



STATE OF INDIANA

MICHAEL R. PENCE, Governor

**PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE**

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317) 234-0906
Fax: (317) 233-3091
1-800-228-6013
www.IN.gov/pac

March 8, 2013

Ms. Sadie Durbin
Commonwealth's Attorney's Office
Domestic Violence and Child Abuse Unit
514 West Liberty Street
Louisville, Kentucky 40202

Re: Informal Inquiry 13-INF-14; Clark County Clerk

Dear Ms. Durbin:

This informal opinion is in response to your inquiry regarding a recent request for records that was submitted to the Clark County Clerk ("Clerk") on behalf of the Commonwealth's Attorney's Office ("Commonwealth"). Ms. Barbara Bratcher Haas, Circuit Court Clerk, responded to your inquiry. Her response is enclosed for your reference. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*

BACKGROUND

You provide that you are a paralegal for the Commonwealth for the 30th Judicial Circuit of Kentucky. In your job capacity, you are required to make certified public record requests to the Clerk in order to obtain records on defendants the Commonwealth is prosecuting that have previous convictions in Clark County. The records requested are being used for the sole purpose in aiding the Commonwealth's prosecution by using Clark County's felony convictions as a basis to indict defendants as Persistent Felony Offenders ("PFO"). PFO is very similar to Indiana's Habitual Offender Law, which allows for higher penalty ranges if conviction is secured. In addition to using the records for PFOs, in domestic violence and child abuse cases, many times the defendant and victim have a history of violence. The Commonwealth is required to obtain information on previous Clark County cases in order to enhance the Commonwealth's case by proving prior bad acts via Kentucky's Rules of Evidence 404(b).

On February 22, 2013, the Clerk responded to a request for records that you had submitted on February 16, 2013. Ms. Hass provided that the Clerk's office was open and records were available for inspection during the regular business hours and a fee of \$.10 per page and \$1.00 for certification would apply. The Clerk's news came as a shock to

you as the Clerk had previously fulfilled your requests free of charge. You thereafter contacted Ms. Haas who stated that the Clerk was required to let six of its employees go in light of budget cuts. As a result, she could no longer provide a copying/ mailing service for your requests and that the records would be available in her office for the Commonwealth to copy. You inquired whether the Clerk would be willing to charge a fee for the mailing/copying, Ms. Haas declined. When asked if the prosecuting attorney from California sent a request for records, would the same policy apply, Ms. Haas stated it would not and if she had enough time, copies would be made and sent.

You provide that it is not plausible for the Commonwealth to drop everything that it is currently working on and drive to the Clerk's office to make copies of the records, especially in light of the Commonwealth's willingness to pay the Clerk a reasonable fee for the copies and mailing charges. This is the first time the Commonwealth has encountered such a stringent, unrealistic policy and thus you inquire whether the actions of the Clerk are compliant with the APRA.

In response to your inquiry, Ms. Haas advised that your request for records was never denied. You were informed that the Clerk did not have the resources to look through the files to locate the documents that had been sought. Further, if you would send someone from your office to select the appropriate documents from the file, the Clerk would gladly provide you the copies. After reviewing information contained on the Public Access Counselor's website, Ms. Haas has copied the suggested letter of response to a requesting party and will assign a court deputy to assist the records department in an effort to comply with your request. The Clerk's response to your request provided that the copy cost would be \$.10 per page and a certification fee of \$1.00. The records would be sent upon payment of the respective fees.

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." *See* I.C. § 5-14-3-1. The Clerk is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Clerk's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

For public agencies that are not state agencies, 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 or copying of documents. *See* I.C. § 5-14-3-8(d). The fee for copying documents may not exceed the greater of ten cents (\$0.10) per page for copies that are not color copies or twenty-five cents (\$0.25) for color copies or the actual cost of to the agency of copying the document. *See* I.C. § 5-14-3-8(d). The fee for certification of documents may not exceed five dollars (\$5) per document. *Id.* 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.* A fee established under this subsection

must be uniform throughout the public agency and uniform to all purchasers. *Id.* A public agency may require that payment for copying costs be made in advance. *See* I.C. § 5-14-3-8(e). An agency may only charge a fee greater than what is provided in section 8 of the APRA pursuant to a specific state statute (e.g. I.C. § 9-29-11-1 provides that a law enforcement agency may charge a fee not less than \$5.00 for an accident report). This office has stated that it is reasonable for public agencies to mail copies of records to the requestor when the requestor has paid for the applicable postage costs in advance. *See Opinions of the Public Access Counselor 09-FC-13; 09-FC-221; 10-FC-59; 12-FC-36.*

The Clerk has provided that a court deputy will now be assigned to assist the Records Department in an effort to provide all records that are responsive to the Commonwealth's requests. There will be a copy fee of \$.10 per page with a \$1.00 certification fee. Further, the Clerk has advised that all fees must be paid prior to disclosure. Upon payment of the respective fees, the records will be sent to the Commonwealth. It is my opinion that the fees and procedures contemplated by the Clerk are in compliance with section 8 of the APRA.

I would note for all parties that the APRA provides a public agency shall provide records that are responsive to the request within a reasonable time. *See* I.C. § 5-14-3-3(b). The public access counselor has stated that among the factors to be considered in determining if the requirements of section 3(b) have been met include, the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and redacted prior to disclosure. The APRA requires an agency to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. *See* I.C. § 5-14-3-6(a). Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. *See* I.C. § 5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. *See* I.C. § 5-14-3-7(c). The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *See Opinion of the Public Access Counselor 02-FC-45.* This office has often suggested a public agency make portions of a response available from time to time when a large number of documents are being reviewed for disclosure. *See Opinions of the Public Access Counselor 06-FC-184; 08-FC-56; 11-FC-172.* Further nothing in the APRA indicates that a public agency's failure to provide "instant access" to the requested records constitutes a denial of access. *See Opinions of the Public Access Counselor 09-FC-192 and 10-FC-121.*

The Clerk has noted that it was forced to let go of six employees due to budget cuts. The Commonwealth should keep this factor in mind in that while the Clerk has provided it will continue to provide copies of the records requested, the cutbacks may affect the ability of the Clerk to produce the records requested as quickly as in the past. Thus, the Commonwealth should ensure that upon notification that certain records of the Clerk are needed in order to aid in prosecution, the request should immediately be sent to the Clerk in order to allow the agency enough time to properly search for and copy the

records that have been requested. The Commonwealth should also ensure that the requests that are submitted accurately identify the records that have been sought, which would include identifying the correct cause number for the defendant in question.

Please let me know if I can be of any further assistance.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a distinct "Hoage" following.

Joseph B. Hoage
Public Access Counselor

cc: Ms. Barbara Bratcher Haas