



STATE OF INDIANA

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May 1, 2013

Paul Davis
711 S. Drexel Avenue
Indianapolis, Indiana 46203

Re: *Informal Opinion 13-INF-24; I.C. § 33-37-5-1*

Dear Mr. Davis:

This opinion is in response to your informal inquiry regarding fees charged by a public agency pursuant to I.C. § 33-37-5-1. 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.*, and I.C. § 33-37-5-1.

BACKGROUND

Regarding a request for records made pursuant to the APRA, you inquire if you request records to be sent by facsimile, whether the agency may charge you a copying fee. You have reviewed the relevant portions of I.C. § 33-37-5-1, which specifically excludes a fee for the transmitting of a document by facsimile machine or other electronic device.

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. Accordingly, any person has the right to inspect and copy a public agency'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). 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.* The fee for certification of documents may not exceed five dollars (\$5) per document. 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).

In your inquiry, you have specifically cited to I.C. § 33-37-5-1, which applies exclusively to any circuit, superior, probate, city, and town courts. *See* I.C. § 33-37-1-1. The Clerk of each respective Court is generally responsible for the disclosure of the records and collection of fees. I.C. § 33-37-5-1 provides:

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 documents fees to be collected by a clerk under this section. If an ordinance has been adopted, the clerk shall collect documents 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.

A Clerk may not charge a fee pursuant to I.C. § 33-37-5-1(a)(2) for transmitting the record by facsimile or other electronic device. As to any facsimile fee beyond that contemplated by I.C. § 33-37-5-1, I.C. § 5-14-3-8(d) authorizes the fiscal body to establish a fee schedule for the certification or copying of documents. Prior to July 1, 2007 this subsection allowed for the inclusion of a facsimile machine transmission fee. Effective July 1, 2007 the reference to the inclusion of a fee for facsimile machine transmissions was deleted from this subsection. I.C. § 5-14-3-8(f) states in part: “Notwithstanding subsection...(d)..... a public agency shall collect.... facsimile machine transmission fee... that is specified by statute or is ordered by a court.” I am not aware of any statute that authorizes the court or clerk to collect a facsimile transmission fee. Indiana Trial Rule 81(A) does not allow for a standing court order for facsimile fees.

Thus unless specifically ordered by the Court in a particular case, a facsimile fee may not be collected by the Clerk. *See also Opinion of the Public Access Counselor 11-FC-242.*

The question remains is whether the Clerk can charge a copying fee pursuant to I.C. § 33-37-5-1 when a record is provided via facsimile machine or other electronic device. By way of example, a request is submitted to the Clerk for a copy of a Notice of Appearance in a criminal matter. In lieu of the record being provided by mail or retrieved by the requestor, the requestor asks that the record be sent by fax. Generally, all records maintained by the Clerk are kept in a specific file assigned to the matter in hard-copy. In our example, the Clerk is not required to print out a copy of the Notice of Appearance, as a copy is already maintained in the Court's file. The Clerk must retrieve the copy from the file and fax it to the requestor.

In an opinion by my predecessor, Andrew Kossack, the issue of whether the Clerk could charge a copy fee pursuant to I.C. § 33-37-5-1 when the requestor uses their own equipment was addressed. Counselor Kossack stated:

“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.”
<http://www.in.gov/pac/files/11-INF-02.pdf>

I would note that I am not aware of any statute that would require the Clerk to fax the record requested, although I would encourage such a practice if it is reasonably feasible. I believe that Counselor Kossack’s analysis is applicable to your inquiry, in that the Clerk would not be “preparing” the record by retrieving it from the file and faxing it. Thus a copy fee could not be charged by the Clerk pursuant to I.C. § 33-37-5-1 under these circumstances. However, in the unique situation where the record requested is not already maintained in hard copy and the Clerk is required to print the record in order so that it may be faxed to the requestor, it is my opinion that the Clerk could charge a copy fee pursuant to I.C. § 33-37-5-1. As an alternative to this specific situation, as opposed to the record being faxed, the requestor could ask that it may be emailed, so that a physical

record is not required to be produced prior to disclosure and thus no fee could be levied pursuant to I.C. § 33-37-5-1.

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 vertical line for the "H".

Joseph B. Hoage
Public Access Counselor