *Id.*

⁷⁵ OHIO REV. CODE ANN. § 149.43(A)(1) (LexisNexis, Lexis Advance through legislation passed by the 133rd General Assembly and filed with the Secretary of State through file 30).

⁷⁶ *Id.*

⁷⁷ W. VA. CODE ANN. § 29B-1-3(e) (LexisNexis, Lexis Advance through all 2020 regular session legislation).

⁷⁸ W. VA. CODE ANN. § 29B-1-1 (LexisNexis, Lexis Advance through all 2020 regular session legislation).

⁷⁹ *Id.*

⁸⁰ W. VA. CODE ANN. § 29B-1-2 (LexisNexis, Lexis Advance through all 2020 regular session legislation).

⁸¹ W. VA. CODE ANN. § 29B-1-2(4) (LexisNexis, Lexis Advance through all 2020 regular session legislation).

information prepared or received by a public body, the content or context of which relates to the conduct of the public's business.⁸² These definitions give the act broad applicability at varying levels of government.

West Virginia law allows public bodies to establish fees reasonably calculated to reimburse them for the actual costs in making reproductions of records, but the statute explicitly declares that they "may not charge a search or retrieval fee or otherwise seek reimbursement based on a man-hour basis as part of costs associated with reproduction of records."⁸³ Like Ohio, West Virginia does not charge for research and retrieval or other staff time related to fulfilling an open records request at state and local levels.⁸⁴

New York

New York follows a scheme like that of Ohio and West Virginia. Its law broadly defines an agency to include any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature.⁸⁵ A record is any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes.⁸⁶

New York statutes allow agencies to determine only the cost of reproducing a record from an enumerated list of items within its records law.⁸⁷ One allowed cost is an amount equal to the hourly salary of the lowest-paid agency employee who has the necessary skill required to prepare a copy of the record.⁸⁸ Another allowed cost is that of any storage device or media provided to the person who made the request.⁸⁹ An agency may even include the actual cost of an outside professional service to prepare a copy of a record when the agency's equipment is inadequate to prepare the copy.⁹⁰ However, an agency "shall not include search time or administrative costs, and no fee shall be charged unless at least two hours of employee time is required to prepare a copy."⁹¹ Therefore, while New York allows an agency to charge for materials and an

⁸² W. VA. CODE ANN. § 29B-1-2(5) (LexisNexis, Lexis Advance through all 2020 regular session legislation).

⁸³ W. VA. CODE ANN. § 29B-1-3(e) (LexisNexis, Lexis Advance through all 2020 regular session legislation).

⁸⁴ *Id.*

⁸⁵ N.Y. Pub. Off. Law § 86(3) (Consol., through 2020 released Chapters 1-55, 59-65, 67-69, 71-73, 77-80, 82-84, 86-88).

⁸⁶ N.Y. Pub. Off. Law § 86(4) (Consol., through 2020 released Chapters 1-55, 59-65, 67-69, 71-73, 77-80, 82-84, 86-88).

⁸⁷ N.Y. Pub. Off. Law § 87(1)(c) (Consol., through 2020 released Chapters 1-55, 59-65, 67-69, 71-73, 77-80, 82-84, 68-88).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* (emphasis added).

employee's copying and preparation of a record, its agencies cannot charge for employee time spent searching for a record.

B. Charges for personnel time when records are for a commercial purpose

A second category of states charges records requesters for staff time only under specific conditions. Illinois and Kentucky follow this approach.

Illinois

Illinois premised its open records policy on transparency and accountability but does not intend its act to allow requests from a commercial enterprise to unduly burden public resources or to “disrupt the duly-undertaken work of any public body.”⁹² The general assembly recognized that its act imposes a fiscal obligation, but also declared that providing records to the public is a primary duty of the state’s public bodies and its open records laws should be interpreted to this end “fiscal obligations notwithstanding.”⁹³

Under the Illinois act, “[i]f a request is not a request for a commercial purpose or a voluminous request, a public body may not charge the requester for the costs of any search for and review of the records or other personnel costs associated with reproducing the records.”^{94 95}

The Illinois act applies broadly to state and local public agencies.⁹⁶ “Public records,” like other states’ acts, is defined to include essentially all materials related to the transaction of public business.⁹⁷ Illinois defines a “commercial purpose” as the use of any part of a record or information therefrom, in any sale, resale, or solicitation or advertisement for sales purposes.⁹⁸

⁹² 5 ILL. COMP. STAT. ANN. 140/1 (LexisNexis, Lexis Advance through Feb. 5, 2020 – the effective date of the final chaptered act, P.A. 101-629, of the 2019 Regular Session of the 101st General Assembly).

⁹³ *Id.*

⁹⁴ 5 ILL. COMP. STAT. ANN. 140/6(b) (LexisNexis, Lexis Advance through Feb. 5, 2020 – the effective date of the final chaptered act, P.A. 101-629, of the 2019 Regular Session of the 101st General Assembly).

⁹⁵ Illinois defines “voluminous” in two ways. A “voluminous” request may be the fifth or more request by an individual for more than five different categories of records in a period of twenty business days, or it may be a request that requires the compilation of more than 500 pages of legal-sized pages of public records; the 500 pages rule does not apply if a single record is over 500 pages. However, the “voluminous” definition explicitly excludes news media, non-profit, scientific, and academic organizations, so long as the principal purpose of the request is pertinent the goals of those organizations. See ILL. COMP. STAT. ANN. 140/2(h) (LexisNexis, Lexis Advance through Feb. 5, 2020 – the effective date of the final chaptered act, P.A. 101-629, of the 2019 Regular Session of the 101st General Assembly).

⁹⁶ 5 ILL. COMP. STAT. ANN. 140/2(a) (LexisNexis, Lexis Advance through Feb. 5, 2020 – the effective date of the final chaptered act, P.A. 101-629, of the 2019 Regular Session of the 101st General Assembly).

⁹⁷ 5 ILL. COMP. STAT. ANN. 140/2(c) (LexisNexis, Lexis Advance through Feb. 5, 2020 – the effective date of the final chaptered act, P.A. 101-629, of the 2019 Regular Session of the 101st General Assembly).

⁹⁸ 5 ILL. COMP. STAT. ANN. 140/2(c-10) (LexisNexis, Lexis Advance through Feb. 5, 2020 – the effective date of the final chaptered act, P.A. 101-629, of the 2019 Regular Session of the 101st General Assembly).

Requests made by news media and nonprofit, scientific, or academic organizations are not sought for a “commercial purpose” so long as the entity uses the records to access and disseminate information concerning news and current events, for articles of opinion or interest to the public, or for academic, scientific, or public research or education.⁹⁹ Illinois law further provides that in addition to not being for a commercial purpose, requests made by news media and nonprofit, scientific, or academic organizations for the previously-mentioned uses are not voluminous.¹⁰⁰

When a public body fulfills a record request for a commercial purpose, it may charge for the use of its equipment and the costs of any search and review of records or other personnel costs associated with producing the records.¹⁰¹ The public body may charge up to \$10 for each hour spent by personnel in searching for or retrieving a requested record.¹⁰² It shall not charge for the first eight hours spent by personnel in searching for or retrieving a record.¹⁰³ However, when public records are maintained by a third party with whom the public body has a contract, the public body may charge the actual cost of transporting the public records from an off-site storage facility.¹⁰⁴ Therefore, the Illinois act broadly prevents local and state agencies from charging research or retrieval fees for noncommercial requests that are not voluminous. News organizations are among a group to which the commercial and voluminous considerations do not apply so long as they are pursuing certain interests.

Kentucky

Kentucky’s open records law follows an approach like that taken by Illinois. Under the Kentucky statute, an agency may charge a fee for making copies of records requested for noncommercial purposes that shall not exceed the cost of production, including the costs of any media and mechanical processing costs incurred by the public agency, but not including the cost of staff required.¹⁰⁵ If a requester seeks records in a nonstandard format or tailoring is needed to meet the request, the agency may provide the requested format and recover staff time as well as actual costs incurred.¹⁰⁶ An agency may charge a reasonable fee when a requester seeks records for “commercial purposes.”¹⁰⁷

⁹⁹ 5 ILL. COMP. STAT. ANN. 140/2(h) (LexisNexis, Lexis Advance through Feb. 5, 2020 – the effective date of the final chaptered act, P.A. 101-629, of the 2019 Regular Session of the 101st General Assembly).

¹⁰⁰ *Id.*

¹⁰¹ 5 ILL. COMP. STAT. ANN. 140/6(b) (LexisNexis, Lexis Advance through Feb. 5, 2020 – the effective date of the final chaptered act, P.A. 101-629, of the 2019 Regular Session of the 101st General Assembly).

¹⁰² 5 ILL. COMP. STAT. ANN. 140/6(f) (LexisNexis, Lexis Advance through Feb. 5, 2020 – the effective date of the final chaptered act, P.A. 101-629, of the 2019 Regular Session of the 101st General Assembly).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ KY REV. STAT. ANN. § 61.874(3) (LexisNexis, Lexis Advance through Ch. 128 of the 2020 Regular Session).

¹⁰⁶ *Id.*

¹⁰⁷ KY REV. STAT. ANN. § 61.874(4)(a) (LexisNexis, Lexis Advance through Ch. 128 of the 2020 Regular Session).

Similar to Illinois, Kentucky's statute broadly defines the public agencies to which it applies, including state and local entities.¹⁰⁸ A commercial purpose means the direct or indirect use of any part of a public record or records, in any form, for sale, resale, solicitation, rent, or lease of services, or any use by which the user expects a profit either through commission, salary, or fee.¹⁰⁹ Like other states, public records are broadly defined, with Kentucky excepting the records of a contracted entity that are unrelated to the contract.¹¹⁰ Like Illinois, a "commercial purpose" does not include the use of a public record by a newspaper or "by a radio or television station in its news or other informational programs."¹¹¹

C. Charges for personnel time regardless of whether the request is commercial or otherwise

A third category of states allow agencies to charge for personnel time in researching and retrieving of open records, regardless of the requester's purpose. Michigan and Georgia follow this model.

Michigan

Michigan's open records law covers public bodies,¹¹² broadly defined to include: state agencies within the executive branch, except for the governor and the governor's employees; agencies, boards, commissions, or councils within the state's legislative branch; and county, city, township, village, intercounty, intercity, or regional governing bodies, councils, school districts, special districts, municipal corporations, or boards, departments, commissions, councils, or agencies thereof.¹¹³ A public record is a writing prepared, owned, used, in possession of, or retained by a public body in the performance of an official function.¹¹⁴

Michigan law provides six components that public bodies use to calculate the fee for fulfilling a public records request.¹¹⁵ One of these components is a portion of labor costs directly associated with the necessary searching for, locating, and examining of public records.¹¹⁶ For this component, the public body "shall not charge more than the hourly wage of its lowest-paid employee capable of searching for, locating,

¹⁰⁸ KY REV. STAT. ANN. § 61.870(1) (LexisNexis, Lexis Advance through Ch. 128 of the 2020 Regular Session).

¹⁰⁹ KY REV. STAT. ANN. § 61.870(4)(a) (LexisNexis, Lexis Advance through Ch. 128 of the 2020 Regular Session).

¹¹⁰ KY REV. STAT. ANN. § 61.870(2) (LexisNexis, Lexis Advance through Ch. 128 of the 2020 Regular Session).

¹¹¹ KY REV. STAT. ANN. § 61.870(4)(b)(2) (LexisNexis, Lexis Advance through Ch. 128 of the 2020 Regular Session).

¹¹² MICH. COMP. LAWS SERV. § 15.234(1) (LexisNexis, Lexis Advance through Public Act 84 from the 2020 Legislative Session).

¹¹³ MICH. COMP. LAWS SERV. § 15.232(h) (LexisNexis, Lexis Advance through Public Act 84 from the 2020 Legislative Session).

¹¹⁴ MICH. COMP. LAWS SERV. § 15.232(i) (LexisNexis, Lexis Advance through Public Act 84 from the 2020 Legislative Session).

¹¹⁵ MICH. COMP. LAWS SERV. § 15.234(1) (LexisNexis, Lexis Advance through Public Act 84 from the 2020 Legislative Session).

¹¹⁶ MICH. COMP. LAWS SERV. § 15.234(1)(a) (LexisNexis, Lexis Advance through Public Act 84 from the 2020 Legislative Session).

and examining the public records. ...”¹¹⁷ It does not matter whether that lowest-paid person actually conducts the search.¹¹⁸ When an agency charges for labor costs, it must charge in increments of 15 minutes, with all partial increments rounded down.¹¹⁹

Georgia

Georgia law allows an agency “to impose a reasonable charge for the search, retrieval, redaction, and production or copying costs for the production of records. ...”¹²⁰ Agency is broadly defined to include state and municipal entities.¹²¹ Public records are materials prepared and maintained by an agency or materials received from a private person or entity in the performance of a service or function on behalf of the agency when the agency receives the materials for storage or future use.¹²² The agency must use the most economical means reasonably calculated to identify and produce responsive documents.¹²³ Other state laws may provide for specific fees.¹²⁴ However, in all other instances, the charge for the search, retrieval, and redaction “shall not exceed the prorated hourly salary of the lowest-paid full-time employee who, in the reasonable discretion of the custodian of the records, has the necessary skill and training to perform the request.”¹²⁵ An agency does not charge for the first quarter-hour.¹²⁶

D. Maximum hourly charges

A fourth category of states set maximum allowed hourly charges for research and retrieval. Maine, Rhode Island, and North Dakota are among these states.

Maine and Rhode Island

Both Maine and Rhode Island follow a similar format for charging for research and retrieval. Maine allows hourly charges for research and retrieval that are not more than \$15 per hour.¹²⁷ This fee only applies

¹¹⁷ *Id.* (emphasis added).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ GA. CODE ANN. § 50-18-71(c)(1) (LexisNexis, Lexis Advance through the 2019 Regular Session of the General Assembly and HB 276 and HB 444 of the 2020 Regular Session of the General Assembly).

¹²¹ GA. CODE ANN. § 50-18-70(b)(1) (LexisNexis, Lexis Advance through the 2019 Regular Session of the General Assembly and HB 276 and HB 444 of the 2020 Regular Session of the General Assembly); see GA. CODE ANN. § 50-14-1 (LexisNexis, Lexis Advance through the 2019 Regular Session of the General Assembly and HB 276 and HB 444 of the 2020 Regular Session of the General Assembly).

¹²² GA. CODE ANN. § 50-18-70(b)(2) (LexisNexis, Lexis Advance through the 2019 Regular Session of the General Assembly and HB 276 and HB 444 of the 2020 Regular Session of the General Assembly).

¹²³ GA. CODE ANN. § 50-18-71(c)(1) (LexisNexis, Lexis Advance through the 2019 Regular Session of the General Assembly and HB 276 and HB 444 of the 2020 Regular Session of the General Assembly).

¹²⁴ *Id.*

¹²⁵ *Id.* (emphasis added).

¹²⁶ *Id.*

¹²⁷ ME. REV. STAT. ANN. tit. 1, § 408-A(8) (LexisNexis, Lexis Advance through the First Regular Session, the First Special Session, Chapter 533-678 of the Second Regular Session of the 129th Maine Legislature).

after the first hour of staff time per request.¹²⁸ Similarly, Rhode Island allows hourly charges for search and retrieval that shall not exceed \$15 per hour.¹²⁹ This charge only applies after the first hour of search and retrieval.¹³⁰ Rhode Island, however, considers multiple requests from any person or entity to the same public body within 30 days to be one request.¹³¹

North Dakota

North Dakota allows for fees that shall not exceed \$25 per hour per request for locating records, including electronic records.¹³² Like Maine and Rhode Island, agencies do not charge for the first hour.¹³³

II. The Freedom of Information Act approach to research and retrieval fees

The federal Freedom of Information Act (FOIA) establishes basic guidelines by which federal agencies must abide in making information available to the public.¹³⁴ The guidelines require all federal agencies to promulgate regulations specifying applicable fees regarding the processing of FOIA requests and the procedures and guidelines that govern fee waivers and reductions.¹³⁵

An agency's regulations must not just conform to FOIA's requirements but guidelines set by the Office of Management and Budget (OMB).¹³⁶ "Given OMB's budgetary responsibilities, it is quite appropriate for it to require agencies to develop and diligently carry out programs that charge, collect and deposit fees for FOIA services where such activities are clearly permitted by statute."¹³⁷ However, because the FOIA Reform Act requires agencies to base their fees upon their direct reasonable operating costs of providing FOIA services, the OMB is precluded from establishing a government-wide fee schedule.¹³⁸ The only exception to the FOIA and OMB requirements is the instance in which a statute provides explicitly for setting the levels of fees for particular records, superseding FOIA.¹³⁹

¹²⁸ *Id.*

¹²⁹ R.I. GEN. LAWS § 38-2-4(b) (LexisNexis, Lexis Advance through Chapter 6 of the 2020 Session).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² N.D. CENT. CODE § 44-04-18(2) (LexisNexis, Lexis Advance through all acts approved by the governor through the end of the 2019 Regular Legislative Session).

¹³³ *Id.*

¹³⁴ See 5 U.S.C.S. § 552 (LexisNexis, Lexis Advance through Public Law 116-141, approved May 29, 2020).

¹³⁵ 5 U.S.C.S. § 552(a)(4)(A)(i) (LexisNexis, Lexis Advance through Public Law 116-141, approved May 29, 2020).

¹³⁶ *Id.*

¹³⁷ The Freedom of Information Reform Act of 1986; Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10012 (effective Apr. 27, 1987) (final publication of Fee Schedule and Guidelines implementing certain provisions of the Freedom of Information Reform Act of 1986 (Pub. L. 99-570)).

¹³⁸ *Id.*

¹³⁹ 5 U.S.C.S. § 552(a)(4)(A)(vi) (LexisNexis, Lexis Advance through Public Law 116-141, approved May 29, 2020).

FOIA's framework for assigning fees requires an agency first to designate a request by its character.¹⁴⁰ The agency considers the requester and the purpose for which the requester seeks the records to determine the character of the request.¹⁴¹ It then assigns one of the following designations to the request: records requested for commercial use; records not sought for commercial use by an educational or noncommercial scientific institution whose purpose is scholarly or scientific research; records not sought for commercial use by a representative of the news media; and all other requests.¹⁴² The category to which the request is designated determines its fees.¹⁴³ An examination of the allowable search fees for each of these designations is in the following subsections.

In addition to the group-determinative fee structure, other FOIA provisions also restrict agency fees. As a threshold matter, agencies may not charge a fee when the costs of collection and fee processing are likely to equal or exceed the fee amount.¹⁴⁴ Further, if the disclosure of the requested information is in the public interest because it is likely to contribute to public understanding of the operations or activities of the government and the request is not primarily in the commercial interest of the requester, then agencies shall furnish documents without charge or at a charge less than the established fee.¹⁴⁵ Additional provisions prohibit an agency from charging specific fees if it violates time requirements.^{146 147}

When an agency does charge fees, the agency's fees may only provide for recovery of direct costs of search, duplication, or review.¹⁴⁸ A charge for an employee's time spent fulfilling a request is a direct cost.¹⁴⁹ While the inclusion of charges for some kinds of fringe benefits is unreasonable (e.g., recreational facilities for an employee), the inclusion of charges for benefits that are concretely and identifiably associated with

¹⁴⁰ See 5 U.S.C.S. § 552(4)(A)(ii) (LexisNexis, Lexis Advance through Public Law 116-141, approved May 29, 2020).

¹⁴¹ See *Id.*

¹⁴² 5 U.S.C.S. § 552(a)(4)(A)(ii) (LexisNexis, Lexis Advance through Public Law 116-141, approved May 29, 2020).

¹⁴³ *Id.*

¹⁴⁴ 5 U.S.C.S. § 552(a)(4)(A)(iv)(I) (LexisNexis, Lexis Advance through Public Law 116-141, approved May 29, 2020).

¹⁴⁵ 5 U.S.C.S. § 552(a)(4)(A)(iii) (LexisNexis, Lexis Advance through Public Law 116-141, approved May 29, 2020).

¹⁴⁶ See 5 U.S.C.S. § 552(a)(4)(A)(viii) (LexisNexis, Lexis Advance through Public Law 116-141, approved May 29, 2020) (identifying instances in which agencies may not assess any search fees and, in limited cases, duplication fees for failing to comply with timing or notification requirements).

¹⁴⁷ FOIA contains many complexities, including specific procedures that agencies must follow. However, an agency generally has 20 days (not including Saturdays, Sundays, and legal public holidays) after receiving a request to determine and inform a requester that it will either comply with a request or state the grounds on which it will not comply. There are similar deadlines for appeals of records denials. An agency violating one of these procedures generally loses its inability to charge search fees. See *Id.*

¹⁴⁸ 5 U.S.C.S. § 552(a)(4)(A)(iv) (LexisNexis, Lexis Advance through Public Law 116-141, approved May 29, 2020) (emphasis added).

¹⁴⁹ The Freedom of Information Reform Act of 1986; Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10012, 10013 (effective Apr. 27, 1987) (final publication of Fee Schedule and Guidelines implementing certain provisions of the Freedom of Information Reform Act of 1986 (Pub. L. 99-570)).

the salary of the employee is not (e.g., a prorated amount relating to an employee's retirement contribution).¹⁵⁰

A federal agency may impose a reasonable standard charge for document search, duplication, and review to fulfill a request for commercial use. "Commercial use" is defined as use that "furthers the commercial, trade or profit interests of the requester or the person for whom the requester submitted the request."¹⁵¹ A commercial enterprise can make a request that is not for commercial use, and a nonprofit organization can make a request that is for commercial use.¹⁵² Thus, the use to which the requester puts the requested information is the relevant consideration.¹⁵³ When a requester seeks records for commercial use, an agency may charge only reasonable standard charges for document search, duplication, and review.¹⁵⁴ An agency charging reasonable standard fees for direct costs must look to the categorical limitations in FOIA and charge fees according to those limitations.¹⁵⁵

A federal agency may not charge for search time to fulfill a request for noncommercial use by an educational or noncommercial scientific institution whose purpose is scholarly or scientific research. When an educational or noncommercial scientific institution whose purpose is scholarly or scientific research seeks records for noncommercial use, then an agency may only impose a reasonable standard charge for document duplication.¹⁵⁶ The agency may not charge a fee for the first 100 pages of duplication.¹⁵⁷

A federal agency may not charge for search time to fulfill a request for noncommercial use by a representative of the news media. An agency may only impose a reasonable standard charge for document duplication when the records are sought for noncommercial use by a representative of the news media.¹⁵⁸ In such an instance, the agency may not charge a fee for the first 100 pages of duplication.¹⁵⁹

FOIA broadly defines "a representative of the news media"¹⁶⁰ to mean "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and contributes that work to an audience."¹⁶¹ "News" includes but is not

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ 5 U.S.C.S. § 552(a)(4)(A)(ii) (LexisNexis, Lexis Advance through Public Law 116-141, approved May 29, 2020).

¹⁵⁵ *Id.*

¹⁵⁶ 5 U.S.C.S. § 552(a)(4)(A)(ii)(II) (LexisNexis, Lexis Advance through Public Law 116-141, approved May 29, 2020).

¹⁵⁷ 5 U.S.C.S. § 552(a)(4)(A)(iv)(II) (LexisNexis, Lexis Advance through Public Law 116-141, approved May 29, 2020).

¹⁵⁸ 5 U.S.C.S. § 552(a)(4)(A)(ii) (LexisNexis, Lexis Advance through Public Law 116-141, approved May 29, 2020).

¹⁵⁹ 5 U.S.C.S. § 552(a)(4)(A)(iv)(II) (LexisNexis, Lexis Advance through Public Law 116-141, approved May 29, 2020).

¹⁶⁰ See 5 U.S.C.S. § 552(a)(4)(A)(ii) (LexisNexis, Lexis Advance through Public Law 116-141, approved May 29, 2020).

¹⁶¹ *Id.*

limited to: television or radio stations broadcasting to the public and publishers of periodicals that qualify as disseminators of news who make their products available for purchase by or subscription by or free distribution to the general public.¹⁶² FOIA anticipates evolving methods in which news is delivered and considers alternative media to be news media entities.¹⁶³

Under FOIA, a freelance journalist is a news media entity if the journalist can demonstrate a solid basis for expecting publication through an entity, whether or not the entity employs the journalist.¹⁶⁴ A freelance journalist can demonstrate a “solid basis for expecting publication” by producing a publication contract or by demonstrating a past publication record.

A federal agency may impose a reasonable standard charge for document search and duplication to fulfill a request not otherwise addressed by FOIA. An agency shall charge fees limited to reasonable standard charges for document search and duplication when the previous three subsections do not characterize the request.¹⁶⁵ The agency charging reasonable standard fees must look to the categorical limitations in FOIA and charge fees according to those limitations.¹⁶⁶ In such an instance, the agency may not charge a fee for the first two hours of search time or the first 100 pages of duplication.¹⁶⁷

RECOMMENDATIONS

As demonstrated earlier, Coloradans can be denied their statutory right to access public records through the imposition of CORA fees that are anything but “nominal.” This paper therefore advocates for legislative reform to restore the balance the General Assembly originally envisioned for CORA, suggesting four main proposals.

The first is a stand-alone proposal based on other states’ practices; while ideal, it presents practical issues in Colorado’s current fiscal climate. This paper then explores the concept of itemized receipts to bolster the other, more practical, proposals.

In considering these recommendations, a reader should be mindful that Colorado operates within the constraints of the Taxpayer Bill of Rights.¹⁶⁸ Under this state constitutional amendment, government

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ 5 U.S.C.S. § 552(a)(4)(A)(ii) (LexisNexis, Lexis Advance through Public Law 116-141, approved May 29, 2020).

¹⁶⁶ The Freedom of Information Reform Act of 1986; Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10012, 10015 (effective Apr. 27, 1987) (final publication of Fee Schedule and Guidelines implementing certain provisions of the Freedom of Information Reform Act of 1986 (Pub. L. 99-570)).

¹⁶⁷ 5 U.S.C.S. § 552(a)(4)(A)(iv)(II) (LexisNexis, Lexis Advance through Public Law 116-141, approved May 29, 2020).

¹⁶⁸ COLO. CONST. ART. X, § 20 (LexisNexis, Lexis Advance through all laws passed during the 2019 Legislative Session).

expenditures cannot grow more from year to year than the rate of inflation and the percentage of population growth.¹⁶⁹ As a result, government entities often operate within tight budgetary constraints, making it difficult for them to absorb all costs associated with records request fulfillment. Therefore, policies that recoup *some* costs for research and retrieval seem practical, with the question of the best policy then becoming focused on the *degree to which* governments should be permitted to recover administrative costs.

I. Do not permit agencies to charge for personnel time spent researching and retrieving records in response to requests

Colorado could adopt the model that does not permit agencies to charge requesters for personnel time spent researching and retrieving records. Other states have chosen to operate under this model, and they justify this approach by considering the form and function of government. While an ideal policy, this approach is likely impracticable given the budgetary constraints of TABOR.

Ohio operates under the belief that, based on the form of public employment, agencies already compensate records custodians for performing their duty of fulfilling records requests.¹⁷⁰ With this reasoning, the agency should not need to recover a cost for research and retrieval because the employee is merely performing duties for which he or she already receives a salary.

In Colorado, many agencies appoint a custodian whose duty is to fulfill records requests, among other responsibilities. Ohio's approach poses an intriguing public policy question for Colorado: If the custodian must fulfill records requests under his or her job title, then why should individual Coloradans be asked to pay the public body for him or her to carry out that duty, especially if the custodian is a salaried employee?

West Virginia has a belief similar to Ohio, albeit based on a different premise. West Virginia states that the government is the servant of the people and, as such, its people are entitled to information regarding government affairs and those who represent them.¹⁷¹ Consistent with this view, the government is obligated to provide to its citizens public records access; West Virginia does not consider personnel time spent researching and retrieving records to be a burden that it should balance with administrative costs. This approach poses yet another public policy question for Colorado: Should there even be a balancing consideration in providing access to public records?

The Ohio and West Virginia approaches are both incredibly conducive to government transparency, which frequently promotes the public good. Research institutions operate with less restriction, and the

¹⁶⁹ *Id.*

¹⁷⁰ State ex rel. Warren Newspapers v. Hutson, 640 N.E. 2d 174, 180 (Ohio 1994).

¹⁷¹ W. VA. CODE ANN. § 29B-1-3(e) (LexisNexis, Lexis Advance through all 2020 Regular Session legislation); W. VA. CODE ANN. § 29B-1-1 (LexisNexis, Lexis Advance through all 2020 Regular Session legislation).

news media is better able to inform citizens of the activities of government. Coloradans would receive a similar public good from such a policy. However, under such a policy, agencies would absorb all administrative costs associated with fulfilling CORA requests. Therefore, this approach is problematic due to the budget constraints TABOR imposes.

II. Require agencies to provide itemized receipts that justify charges

Colorado should require government entities to provide records requesters with itemized receipts substantiating charges; if an agency does not provide an itemized receipt and is unable to produce one within a specified period after the requester seeks it, then the agency should refund any already-collected fees and waive any amount due related to the request.

Records requesters express fair concerns regarding the fees being charged. For example, it is not uncommon for an agency to utilize paralegal services to research and retrieve records.¹⁷² According to the U.S. Bureau of Labor Statistics, the mean hourly paralegal wage in Colorado is \$29.93.¹⁷³ This makes CORA's maximum research-and-retrieval fee \$3.65 greater, per hour, than the average Colorado paralegal wage. Considering that 85 percent of school districts across the state adopt the maximum \$33.58 per hour rate when adopting, revising, or reviewing their CORA policies, this is a striking disconnect, and the effects of this disconnect only multiply as agencies require more hours to fulfill a request. The disconnect continues to exist in Boulder, which the U.S. Bureau of Labor and Statistics lists as one of the "Top-Paying Metropolitan Areas for [Paralegals]."¹⁷⁴ In this "top-paying metropolitan area," the mean hourly paralegal wage is \$31.48 per hour.¹⁷⁵ Here, CORA's maximum allowable research-and-retrieval fee is *still* \$2.10 greater, per hour, than the mean hourly paralegal wage in this high-paying market. With this disparity both statewide and in a nationally recognized high-paying area, there is a reasonable question as to what extent agencies are justified in charging the maximum allowable fee.

The state can help ensure that this disparity does not adversely impact records requesters by requiring government entities to provide itemized receipts stating: (1) the name and salary of the person performing the research and retrieval; (2) the total time spent researching and retrieving; and (3) a breakdown of what that employee did regarding research and retrieval work. By providing identifiable salary information, the entity will assure the requester it is justified in charging its research-and-retrieval rate. Requesters would gain both insight into the process and confidence that the agency based its charges on an accurate

¹⁷² Citizens Progressive All. v. Sw. Water Conservation Dist., 97 P.3d 308, 314 (Colo. App. 2014).

¹⁷³ PARALEGALS & LEGAL ASSISTANTS, <https://www.bls.gov/oes/current/oes232011.htm#st> (last visited May 4, 2020).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

accounting of work performed. If the itemized receipt reflects a disparity or shows that the agency is making a profit from fulfilling record requests, the requester should be able to use that receipt to challenge the reasonableness of the fees.

III. Adopt a commercial/non-commercial dichotomy for charging research-and-retrieval fees in conjunction with itemized receipts

Colorado could adopt a format that differentiates how it treats research-and-retrieval fees based on the requester's use of the record, akin to Illinois, Kentucky, and the federal Freedom of Information Act. These approaches share a common policy distinction — they do not treat all records requests similarly, and they do not collect for research and retrieval in all requests. Illinois, for example, only charges research and retrieval for commercial or voluminous requests.¹⁷⁶ Further, both Illinois and Kentucky have made the policy decision to treat news agencies as non-commercial, so long as they are acting within their professional capacities.¹⁷⁷

One of the benefits of this method is that it considers the public good while also striking some balance with the administrative burden agencies face. Unlike the Ohio and West Virginia approaches, which do not charge at all for research and retrieval, the Illinois, Kentucky, and federal Freedom of Information Act approaches allow agencies to recoup some of the expenses they sustain from fulfilling records requests. This method selectively recoups costs only from voluminous requests or those pursuing records for commercial interests.¹⁷⁸ Those who seek records for academic and news media-related purposes are less burdened and more able to pursue the public good.¹⁷⁹ This approach, by selectively recouping costs, makes the impact of

¹⁷⁶ 5 ILL. COMP. STAT. ANN. 140/6(b) (LexisNexis, Lexis Advance through Feb. 5, 2020 – the effective date of the final chaptered act, P.A. 101-629, of the 2019 Regular Session of the 101st General Assembly).

¹⁷⁷ 5 ILL. COMP. STAT. ANN. 140/2(h) (LexisNexis, Lexis Advance through Feb. 5, 2020 – the effective date of the final chaptered act, P.A. 101-629, of the 2019 Regular Session of the 101st General Assembly); KY REV. STAT. ANN. § 61.870(4)(b)(2) (LexisNexis, Lexis Advance through Ch. 128 of the 2020 Regular Session).

¹⁷⁸ Recall, for example, that Illinois exempts requests from news media, non-profit, scientific, and academic organizations from being “commercial,” so long as the entity uses the records to access and disseminate information concerning news and current events, for articles of opinion or interest to the public, or for academic, scientific, or public research or education. It further exempts requests from those entities from being “voluminous,” so long as the principal purpose of the request is pertinent to the goals of those relevant organization. *See supra* notes 96, 99.

¹⁷⁹ An alternative approach would be to provide a mandatory waiver of research-and-retrieval fees for members of established and credentialed news media only. Such an approach, modeled after the exemption in the federal FOIA discussed above, would allow the news media – currently beset by economic woes never heretofore experienced, the opportunity to perform its traditional role as “the Fourth Estate,” keeping a watchful eye on the government, on behalf of the People. Notably, Colorado’s statutes and court rules already include several provisions that provide preferential treatment for credentialed members of the news media. *See, e.g.,* COLO. REV. STAT. 24-72-205(4): “Such fee may be reduced or waived by the custodian if the electronic services and products are to be used for a public purpose, including public agency program support, nonprofit activities, journalism, and academic research.”

TABOR's budget restrictions less imposing than other proposed methods while still considering public interest.

IV. Adopt a hybrid of nominal fees with a maximum chargeable rate in conjunction with itemized receipts

Colorado could adopt a model that reestablishes the “nominal” standard while maintaining a maximum allowable fee; such a hybrid could restrike “a balance between the statutory right of members of the public to inspect and copy public records and the administrative burdens that may be placed upon state agencies in responding to such requests.”¹⁸⁰

CORA long operated under a nominal standard, with “nominal” meaning “trifling, especially as compared to what would be expected.”¹⁸¹ This definition implies that the fees should never exceed the actual costs, a concept otherwise present in CORA.¹⁸² Research-and-retrieval fees that were nominal in comparison to the time spent responding to the volume of requests and court orders did not constitute a burden contrary to the spirit of CORA.¹⁸³ Current data and stories demonstrate that agencies tend to adopt the maximum allowable rate, sometimes charging more per hour than the mean wage of workers capable of performing research and retrieval work.

The *Black* court used a definition of “nominal” that was generous to agencies in attempting to “strike[] a balance.” While the *Black* court cited Colo. Legis. Council, Research Publ’n #126 in arriving at the “nominal” concept, the court defined the term using the 7th edition of Black’s Law Dictionary, published in 1999.¹⁸⁴ Had the court followed a textual approach, it would have used the 4th edition of Black’s Law Dictionary, published in 1951 — this would have been a persuasive legal text at the time the research publication was issued. The definition of “nominal” from that version reads as follows:

Titular; existing in name only; not real or substantial; connected with the transaction or proceeding in name only, not in interest . . . not real or actual; merely named, stated, or given without reference to actual conditions; often with the implication that the thing named is so small, slight, or the like, in comparison to what might properly be expected, as scarcely to be entitled to the name . . .¹⁸⁵

¹⁸⁰ *Black v. Sw. Water Conservation Dist.*, 74 P.3d 462, 471 (Colo. App. 2003) (quoting *Pruitt v. Rockwell*, 886 P.2d 315 (Colo. App. 1994)).

¹⁸¹ *Id.* at 472 (quoting *Nominal*, Black’s Law Dictionary (7th ed. 1999)).

¹⁸² *Cf.*, Colo. Rev. Stat. 24-72-205(3) (LexisNexis, Lexis Advance through all laws passed during the 2019 Legislative Session) (stating that the fee charged for manipulating data “shall not exceed the actual cost of manipulating the said data and generating the said record in accordance with the request”).

¹⁸³ *Id.*

¹⁸⁴ *Black* at 472 (quoting *Nominal*, Black’s Law Dictionary (7th ed. 1999)).

¹⁸⁵ *Nominal*, Black’s Law Dictionary (4th Deluxe ed. 1951).

This definition is consistent with other usages of the word “nominal” in Colorado jurisprudence, making the *Black* court’s choice of definition an aberration in usage. For example, the Colorado Jury Instructions for Civil Trials repeatedly emphasize that “nominal damages” are “one dollar.”¹⁸⁶ The Colorado Court of Appeals has relied on and approved of these jury instructions since at least the 1980s.¹⁸⁷

The court in *Black* decided to “strike a balance” by adopting a definition of “nominal” that was implicitly favorable to agencies. However, the balance is now even more askew, benefiting government entities to the detriment of government transparency — agencies burden and stymie the public’s statutory right to inspect public records by passing along questionable research-and-retrieval costs. By adopting a model that encompasses a “nominal” standard with a maximum allowable fee, there is space to once again “strike a balance.” By incorporating itemized receipts into this model, the public could challenge fees by comparing costs the agency expends to what the agency charges requesters. Furthermore, courts could use itemized explanations of charges to reestablish the standard that fees that be “trifling, especially as compared to what would be expected.”¹⁸⁸

CONCLUSION

CORA’s fee provision is unbalanced, negatively affecting those who work for the public good. The alternative approaches this paper discusses are more favorable to the public good than the status quo. Some states have taken an approach that does not charge at all for staff time, which is most favorable to those working for the public good. Of the remaining two approaches, both charge for staff time with limitations. The first approach affords preferable treatment to news media, nonprofit organizations, and educational institutions, while recouping administrative costs from commercial requests. The other approach limits administrative charges to the costs associated with the lowest-paid employee who is capable of performing the work required to fulfill the request. The latter two approaches present models that are not irreconcilable with TABOR and the budgetary restrictions under which many public bodies operate.

More problematic is the fact that Colorado governments historically tend to adopt the maximum allowable research-and-retrieval fee, even if some have not yet done so. This presents two long-term issues. First, as the trend indicates, more and more governments will adopt the maximum fee. Statistically, this will

¹⁸⁶ See *Colo. J.I.* 18:4 (2020), see also *Colo. J.I.* 18:4 (2020), *Colo. J.I.* 20:4 (2020), *Colo. J.I.* 21:5 (2020), *Colo. J.I.* 22:25 (2020), *Colo. J.I.* 24:7 (2020), *Colo. J.I.* 30:41 (2020), and *Colo. J.I.* 31:7 (2020).

¹⁸⁷ See *Colo. Inv. Servs., Inc. v. Hager*, 685 P.2d 1371, 1375 (Colo. App. 1984).

¹⁸⁸ Quoting *Nominal*, *Black’s Law Dictionary* (7th ed. 1999).

result in greater costs to those submitting CORA requests. Second, while the fee is currently disproportionate to expected costs, it has the potential to grow even more disproportionate. As this paper mentioned previously, the current rate is beyond the hourly pay of a paralegal. Furthermore, it is two-and-a-half times greater than Colorado's minimum wage.¹⁸⁹ If the previous adjustment to the maximum allowable charge were to increase at the same rate in 2019 to 2024 as it did from 2014 to 2019, then the maximum hourly rate in 2024 will be \$37.18; this would be more than three times Colorado's current minimum wage.¹⁹⁰

Finally, as CORA's legislative intent allowed for "nominal" fees, CORA is silent as to how one would verify that a government body's fees are justified. With a mindfulness toward the already-disproportionate amounts for maximum research-and-retrieval fees and paralegal pay, reasonable minds may question whether a government body is charging more than the pay of the employee fulfilling the request. The only way to verify such a consistency is to submit a CORA request and compare the salary of the employee fulfilling the request to the research-and-retrieval fee.

Therefore, Colorado's legislature would serve the public interest by adopting a policy that requires transparent, itemized receipts, and a policy that recoups some administrative costs, so as to minimize the costs absorbed in a world in which agencies operate under TABOR. An ideal policy that strikes this balance would either provide preferable treatment to news media, nonprofit organizations, and educational institutions, or limit its charges to the cost of the lowest-paid employee capable of performing the fulfillment of the records request.

¹⁸⁹ MINIMUM WAGE | COLORADO DEPARTMENT OF LABOR AND EMPLOYMENT, <https://colorado.gov/pacific/cdle/minimumwage> (last visited May 21, 2020) (identifying Colorado's 2020 minimum wage as \$12 per hour).

¹⁹⁰ *Id.*