

FOR YOUR INFORMATION

News for School Clients

**FEES MAY NOT BE IMPOSED
FOR REDACTING PUBLIC RECORDS**

August 2004



740 Regent Street
P.O. Box 1507
Madison, Wisconsin
(608) 257-7766

Joanne H. Curry care of info@lathropclark.com

August 2004
News For Clients

Fees May Not Be Imposed For Redacting Public Records

When the Wisconsin Supreme Court released its opinion in *Osborn v. Board of Regents* in July 2002, it created some uncertainty for public records custodians concerning whether they may charge a fee to persons requesting a public record for the time associated with redacting a record. Redaction is the act of reviewing a document and concealing information in the document that is not subject to disclosure before the release of the record. (This is frequently accomplished by simply covering up the information with a black marking pen.) In *Osborn*, the Court required the University of Wisconsin System to release numerous records related to university applicants. The Court, however, stated that the UW System could charge a fee to Osborn for the cost of *complying* with the records request, suggesting that redaction costs could be included in the fee. This decision prompted the UW System to include redaction costs in its notice of the fees to Osborn. The fees totaled \$44,000.

After receiving a similar, yet less expensive notice of costs, a Madison newspaper recently sought an opinion from the Wisconsin Attorney General on whether records custodians may charge for such redaction costs. The Attorney

General concluded that there was no authority to support such charges.

In its letter to the Wisconsin Attorney General, the *Isthmus*, a Madison weekly newspaper, stated that it had submitted a written public records request to the Madison Metropolitan School District (District) asking for all correspondence from the public to the superintendent and the Board of Education concerning proposed cuts to the 2004-2005 budget. It also asked for an estimate of the fees associated with the request. In its response letter, the District stated that it needed to conduct a balancing test as to whether or not the public interest in disclosure of the correspondence was outweighed by the other legal considerations. It then estimated the costs of complying with the request at \$613 and stated that this amount included location fees, copying charges, and the actual costs of reviewing the records and redacting information not subject to disclosure. The District's letter prompted the *Isthmus* to request an opinion from the Wisconsin Attorney General as to whether records custodians may charge for the cost of reviewing records or redacting information.

The Attorney General concluded that the

Wisconsin Public Records Law plainly and clearly authorized the District to charge for location fees and copying charges, but that there was no specific authorization for the recovery of redaction costs. The Attorney General stated that, although *Osborn* may afford the basis for a claim that redaction costs could be included as part of the costs for public records request, the Wisconsin Supreme Court did not explicitly state as much. The Attorney General also noted that the Wisconsin Public Records Law does not authorize the imposition of a fee for performing the balancing test. As a result, without any explicit authorization by statute or by case law for the recovery of the cost of redaction and in light of the broad presumption under state law of open access to public records, the Attorney General concluded that charging for the time associated with redacting records would be inappropriate.

Such informal letter opinions from the Attorney General are not statements of the law, but instead are interpretations of the law by the Attorney General on certain issues. However, because the Attorney General enforces the Wisconsin Public Records Law, his or her interpretations provide important guidance in complying with the law. In short, a records custodian is limited in the costs it can charge for complying with a records request. The Wisconsin Supreme Court may have

intended to allow the UW System to charge Osborn for redaction costs, but it did not make its intentions clear and did not provide any support for such a conclusion in its decision. The Wisconsin legislature declined to address this issue directly in its recent revision of the Wisconsin Public Records Law in 2003. Thus, records custodians should continue to rely on the specific language of the statute, Wis. Stat. § 19.35(3), when assessing costs against any record requesters.

Fees may not exceed the actual, necessary and direct costs of reproduction and transcription of the record. Such costs include photocopying charges. Location fees, not exceeding the actual, necessary, and direct costs of location, may also be charged, but only if the total cost of location exceeds \$50. A fee may also be imposed for the actual, necessary and direct cost of mailing or shipping of any copy or photograph of a record that is mailed or shipped to the requestor. An authority or records custodian can demand payment of fees in advance if applicable fees exceed \$5. An authority or records custodian who is found to have charged excessive fees may be required to forfeit up to \$1,000. A court can also award reasonable costs to the state or county associated with enforcement of this provision.

If you have any questions regarding this topic, please call Rick Verstegen of Lathrop & Clark LLP at 608-286-7233. Attorney Verstegen provides counsel in the areas of school law, labor and employment, including collective bargaining, public records, and wage and hour law, among other areas.

Disclaimer: Lathrop & Clark LLP provides this material for information about legal issues and not to give legal advice. However, material may quickly become outdated. Anyone referencing this material must update the information presented to ensure accuracy. The use of the materials does not establish an attorney-client relationship, and Lathrop & Clark LLP recommends the use of legal counsel on specific matters.