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Advisory Opinion 23AO:0002

DATE: March 3, 2023

SUBJECT: Costs for legal services

RULING:

This opinion is in response to a question raised with the Iowa Public Information Board (IPIB) concerning the extent to which a lawful custodian may charge a requester for the cost of legal services. Advisory opinions may be adopted by the board pursuant to Iowa Code section 23.6(3) and Rule 497–1.2(2): “[t]he board may on its own motion issue opinions without receiving a formal request.” We note at the outset that IPIB’s jurisdiction is limited to the application of Iowa Code chapters 21, 22, and 23, and rules in Iowa Administrative Code chapter 497. Advice in a Board opinion, if followed, constitutes a defense to a subsequent complaint based on the same facts and circumstances.

QUESTION POSED:

Under Iowa Code section 22.3(2), to what extent may a lawful custodian charge a requester for the cost of legal services used in responding to a records request?

OPINION:

Iowa Code section 22.3 governs the fees that lawful custodians may charge when responding to records requests. On May 2, 2022, section 22.3 was amended to include the following language: “Costs for legal services should only be utilized for the redaction or review of legally protected confidential information.” Acts 2022 (89 G.A.) ch. 1039, SF 2322, § 1, eff. July 1, 2022. This amendment limits the extent to which lawful custodians may charge requesters for legal costs incurred in responding to records requests.

The amendment states that a lawful custodian may only charge for the time an attorney spends redacting or reviewing legally protected confidential information. Consequently, a lawful custodian should not charge for an attorney’s preliminary review of records to determine whether the records contain confidential information.

Prior to the enactment of this amendment, Iowa Code section 22.3 contained no mention of legal costs or the extent to which a requester may be charged for them. Under that prior version of the

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statute, the Iowa Court of Appeals held that a lawful custodian could charge a requester for legal services used in determining whether the records requested contained confidential information. See *Hackman v. Kolbet for New Hampton Mun. Light Plant*, 906 N.W.2d 206 (Table), 2017 WL 3065168, *2–3. The enactment of SF 2322, which specifically addresses which legal costs may be charged to a requester, overruled the portion of *Hackman* that addressed this issue.

The critical phrase that leads to the conclusion that a lawful custodian may only charge for the time an attorney spends redacting or reviewing legally protected confidential information is “review of legally protected confidential information.” “Review of” legally protected confidential information implies that the information under review has already been determined to be legally protected and confidential.

Furthermore, because of the language of limitation used in the statute (“Costs for legal services *should only be utilized for . . .*”), it is clear that no costs for legal services except for those specified in the statute should be charged to the requester.

Therefore, under the plain meaning of the statute, a lawful custodian should not charge a requester for legal services used to determine whether the records requested contain confidential information. A lawful custodian is of course free to utilize whatever legal services it deems necessary when responding to a records request. However, the lawful custodian should only charge the requester for the time an attorney spends actually redacting or reviewing confidential information—not time spent identifying whether confidential information does or does not exist.

BY DIRECTION AND VOTE OF THE BOARD:

Daniel Breitbarth
Joan Corbin
E.J. Giovannetti
Barry Lindahl
Joel McCrea
Monica McHugh
Julie Pottorff
Jackie Schmillen

SUBMITTED BY:



Daniel M. Strawhun
Legal Counsel
Iowa Public Information Board

ISSUED ON:

March 3, 2023

Pursuant to Iowa Administrative Rule 497-1.3(3), a person who has received a board opinion may, within 30 days after the issuance of the opinion, request modification or reconsideration of the opinion. A request for modification or reconsideration shall be deemed denied unless the board acts upon the request within 60 days of receipt of the request. The IPIB may take up modification or reconsideration of an advisory opinion on its own motion within 30 days after the issuance of an opinion.

Pursuant to Iowa Administrative Rule 497-1.3(5), a person who has received a board opinion or advice may petition for a declaratory order pursuant to Iowa Code section 17A.9. The IPIB may refuse to issue a declaratory order to a person who has previously received a board opinion on the same question, unless the requestor demonstrates a significant change in circumstances from those in the board opinion.