

“Can I Charge Fees for That?” FAQs Regarding Permissible Fees under the RTKL

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RTKL (Sections 701, 705, 901 1307 of the RTKL) – Responding to a RTKL Request.

One of the most confusing issues an Open Records Officer faces is determining whether they may charge duplication costs when responding to a request and, if so, determining the amount that they may charge. Section 1307 of the RTKL provides that the OOR has the authority to establish duplication fees for local agencies. 65 P.S. § 67.1307(b)(1)(i). Pursuant to this authority, the OOR has approved fees of up to \$ 0.25 per page for black and white copies of standard sized records as set forth in the OOR’s Fee Schedule.

When paper copies are requested, determining the amount of copying fees is fairly straightforward. For anything else, however, determining the amount of fees is complicated. Moreover, there are some documents where the OOR has determined that the agency cannot charge copying fees. This post will touch on how the Office of Open Records has answered some common questions that an Open Records Officer may have about fees.

When Does the Requester Have to Pay the Fees?

Section 901 of the RTKL provides that “[a]ll applicable fees shall be paid in order to receive access to the record requested.” 65 P.S. § 67.901. Accordingly, the RTKL contemplates a contemporaneous exchange of fees for records and an agency, after processing the request, may withhold the responsive records until the Requester pays the duplication and postage fees for the records. For example, in *Daley v. Achievement House Charter School, AP 2010-0300*, the OOR held that an agency may require payment of any outstanding balances from previous RTKL requests before releasing any records that are responsive to a current request. Similarly, in *Mezza Cappa v. Borough of West Easton, AP 2011-0833*, the OOR upheld the Borough’s refusal to allow a requester with outstanding copying fees to review records, stating: “the Borough is entitled to withhold access to the records until the prior fee is paid and may refuse to process the Request until all outstanding fees are paid.”

Doesn’t the Fee Have to Exceed \$100 to Withhold Records Prior to Payment?

No. The contemporaneous exchange rule is different than the “prepayment” option set forth in Section 1307(h) of the RTKL, which states:

Prior to granting access in accordance with this act, an agency may require a requester to prepay an estimate of the fees authorized under this section if the fees required to fulfill the request are expected to exceed \$100.

65 P.S. § 67.1307(h). In this situation, the agency does not need to *process* the request until the prepayment is made. However, the estimate must be based on the number of responsive records, not the total number of documents in a file. In *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d 638, 654 (Pa. Commw. 2016) the Commonwealth Court noted that a prepayment demand must be based on “the cost of duplicating and sending public records, not potentially responsive records, to a requester.”

In some circumstances, given the amount of work required to calculate an accurate estimate of fees under Section 1307, it may be easier to process the request and insist on a contemporaneous exchange of fees rather than insisting on prepayment under Section 1307(h).

What Fees Can I Charge when the Requester seeks to Inspect Records?

Generally, duplication fees cannot be charged by an agency for the inspection of records. *Milkos v. Ford City Borough*, AP 2011-0278. However, an agency is entitled to impose duplication fees for records required to be redacted prior to the inspection of the records by a requester. *Robbins v. Pa. Dep't of Transp.*, AP 2012-1903. In its Fee Schedule, the OOR explains that the agency may not charge for the redaction, but it may charge for copies it must make to securely redact the material before allowing the requester to view the records. Since requester has already paid for these copies, the requester may take the redacted copies without additional charge.

As set forth above, the agency may insist on payment of any copying fees due prior to or contemporaneously with the inspection. In addition, if the requester has any outstanding balance for fees, the agency is not required to process the request until the outstanding fees are paid.

What Fees Can I Charge when the Requester seeks Electronic Records?

For purposes of our discussion, an electronic record is a record that is stored in an electronic medium. Section 701 of the RTKL provides that “[a] record being provided to a requester shall be provided in the medium requested if it exists in that medium otherwise, it shall be provided in the medium in which it exists.” See 65 P.S. § 67.701. The RTKL does not define “medium”; however, the OOR has defined it “as the substance through which something is transmitted or carried, a ‘means,’ such as on paper or on the hard-drive or on a database or over the internet.” Therefore, “under the RTKL, ‘medium’ is a broad term, and ‘electronic medium’ encompasses all electronic formats.” Generally, PDF and Excel are different electronic formats, but both fall within the definition of electronic medium.

The OOR’s Fee Schedule permits an agency to charge copying fees for any printing necessary to securely redact records, even when inspection is sought. In *Mollick v. Township of Worcester*, AP 2015-0678, the OOR held that it was permissible to charge a copying fee for electronically redacted records that were then printed if printing was the only way to permanently and securely redact the records.

However, no other fees may be imposed for records delivered via email. In *Oser v. Borough of Mount Pocono*, AP 2019-0001, the Requester sought certain emails in electronic format. The requester specifically stated that he did not want hard paper copies. The agency responded by printing and scanning the documents into PDF format and charged the Requester \$53.00 for copying charges. On appeal, the OOR held that the fees were impermissible because the records existed in an electronic format, were provided in an electronic format and did not require any redaction.

Am I Required to Covert Paper Records into Electronic Format?

No. Section 705 of the RTKL provides: “When responding to a request for access, an agency shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record.” 65 P.S. § 67.705

In *Youdelman v. William Penn School District*, AP 2018-1278, 2018 WL 3968625, a request was filed seeking electronic copies of records. The District granted the request, contingent upon the payment of duplication and postage fees for paper copies. Requester appealed to the OOR, challenging the assessment of fees for records requested in electronic format.

On appeal to the OOR, the School District submitted evidence that the requested records did not exist in electronic format. Noting that Section 705 of the RTKL does not obligate an agency to convert paper records into electronic format, the OOR held that the School District could impose duplication charges for records only maintained in paper format.

Accordingly, you can deny the Request or insist on payment prior to delivery of the paper records.

DO NOT, however, convert the records into electronic format if you expect to be paid for copying fees. In *Friedman v. Upper Darby School District*, AP 2017-0397, the OOR held that while an agency is not required to convert paper records into electronic format, where an agency chooses to do so, it may not charge a duplication fee.

Can I Charge a Fee for the Time and Labor Spent Responding to the Request?

No. While an agency may spend hours responding to a RTKL Request, it is not permitted to pass these costs onto the requester. The OOR Fee Schedule simply does not permit an agency to charge copying fees for the time and labor making redactions or otherwise responding to a request.

Can a Requester Take Pictures of Records without Paying Duplication Fees?

In most cases, yes. Provided such duplication does not violate the Copyright Act or other law, the OOR has held that if the requester is using his/her own camera, such as a cell phone camera, the agency may not impose a fee if a requester photographs a record. *Muenz v. Twp. of Reserve*, AP 2015-1021. This decision has been incorporated in the OOR Fee Schedule.

To ensure that no illegal photographing takes place, an agency may schedule times for the inspection so that a records review occurs under the supervision of agency staff. *Muenz v. Twp. of Reserve*, AP 2015-1021. Moreover, if any documents need to be redacted prior to inspection, the requester is responsible for those costs.

What if the Request Seeks to Inspect and Requests Copies?

The OOR has held that, in appropriate circumstances, it is reasonable for the agency to choose whether to provide copies or allow inspection. For example, in *Riches v. Pa. State Police*, AP 2015-2409, 2015 WL 7874372 the request sought inspection and copies of records. The OOR concluded that because the Request sought to both inspect and copy records, it was reasonable for the agency to make copies of records available to the requester and it was permissible for the agency to charge for copies.

What if there are Conflicting Statutory Fees?

As set forth in the OOR Fee Schedule, if a statute other than the RTKL governs the amount that an agency may charge for a certain type of record, that other statute controls. The Fee Schedule provides the following examples:

- A Recorder of Deeds may charge \$0.50 per uncertified page and \$1.50 per certified page. 42 P.S. §21051;
- Police Departments may charge up to \$15 for a copy of a vehicle accident report and the Philadelphia Police Department may charge up to \$25 per copy. 75 Pa.C.S. §3751;
- State Police may charge \$5 for each copy of the Pennsylvania State Police full report of investigation. 75 Pa.C.S. § 1956(b).

In addition, the Fee Schedule references: the Municipalities Planning Code; the Criminal History Record Information Act; and the History Code.

There are a few cases pending before the OOR involving requests for transcripts generated pursuant to the Municipalities Planning Code (*i.e.*, Zoning Hearing Board hearing transcripts). Transcripts generated pursuant to the MPC and through

other means will be addressed in a future post.

Hopefully this long post answers some of your questions regarding the ability to charge fees under the RTKL.

If you have any questions or comments, please do not hesitate to contact Chris Voltz or any of the other Municipal and School Attorneys at Tucker Arensberg, P.C.