

**From:** smbisio@gmail.com  
**Sent:** Saturday, November 16, 2024 4:03 PM  
**To:** Lamphierm@VillageofClarkston.org; CaseyG@VillageofClarkston.org; 'Sue Wylie'; QuisenberryT@VillageofClarkston.org; RodgersL@VillageofClarkston.org; ForteA@VillageofClarkston.org  
**Cc:** 'Jonathan Smith'; clerk@villageofclarkston.org  
**Subject:** FOIA costs

Dear all:

I write to correct two oft-repeated claims made by city manager Jonathan Smith and echoed by certain council members. The first relates to blaming me for the legal costs the city voluntarily incurs to process all FOIA requests (not just mine) and the second is to respond to the "Smith myth" that I've managed to evade the valiant efforts of three clerks who've unsuccessfully tried to charge me for responding to FOIAs.

Legal Fees Relating to FOIA Requests:

The reason your legal services bills are so high is because Smith and the clerks forward everything to city attorney Thomas Ryan to review – even things as basic as an extension letter. And, since it's been my preference to work things out with the city rather than running to court, it's apparent from the September and October legal services charges that Smith relied on Ryan to review and comment on every exchange we had.

For me, the alternative to trying to work things out with the city is to go to court immediately when the city does not comply with its legal obligations. For you, the alternative is to tell your city employees to stop treating the city attorney as the FOIA Coordinator rather than as an advisor because my emails weren't asking about legal issues. They were more along the lines of "when do you think you can respond," "can you please confirm that everyone did a search," "what was the city's reason for sending records that had information blacked out (redacted)," "can you please provide the obviously missing records," etc.

Here's a chronology of the two FOIA requests that were discussed in your Tuesday, November 12 meeting because I want you to not only appreciate the ridiculousness of involving Ryan but also why his involvement wasn't particularly helpful:

- 9/19 – Smith sent 10-day extension letters, which he's entitled to do. My 9/14 and 9/16 FOIAs, due on 10/7 and 10/8 with the extension, asked for records from HDC

commissioners and Nancy Moon. Because these appointees use private emails and would need to conduct their own search, this meant that Smith needed to spend exactly zero minutes searching for records. Ryan billed a half-hour of time (\$47.50) to review this most basic of communications – a brief email request for an extension of time.

- 10/3 – Smith advised me that Moon had left town before completing her response to the requests. He provided twelve pages of records that included information that was improperly redacted, without the statutorily required explanation for claiming that part of the records were exempt from disclosure. Despite charging the city \$95.00 to review my FOIA and someone else's, Ryan allowed Smith to send records to me without providing a basis for the redactions. The need to justify redactions is a basic requirement that everyone working with FOIAs should be aware of, whether or not they are lawyers.
- 10/9 – I emailed Smith about the redactions, asked whether the HDC commissioners had told him they had no records (or whether they ignored his inquiry), and asked how much more time he needed to respond. I told him I would accept an email from any of the commissioners advising Smith they didn't have records rather than making him go through the time and effort to prepare "no records" certifications. Smith ignored this email.
- 10/17 – Even though Moon was now back in town and participated in a presentation about historic districts at the library on 10/13, I'd heard nothing further from the city. I emailed Smith asking about the status of the missing information and voluntarily extended the city's time to respond until 10/23 because I knew Smith was short-staffed and had no direct access to HDC commissioners' or Moon's records. Twelve minutes later, Smith sent additional Moon records, also containing redactions, and said he would send my follow-up questions to Moon. My follow-up questions were simply asking Smith to provide things that should have been provided. Since the city was paying for legal advice, Ryan should have ensured these issues were addressed even without me asking for them, particularly since he spent two hours (\$190) to review records that had unexplained redactions and was privy to my correspondence.
- 10/29 – My good-faith extension of the time to respond to 10/23 came and went without response. Rather than file a lawsuit, I followed up again and gave a final extension of time to 10/31.
- 10/30 – Ryan billed one hour (\$95) for a "response" to my request.
- 10/31 – Smith provided records without redactions and several "no records" certifications. Ryan billed the city for one hour (\$95) for two reviews of the response and one phone call.

Apparently, these basic requests also inexplicably required the services of a second attorney "FOIA specialist," and the council has yet to see that bill.

Rather than blaming FOIA requesters for legal fees the city incurs, you might want to ask why every FOIA request and every bit of correspondence needs to be referred to one or two lawyers when there are no legal issues the city needs advice on. And you might also want to ask why, when an attorney reviews something relating to FOIA, the attorney doesn't see and advise on elementary requirements of FOIA, such as the need to cite the basis for redacting records.

In addition to asking why Ryan needs to be involved in every FOIA response (not just mine), and even though his review apparently doesn't address basic legal issues such as the reason for redactions, you may want to reconsider whether a \$95/hour billing rate is "the favor" you think it is.

Ryan has always billed in half-hour increments no matter how little time he spends on an issue. For example, if Ryan spends ten minutes on each of four discrete issues, he can bill two hours of time for only forty minutes of work, which effectively increases his hourly rate far higher than \$95. When the large half-hour billing increment is coupled with Ryan's practice of "block billing" (describing multiple tasks for one billing charge), it has the effect of obfuscating the actual time he's spent on each matter. These two billing practices are not unethical because the city has consented to them through a course of dealing, but if the council is interested in reducing legal services bills, it may wish to ask more questions about these two billing practices – or ask Ryan to change them – because you're not getting the bargain you think you are.

#### FOIA Fees:

I've worked with four clerks on FOIA requests – Sandy Miller, Jennifer Speagle, Karen DeLorge, and Catherine Ashley. Ashley never sent an invoice. DeLorge and Miller did send unobjectionable invoices, and contrary to Smith's claims, I paid them. I did not pay one Speagle invoice and that deserves some explanation since it largely forms the basis for the Smith myth about my ostensible refusal to pay any FOIA fee invoice.

The Speagle invoice related to a FOIA request that primarily sought records concerning Smith's attempts to conceal the source of a \$10,000 payment that was sent to Mark Peyser, the outside attorney handling settlement of the city's liability for costs and fees for my five-year FOIA lawsuit that the city lost. Peyser was hired because the city made a malpractice claim against Ryan for his misconduct during the FOIA lawsuit, and because of that malpractice claim, Ryan was disqualified from handling the settlement issues. (Ryan's malpractice carrier was forced to contribute to the settlement.) Peyser's fees were not covered by the city's liability policy from the Michigan Municipal League's Liability and Property Pool (MMLLPP).

Smith told the council and the public that the \$10,000 came from an anonymous donor who'd asked for confidentiality, and he intended to honor that request. To ensure the source of the funds was kept a secret, Smith arranged to have the money funneled directly from the secret donor to Peyser, thus avoiding a paper trail that could be uncovered by FOIA requests. This created the appearance that the unidentified donor could be someone who was potentially seeking city favors in exchange for the "donation." As a result of questions I raised on my website about the impropriety of accepting payments from anonymous donors, Smith was eventually forced to disclose that the payment was from the MMLLPP who apparently wanted to keep the \$10,000 payment a secret from its other insureds. This wasn't something worth hiding, especially since it related to a five-year lawsuit that arose out of Ryan's insistence that he could hide city records in his office and claim they weren't subject to the FOIA.

Speagle did not formally respond to my request, telling me which parts were granted, which parts were denied, and/or which parts were granted in part and denied in part, as required by the FOIA statute. As a result, I had no idea why I received an almost \$800 invoice for records. This was not a request for deposit; it was a request for full payment. The major issues with the invoice were as follows:

1. The \$17.00/hour labor rate. The city is required to use the rate of the least paid capable employee to perform authorized tasks. The least paid capable office person at the time was Evelyn Bihl. During the budget presentations for the 2021/2022 budget year, Smith falsely represented Bihl's then-current wages as \$11.54/hour and he requested a 25% increase to \$14.42/hour in recognition of her increased responsibilities and title change to administrative/treasurer assistant. After further inquiry, I learned Smith had increased Bihl's rate to \$17.00/hour as of January 24, 2021, without advising the council in January or during the 2021/2022 budget hearings. Though I'd relied on Smith's representation that Bihl's rate was \$14.42/hour, it turned out the \$17.00/hour labor charge was correct, but it wasn't something I could know without further inquiry due to Smith's misrepresentations.
2. Though I'd asked for electronic copies of records, Speagle included a \$.10/page charge for paper records. The city is only allowed to charge for actual costs, and ephemeral electronic records have no separate cost.
3. The charges weren't reduced by the mandatory 50% because the response was horrendously late.
4. It appeared from Speagle's communications that she'd invoiced at least 9.5 hours for "organizing records" and "weening out all the dupes," neither of which would have been necessary to the response or reflect a legally authorized charge (and it would have been a bizarrely long period of time to do either of these things).
5. Even though the statute requires that charges reflect the actual time spent doing retrieval work, which is then billed in fifteen-minute increments with the final total

rounded down to the nearest increment, Speagle kept no formal records other than notes that reflected whole one-hour increments. (There was one instance that included a half-hour increment.)

The FOIA statute requires that fee disputes be appealed to the head of the public body before filing a lawsuit, which is the city council. I filed a fee appeal, which would have given the council the opportunity to review Speagle's invoice, make any appropriate adjustments, and send the revised invoice to me for payment. Given all the caterwauling from councilmembers over FOIA fees, one would think the council would have jumped on the opportunity to recover any FOIA-related costs.

But that's not what happened.

The council completely ignored the fee appeal, giving me the right to go to court and win on the fee issue because I could have easily met the legal standard and forced the city to pay my attorneys' fees and costs. Rather than filing a lawsuit, I waited six weeks with no response before I emailed the council again and gave it one last opportunity to respond to the fee appeal before filing a lawsuit. The records were sent to me within two minutes, four months after my original request and without a response telling me exactly what the records pertained to. I never received a response from the city council, and to this day, I don't know if any records were held back or if all the records I asked for actually existed.

Now you know the backstory of these two issues. If Smith, the clerks, and certain councilmembers think the best way to approach these issues is to attack me (or occasionally my husband) in public meetings based on a Smith myth and/or legal fees that are entirely within Smith's or a city clerk's control, then I will stop trying to work things out with the city and file lawsuits instead. I promise I will only bring cases I believe I can win, and the complaint will be pled to avoid the city's insurance coverage. This will increase your FOIA costs exponentially since each lawsuit will require you to pay thousands for Ryan's attorney's fees (or the more expensive "FOIA specialist" attorney's fees) and my attorney's fees and costs. I leave it to you to decide which course of action you prefer.

My husband and I are not the enemy, and despite what you may believe, our transparency efforts are supported by the community as evidenced by the number of people who read my websites and who send words of encouragement. I would also remind you that the ~\$96,000 refund you expect to receive in partial reimbursement for fourteen years of negligent police and fire overpayments began with one of my FOIA requests and my husband's research, so I think that overall, the city has financially benefited from our requests more than it has been financially harmed. My husband and I

have both been willing to work with the city, but we aren't willing to be publicly attacked over our attempts to do so.

Regards,  
Susan Bisio