

October 12, 2001

Mr. Donald Slayton
129 Stace Street
Paoli, IN 47454

Re: *Advisory Opinion 01-FC-63*;

Alleged Violation of the Access to Public Records Act Concerning Copying Fees by the Clerk of the Supreme and Appellate Courts.

Dear Mr. Slayton:

This is in response to your formal complaint, which was received on September 13, 2001. You have requested an opinion as to whether the Clerk of the Supreme and Appellate Court's Office ("Clerk's Office") violated the Access to Public Records Act, Indiana Code chapter 5-14-3 ("APRA,") by requiring you to pay one dollar (\$1.00) per page copying fees related to your request for access to a copy of an exhibit in court records. Mr. David R. Schanker, Chief of Staff for the Clerk's Office, responded to your complaint and a copy of his response is enclosed for your reference.

It is my opinion that, in the absence of a statutory or court ordered copying fee for the exhibit you requested, the Clerk's Office may charge only the actual cost of copying as authorized under Indiana Code section 5-14-3-8(d). The burden lies with the Clerk's Office to show that the one dollar (\$1.00) per page copying fee is the actual cost or to charge you the amount that does constitute actual cost under the APRA. Further, absent any other statutory authority or an order from a court providing you with indigent status with respect to the public records requested, the Clerk's Office is not obligated to waive this copying fee.

BACKGROUND

According to the facts presented in your complaint, you made a written request to the Clerk's Office for a copy of the State Police Undercover Officers Manual¹ that was included as an exhibit in a record or proceedings from a file entitled "McGowan." In response to your request, you received a letter from the Clerk's Office indicating that you would be required to pay \$1.00 per page for each of the eighty-seven (87) pages you requested. You filed your formal complaint with this Office alleging that the Clerk's Office violated the APRA by charging you one dollar (\$1.00) per page copied and for charging you any copying fees at all.

According to Mr. Schanker, the Clerk's Office may charge a statutory copying fee, under both Indiana Code sections 33-15-5-3-(d) and 33-19-6-1, in the amount of one dollar (\$1.00) per page. The

Clerk's Office knows of no statutory requirement that you be provided with copies at no charge.

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." Ind. Code § 5-14-3-1. The Clerk's Office is clearly a public agency for the purposes of the APRA. Ind. Code § 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Clerk's Office during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under Indiana Code section 5-14-3-4. Ind. Code § 5-14-3-3(a).

One-Dollar (\$1.00) Per Page Copying Fees

The APRA provides that public agencies may charge a copying fee under Indiana Code section 5-14-3-8. Public agencies may also request payment in advance for photocopies. Ind. Code §5-14-3-8(e).

There are instances when the General Assembly has provided separate statutory authority for officials to charge a copying fee different from those specifically authorized under Indiana Code section 5-14-3-8. Ind. Code §5-14-3-8(f). Mr. Schanker has cited to two different statutes authorizing the one dollar (\$1.00) per page copy fee, so I will address these provisions first. First, he cited to Indiana Code section 33-15-5-3(d), which provides that

(f)or all other unauthenticated carbon copies of the opinions of the supreme court and the court of appeals furnished by the clerk to any person, firm, limited liability company, or corporation, the clerk shall charge one dollar (\$1) per page.

This provision appears to apply only to copies of supreme and appellate opinions and does not address copies of other public records, such as the Manual you requested from the Clerk's Office.

Mr. Schanker also cited to Indiana Code section 33-19-6-1(b), which provides that 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." For the purposes of Indiana Code section 33-19-6-1(b), however, "clerk" does not include the Clerk's Office so this fee provision does not appear to be applicable to the Clerk's Office. Ind. Code 33-19-1-2.

Since neither of these two statutes appear to provide authority for the one dollar (\$1.00) copying fee for the Manual you requested, we must look to Indiana Code section 5-14-3-8. Under Indiana Code section 5-14-3-8(c), state agencies charge a uniform fee set by the Indiana Department of Administration.² "State agency" for the purposes of this provision is defined at Indiana Code section 4-13-1-1 as:

an authority, board, branch, commission, committee, department, division, or other instrumentality of the executive, including the administrative, department of state government. *The term "state agency" does not include the judicial or legislative departments of state government*, nor does that term include a state educational institution as defined in IC 20-12-0.5-1.

[Emphasis added.] Indiana Code section 5-14-3-8(c), therefore, does not apply to the judicial branch of government, including the Clerk's Office.

For public agencies that are not state agencies, the copying fee is governed by Indiana Code section 5-14-3-8(d), which states in relevant part that

(T)he governing body . . . shall establish a fee scheduled for the . . . copying . . . of documents. The fee may not exceed the actual cost of . . . copying. . . of the document by the agency and the fee must be uniform throughout the public agency and uniform to all purchasers. As used in this subsection, "actual cost" means the cost of the paper and the per-page cost for use of copying . . . equipment and does not include labor or overhead costs.

This provision does apply to the Clerk's Office and would require the fiscal or governing body for the Office to establish a copying fee for documents not governed by any other specific statutory fee.

Indiana Code section 5-14-3-8(f) also provides that a public agency "shall collect any . . . copying . . . fee that is . . . ordered by a court." It is conceivable that the Indiana Supreme Court may have or could by order set the copying fees for the Clerk's Office. After contacting Mr. Schanker about this possibility, I was unable to obtain any verification that this had ever been done.

In the absence of a statutory or court-ordered copying fee, therefore, it is my opinion that the Clerk's Office may only charge you the actual cost of copying, as defined at Indiana Code section 5-14-3-8(d) for photocopies. The burden lies with the Clerk's Office to show that the one dollar (\$1.00) per page copying fee is the actual cost of copying the Manual or to charge you only what constitutes the actual cost of copying. Mr. Schanker had indicated that the Clerk's Office is willing to work with you directly on this matter, so you may wish to contact him directly.

Copies at No Charge

You also claim that under Indiana Code section 5-14-3-8(e)(2), you are entitled to at least one (1) copy of a public record at no charge. It is my opinion that this statute, however, does not state that you are entitled to copies of public records at no charge. It is possible that in some instances the General Assembly may have provided for fee waivers for copies of certain public records. Further, there are instances when a court will issue an order of indigency that would provide that an incarcerated person would be entitled to copies of certain public records at no charge. In the case of your request to the Clerk's Office, you did not provide any statutory or other legal authority that would have authorized you to obtain copies at no charge from that Office.

CONCLUSION

It is my opinion that, in the absence of a statutory or court ordered copying fee for the Manual you requested, the Clerk of the Supreme and Appellate Courts may charge only the actual cost of copying as authorized under Indiana Code section 5-14-3-8(d). The burden lies with the Clerk's Office to show that the one dollar (\$1.00) per page copying fee is the actual cost, or to charge you the amount that does constitute actual cost under the APRA. Further, absent any other statutory authority or an order from a court providing you with indigent status with respect to the public records requested, the Clerk's Office is not obligated to waive this copying fee.

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: Mr. David R. Schanker, Chief of Staff Clerk of the Supreme & Appellate Courts

¹ This information was not specified in your complaint, but was the subject of your complaint in PAC Advisory Opinion 01-FC-43.

² The current per-page copy fee is \$0.10 per page.