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Water Wars: Interstate Compacts And The Supreme Court's Equitable Apportionment Jurisprudence

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CONTENTS

MAY / JUNE 2025

WATER WARS: INTERSTATE COMPACTS AND THE SUPREME COURT'S EQUITABLE APPORTIONMENT JURISPRUDENCE
By: Thomas E. Powers III, Senior Assistant City Attorney, Charlotte, North Carolina and Elizabeth Fadl, Law Clerk, North Carolina Court of Appeals, Raleigh, North Carolina
Few resources are more critical to the vitality of local communities than adequate fresh water. Where more than one state seeks to tap an interstate river, comprehensive sharing arangements are essential. As our authors explain, the paths to enforceability are lengthy and complex, and lead to resolution before the Supreme Court.
PAGE 6

VEXATIOUS RECORDS REQUESTS: THE WEAPONIZATION OF OPEN RECORDS LAWS
By: Joseph G. Lauber, Managing Member, and Lindsey Kolisch, Associate Attorney, Lauber Municipal Law, Lee's Summit, Missouri
At the heart of democratic transparency is the public's right to receive and review governmental records. But that prerogative can quickly become a vehicle for harassment and confrontation, saddling localities with contentious and costly document demands. Governments are responding accordingly, enacting reasonable limits and curbing undue burden.
PAGE 12



DEPARTMENTS

18 THOMPSON SCHOLARSHIP WINNER
Indiana and Discretion in the Realm of Property Rights: A Primer for Mayors
By: R. Colby Wicker, University of Indiana Maurer School of Law, Bloomington, Indiana
Perspectives on annexation, eminent domain, and zoning.

22 OP ED
The Case for Capping Damages in Section 1983 Reversed Conviction Lawsuits
By: Avi Kamionski, Founder, Nathan & Kamionski, LLP, Chicago, Illinois
A proposal to curb runaway awards.

24 INSIDE CANADA
Continuing Omissions, Cannabis Licenses, and Re-Zoning Bylaws
By: ACM Consulting and Legal Services, Edmonton, Alberta
Recent Canadian cases of interest.

26 FIRST AMENDMENT
Time Restrictions on Adult Entertainment: Crime Prevention Lessons from Dallas
By: John L. Worrall, Ph.D., Director of Graduate Studies, Criminology and Criminal Justice Program, University of Texas, Dallas, Texas
The probative value of studies demonstrating secondary crime.

32 PRACTICE TIPS
Coexisting with Special Districts and Franchised Utilities after Annexation
By: John Dorman, Of Counsel, Spencer Fane LLP, Oklahoma City, Oklahoma
When annexation becomes contentious.

34 IMLA MID-YEAR AND AMICUS AWARDS
Recognizing Our Pro Bono Contributors
By: Erich Eiselt, Editor
IMLA's perennial DC gathering and amicus award proceedings

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Vexatious Records Requests: the Weaponization of Open Records Laws

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Since their inception in the 1960s, the intent of open records laws has been to "promote transparency and ensure access to government records."[1] In the 60 years that have passed since open records laws have come into being, they have suffered from the failure to keep up with significant shifts in technology. As the number of records created by public agencies – and the available formats of records – have increased exponentially, the administration of these laws has fallen victim to backlogs, misuse, and a strain of resources on responding public bodies. The challenges all tend to work against the good policy reasons these laws were enacted. Worse yet, in at least the last decade, it seems as though requests are more frequently becoming "weaponized"—in other words, a tool to use against government, which wastes resources, grinds government to a halt, and may incentivize elected officials and government employees to create fewer records. This article explores the problem of vexatious (even "weaponized") records requests; how these requests erode transparency, current state laws aimed at reducing the burden of vexatious requests, and what, practically and legislatively, local governments can do to eliminate or at least mitigate the requests.

What is a vexatious or weaponized records request?

Count yourself lucky if you are reading this article and wondering "what is a vexatious records request?" According to the governmental technological services provider *CivicPlus*, a vexatious requestor is a person "who repeatedly attempts to get information from their government through frequent or voluminous requests."[2] Open government watchdog the *National Freedom of Information Coalition* notes that:

> There are two types of requests that can be considered unduly burdensome…[t]he first is a request that is unduly burdensome because the request is vague and asks for an unreasonable amount of records. The second category is unduly burdensome because the individual or an organization makes a request too frequently or is doing so to harass the agency.[3]

As indicated above, vexatious requests often, but not always, come with scienter to harass the governmental agency by tying up resources. A presumably less sinister form of vexatious request is the "vague" request that results in a high volume of records, perhaps because the requester does not understand what they are looking for or how the wording of their request might lead to many records. To the extent that either of these types of requests results in a high volume of responsive records, some federal and state legislative provisions protect government agencies from "unduly burdensome" requests.[4]

In the past year, the authors have experienced multiple requesters making vexatious requests with two of our Missouri clients. In one case, residents of a subdivision neighboring the city's jurisdictional boundaries became riled by an application for a data center to be located near their neighborhood. It was shocking to see how quickly they organized and thoroughly they attacked the application from numerous fronts, including yard signs, personal appearances at meetings, social media posts, and involving the *New York Times*, almost as if they were working from a playbook. Unfortunately, they were successful in frightening the governing body and the applicant to the point that the application, which would have likely provided much-needed revenues and opportunities for growth in the city for decades, was abandoned.

Among the group's tactics were vexatious records requests, which

overwhelmed the staff of this small city (population of just over 5,000). In the span of a few weeks eight different requesters made 29 requests regarding records related to the data center application. These requests produced nearly 70,000 responsive records. One of these requesters placed 12 requests in a single day, including one that yielded 64,000 records. Following a practice that will be addressed again in this article, the city asked the requester to modify the request to reduce the responsive records, but the requester refused to do so. As frequently happens with vexatious requesters, when the city denied requests due to Missouri Sunshine Law exceptions,[5] or delayed the production of records due to processing the large number of responsive documents, the requesters filed complaints with the Missouri Attorney General's Office. After the requests came in, city staff and members of the governing body became wary of creating records in fear that records requested and produced before the data center was fully vetted could lead to misinformation and misunderstanding regarding the project details or compromise the city's preliminary negotiations with the applicant for economic development incentives. Though the Missouri Sunshine Law does not require that records be created, this fear of vexatious requests erodes the transparency that the Missouri Sunshine Law was created to protect. Fortunately, with the abandonment of the data center application the vexatious requests have subsided; however, the city lost its city clerk (records custodian) and city administrator to resignation, most likely due to the abuse endured during this timeframe.

In another case, one of our clients has encountered a long-term group of vexatious requesters. This city is also facing a growing group of repetitive requestors, but two particularly stand out. Between March and December 2024 one of the requesters made 45 requests, which yielded nearly 2,000 pages of documents and took almost 75 hours of staff time to process. The other "frequent flier" made 39 requests over the same period, which yielded nearly 4,000 pages of documents and consumed just over 24 hours of staff time to process. The first two months of 2025 yielded requests at the same rate and are continuing as of the time of this writing. The first requester proudly refers to himself as the "town menace" in social media posts, underscoring the vexatious nature of the requests.

Other examples of vexatious requests include the over 4,000 hours spent by the town of Gulf Stream, Florida, to process records requests between 2013 and 2015, which resulted in 42 different lawsuits against them.[6] Tim Clemans filed 200 records requests against the City of Seattle's police department within hours after resigning from a position where he developed software to blur police videos.[7] Mr. Clemans also filed "thousands of requests with government agencies statewide," and later filed more than 300 requests with the City of Seattle over the course of six weeks.[8]

Although not always vexatious or burdensome, another type of records request worth mentioning (and for which protections are desired) are artificial intelligence ("AI") or "robo" requests. Readers of this article may be familiar with, or may have experienced, records request submitted from the source known as "*FOIA Buddy*". *FOIA Buddy* is a web-based resource designed to inform its customers of federal open records laws and those of the 50 individual states.[9] These automated requests allow a requester to send the same request with the same wording to multiple agencies at once.[10] *FOIA Buddy* allows requestors to submit anonymous requests, to which the platform assigns the name "Frank Curry."[11] Responses to these requests may differ depending on what your state's open records law provides.

Examples such as these clearly illustrate vexatious requests and distinguish them from typical requests that cities regularly receive for records on a one-time basis for informational purposes only:

> Due to the powerful idealism fueling the demands for open governance, coupled with the frequent suggestion that governmental transparency remains inadequate, bureaucrats and lawmakers find themselves in an uncomfortable position when discussing public records laws. To begin with, the burden of compliance with the procedural and production requirements of public records laws necessitates a commitment of time, money, and staffing that detracts from any effort to comply with or fulfill any agency's other substantive responsibilities.[12]

Solutions to these vexing issues are needed to allow open records laws to continue to serve the good policy reasons they were adopted. Lack of solutions may result in government officials and staff being wary of creat-

Continued on page 14



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Open Records *cont'd from page 13*

ing records, which is the antithesis of the intent behind open records laws. To continue the intent and ideal of an open and transparent government, open records laws must continually be amended and updated to reflect the technology of the moment and the concerns of those who are working with open records laws day in and day out.

Federal and state legislative efforts to address these requests.

Courts have long held that there exists no federal constitutional right to obtain information from the government.[13] To the extent that citizens have a right to obtain information from the government, those rights may exist in state constitutions, but most are statutory, and states could decide to provide no information at all.[14] Thus, resolving the problem of vexatious records requests must first come from open records laws themselves. At the federal level, the Freedom of Information Act ("FOIA")[15] requires requesters to reasonably describe the records they are seeking.[16] From this requirement, courts have fashioned the "unreasonable burden rule."[17]

Likewise, many states have adopted provisions for when a request becomes an unreasonable burden on staff or is made with the intention to disrupt the services of the government entity. The Kansas Open Records Act allows a records custodian to refuse to provide access to a public record if the request is an unreasonable burden, or if the custodian believes by a preponderance of the evidence that repeated requests are being made with the intention of disrupting the essential functions of the agency.[18] Kentucky's open records law contains a similar refusal provision, but provides that the refusal must be sustained by clear and convincing evidence.[19] It appears that most states do not allow government entities to refuse burdensome requests outright. Many states require that requests are completed in a specific number of days but allow custodians to seek relief from such time period when the request is overly burdensome or voluminous. Even so, the records may be required to be produced quickly. In Rhode Island, the government entity must allow inspection or copying of records within ten business days of the request but can request up to an additional twenty business days if it can prove that a request is voluminous, and additional time is necessary to avoid an undue burden on the entity.[20]

In Missouri, records custodians are required to respond to the request within three business days, but the records may be produced after those initial three days for reasonable cause.[21] This allows overly burdensome requests to be completed over a period of days or weeks. However, this doesn't take into consideration the limited staff time and resources that many cities experience. A request for all emails between city representatives and a regional planning association may produce tens of thousands of emails. To ensure that the city produces only the open records and not those that are closed, a city staff member would need to review every email that is potentially responsive to that request. Requests like these are a burden on the city staff and they certainly disrupt the regular services of the government. Some cities may be fortunate enough to have document review software, but others do not, and the costs of the software may or may not be allowed to be charged to the requestor. Without a procedure to object to overly burdensome requests, Missouri cities are left incurring significant fees and staff time, for a request that may have been intentionally overly broad to ensure that government functions are disrupted.

Some states have adopted provisions that allow government entities to seek an order from the court that the requestor is a vexatious requestor, and that the entity is allowed to refuse future records requests from the requestor. Connecticut's Freedom of Information Act allows a public agency to petition the state Freedom of Information Commission to seek relief from vexatious requestors.[22] The petition must detail the alleged vexatious conduct, which may include the number of requests that are filed and are pending, the scope of the requests, the nature, content, language, or subject matter of the requests and the requestor's communication with the agency, and a pattern of conduct that reaches an abuse of the right to request public records.[23] In ruling that a requestor is vexatious, the Commission can order that the agency is not required to comply with future requests for up to a year.[24] Likewise, Maryland allows the State Public Information Act Compliance Board to rule upon a records custodian's complaint that a request is frivolous, vexatious, or in bad faith.[25] If it does find that a request is frivolous, vexatious, or in bad faith, determined by the totality of the circumstances, the Board can authorize the records custodian to respond to a less burdensome version of the request or ignore the request entirely.[26] In New Jersey, a government entity can seek a protective order from the county court for a request that is made with the intent to substantially interrupt the functions of the government, which must be proven by clear and convincing evidence.[27] If the protective order is issued, the court can rule that the government entity need not respond to future requests from the requestor.[28]

An alternative to a petition or complaint procedure can be found in Tennessee's Public Records Act, which allows a government entity to ignore requests to view records from a requestor for six months if the requestor makes two or more requests within a six-month period and fails to view the records within fifteen business days of notification that the record is available for viewing.[29] Texas provides that if a requestor has received previously requested documents but repeatedly seeks the same records, the records custodian can issue a certification to the requestor that the records have been previously provided.[30]

Whether relief from vexatious request-

ors is momentary or extended depends on whether the law focuses on the request or the requestor. In Maryland, where the vexatious request provisions focus on the request itself, the relief is momentary. While a single request can be declared vexatious and therefore ignored, the relief does not account for that requestor's next request. However, in New Jersey, it appears that the relief from interruptive requests could be forever; the law does not place a limit on how long future requests can be ignored. While an eternal bar on receipt of public records is extraordinary relief, an order that a requester is vexatious and that their future requests, for a limited time or otherwise, need not be complied with is the relief that some situations require. Note that procedures that allow a requestor to be declared vexatious necessarily require that a requestor be identifiable. Many states require that an identifiable person or entity make a request. In Missouri, the Sunshine Law does not require that an identifiable person or entity make a request. Requests from anonymous or false names or requests without contact information other than an anonymous email address are compliant requests but would leave government entities without sufficient information to be able to seek relief from the requestor. Any procedure that would allow Missouri government entities to seek relief from specific requestors or requests would necessarily need to require that the requestor provide accurate contact information to the government entity, at least enough to be able to provide notice of a petition or complaint being filed.

Undue Burden Analysis

As mentioned above, the Federal FOIA requires records to be made promptly available to any person, provided that the request "reasonably describes such records."[31] To address concerns for the efficient operation of government in the face of records requests, federal courts have allowed agencies to deny requests if the search for the records requested is "unreasonably burdensome."[32] Federal government agencies are "not required to comply with a request that is 'so broad as to impose an unreasonable burden upon the agency,' such as one that 'require[s] the agency to locate, review, redact, and arrange for inspection a vast quantity of material.'"[33] When denying a request due to unreasonable burden the agency is required to explain why the search would be unreasonably burdensome.[34] Courts normally consider two factors when analyzing a potential unreasonable burden: 1) how broad the request is; and 2) the agency's determination of the strain on resources that would occur in complying with the request.[35] Examples of unreasonable burdens include:

> a page-by-page search through the 84,000 cubic feet of documents in the [CIA] Records Center," *Goland v. CIA*, 607 F.2d 339, 353 (D.C. Cir. 1978) (internal quotations omitted), cert. denied, 445 U.S. 927, 100 S.Ct. 1312, 63 L.Ed.2d 759 (1980); a "search through every file in [the IRS'] possession to see if a reference to Scientology appeared," *Church of Scientology v. IRS*, 792 F.2d 146, 151 (D.C. Cir. 1986); a search of 3,500,000 files of patents as well as 1,000,000 other files, *Irons v. Schuyler*, 465 F.2d 608, 611-12 (D.C. Cir.), cert. denied, 409 U.S. 1076, 93 S.Ct. 682, 34 L.Ed.2d 664 (1972). It is also unreasonably burdensome to require a search of the files of over 5,000 criminal cases upon a general request for data to be gleaned from documents which have not been created. *See Krohn v. Dep't of Justice*, 628 F.2d 195, 198 (D.C.Cir. 1980).[36]

Of course, whether a similar "unreasonable burden" analysis is available under a state's open records act depends upon whether reasonable request language exists in those statutes. Missouri, for example, does not have such protection in place.[37]

Kentucky statutes, on the other hand, provide that:

> If the application places an unreasonable burden in producing public records or if the custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency, the official custodian may refuse to permit inspection of the public records or mail copies thereof.[38]

A public agency refusing to produce records for this reason must prove the existence of the unreasonable burden by clear and convincing evidence.[39] Evidence of the unreasonable burden should show with some specificity how much time it takes to comply with the records request.[40] Merely indicating that complying with an open records request, especially one that requires redaction, would be time consuming is not by itself clear and convincing evidence of an unreasonable burden.[41] The standard of clear and convincing evidence is a high bar, indeed.

Wisconsin statutes state that a records request "is deemed sufficient if it reasonably describes the requested record or the information requested. However, a request for a record without a reasonable limitation as to subject matter or length of time represented by the records does not constitute a sufficient request."[42] Courts there considered whether a request for three hours of tape on sixty different sheriff's department channels constituted an unreasonable burden.[43] Despite the Sheriff's request, the requester refused to limit its request to a specific time frame or a specific factual event and the court found that requiring a custodian of records to copy 180 hours of tape was a "burden far beyond that which may reasonably be required of a custodian of a public record."[44] The court went on to state that "[w]hile this state favors the opening of public records to public scrutiny, we may not in furtherance of this policy create a system that would so burden

Continued on page 16

Open Records *cont'd from page 15*

the records custodian that the normal functioning of the office would be severely impaired."[45]

Practical Advice for Municipal Practitioners

So, as municipal practitioners, what can we do to head off or at least mitigate the effects of vexatious records requests? First, we can be aware of whether we have legislative protections in our open records laws. As discussed above, at a bare minimum, open records laws should include provisions for reimbursement of costs to research, collect, and copy responsive records. Lobbying efforts alongside your municipal league or other lobbying organization may help to add language to statutes to preserve the good public policy reasons open records acts serve. In the authors' home state of Missouri, courts have interpreted existing cost recoupment language to exclude the cost of attorneys' fees to assist governmental clients in determining which records are or are not responsive to requests or are covered by an exception to disclosure.[46] Thus, legislative correction of this interpretation is needed.

Hopefully, your state legislature is open to the idea of correcting the problem of vexatious and weaponized records requests. If so, efforts to move the burden of proof for unreasonableness to a lower standard (e.g., from "clear and convincing evidence" to a "preponderance of the evidence" would be helpful). Clear provisions addressing repetitive or unreasonable requests are a must. If possible, provide draft language that provide protection from vexatious requests similar to provisions that Connecticut, Maryland, New Jersey, Tennessee, and Texas have adopted, as described above. At a bare minimum, statutory protections should include a specificity requirement regarding the description the records sought.

Beyond legislative efforts, and to the extent your open records laws include language requiring requests to reasonably describe records, be familiar with "unreasonable burden" analysis— and use it to aid in denials of requests that cross the line. Even in states like Missouri that have virtually no protection in place against unreasonable requests it is helpful for practitioners and records custodians to quickly distinguish between acceptable requests and requests that do not describe a record or lack specificity to the extent that a record cannot be identified. Establishing good habits like tracking requesters and the volume of requests or keeping a log of the resources expended in responding to requests can be invaluable as evidence in case a denial is challenged or when requesting legislative assistance. **ML**

NOTES

1. *See, e.g.,* Stephanie Alvarez-Jones, *"Too Big to FOIA:" How Agencies Avoid Compliance with the Freedom of Information Act,* 39 Cardozo L. Rev. 1055, 1059-1060.
2. *Id.*, at 1060
3. Civic Plus Blog, What is a Vexatious Requester? https://www.civicplus.com/blog/rr/what-is-a-vexatious-requester/#:~:text=Vexatious%20requesters%20have%20earned%20their,vexatious%20requesters%20are%20%E2%80%9Cfrivolous%20requesters%E2%80%9D (May 1, 2018) (last visited Feb. 21, 2025).
4. National Freedom of Information Coalition White Paper, *Beast or Burden: Nuisance, vexatious, or burdensome public records requests, https://www.nfoic.org/blogs/new-nfoic-white-paper-looks-rising-issue-burdensome-public-record-requests/* (Dec. 3, 2018) (last visited Feb. 22, 2025).
5. *See*, e.g., 5 ILCS 140/3.6; K.S.A. 45-218; 1 M.R.S. Sec. 408-A; and N.M. Stat. Ann. Sec. 14-2-10.
6. Mo. Rev. Stat. Sec. 610.021.
7. NFOIC White Paper at p. 4.
8. See Kate Martin, *Sunshine Sunday: Open records act under fire as large requests tax system,* The News Tribune (Tacoma, WA), Mar 14, 2016, https://www.thenewstribune.com/news/politics-government/article65673537.html (last visited Feb. 23, 2025).
9. *See Id.*
10. *See*, *e.g.*, FOIA Buddy.com Mission statement https://www.foiabuddy.com (last visited Feb. 23, 2025).
11. *See, e.g.,* Maddie Seiler, *School Officials Suspect AI Behind Burdensome Public Records Requests,* The Sentinel (Carlisle, PA), Aug. 16, 2024, https://www.govtech.com/education/k-12/school-officials-suspect-ai-behind-burdensome-public-records-requests (last visited Feb. 23, 2025).
12. *See Id.*
13. Keith W. Rizzardi, Sunburned: *How Misuse of the Public Records Laws Creates an Overburdened, More Expensive, and Less Transparent Government*, 44 Stetson L. Rev. 425, 433 (2015).
14. See, e.g., McBurney v. Young, 569 U.S. 221, 232 (2013) (citing numerous cases back to 1978).
15. *See Id.* (citing Police Dept. v. United Reporting Publishing Corp., 528 U.S. 32, 40, 120 S. Ct. 483, 145 L. Ed. 2d 451 (1999) (the Government could decide "not to give out [this] information at all").
16. 5 U.S.C. §552.
17. 5 U.S.C. §552(a)(3)(A).
18. Stephanie Alvarez-Jones, *supra* note 1 at 1064.
19. K.S.A. 45-218(e).
20. Ky. Rev. Stat. Ann. § 61.872(6) (2021).
21. R.I. Gen Laws § 38-2-3(e).
22. § 610.023.3, RSMo.
23. Conn. Gen. Stat. § 1-206(b)(6).
24. *Id.*

25. *Id.*
26. Md. General Provisions Code Ann. § 4-1A-04(b)(1).
27. Md. General Provisions Code Ann. § 4-1A-04(b)(3).
28. N.J. Stat. § 47:1A-5.1(a).
29. N.J. Stat. § 47:1A-5.1(b).
30. Tenn. Code Ann. § 10-7-503(a)(7)(A)(vii)(a).
31. Tex. Gov't Code § 552.232.
32. 5 U.S.C.§ 552(a)(3)(A).
33. *See, e.g.*, Stephanie Alvarez-Jones, *supra* note 1 at 1066 (citing numerous authorities in an in-depth study of "undue burden" jurisprudence).
34. Ayuda, Inc. v. Fed. Trade Comm'n, 70 F. Supp. 3d 247, 275 (D.D.C. 2014) (quoting Am. Fed'n of Gov't Emps., Local 2782 v. U.S. Dep't of Commerce, 907 F.2d 203, 209 (D.C. Cir.1990).
35. *Id.*
36. See Stephanie Alvarez-Jones, *supra* note 1 at 1067.
37. Ruotolo v. Department of Justice, Tax Division, 53 F.3d 4, 9 (2d Cir. 1995).
38. See. e.g., Chapter 610, RSMo.
39. Ky. Rev. Stat. Ann. § 61.872(6) (2021).
40. *Id.*; see also Kentucky Open Government Coalition, Inc. v. Ky. Dept. of Fish and Wildlife Services, 2023 Ky. App. LEXIS 91.
41. *See* Commw. v. Chestnut, 250 S.W.3d 655, 664 (Ky. 2018).
42. *Id.* (noting that it is up to the legislature to provide relief in the form of restricting access, extending the time to comply, or providing additional funds to offset the burdens of compliance).
43. Wis. Stat. § 19.35 (1)(h) (2024).
44. See, Schopper v. Gehring, 210 Wis.2d 208 (Wis. Ct. App. 1997).
45. *Id.* at 213.
46. *Id.*
47. Gross v. Parson, 624 S.W.3d 877, 884-888 (Mo. 2021):

> Because the Sunshine Law obligates a public governmental body to separate exempt and non-exempt material without regard to any particular records request, attorney review time to determine whether responsive documents contain privileged information is not "[r]esearch time required for fulfilling records requests." It is not a public records request that requires the closing of records. A public records request may be fulfilled without any attorney review time. Therefore, section 610.026.1(1) does not authorize a public governmental body to charge attorney review time as research time required for fulfilling records requests.

