

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**RON KING, "Fire Marshal/Code Official"
for the City of Nitro, DAVID A.
CASEBOLT, duly elected and serving
Mayor for the City of Nitro, and the CITY
OF NITRO, a municipal corporation and
political subdivision of the State of West
Virginia**

Petitioners,

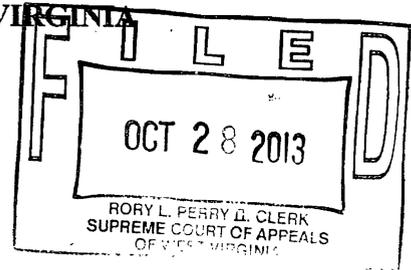
v.

NO. 13-0603

**Appeal from a final order of the
Circuit Court of Kanawha County
(Civil Action No. 12-C-1716)**

**RICHARD A. NEASE and LORINDA
J. NEASE, husband and wife,**

Respondent.



PETITIONERS' REPLY BRIEF

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III. Preliminary Statement

The Petitioners (hereinafter “City of Nitro”) submit that the plain language in the Freedom of Information Act, W.Va. Code §§ 29B-1-1 *et. seq.*, authorizes the City of Nitro and all public agencies to charge reasonable search fees. In the alternative, even if the statute is susceptible to two or more interpretations and must be construed, still it is clear that the authority of public agencies to charge fees extends beyond the cost of operating a copying machine. Specifically, reasonable fees include actual cost incurred by public agencies in searching for documents.

The Respondents’ arguments in opposition to the City of Nitro may be summarized as follows: First, public policy dictates that public agencies may not charge search fees; Second, the City of Nitro’s ordinance imposing search fees exceeds the scope the Freedom of Information Act; Third, a separate provision in the West Virginia code governing access to medical records supports their position; and, Fourth, laws from other jurisdictions, including one California Court case, also support their position.

The City of Nitro respectfully submits that when the Respondents’ arguments are closely examined, they fail to support a finding that public agencies are prohibited from charging search fees. Indeed, close scrutiny of each argument compels a contrary conclusion.

IV. Argument

A. The Plain Language in the Freedom of Information Act Authorizes a Public Body To Charge Search Fees.

The Respondents’ conclude in their brief that the term “‘actual cost’ means the cost incurred to make a copy.” (Respondents’ brief at 6). They provide no concrete legal support for this conclusion. Instead, the focus of their argument is upon public policy and two words in the statute,

i.e. “actual cost”.

The phrase actual cost may not be read in a vacuum. This Court has held “[e]ach word of a statute should be given some effect and a statute must be construed in accordance with the import of its language. Undefined words and terms used in a legislative enactment will be given their common, ordinary and accepted meaning.’ Syl. Pt. 4 Osborne v. United States, 211 W. Va. 667, 567 S.E.2d 677 (2002) *citing* Syllabus point 6, in part, State ex rel. Cohen v. Manchin, 175 W. Va. 525, 336 S.E.2d 171 (1984); and, Syllabus point 2, State v. Snodgrass, 207 W. Va. 631, 535 S.E.2d 475 (2000).

The term “actual” means “existing in fact or reality.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY (11th Ed. 2004). This term must be read in conjunction with the other words in the statute governing fees which may be charged to persons who request records.

This provision reads:

The public body may establish **fees** reasonably calculated to **reimburse** it for its **actual cost** in making **reproductions** of such records.

W.Va. Code § 29B-1-3(5). The City of Nitro in its Brief sets forth the definitions for each relevant term. All will not be repeated herein.

The City of Nitro notes that Black’s Law Dictionary defines the term “fee” as “[a] charge fixed by law for services of public officers or for use of a privilege under control of government.” BLACK’S LAW DICTIONARY (6th Ed. 2009). In responding to Freedom of Information Act requests, the services offered by public officials include searching for and retrieving public documents to satisfy the requests of citizens seeking access to documents. While public agencies have a duty to respond to requests, they do not have a duty to provide this service free of charge. For

that reason, the Legislature authorized public agencies to charge fees to reimburse the public body for rendering this service.

The Petitioners' brief repeatedly references the public policy underlying the Freedom of Information Act as the basis for their assertion that the Legislature did not authorize or intend for public agencies to charge search fees. The City of Nitro does not dispute that the overriding public policy of the Freedom of Inform Act is to provide citizens access to public records. Nevertheless, the City of Nitro submits that providing documents is a service provided by government for which fees, including search fees may be charged.

Similarly, just as citizens may have the right to access Circuit Court documents and despite the overriding public policy reasons for providing this access; still, citizens must pay the Circuit Clerk a fee of one dollar (\$1.00) per page. This provision in the code reads, in relevant part:

(a) The clerk of a circuit court shall charge and collect for services rendered by the clerk the following fees which shall be paid in advance by the parties for whom services are to be rendered:

...

For a transcript, copy or paper made by the clerk for use in any other court or otherwise to go out of the office, for each page, \$ 1;

...

W. Va. Code § 59-1-11

The one dollar (\$1.00) per page fee clearly covers more than the cost of operating a copy machine. This fee is not imposed to hinder public access to Court documents. Instead, it is one means of shifting the costs of a particular service offered by government to the person who seeks to utilize the particular service.

The majority of public agencies in this State cannot afford to hire a staff person solely for the

purposes of responding to Freedom of information Act requests. As such, instead of establishing a per page fee limit, the Legislature gave public agencies discretion to set reasonable fees to cover their actual costs incurred in reproducing documents.

B. W. Va. Code § 16-29-2 Supports the City of Nitro's Position

The Respondents also assert that another provision in the West Virginia code which authorizes search fees demonstrates that the language in the Freedom of Information Act, in contrast, does not authorize search fees. This argument fails.

The section cited by the Respondents governs the duty of health care providers to provide medical records to patients. When this section is read closely, it does not support the Respondents' position that the Freedom of Information Act prohibits public agencies from charging search fees. Instead, this statutory provision supports the City of Nitro's position.

The code section, W. Va. Code § 16-29-2(a), reads in relevant part:

The provider shall be reimbursed by the person requesting in writing a copy of the records at the time of delivery for all **reasonable expenses** (emphasis supplied) incurred in complying with this article: **Provided, That** (emphasis supplied) the cost may not exceed seventy-five cents per page for the copying of any record or records which have already been reduced to written form and a search fee may not exceed ten dollars.

This statutory provision clearly contemplates that the phrase "reasonable expenses" includes copying costs and search fees based upon the proviso which references the same.

This Court has held "[t]he function of a proviso in a statute is to modify, restrain, or conditionally qualify the preceding subject to which it refers." Syl. Pt. 1, State ex rel. Browne v. Hechler, 197 W. Va. 612, 476 S.E.2d 559, (W. Va. 1996) *citing* Syl. pt. 2, State v. Ellsworth J.R., 175 W. Va. 64, 331 S.E.2d 503 (1985). Here, the proviso conditionally qualifies/restricts the preceding subject which it governs. The Legislature contemplated that the preceding subject

“reasonable expenses” included copying costs and search fees. Then, through the proviso, it imposed restrictions upon the fees health care providers could charge for these services, copying and searching, by capping those charges. Hence, this statutory provision demonstrates that the Legislature contemplated that reasonable expenses in producing records includes both copying costs and search fees.

C. The Laws Cited From Other Jurisdictions Do Not Support A Conclusion That the West Virginia Freedom of Information Act Prohibits Search and Retrieval Fees.

The Respondents assert that Freedom of Information statutes from other jurisdictions are instructive. (Respondents' Brief at 11). The City of Nitro respectfully disagrees that the statutes are instructive. In contrast, the California case cited by the Respondents is instructive. Indeed, it supports the City of Nitro's position.

The statutes cited, in relevant part, read:

Virginia

A public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records...

Va. Code Ann. § 2.2-3704(F)

Kentucky

The public agency may prescribe a reasonable fee for making copies of nonexempt public records requested for use for noncommercial purposes which shall not exceed the actual cost of reproduction, including the costs of the media and any mechanical processing cost incurred by the public agency, but not including the cost of staff required. If a public agency is asked to produce a record in a nonstandardized format, or to tailor the format to meet the request of an individual or a group, the public agency may at its discretion provide the requested format and recover staff costs as well as any actual costs incurred.

...

KRS § 61.874(4)

Ohio

If any person chooses to obtain a copy of a public record in accordance with division (B) of this section, the public office or person responsible for the public record may require that person to pay in advance the cost involved in providing the copy of the public record in accordance with the choice made by the person seeking the copy under this division.

...

ORC Ann. 149.43(6)

California

Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so.

...

Cal Gov Code § 6253(b)

None of the cited laws use the same statutory language chosen by the West Virginia Legislature. In turn, these statutes have limited value in answering the question before this Court. These laws do demonstrate that had the West Virginia Legislature intended to prohibit public agencies from charging search fees, it simply could have used language which expressly prohibited public agencies from doing so.

The Respondents have cited a case from another jurisdiction which supports the City of Nitro's position. See North County Parents Organization v. Department of Education, 23 Cal. App. 4th 144, 147-148, 28 Cal. Rptr. 2d 359, (Cal. App. 4th Dist. 1994). The focus of this case was whether California's Freedom of Information Act law which uses the terms "direct costs of

duplication” authorized public agencies to charge search fees. In North County a non-profit entity requested records from the California Department of Education. The Department of Education charged a fee which covered both copying costs and staff time involved in searching for the records. The non-profit took exception to the fees charged and filed suit.

The majority opinion found that the plain language in the statute authorizing a fee “covering direct costs of duplication” only allowed the Department to charge a fee for “the cost of running the copying machine, and conceivably also the expense of the person operating it.” Id. at 146. It found that direct cost “does not include ancillary tasks necessarily associated with the retrieval, inspection, and handling of the file from which the copy is extracted.” Id.

In its analysis, the California Court noted that at one point California employed different language. This prior language is similar to that used in the West Virginia’s Freedom of Information Act, i.e. at one point the California Act used the phrase “reasonable fees” and in a later version of the Act used the phrase “actual cost of providing the copy.” The California Appellate Court found that this prior language most likely authorized governing bodies to charge search fees.

Then, it appears California subsequently imposed additional limitations on the fees which public bodies could charge. In particular, it restricted public bodies to only charging copying costs when it amended its statute in 1981 to use the phrase “direct costs of duplication.”

In analyzing the differences between the current language in its statute, “direct costs of duplication,” versus the prior language, “reasonable fee” or “the actual cost of providing the copy”, the California Court held that the former language could be interpreted as authorizing search fees.

The California Court reasoned:

However, if our quick conclusion needs any bolstering it is easy to find in the statutory history of this fee-setting provision. The original wording, adopted in 1968 (Stats. 1968, ch.

1473, § 39), was that "a reasonable fee" could be charged. In 1975 an amendment limited the "reasonable fee" to not more than \$.10 per page. (Stats. 1975, ch. 1246, § 8.) An amendment in 1976 deleted "reasonable fee" and inserted instead **"the actual cost of providing the copy."** (emphasis supplied) (Stats. 1976, ch. 822, § 1.) Finally, the present version of the statute was adopted in 1981 limiting the fee to the "direct costs of duplication." (§ 6257.) Thus it can be seen that the trend has been to limit, rather [148] than to broaden, the base upon which the fee may be calculated. **A "reasonable fee" or the "actual cost of providing the copy" could be interpreted to include the cost of all the various tasks associated with locating and pulling the file, excising material, etc. When these phrases are replaced by the more restrictive phrase "direct costs of duplication," only one conclusion seems possible.** (emphasis supplied) The direct cost of duplication is the cost of running the copy machine, and conceivably also the expense of the person operating it. "Direct cost" does not include the ancillary tasks necessarily associated with the retrieval, inspection and handling of the file from which the copy is extracted.

North County Parents Organization v. Department of Education, 23 Cal. App. 4th 144, 147-148, 28 Cal. Rptr. 2d 359, (Cal. App. 4th Dist. 1994)

The California Court then concluded that the Board of Education may not charge search fees. Even then, there was a dissenting opinion wherein the writer argued that the term "direct" encompassed acts necessary to make the public material available to the requesting party. *Id.* at 148.

D. Based Upon Information and Belief, Numerous Public Bodies Charge Search Fees.

In its Brief, the City of Nitro cites two legislatively approved rules which authorize search fees. W. Va. Code St. R. § 24-5-4 (2011) (West Virginia Board of Osteopathy) and W. Va. Code St. R. § 64-51-4 (2010) (West Virginia Bureau of Public Health). These rules have the force of law and the Respondents generally elect to ignore the weight which should be afforded therein. Instead, even though the Legislative Rules are approved by the Legislature, and cite the Freedom of Information Act in their authority clause, the Respondents in a conclusory fashion state that the "authority is based upon the nature of the agency, not the nature of the fees to be charged." Respondents' Brief at 11. This conclusory assertion of the Respondents is not responsive to the argument raised. Instead,

in interpreting the Freedom of Information Act through the Rule-Making process the Legislature has affirmed that the Freedom of Information Act authorizes search fees.

The Respondents cite no authority in the enabling legislation of the West Virginia Board of Osteopathy or West Virginia Bureau of Public Health which authorize these agencies to charge fees in excess of those fees authorized by the Freedom of Information Act. Instead, the authority of these agencies to adopt these rules, and to impose the subject fees, including search fees, is derived from the Freedom of Information Act. Through approving these Rules, once again, the Legislature declared that the Freedom of Information Act authorizes search fees.

Other State agencies and local government bodies also charge search fees. State agencies which have established search fees through their Procedural Rules include, but are not limited to: (1) The Office of Miners' Health and Safety and Training, W. Va. Code St. R. § 56-9-6 (2013); and, (2) the Division of Environmental Protection, W. Va. Code St. R. § 60-2-1 (2013). Also, it appears that the West Virginia Supreme Court charges the equivalent of a search fee. Rule 40 of the Rules of Appellate Procedure governs public access to records. It provides in relevant part, "[c]harges for copies of documents in case records provided by the Clerk's Office are set forth in an administrative order that is posted to the Court's website." The Clerk's Office webpage states that "Charges for copies vary depending on whether the cases are pending or closed." The cost per page for **pending** (emphasis supplied) cases is twenty-five cents (.25) per page. The cost per page for **closed** (emphasis supplied) cases is \$1.00.

Presumably the extra cost charged for closed cases contemplates the time required to retrieve archived material. Similarly, there is a \$2.00 per page charge for documents reproduced from microfilm. It appears that this cost too contemplates more than the cost of running the machine to

produce copies from microfilm.¹

The City of Nitro is fully cognizant that the Supreme Court may interpret its own fee schedule as not including a search fee. The City of Nitro further recognizes that the Supreme Court will base its decision in this case on the law, not its own practice. Nevertheless, Legislative Rules, Procedural Rules, and possibly the rules or practices of the Supreme Court reflect that the practice of charging search fees, or other costs associated with producing documents, particularly old or archived documents, has been a long-standing practice based upon the plain language in the Freedom of Information Act. The City of Nitro submits that this practice is permissible as it is expressly authorized by the Freedom of Information Act as constituting fees reasonably calculated to reimburse a public agency for its actual cost in making reproductions of such records

V. CONCLUSION

For the reasons set forth above and in its previously filed brief, the Petitioner City of Nitro respectfully request that this Honorable Court reverse the decision of the Circuit Court of Kanawha County and to enter judgment for the City of Nitro. Specifically, the City of Nitro respectfully submits that the lower court erred in ruling that the City of Nitro lacked the authority to enact an ordinance establishing a search, retrieval or compilation fee for documents requested pursuant to the Freedom of Information Act, W. Va. Code §§ 29B-1-1 et. seq. The City of Nitro further respectfully requests that it be awarded its costs and fees and any other relief that this Court deems appropriate.

¹ It is clear that the definition of a "public body" under FOIA includes the judicial branch of State government. See W. Va. Tr. Ct. R. 10.04(a) and AP v. Canterbury, 224 W. Va. 708, 715, 688 S.E.2d 317 (2009).

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Respondent.

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Petitioners, do hereby certify on this 28th day of October, 2013, that a true copy of the foregoing "*PETITIONERS' REPLY BRIEF*" was served upon opposing counsel by depositing same to them in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:

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