



January 12, 2016

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RE: Advisory Opinion – Requiring Payment When A Requester Has Not Retrieved Records From A Prior Request

Dear Ms. Smith:

Thank you for writing to the Office of Open Records (“OOR”) concerning the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101-3104. As discussed, the OOR is treating your correspondence as a request for an Advisory Opinion in accordance with Section 1310(a)(2) of the RTKL, 65 P.S. § 67.1310(a)(2).

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be advised, however, that the views expressed in Advisory Opinions are those of the OOR and, as such, they may be superseded by subsequent statute or court ruling.

In your correspondence, you set forth the following factual scenario:

An individual seeking records (“Requester”) files a RTKL request with an agency. In response, the agency creates copies of the requested records and states that records can be retrieved at the agency’s office upon the Requester’s payment of a duplication fee.^[1] The Requester, however, fails to retrieve the records within 60 days, and, pursuant to 65 P.S. § 67.905, the agency destroys the copies of the requested records. Subsequently, the Requester files a new RTKL request seeking a different set of records.

With the above factual scenario in mind, you ask:

May an agency require a requester to pay the duplication fees assessed for making copies of records in response to a prior RTKL request, even though the Requester never retrieved the records?

¹ The OOR notes that the Requester in this scenario could appeal the fees set forth in the agency’s response within 15 business days pursuant to 65 P.S. § 67.1101. See *Prison Legal News v. Office of Open Records*, 992 A.2d 942 (Pa. Commw. Ct. 2010); *State Employees’ Ret. Sys. v. Office of Open Records*, 10 A.3d 358 (Pa. Commw. Ct. 2010).

In order to obtain access to records, a requester must pay “[a]ll applicable fees.” 65 P.S. § 67.901. Section 905 of the RTKL provides that

If an agency response to a requester states that copies of the requested records are available for delivery at the office of an agency and the requester fails to retrieve the records within 60 days of the agency’s response, the agency may dispose of any copies which have not been retrieved and retain any fees paid to date.

65 P.S. § 67.905.

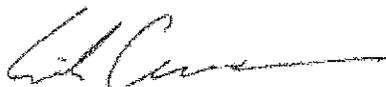
In *Department of Transportation v. Drack*, 42 A.3d 355, 363 (Pa. Commw. Ct. 2012), the Commonwealth Court held that, when a requester “owes money for an agency’s fulfillment of an earlier request ... Section 901 of the RTKL permits an agency to process the request but to withhold *access* to the request until all applicable fees, **including fees for earlier requests**, are paid” (emphasis in bold added).

Based on the pertinent language in *Drack* in conjunction with Sections 901 and 905 of the RTKL, it can be discerned that agencies may deny access to records sought in RTKL requests based on a requester’s outstanding fees stemming from a prior RTKL request. *Id.* This would apply even where the requester never retrieved the records, because the agency, in responding to the prior request, had been required to produce physical copies of the requested records.

However, even if fees are owed in response to a prior RTKL request, agencies must still timely process future RTKL requests. *See* 65 P.S. §§ 67.901-.902 (requiring agencies to issue a response or extension notice within five business days of an agency’s open-records officer’s receipt of a request). Further, if an agency chooses to deny a request due to fees owed as a result of a prior request, the agency should raise *all* applicable reasons for denying access, including the fact that past due fees are owed, in its response.

Thank you for your inquiry. The OOR will post this Advisory Opinion on the OOR’s website: <http://openrecords.pa.gov>.

Respectfully,



Erik Arneson
Executive Director