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May 27, 2010

Ms. Susan C. Antos
Senior Attorney
Empire Justice Center
119 Washington Avenue
Albany, NY 12210

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Antos:

As you are aware, I have received your letter and the correspondence relating to it, and I hope that you will accept my apologies for the delay in response. In brief, the Empire Justice Center requested fair hearing decisions from the Office of Temporary and Disability Assistance (OTDA) pursuant to the Freedom of Information Law and was informed that it would be required to pay a fee of \$507.34 to obtain copies. You have questioned the propriety of the fee.

In a letter addressed to your associate, the fee was based on the following calculations:

“Fair hearing decisions redacted per hour – 10

Hourly rate of staff used to do redaction - - \$30.02

Fair hearing decisions to be redacted - - 189

189 cases/10 decisions per hour = 18.9 hours X \$30.02/hour =
\$567.38, for redaction of the requested decisions, minus 2 hours
(\$30.02 x 2 = \$60.04) for initial request = \$507.34.”

In this regard, since the correspondence refers to your request that fees be waived, I note that it has been held that an agency may charge its established fee, even though an applicant for records may be indigent [Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

In consideration of the figure sought to be charged, by way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate general

rules and regulations concerning the procedural implementation of that law, as well as fees. The Committee has done so, and the regulations (21 NYCRR Part 1401) have the force and effect of law. In turn, §87(1) requires the board or governing body of an agency to adopt rules and regulations consistent with the Freedom of Information Law and the Committee's regulations.

Section 87(1)(b)(iii) refers to fees for copies and includes two standards, the first of which pertains to photocopies, and the second to "other" records. An agency's rules and regulations are required to include reference to "the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record in accordance with the provisions of paragraph (c) of this subdivision..." Paragraph (c) permits agencies to assess a fee based on an employee's salary when two hours or more are needed to prepare requested records.

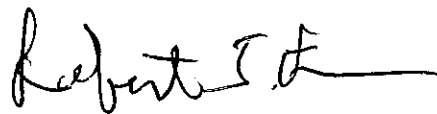
Based on the language of the statute, it is clear that the only fee that may be charged when a request involves photocopies of paper records up to nine by fourteen inches is a maximum of twenty-five cents per photocopy; no additional fee may be charged for employee time, for search, redactions, etc. Employee time may be charged only when the request involves "other" records, those that are larger than nine by fourteen inches or which are maintained electronically, and even then, only in circumstances in which at least two hours of employee time are needed to prepare the records.

Based on the foregoing, if OTDA sought to respond by preparing photocopies from which appropriate redactions would be made, I believe that it would be limited to charging a fee of twenty-five cents per photocopy, irrespective of the time used by employees in fulfilling the request.

Similarly, if OTDA redacts information electronically, in my view, it would not be able to charge for employee time spent redacting. A key issue, an issue that has not clearly been addressed by the courts, involves "preparing" copies of records. Section 87(1)(c)(iv) states in part that "preparing a copy shall not include search time or administrative costs, and no fee shall be charged unless at least two hours of agency employee time is needed to prepare a copy of a record requested." From my perspective, if redactions are made as a result of a review of existing records, whether those records exist on paper or electronically, the records would already have been "prepared." If that is so, no fee could be charged for the time involved in reviewing the decisions and making the appropriate redactions.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director