



July 21, 2017

Lisa Widawsky Hallowell, Esq.
Senior Attorney
Environmental Integrity Project
509 Vine Street, #2A
Philadelphia, PA 19106

RE: Request for Advisory Opinion regarding Agency Imposed Electricity Usage Fee

Dear Ms. Hallowell:

Thank you for writing to the Office of Open Records (“OOR”) with your July 11, 2017 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 issue an Advisory Opinion addressing whether “an agency [may] assess a fee [under the RTKL] for the use of the agency’s electricity during a file review, where the requester uses portable scanning or copying equipment plugged into the agency’s electrical outlet, but without otherwise using any agency resources such as paper or toner[.]”

The OOR declines to grant your request for an Advisory Opinion. We decline to accept this request because the OOR has issued several Final Determinations that address similar issues related to permissible fees under the RTKL. *See, e.g., Friedman v. Upper Darby Sch. Dist.*, OOR Dkt. AP 2017-0397 (“The RTKL permits an agency to recoup necessarily incurred costs associated with fulfilling requests [under Section 1307(g) of the RTKL]”) (quoting *Daly v. Achievement House Charter Sch.*, OOR Dkt. AP 2010-0365.

The issues you raise are better addressed within the context of the RTKL appeal process, which permits a full examination of the facts and legal issues surrounding a specific request and agency response and also includes the presentation of opposing legal positions and supporting evidence.

Thank you for your inquiry. This response and your request for an Advisory Opinion will be posted on the OOR's website.

If you have any additional questions, please do not hesitate to contact our office.

Sincerely,

/s/ Charles Rees Brown

Charles Rees Brown, Esq.
Chief Counsel

cc: Gretchen Moore (via e-mail only);
Alan Shuckrow (via e-mail only)



July 11, 2017

Via Email

Erik Arneson
Executive Director
Office of Open Records
400 North St., 4th Floor
Harrisburg, PA 17120
openrecords@pa.gov

Re: Request for an Advisory Opinion Regarding Scanner Fees

Dear Executive Director Arneson:

The Environmental Integrity Project (“EIP”) is writing to request an advisory opinion regarding the assessment of fees on requesters in file reviews pursuant to Section 1310(a)(2) of the Pennsylvania Right-to-Know Law, 65 P.S. § 67.1310(a)(2). Specifically, may an agency assess a fee for the use of the agency’s electricity during a file review, where the requester uses portable scanning or copying equipment plugged into the agency’s electrical outlet, but without otherwise using any agency resources such as paper or toner?

This request for an advisory opinion is based on the following events that recently occurred during and following a Right-to-Know Law file review in Robinson Township, Washington County. On April 6, 2017, Cathy Lodge, a resident of Robinson Township, and Lisa Graves Marcucci, an employee EIP, conducted a file review, which they had scheduled in advance with the Township’s Open Records Officer, at the Robinson Township Municipal Building. Prior to this review, Ms. Lodge and Ms. Graves Marcucci had conducted file reviews of the Township’s public documents on multiple occasions. On those previous occasions, Ms. Lodge and Ms. Graves Marcucci had brought a portable scanner with them to the file reviews to make electronic copies of the files.

During the April 6 file review, Ms. Graves Marcucci arrived shortly after Ms. Lodge and began to set up the portable scanner. A police officer entered the file review room and informed Ms. Lodge and Ms. Graves Marcucci, on instruction from the Township’s Open Records Officer, that they could not use the Township’s electrical outlets to power the scanner. Ms. Graves Marcucci then contacted EIP attorney Lisa Hallowell, who in turn contacted the Township solicitors to raise issue and inform them that such a prohibition was contrary to the requirements of the Right-to-Know Law. Following these calls, the police officer stated that Ms. Graves Marcucci and Ms. Lodge could use the scanner for the review, but at the cost of \$0.25 per page.

At that point, EIP attorney Lisa Hallowell contacted George Spiess of the Office of Open Records. Mr. Spiess instructed the officers over the phone that the Township could not prohibit or charge for the use of a portable scanner in a file review under the Right-to-Know Law. Following these instructions, Ms. Lodge and Ms. Graves Marcucci were able to complete their file review using the portable scanner without further incident or assessment of fees.

The following week, at the Township Board of Supervisors' monthly meeting on April 10, 2017, the Board passed an ordinance amending the Township's Right-to-Know Law Policy. Under the amended policy, the Township will require a fee of \$0.05 per page where the requester "utilizes his/her own copying/scanning equipment and the Township's electricity." See Attachment A. "Arrangements must be made in advance through coordination with the Township RTKL officer." *Id.*

We believe that this amended policy violates the Right-to-Know Law and guidance that the Office of Open Records has issued in three main ways. First, use of the Township's electricity is akin to the "routine expenses" inherent in complying with Right-to-Know Law requests, such as staff time or salary, for which the Right-to-Know Law, the Office of Open Records, and courts have prohibited the assessment of fees. See 65 P.S. § 67.1307(g); Office of Open Records, RTKL Fee Structure (Sep. 15, 2016), <http://www.openrecords.pa.gov/RTKL/FeeStructure.cfm> [hereafter RTKL Fee Structure]; *State Employees' Retirement System v. Office of Open Records*, 10 A.3d 358, 360 (Pa. Cmwlth. 2010). As Pennsylvania courts have stated, "[t]he only permissible fees under the RTKL are for duplication, postage, and certification." *Pa. Dep't of Education v. Bagwell*, 131 A.3d 638, 651 (Pa. Cmwlth. 2015). For similar reasons, an agency may not assess any fee for the delivery of electronic records via email, even though this delivery would certainly involve expenses for electricity and internet bandwidth. The only exception to this prohibition on assessing fees is where the agency actually printed copies of the records in the process of creating the electronic document—"as fees are based on actual out-of-pocket expenses for paper, toner, etc." See RTKL Fee Structure; Office of Open Records, *Advisory Opinion – Charging for Electronically Transmitted Public Records 1-2* (March 26, 2009) [hereafter *Advisory Opinion*].

Second, use of personal scanning equipment rather than the agency's copying equipment is nearly identical to a situation in which a requester opts to duplicate records by photographing them. As the Office of Open Records has determined, the agency may assess no fee where the requester photographs records using his/her own camera—with the narrow exception of where the agency must make physical reproductions of the records in order to redact them. See RTKL Fee Structure; *Muenz v. Township of Reserve*, OOR Dkt. AP 2015-1021, 2014 WL 10288926.

Third, even assuming that the assessment of a fee for use of personal scanning equipment is permissible under the Right-to-Know Law, Robinson Township's fee of \$0.05 per page does not appear to be a "reasonable" fee based on actual costs. The Right-to-Know Law requires that duplication fees "must be reasonable and based on prevailing fees for comparable duplication services provided by local business entities." 65 P.S. § 67.1307(b)(2). Both the Office of Open Records and courts interpreting the statute have stated that the fee should be roughly equivalent to the cost actually incurred by the agency in providing the service. For example, a fee estimate of charges must generally "must correspond to the number of pages of records that will be sent to

the requester and the cost of sending them,” and “fees are based upon actual out-of-pocket expenses for paper, toner, etc.” *Dep’t of Education v. Bagwell*, 131 A.3d at 652; *Advisory Opinion* at 2.

We believe that Robinson Township’s fee of \$0.05 per page is not based on any actual expense to the Township or prevailing fees for comparable services. As an example, the portable scanner that Ms. Graves Marcucci typically uses for file reviews consumes 18 Watts of electricity while scanning. Epson, WorkForce DS-510 Color Document Scanner 2, *available at* <https://images-na.ssl-images-amazon.com/images/I/A1OAV78Ji0L.pdf>. Assuming the scanner is constantly scanning documents, it will consume 0.3 Watt-hours in a minute. As the scanner is capable of scanning 26 pages per minute, it will consume 0.0115 Watt-hours per page (or 0.0000115 kWh per page). *Id.*

Electrical rates in Midway, Pennsylvania—the closest municipal data available—are 3.37 cents/kWh (commercial rates) or 7.46 cents/kWh (residential rates). Electricity Local, Midway, PA, <https://www.electricitylocal.com/states/pennsylvania/midway/> (last visited May 30, 2017). Based on these rates, the electricity consumed to scan one page would cost \$0.00000038755 at commercial rates or \$0.0000008579 at residential rates. Robinson Township’s fee of \$0.05 per page is more than 129,000 times higher than the actual commercial cost and more than 58,000 times higher than the actual residential cost. The fee does not, therefore, appear to be based on actual expense to the Township or prevailing fees for electricity.

Robinson Township’s fee for the requester’s use of his/her own scanning equipment appears to violate the requirements of the Right-to-Know Law and interpretations by the Office of Open Records and the courts in at least three ways. In order to provide clarity for the public, Robinson Township, and other agencies going forward, we respectfully request that the Office of Open Records provide an advisory opinion on this subject.

Sincerely,



Lisa Widawsky Hallowell
Senior Attorney
Environmental Integrity Project
509 Vine Street, #2A
Philadelphia, PA 19106
Direct: (202) 294-3282
Fax: (202) 296-8822
Lhallowell@environmentalintegrity.org

Enclosure

cc: Robinson Township Solicitor Gretchen Moore, gmoore@smgglaw.com
Robinson Township Solicitor Alan Shuckrow, ashuckrow@smgglaw.com

ATTACHMENT A

Robinson Township Board of Supervisors

Monthly Meeting
April 10, 2017

AGENDA

CALL TO ORDER AND PLEDGE OF ALLEGIANCE

ROLL CALL

- | | |
|-----------------------------------|-------------------------------------|
| ___ Rodger Kendall, Chairman | ___ Gretchen Moore, Solicitor |
| ___ Mary Donaldson, Vice Chairman | ___ Chief Mark Dorsey, Zoning |
| ___ Regis Curtis, Supervisor | ___ Monica Miller, Township Manager |

PUBLIC DISCUSSION

Of items to be voted on only. *These agenda items are preceded by an asterisk.*

ADMINISTRATIVE

- *Approval of the Minutes from the Board of Supervisors Meeting on March 13, 2017
- *Authorize Payment of Bills & Payroll for the month of March
- *Approval of Correspondence for the month of March

REPORTS

- | | |
|----------------------------|-------------------------|
| a) Fire Departments | e) Supervisors |
| b) Police | f) Solicitor's Report |
| c) Zoning/Code Enforcement | g) Public Work's Report |
| d) Animal Control | h) Manager Report |

OLD BUSINESS - NONE

NEW BUSINESS

- * Motion to advertise Ordinance 01-2017
- *Adoption of Resolution 07-2017, authorizing the Appointment of the Property Maintenance Appeals Board
- *Adoption of Resolution 08-2017, RIGHT-TO-KNOW Policy.
- *Motion to hire a part-time employee for the road crew.
- *Motion to appoint HMT as alternative Engineers.

*Advertise?
Gretchen said
no.*

PUBLIC DISCUSSION

ADJOURNMENT

RESOLUTION OF TOWNSHIP OF ROBINSON, WASHINGTON COUNTY
BOARD OF SUPERVISORS - RESOLUTION NO. 08-2617

**A RESOLUTION OF THE BOARD OF SUPERVISORS OF THE TOWNSHIP OF
ROBINSON, WASHINGTON COUNTY, AMENDING ITS EXISTING RIGHT-TO-
KNOW LAW POLICY**

WHEREAS, Senate Bill No 1 (Act 3) was signed into law by Governor Edward G. Rendell on February 14, 2008. This legislation is effective January 1, 2009 and is called the "Right-to-Know Law"; and

WHEREAS, public records shall be accessible for inspection and duplication during regular business hours in the medium requested, if said public records exist in the requested medium and if the public records are not exempt and/or privileged pursuant to the Right-to-Know Law; and

WHEREAS, all requests for public records shall be governed by this Resolution and the aforementioned Pennsylvania Right-to-Know Law.

NOW THEREFORE, in consideration of the above recitals, the Board of Supervisors of the Township of Robinson, Washington County, adopts the following Right-to-Know Law Policy:

RIGHT-TO-KNOW LAW POLICY

I. Authority and Purpose

The Township of Robinson, Washington County, Pennsylvania ("**Township**") adopts this policy pursuant to Section 504(a) of the Right-to-Know Law, 65 P.S. §§ 67.101-67.3104 ("**RTKL**"). This policy supersedes and replaces any other Right to Know Law Policies formerly adopted by the Township.

The purpose of the this policy is to assure compliance with the RTKL, to provide access to public records of the Township, to preserve the integrity of the Township's records, and to minimize the financial impact to the Township's taxpayers regarding the resources utilized in the receipt and processing of public record requests and the retrieval and copying of public records.

II. Definitions

All of the definitions set forth in the RTKL are incorporated in to this policy by reference.

Business day. The regular business hours of the Township are Monday through Friday from 9:00am to 2:30pm. Business days exclude Saturday and Sunday and a weekday where the Township is closed for business.

III. Submitting a RTKL Request to the Township

A. Open Records Officer. The Township has designated the Township Secretary as the Open Records Officer to respond to RTKL requests.

The contact information for the Township's Open Records Officer (RTKL Officer) is:

Monica Miller, Township Manager/Secretary and Open Records Officer

By Mail/In Person: Robinson Township Municipal Building
8400 Noblestown Road
McDonald, PA 15057

Phone: (724) 926-8700

Facsimile: (724) 926-0108

E-mail: robinsontownshipmanager@yahoo.com

The Township Open Records Officer contact information is posted on the Township website at <http://www.robinsonpa.gov/>. The Township RTKL Officer may be changed from time-to-time by separate Resolution.

B. Request. Requests must be submitted in writing using the RTKL Uniform Request Form available on the Township website and be addressed to the Township Open Records Officer. If a requester chooses not to use the RTKL Uniform Request Form, the request will be considered an informal request, not subject to the RTKL. To allow the Township to locate requested records and determine whether those records are public, requests for records should be specific and concise and clearly identify as precisely as possible the records sought. Requesters should retain a copy of the request for their file as a copy of the request is necessary should a requester appeal the Township response.

C. Receipt of the request. The Township receives the request on the business day the Township Open Records Officer receives the request. Any request that is received by the Township after the close of regular business hours shall be deemed to be received on the next business day. If the request is received by an Township employee other than the Township Open Records Officer, the request will be forwarded to Township Open Records Officer as soon as practical.

D. Verbal and anonymous requests. The Township will not respond to verbal and anonymous requests for records. Requesters submitting verbal and anonymous requests for records may not pursue the remedies available to a requester under the RTKL.

E. Response period generally. The Township has five (5) business days to respond to a request for records under the RTKL, unless this time period is extended (see below). If a

Township does not respond, the request is considered “deemed denied” and a requester’s appeal rights commence.

IV. Township Response

A. Interim response. The Township is permitted to take an additional thirty (30) days to respond to any request for the reasons set forth in Section 902 of the RTKL, 65 P.S. § 67.902. If the Township invokes an extension, the Township will inform the requester in writing. If the Township does not respond at the end of the extension period, the request is considered “deemed denied” and a requester’s appeal rights commence.

B. Requester agreement to extend the response period. The requester may agree, in writing, to extend the response period beyond thirty (30) days. The requester must agree to the extension during the five (5) business day or Township extended response period. If the Township does not respond at the end of the agreed upon extension period, the request is considered “deemed denied” and a requester’s appeal rights commence.

C. Final response. The Township may grant a request, partially grant and partially deny a request, or deny a request in its entirety. The final response of the Township will be in writing. Should the Township fail to issue a response within the applicable response period, the request is deemed denied.

1. Granting access to records. The Township may grant a request for records by issuing a response: (1) granting access to inspect Township records during the Township’s regular business hours; (2) sending copies of the records to the requester; or (3) by notifying the requester that the records are available on the Township website or other publically accessible electronic means.

2. Denying or partially denying access to records. Should the Township deny or partially deny a request for records through redaction or otherwise, the Township will inform the requester of the denial or partial denial in writing. The response will inform the requester that the Township does not possess the responsive record or, if the information is exempt from public access, provide a citation to the relevant legal basis for withholding the requested information.

D. Fees. The Township will charge duplication and certification fees as follows (prepayment of fees is required in the amount specified by the RTKL Officer if the fees will exceed \$100):

Record Type/Delivery Method	Fee
Black & White Copies	Up to \$0.25 per copy. ⁽¹⁾
Color Copies	Up to \$0.35 per copy. ⁽²⁾
Specialized Documents ⁽³⁾	Up to actual cost.

Records Delivered via Email	No additional fee may be imposed, unless conversion of document is required. ⁽⁴⁾
CD / DVD	Up to actual cost, not to exceed \$3.00 per disc.
Flash Drive	Up to actual cost.
Facsimile	Up to actual cost. ⁽⁵⁾
Other Media	Up to actual cost.
Redaction	No additional fee may be imposed. ⁽⁶⁾
Conversion to Paper	Up to \$0.25 per page. ⁽⁷⁾
Photographing a Record	No additional fee may be imposed. ⁽⁸⁾
Requester utilizes his/her own copying/scanning equipment and the Township's electricity	\$.05 per page. ⁽⁹⁾
Postage	Up to actual cost of USPS first-class postage.
Certification	Up to \$5.00 per record. ⁽¹⁰⁾

Footnotes:

1. A "copy" is either a single-sided copy on 8.5"x11" paper, or one side of a double-sided copy on 8.5"x11" paper.
2. A "copy" is either a single-sided copy on 8.5"x11" paper, or one side of a double-sided copy on 8.5"x11" paper. Note that a requester may ask for black and white copies even if the original is in color and color copies are available.
3. Including, but not necessarily limited to, non-standard sized documents and blueprints.
4. If a requester asks to receive records which require redactions in electronic format, the Township may print the records to provide for secure redaction, then scan them in for delivery by email. Accordingly, the Township may charge the fees noted above for either B&W or color copies, as appropriate. If scanning of a document is required, that cost may be passed on to the Requestor.
5. If the Township must print records to send them by facsimile, the Township may charge the fees noted above for B&W copies.
6. If a requester seeks records requiring redaction, the Township may copy or print the records to provide for secure redaction. Accordingly, the Township may charge the fees noted above for either B&W or color copies, as appropriate.
7. If a record is only maintained electronically or in other non-paper media, duplication fees shall be limited to the lesser of the fee for duplication on paper or the fee for duplication in the original media, unless the requester specifically requests for the record to be duplicated in the more expensive medium. See §1307(e).
8. This assumes the requester is using his or her own camera, such as a cellphone camera, to photograph the records. If redaction is required prior to the requester being granted access to photograph records, the Township may copy or print the records to provide for secure redaction. Accordingly, the Township may charge the fees noted above for either B&W or color copies, as appropriate.

9. Arrangements must be made in advance through coordination with the RTKL officer.
10. Under the RTKL, the Township may impose "reasonable fees for official certification of copies if the certification is at the behest of the requester and for the purpose of legally verifying the public record." The OOR recommends no more than \$5 per record to certify a public record. Certification fees do not include notarization fees.

As expressly provided by 65 P.S. §67.1307(g), the Township has the authority to charge requesters reasonable fees for necessarily incurred costs. The Township will determine and charge such fees on a case by case basis.

V. RTKL Appeals

Generally. To challenge the denial or deemed denial of a request for Township records, an appeal may be filed with the OOR by contacting:

Executive Director
Office of Open Records
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225
openrecords@pa.gov

Criminal investigative records. To challenge the denial of a request or portion of a request on the basis that information was withheld as exempt criminal investigative records, a concurrent appeal should be filed by contacting:

District Attorney of Washington County
Washington County Courthouse, Suite 1003
1 South Main Street
Washington, Pennsylvania 15301
Phone: (724) 228-6790
Fax: (724) 250-4142

Requirements of an appeal. All appeals: must be in writing; must state the grounds upon which the requestor asserts that the requested records is a public record; must address any grounds stated by the Township for denying the request; and must include a copy of the request and the Township's response, if any. All appeals must be filed within 15 business days of the mailing date of the Township's denial or deemed denial of the request.

VI. Additional Information about the RTKL

Additional information regarding the RTKL and the request and appeal process, including the OOR Citizen's Guide, Township Guides, and related forms, are available on the OOR website at <http://openrecords.state.pa.us>.

RESOLVED BY THE BOARD OF SUPERVISORS OF ROBINSON TOWNSHIP THIS
10th DAY OF April, 2017.

ATTEST:

Township of Robinson

Township Secretary

Rodger Kendall
Chairman

Mary Donaldson
Vice Chairman

Regis Curtis
Supervisor