

MEMORANDUM

TO: Erik Arneson, Executive Director
Nathan Byerly, Deputy Director

CC: Charles Brown, Chief Counsel

FROM: Josh Young
Kelly Isenberg
Jordan Davis
Blake Eilers

DATE: July 11, 2016

RE: **OOOR Fee Schedule Review**

INTRODUCTION

The Office of Open Records (“OOR”) is required to conduct a biannual review of fees charged under the Right-to-Know-Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.* This Memorandum was prepared to assist in the OOR’s assessment and evaluation of fees currently charged for records under the RTKL. This Memorandum includes a review of recent appellate court cases and Final Determinations issued since the last fee review in July, 2014; a comparative analysis of fees assessed by various Pennsylvania agencies; fees charged by copy/printing businesses located in various cities and municipalities across the Commonwealth; and recommendations for future fee reviews. Also attached to this Memorandum is a Proposed OOR Biannual Fee Review.

BACKGROUND

The OOR is statutorily mandated to conduct a biannual review of fees charged under the RTKL. 65 P.S. § 67.1310(a)(8). Duplication fees charged under the RTKL must be reasonable and based on “prevailing fees for comparable duplication services provided by local business entities.” 65 P.S. § 67.1307(b)(2). The OOR’s current fee schedule permits local and Commonwealth agencies to charge up to \$0.25 per standard-sized, black-and-white page; however, fees for local agencies may also reflect regional price differences. 65 P.S. § 67.1307(b)(3). Fees for duplicating complex and extensive data sets may be based on reasonable market value of the same or closely related data sets, and fees for certification of copies must be reasonable. 65 P.S. § 67.1307(b)(4); 65 P.S. § 67.1307(c). Actual costs may be assessed for the duplication of specialized documents, such as blueprints, color copies, and irregular sized documents, as well as for facsimiles, audio/video recordings and other media. Fees for postage

may not exceed the actual cost of mailing. Also, for a record only maintained electronically or in other non-paper media, duplication fees are limited to the lesser of the fee for duplication on paper or the fee for duplication in the original media, unless the requester specifically requests the more expensive medium.

Agencies are not permitted to assess “[f]ees for staff time reviewing or redacting records.” *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d 638, 651 (Pa. Commw. Ct. 2016).

This review constitutes the fourth review of fees charged under the RTKL by the OOR since the OOR was established in 2009.

CASE UPDATE

We conducted an analysis of the appellate court cases and Final Determinations issued since August 2014 as part of this fee review. The Commonwealth Court decided two cases concerning fees since the last fee review, while the OOR made roughly 140 Final Determinations involving fees in that time. A table of these cases and Final Determinations is attached to this Memorandum (Appendix A).

1. Appellate court cases decided since August 2014

In *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d 638 (Pa. Commw. Ct. 2016), the Department of Education argued that it was entitled to seek prepayment of fees for all records responsive to a request prior to determining which records it would release and which it would withhold. The Commonwealth Court held that the language of the RTKL requires an agency to provide an initial estimate of the number of public records it would disclose in response to the request; conversely, the agency was not permitted to calculate prepayment using exempt records. Additionally, an agency may seek prepayment at any time during the response period.

In the second case, *Borough of West Easton v. Mezzacappa*, 116 A.3d 1190 (Pa. Commw. Ct. 2015), a borough granted access to redacted records and then asserted, on appeal, that the requester needed to pre-pay the outstanding fees for prior requests. The Commonwealth Court, in this unpublished decision, found that the Borough was entitled to the payment of those fees, but only if the fees were properly assessed before the Borough chose to grant access to those records. Ultimately, the Court affirmed the trial court’s opinion upholding the OOR’s determination that an agency’s ability to condition its grant of access to records on the payment of fees ends when the agency issues its final response.

2. Final Determinations issued since August 2014

Some of the common issues addressed in the Final Determinations include fees set by other statutes, fees that may be charged for adjudicatory records, the effect of unpaid fees from past requests on current requests, the calculation of reasonable market value, and the point at which an agency may charge and a requester may challenge the assessment of fees.

With respect to fee schedules set by other statutes, the OOR identified three classes of records with fee schedules set by other statutes: records held by the State Archives and governed by the History Code, 37 Pa.C.S. §§ 101 *et seq.*; records held by recorders of deeds and governed by the Municipalities Planning Code, 53 P.S. §§ 10901-10916.2; and criminal records governed by the Criminal History Record Information Act (“CHRIA”), 18 P.S. §§ 9101 *et seq.* However, the OOR determined that an agency bears the burden of proving that another fee schedule supersedes the OOR’s fee schedule. Additionally, the OOR found that an agency may not create its own fee schedule for the purpose of limiting access to records, and that an agency may assess fees different from those on the OOR’s fee schedule, so long as the fees charged are less than those permitted by the OOR.

Notably, the OOR clarified that a requester must challenge fees assessed for a request in a timely fashion to prevent waiver. In one case, the OOR held that a requester who fails to challenge fees associated with one request is unable to dispute those fees when appealing a subsequent request. In another case, the OOR held that it loses jurisdiction to determine the fairness of fees after granting access to a record with a precondition of payment. Both of these holdings may require further review in light of the Commonwealth’s unpublished decision in *Buehl v. Pa. Dep’t of Corr.*, No. 198 C.D. 2015, 2015 Pa. Commw. Unpub. LEXIS 552 (Pa. Commw. Ct. 2015), which suggests that the OOR may accept certain appeals challenging fees outside of the fifteen business-day appeal period.

For more detailed summaries of the cases discussed above, please see Appendix A.

COMPARATIVE ANALYSIS

Although Judicial and Legislative agencies establish their own fees, and the OOR has authority only to establish a fee schedule for Commonwealth and local agencies, we reviewed fees assessed by Judicial and Legislative agencies as an indicator of what is “reasonable.” Moreover, the OOR’s obligation to conduct a biannual review necessitates a review of “fees charged under the act,” without limiting the review to only those Commonwealth or local agencies over which the OOR has jurisdiction. *See* 65 P.S. § 67.1310(a)(8).

During this review, we gathered information from various independent Commonwealth agencies, as well as Judicial and Legislative agencies, regarding fees assessed for records sought under the RTKL. Additionally, data was collected from a random sampling of seven county Prothonotary's Offices throughout the Commonwealth. The RTKL fees assessed by the independent Commonwealth agencies sampled, which included the Offices of the Attorney General ("Attorney General"), Auditor General ("Auditor General") and State Treasurer ("Treasurer"), were relatively consistent and fell below the fee amounts currently authorized by the OOR. The Attorney General and Treasurer both assess duplication fees in the amount of \$0.20 per page, while the Auditor General imposes no fees for the first ten pages, and \$0.15 for each subsequent page. These fees are consistent with the data gathered during the OOR's 2014 fee review. With respect to Legislative agencies, namely the House of Representatives, Senate and Independent Regulatory Review Commission ("IRRC"),¹ each agency assesses duplication fees of \$0.25 per page; however, IRRC also charges \$0.50 per page for the duplication of irregularly-sized pages. As for Judicial agencies, the Unified Judicial System ("UJS") utilizes a fee schedule substantially similar to the Auditor General.² Finally, we randomly selected seven counties³ and analyzed the fees imposed by each county's Prothonotary's Office, which generally assess copying charges of \$0.25 per page. Allegheny and Philadelphia Counties were the outliers, charging fees of \$0.50 or more per page for duplication, but in some cases, records were available online at reduced rates or for free. Certification fees for these agencies range from \$1 and \$5.

We also evaluated pricing information from a random sampling of local businesses that provide duplication services across the Commonwealth. Fees for duplication of standard-sized, black-and-white pages ranged from \$0.08 per page to \$0.16 per page, while the duplication of irregularly-sized and color pages was considerably more. In each instance, the business operated under a tiered fee structure, offering discounts for larger jobs.

Lastly, we collected and analyzed pricing information for several other means of providing access to records, such as through CDs, DVDs and thumb/flash drives. To the extent the copying/printing businesses offered these services, the pricing varied greatly among the businesses themselves and across the regions of the Commonwealth that we sampled. The types of fees imposed by the businesses included scanning charges, per page "transfer" charges, and charges for the purchase of a CD or thumb drive. To the extent the agencies provided for the release of records on a CD, the associated fee ranged from \$1 to \$5, with most agencies charging

¹ Interestingly, IRRC's fee policy permits the charging of "reasonable fees ...for *labor* and other expenses necessary to comply with the request for access."

² The procedures for accessing public information through the UJS are set forth in Pennsylvania Rules of Judicial Administration Rule 509.

³ As noted on the spreadsheet attached to this Memorandum, data was collected from Prothonotary Offices in Allegheny, Philadelphia, Dauphin, Erie, Centre, Lackawanna and Tioga Counties.

the latter. None of the agencies suggested that they provided records via thumb/flash drive; nor did the agencies offer any other atypical manner of transmitting records.

All of the relevant information collected during this fee review is included in the spreadsheet attached to this Memorandum.

RECOMMENDATIONS

Based on the foregoing, the following recommendations are made:

1. Add a line-item to the OOR's fee schedule for color copies and set a cap that can be charged for color copies. Given the pricing information collected from the copying/printing service providers, we believe \$0.50 per color copy would be reasonable.
2. Add a line-item to the OOR's fee schedule for CD and DVD and permit agencies to charge the actual cost of the CD/DVD on which records are transmitted. It is further recommended that a cap to the cost for CD/DVD be established somewhere in the range of \$3-\$5. We believe a cap of \$3 would be reasonable.
3. Continue to monitor whether new forms of record transmission (*i.e.*, thumb/flash drive, cloud-based services like DropBox or Google Drive, etc.) are available to or are being utilized by agencies and evaluate the reasonable costs associated with each of these forms of record transmission.
4. In the event commercial fees are addressed through pending legislation, a thorough analysis of whether the OOR can impose such fees should be conducted.
5. Although outside the scope of this assignment, the cost of sending facsimiles may be a future area of research.

OOR BIENNIAL FEE REVIEW (PROPOSED)

JULY 31, 2016

The Office of Open Records (“OOR”) is required to conduct a biannual review of fees charged under the Right-to-Know-Law (“RTKL”). 65 P.S. § 67.1310(a)(8). The current fee schedule that outlines the fees that may be charged by Commonwealth and local agencies under the RTKL is as follows:

Fee Structure

Record Type

Fee

Black and White Copies

Up to \$ 0.25 per page.

(A “photocopy” is either a single-sided copy or one side of a double-sided black-and-white copy of a standard 8.5” x 11” page)

Color Copies

Up to \$0.50 per page.

Certification of a Record

An agency may impose reasonable fees for official certification of copies if the certification is at the behest of the requester for the purpose of legally verifying the public record. The Office of Open Records recommends no more than \$5 per record to certify a public record. Please note that certification fees do not include notarization fees.

Specialized documents

Actual Cost

(For example, but not limited to, blue prints, color copies, non-standard sized documents)

CD/DVD

Actual cost not to exceed \$3/unit.

Facsimile/Audio/Video/Other Media

Actual Cost

Redaction Fee

No Redaction Fee May be Imposed

Conversion to Paper

If a record is only maintained electronically or in other non-paper media, duplication fees shall be limited to the lesser of the fee for duplication on paper or the fee for duplication in the original media unless the requester specifically requests for the record to be duplicated in the more expensive medium. (Sec. 1307(d)).

Postage Fees

Fees for Postage May Not Exceed the Actual Cost of Mailing

After conducting, among other things, a review of the current fee schedule, a review of recent case law and Final Determinations, and a comparative analysis of fees currently assessed by various Pennsylvania agencies, the following conclusions have been reached:

It has been determined that “up to \$0.25 per page” remains a reasonable charge for standard-sized, black-and-white copies under the RTKL. Both legislative and judicial agencies have implemented fees that are in line with this standard. Although some local court-related offices may charge more than \$0.25 for copies, many of those offices utilize the \$0.25 rate. Moreover, the rate set for access to judicial records under the RTKL is substantially less than \$0.25. In most cases, the range afforded by this standard should provide agencies with enough flexibility to set fees comparable to “duplication services provided by local business entities” across the state. 65 P.S. § 67.1307(b)(2). Legal research conducted revealed no new case law that would be contrary to a copy fee of “up to \$0.25.” *See Weiss v. Williamsport Area Sch. Dist.*, 872 A.2d 269 (Pa. Commw. Ct. 2005) (holding, under the repealed RTKL, that \$0.25 was a reasonable fee for copies).

Additionally, we find \$0.50 per copy to be a reasonable charge for color copies, given the pricing information collected during this review.

Finally, it was concluded that a charge of no more than \$3 per CD/DVD is reasonable in light of today's market for those items.

The other provisions of the Fee Schedule were reviewed, and it was determined that they should remain as written.