January 3, 2006

Sent Via Facsimile

Mr. Christopher Mason
411 West 1st Street
New Albany, IN 47150

Re: Formal Complaint 05-FC-243; Alleged Violation of the Access to Public Records Act by the Clark County Recorder's Office

Dear Mr. Mason:

This is in response to your formal complaint alleging that the Clark County Recorder's Office ("Recorder") violated the Access to Public Records Act by charging you $1 per page for certain copies.

BACKGROUND

You filed your formal complaint with my office on December 1, 2005. You alleged that the Recorder Shirley Nolot imposed a copy fee of $1 per page for all public records in her office, including both "ditto" copies and copies printed from digital images available via an indexing computer program. You contend that copies that are not made by a "photographic reproduction" are limited to the actual cost of the copies.

I sent the Recorder a copy of your complaint. Clark County Attorney Daniel E. Moore responded by letter, a copy of which is enclosed for your reference. Mr. Moore stated that under Ind. Code 36-2-7-10, county recorders may charge a $1 per page fee for copies produced by a photographic process. Furthermore, recorders in Floyd, Jennings, Jefferson, and Washington counties charge for copies under this statute. Accordingly, Mr. Moore asked that I dismiss your complaint.

ANALYSIS

Under the Access to Public Records Act ("APRA"), public agencies may charge a fee to provide a copy of a public record. For a public agency that is not a state agency, the fiscal body of the public agency, or the governing body if there is no fiscal body, shall establish a fee schedule for the certification, copying, or facsimile machine transmission of documents. IC 5-14-3-8(d). The fee may not exceed the actual cost of certifying, copying, or facsimile transmission of the document by the agency, and the fee must be uniform throughout the public agency and uniform to all purchasers. *Id.* As used in subsection (d), "actual cost" means the cost of paper and the per-page cost for use of copying or facsimile equipment and does not include labor costs or overhead costs. *Id.* Notwithstanding subsection (d), a public agency shall collect any certification, copying, facsimile machine transmission, or search fee that is specified by statute or is ordered by a court. IC 5-14-3-8(f).

Under IC 36-2-7-10(a)(5), the county recorder shall charge one dollar ($1) per page not larger than eight and one-half (8 ½) inches by fourteen (14) inches for furnishing copies of records produced by a *photographic process,* and two dollars ($2) per page that is larger than eight and one-half (8 ½) inches by fourteen (14) inches. (Emphasis supplied). The question you present by your complaint is whether the recorder may charge $1 for copies that are made by a non-photographic process, and if so, whether the cost for copies may be more than the actual cost of copying. If these were truly the only questions presented by your complaint, it would be simple to respond. IC 36-2-7-10(a)(5) clearly is limited to copies of records produced by a photographic process. Where no statute provides for any other copy fee, the APRA would apply, and the Recorder would be limited to charging the cost of copying set by the county fiscal body, not to exceed "the actual cost of copying."

However, you seem to contend that the county recorder fee statute does not cover at least two means of reproducing records in the Recorder's office. First, you describe "ditto" copies. I take it that you are referring to copies made by xerography, or photocopies. You also allege that the Recorder may not charge $1 per page for copies printed from digital images available via an indexing computer program. Hence, resolution of your complaint requires construing the meaning of the term "photographic process" in the county recorder fee statute.

While you have implied that you do not believe digital printing and xerography are a "photographic process," you do not state what type of process you believe to be a photographic process. Also, Mr. Moore has not directly addressed your contentions, stating only that he believes the county recorder fee statute allows charging a fee for copies.

There is no Indiana case law or statute defining "photographic process," so were it necessary to interpret the law to determine what the General Assembly intended this phrase to mean, courts would rely upon the common and ordinary, dictionary meanings of the word used. *Crowley v. Crowley*, 588 N.E.2d 576, 578 (Ind. App. 1992). "Process" is defined as "the condition of being carried on." THE RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (2001), 1054. "Photographic" means "of photography"," and "photography"

means "the process or art of producing images of objects on sensitized surfaces by the chemical action of light or other forms of radiant energy." *Id.*, 997. Hence, "photographic process" means "carrying on producing images of objects on sensitized surfaces by the chemical action of light or other forms of radiant energy."

Other statutory provisions relating to recording local records use the term "photographic process." IC 36-2-17-3(a) provides that a county officer who is required to record documents may record them by a photographic process if the process is adopted by the county executive and the necessary photographic equipment and supplies are furnished for that purpose by the county executive. IC 36-2-17-4(a) states that a county officer may record documents by miniature photographic process or microfilm process under prescribed conditions. Hence, if I theorized that a photographic process meant only microfilm, this belief was dispelled by the legislature's equating microfilm with a "*miniature* photographic process," which is consistent with the dictionary definition of "microfilm." *See* THE RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (2001), (defining "microfilm" as "a film bearing a miniature photographic copy of printed or graphic matter"). Hence, "photographic process" subsumes microfilm, but is not limited to that media.

Also, a county recorder may accept for recording a document or a copy of a document produced by a photographic process if the document complies with other statutory recording requirements and the document or copy will produce a clear and unobstructed copy. IC 36-2-11-16(e). This latter provision and the previous statutes suggest that the legislature did not intend a highly technical meaning for "photographic process," nor did it intend to limit the meaning of photographic process to only those media utilizing film. Also, the plain meaning of "photographic process" includes photocopies. Furthermore, in a Florida case involving the identical phrase, the court deciding whether an agency was exempt from the fees imposed by the county recorder's statute gave face value to the statute's application to photocopies provided by the county recorder. *Department of Health and Rehabilitative Services v. Hartsfield 443 So.2d 322, (Fla. App. 1983).*

For all these reasons, it is my opinion that the Recorder may charge $1 per page for photocopies of records. However, I do not believe that the Recorder may charge a fee under the county recorder fee statute for a printout of a digital record. The plain meaning of "photographic process" would not include printing out a digital record from a computer. Hence, unless a statute specifies a copying fee for this mode of reproducing a record, the Recorder is limited to charging for a paper copy of a digital record via a fee schedule adopted by the county fiscal body.

CONCLUSION

For the foregoing reasons, it is my opinion that the Clark County Recorder may charge a $1 per page fee for photocopying its records, but not for providing a printout of a digital record unless a statute authorizes a special copying fee for the latter copy.

Sincerely,

Karen Davis
Public Access Counselor

cc: Daniel E. Moore