

Opinion No. 2008-162

November 5, 2008

The Honorable Bruce Maloch  
State Representative  
650 Columbia Road 258  
Magnolia, Arkansas 71753-8599

Dear Representative Maloch:

I am writing in response to your request for an opinion on the following questions regarding the Arkansas Freedom of Information Act (FOIA), which is codified at A.C.A. §25-19-101 to-109 (Repl. 2002 & Supp. 2007):

1. Does the Freedom of Information Act allow an individual to take digital pictures of public records?
2. May a County/City Clerk or any other custodian forbid the use of digital cameras when viewing public records?
3. May a City/County Clerk or any other custodian require that any copies of public records be produced only by paying a "copying fee"?
4. Are there any other state laws that would preclude the inspection and photographing of public records?
5. Are there any other state laws that would estop the custodian of a public record from forbidding an individual from making his or her own copy of a public record?

## **RESPONSE**

With respect to your first and second questions, in my opinion, a person requesting records under the FOIA is free to take digital photos of the documents and the records custodian cannot issue a blanket prohibition against that. With respect to your third question, a copying fee may be charged, but the fee is subject to several restrictions, which are explained below. With respect to your fourth and fifth questions, while I am not aware of any such *additional* state laws, the FOIA itself is sufficient to permit requesters to photograph (or otherwise make their own copies of) properly released public records.

Before responding to each of your questions in detail, I must make a few preliminary points that I will presume in answering each question. It appears to me that each of your five questions already assumes that a custodian has received a proper FOIA request and has determined that the documents are subject to disclosure. Thus, the only remaining issue in your question involves the mechanics of how the requester inspects and copies the properly-disclosed documents. Accordingly, I will not address the general standards of disclosability under the FOIA or other state or federal laws that may supersede the FOIA with regard to what documents may be disclosed.

### ***Question 1: Does the Freedom of Information Act allow an individual to take digital pictures of public records?***

In my opinion, the answer is “yes.” The FOIA affords citizens the right to inspect and copy “public records.” A.C.A. §25-19-105(a), 25-19-105(d)(3). As one of my predecessors noted, this copying can “be done by hand, or with a camera or other mechanical device at the disposal of the citizen.” Inf. Op. Att’y Gen. (Maxine Harrell, Feb. 19, 1985). A leading commentator on the FOIA agrees. John J. Watkins, *The Arkansas Freedom of Information Act* 177 (3d ed., m & m Press 1998).

### ***Question 2: May a County/City Clerk or any other custodian forbid the use of digital cameras when viewing public records?***

In my opinion, because requesters can use digital cameras to copy properly released public records, custodians cannot forbid digital cameras as a copying method.

***Question 3: May a City/County Clerk or any other custodian require that any copies of public records be produced only by paying a “copying fee”?***

Yes. The FOIA permits a reasonable copying fee to be charged and sets several rules to govern how that fee is calculated and assessed. Any copying charges cannot “exceed the actual costs of reproduction” unless some other statute permits a higher fee. A.C.A. § 25-19-105(d)(3). The “actual costs of reproduction” include “the costs of the medium of reproduction, supplies, equipment, and maintenance,” and the costs of transmitting the records (whether by mail or otherwise). A.C.A. § 25-19-106(d)(3)(A). The “actual costs of reproduction” does not include the *time* agency personnel spent searching for, retrieving, reviewing, redacting, or copying the requested documents. A.C.A. § 25-19-105(d)(3)(A), 25-19-105(f)(4). If the estimated fees exceed \$25, the custodian can require the requester to pay in advance. A.C.A. § 25-19-105(d)(3)(A)(iii). Finally, the bill must be itemized. A.C.A. § 25-19-105(d)(3)(B); John J. Watkins & Richard J. Peltz, *The Arkansas Freedom of Information Act 268-70* (4th ed., m & m Press 2004).<sup>1</sup>

***Question 4: Are there any other state laws that would preclude the inspection and photographing of public records?***

As an initial matter, I should clarify that in my opinion the FOIA does not preclude inspecting and photographing “public records” that are subject to disclosure. In response to your question, I am not aware of any such statutes that override the FOIA’s implied permission to photograph public records.

***Question 5: Are there any other state laws that would estop the custodian of a public record from forbidding an individual from making his or her own copy of a public record?***

As I understand your question, it is purely about whether any “state law,” *other than* the FOIA, prohibits the custodian from preventing requesters’ attempts to make their own copies of documents that the custodian has already determined must be disclosed. I am not aware of any such statute. However, the FOIA does estop the

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<sup>1</sup> If you are asking whether custodians can charge requesters when the latter photograph public records, in my opinion, the FOIA likely prohibits such a charge. As explained in the text accompanying this note, the FOIA only permits custodians to charge the “actual costs of reproduction.” If requesters use their own digital camera, it does not appear custodians have any “actual costs of reproduction.”

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custodian from such action for the reasons explained in response to your first and second questions. Thus, the lack of additional statutes that also estop those actions by custodians is irrelevant to whether custodians may prevent requesters from making their own copies of public records.

Assistant Attorney General Ryan Owsley prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN MCDANIEL  
Attorney General

DM:RO/cyh