STATE OF INDIANA

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April 14, 2011

Sue Anne Misiniec
Johnson County Clerk
Via Electronic Mail: smisiniec@co.johnson.in.us

Re: Informal Inquiry 11-INF-02; Requests to photograph court records

Dear Ms. Misiniec:

This is in response to your informal inquiry concerning requests to photograph court records. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry. My opinion is based on applicable provisions of the Indiana Public Access Records Act ("APRA"), I.C. § 5-14-3-1 *et seq*.

You pose three questions in your inquiry, which concerns requests that you have received to photograph public court case files with the requester's own equipment and without paying the statutory fee charged by county court clerks. First, would an office policy that requires such copies be made on the clerk's equipment violate the APRA? Second, if a requester makes digital copies using his or her own equipment, does the clerk have the authority to charge the statutory copy fee? Third, what recommendations does the public access counselor have for procedures to safeguard public records if a requester is permitted to make copies on his or her own equipment? I will address each of these herein.

1. May a public agency require that copies of public records be made on the agency's equipment?

The APRA provides that any person may inspect and copy the public records of any public agency, except as provided in the exceptions listed in section 4 of the APRA. I.C. § 5-14-3-3(a). A public agency may not deny or interfere with the exercise of these rights. I.C. § 5-14-3-3(b). If a requester seeks a copy of a public record, the APRA requires the public agency to either: (1) provide the requested copies to the person making the request; or (2) allow the person to make copies on the agency's equipment or on the requester's own equipment. I.C. § 5-14-3-3(b).

In *Opinion of the Public Access Counselor 05-FC-70*, Counselor Davis considered "whether the APRA allows a public agency's sole discretion to dictate

whether it will make the requested copy or whether it will permit the person requesting the record to make the copy on his own equipment." *Id.*, available at http://www.in.gov/pac/advisory/files/05-FC-70.pdf. Counselor Davis considered that question in response to a formal complaint against a county recorder. Her analysis is instructive here:

> There is no question that "copy" includes using a digital camera to make a reproduction of the record, and the Recorder does not raise any such issue. See IC 5-14-3-2 (defining "copy" to include "reproducing by any other means").
>
> The Recorder argues that nowhere in the APRA is the public agency mandated to allow a person the right to make a digital image using a camera provided by the person, if the public agency prefers to make the copy on the agency's own equipment. The Recorder cites concerns (aside from recoupment of the copying fee allowed under IC 36-2-7-10) about "the effect on the equipment and documents in the office, the potential for disruption of the operations and business conducted in the Recorder's Office and other abuses the public agency is required to protect against by IC 5-14-3-7." The foregoing statement is the extent of the submission of the Recorder to support its argument that the Recorder may opt to deny you the right to make a copy of its records using your own equipment. The Recorder asks this office to determine that the APRA does not require public agencies to allow individuals to bring in their own equipment to make digital visual images.
>
> To the contrary, I find support in the APRA for the notion that a public agency's discretion is somewhat limited under IC 5-14-3-3(b)(1) and (2). The central provision in APRA states that any person may "inspect and copy" the public records of any public agency. IC 5-14-3-3(a). The words that I set in quotes are action verbs that suggest that the person availing himself of APRA may do something, inspect and copy, public records. . . .
>
> IC 5-14-3-3(b) prohibits a public agency from denying or interfering with the exercise of the right stated in subsection (a). The difficulty in interpretation stems from the language stating that a public agency shall either provide the copies or allow the person to make copies on the agency's equipment or on the requester's own equipment. The APRA is silent on whether the options for supplying a copy are solely within the public agency's discretion. In fact, the public agency could wish to exercise its discretion to decline to make the copies and instead allow the person to make the copies himself on either the agency's equipment or the person's own equipment. This is a reasonable interpretation of IC 5-14-3-3(b)(2). Also, a public agency is not required to maintain equipment capable of reproducing a record; in that instance, the public agency must permit a person to inspect and manually transcribe the record. IC 5-14-3-8(e). However, to read this clause to not allow a person to use his own equipment to make a copy would nullify the language in IC 5-14-3-3(b)(2)(B), and in any case, the Recorder does maintain equipment to reproduce its records.
>
> A public agency is required to protect records from loss, alteration and destruction, and the Recorder has raised the provision at IC 5-14-3-7(a). However, the Recorder has not explained how your use of a

> digital camera to take pictures from records displayed on the computer will result in the loss, destruction, or alteration of records, or interferes materially with the functions or duties of the Recorder. If anything, I would suspect that your making copies utilizing your own equipment may actually save staff the time and effort to make copies themselves.
> The statutory provisions for the right of access to public records must be construed liberally, with the burden of proof for nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record. IC 5-14-3-1. In my opinion, the Recorder may not deny you the right to make copies using your own equipment, your digital camera, without sustaining its burden of showing that the use of your equipment to make copies implicates the Recorder's obligations under IC 5-14-3-7(a), or implicates some other legal obligation imposed on the Recorder under the APRA or other relevant law. The conclusory statement of the Recorder that she has concerns about the effect on the equipment and documents in the office falls short of meeting a public agency's burden under the APRA.

While I appreciate Counselor Davis' reasoning, I respectfully disagree to the extent that I do not read Ind. Code § 5-14-3-3(b) to mean that an agency lacks discretion to determine whether to provide a requester with a copy or to allow the requester to make his or her own copy of a public record. The provision states, "A public agency may not deny or interfere with the exercise of the right stated in subsection (a). The public agency ***shall either***: (1) provide the requested copies to the person making the request; or (2) allow the person to make copies: (A) on the agency's equipment; ***or*** (B) on the person's own equipment." *Id.* (emphasis added). This language requires that, after receiving a request for copies of a public record, a public agency must do one of two things: "either" provide a copy to the requester, "or" permit the requester to copy the record. Once the agency does one of the two, it has satisfied its obligation. The General Assembly's use of the "either . . .or" language indicates an intent to provide public agencies with the flexibility to determine which option is appropriate under the circumstances. As Counselor Davis acknowledged, in some circumstances it might not be practicable or prudent to allow requesters to make their own copies of public records. Because neither the General Assembly nor the public access counselor fully understands each agency's circumstances, providing agencies with the flexibility to choose whether to provide copies or allow copying allows agencies to produce records in the most efficient manner possible without neglecting their security.

However, Counselor Davis reasoned that "to read this clause [in subsection 3(b)] to not allow a person to use his own equipment to make a copy would nullify the language in IC 5-14-3-3(b)(2)(B)." I agree with Counselor Davis' premise, but respectfully disagree with her conclusion. If a provision requires an agency to do one of two things, the agency's decision will always result in a "nullification" of the other option. However, that does not mean that the agency has no discretion to choose one of the two options available to it. If that were the case, there would be no need to provide the agency with an option by using the "either . . . or" language in subsection 3(b). Moreover, it is puzzling why Counselor Davis would state that a "public agency could wish to exercise its discretion to decline to make the copies and instead allow the person

to make the copies himself," but the same public agency does not, according to Counselor Davis, have the discretion to refuse to allow a requester to make copies on the requester's own equipment. If a public agency has the discretion to choose one option, I do not see a reason to deprive the agency of the discretion to choose the other. As a general rule of statutory construction, if a statute is unambiguous (i.e., susceptible to but one meaning), Indiana courts give the statute its clear and plain meaning. *Elmer Buchta Trucking, Inc. v. Stanley*, 744 N.E.2d 939, 942 (Ind. 2001). Because subsection 3(b) requires a public agency to "either" provide copies to a requester "or" allow the person to make copies on either the agency's equipment or the person's own equipment, it is my opinion that a public agency has the discretion to employ either option in fulfilling a public records request.

2. If a requester makes copies on his or her own equipment, does the clerk have the authority to charge its statutory copy fee?

Ind. Code § 33-37-5-1 provides that a court clerk shall collect a fee of one dollar ($1) per legal size or letter size page for preparing a copy of any record:

> **IC 33-37-5-1**
> **Preparing transcript or copy of record; fee**
> Sec. 1. (a) This section applies to a document fee for preparing a transcript or copy of any record. However, this section does not apply to either of the following:
> (1) The preparation or copying of a record:
> (A) through the use of enhanced access under IC 5-14-3; or
> (B) by a governmental entity using an electronic device.
> (2) The transmitting of a document by facsimile machine or other electronic device.
> (b) Except as provided in subsection (c), the clerk shall collect a fee of one dollar ($1) per legal size or letter size page, including a page only partially covered with writing.
> (c) The legislative body of a county may adopt by ordinance a schedule of document fees to be collected by a clerk under this section. If an ordinance has been adopted, the clerk shall collect document fees according to the schedule. However, the document fee collected by the clerk under this subsection may not exceed one dollar ($1) per legal size or letter size page, including a page only partially covered with writing.

The plain language of this section states that the fee is assessed "for preparing a transcript or copy of any record." I.C. § 33-37-5-1(a). For each copied page that the clerk prepares, subsection 1(b) requires the clerk to collect a one dollar fee.

There has been some disagreement about whether this language permits county clerks to charge a requester for copying clerks' records with the requester's own equipment. In my opinion, the clerk could not assess the fee from a requester who makes copies on his or her own equipment because the statute requires fees for the clerk's "preparing" a copy. "Prepare" is defined in various ways: (1) to put in proper condition or readiness; (2) to get (a meal) ready for eating, as by proper assembling, cooking, etc.; and (3) to manufacture, compound, or compose: to prepare a cough syrup.

http://dictionary.reference.com/browse/prepare (last visited April 14, 2011). I do not consider a county clerk to be "preparing" a copy by merely allowing a requester to access a record and use the requester's own equipment to copy the record. Consequently, it is my opinion that a clerk may not assess the fee prescribed by Ind. Code § 33-37-5-1 if a requester copies the record on the requester's own equipment.

3. What recommendations does the public access counselor have for safeguarding records if a requester makes copies on the requester's own equipment?

The APRA requires a public agency to "protect public records from loss, alteration, mutilation, or destruction, and regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees." I.C. § 5-14-3-7(a). This language cannot be used to perpetually deny or interfere with a requester's rights to inspect and copy public records, *see* I.C. § 5-14-3-7(c), but agencies also cannot neglect their responsibility to protect public records and maintain the confidentiality of nondisclosable records. *See* I.C. § 5-14-3-10.

The means by which public agencies secure their records will vary greatly depending on the particular agency, the type of records stored, and the means by which requesters typically access those records. Consequently, it is generally difficult for the public access counselor to advice agencies regarding the safeguarding of records. The Indiana Commission on Public Records advises State and local agencies regarding retention issues, and its website includes detailed information regarding the preservation of public records. *See* http://www.in.gov/icpr/2359.htm (last visited April 14, 2011).

If I can be of additional assistance, please do not hesitate to contact me.

Best regards,

Andrew J. Kossack
Public Access Counselor