



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

Karen Davis

PUBLIC ACCESS COUNSELOR

402 West Washington Street, Room W460
Indianapolis, IN 46204-2745
Telephone: (317) 233-9435
1-800-228-6013
FAX: (317) 233-3091
www.IN.gov/pac

February 24, 2006

VIA FACSIMILE

John Emery
62 W. Jefferson Street
Franklin, IN 46131-2311

Re: Formal Complaint 06-FC-24; Alleged Violation of the Access to Public Records Act by the City of New Castle

Dear Mr. Emery:

This is in response to your formal complaint alleging that the City of New Castle violated the Access to Public Records Act by charging a copy fee in excess of that allowed by the Access to Public Records Act.

BACKGROUND

On January 25, 2006 you filed a formal complaint against the City of New Castle ("City"). Your complaint was assigned formal complaint number 06-FC-24. You requested records from the New Castle Police Department on January 10, 2006. The Chief of Police responded on January 16, 2006 to inform you that he forwarded the records to the City Attorney, David Copenhaver. He indicated that you would have to contact the City Attorney and pay a copy charge of \$.35 per page to obtain the records. You contacted Mr. Copenhaver on January 17, 2006 regarding the copy fee. You questioned the fee and requested that he advise you as to the cost to obtain the records. As of January 25, 2006 you had not received a response from Mr. Copenhaver.

On January 17, 2006 you made a request to the Clerk-Treasurer for a copy of the City's fee schedule which established the charge for reimbursement of copying and duplicating costs. The Clerk-Treasurer responded by providing you with a copy of New Castle City Ordinance 94-2988 (Code § 37.01). She did not provide a fee schedule. New Castle City Ordinance 94-2988 (Code § 37.01) provides that the City may charge "a fee for the reproduction of documents and photographs which will reasonably reimburse it for the costs in both material and labor it incurs." City of New Castle Ordinance 94-2988 (Code § 37.01). Further, the ordinance provides that "the Board of Public Works and Safety of the City shall be responsible for establishing this charge." City of New Castle Ordinance 94-2988 (Code § 37.01). The expressed purpose of the ordinance

was to raise funds from charges for document duplication to a fund established for the purpose of fire safety education. City of New Castle Ordinance 94-2988 (Code § 37.01).

The City did not provide this office with a written response to your formal complaint. Mr. Copenhaver did copy this office on a letter sent to you on January 26, 2006. Mr. Copenhaver indicated in that letter that he was faxing to you all incident and investigation reports responsive to your request. He stated that he did not have copies of police department policies and procedures; however, he indicated that if such existed he would forward them to you. He stated that he had requested information regarding the copy expenses reimbursement and would forward it to you as soon as he received it. He stated that he would inform you of the charges at that time. He also indicated that he had tried unsuccessfully to reach you by telephone on two prior occasions.

My staff attorney spoke with Mr. Copenhaver via telephone on December 15, 2005. Mr. Copenhaver indicated that the agency does not dispute that the City's ordinance was not in accordance with the Access to Public Records Act ("APRA"). Further, the City is in the process of adopting a new ordinance to charge \$0.10 per page. The City has provided you with the requested records at no charge.

ANALYSIS

Any person may inspect and copy the public records of any public agency during the agency's regular business hours, unless a record is excepted from disclosure under applicable law. IC 5-14-3-3(a). Under the APRA, a public agency may charge a fee to copy a record. IC 5-14-3-8. For local agencies, the fiscal body (as defined by IC 36-1-2-6) 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. 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. IC 5-14-3-8(d). Actual cost means the cost of paper and the per-page cost for use of the copying or facsimile equipment and does not include labor costs or overhead costs. IC 5-14-3-8(d). Except as provided in section 8, a public agency may not charge any fee under chapter 3 to search for, examine, or review a record to determine whether the record may be disclosed. IC 5-14-3-8(b)(2).

The City has acknowledged that its copy fee is not in accordance with the APRA. The City violated the APRA when it included labor costs in the setting of its copy fee. Under the APRA, the City may not exercise the discretion to charge excessive copy fees as a means to supplement its budget. Additionally, the City's ordinance delegated the authority to establish a fee schedule to the Board of Public Works and Safety. Pursuant to IC 5-14-3-8(d) the fee schedule must be established by the fiscal body. "'Fiscal body' means . . . common council, for a city other than a consolidated city..." IC 36-1-2-6(3). The New Castle Common Council may not delegate the authority to establish the fee schedule to the Board of Public Works and Safety.

The City is currently working to pass a new ordinance that will conform to the requirements of the APRA. Additionally, the City has provided you with the requested records free of charge. As the City may not charge any fee other than that provided for by statute or a

fee schedule established by the fiscal body, the City acted appropriately in providing the records to you free of charge.

Although you filed your complaint against the Town of New Castle, rather than the Police Department, your request was made to the New Castle Police Department. Police Chief James E. Nicholson responded to your request by sending the records to the town attorney and stating that you should contact him regarding the reports. While the agency may solicit the advice of legal counsel where it has uncertainty regarding the disclosability of certain records, it may not require you to make an additional request to the attorney. The City may have its attorney provide an appropriate response to a request for records on its behalf, so long as it does not delay production of the records. However, because it is the agency's burden to respond to the request, the attorney should contact the requestor rather than requiring the requestor to contact the attorney.

CONCLUSION

For the foregoing reasons, I find that the City of New Castle violated the Access to Public Records Act when it charged a copy fee that was not in accordance with IC 5-14-3-8(d).

Sincerely,

Karen Davis
Public Access Counselor

cc: David Copenhaver