



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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June 1, 2004

Mr. Bill Lueders
News Editor
Isthmus
Isthmus Publishing Company, Inc.
101 King Street
Madison, WI 53703

Dear Mr. Lueders:

I am responding to your letter of April 8, 2004, in which you raised questions about the Madison Metropolitan School District's ("MMSD" or "District") response to a public records request you made for email correspondence received by the District concerning its 2004-05 budget.

From the e-mail exchange you attached to your letter, I understand that your public records request to the District ultimately focused on e-mail correspondence to the Board of Education and Superintendent Art Rainwater received between March 11 and April 1, 2004, on the subject of MMSD's 2004-05 budget. Your assistant, Vikki Kratz, was first informed on April 2, 2004, by Ken Syke of MMSD's Public Information & Business Relations office that the District would charge a fee of \$613.08 to cover "pul[ing] these emails out of our email system and then to determine whether each one is able to be released to the public (student confidentiality)." *Id.* The fee was also to cover duplicating costs. *Id.* On April 6, 2004, MMSD's Custodian of Records, Roger Price, sent Ms. Kratz a more formal letter, in which he attributed the projected fee to the costs of location, copying, review of the records and redaction. Letter from Roger Price to Vikki Kratz dated April 6, 2004.

I am also aware of a subsequent email exchange, conducted after the date of your letter to me, in which Mr. Price explained:

Due to the nature of your request (i.e. all the e-mails on the budget from 03/11/04 to 04/07/04), the District has to locate the record through the development of a specific search program for the key words that would be relevant. The program is based on a keyword search for the records you have requested. As a result of the key words not always generating a relevant document, there could be 700-plus e-mails of which only half or less than half may be relevant, and only those, if any, may need redaction. If a less than broad key word search is used, then the District may not retrieve all the records you had requested. In order to find the actual records that you requested, I would have to go through the 700 or what-

ever [sic] number of records that the search generates. The major part of the cost results from [the] time it takes to locate your records from those generated by the search.

Email from Roger Price to Vikki Kratz dated April 12, 2004.

Mr. Price went on to discuss emails sent directly to school board members, and noted that Carol Carstensen had agreed to forward to you the emails she had received responsive to your public records request:

Individual board members remain the custodian of records which include electronic mail they receive through the district's system or through their own personal e-mail accounts. What Carol [Carstensen] is forwarding is the majority of e-mails, approximately 250-plus, that went through the District's system and that all board members probably received. In light of the fact that you have received the e-mails from Carol, do you still want to pursue your request with other Board members and you [sic] public records request with the District?

Id. Ms. Kratz responded: "Tomorrow we should be receiving two disks from Carol [Carstensen] containing all the e-mails. If that happens, we will consider our records request fulfilled." Email from Vikki Kratz to Clarence Sherrod, et al., dated April 13, 2004. I understand from Assistant Attorney General Maura Whelan, with whom you have spoken by telephone, that you have received the emails from Board Member Carstensen. Ms. Whelan also tells me that the District considers the matter closed now that Carstensen has supplied you with the requested emails.¹

Thereafter, Ms. Kratz informed Mr. Price that "Isthmus will still be pursuing an opinion from Attorney General Peg Lautenschlager with regard to the cost of our open records request." Email from Vikki Kratz to Clarence Sherrod, et al., dated April 13, 2004. You confirmed this position in your telephone conversation with Ms. Whelan. Accordingly, as I understand it, the issue presented to me relates not to the production of records but rather the propriety of the fees being assessed for such production.

Location and copying fees are plainly and clearly authorized by statute. See sec. 19.35(3), Wis. Stats. As you note, the Wisconsin Supreme Court's decision in *Osborn v. Board of Regents*, 2002 WI 83, ¶ 46, 254 Wis. 2d 266, 647 N.W.2d 158, addresses the authority governmental agencies have to charge for expenses related to the production of public records. In that case, the Supreme Court stated as follows:

¹Apparently you expressed doubt to Ms. Whelan that Ms. Carstensen has actually supplied you with all of the emails you seek. If that is the case, it presents a matter beyond your present inquiry to me about MMSD's proposed \$613.08 public records fee.

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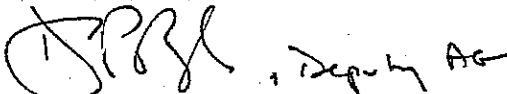
In addition, we note that under the open records law, the University is not required, by itself, to bear the cost of producing documents in response to **Osborn's** request. Under § 19.35(3) [FN18], the University may impose a fee on **Osborn *304** for the location, reproduction or photographic processing of the requested records, but the fee may not exceed the actual, necessary and direct cost of complying with the open records requests.

254 Wis. 2d at 303-04. While *Osborn* may afford the basis for a claim that redaction costs may be included as part of the actual, necessary and direct costs of complying with a public records request, the decision does not explicitly state as much. Moreover, the statute upon which the decision rests does not provide for recovery of redaction costs. In the absence of such specific authorization, and in light of the broad presumption under state law of open access to public records, I conclude that charging for the cost of redaction would be inappropriate.

Because none of the correspondence I have seen explains precisely how MMSD calculated the \$613.08 figure, it is impossible to determine whether the proposed charges were based on factors explicitly authorized by statute, reiterated in *Osborn*, or clearly unauthorized. Mr. Price alluded to his need "to conduct a balancing test as to whether or not the public interest in disclosure is outweighed by other legal considerations." Letter from Roger Price to Vikki Kratz dated April 6, 2004. I agree with you that the statute does not authorize the imposition of a fee for performing the balancing test. As stated above, I also find no explicit authorization by statute or case law for the recovery of the cost of redaction.

Thank you for your inquiry.

Very truly yours,


for Peggy A. Lautenschlager
Attorney General

PAL:MFJW:cla

c: Clarence Sherrod