



**STATE OF TENNESSEE
COMPTROLLER OF THE TREASURY
OFFICE OF OPEN RECORDS COUNSEL
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**Justin P. Wilson
Comptroller**

December 23, 2014

Mr. Alex Friedmann
Via email: afriedmann@prisonlegalnews.org

You have requested an opinion from this Office that addresses the following issue:

Does the Schedule of Reasonable Charges¹ permit a records custodian to charge \$0.15 per page when the custodian provides copies of records only in an electronic format?

It is the opinion of this Office that, in situations when the records custodian provides copies of records only in an electronic format, the per page charge is only permitted if actual paper copies were produced.

Analysis

State law² allows a records custodian to “require a requestor to pay the custodian's reasonable costs incurred in producing the requested material and to assess the reasonable costs in the manner established by” the Office of Open Records Counsel. This Office worked with the Advisory Committee on Open Government to establish the Schedule, which was most recently revised in December 2010.

Pursuant to T.C.A. Section 10-7-506, with a properly adopted, reasonable rule in place, a records custodian may charge for copies or duplicates in accordance with the Schedule.³

¹ Tenn. Code Ann. Section 8-4-604(a)(1) directs the Office of Open Records Counsel to “establish a schedule of reasonable charges that a records custodian may use as a guideline” (hereinafter referred to as the “Schedule”).

² Tenn. Code Ann. Section 10-7-503(a)(7)(C)(i).

³ The Tennessee Attorney General’s Office opined that before a state level entity can assess fees permitted by Tenn. Code Ann. Section 10-7-503(a)(7)(C)(i), the entity is required to promulgate a rule through the Uniform Administrative Procedures Act. There appears to be no judicial guidance as to what actions a functional equivalent of a state level entity must take.

The Schedule requires the rule to be “evidenced by a written policy authorized by the governmental entity’s governing authority”. The Schedule establishes a per page charge for copies or duplicates of records made on paper⁴ as well as a formula for calculating labor costs. A records custodian has the ability to charge for copies or duplicates above the fee set out in the Schedule, but only after a cost analysis has been performed showing that the actual cost to the custodian exceeds the fee in the Schedule⁵.

No standard fee is established for copies produced on medium other than on paper, although guidance is given as to the components to be considered in establishing such copying or duplication charges⁶.

Previously, this Office opined in a letter dated November 9, 2012 addressed to Mr. Briton Collins⁷:

The office is currently researching whether or not there is a way to determine how much it costs to send information electronically. Until such time as that determination has been made, it is the opinion of this office that when a request is made for records in .pdf and the records are not otherwise maintained in that format, a governmental entity that has a properly adopted records policy in place is permitted to assess a requestor any labor necessary to produce the records after one (1) hour is incurred, but is not permitted to assess the requestor the per page fee that can be assessed for paper copies.

No determination has been made with respect to charges or fees for internal costs of using email or other forms of electronic transmission of copies. In accordance with the 2012 opinion, the Schedule does not authorize a per page fee for a page of records sent electronically.

For purposes of this Opinion, we will assume that a records custodian has a properly adopted, reasonable rule authorizing charges and fees evidenced in writing. When a records custodian provides the copy or duplicate only in an electronic form, the custodian is allowed to charge the per page fee if the custodian was required to print or produce a paper version of the record in order to create the electronic copy. For example, if the records custodian was required to print or produce a paper version of the record in order to redact information, then the custodian may impose the per page fee for each printed page. If the public record existed in paper form, without need for redaction, the act of scanning the record does not trigger the per page fee, but may trigger labor charges and other production charges. If the public record already exists in the electronic format that will be sent to the requestor, without need for redaction, then the act either of copying, or

⁴ The Schedule distinguishes between black & white copies and color copies, but not between letter and legal sizes.

⁵ The records custodian is not required to charge for copies and may charge less than the amounts specified in the Schedule.

⁶ The Schedule under “Additional Production Charges” addresses use of the most economical and efficient methods of production, costs and means of delivery, use of outside vendors, and archive fees.

⁷ Op. Tenn. ORC 12-04 (November 9, 2012).

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of sending, the record does not trigger the per page fee, but may trigger labor charges and other production charges.

Conclusion

For the reasons set out above, it is the opinion of this Office that a records custodian providing records in an electronic format may charge the requestor for documented:

- actual, out of pocket costs for discs, flash drives or other similar device used to convey the records;
- shipping or outside vendor charges;
- labor in accordance with the Schedule; and
- per page costs only when paper copies that did not already exist are required to be produced in response to the request.

Ann V. Butterworth
Open Records Counsel