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**DEPARTMENT OF JUSTICE**

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Mr. Eric Marcus
Alderman - 2nd District
City of Racine
1520 College Avenue
Racine, WI 53403

Dear Mr. Marcus:

I am writing to respond to your request for an opinion regarding the City of Racine's ("City") response to a request you made under Wisconsin's public records law, sections 19.31-19.39 of the Wisconsin Statutes. Your request was for access to "all records relating to Countryside Humane Society from 1/1/2004—7/13/2010 provided to Marcia Fenholz, Environmental Health Director, City of Racine in her capacity as an appointee to the Countryside Humane Society Board of Directors by the Mayor of the City of Racine and a copy of individual documents as may be requested by me." The City responded by granting you access to some of the records, while denying access to others. You believe the partial denial of the request was erroneous, and you question the City's decision to charge you for the cost of redacting the records it is willing to provide.

Let me first set forth some facts gleaned from your letter to this office and the City's response to your request. Countryside Humane Society ("Countryside") provides animal control services to the City under contract. Ms. Fernholz is the City's Environmental Health Director. You indicate that she is responsible for overseeing Countryside's contract with the City. Sometime in January 2004 Ms. Fernholz began attending meetings of the Countryside Humane Society Board of Directors ("Board") at the request of Racine's mayor. Apparently the mayor intended for Ms. Fernholz to be the City's "eyes and ears" at these meetings, to gather information that would be of interest to the City. Then, in April 2004, the mayor "nominated" Ms. Fernholz to the city council for appointment to the Board, and the city council accepted that nomination in May 2004. Two months later, Ms. Fernholz was nominated by the Countryside nominating committee for a seat on its Board, and she in fact was elected to the Board by Countryside's members, though I do not know when that election took place.

You dispute with the City what effect the City's "nomination" of Ms. Fernholz to the Board had. The City now maintains that its "nomination" of Ms. Fernholz had no legal effect.

As stated by the City's attorney (who wrote the City's response to your public records request): "[t]he nomination conferred no special authority on Fernholz within [Countryside], nor did it have any effect on [Countryside] board operations, since the [Countryside] Board nominates and elects its own board of directors. Subsequent to the City's action, Ms. Fernholz continued to attend [Countryside] board meetings, just as any member of the public could do, since [Countryside] board meetings are open to the public. Ms. Fernholz was not permitted to go into closed session with the [Countryside] board, nor did she have access to documents to which only [Countryside] board members were privy." The City attorney has taken the position that when Ms. Fernholz was later *elected* to the Board by a vote of the membership, she was elected as a private citizen and not as a representative of the City. You, on the other hand, regard Ms. Fernholz's election to the Board by its members as merely a confirmation of the City's action in "nominating" her to the position a few months earlier. In your estimation, Ms. Fernholz is not and never has served on the Board as a private citizen; she is rather the City's representative on the Board.

I will not be able to resolve this dispute regarding Ms. Fernholz's status or the legal effect of her "nomination" by the City. The authority of this office to provide legal opinions to the public is limited by statute to questions concerning the public records law, secs. 19.31 - 19.39, Wis. Stats., and the open meetings law, secs. 19.81 - 19.98, Wis. Stats. Questions regarding the power of a City to nominate persons to membership in other organizations, and questions regarding Ms. Fernholz's actual legal status as a member of the Board, go well beyond the scope of the public records and open meetings law, and therefore I cannot opine on those questions. However, the answer to these questions likely has an impact on the public records law analysis, as I will explain.

The public records law applies to "records" as defined in section 19.32(2) of the Wisconsin Statutes in relevant part as follows: "[A]ny material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority." The City has acknowledged that the records you requested were obtained, starting in January 2004, by Ms. Fernholz as the mayor's designated "eyes and ears" at the Board meetings, to gather information from Countryside that was of interest to the City. During that early period, at least, attending Countryside board meetings and retaining documents was understood to be part of Ms. Fernholz's job as a City employee. Ms. Fernholz apparently did bring back some Countryside board records to the City's offices and keep them there. As such, they are clearly records subject to the public records law, because they are being "maintained," sec. 19.32(2), Wis. Stats., by an authority. Those records, gathered when Ms. Fernholz was acting as the City's "eyes and ears" at the Countryside board, show that the records are not "purely personal" records not subject to disclosure, because she collected them in connection with her official duties. *See Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶ 9 & n.4, 327 Wis. 2d 572, 786 N.W.2d 177 (holding that personal emails sent or received by employees or officers on an authority's

computer system, evincing no violation of law or policy, are not subject to disclosure in response to a public records request). In fact, although the City does not believe these records are subject to the law, it has agreed to give you access or copies of the records Ms. Fernholz collected while she was the "eyes and ears" of the mayor at the Countryside board, subject to necessary redactions (more on redaction later in this letter).

The City takes a different position on the records that Ms. Fernholz gathered after her election to the Countryside board, and I am uncertain whether that position is correct or not. The City contends that when Ms. Fernholz was elected by the Countryside board she became a purely private member of that board. Therefore, the City asserts, any records she has maintained in her office at the City's premises are personal records having no connection to official City business, and therefore are not "records" within the scope of section 19.32(2). Whether that position is correct depends on the totality of circumstances surrounding Ms. Fernholz's involvement with the Countryside board and her work for the City. It is true that purely personal records maintained by an "authority" need not be disclosed under the public records law unless they evince some violation of law or policy. *Schill,* 327 Wis. 2d 572, ¶ 9 & n.4. Some public employees are involved in community and professional organizations and will keep, for convenience's sake, documents related to that activity in their public offices. But whether a given set of documents truly is purely personal or not depends on the totality of circumstances relating to those records and the employees who are keeping them.

I will not question the City's view that Ms. Fernholz is a private citizen member of the Board (as noted, that legal issue is beyond the purview of this office), but if that view is correct, then it probably goes a long way to establishing that the records she collected after her election to the Board and that are maintained in her City office are purely personal documents not subject to the public records law. Furthermore, the City's response to you indicates that Ms. Fernholz has been under no obligation by her employer to retain any records she may bring into her office from the Board meetings; that, too, supports the position that such records are purely personal and not subject to the public records law. However, the City cited no other ways in which Ms. Fernholz's work for the City, *vis-à-vis,* the Board changed after her election to the Board. It has not indicated that Ms. Fernholz is no longer acting as the "eyes and ears" of the City on Board issues. If she continues to provide service to the City by providing information on what the Board is doing—if, in other words, her job duties comprise in some measure reporting on Board activities—then her legal status as a private citizen member of the board, or the lack of expectation that she retain all relevant records, may not be dispositive. Ultimately the issue is whether the records are maintained as part of her official business as a City employee. It is the totality of circumstances that would determine whether the records are instead purely personal, and I am unable to opine with confidence on the question without a more complete factual record, which this office will not undertake to gather.

Let me turn now to the issue of costs that you have raised. You ask whether the City can lawfully charge you a fee for the City's review of records prior to release, and charge you a fee for making any necessary redactions. An authority is required to engage in a record-by-record determination of how the public records law applies 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 City has indicated that it may need to redact portions of the records it will disclose to you, and it demands that you prepay $400, which represents staff wages and benefits of $50 per hour for 8 hours. The work would be completed by the assistant city attorney.

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 statute does not mention redaction nor the review of records for possible redaction.

Let me speak to redaction costs first. Opinion is divided whether an authority may pass along to requesters the cost of redacting confidential parts of records from accessible parts. As noted above, section 19.35(3) sets forth several specific types of cost that may be charged to requesters, but redaction cost is not among them. In 1983, the Attorney General opined that redaction costs generally must be borne by the authority. *See* 72 Op. Att'y Gen. 99 (1983). The relevant statutory language has not changed since that opinion was issued. However, the Wisconsin Supreme Court's *Osborn* decision has been relied on by some authorities, such as the City here, as permission to charge these costs to requesters. *See Osborn v. Bd. of Regents*, 2002 WI 83, ¶ 48, 254 Wis. 2d 266, 647 N.W.2d 158 ("We have also noted that the University is entitled to charge a fee for the actual, necessary and direct cost of complying with these open records requests."); *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.").

In a recent case where the issue of redaction costs was squarely before the court, a Milwaukee County Circuit Court judge ruled that an authority may charge a requester for the cost of performing necessary redactions. *See Milwaukee Journal Sentinel v. City of Milwaukee*, Case No. 2010-CV-5395. An appeal from the circuit court's decision has been filed and docketed as 2011AP1112. The appeal could lead to an appellate court opinion that clarifies the law on the issue of charging for redaction costs.

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.

The City's response to you indicates that the $400 cost it seeks to recoup from you is for the attorney's review of records and any necessary redaction. While acknowledging that opinions differ and some authorities look to language in the *Osborn* and *WireDATA* decisions to support charging for redaction, I think there is no support for that position in section 19.35(3), and therefore consistent with the longstanding view of this office I advise you that the City cannot charge you for redaction costs. Nor can it charge you for the time it takes an attorney to review records for possible redactions.

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,

Lewis W. Beilin
Assistant Attorney General

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c: Nicole F. Loop
City Attorney
City of Racine