

October 5, 2007

Tom DeArk  
PO Box 2062  
Clarksville, Indiana 47131

*Re: Formal Complaint 07-FC-266; Alleged Violation of the Access to Public Records Act by the Town of Clarksville Town Council*

Dear Mr. DeArk:

This is in response to your formal complaint alleging the Clarksville Town Council (“Council”) violated the Access to Public Records Act (“APRA”) (Ind. Code §5-14-3) by charging an excessive copy fee. A copy of the Council’s response to your complaint is enclosed. I find the Council has not violated the APRA by establishing a fee schedule of \$.25 per page for copies of public records.

#### BACKGROUND

In your complaint you allege that the Council’s Ordinance 2007-G-02, effective August 28, 2007 sets forth an excessive fee for copies of public records. The ordinance establishes a fee of \$.25 per page for copies. You provide documentation showing the cost for paper and the copy machine contract equals an actual cost of just under \$.04 per page. You filed your complaint on September 6, asking me to advise the Council to rescind or amend the ordinance, suspend the collection of fees, and refund any fees which may have been collected.

The Council responded to your complaint by letter from attorney Christopher Sturgeon dated September 23. The Council contends that I.C. §5-14-3-8(d) authorizes a public agency to establish copying fees not to exceed \$.10 per page for non-color copies and \$.25 per page for color copies or the actual cost to the agency of copying the document. The Council contends the fee established in the ordinance is based on a study conducted by the Town Planning Commission to determine how long it would take to retrieve and copy a document. The per document total determined by the study was \$1.61.

You provided a further communication dated October 1 wherein you seem to dispute several facts related to the Council’s reliance on the study conducted by the Planning

Commission. You further assert that the Public Access Counselor's Handbook indicates "actual cost" as used in I.C. §5-14-3-8(d) cannot include labor and overhead.

## ANALYSIS

The public policy of the APRA states that "(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information." I.C. §5-14-3-1. The Council is clearly a public agency for the purposes of the APRA. I.C. §5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Council during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. §5-14-3-3(a).

The fiscal body (as defined in I.C. §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 or copying of documents. The fee for certification of documents may not exceed five dollars (\$5) per document. The fee for copying documents may not exceed the greater of:

- (1) ten cents (\$0.10) per page for copies that are not color copies or twenty-five cents (\$0.25) per page for color copies; or
- (2) the actual cost to the agency of copying the document.

A fee established under this subsection must be uniform throughout the public agency and uniform to all purchasers. I.C. §5-14-3-8(d).

A person or public agency denied the right to inspect records under I.C. §5-14-3 or any other right conferred by I.C. §5-14-3 may file a formal complaint with the counselor. I.C. §5-14-5-6.

Here, you have not alleged a denial of the right to inspect records under the APRA. You have also not alleged that you were charged an excessive fee when you received records pursuant to a request. Instead you have alleged the ordinance passed by the Council violates the APRA by setting forth an excessive fee. As such, rather than accepting your complaint formal complaint filed under I.C. §5-14-5-6, I am converting your complaint to an informal inquiry and am answering it under the authority granted in I.C. §5-14-4-10(5), powers and duties of the public access counselor.

Furthermore, you pray for relief which cannot be granted by the public access counselor. The role of the counselor in such matters is to issue advisory opinions. I.C. §5-14-4-10. The counselor has no authority to enforce the laws, compel action, or render an ordinance void.

Here, you present the question whether the Council's ordinance setting a fee of \$.25 for non-color copies violates the APRA. As you have noted, the *Handbook on Indiana's Public Access Laws* ("Handbook") published by this office does have an indication on page 21 that a public agency may not include labor and overhead when calculating actual cost for copies. *Handbook* at 21. You will note, though, that the *Handbook* was last updated in December 2003. Since my appointment to this post on July 1 of this year, one of my top priorities has been to endeavor to get the *Handbook* updated to reflect current law. That project is under way, and I

expect it to be completed by the end of this year. Since the *Handbook* was last updated in 2003, it does not reflect changes made by the General Assembly in 2004, 2005, 2006, or 2007.

In 2007, a change was made to I.C. §5-14-3-8(d) by House Enrolled Act 1379, striking the language “As used in this subsection, “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.” The language was replaced with the language noted previously in this opinion, which allows an agency to charge an amount not to exceed \$.10 per page or the actual cost to the agency. I.C. §5-14-3-8(d). Regardless of whether the striking of the language was intentional or inadvertent, the language of section 8(d) as it stands now allows a public agency that is not a state agency to charge a copy fee not to exceed its actual cost. Since actual cost is no longer defined in the APRA and since the General Assembly struck the language indicating labor and overhead costs could not be included, I cannot find the Council has violated this provision by passing an ordinance establishing a copy fee that does not exceed the actual cost of copying a record.

As I understand it, the Council relied on the Planning and Building Commissioners Office study regarding copy time to determine the actual cost of copying documents. The study revealed a cost of just under \$1.61 per page for copying. It is my opinion this is a reasonable study upon which to rely considering the Council set the copy fee well under the \$1.61 per page cost determined by the Planning Commission, which I understand to be a public agency subject to the ordinance. In my opinion, though, an even better assessment on which to rely would be one of the Clerk-Treasurer’s office since under I.C. §36-5-6-6(a)(7) the Clerk-Treasurer has the duty to maintain the records of the Town legislative body.

#### CONCLUSION

For the foregoing reasons, I find that the Council has not violated the APRA by establishing a fee schedule of \$.25 per page for copies of public records.

Best regards,



Heather Willis Neal  
Public Access Counselor

cc: Christopher Sturgeon