



STATE OF INDIANA

MICHAEL R. PENCE, Governor

PUBLIC ACCESS COUNSELOR
LUKE H. BRITT

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

October 6, 2016

Shannon Hall
Courier & Press Reporter
Shannon.hall@courierpress.com
812-464-7624

Re: Formal Complaint 16-FC-227; Alleged Violation of the Access to Public Records Act by the Town of Newburgh

Dear Ms. Hall:

This advisory opinion is in response to your formal complaint alleging the Town of Newburgh ("Town") violated the Access to Public Records Act ("APRA"), Indiana Code § 5-14-3-1 et. seq. The Town has responded to your complaint on September 19, 2016. Pursuant to Indiana Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on September 7, 2016.

BACKGROUND

Your formal complaint dated September 7, 2016 alleges the Town of Newburgh violated the Access to Public Records Act by charging a fee in excess of what is allowable by law.

On or about August 25, 2016, you filed a request under the APRA on behalf of the Evansville Courier & Press, requesting digital copies of all emails between Newburgh Police Commission members. The Town Manager responded to your request the same day suggesting she would provide you with records in a reasonable time.

On September 1, 2016, the Town Manager sent you an email suggesting you specify the subject matter of your request in order to narrow the scope of the search terms. Secondly, you were notified all emails are on the Town's servers which are not accessible immediately to the Town; the Town would be required to call in outsourced IT contractors to obtain the data requested. The cost of this work is quoted at \$90 per hour and would be passed on the Courier. The Town Manager was ready to comply with the request, but she received no response until the filing of APRA complaint.

According to its response to your formal complaint, due to the Town's size, it does not employ IT personnel, but rather contracts with a third party to maintain its servers. On September 8, 2016, the

Town Manager sent an email to its vendor PC Quest, Inc., requesting a cost estimate to retrieve the emails for you. The estimate from the vendor was for \$540-\$720 depending on duration of time it takes to retrieve the information. In the Town Manager's response, she believes the cost to retrieve the emails is considered a direct cost under Indiana Code § 5-14-3-2 (d).

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 Indiana Code § 5-14-3-1*. The Town of Newburgh is a public agency for the purposes of the APRA. *See Indiana Code § 5-14-3-2(n)(1)*. Accordingly, any person has the right to inspect and copy the Town's disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. *See Indiana Code § 5-14-3-3(a)*.

Often in the case of smaller communities, it is prudent for the government unit to outsource certain government functions in order to save costs. Outsourcing IT responsibilities is a common circumstance. If it chooses to do so, the public agency is contracting with outside vendors using an appropriation from the Town Board or City Council. Those monies, of course, are collected from taxpayers and saves money on the front end.

What the Town is attempting to do, however, is double-charge its constituents on the back end as well for information, which would be available (and inexpensive) *but for* the Town's outsourcing of IT responsibilities. This is a clear barrier to access.

Government documents are capped at a copy charge of \$.10 per page on the local level. *See Indiana Code § 5-14-3-8(d)*. You are seeking individual documents which generally are printed out per page or are else scanned and sent electronically in .pdf form.

There are situation when a requester is asking for a duplicate of a disc or a flash drive or some other form of electronic storage device that would trigger Indiana Code § 5-14-3-8(g) which states:

for providing a duplicate of a computer tape, computer disc, microfilm, law enforcement recording, or similar or analogous record system containing information owned by the public agency or entrusted to it, a public agency may charge a fee, uniform to all purchasers, that does not exceed the sum of the following:

- (1) The agency's direct cost of supplying the information *in that form*.

Emphasis added.

However, your public records request does not seek a duplicate "a computer tape, computer disc, microfilm, law enforcement recording, or similar or analogous record system containing information owned by the public agency or entrusted to it". You seek email messages. Had the Town employed in-house technology, your cost would be \$.10 per page. However, because of the outsourcing, the Town is

saving money on overhead cost yet is still charging back a requestor an outrageous sum which would be absolutely prohibitive of access.

If the Town chooses to provide you the information on a thumb drive or compact disc, it may charge 105% of the cost of the CD or flash drive and any labor to drag and drop the .pdf files (or other file format) onto the actual medium. This would be a fairly negligible cost and would not come close to approaching the price quoted to you.

Indiana Code § 5-14-3-8(g) is reserved for circumstances where a public access requestor is seeking a duplicate of an entire program or hard drive or other large data repository necessitating a file storage system. The Courier is not seeking a *system* or account. It is requesting individual messages. The cost of retrieval, if outsourced to an outside party, cannot be charged back to the end user.

CONCLUSION

Based on the foregoing, it is the Opinion of the Public Access Counselor the Town of Newburgh must only charge a maximum of \$.10 per page for the messages you seek.

Regards,

A handwritten signature in black ink, appearing to read 'LH Britt', with a long, sweeping underline.

Luke H. Britt
Public Access Counselor

Cc: Christy Powell