

2-G-3 | SPECIAL SERVICE CHARGE FOR EXTENSIVE USE OF CLERICAL OR SUPERVISORY LABOR OR EXTENSIVE INFORMATION TECHNOLOGY RESOURCES

Section 119.07(4)(d), F.S. provides that if the nature or volume of public records to be inspected or copied requires the extensive use of information technology resources or extensive clerical or supervisory assistance, or both, the agency may charge, in addition to the actual cost of duplication, a reasonable service charge based on the cost actually incurred by the agency for such extensive use of information technology resources or personnel. When warranted, the special service charge applies to requests for both inspection and copies of public records. Board of County Commissioners of Highlands County v. Colby, 976 So. 2d 31 (Fla. 2d DCA 2008).

Thus, while an agency may not refuse to allow inspection or copying of public records based upon the amount of records requested or the span of time which is covered by the public records request, if extensive use of information technology resources or clerical or supervisory personnel is needed in order to produce the requested records, the agency may impose a reasonable special service charge that reflects the actual costs incurred for the extensive use of such resources or personnel. See AGOs 92-38 and 90-07. Cf. Trout v. Bucher, 205 So. 3d 876 (Fla. 4th DCA 2016) (supervisor of elections authorized to charge a reasonable fee based on the labor costs "actually incurred" to comply with Trout's request to inspect ballots in accordance with s. 119.07[5], F.S.).

a. Meaning of the Term "Extensive"

Section 119.07(4)(d), F.S., "does not identify the Legislature's intent as to what may constitute 'extensive use' and provides no definition of that term." AGO 13-03. In 1991, a divided First District Court of Appeal upheld a hearing officer's order rejecting an inmate challenge to a Department of Corrections rule that defined "extensive" for purposes of the special service charge to mean that it would take more than 15 minutes to locate, review for confidential information, copy and refile the requested material. Florida Institutional Legal Services, Inc. v. Florida Department of Corrections, 579 So. 2d 267 (Fla. 1st DCA 1991), review denied, 592 So. 2d 680 (Fla. 1991). The court agreed with the hearing officer that the burden was on the challenger to show that the administrative rule was invalid under Ch. 120, F.S., and the record did not indicate that the officer's ruling was "clearly erroneous" in this case.



In light of the lack of clear direction in the statute as to the meaning of the term "extensive," the Attorney General's Office has suggested that agencies implement the service charge authorization "in a manner that reflects the purpose and intent of the Public Records Act and that does not constitute an unreasonable infringement upon the public's statutory and constitutional right of access to public records." AGO 13-03. In addition, the Attorney General's Office also strongly encourages agencies to adopt a public records procedure that addresses imposition of special service charge. *Id.*

Moreover, the statute mandates that the special service charge be "reasonable." See *Carden v. Chief of Police*, 696 So. 2d 772, 773 (Fla. 2d DCA 1996), in which the court reviewed a challenge to a service charge that exceeded \$4,000 for staff time involved in responding to a public records request, and said that an "excessive charge could well serve to inhibit the pursuit of rights conferred by the Public Records Act." Accordingly, the court remanded the case and required the agency to "explain in more detail the reason for the magnitude of the assessment." *Id.* And see *Board of Trustees, Jacksonville Police & Fire Pension Fund v. Lee*, 189 So. 3d 120, 129 (Fla. 2016), noting that "excessive, unwarranted special service charges deter individuals seeking public records from gaining access to the records to which they are entitled."

b. Meaning of the Term "Information Technology Resources"

"Information technology resources" is defined as data processing hardware and software and services, communications, supplies, personnel, facility resources, maintenance and training. Section 119.011(9), F.S. The term does not include a videotape or a machine to view a videotape. AGO 88-23. The fact that the request involves the use of information technology resources is not sufficient to incur the imposition of the special service charge; rather, extensive use of such resources is required. AGOs 13-03 and 99-41.

c. Cost to Review Records for Exempt Information

An agency is not ordinarily authorized to charge for the cost to review records for statutorily exempt material. AGO 84-81. However, the special service charge may be imposed for



this work if the volume of records and the number of potential exemptions make review and redaction of the records a time-consuming task. See *Florida Institutional Legal Services v. Florida Department of Corrections*, 579 So. 2d at 269. And see *Agency for Health Care Administration v. Zuckerman Spaeder, LLP*, 221 So. 3d 1260 (Fla. 1st DCA 2017) (prior court decisions as well as the language in s. 119.07[4], F.S., dictate that the requester, who had submitted several voluminous public records requests for records which included confidential information “should be required to pay for the cost of searching, review, and redaction of exempted information prior to production”).

Accordingly, because “the Public Records Act requires a records custodian to determine whether the requested records exist, locate the records, and review each record to determine if any of those records are exempt from production,” the agency may charge the special service charge as authorized under s. 119.071(4)(d), F.S. for the cost to review voluminous requested records for exempt material. *City of St. Petersburg v. Dorchester Holdings, LLC*, 331 So. 3d 799 (Fla. 2d DCA 2021). [Emphasis supplied by the court].

d. Calculation of Labor Cost

In *Board of County Commissioners of Highlands County v. Colby*, 976 So. 2d 31 (Fla. 2d DCA 2008), the court approved a county’s special service charge pursuant to s. 119.07(4), F.S., which included both an employee’s salary and benefits in calculating the labor cost for the special service charge, recognizing, however, that the charge must be reasonable and based upon the actual labor costs incurred by or attributable to the county. See *Trout v. Bucher*, 205 So. 3d 876 (Fla. 4th DCA 2016) (supervisor of elections not required to charge the lowest hourly rate of the employee capable of doing the work needed to comply with Trout’s request to inspect ballots in accordance with s. 119.07[5], F.S., because s. 119.07[4][d] allows the agency to charge the labor cost of the personnel that is “actually incurred” by the agency where extensive assistance is required).

The term “supervisory assistance” has not been widely interpreted. See *Herskovitz v. Leon County*, No. 98-22 (Fla. 2d Cir. Ct. June 9, 1998), available online in the Cases database at the open government site at myfloridalegal.com, concluding that an appropriate charge for supervisory review



is "reasonable" in cases involving a large number of documents that contain some exempt information. In *State v. Gudinas*, No. CR 94-7132 (Fla. 9th Cir. Ct. June 1, 1999), available online in the Cases database at the open government site at myfloridalegal.com, the circuit judge approved a rate based on an agency attorney's salary when the attorney was required to review exempt material in a voluminous criminal case file. The court noted that "only an attorney or paralegal" could responsibly perform this type of review because of the "complexity of the records reviewed, the various public record exemptions and possible prohibitions, and the necessary discretionary decisions to be made with respect to potential exemptions."

e. Reasonable Deposit or Advance Payment

Section 119.07(4)(a)1., F.S., states that the custodian of public records shall furnish a copy or a certified copy of the record "upon payment of the fee prescribed by law...." See *Wootton v. Cook*, 590 So. 2d 1039, 1040 (Fla. 1st DCA 1991) (if a requestor "identifies a record with sufficient specificity to permit [the agency] to identify it and forwards the appropriate fee, [the agency] must furnish by mail a copy of the record.") (e.s.); and *Promenade D'Iberville, LLC v. Sundy* 145 So. 3d 980, 983 (Fla. 1st DCA 2014) (a records custodian may delay production "if the requesting party fails to remit the appropriate fees").

Accordingly, an agency's policy of requiring the payment of a deposit prior to redaction and delivery of hundreds of telephone recordings related to a criminal trial was determined to be "facially reasonable." *Morris Publishing Group, LLC v. State*, 154 So. 3d 528, 534 (Fla. 1st DCA 2015), review denied, 163 So. 3d 512 (Fla. 2015). *Accord Board of County Commissioners of Highlands County v. Colby*, 976 So. 2d 31, 37 (Fla. 2d DCA 2008), noting that a "policy of requiring an advance deposit seems prudent given the legislature's determination that taxpayers should not shoulder the entire expense of responding to an extensive request for public records." "[T]he reasonableness of a policy and its application – based on the facts in a particular case – guides whether an abuse of discretion is shown." *Morris Publishing Group, LLC* at 534. And see *Agency for Health Care Administration v. Zuckerman Spaeder, LLP*, 221 So. 3d 1260 (Fla. 1st DCA 2017) (lower court abused its discretion by



ordering the agency to produce a large number of responsive public records within 48 hours of the issuance of the order without requiring advance payment of the agency's invoices associated with production of the records); *City of St. Petersburg v. Dorchester Holdings, LLC*, 331 So. 3d 799 (Fla. 2d DCA 2021) (trial court erred in holding that the City's prepayment request constituted an unlawful interference with requester's right of access to public records). Compare *Miami Dade College v. Nader + Museu I, LLLP*, 47 F.L.W. D1814 (Fla. 3d DCA August 31, 2022) (trial court properly denied agency's requested fees after production based on the agency's failure to provide the requester with an estimate of the anticipated costs to fulfill the public records request or an invoice prior to production, as required by agency policy, nor did the parties agree in advance to the charges).

An agency may refuse to produce additional records if the fees for a previous request for records have not been paid by the requestor. See *Lozman v. City of Riviera Beach*, 995 So. 2d 1027 (Fla. 4th DCA 2008) (s. 119.07[4], F.S., "does not require the City to do any more than what it did in this case," i.e., require Lozman to pay the bill for the first group of records he requested before the city would make any further documents available). And see AGO 05-28 (custodian authorized to bill the requestor for any shortfall between the deposit and the actual cost of copying the public records when the copies have been made and the requesting party subsequently advises the city that the records are not needed). Compare, *Smith v. State*, 335 So. 3d 795 (Fla. 2d DCA 2022) (Smith's failure to timely pay fees to obtain requested public records does not permit the agency to ban him from ever obtaining records in the future, provided Smith pays the amount owing for the first request).

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