

February 24, 2006

*Sent Via Facsimile*

Mr. Richard Shirey  
Center Township Trustee  
1200 East Main Street  
Muncie, IN 47305

*Re: Formal Complaint 06-FC-27; Alleged Violation of the Access to Public Records Act by the Delaware County Commissioners*

Dear Mr. Shirey:

This is in response to your formal complaint alleging that the Delaware County Commissioners (“Commissioners”) violated the Access to Public Records Act by denying you access to records.

#### BACKGROUND

On December 15, 2005, you sent to Larry Crouch, President of the Commissioners, a request for records. Specifically, you requested:

- Newly published Delaware County EMS Protocols
- Newly published Supervising Hospital Agreement
- E911 Current Dispatch SOP – Protocols
- E911 Emergency Medical Dispatch SOP – Protocols
- E911 Current Roster of Certified Medical Dispatch Personnel

You do not specifically describe a denial of access in your written complaint, but I inferred from your complaint that as of the date of filing, January 25, 2006, you had not received the records. You have spoken with my staff attorney to supplement your complaint, questioning the assessment of fees for some of the records. You provided me with a copy of the letter to you from the Commissioners dated December 15, 2006 (sic), acknowledging receipt of your request

and stating that the Commissioners were compiling the records and they would be provided in a timely manner. I also reviewed a December 22, 2005 letter from the Commissioners to you reiterating that the records would be provided, but were voluminous, consisting of a few hundred pages. The cost would be \$.25 per page.

I sent a copy of your complaint to the Commissioners. I received a letter stating that as of February 3, 2006, the Commissioners had provided all the information you requested, with delivery of the E-911 Current Dispatch SOP and E-911 Emergency Medical Dispatch Protocols. I also received from the Commissioners a January 30 letter stating specifically what records would be provided. In this letter, the Commissioners assessed you for 272 pages of documents at the rate of \$.10 per page. The Commissioners also assessed "overtime costs for retrieval of these documents at \$74.94. Copyrighted material is \$70.00." The letter recites that the overtime costs were for a person to "retrieve the document for your request," "and print each page individually." In addition, the letter states that the E-911 Current Dispatch SOP and E-911 Emergency Medical Dispatch Protocols "were purchased by Delaware County and are copyrighted materials. The publisher of these items has specified a price of \$70 per copy." You have called this office to complain that the fee for the records is inappropriate.

#### ANALYSIS

Any person may inspect and copy the public records of any public agency during the agency's regular business hours, except as provided in section 4 of the Access to Public Records Act ("APRA"). Ind. Code 5-14-3-3(a). A public agency that receives a request for a record that is hand-delivered to the agency must respond within 24 hours. IC 5-14-3-9(a). A public agency must respond within seven (7) days from the agency's receipt of a request sent via U.S. Mail or facsimile. IC 5-14-3-9(b). A response may be an acknowledgment that the agency has received the request, and some indication of how and when the agency intends to comply. The public agency should produce records within a reasonable time, under the circumstances.

You do not state how you delivered your December 15 request to the agency. However, the Commissioners sent a response letter dated December 15; this was within 24 hours of the date that your letter was evidently received by the agency. Therefore, the Commissioners responded timely under the APRA. The Commissioners indicated that several departments of the county were contacted in order to retrieve and assemble the records you sought. I also learned that some of the records were not yet available to the county at the time you requested them, but were provided as soon as they became available.

I have no information before me that leads me to the conclusion that the Commissioners were not diligently providing the records. However, I remind public agencies that to the extent several categories of records are requested, some of which are easily identifiable and could be made available before others, I recommend that the agency make those records available without delay. Nevertheless, it appears to me that the Commissioners updated you on their progress over the several weeks before and after your complaint was filed. I do not find the time for production for these records unreasonable.

Finally, you have told this office that you are unsure whether the cost for providing copies of the records was reasonable. A public agency may charge a fee to copy its public records. 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. IC 5-14-3-8(d). As used in section 8, "actual cost" means the cost of paper and the per-page cost for use of copying equipment, and does not include labor costs or overhead costs. IC 5-14-3-8(d).

In addition, a public agency may charge the direct cost of any reprogramming necessary to separate disclosable from the nondisclosable information. IC 5-14-3-6(c). A public agency may also charge the direct cost for providing a duplicate of a computer tape, computer disc, microfilm, or similar or analogous record system containing information owned by the public agency or entrusted to it. IC 5-14-3-8(g). Direct cost is defined as:

(c) "Direct cost" means one hundred five percent (105%) of the sum of the cost of:

- (1) the initial development of a program, if any;
- (2) the labor required to retrieve electronically stored data; and
- (3) any medium used for electronic output;

for providing a duplicate of electronically stored data onto a disk, tape, drum, or other medium of electronic data retrieval under section 8(g) of this chapter, or for reprogramming a computer system under section 6(c) of this chapter.

IC 5-14-3-2(c).

In addition, the APRA provides that a public agency may not enter into or renew a contract or an obligation:

- (1) for the storage or copying of public records; or
- (2) that requires the public to obtain a license or pay copyright royalties for obtaining the right to inspect and copy the records unless otherwise provided by applicable statute; if the contract, obligation, license, or copyright unreasonably impairs the right of the public to inspect and copy the agency's public records. IC 5-14-3-3(g).

The Commissioners have referred to the E-911 Dispatch SOP and E-911 Emergency Medical Dispatch Protocols as documents that are electronically stored; they do not exist in paper form in the Commissioner's offices. The Commissioners wrote in the January 30 letter that the charge for the copyrighted material was being assessed pursuant to IC 5-14-3-2(c)(2). I read this sentence as claiming that the labor required to retrieve an electronically stored document may be passed to the person requesting the records.

I do not agree that the Commissioners could rely on IC 5-14-3-2(c)(2) to assess you a fee for the labor involved in a staff person printing out the pages of a document stored in the computers of the Commissioners. IC 5-14-3-2(c) merely defines "direct cost." By its terms, the definition of "direct cost" applies in situations in which the agency must reprogram the computer

to separate disclosable from nondisclosable information under section 6(c), or when providing a duplicate of electronically stored data onto a disk, tape, drum, or other medium of electronic data retrieval under section 8(g). The Commissioners may not extract that part of the definition of direct cost and apply it in the present situation, where an individual has printed out the pages of a document that is stored in the agency's computers. The only provision for assessing a copying fee for all the documents you received is at IC 5-14-3-8(d), the actual cost of copying.

Also, there is no provision in the APRA for a public agency to charge a purchaser the cost that has been specified by the publisher of copyrighted material that is a public record. IC 5-14-3-3(g) expressly prohibits a public agency from entering into or renewing a contract or an obligation that requires the public to obtain a license or pay copyright royalties for obtaining the right to inspect and copy records unless otherwise provided by applicable statute, if the contract or obligation unreasonably impairs the right of the public to inspect and copy the agency's public records.

I do not have evidence of the existence of any licensing agreement with the Commissioners requiring the public to pay copyright royalties for the records, much less evidence showing that an agreement does not unreasonably impair the public's right to make copies of the records. Hence, in my opinion, the fee of \$70 for copyrighted material is not in accordance with the Access to Public Records Act.

#### CONCLUSION

In my opinion, the Delaware County Commissioners could not charge a fee for labor to print documents stored in a computer. In addition, the Commissioners could not charge a royalty fee for copyrighted material.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Larry Crouch