

July 12, 1999

Mr. Timothy McCaulay
Attorney, City of Fort Wayne
HELMKE, BEAMS, BOYER & WAGNER
202 West Berry Street, Suite 300
Fort Wayne, Indiana 46802-2216

Re: PAC Opinion 99-7; Various questions concerning access to records of law enforcement agencies.

Dear Mr. McCaulay:

This is in response to your request for a written opinion, which was dated June 25, 1999. You have asked a number of questions concerning access to the public records of law enforcement agencies, in particular, those of the Fort Wayne City Police Department. Each of your questions has been addressed below.

1. Prior to July 1, 1999, could a local public agency, such as the Fort Wayne Police Department, include overhead and labor expenses in its copying charges for the copying of a public record?

Prior to July 1, 1999, a local public agency was authorized to charge fees for photocopies that did not "exceed the actual cost of certifying, copying, or facsimile transmission of the document." Ind. Code rc 5-14-3-8(d). The term "actual cost" was not defined, thus, some local fiscal bodies, which are responsible for setting fee schedules for the local public agencies, did include overhead and labor costs in their computation of "actual cost."

It is my opinion, however, that reading the Access to Public Records Act as a whole, that the General Assembly never intended for overhead and labor costs to be included in the computation of actual cost. The public policy of the Act is that "(p)roviding persons with the 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." Ind. Code rc 5-14-3-1. The General Assembly took action during its 1999 Session to clarify its intent under Indiana Code section 5-14-3-8(d) and have expressly excluded overhead and labor costs from the computation of photocopying fees at the local level after July 1, 1999.

2. Prior to, or after July 1, 1999, is there or has there been, any requirement that a local public agency, such as the Fort Wayne Police Department, charge only \$0.10 per page for the copying of documents?

Before and after July 1, 1999, there neither was nor is no provision in the Access to Public Records Act that mandates that a local public agency charge only \$0.10 per page for the photocopying of documents. Many readers of the Access to Public Records Act confuse the minimum \$0.10 per page copying fee stated for state agencies, at Indiana Code section 5-14-3-8 (c), as being applicable to local agencies as well. Under the pre-July 1, 1999 and post-July 1, 1999 versions of Indiana Code 5-14-3-8(d), the fiscal bodies for local public agencies will still have authority to set the per page photocopying fees for their agencies and there is no statutory minimum or maximum stated.

3. After July 1, 1999, may a local public agency, such as the Fort Wayne Police Department, no longer include overhead and labor expenses as a result of a change in state law that goes into effect on that date, pursuant to P.L. 151-1999?

Under P.L. 151-1999, § 1, the General Assembly amended Indiana Code 5-14-3-8(d) to clarify its meaning of the term "actual cost" as used in that provision.

"(A)ctual 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.

It is now clear that, effective July 1, 1999, local public agencies may not include overhead and labor costs in the computation of the "actual cost" of providing photocopies, facsimile transmissions or certifications of documents.

4. Even after July 1, 1999, does there remains some uncertainty as to the amount a law enforcement agency may charge for a police report because of Indiana Code section 9-29-11-1, which authorizes a charge of not less than \$3.00 for "each report" prepared by a law enforcement officer? Do you agree that, although it would appear that the General Assembly meant to refer only to "accident reports" in Indiana Code section 9-29-11-1, the fact that the law states "reports" creates confusion over whether a police department could charge \$3.00 for every report or only for accident reports? Do you agree that this confusion will continue to exist until the General Assembly clarifies the language in Indiana Code section 9-29-11-1?

For the reasons stated below, it is my opinion that there is no uncertainty that Indiana Code section 9-29-11-1 applies to fees to be collected for accident reports, but not to other reports created by law enforcement officers in the conduct of their duties. I do not agree that Indiana Code section 9-29-11-1 creates confusion over the fees to be charged for other reports created by law enforcement agencies which may be, in part or in whole, subject to disclosure under Indiana Code 5-14-3-5(c). Finally, I do not believe that an amendment to Indiana Code section 9-29-11-1 is necessary to clarify that this section applies only to fees for copies of motor vehicle accident reports.

The Access to Public Records Act states that, notwithstanding Indiana Code section 5-14-3-8(d), which governs the fees to be charged by local public agencies for photocopies,

a public agency shall collect any certification, copying, facsimile transmission, or search fee that is specified by statute or is ordered by a court.

Indiana Code α 5-14-3-8(f). Indiana Code section 9-29-11-1(a), a provision under the Indiana Motor Vehicle Code, provides that:

The main department, office, agency, or other person under whose supervision a law enforcement officer carries on the law enforcement officer's duties may charge a fee that is fixed by ordinance of the fiscal body in an amount not less than three dollars (\$3) for each *report*.

(Emphasis added.) The only other subsection under Indiana Code section 9-29-11-1, subsection (b), refers back to subsection (a) and specifically mentions the fees collected under subsection (a) for copies of "accident reports" created by law enforcement agencies. Indiana Code section 9-29-11-1(a) may only refer to "reports" but in reading the entire provision, it is clear that the General Assembly was referring only to fees for the motor vehicle accident reports created under Indiana Code article 9-26.

5. Is the standard "Miscellaneous Incident Report" prepared by a Fort Wayne Police Officer, a blank copy of which report form is enclosed, a law enforcement investigatory record that need not be released to the public?

An "investigatory record" of a law enforcement agency includes "information compiled in the course of the investigation of a crime." Ind. Code α 5-14-3-2. Investigatory records of law enforcement agencies are disclosable at the discretion of the agencies under Indiana Code section 5-14-3-4(b)(1), but these agencies are required to disclose certain information concerning responses to complaints, incidents and accidents and make this information available under Indiana Code section 5-14-3-5(c). In reviewing whether the Miscellaneous Incident Report Form used by the Fort Wayne Police Department qualifies as an investigatory record, it is important to determine whether the Department has made the information required to be disclosed under Indiana Code section 5-14-3-5(c) available for public inspection in some other form.

Under Indiana Code section 5-14-3-5(c), the following information must be made available in a record that is open for public inspection and copying within 24 hours after the suspected crime, accident or complaint as been reported to the Department:

1. The time, substance, and location of all complaints or requests for assistance received by the agency.
2. The time and nature of the agency's response to all complaints or requests for assistance.
3. If the incident involves an alleged crime or infraction:
 - a. the time, date, and location of the occurrence;
 - b. the name and age of any victim, unless the victim is a victim of a crime under IC 35-42-4 [sex crimes];
 - c. the factual circumstances surrounding the incident; and

d. a general description of any injuries, property or weapons involved.

According to your letter, the Department makes a record for the purposes of disclosure under Indiana Code section 5-14-3-5(c), which is known as the "daily police log." So long as the information listed above is provided in the daily police log, the disclosure of the Miscellaneous Incident Report Form should not be an issue. If the information listed above is not available in the daily police log, but is available within the Miscellaneous Incident Report Form, the Department may comply by disclosing only the information required to be disclosed under Indiana Code section 5-14-3-5(c). The Department may then redact any other information that may appear on the Miscellaneous Incident Report Form and which need not be disclosed as authorized under Indiana Code section 5-14-3-6.

6. May the Fort Wayne Police Department legally have a policy that places limitations on the release of law enforcement investigatory records, including "Miscellaneous Incident Reports," such as:

- a. Limiting release to individuals mentioned in the report upon showing of satisfactory identification.*
- b. Deleting references to the identity of complaining parties; and,*
- c. Releasing the reports when the daily police log does not contain all the information required by Indiana Code section 5-14-3-5(c) after deleting any information not required to be given under Indiana Code section 5-14-3-5(c)?*

Do you agree that such a policy need not be in writing, but that it is a better practice that such a policy be in writing to avoid claims of arbitrary or capricious denial of access?

The Access to Public Records Act does provide public agencies with discretion to disclose certain categories of documents, including investigatory records of law enforcement agencies. See, Indiana Code 5-14-3-4(b). The public agency must be conscious of the fact that, upon review of the denial of access to a public record based upon one of these exemptions from disclosure, the person denied access can bring forward proof that the denial of access was arbitrary and capricious under Indiana Code section 5-14-3-9(f). For this reason, it is important that a public agency be consistent in any policies concerning disclosure of public records when the agency wishes to preserve the position that the public records are disclosable at the agency's discretion.

The Fort Wayne Police Department may, therefore, have a policy that places limitations on the release of investigatory records so long as the release of information is consistent among the persons making such requests for access. The Department may release investigatory records, for example the Miscellaneous Incident Report Form, to persons mentioned in the body of the report upon proper identification. This requirement to show identification, however, does not impact the ability of any person to obtain the information required to be disclosed under Indiana Code section 5-14-3-5(c). The Department may choose not to disclose information about complaining parties, so long as that nondisclosure is consistent among requestors. Finally, the Department may release portions of the Miscellaneous Incident Report Forms if the daily police log is lacking

any of the information required to be disclosed under Indiana Code section 5-14-3-5(c). It is my advice, however, that the daily police log, if it is the record that the Department wishes to use in order to comply with Indiana Code section 5-14-3-5(c), be revised in format to ensure that all of the required information be included in that one record.

If the Department has a policy with respect to disclosure under Indiana Code section 5-14-3-4(b) (1), it need not be in writing in order to be effective. I do agree, however, that it is a better practice to put such guidelines for disclosure in written form so that the Department can better defend any action brought under the Access to Public Records Act in the case of a denial.

7. Is it a violation of the Indiana Access to Public Records Act for a local public agency to provide media representatives "free" copies of police reports? Do you agree that if this practice is a violation, charging the press the same amount that members of the public are charged for copies of the same record can cure it?

The public policy of the Access to Public Records Act provides that persons are entitled to "full and complete information regarding the affairs of government and the official acts of those who represent them." Ind. Code $\text{\textcircled{r}}$ 5-14-3-1. As a result, many public agencies do provide photocopies at no charge or will provide a minimal number of photocopies at no charge to all persons requesting access.

Under Indiana Code section 5-14-3-8(d), the fiscal body for a local public agency shall establish a fee schedule for photocopies of public records and the fee may not "exceed" the actual cost of providing a photocopy. The Access to Public Records Act does not expressly prohibit the provision of copies at no charge¹ and there is nothing that would prohibit a public agency from charging less than the actual cost. As noted above, some local public agencies charge no fees for photocopies.

One provision that should be kept in mind as you consider this issue is that Indiana Code section 5-14-3-8(d) does provide that fee schedules for a public agency should be "uniform throughout the agency and uniform to all purchasers." The fiscal body for the Fort Wayne Police Department should consider any current policies or changes to such policies about the provision of photocopies and incorporate them into the fee schedule for the Department to ensure the uniformity contemplated under Indiana Code section 5-14-3-8(d).

If you have any further questions, please feel free to contact me.

Sincerely,

Anne Mullin O'Connor

cc: Joe Weller, Fort Wayne News-Sentinel
Enclosure

¹There is one instance in which a public agency is expressly required to waive fees. A public agency may not charge a fee for providing an electronic map if the map will be used for a noncommercial purpose, including journalism. Ind. Code α 5-14-3-8(k).