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JASON T. CONFAIR

E-MAIL: confair@kkaglaw.com

January 7, 2009

Deputy Director Barry Fox  
Commonwealth of Pennsylvania  
Office of Open Records  
Commonwealth Keystone Building  
400 North Street, 4<sup>th</sup> Floor  
Harrisburg, PA 17120-0225

Re: Advisory Opinion

Dear Deputy Director Fox:

I hope your holiday season was memorable. As you may recall, we spoke on November 25, 2008, about the Office's Fee Structure and, more specifically, about charging for e-mail transmission of public records. You assured me during that conversation that the Office's intent is to allow agencies to charge for e-mailed duplicates on a "per page" basis, meaning an agency is permitted to charge up to 25¢ per each page attached to an e-mail. After our conversation, I sent an e-mail to you memorializing what we had discussed and asking for further guidance.

The next day, November 26, 2008, I sent an e-mail to your secretary requesting the Office issue an advisory opinion addressing other questions. A copy of that e-mail is attached to this letter. While I would appreciate it if your Office would issue an advisory opinion addressing the questions raised in my November 26, 2008, e-mail, I understand the Office is dealing with more pressing matters at this time. It is my understanding there is substantial disagreement between your Office and the Governor's Office as to whether redaction fees may be assessed and as to whether personnel time may be used in calculating "actual costs." Obviously, it makes sense to settle the Fee Structure itself before dealing with the minutiae.

I believe, however, there is one matter I previously raised which demands the Office's immediate attention. Our firm serves as solicitor to fourteen (14) Pennsylvania school districts and various other government agencies, and serves as special counsel to dozens of other school districts and government agencies. Over the past few days, many of our school clients have received Right to Know Law requests via e-mail from a newspaper seeking copies of superintendent contracts and collective bargaining agreements. These requests ask that those public records be provided by e-mail attachment. We have advised our school clients that charging for e-mail duplication is permitted, based upon your statement during our November 25, 2008, conversation. Nevertheless, many of our clients would like written assurance from your Office that these charges are lawful and appropriate in order to avoid litigation on the issue.



Deputy Director Barry Fox

January 7, 2009

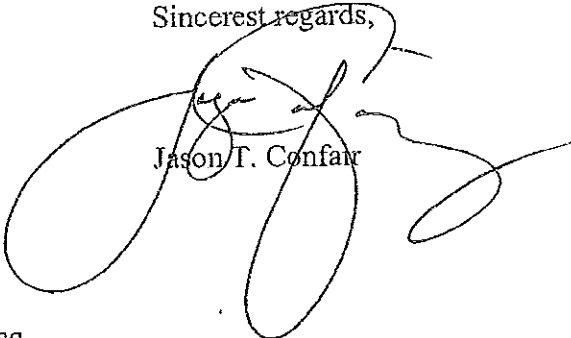
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Fortunately, the General Assembly has given your Office the authority and the responsibility to deal with significant Right to Know Law issues before they reach the courtroom. Section 1310(a)(2) of the Right to Know Law provides: "There is established in the Department of Community and Economic Development an Office of Open Records. The office shall...[i]ssue advisory opinions to agencies and requesters." (emphasis added).

We believe it is imperative the Office issue an advisory opinion as soon as possible addressing the following issue: whether Pennsylvania agencies may charge a per page fee for e-mailing duplicates as an attachment to requesters and under what circumstances can these fees be assessed.

While I recognize the Office is burdened with a number of pressing legal and administrative issues right now, I believe the e-mail fee question raised above is very significant and demands the Office's immediate deliberation. We strongly believe an Office of Open Records advisory opinion addressing the e-mail fee question would resolve any potential ambiguity regarding the appropriateness of e-mail fees, and will provide extremely helpful guidance to local agencies throughout the Commonwealth who are being asked to provide copies of public records in e-mail form. I appreciate your time and consideration.

Sincerest regards,



Jason F. Confair

JTC:prm:94754-1.

Enclosure

cc: Clarence C. Kegel, Jr., Esq.  
Howard L. Kelin, Esq.  
Jeffrey D. Litts, Esq.

Dear Mary Ann,

The purpose of this email is to confirm our conversation today, and to follow up with further questions about the Fee Structure for presentation during the Monday, December 1, 2008 Office meeting.

Please accept this email as a request for the following: 1) informal written answers to the questions raised in this email and the email I forwarded to Deputy Director Fox on Wednesday, November 19, 2008; and 2) a formal advisory opinion answering the questions raised in both this email and my November 19<sup>th</sup> email. As you probably already know, 65 P.S. § 67.1310(a)(2) allows the Office of Open Records to: "Issue advisory opinions to agencies and requesters". Section 1310 became effective on February 14, 2008. 65 P.S. § 67.3104(1)(i).

The additional questions I have follow:

1) Under the section entitled "Certification of a Record," the fee does "not include notarization fees". When an agency calculates "actual cost" for specialized documents and faxes, or even certified records, may the agency charge fees it incurs for notarization of these documents?

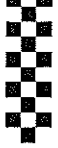
2) My understanding from my conversations with Deputy Director Fox is that email duplications of records maintained exclusively in electronic form are supposed to be charged using the per page duplication fee. (As we discussed, I do not believe the Fee Structure is clear on this point.) But, what happens if an agency is asked, or decides, to scan a document stored in a non-electronic format into a file, and then attach the file to an email as a response? Is the agency permitted to charge a per-page duplication fee then as well?

3) The Right-to-Know Law reads: "A record being provided to a requester shall be provided in a medium requested if it exists in that medium; otherwise, it shall be provided in the medium in which it exists". 65 P.S. § 65.701(a). Furthermore, the Act does not require that agencies transmit a duplicate by any prescribed method. Presumably, when the Office talks about "color copies", "blue copies", and other methods of transmission in the Fee Structure, it is not implying agencies must use these transmission methods, whether upon request or otherwise. Is this presumption correct?

I greatly appreciate the Office's willingness to work towards clarifying these novel issues. Ultimately, we all have a shared goal of being able to provide clear guidance to Commonwealth agencies so that compliance with the new Right-to-Know law is as seamless as possible. I look forward to hearing from you, and have a Happy Thanksgiving.

Sincerest Regards,

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*TELECOPIER TRANSMITTAL COVER SHEET*

*DATE / TIME:* 1/28/2009 12:14:03 PM

*TO:* Mary Ann

*FAX NO.:* +1 (717) 425-5343,99999

*FROM:* Jason T. Confair

*TOTAL NUMBER OF PAGES, INCLUDING COVER SHEET:* 4

*COMMENTS:* Advisory Opinion Request

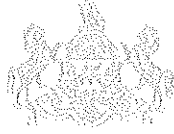
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COMMONWEALTH OF PENNSYLVANIA  
OFFICE OF OPEN RECORDS

February 12, 2009

Jason T. Confair, Esquire  
Kegel, Kelin, Almy & Grimm LLP  
24 North Lime Street  
Lancaster, PA 17602

RE: Advisory Opinion Request re: Copy Charges for Electronically Transmitted Records

Dear Mr. Confair,

Thank you for writing to the Office of Open Records ("OOR") with your request for an Advisory Opinion pursuant to the Right to Know Law, 65 P.S. §§67.101, *et. seq* ("RTKL").

You asked the OOR to interpret the RTKL and provide an opinion regarding the following issue: "whether Pennsylvania agencies may charge a per page fee for e-mailing duplicates as an attachment to requesters and under what circumstances these fees can be assessed."

Please be advised that the OOR has decided to grant your request for an Advisory Opinion. Unlike Final Determinations, the law does not establish a deadline for the issuance of Advisory Opinions by the Office of Open Records. The OOR will work diligently to provide Advisory Opinions as soon as practicable; however, please be advised that issuance of an Advisory Opinions will take at least ninety (90) days from the date OOR grants a request for an Advisory Opinion. Our response will be mailed to you and also placed on our website at <http://openrecords.state.pa.us>.

The OOR will contact you should any additional facts be necessary to render its Advisory Opinion. We appreciate your cooperation in this regard.

Respectfully,

A handwritten signature in black ink, appearing to read "Terry Mutchler".

Terry Mutchler  
Executive Director



COMMONWEALTH OF PENNSYLVANIA  
OFFICE OF OPEN RECORDS

March 26, 2009

Mr. Jason T. Confair  
KEGAL, KELIN, ALMY & GRIMM, LLP  
24 North Lime Street  
Lancaster, PA 17602

RE: Advisory Opinion – Charging for Electronically Transmitted Public Records

Dear Mr. Confair,

Thank you for writing to the Office of Open Records (“OOR”) with your January 7, 2009 request for an Advisory Opinion pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (“RTKL”).

The purpose of an Advisory Opinion is to provide written guidance to an agency or requester that may be relied upon in taking action. Please be advised however, that the views expressed in Advisory Opinions are those of the OOR and as such, they may be superseded by subsequent statute or court ruling.

As a solicitor to Pennsylvania school districts, you requested guidance regarding permissible charges for electronically transmitted documents. Your request for an Advisory Opinion is granted as outlined below.

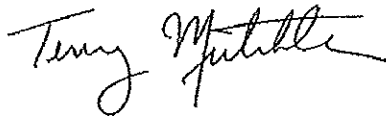
Your correspondence stated that “...many of our school clients have received Right to Know requests via e-mail from a newspaper seeking copies of superintendent contracts and collective bargaining agreements. These requests ask that those public records be provided by e-mail attachment. We have advised our school clients that charging for e-mail duplication is permitted based upon your statement during our November 25, 2008 conversation. Nevertheless, many of our clients would like written assurance from your Office that these charges are lawful and appropriate in order to avoid litigation on the issue.”

The RTKL authorizes the OOR to establish fees for duplication, printing, transmission by facsimile, etc., 65 P.S. § 67.1307. Accordingly, a schedule was posted on the OOR website, providing permissible fees for regular copies.

When a document already exists in electronic format and can be attached to an email, it is not permissible to charge for copies, because none were required to be made in order to fulfill the request. However, in the example you provided – a request for a

collective bargaining agreement - it would be appropriate to charge for copies if a bound volume is copied and then a PDF or other attachment is made from scanning those copies. In that instance, the agency has incurred the expense of copying the bound volume in order to make a document capable of being scanned, attached to an email and transmitted electronically. It is only permissible to charge for copies if it is required to duplicate the original using a traditional copier as fees are based upon actual out-of-pocket expenses for paper, toner, etc.

Respectfully,

A handwritten signature in black ink, appearing to read "Terry Mutchler". The signature is written in a cursive style with a prominent loop at the end of the last name.

Terry Mutchler  
Executive Director