

Office of the Inspector General

Commonwealth of Massachusetts

Gregory W. Sullivan
Inspector General

Fees for Bid and Proposal Packages

October 2002

Fees for Bid and Proposal Packages

The Office of the Inspector General recently reviewed a matter concerning a \$7,500 fee charged by the City of Lawrence to prospective proposers for copies of a request for proposals (RFP). As a result of the Office's efforts, the Supervisor of Public Records in the Office of the Secretary of the Commonwealth issued an advisory opinion clarifying the applicability of the public records law to fees for bid and proposal packages issued by public jurisdictions. According to the advisory opinion, the fee charged by the City could not exceed the actual cost of reproducing the RFP.

The Massachusetts public records law ensures citizen access to public records. Under M.G.L. c. 66, §10(a), any person may inspect, copy or have copies of public records provided upon the payment of a reasonable fee:

Every person having custody of any public record, as defined in clause Twenty-sixth of section seven of chapter four, shall, at reasonable times and without unreasonable delay, permit it, or any segregable portion of a record which is an independent public record, to be inspected and examined by any person, under his supervision, and shall furnish one copy thereof upon payment of a reasonable fee. Every person for whom a search of public records is made shall, at the direction of the person having custody of such records, pay the actual expense of such search.

In July 2001, the City of Lawrence published a notice in the *Central Register* of an RFP for capital improvements, operations, maintenance, and management services for the City's water treatment supply system. The RFP was issued pursuant to Chapter 390 of the Acts of 2000.

The Central Register notice listed a nonrefundable fee of \$7,500 to obtain the RFP. The City advised the Office that the \$7,500 fee charged to prospective proposers was intended to enable the City to recoup the cost of creating the RFP, including the cost of procuring engineering services, conducting environmental surveys, compiling background documents relating to the water treatment supply system, and producing a CD-ROM containing these background documents.

The Office requested an opinion from the Supervisor of Public Records in the Office of the Secretary of the Commonwealth as to:

- Whether the RFP was a public record for purposes of the public records law and, if so,
- Whether the public records law restricted the City to charging prospective proposers, or anyone else interested in obtaining the RFP package, only reasonable reproduction costs.

In February 2002, the Acting Supervisor of Public Records issued an advisory opinion to the City Solicitor regarding the City's \$7,500 fee for the water treatment supply system RFP. The Acting Supervisor's advisory opinion reviewed the purposes and requirements of the public records law, noting:

It is my understanding that this [\$7,500] fee includes not only the cost of reproducing the responsive records, but also includes the City's costs of originally creating these records.

The advisory opinion pointed out that the special legislation under which the RFP was issued provided for the City to receive payment from the selected contractor for the cost incurred by the City in preparing the RFP; however, the special legislation did not authorize the City to recoup its RFP preparation costs from prospective proposers.¹

The advisory opinion confirmed that the City's \$7,500 fee to prospective proposers was impermissible under the public records law:

Once a record exists, developmental costs cannot be assessed against future requesters of the information. . . . Rather, those individuals may only be assessed the actual reproduction costs of complying with their request. . . . Please be advised that a failure to restructure the City's fees as described herein will result in the issuance of an administrative order to do so.

A full copy of the Acting Supervisor's advisory opinion is attached.

¹ Chapter 390 of the Acts of 2000 contained the following provision: "Except as to an amount equal to the costs incurred by the city to prepare the request for proposals, evaluate proposals, negotiate the terms of the contract and pay any other related transaction costs, a contract entered into pursuant to this act shall not provide for the city to receive any payment from the contractor to be used by the city to fund operating expenses of the city with the repayment of such contractor payment being amortized over the term, or any portion thereof, of such contract."



The Commonwealth of Massachusetts
William Francis Galvin, Secretary of the Commonwealth
Public Records Division

February 19, 2002
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Carol Hajjar McGravey
City of Lawrence
Office of the City Solicitor
City Hall, Room 306
200 Common Street
Lawrence, Massachusetts 01840

Dear Ms. McGravey:

Based on information received by this office, I have initiated this advisory opinion to review the fees being charged by the City of Lawrence (City) for copies of public records. See 950 C.M.R. 32.07 (Supervisor of Public Records may initiate advisory opinion). Specifically, I have been informed that the City is charging all requesters a rate of seven thousand and five hundred dollars (\$ 7,500.00) for copies of records concerning requests for proposals related to the City's water treatment supply system.

The Public Records Law provides that a record custodian shall provide any person with a copy of a requested public record upon payment of a reasonable fee. G. L. c. 66, § 10(a) (2000 ed.); see also G. L. c. 4, § 7(26) (2000 ed.) (defining "public records" as any documentary materials made or received by any officer or employee of any department of the Commonwealth unless falling within a statutory exemption); 950 C.M.R. 32.03 (defining "custodian" as the public employee or officer with routine access to or control of public records). Citizens should not be required to pay a premium for access to public records, since the ability to inspect the records of government is fundamental in our democracy. See Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. 427, 436 (1983); citing Attorney General v. Assistant Comm'r of the Real Property Dep't of Boston, 380 Mass. 623, 625 (1980) (freedom of information concerning the operations of government officials).

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Public Records Fees

A custodian may assess a reasonable fee for complying with a public records request. G. L. c. 66, § 10(a) (2000 ed.). Absent specific statutory authority to the contrary, the fees to be charged for complying with public records requests are established by regulation. See 950 C.M.R. 32.06 (fees for public records). Unless otherwise authorized by statute, the fee for photocopies is twenty cents (\$.20) per page. 950 C.M.R. 32.06(1)(a). For copies of those records not susceptible to ordinary means of reproduction, such as computer diskettes, the actual cost of reproduction may be charged. 950 C.M.R. 32.06(1)(f).

A custodian may also charge a fee if complying with a request requires "search time". The Regulations provide that, in cases where search or segregation time is necessary, a custodian may charge a pro-rated fee based on the hourly rate of the lowest paid employee who is capable of performing the task. 950 C.M.R. 32.06(1)(a); see also 950 C.M.R. 32.03 (defining "search time" as the time needed to locate, pull from the file, copy and refile public records, and "segregation time" as the time used to delete data which is exempt from non-exempt material). The search fee must reflect the actual cost of complying with a particular request. G. L. c. 66, § 10(a) (2000 ed.).

A custodian shall provide a written, good faith estimate of the applicable copying, search time and segregation time fees to be incurred prior to complying with public records requests where the total costs are expected to exceed ten dollars (\$10.00). 950 C.M.R. 32.06. A custodian may require prepayment of that fee prior to complying with a public records request. G. L. c. 66, § 10(a) (2000 ed.).

In a letter to this office you indicated that the City is charging all requesters a fee of seven thousand and five hundred dollars for copies of request for proposal records concerning the City's water treatment supply. It is my understanding that this fee includes not only the cost of reproducing the responsive records, but also includes the City's costs of originally creating these records. It is my understanding that

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the City relies on enabling legislation as the basis for setting the fee. The legislation provides in pertinent part that:

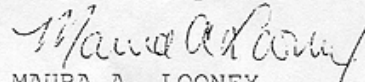
(d) Except as to an amount equal to the costs incurred by the city to prepare the requests for proposals, evaluate proposals, negotiate the terms of the contract and pay any other related transaction costs, a contract entered into pursuant to this act shall not provide for the city to receive any payment from the contractor to be used by the city to fund operating expenses of the city with the repayment of such contractor payment by the city being amortized over the term, or any portion thereof, of such contract.

2000 Mass. Acts 390, § 2(d)

The above legislation provides for the City to receive payment for the cost of preparing the requests for proposals from the contractor selected for the project. However, the legislation does not provide for the City to attempt to recoup its costs of preparing the proposal documentation from all parties who request the information. Once a record exists, developmental costs cannot be assessed against future requesters of the information. See 950 C.M.R. 32.06(1) (permissible fees for complying with public records requests). Rather, those individuals may only be assessed the actual reproduction costs of complying with their request. Id.

I hope this advisory opinion has been useful. Please be advised that a failure to restructure the City's fees as described herein will result in the issuance of an administrative order to do so. Please do not hesitate to contact this office with any further questions.

Very truly yours,


MAURA A. LOONEY
Acting Supervisor of
Public Records

cc: Barbara J. Hansberry