

Don't Picture This: The FOIA And The Use Of Smartphones As A Substitute For Paying For Copies

Education Law Notes

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Connecticut's Freedom of Information Act ["FOIA"] generally permits public agencies to charge for copies (usually, \$0.50/page) when complying with FOIA requests. One exception to this fee requirement is that an individual may engage in "self-help" and copy a public record through the use of a "hand-held scanner". *Connecticut General Statutes §1-212(g)*. A "hand held scanner" is defined under the FOIA as a "battery operated electronic scanning device the use of which (1) leaves no mark or impression on the public record, and (2) does not unreasonably interfere with the operation of the public agency." *Id.* A public agency may establish a fee structure not to exceed \$20 for an individual to pay each time the individual copies records at the agency with a hand-held scanner. *Id.*

Why is this at all important (or even vaguely interesting to non-FOIA nerds)? While public agencies can charge for copies, they cannot charge the public a fee to **inspect** public records. Consequently, how should a public agency respond if a member of public then whips out a cell phone and wants to photograph the records? Does the use of a "smartphone" constitute an inspection – as opposed to copying -- of records, which must be free of charge? Or is such use analogous to a hand held scanner, thus subject to a \$20 flat fee? Or could the public agency tell John Q. Public that the cell phone is **NOT** a hand held scanner, that he cannot use it to take pictures, and that if he wants copies of the records, he must let the agency make and provide copies at \$0.50 per page (which, depending upon the amount of records at issue, could far exceed the \$20 fee)?

Connecticut's Freedom of Information Commission ["FOIC"] recently addressed this specific issue. In *Paulsen v. Superintendent of Schools, Bethel Public Schools*, #FIC 2015-663 (June 8, 2016), a person alleged that a school district violated the FOIA by charging him \$20 for a session to copy five years of expense reports and receipts with his iPhone. The district had informed this complainant that if he wanted paper copies of the relevant records, the fee would be \$0.50 per page, and, if he wanted to instead scan or photograph the records, the fee would be a flat \$20. The complainant contended that an iPhone is not a hand-held scanner and that the school district was not entitled to charge him \$20 for the copying session.

The district countered that because the FOIA does not mention cell phones or cameras as a means of copying public records, it could have rightfully denied the complainant's request to use his iPhone to copy or photograph the records. The district then added that because a copying session with an iPhone is an activity that closely resembles a copying session with a hand-held scanner, it was "in the spirit of open government"

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allowing the complainant to use his iPhone to photograph the records and charging a fee associated with the most similar activity.

The FOIC agreed with the school district. The FOIC strictly applied the FOIA as written and found that the complainant was using his smartphone as a camera, and that a camera (without a downloaded scanning app) is not a “hand-held scanner”. Since the use of a camera to photograph records is not a right provided by the FOIA, the FOIC found that the school district did not violate the FOIA by charging the complainant for the photo session. The FOIC did bemoan that the FOIA has not caught up with technology, noting that the statutory definition of a handheld scanner was enacted in 2002, when no one could contemplate the technology that now exists with smartphones (e.g., high resolution photographs and scanning “apps”). While not required by law, the FOIC noted that it “encourages” public agencies to permit the use of such new technologies and to assess fees, *if any*, at a cost that is reasonable and in keeping with “the spirit of open government”.

What can you do?

In light of *Paulsen*, public agencies still have several options. An agency could take a hard line and state that the use of a smartphone or camera to copy records is prohibited. An agency could take the “medium line” taken by the school district in *Paulson* and offer the public the choice of 1) using a camera/smartphone subject to the up-to-\$20 payment rule, or 2) receiving copies from the agency the old fashioned way, at \$0.50 per page. Indeed, if a smartphone has a “scanning app”, the agency may be **required** to allow this option.

Finally, although not required under the FOIA, an agency could acquiesce and allow the public to copy with a smartphone at will, free of charge. A couple of notes of caution: 1) if any agency is going to charge a fee for the use of any handhold scanners, it should establish a fee schedule for such use (with a \$20 maximum), and 2) an agency has the right to take steps to protect its records from destruction, including supervision of the documents while they are being inspected and/or photographed.

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