



Dave Yost • Auditor of State

June 12, 2013

OHIO ATTORNEY
GENERAL'S OFFICE

JUN 18 2013

Hon. Michael DeWine
Ohio Attorney General
30 East Broad Street, 14th Floor
Columbus, Ohio 43215

OPINIONS

Re: Opinion Request

Dear Attorney General DeWine:

Recently, a member of the public filed a complaint with the Office of Auditor of State advising that the Monroe County Auditor (the County Auditor) was charging a subscription fee for online access to the County Auditor's public records.

When contacted, the County Auditor advised that her office lacked sufficient funds to provide free online access to its public records. Desiring to promote open government, the County Auditor contracted with Digital Data Technologies, Inc. (DDTI), a private, third-party vendor, to build and maintain a portal through the County's website for online access to the County Auditor's public records. DDTI billed the County Auditor's Office for its services, and the County Auditor's Office passed those costs along to online users through a monthly subscription fee of \$15. According to the County Auditor, no funds in excess of the actual cost to the County Auditor from the third party vendor have been collected. At the request of the County Auditor, a legal opinion was issued by the Monroe County Prosecutor, James L. Peters, upon which the County Auditor relied in deciding to continue a monthly subscription fee for online access. The prosecutor's opinion was forwarded to the Auditor of State by the County Auditor, and copies of those letters are attached.

The Auditor of State annually audits county governments and must consider whether transactions, like the online access fee to recover the costs of making records available online through a third party vendor, are authorized by law.

In considering the propriety of charging an online subscription fee or charge, the several authorities which follow below touch indirectly upon the questions at issue.

Ohio Rev. Code § 149.43(B) provides in part:

(1) Upon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(8) of this section, upon request, a public office or person responsible for public records shall make copies of the requested public record available at cost and within a reasonable period of time. ...

...

(6) If any person chooses to obtain a copy of a public record * * *, the public office or person responsible for the public record may require that person to pay in advance the cost involved in providing the copy of the public record in accordance with the choice made by the person seeking the copy under this division.

The Ohio Supreme Court has consistently held that the purpose of R.C. 149.43 is to promote open government by providing persons with full access to public records. See *State ex rel. Schneider v. Kreiner*, 83 Ohio St. 3d 203, 205, 699 N.E.2d 83, 84 (1998); *State ex rel. The Miami Student v. Miami Univ.*, 79 Ohio St. 3d 168, 171, 680 N.E.2d 956, 959 (1997), cert. denied, 522 U.S. 1022 (1997). See generally *State ex rel. The Warren Newspapers, Inc. v. Hutson*, 70 Ohio St. 3d 619, 623, 640 N.E.2d 174, 178 (1994). Further, the Court has stated that a custodian of public records may grant greater access to those records than R.C. 149.43 requires. *State ex rel. Fenley v. Ohio Historical Soc.*, 64 Ohio St. 3d 509, 512, 597 N.E.2d 120, 123 (1992), reh'g denied, 65 Ohio St.3d 1436, 600 N.E.2d 679 (1992).

The Act provides minimum standards regarding access to public records. Providing greater access than those minimum requirements is the subject of this formal request for opinion.

An Ohio Attorney General opinion addresses a related matter involving a fee charged by a county recorder for online access to the county recorder's records when there was no third party vendor involved. OAG 2000-046. The Ohio Supreme Court has recently ruled that the cost of providing public records to a person requesting those records may include the cost paid to private contractors utilized by the public office as long as the decision to use a private contractor is reasonable. *State ex. Rel. Gambill v. Opperman*, 2013-Ohio-761.

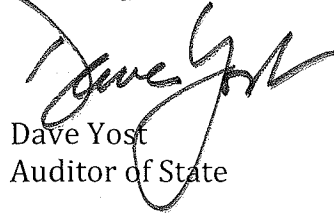
We, as the Auditor of State and the Prosecuting Attorney of Monroe County, request your formal opinion on the following questions raised in this situation relating to the Ohio Public Records Act:

1. If a County Auditor's public records are accessible online, are the online records considered to be "copies" or considered to be "records for inspection" for purposes of Ohio Rev. Code §149.43?

2. If a County Auditor's Office contracts with a private third party to provide online access to the Auditor's Office's public records, may that Auditor's Office charge a fee to those accessing the records online to cover the County's actual cost incurred in contracting with the private third party to provide this service?

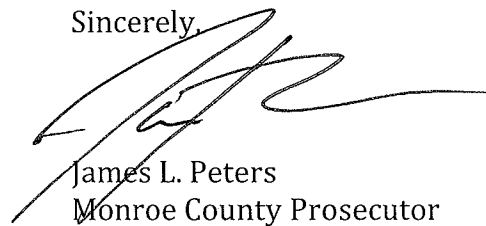
Your assistance in this matter is appreciated.

Sincerely,



Dave Yost
Auditor of State

Sincerely,



James L. Peters
Monroe County Prosecutor

MONROE COUNTY AUDITOR

Pandora J. Neuhart, Auditor

101 North Main Street Room 22 Woodsfield, Ohio 43793

(740) 472-0873, fax (740) 472-2523,

E-mail: monroecountyauditor@yahoo.com

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**DAVE YOST
AUDITOR OF STATE**

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Ohio Auditor of State
Honorable Dave Yost
88 East Broad Street, 10th Floor
Columbus, Oh 43215

Dear Auditor Yost:

Please find enclosed a copy of the letter we discussed on Friday April 19th 2013. It is from the Monroe County Prosecutor James L. Peters in reference to Online Public Records.

In the letter he does address the Ohio Supreme Court decision that Cuyahoga County Recorder could not charge certain fees for documents it was providing online.

I hope you have been able to speak with Prosecutor Peters, and I look forward to our next conversation.

As always, should you have any questions, do not hesitate to contact me at the above number.

Sincerely,


Pandora J. Neuhart
Monroe County Auditor

MONROE COUNTY PROSECUTOR'S OFFICE

JAMES L. PETERS, Prosecutor
Thomas A. Hampton, Assistant Prosecutor
Kim Whitacre, Legal Assistant
Becky Huffman, Legal Assistant
Lynn Booher, Victim Advocate

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July 6, 2012

Pandora Neuhart, Auditor
Monroe County
101 North Main Street
Woodsfield, OH 43793

In re: Online Public Records

Dear Pandora:

You have asked me to look into the legality of continuing to provide public records online in light of the recent Ohio State Supreme Court decision which found that the Cuyahoga County Recorder could not charge certain fees for documents it was providing online.

My review of that Supreme Court case indicates that the essential holding is that the County Recorder can only charge the "actual cost" incurred for providing public records. The case does not discuss how much Cuyahoga County was incurring monetarily to provide its documents online. However, the Cuyahoga County Recorder was charging \$2.00 per page viewed online by those who accessed it. This resulted in an outside company being charged in excess of \$200,000.00 for the documents that they viewed and the Supreme Court found that this was not permissible, despite the \$2.00 fee that the Recorder is statutorily permitted to charge per hard copy page for documents copied in the Recorder's Office.

As I indicated, the essential holding is that the person complying with a public records request can only charge for the "actual cost" incurred in order to fulfill the request in the format requested by the requestor.

Therefore, if they request a hard copy, you could charge for the cost of the paper and any copier fees incurred for one copy. If the

Pandora Neuhart, Auditor

Page 2

July 6, 2012

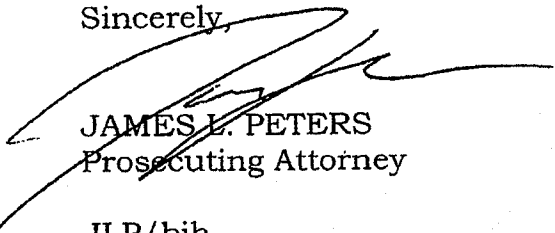
request is for electronic or digital documents on a CD, then the cost incurred would be the cost of the CD.

Using that same rational, I would argue that your office is simply providing digital documents pursuant to a public records request in the form requested by those requesting it, i.e. by providing digital documents pursuant to an online service. Based upon our previous discussion, it is my understanding that all of the fees collected are used to continue providing the online service and that your office is not profiting from providing the service. Therefore, I would argue that you are simply charging them for the "actual cost" incurred to provide them the documents they have requested in the format that they desire.

Based thereon, I would have no problem advising you that you could continue providing this service.

Should you have any questions, please contact me.

Sincerely,



JAMES L. PETERS
Prosecuting Attorney

JLP/bjh

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