



HENRY McMASTER  
ATTORNEY GENERAL

September 29, 2010

Charles E. McNair, Director  
Cayce Department of Public Safety  
PO Box 2004  
Cayce, SC 29171

Dear Mr. McNair:

We received your letter requesting an opinion of this Office regarding the department's ability to charge for time and resources used in satisfying discovery motions. You asked "whether or not [the department] can charge attorneys and other persons that make a discovery motion." Additionally, you asked whether the department can apply the same guidelines or pay schedule it uses for Freedom of Information Act (FOIA) requests to discovery motions.

As a way of background you explained that the department acknowledges its responsibility "to comply with all [reasonable] discovery motions submitted" but that "it requires time and utilizes [the department's] resources to satisfy [the discovery request]."

This opinion will address prior opinions of this Office, relevant statutes and caselaw to answer the questions posed above.

### **Law/Analysis**

South Carolina Rules of Civil Procedure, Rule 26 explains the general provisions governing discovery. Rule 26(a) reads as follows:

- (a) **Discovery Methods.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land

or other property, for inspection and other purposes; physical and mental examinations; and requests for admissions. The frequency or intent of use of **discovery** methods set forth in subdivision (a) **shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unreasonably burdensome or expensive taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.** The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c) of this Rule.

Rule 26, SCRCF (emphasis added).

Rule 26 explains that a discovery request must be reasonable, but this rule does not indicate that costs of discovery should be shifted to the requesting party.

As noted in Justice Kennedy's dissent, a defendant "may conclude a quick settlement is preferable to the costs of discovery and a protracted trial." Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 130 S.Ct. 1605, 1631 (2010). The costs of discovery may "force settlement even absent fault or injury," but our litigation system is designed for each party to bear the cost of any reasonable discovery request it is asked to produce. Jerman, 130 S.Ct. 1605, 1628 (2010).

### Conclusion

It is the opinion of this Office that the Cayce Department of Public Safety cannot charge persons who submit discovery requests. It is permitted under the FOIA statute for government agencies to charge the requestor for the cost of time and resources, but the statute limits such permission to FOIA requests. S.C. Code § 30-4-30(b).<sup>1</sup> If a discovery request is unduly burdensome, one may petition the court to limit the discovery motion. Otherwise, one asked to satisfy a reasonable discovery

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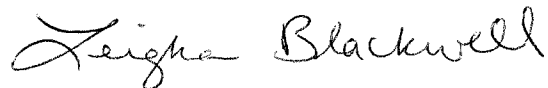
<sup>1</sup> In relevant part, S.C. Code § 30-4-30(b) states as follows: "The public body may establish and collect fees not to exceed the actual cost of searching for or making copies of records . . . ."

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request should do so in a timely fashion and at his or her own expense. See, Rule 26, SCRCP and Rule 34, SCRCP.

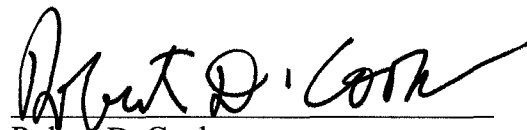
Sincerely,

Henry McMaster  
Attorney General

A handwritten signature in cursive script that reads "Leigha Blackwell".

By: Leigha Blackwell  
Assistant Attorney General

REVIEWED AND APPROVED BY:

A handwritten signature in cursive script that reads "Robert D. Cook".

Robert D. Cook  
Deputy Attorney General