Your Right to Know / Tom Kamenick

Using outside record vendors brings risks

Last March, the Wisconsin Examiner [asked](https://wisconsinexaminer.com/briefs/wisconsin-examiner-sues-black-river-falls-over-records-costs/) the Black River Falls Police Department to search for emails regarding the death of a missing Indigenous man. The department said it would process the request but the news outlet would have to pay $4,400. That’s the amount the city’s IT vendor, Tech Pros, quoted to perform the search.

It was a dramatic illustration of a growing problem. More and more government agencies are using outside vendors to store their electronic records, and relying on those vendors to do the searching when somebody makes a request for emails, bodycam videos, or other records. Such outsourcing is touted as a cost-saving measure, but it can make obtaining records prohibitively expensive, as the Examiner found.

Government agencies typically pay vendors a set fee for storage, but there often is a separate charge for search and retrieval of archived files. Can a government authority in Wisconsin pass those vendor fees on to record requesters?

The Black River Falls Police Department thinks that it can. In response, the law firm I run, the Wisconsin Transparency Project, filed a [lawsuit](https://s3.documentcloud.org/documents/25083040/2-2024-07-24-petition-for-writ-of-mandamus.pdf) against the department on the Examiner’s behalf.

I don’t intend to dive into the weeds of the legal arguments of that case. Rather, the case highlights some of my serious concerns with the practice of hiring outside parties and then passing on those costs to records requesters.

Wisconsin’s [open records law](https://wisfoic.org/text-of-open-records-law/) allows government custodians to charge only their “actual, necessary, and direct costs” to fulfill record requests. In other words, they are not allowed to profit from records requests. I would argue that this also means they cannot fob off their record-keeping responsibilities to somebody who does.

The law itself says this rule remains in place for records “produced or collected by a person who is not an authority pursuant to a contract entered into by that person with an authority.” That raises several issues.

First, the fees quoted by an outside vendor are not a “direct” cost. They’re a cost being imposed (and even calculated or arbitrarily decided) by the vendor, not the government.

Second, is it really “necessary” to use such an expensive vendor? Can a government agency intentionally develop an arrangement that shifts additional and outrageous costs onto record requesters?

Finally, is this an “actual” cost? It may be what the vendor is charging the government, but the vendor’s actual costs are likely far lower, because the vendor is making a profit. The vendor is incentivized to charge an exorbitant amount, knowing its true customer (the government) won’t have to pay it.

Another problem with the use of outside vendors is compliance with record retention laws. Government agencies are required to keep their records for a certain amount of time before disposing of them. Different agencies and categories of records are subject to different retention periods, but most records need to be kept at least seven years.

I’ve twice recently run into situations where outside vendors weren’t following those laws. In the first instance, emails produced by a vendor were missing all their images. Those images had been replaced by a placeholder question mark. In the second instance, the vendor was completely unable to produce emails that had been sent by the government agency more than a year prior.

When vendors mess up like this, any liability falls on the government agency for failing to keep records properly. That’s a big risk to take. Government officials should make sure their vendors are aware of retention laws and ideally agree to indemnify the government for any liability caused by their mistakes.

The use of outside vendors to store government records raises a host of potential problems. The better practice would be to keep records “in house,” or at the very least use a service that permits the government unfettered access and searching without the need to pay the vendor additional money.

*Your Right to Know is a monthly column distributed by the Wisconsin Freedom of Information Council (*[*wisfoic.org*](https://wisfoic.org/)*), a group dedicated to open government. Tom Kamenick, a council member, is the president and founder of the Wisconsin Transparency Project.*



Tom Kamenick, provided photo