

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

State Employees' Retirement System, :
: Petitioner :
: v. : No. 153 C.D. 2010
: Submitted: August 13, 2010
Office of Open Records, :
: Respondent :
:

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY

FILED: November 4, 2010

The State Employees' Retirement System (SERS) petitions for review from a decision of the Office of Open Records (OOR) which granted the appeal of Beaver County Times reporter, Bob Bauder (Requestor) and ordered SERS to furnish the requested information to Requestor at a rate of no more than \$0.25 per page within thirty days, pursuant to the Right to Know Law (RTKL).¹ We affirm.

On November 18, 2009, Requestor submitted a RTKL request to SERS seeking the annual pension amount of four retired legislators.

¹ Act of February 14, 2008, P.L. 6, 65 P.S. §§67.101 – 67.3104, effective January 1, 2009. The new RTKL repealed the former Right-to-Know Law, Act of June 21, 1957, P.L. 390, *as amended*, formerly 65 P.S. §§66.1-66.4.

Robert Gentzel (Gentzel), Agency Open Records Officer for SERS, timely responded to the request in a letter dated November 20, 2009, which provided all of the requested records. The letter also stated that the fee for fulfilling the request was \$14.53 and was due within thirty days of receipt of the letter.

On November 23, 2009, Requestor spoke with Gentzel, who advised Requestor that the fee was for retrieving the records and checking them for accuracy. On that same date, Requestor appealed to the OOR challenging the charging of labor costs. On December 8, 2009, SERS responded, asserting that the fee charged was “exclusively for labor costs for the SERS employee to retrieve and verify the accuracy of the requested records,” which SERS was permitted to charge by the RTKL, *see* Section 1307(g) of the RTKL, 65 P.S. §67.1307(g),² and required to charge pursuant to the State Employees’ Retirement Code, 71 Pa. C.S. §§5101-5956 (Retirement Code) and Section 401 of the Internal Revenue Code, 26 U.S.C. §401 (IRC). SERS letter, December 8, 2009, at 1-2.

SERS advised that its policy is to charge a fee for costs necessarily incurred in responding to RTKL requests. SERS own RTKL

² 65 P.S. §67.1307(g) provides as follows:

(g) LIMITATIONS.—Except as otherwise provided by statute, no other fees may be imposed **unless the agency necessarily incurs costs for complying with the request**, and such fees must be reasonable. No fee may be imposed for an agency’s review of a record to determine whether the record is a public record, legislative record or financial record subject to access in accordance with this act. (emphasis added).

policy states that fees are based upon the applicable cost to SERS and include, “Employee time for compiling and printing requested records (based on hourly wage and benefits)”. *Commonwealth of Pennsylvania State Employees’ Retirement System Board Second Amended and Restated Right-to-Know Law Policy*, Section X. Fees, (G).³ SERS does not charge for time spent to determine whether a record is a “public record.” SERS letter, December 8, 2009 at 4-5.⁴

The OOR determined that:

[C]harging for the time it takes an agency employee to respond to a request during normal business hours is not a proper charge to pass along to a Requestor. SERS is statutorily required to provide public records in response to a RTKL request. Arguing that doing so without recouping the cost of employee time to do so jeopardizes SERS’ qualification, and consequently, the favorable tax treatment afforded its members in essence is arguing that SERS is not required to comply with a statutory mandate. The RTKL is clear that an agency cannot charge a fee except for those expressly stated. Employee time spent during their regular day in the course of their

³ We note the *Commonwealth of Pennsylvania State Employees’ Retirement System Board Second Amended and Restated Right-to-Know Law Policy* is SERS’ own policy.

⁴ SERS further stated that Management Directive 205.36, *Amended*, (November 20, 2008, effective January 1, 2009), buttresses the RTKL’s authority to charge a fee for necessarily incurred costs. However, this Management Directive was again amended on March 18, 2010, and the amended directive “replaces, in its entirety, Management Directive 205.36 dated November 20, 2008.” Management Directive, Commonwealth of Pennsylvania, Governor’s Office, No. 205.36, *Amended* March 18, 2010. This directive states that “[a]n agency may impose a reasonable fee for costs necessarily incurred in the production of the public records....” Management Directive 205.36, *Amended*, Section 6.a.(5)(g)1. This directive, as amended, does not add anything of substance to SERS’ argument.

duties to provide records in response to RTKL requests is not a necessarily incurred cost but rather a routine expense for complying with RTKL mandates.

To the extent that SERS created a record it is not statutorily required to, it cannot circumvent the fee restriction by unilaterally creating such a record from existing records and then charge more than the fee per page allowed under the RTKL. Therefore, printouts of the records containing the requested information must be provided at a rate of no more than \$0.25 per page.

OOR Final Determination, January 11, 2010, at 5. The OOR granted Requestor's appeal and required SERS to furnish the information within thirty days without assessing fees other than actual per page copying costs. SERS appealed to this court.⁵

SERS contends that Section 1307(g) of the RTKL permits SERS to charge a reasonable fee for labor costs it necessarily incurs for complying with the RTKL request and that the "exclusive benefit" rule, set forth in the IRC and the Retirement Code, require SERS to charge a reasonable fee for labor costs it necessarily incurs in complying with the RTKL requests.

Initially, SERS argues that the fee it charged was for costs it "necessarily incurred" for the purpose of "complying with the request" and

⁵ This court, in its appellate jurisdiction, independently reviews the OOR's orders regarding Commonwealth agencies. Not limited by the OOR's reasoning in the written decision subject to review, this court enters findings and conclusions, based on the evidence as a whole and explains its own rationale. Bowling v. Office of Open Records, 990 A.2d 813 (Pa. Cmwlth. 2010). In Prison Legal News v. Office of Open Records, 992 A.2d 942, 947 (Pa. Cmwlth. 2010), this court advised that as to the standard of review, Bowling holds "that 65 P.S. §67.1301(a) provided for an independent review of the evidence, not *de novo* review." Thus, this court, sitting in its appellate jurisdiction, functions as a trial court and may independently review the OOR's order.

that the fee was reasonable. 65 P.S. §67.1307(g). Section 1307 of the RTKL permits fees to be assessed for postage, duplication, certification of copies, conversion to paper, and enhanced electronic access to records. 65 P.S. §67.1307(a)-(e). As stated previously, Section 1307(g) of the RTKL limits the imposition of fees to those provided for by statute and states that “no other fees may be imposed unless the agency necessarily incurs costs for complying with the request, and such fees must be reasonable.” 65 P.S. §67.1307(g).

SERS maintains that the fee it charged for the requested documents included costs it necessarily incurred in complying with Requestor’s request. SERS states that the information Requestor requested did not come in a format that could simply be printed and provided to Requestor. SERS states that in complying with Requestor’s request, it was required to extract the monthly pension amounts, annualizing the amounts and transferring the calculated amount into the response.

SERS further states that the work for which it charged Requestor was performed by an employee in the SERS’ Office of Membership Services, Bureau of Benefits Determinations, whose usual duties entailed overseeing the calculation of various pension benefits and death benefits. The employee’s task with regard to Requestor was to extract from SERS’ database each identified member’s monthly annuity amount, calculate the annual annuity amount and verify the calculation. The duties required to fulfill Requestor’s request were not something the employee would have performed in the absence of such request.

SERS sets forth that in producing a paper response it would be required to redact manually and electronically scan the response and that the extra steps could create the need for a time extension. The SERS employee extracted the requested pieces of data from the database electronically and compiled them into one sheet, eliminating the need for manual redaction and photocopying. The end product is a single sheet containing only the records that Requestor wanted and nothing else.

The employee submitted a time sheet.⁶ As the descriptions suggest, the work performed was specific to Requestor's request and would not have been performed absent the request. In addition to the comparative sizes of the response formats is the time needed to perform the necessary work. Both methods involve opening multiple database screens for each member. However, unlike the method that SERS used, the paper method would require the additional steps of printing, redacting and photocopying. The final response would also have to be scanned electronically for SERS' records.

Further, during the time the SERS' employee was performing this work, she could not perform other SERS functions. SERS states that it was not motivated by profit and had utilized the most efficient method of response, but that there was a cost incurred in complying with Requestor's request. SERS contends that complying with a RTKL request is both a "necessarily incurred cost" and a "routine expense." The cost was necessary

⁶ The time sheet stated in pertinent part as follows:

Look up members in SERIS, verify their monthly annuity and multiply it by 12 for annual annuity.

in that no cohesive record response to Requestor's request existed and work to compile that response had to be performed. SERS compensated its employee for his work, thereby incurring a cost. It was also a routine expense in that SERS is subject to the RTKL and must invest the staff time necessary to comply with the RTKL requests. The General Assembly expressly prohibited labor fees for legal review of the record, but did not prohibit other labor fees that satisfy the requirements of Section 1307(g).

SERS further sets forth Section X, G of the *Commonwealth of Pennsylvania State Employees' Retirement Board Second Amended and Restated Right-to-Know Law Policy* (Policy) which provides in pertinent part as follows:

X. Fees

The fees applicable to all RTKL Requests shall be determined by the Open-Records Officer.

- Charges for other services and materials will be determined on a case-by-case basis based upon the applicable cost to SERS. These include, but are not limited to, charges for the following:

G) Employee time for compiling and printing requested records (based on hourly wage and benefits)....

The Policy has been in effect since the RTKL's January 1, 2009 effective date. SERS charged Requestor \$14.53 based upon the employee's hourly rate. Requestor could have received the same data without the labor fee, in a less timely manner and in a cumbersome, much less convenient format.

The OOR determined that SERS had no statutory duty to create the data compilation. The Section 705 of the RTKL provides that an agency “shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record.” 65 P.S. §67.705; see also, Moore v. Office of Open Records, 992 A.2d 907, 909 (Pa. Cmwlth. 2010)(the agency cannot be made to create a record which does not exist.) The OOR was correct in determining that SERS cannot charge for creating a record it was not required to create. Further, SERS’ creation of such a record was not “necessarily” incurred, as it was not “necessary” for SERS to create such record.

Next, SERS contends that the “exclusive benefit” rule, set forth in the IRC and the Retirement Code, requires SERS to charge a reasonable fee for labor costs it necessarily incurs in complying with the RTKL requests. The IRC and the Retirement Code are charged to operate for the “exclusive benefit” of its members. Such charge does not authorize a state agency to disregard a state statute. Our Supreme Court in Pennsylvania State University v. State Employees’ Retirement Board, 594 Pa. 244, 256-257, 935 A.2d 530, 537 (2007), determined that even though SERS had “limited fiduciary duties,” it was not exempt from complying with the RTKL. As stated previously, SERS failed to show that the labor costs were “necessarily incurred.” Thus, as the RTKL does not expressly authorize the charging of labor costs, SERS is not permitted to charge a fee for such costs.

Lastly, SERS contends that the OOR exceeded its authority to establish duplication fees and abused its discretion when it prohibited fees

for search or retrieval and staff time or salary. The Section 1307(b) of the RTKL states the following with regard to duplication fees:

Fee limitations.

(b) Duplication.—

(1) Fees for duplication by photocopying, printing from electronic media or microfilm, copying onto electronic media, transmission by facsimile or other electronic means and other means of duplication shall be established:

- (i) by the Office of Open Records, for Commonwealth agencies and local agencies;
- (ii) by each judicial agency; and
- (iii) by each legislative agency.

65 P.S. §67.1307(b). Thus, the OOR may establish duplication fees for Commonwealth agencies and local agencies.⁷ 65 P.S. §67.1307(b)(1)(i). The OOR did not err in determining such.

Accordingly, we must affirm the decision of the OOR.

JIM FLAHERTY, Senior Judge

⁷ SERS' assertion that OOR has an approval role is correct under Section 1307(e) of the RTKL, regarding enhanced electronic access. However, the issue in this matter involves Section 1307(g) of the RTKL, which does not state that OOR has an approval role.

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ORDER

AND NOW, this 4th day of November, 2010 the order of the Office of Open Records in the above-captioned matter is affirmed.

JIM FLAHERTY, Senior Judge