

May 19, 2005

Charles C. Garnette
4602 Lafayette Place
Fort Wayne, IN 46806

Re: Formal Complaint 05-FC-70; Alleged Violation of the Access to Public Records Act by the Allen County Recorder

Dear Mr. Garnette:

This is in response to your formal complaint alleging that the Allen County Recorder ("Recorder") violated the Access to Public Records Act by not allowing you to use a digital camera to copy public records. I find that the Recorder may not disallow your use of a digital camera to make copies without sustaining its burden of proof.

BACKGROUND

You allege that you visited the Recorder's office on April 11, 2005 and accessed several documents in the Recorder's computer system utilizing a computer provided by the Recorder for use of members of the public. Using your small digital camera, you began making copies of the documents that were displayed on the computer screen. After having taken some photographic images, you were approached by an employee of the Recorder and told that you could no longer take photographs of documents from the computer. You allege that the motivation of the Recorder in denying you the right to use your digital camera to copy the records is that the Recorder could not recover the statutory \$1 per page copying fee. You filed your complaint with the public access counselor on April 19, 2005. You allege that you were denied access to records, denied electronic access to records, and were not allowed to digitally capture an image of a public record.

I sent a copy of your complaint to the Recorder. Associate Allen County Attorney Carrie Hawk Gutman responded in writing, a copy of which is provided for your reference. Ms. Gutman responds by denying that the Recorder denied you access to public records or denied electronic access to records, because you were allowed to view the records on the computer screen, to manually transcribe the record, and to pay the copying fee prescribed by statute. Ms.

Gutman denies that you have the right under the Access to Public Records Act to make copies of the Recorder's records using your own equipment.

ANALYSIS

The Access to Public Records Act provides that any person may inspect and copy the public records of any public agency, except as provided in the exceptions listed in section 4 of the APRA. Ind. Code 5-14-3-3(a). A public agency may not deny or interfere with the exercise of the right stated in subsection (a). IC 5-14-3-3(b). The public agency shall either:

- (1) provide the requested copies to the person making the request; or
- (2) allow the person to make copies:
 - (A) on the agency's equipment, or
 - (B) on his own equipment.

IC 5-14-3-3(b).

A public agency shall protect public records from loss, alteration, mutilation, or destruction, and regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. IC 5-14-3-7(a). The foregoing section does not operate to deny to any person the rights secured by section 3 of the Access to Public Records Act. IC 5-14-3-7(c).

Although you have alleged three discrete violations of the Access to Public Records Act, I take your complaint to be that you were not allowed to make a copy of the records displayed on the computer in the Recorder's office utilizing your own equipment, a digital camera. You believe that you have the right to take digital images from the Recorder's computer-displayed records; the Recorder's office argues that there is no such right in the APRA.

I believe that the issue presented in your complaint has not been squarely presented to this office in any prior formal complaints. The precise issue is whether the APRA allows a public agency's sole discretion to dictate whether it will make the requested copy or whether it will permit the person requesting the record to make the copy on his own equipment.

There is no question that "copy" includes using a digital camera to make a reproduction of the record, and the Recorder does not raise any such issue. *See* IC 5-14-3-2 (defining "copy" to include "reproducing by any other means").

The Recorder argues that nowhere in the APRA is the public agency mandated to allow a person the right to make a digital image using a camera provided by the person, if the public agency prefers to make the copy on the agency's own equipment. The Recorder cites concerns (aside from recoupment of the copying fee allowed under IC 36-2-7-10) about "the effect on the equipment and documents in the office, the potential for disruption of the operations and business conducted in the Recorder's Office and other abuses the public agency is required to protect against by IC 5-14-3-7." The foregoing statement is the extent of the submission of the Recorder to support its argument that the Recorder may opt to deny you the right to make a copy of its records using your own equipment. The Recorder asks this office to determine that the

APRA does not require public agencies to allow individuals to bring in their own equipment to make digital visual images.

To the contrary, I find support in the APRA for the notion that a public agency's discretion is somewhat limited under IC 5-14-3-3(b)(1) and (2). The central provision in APRA states that any person may "inspect and copy" the public records of any public agency. IC 5-14-3-3(a). The words that I set in quotes are action verbs that suggest that the person availing himself of APRA may do something, inspect and copy, public records. The APRA does not say that a person may receive a copy of a record, unlike Louisiana's public records law, which states: "any person...may inspect, copy or reproduce *or obtain a reproduction* of any public record." La. R.S. 44:1-44. (Emphasis supplied); *See First Commerce Title Company, Inc. v. Martin*, 887 So.2d 716 (La. App. 2004)(upholding a person's use of a portable scanner in Clerk's office to reproduce records).

IC 5-14-3-3(b) prohibits a public agency from denying or interfering with the exercise of the right stated in subsection (a). The difficulty in interpretation stems from the language stating that a public agency shall either provide the copies or allow the person to make copies on the agency's equipment or on the requester's own equipment. The APRA is silent on whether the options for supplying a copy are solely within the public agency's discretion. In fact, the public agency *could* wish to exercise its discretion to decline to make the copies and instead allow the person to make the copies himself on either the agency's equipment or the person's own equipment. This is a reasonable interpretation of IC 5-14-3-3(b)(2). Also, a public agency is not required to maintain equipment capable of reproducing a record; in that instance, the public agency must permit a person to inspect and manually transcribe the record. IC 5-14-3-8(e). However, to read this clause to not allow a person to use his own equipment to make a copy would nullify the language in IC 5-14-3-3(b)(2)(B), and in any case, the Recorder does maintain equipment to reproduce its records.

A public agency is required to protect records from loss, alteration and destruction, and the Recorder has raised the provision at IC 5-14-3-7(a). However, the Recorder has not explained how your use of a digital camera to take pictures from records displayed on the computer will result in the loss, destruction, or alteration of records, or interfere materially with the functions or duties of the Recorder. If anything, I would suspect that your making copies utilizing your own equipment may actually save staff the time and effort to make copies themselves.

The statutory provisions for the right of access to public records must be construed liberally, with the burden of proof for nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record. IC 5-14-3-1. In my opinion, the Recorder may not deny you the right to make copies using your own equipment, your digital camera, without sustaining its burden of showing that the use of your equipment to make copies implicates the Recorder's obligations under IC 5-14-3-7(a), or implicates some other legal obligation imposed on the Recorder under the APRA or other relevant law. The conclusory statement of the Recorder that she has concerns about the effect on the equipment and documents in the office falls short of meeting a public agency's burden under the APRA.

CONCLUSION

For the foregoing reasons, I find that the Allen County Recorder has not carried its burden to prove that you did not have the right to use your own equipment, a digital camera, to copy records in the Recorder's office.

Sincerely,

Karen Davis
Public Access Counselor

cc: Carrie Hawk Gutman