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Mr. Jim Zellmer
Virtual Properties, Inc.
2979 Triverton Pike Drive, Suite 100
Madison, WI 53711

Dear Mr. Zellmer:

I am writing to respond to your correspondence to Attorney General J.B. Van Hollen, wherein you seek an opinion regarding the Madison Metropolitan School District's ("District") response to your public records request. In particular, you ask whether the District's response to your request for an electronic copy of all email messages sent to *comments@madison.k12.wi.us* from January 1, 2009 through September 3, 2009, is consistent with Wisconsin's public records law. The District, which apparently suggested that you seek an opinion from this office, has provided us with a copy of a November 9, 2009, letter that its legal counsel sent to you in further explanation of its response.

The District has asserted, in its correspondence with you, that your request as written is legally insufficient because, according to the District, the request is not reasonably specific as to subject matter and length of time as required by section 19.35(1)(h) of the Wisconsin Statutes. The District points out that you have identified no subject matter for the records you seek, and that your request is therefore analogous to a request for "all U.S. mail received" over an equivalent period of time. The District contends it is unreasonably burdensome for it to have to sort through the approximately 5,000 email messages that are potentially responsive to your request, some of which are likely to be unintelligible "spam" emails. The District initially asked you to narrow your request, for instance by providing a list of search terms, but you refused.

The District is not standing on its legal objection to the sufficiency of your request under section 19.35(1)(h), however. It has informed you that it will provide you with records once it has conducted a review of the approximately 5,000 records it has identified to determine, on a case-by-case basis, whether or not the public records law mandates access to those records. The District suggests that some of the records may contain information protected by the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, or Wisconsin's pupil records law, section 118.125, and it must take a look at each email in order to properly apply those important statutes. Other laws mandating confidentiality may apply to some of the emails, as well. The

District estimates that at least 7 hours of staff time are required to fulfill your request, for a total estimated price of $257.74. (This is based on a 5-second-per-email review, and is meant to include estimated copying charges.)

You indicate that you believe any charge for access to these records is illegitimate because the records already have been gathered and nothing remains to be done but copy them to a compact disk and mail the disk to you. You state that you do not care whether some of the records you receive from the District are spam emails or not, and believe it is improper for the District to charge you to weed out the spam email when you have indicated you are willing to accept it.

Having set forth your respective positions in outline, let me comment on these points one at a time. An authority is required to engage in a record-by-record determination of how the public records law is to be applied to a request. "The [public records] custodian, mindful of the strong presumption of openness, must perform the [public] records disclosure analysis on a case-by-case basis." *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 62, 284 Wis. 2d 162, 699 N.W.2d 551. In addition, when a given document contains both confidential and non-confidential information, an authority is obliged to disclose as much of the record as possible, consistent with applicable law. Sec. 19.36(6), Wis. Stats. In the present situation, the District has indicated that it may need to redact portions of the email records, and I find that expectation to be reasonable in light of the fact that the District is an educational institution whose records are often subject to pupil record laws. The District is not relieved of its duty to review the records, and redact them if necessary, just because the number of responsive records (here, approximately 5,000) is large, and the task of redaction is potentially burdensome. *See Osborn v. Bd. of Regents*, 2002 WI 83, ¶ 46, 254 Wis. 2d 266, 647 N.W.2d 158. Whether these 5,000 emails do, or do not, contain any confidential information is an open question, but clearly the District must review the records, apply the law, and redact accordingly, if necessary.

I am concerned, however, by the District's apparent position that despite your willingness to receive spam email records as part of the District's response, the District nonetheless insists on culling all spam email from the response. From language in some of the District's communications to you it appears the District may believe that spam email received by an authority is not a "record" under section 19.32(2), because it does not relate to the District's business and is merely the unintentional byproduct of retaining non-spam messages in the system.

I will not offer an opinion on whether the District's reading of the definition of "record" is reasonable because doing so is unnecessary to resolve your dispute with the District.[1] Even if spam email is not within the definition of "record," and no other basis for withholding the email is present, an authority is not prohibited from giving a requester access to a non-record. Therefore, if withholding spam email in a given situation increases the burden on the District's time (and the cost to you, potentially), I see no reason why the District would stand on principle and insist on undertaking that burden, and passing on that charge. No satisfactory explanation, at any rate, is expressed in its correspondence with you.

The primary issue here, however, is the issue of cost. It has been established that an authority may charge: actual, necessary, and direct costs of reproducing records; the costs of a computer run; actual, necessary, and direct transcription fees; costs of locating records, if such costs total $50.00 or more; and actual, necessary, and direct mailing and shipping fees. *See* sec. 19.35(3), Wis. Stats.

The District has indicated that it will charge you an estimated $257.74 for the costs it will incur in responding to your request. There is nothing clearly unlawful about this estimated charge, but I am concerned with the way the District has characterized its basis. In its final letter to you, the District characterizes the charge as being for location and copying of the emails. However, most of its correspondence suggests that the real bulk of the time it expects to spend on your request will be spent reviewing the 5,000 emails, considering whether confidential information is contained in them, and completing any necessary redactions. Five-thousand (5,000) emails have been electronically retrieved in some manner by the District already, so it is unclear what "locating" is left to be done. The public records statute was enacted well before email and other electronic means of communication and record storage became common, so it is reasonable to consider a search for emails within a computer system either as a "location" cost, or as a "computer run" under section 19.35(3). But the District's $257.74 estimate is not for the computer search, which is already complete, but for what is left to be done in preparing the response to you. And what is left to be done, it appears, is review, and possibly redact, the emails. Therefore, whether or not the $257.74 charge is permissible, I think, depends on whether it is appropriate to charge for reviewing and redacting public records.

I think it is important to distinguish between redaction, and the review one undertakes to determine whether redaction is necessary under the law. Let me speak to redaction costs first. There is somewhat conflicting authority on whether an authority may pass along to requesters the cost of redacting confidential parts of records from accessible parts. As noted above,

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[1] I will take note, however, that whether a record must be retained by a governmental entity under the state's record-retention rules, *see* sections 19.21, 16.61, does not necessarily answer the question whether a given record, once in the custody or control of an authority, must be provided to a requester in response to a valid request under the public records law.

section 19.35(3) sets forth several, specific types of cost that may be charged to requesters, but redaction cost is not among them. The Attorney General's Office has opined that redaction costs generally must be borne by the authority. *See* 72 Op. Att'y Gen. 99 (1983). However, the supreme court's *Osborn* decision has been relied on by some authorities as permission to charge these costs to requesters. *See Osborn*, 254 Wis. 2d 266, ¶ 46. *See also WIREdata, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶ 107, 310 Wis. 2d 397, 751 N.W.2d 736 ("an authority may charge a requester for the authority's actual costs in complying with the request, such as any computer programming expenses or any other related expenses. . . . [A]n authority may recoup all of its actual costs.").

The divergence in views may be partially explained by the fact that in extreme cases, distinguishing between redaction of confidential information from an existing record, on the one hand, and creation of an entirely new (non-confidential) record, on the other, may be conceptually impossible. Authorities are not required to create new records in response to a request. Sec. 19.32(1)(L), Wis. Stats.; *George v. Record Custodian,* 169 Wis. 2d 573, 579, 485 N.W.2d 460 (Ct. App. 1992). In addition, as the sheer amount of necessary redaction increases, the argument for passing on that cost to requesters may become more reasonable. Redacting 5,000 emails could be a major undertaking.

Setting redaction itself aside for a moment, reviewing records to determine whether or not redaction is even necessary is clearly within the scope of an authority's general duties to apply the public records law. Information may be redacted for any number of reasons, including statutory provisions barring access to certain information, or application of the public-interest balancing test. Sometimes an authority reviews records only to conclude that there is nothing in them that needs to be withheld under the law. To charge requesters for the mere review of records is therefore tantamount to charging them for the cost of applying the law in its most general sense. I think that is unreasonable as a general matter.

To sum up my discussion of the cost issue: although I am skeptical of the District's use of the "location" concept to formally justify its estimated charge in this case, I cannot say that the charge itself is unreasonable in light of the totality of circumstances described in your correspondence. As noted earlier, you have refused to offer the District any way to narrow down the universe of responsive emails so as to make the process of review more efficient. The District clearly must review all the records individually, and this will take time. There could very well be significant redaction involved, but maybe not. Although I think the District cannot charge you for merely reviewing records, it would not be alone in charging for actual redaction costs, and there is some legal support for such a position, as explained above.

The opinions contained in this letter do not constitute a formal opinion of the Attorney General or the Department of Justice under section 165.015(1). Thank you for your interest in compliance with Wisconsin's public records law. I hope the information we have provided will be helpful and that your concerns will be resolved fairly.

Sincerely,

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Assistant Attorney General

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