

## Oklahoma Open Meeting Act & Open Records Act For Police Chiefs & Command Staff

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## Policy Behind the OMA

*It is the public policy of the State of Oklahoma to encourage and facilitate an informed citizenry's understanding of the governmental processes and governmental problems.*

25 O.S. §302

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## Policy Behind the ORA

*As the Oklahoma Constitution recognizes and guarantees, all political power is inherent in the people. Thus, it is the public policy of the State of Oklahoma that the people are vested with the inherent right to know and be fully informed about their government. ... The purpose of this act is to ensure and facilitate the public's right of access to and review of government records so they may efficiently and intelligently exercise their inherent political power. ...*

51 O.S. §24A.2

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## Policy Behind the OMA & ORA

OMA and ORA are *Sunshine Statutes*

- Shining a light on government
- Both exist for the benefit of the public
- We lose every close case

OMA: 25 O.S. §§301 to 314

ORA: 51 O.S §§24A.1 to 24A.31

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## OMA 101

- "Public body":
  - Governing body of municipality and its public trusts. Also includes planning/zoning commissions and boards of adjustment.
  - Does not include meetings of administrative staff or groups performing purely administrative or ministerial tasks.
  - Committees: applies if the committee exercises actual or *de facto* decision making authority of the public body.
- "Meeting":
  - The conduct of business of a public body by a majority of its members;
  - Does not include informal gatherings of a majority of the members when no business of the public body is discussed;

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  - Committees: applies if the committee exercises actual or *de facto* decision making authority of the public body.
- "Meeting":
  - No meeting without a Majority;
  - Entire decision-making process (deliberation, decision and formal action) must be conducted in public; this includes informational briefings a majority attend; 2020 OK AG 4.

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## OMA 101

- Types of Meetings
  - **Regular**
  - **Special**
  - **Emergency:** meeting called for the purpose of dealing with an emergency. Emergency is a situation involving [1] injury to persons or [2] injury and damage to public or personal property or [3] immediate financial loss when the time requirements for public notice of a special meeting would make such procedure impractical and increase the likelihood of injury or damage or immediate financial loss.
  - **Continued / Reconvened:** the continuation of a Regular or Special Meeting. Limited to agenda for original meeting. Must announce the date/time/location for the Continued/Reconvened meeting at the original Regular or Special meeting.

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## OMA 101

- Notice to Public:   When/Where & What
- When/Where:       Date, Time and Location of Meeting
  - **To:**               Clerk of the Body (usually City Clerk)
  - **Regular:**       By December 15 for next year's meetings.
  - **Regular:**       10 Days advance notice of any change.
  - **Special:**       48 Hours before meeting.
- What:                Agenda Posting
  - Agenda must be posted 24 hours in advance, excluding weekends and holidays.

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## OMA 101

- Agenda Requirements
  - Post 1) prominent place at City Hall or 2) on your website
  - Must send to citizens who've asked to receive copies in advance (free). Can send by email.
  - Must state all items of business to be transacted in "plain language, directly stating the purpose of the meeting ... [and] the language used should be simple, direct and comprehensible to a person of ordinary education and intelligence." Andrews v. Independent School District No.29 of Cleveland County, 1987 OK 40, 737 P.2d 929
  - Cannot be "deceptively vague and likely to mislead." Excise Board of Greer County v. Rogers, 1984 OK 95, 701 P.2d 754

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## OMA 101

- Agenda Requirements
  - If an executive session will be conducted, agenda must contain:
    - Sufficient information for the public to ascertain that an executive session will be proposed;
    - Identify the items of business and purposes of the executive session; and
    - State specifically the provision of 25 O.S §307 authorizing the executive session.

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## OMA 101

- Agenda Requirements
  - Common Executive Sessions under §307:
    - (B)(1): Employment of a specific person/position
    - (B)(2): Union negotiations
    - (B)(4): Attorney-Client privilege on litigation, claim or investigation
    - (B)(3): Purchase or appraisal of real property
  - Discussion only
    - No votes in E.S.
    - Must take minutes which are confidential unless E.S. was illegal

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## OMA 101

- Criminal Violation of the OMA: Willful violation is a misdemeanor (\$500 fine, 1 year in county)
- Civil Violation:
  - Any action taken in willful violation of the OMA is invalid
  - Any person can seek Declaratory Judgment in District Court.
  - Attorney fee case for prevailing citizen.
  - Attorney fee case for City if the suit was clearly frivolous.
  - **Ratification:** OMA challenge mooted if the action was taken up at a future meeting with a proper agenda and full discussion. State ex rel. Trimble v. City of Moore, 1991 OK 97, 818 P.2d 889.

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## OMA 101

- Criminal Violation of the OMA: Willful violation is a misdemeanor (\$500 fine, 1 year in county)
- Civil Violation:
  - Civil vs. Criminal Willfulness: Intent vs. Statutory Construction
    - Malum prohibitum offense so specific criminal intent not required. Hilliary v. State, 1981 OK CR 78, 630 P.2d 791.
    - Penal statutes must be strictly construed such that the statute is sufficiently explicit so persons of common intelligence may understand by reading the law whether their conduct would violate the statute. State v. Patton, 1992 OK CR 57, 837 P.2d 483.
    - Civil: liberal construction; Criminal: strict construction.

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## OMA 101

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- Civil Violation:
  - Civil Willfulness: "Few, if any, governmental boards or agencies deliberately attempt to circumvent the [the law]. ... The Legislature was not simply to prevent or punish deliberate violations, but to restore sadly sagging public confidence in government, a goal which is hurt by every noncomplying meeting regardless of whether the noncompliance resulted from 'evil motives' or not." Matter of Order Declaring Annexation, Etc., 1981 OK CIV APP 57, 637 P.2d 1270.

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## OMA 101

- Criminal Violation of the OMA: Willful violation is a misdemeanor (\$500 fine, 1 year in county)
- Civil Violation:
  - Different verbs can lead to willful vagueness. Haworth Bd. of Ed. of Indep. Sch. Dist. No. 1-6, McCurtain County v. Havens, 1981 OK CIV APP 56, 637 P.2d 902, 904.
  - What happens at (not before) the meeting is what matters. What action was taken? Did the agenda inform the public that the action could be taken?
  - Pre-meeting shenanigans can influence how specific a Court wants an agenda to be, especially when a majority developed a consensus on what would happen prior to holding the meeting. Wilson v. City of Tecumseh, 2008 OK CIV APP 84, 194 P.3d 140

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## OMA 101

- Criminal Violation of the OMA: Willful violation is a misdemeanor (\$500 fine, 1 year in county)
- Civil Violation:
  - Was it too vague or too specific: the curious case of FOP v. City of Norman, 2021 OK 20, 489 P.3d 20.
  - Voting on a specific amendment or to amend many ways?
  - Voting on a specific draft of a document, or voting on a topic with the text to be presented at the meeting?
  - Better safe than sorry approach adopted by most City Attorneys, now listing boilerplate language at the top of the agenda essentially saying the Council can do whatever it wants on an item.

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## OMA 101

- Minutes
  - Official summary of the proceedings.
  - Must show:
    - Which members were present and absent
    - All actions taken by such public body (should reflect member's votes)
    - Manner and date/time the meeting was noticed and agenda posted
  - Citizens can audio and/or video tape so long as it does not interfere with the conducting of the meeting

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## OMA 101

- Danger Zones:
  - Unless required by law (e.g. zoning cases), there is no obligation under the OMA to hold a public hearing or allow citizen participation
  - Citizen participation can lead to an OMA violation if Council engages in a debate with citizen or each other on a topic not on the agenda
  - New business: any matter not known about or which could not have been reasonably foreseen prior to the time of the posting of the agenda (i.e. 24 hours before the meeting). Regular meetings only.
  - Council comments / staff reports: danger zone for debate on items not posted on the agenda.
  - OMA does not address who can call a meeting or set agenda

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## ORA 101

**All records** of **public bodies** and **public officials** shall be open to any person for **inspection, copying, or mechanical reproduction** during **regular business hours**... §24A.5.

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**Public Body:** Any City or Town and its commissions, trusteeships, authorities, councils, committees and public trusts. §24A.3(2)

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**Public Body:** Any City or Town and its commissions, trusteeships, authorities, councils, committees and public trusts. §24A.3(2)

**Public official:** any officer **or employee** of the public body. §24A.3. This means you! This means your employees.

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**Record:** Any tangible thing or document, regardless of physical/digital form or characteristic. Includes tape recordings, *Fabian & Associates, P.C. v. State ex rel. Dept. of Public Safety*, 2004 OK 67, 100 P.3d 703, and electronic messages, 2001 OK AG 46. Includes records received by public officials while serving on other bodies (i.e. not public bodies) if they meet the criteria. 2002 OK AG 5.

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It is a record if it relates to:

1. Transaction of public business; or
2. Expenditure of public funds; or
3. Administering of public property.

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## ORA 101

**All records** of **public bodies** and **public officials** shall be open to any person for **inspection, copying, or mechanical reproduction** during **regular business hours**... §24A.5.

Does **not** include Software; personal effects; personal financial information/credit reports/other data submitted or obtained by the City for evaluating credit worthiness, ability to obtain a license/permit, or to determine qualification to contract with City.

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If they meet the criteria then "Records" fall into 1 of 3 categories under the ORA:

1. Must Produce: "Open" (Default)
2. May Produce: Discretionary
3. Must Not Produce: Not "Open"

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## ORA 101

**All records** of **public bodies** and **public officials** shall be open to any person for **inspection, copying, or mechanical reproduction** during **regular business hours**... §24A.5.

ORA contains many exceptions to disclosure and "does not apply to records specifically required by law to be kept confidential." §24A.5(A).

Government has the burden to prove that record could be withheld in a mandatory or discretionary refusal to produce.

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## ORA 101

**All records** of **public bodies** and **public officials** shall be open to any person for **inspection, copying, or mechanical reproduction** during **regular business hours**... §24A.5.

ORA only applies to records that already exist. It does not require that a record be created.

Cannot withhold a record because it contains confidential information. Can redact out that confidential information so the otherwise "open" record can be released. §24A.5(2).

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The only record that the ORA requires the public body to keep are record related to the receipt and expenditure of public funds. §24A.4.

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Willful violation of the ORA is a misdemeanor. §24A.17(A).

Citizen can bring suit alleging ORA violation. If they prevail, they are entitled to an Attorney Fee award. Public body or official can only get a fee award if they win and the suit was clearly frivolous. §24A.17(B) & (C).

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## Law Enforcement Records, §24A.8

- ORA General Rule: Record is open unless an exception can be found.
- LE Records: Exact Opposite – record **may** be kept confidential unless it falls under §24A.8(A):
  - Arrestee description (name, DOB, address, race, sex, physical description, and occupation);
  - Facts concerning the arrest, including the cause of arrest and the name of the arresting officer;
  - A chronological list of all incidents, including initial offense report information showing the offense, date, time, general location, officer, and a brief summary of what occurred;
  - Radio logs, including a chronological listing of the calls dispatched;

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## Law Enforcement Records, §24A.8

- ORA General Rule: Record is open unless an exception can be found.
- LE Records: Exact Opposite – record **may** be kept confidential unless it falls under §24A.8(A):
  - Conviction information, including the name of any person convicted of a criminal offense;
  - Disposition of all warrants, including orders signed by a judge of any court commanding a law enforcement officer to arrest a particular person;
  - A crime summary, including an agency summary of crimes reported and public calls for service by classification or nature and number; and

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## Law Enforcement Records, §24A.8

- ORA General Rule: Record is open unless an exception can be found.
- LE Records: Exact Opposite – record **may** be kept confidential unless it falls under §24A.8(A):
  - Jail registers, including jail blotter data or jail booking information recorded on persons at the time of incarceration showing the name of each prisoner with the date and cause of commitment, the authority committing the prisoner, whether committed for a criminal offense, a description of the prisoner, and the date or manner of discharge or escape of the prisoner;
- “May” not “Shall”: If (A) doesn’t apply, a Court can decide whether your interest in withholding outweighs the public’s right know. §24A.8(B).

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## Law Enforcement Records, §24A.8

- Dash Cams: **Per Se** an Open Record. May redact:
  - Death or a dead body (unless caused by officer)
  - Great bodily injury (11-904) (unless caused by officer)
  - Clearly shows Acts of severe violence resulting in great bodily injury (47 OS 11-904) (unless caused by officer)
  - Nudity
  - ID’s minors under 16 or undermines confidentiality from Title 10A
  - Personal information of a person not arrested/cited/warned other than the name or license plate (e.g. DL #, DOB, address, financial info)
  - Personal medical information that is not already public
  - Would undermine a privilege from 43A O.S. 1-109 or 3-428 (detention or transportation for mental health evaluation or treatment detox)
  - Identity of officer who is subject to an IA as a result of an event depicted in the recording. Ends once final discipline is handed down. IA cannot last an “unreasonable amount of time”

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## Law Enforcement Records, §24A.8

- Body Cams: Open Record **if** it shows:
  - Use of physical force
  - Pursuits & Traffic stops
  - Person being arrested, cited, charged or issued a written warning
  - Events that directly led to arrest/citation/charge/warning
  - Investigatory detentions
  - “any exercise of authority by a law enforcement officer that deprives a citizen of his or her liberty”
  - Actions by officer that have become the cause of an investigation or charges being filed
  - “Recordings in the public interest that may materially aid a determination of whether law enforcement officers are appropriately performing their duties as public servants”
  - Any contextual events for the above

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## Law Enforcement Records, §24A.8

- Body Cams: **May** redact items listed under dash cams plus:
  - ID of victim of a sex crime or domestic violence
  - ID of a person who provides information where request for anonymity is made or where disclosure would pose a threat to the person or property of the person or others
  - Undermine CI privilege (12 O.S. §2510)
  - Undermines an ongoing criminal investigation or prosecution
    - This expires 10 days post-arraignment/initial appearance (DA can request exception)
    - 120 days after the date of recording if no charge is filed (appeal)
    - Mandatory release after 4 years

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## Law Enforcement Records, §24A.8

- **Broadly Interpreted in favor of the Public**
- They get **each** record that fits (A), not just **a** record.
- Dash Cam video of a DUI arrest had to be produced even though the arrest report was released. §24A.8(A)(1) & (2) apply (arrestee description; facts concerning the arrest). Ward & Lee, PLC v. City of Claremore, 2014 OK CIV APP 1, 316 P.3d 225.
- Attorney Fee award: \$41,324.25

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## Law Enforcement Records, §24A.8

- Oklahoma Assoc. of Broadcasters, Inc. v. City of Norman, 2016 OK 119, 390 P.3d 689:
  - *Technically right*: Inspection vs. Inspection and Copying.
  - Close case: you lose!
  - The whole ORA applies to LE Agencies, not just 24A.8.
  - Facts concerning the arrest: filed out of custody, but was “arrested” when he was booked.
  - Attorney Fee award: \$60,000. (They asked for \$77,840.68)



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## Personnel Records, §24A.7

- Similar to LEA records – Only certain records must be produced. Remaining personnel records are either a “may” or “must be kept confidential.”
- Must be produced (§24A.7(B)):
  - Application for employment of a person who becomes and official.
  - Gross receipts of funds
  - Dates of employment, title(s)/position(s) held
  - Final disciplinary action resulting in loss of pay, suspension, demotion or termination.

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## Personnel Records, § 24A.7

- Must keep confidential (§24A.7(D)): for current/former employees:
  - Home address
  - Telephone numbers
  - SSN
- Redaction example: Job Application of **current** employee:
  - Application is open §24A.7(B)(1)
  - Home address, phone numbers, and SSN are not §24A.7(D)
  - You redact confidential information §24A.5(2)

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## Personnel Records, § 24A.7

- May keep confidential (§24A.7(A)):
  - IA files, records reviewed or used in the hiring and promotion process
  - Records which, if disclosed, would constitute “a clearly unwarranted invasion of personal privacy” – examples given:
    - Employee evaluations
    - Payroll deductions
    - Applications submitted by persons not hired by the public body
    - Birthdates may fall into this category. See Okla. Pub. Employees Ass’n v. State ex rel. Okla. Office of Pers. Mgmt., 2011 OK 68, 267 P.3d 838.
  - Note: Invasion of privacy not a qualifier on the first class of records.

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## Personnel Records, § 24A.7

- Discretionary Personnel Records (§24A.7(A)) – records that “may” be kept confidential:
  - Records withheld under (A)(2) can be challenged to determine if they qualify for withholding under the invasion of privacy standard. Okla. Pub. Employees Ass’n.
  - Records withheld under (A)(1) or (2) can be challenged on an abuse of discretion standard. Ross v. City of Owasso, 2020 OK CIV APP 66, 481 P.3d 278.
    - Court ordered an IA report involving a terminated City Manager to be released. C.M. had been subject to a grand jury and could have been denied his severance if fired for cause. Court determined the public had a right to know why the Council voted as it did notwithstanding the statutory discretion given to the City to withhold the IA report.

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## Process

- Any person can request records. §24A.5. Not limited to citizen/resident of the City.
- Cannot request the reason the person wants the record as a condition of production. 1999 OK AG 55
- **Prompt** and **Reasonable** Access. 24A.5(E).
- ORA does not establish procedural requirements. §24A.2
- No procedural protections (notice and opportunity to be heard) for interested party before ORA request is complied with – i.e. there are no procedural protections for interested parties. City of Lawton v. Moore, 1993 OK 168, 868 P.2d 690.

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## Process

- Prompt Access?
- Generally, just the time required to locate and compile the requested records. 1999 OK AG 58. Can only delay as long as it takes to gather records without disrupting your activities. Can’t delay an easy production because you are working on a hard one.
- **Who**: Public body should designate the person(s) who are authorized to release records. §24A.5(6)
- **When**: Designated person must be available at all times during regular business hours. §24A.5(6)
- **Where**: if the City has multiple office locations, records must be maintained / available where those records are located in the ordinary course of business. 2005 OK AG 3.

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## Process

- Reasonable Access?
- Public body may establish reasonable procedures to prevent excessive disruption of its functions.
- Large requests: may work out a compliance timetable with requestor.
- On going requests: no case law, but consensus is that requests for records not yet in existence are not valid requests.
- May adopt procedures to ensure and protect the integrity and organization of the records.

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## Process

- Reasonable Access?
- Records stored off site or electronically must be made available at the principal business location. Even if the body contracts with a vendor to provide records online or at another location, those records must still also be made available at the principal business location. 2005 OK AG 3
- Deleted emails / files: if they can be retrieved through a backup, then they are still subject to production.
- Originals do not have to be produced if a true and correct copy is available. May also have an agency employee present during inspection. 2006 OK AG 35.

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## Process

- Reasonable Access?
- Format: no law that requires storage of records in electronic format. Merrill v. OTC, 1992 OK 53, 831 P.2d 634: not required to convert records to electronic for convenience of requestor.
- If records are kept in electronic format, then they must be made available in that format.
  - 2001 OK AG 46: if the electronic version contains confidential information and that information cannot be protected and kept confidential if produced in electronic format, then the record may be produced in a format that allows for the confidential information to be redacted.

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## Process

- Reasonable Access?
- Not required to email records: OMA establishes what you must make available and may/must withhold. How to procedurally comply with the OMA is left to the public entities.
- If the public entity does not have a policy, procedure or history of making records available by email, then the OMA does not require that they do so. Wagner v. Ofc. Of the Sheriff of Custer Co., 2021 OK CIV APP 20, \_ P.3d \_
  - Court held that making records available for inspection and copying in person complies with the OMA. But if you have emailed records in the past, you would have to continue to do so unless you formally adopt a new procedure.

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## Process

- Record, what record? (What if the record doesn't exist)
- Must maintain: financial records. §24A.4.
- §24A.18 – no additional record keeping requirement.
- Records may be disposed of as per City policy or ordinance. (have a records retention policy and follow it).
  - But see 11 O.S. §22-131 and §22-132 which establish certain time limits before which certain records may be destroyed
- No requirement to create or compile a record to the requestors satisfaction. Cummings & Assoc. Inc. v. City of Oklahoma City, 1993 OK 36, 849 P.2d 1087

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## Process

- 1999 OK AG 55: may require written request.
- 2006 OK AG 35: personal copy machines
  - must allow requestor to use their own copier provided it does not unreasonably disrupt the essential functions of the body or result in defacing or loss of records.
  - Do not have to provide access to electricity for the copier.
  - Cannot charge for copies they create on their own machine.

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## Process

- Fees (§24A.5(3))
  - May charge a fee for reasonable, direct costs of copying.
  - Fee cannot be used for the purpose of discouraging requests
  - Cap: \$0.25 per page for 8½ x 14 or smaller sheets, \$1.00 for certified copies.
  - Must post fee schedule and file with county clerk.
  - Search fee: only for requests for a solely commercial purpose. You may ask if the purpose is commercial (narrow exception to the rule). Exceptions:
    - Media: may not charge a search fee, and may only charge direct copy cost.
    - Public Interest: media, scholars, authors, taxpayers, etc. i.e. to determine that those entrusted with the affairs of the public are honestly, faithfully and competently performing their duty. 1988 OK AG 35.

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