



STATE OF TENNESSEE
COMPTROLLER OF THE TREASURY
OFFICE OF OPEN RECORDS COUNSEL
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Comptroller

September 23, 2013

Ms. Donna De Sopo
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Mr. Kirk Clements
Hendersonville, Tennessee

You have requested an opinion from this office that addresses the following issue:

Can the City of Hendersonville (hereinafter referred to as “the City”), pursuant to the resolution adopted on July 23, 2013, legally assess citizens who have requested copies of public records, fees for the copies and the labor necessary to produce the copies, when the language in the City charter reads, “[f]ees for copying and certification shall be charged as established by ordinance”?

I. Analysis

In early July, citizens who were making public records requests to the City began contacting this office about the responses that they received to the requests and the fees that were being assessed for production of the requested records. After conversations with the City Attorney, the production issues were addressed. The City Attorney asserted that the Mayor had been permitted for years to address certain matters through administrative policies and the policy related to fees for records had been established administratively by the Mayor. This office then advised the citizens that to the extent the Board of Mayor and Aldermen (hereinafter referred to as “BOMA”) had delegated the authority to put in place such administrative policies to the Mayor, it appeared that the City has a properly adopted policy¹ in place related to fees for public records. Then, on July 22, 2013, this office received an email from a citizen which indicated that a resolution related to fees for copies of public records was going to be considered at the BOMA meeting scheduled for July 23, 2013. In response to the email, this office sent an email to the City which identified some issues with and raised some questions

¹ Per the requirements of Public Chapter 1179, Acts of 2008, this office developed the Schedule of Reasonable Charges (hereinafter referred to as the “Schedule”). The introductory part of the Schedule sets out that in order for a governmental entity to assess fees for copies and labor associated with a public records request, the entity is required to have a “properly adopted rule . . . evidenced by a written policy authorized by the governmental entity’s governing authority.”

about the resolution.² Based upon the newspaper report of the meeting that was forwarded to the office, it appears the City made the changes to the resolution that were suggested by this office and the resolution passed. The issue that is the subject of this opinion is whether or not the City, pursuant to the resolution that was passed, can legally assess fees for copies of public records and the labor necessary to produce the copies when the language in the City's charter reads:

6-4-203. Custody of official records.³--(a) The recorder or the recorder's designee shall have custody of, and preserve in the recorder's office, the city seal, the public records, original rolls of ordinance, ordinance books, minutes of the board, contracts, bonds, title deeds, certificates, and papers, all official indemnity or security bonds, except the recorder's bond, which shall be in the custody of the mayor, and all other bonds, oaths and affirmations and all other records, papers and documents not required by this charter or by ordinance to be deposited elsewhere, and register them by numbers, dates and contents, and keep an accurate and modern index of such material.

(b) All such records shall be the property of the municipality. [Acts 1991, ch. 154, § 1.]⁴

6-4-204. Copies of records and ordinances.--(a) The recorder shall provide, copy, and, when required by any officer or person, certify copies or records, papers and documents in the recorder's office.

(b) Fees for copying and certification shall be charged as established by ordinance. [Acts 1991, ch. 154, § 1.]

It is the opinion of this office that in order for the City to charge for copies of public records that are required to be in the custody of the city recorder⁵ and the labor necessary to produce such copies, an ordinance related to such charges must be properly adopted by the BOMA. This office understands that in 1991, the City elected to change its form of government. At that time the City revised its charter and adopted a Mayor-Aldermen form of government. The charter provisions that were adopted were substantially similar to the provisions that are in the City Manager-Commission charter.⁶ The language in City Manager-Commission charter was adopted in 1921, approximately 36 years before The Tennessee General Assembly adopted the Tennessee Public Records Act. It has been suggested that because the language in question is almost verbatim the language in the City Manager-Commission Charter and because the City Manager-Commission charter language came into existence

² The email that was sent did not raise any questions related to why the public records policy was being adopted through a resolution and not an ordinance.

³ The language in the City's charter mirrors the language that is in Tennessee Code Ann. Sections 6-4-201 et seq.

⁴ The Hendersonville City Recorder is the person who has responded to all the public records request made to the City that have been brought to this office's attention.

⁵ Based upon the language in Tenn. Code Ann. Section 6-4-203, all public records maintained by the City are required to be in the custody of the city recorder, unless the charter or an ordinance specifies that the records are to be maintained elsewhere.

⁶ The language in the City Manager-Commission Charter is codified in Tenn. Code Ann. Section 6-21-401 et seq.

before there was a public records act, this language cannot be addressing fees for copies of public records. However, there are both statutory provisions and case law that establish that even prior to the adoption of the Tennessee Public Records Act in 1957, the public had the right to obtain copies of certain public records and in certain circumstances, government officials had the right to assess fees for copies of the requested records.⁷

Additionally, it has been suggested that the language in the City's charter, which mirrors the language in Tenn. Code Ann. Section 6-4-204, was intended only to apply to requests for certified copies of public records. While it may not have been contemplated or intended for this language to apply to requests for both certified and uncertified copies of public records, it is the opinion of this office that the plain language in the provision does apply to both types of requests, when the records requested are those referenced within the charter provision that mirrors Tenn. Code Ann. Section 6-4-203. Because it is the opinion of this office that the language in the charter that mirrors Tenn. Code Ann. Section 6-4-204 is unambiguous, this opinion will not examine the intent of the legislation.⁸ Also, it has been suggested that the provision within the charter that mirrors Tenn. Code Ann. Section 6-4-204 cannot be addressing charges that can be assessed for copies of public records because this provision references "fees" and the assessment of fees is only permitted when a service is being provided. However, there are multiple provisions within the Tennessee Code where the word "fee" is used to address how much an individual can be assessed for copies of certain public records.⁹

Finally, in 1982, the Tennessee Attorney General's office issued an opinion that set out the various factors that need to be considered by a municipality when trying to determine whether to address a matter through a resolution or an ordinance. Tenn. Att'y. Gen. Op. 82-286 (June 3, 1982). In the opinion, the Attorney General cites to a passage from 5 Municipal Corporations, McQuillin § 15.42 (1981) which states:

'[I]t may be stated broadly that all acts that are done by a municipal corporation in its ministerial capacity and for a temporary purpose may be put in the form of resolutions, and that matters upon which the municipal corporation desires to legislate must be put in the form of ordinances. It may further be stated broadly that charters contemplate that all legislation creating liability or affecting in any important or material manner the people of the municipality should be enacted by ordinances, whether the city is acting in its governmental or private capacity.'

⁷ See Tenn. Code Ann. Sections 10-7-101 et seq.; Tenn. Code Ann. Sections 10-7-201 et seq; *State v. Williams*, 75 S.W. 948 (Tenn. 1903); and *Shelby County v. Memphis Abstract Company*, 203 S.W. 339, 341 (Tenn. 1918). This case includes language that indicates that copies of records can be obtained by the public subject to the "reasonable rules" of the records custodian. *Id.* at 341. This same language is codified in Tenn. Code Ann. Section 10-7-506(a), which became law in 1957. Tenn. Code Ann. Section 10-7-506(a) was used as the legal basis for assessing fees for copies of public records until Public Chapter 1179, Acts of 2008 was passed, because there was no other provision that applied to all records custodians that explicitly allowed charges to be assessed for copies of public records.

⁸ In *Gleaves v. Checker Cab Transit Corp., Inc.*, the Tennessee Supreme Court stated that a "court ascertains a statute's purpose from the plain and ordinary meaning of its language." *Gleaves v. Checker Cab Transit Corp., Inc.*, 15 S.W. 3d 799, 803 (Tenn. 2000).

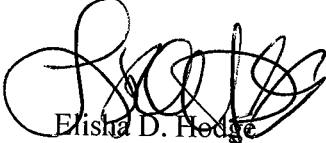
⁹ See Tenn. Code Ann. Section 8-21-401(i)(4); Tenn. Code Ann. Section 10-7-507; and Tenn. Code Ann. Section 68-3-207.

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It is the opinion of this office that the act of establishing fees that citizens will be charged for copies of public records and the labor necessary to produce the copies is not ministerial in nature nor is it meant to be temporary. It is also the opinion of this office that establishing and charging fees for copies and labor materially impacts citizens requesting records from the municipality and as such, fees for copies and labor are required to be established through an ordinance.

For all of the above-cited reasons, it is the opinion of this office that the language in the City's charter, that mirrors the language in Tenn. Code Ann. Sections 6-4-203 and 6-4-204, requires the City's BOMA to pass an ordinance in order to assess fees for copies of public records and the labor necessary to produce the copies, when the records are those required to be in the custody of the city recorder.



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