

Another Dirty Dozen: More Examples of Recent Challenges to Timely and Cost-Effective Access To Public Land Records¹

1. **Arkansas S.B. 871 [Act 1477, 87th General Assembly]**

Challenge: Bill introduced in the Arkansas Senate to create the Arkansas Electronic Records Study Commission, to specifically address the issue of *bulk commercial* access to electronic or computerized records under the Arkansas Freedom of Information Act of 1967. Of the 15 members to be appointed to this committee, NONE are reserved for the title industry [3 members are from the media, 4 members are from local government, and even the University of Arkansas Razorbacks got to appoint a member]. Commission's report and recommendations due July 1, 2011.

Status: Signed into law by the governor April 10, 2009. Per Arkansas Senator Larry Teague October 6, 2010 [he's co-chair of the Commission], no date set for the next meeting. [Editor's note: The fact that the title industry is not represented on the Commission may prove irrelevant if the Commission fails to reach a consensus.]

2. **California S.B. 1324**

Challenge: Bill introduced February 19, 2010 in the California legislature to authorize state and local agencies to add a fee to cover the actual cost of "staff search and review time" when the open records request is made for "commercial use" [currently the agency can only charge a requester the "direct costs" of duplication].

Status: No movement on this bill since introduction. [Editor's note: Something as vague as "staff review and research time" opens the door to arbitrary and excessive charges. In addition to higher fees, the introduction of a "commercial use" category could lead to future issues, such as longer time permitted to produce the records for commercial requestors, restrictions on types of commercial uses, etc.].

3. **Cuyahoga County Ohio Recorder**

Challenge: In June 2010 Lillian Greene, the Cuyahoga County Recorder [Cleveland, Ohio], stopped providing the title industry with bulk electronic copies of recorded documents; for a decade or more the recorder had been providing the title industry with a weekly CD of images for \$50. The recorder suspended this service until she could obtain an opinion of what the proper fee should be; it's rumored that Ms. Greene wants \$2.00/page. Another issue: Ms. Greene is watermarking the images, making OCR difficult and resale problematic.

Status: Data Trace, which maintains a Cuyahoga County title plant, sent a demand letter to Ms. Greene October 5, 2010; a mandamus action may follow. [Editor's note: Another example of a county seeking to make up a revenue short-fall from the title industry.]

4. **Illinois H.B. 5069**

Challenge: Bill introduced January 25, 2010 in the Illinois House which would amend the Illinois Freedom of Information Act to (among other changes) remove the

requirement that electronically-maintained records be provided in the format requested (if feasible).

Status: Referred to House Rules Committee January 29, 2010; no further action.

5. **Illinois S.B. 82**

Challenge: Introduced in the Illinois Senate February 11, 2010 as S.B. 3749, subsequently added to S.B. 82 as an amendment. Permits recorders to charge, for non-certified copies [paper *or* electronic], an amount not to exceed one-half of the amount chargeable for certified copies [the certified copy fee is \$12 for the first 4 pages and \$1 for each additional page]. Exempts from this fee structure non-certified copies purchased (i) in bulk [where “bulk” means all documents for a given day] for a negotiated, lesser amount, (ii) for a lesser amount pursuant to a contractual relationship and (iii) by means of the Internet.

Status: Signed into law by the governor July 28, 2010. [Editor’s note: What a title company or title plant maintainer pays an Illinois recorder for copies of recorded documents may depend, *heavily*, upon one’s relationship with the recorder.]

6. **New Jersey Assembly Bill 559**

Challenge: Originally introduced to reduce the cost of paper copies; during the legislative process the bill went from charging a flat fee of \$.10/page (paper or electronic) to finally setting the fee for letter-size paper copies at \$.10 per page [down from a sliding scale beginning at \$.75 per page] with *free* access to electronic records (except for the “actual costs of any needed supplies such as computer discs”).

Status: Signed into law by the governor September 10, 2010. [Editor’s note: Good example of “It ain’t over ‘til it’s over,” to quote Yogi Berra.]

7. **New Jersey Assembly Bill 2293**

Challenge: Bill introduced February 18, 2010 which would exempt from the New Jersey Open Public Records Act the databases [consisting of real property title records and indices] of county clerks and registers of deeds from disclosure “whenever these records are requested by a private entity for the purpose of assembling its own database to sell those records.”

Status: Referred to the Housing and Local Government Committee; no further action since introduction. [Editor’s note: This bill language was originally introduced in 2006 and has been reintroduced every session since that time. If this bill ever sees the light of day there will be *no* private land record databases in the Garden State.]

8. **Ohio H.B. 22**

Challenge: Bill introduced February 18, 2009 in Ohio’s House and referred to the State Government Committee. Bill would authorize a public record custodian to adopt rules to “reasonably” limit the number of bulk data requests [defined to be a request for 50 or more images or 50 or more records], impose charges to cover the actual costs associated with bulk data requests, and charge for the cost of redaction. “Actual cost” is defined to include supplies, record storage costs, direct equipment operating and maintenance costs, actual costs paid to private

contractors for copying services, and actual labor costs.

Status: The bill remains in the State Government committee. [Editor's note: The Ohio legislature is *always* in session, meaning this bill could grow "legs" overnight; lots of title plants in Ohio! And, if a "private contractor" wanted to charge an arm and a leg for making an electronic copy, would that be ok?]

9. **Pennsylvania S.B. 1469**

Challenge: Introduced September 20, 2010. Amends the act of February 14, 2008 (known as the "Right-to-know Law") to, among other things, exempt from disclosure under the Open Records Law "forms required to be filed with or by any taxing authority," and permits a local agency to charge one-half of the fee [charged for duplication] to "review the records if the requestor does not request duplication of the records."

Status: Final passage in the Senate 47-0 on September 29, 2010; referred to the House State Government committee October 4, 2010. [Editor's note: No more "free looks," particularly pertinent in a state where title is searched directly from the custodian's records.]

10. **Ramsey County Recorder**

Challenge: January 1, 2010 the Ramsey County Recorder [St. Paul, MN] advised Old Republic National Title Insurance Company, which maintains a Ramsey County title plant, that the new charge for electronic copies of real property documents would be \$5.00 per *page* [the fee had been \$.25 per *document*]. In 2009 there were 111,126 documents recorded, a total of 462,193 pages; ORNTIC's cost, if this higher fee had been in effective in 2009, would have gone from \$27,780 to \$2,310,965.

Status: Negotiations continue between ORNTIC and the Ramsey County Recorder; meanwhile the Ramsey County Recorder is not charging ORNTIC for these copies, but ORNTIC is maintaining a reserve to pay the recorder just in case. [Editor's note: Minnesota has 86 counties; what happens in Ramsey and Hennepin [Minneapolis] counties often ripples across the state.]

11. **Webster County Abstract et al v. Webster County, Missouri**

Challenge: A Missouri court ruled October 16, 2009 that recorders are not limited by the Missouri Sunshine Law [which prescribes cost-of-reproduction] in what they can charge for electronic copies; their limit is the statutory fee under the recorder's statute [\$2 first page, \$1 each additional page, regardless if it's a paper or electronic copy]. Webster County Abstract and DD Hamilton Title Company had sought to purchase CDs at cost-of-reproduction.

Status: The Missouri Land Title Association, as intervenor, filed an appeal to the Missouri Court of Appeals (Southern District) and oral arguments were heard September 13, 2010; MLTA awaits the appellate court's decision. [Editor's note: if *any* records should be subject to a state's open records laws, which generally prescribe a reasonable cost for electronic copies, it should be a county's real property records; after all, the reason they exist is to impart

[constructive] *notice!*]

12. **Final Note**

Commenting on a class action lawsuit filed May 26, 2009 by California Public Records Research, Inc. against Monterey County [CA] Clerk-Recorder Steve Vagnini for allegedly overcharging for copies of public records, plaintiff's attorney Donald Ricketts is quoted as saying "The recorder's office has almost lost its way, its function, and become a conduit for title insurance companies." [Editor's note: Huh?]

¹ Written by members of the "Bulk Access: What's Happening on the Legislative and Other Fronts" panel, a professional development session at the 2010 ALTA Annual Convention, sponsored by ALTA's Real Property Records Committee.