

January 30, 2008

Ned Kovachevich
259 Danica Drive
Valparaiso, Indiana 46385-7735

Re: Formal Complaint 08-FC-23; Alleged Violation of the Access to Public Records Act by the Porter County Plan Commission

Dear Mr. Kovachevich:

This is in response to your formal complaint alleging the Porter County Plan Commission ("Commission") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by charging you an excessive copy fee. A copy of the Commission's response to your complaint is enclosed for your reference. It is my opinion the Commission has not violated the APRA.

BACKGROUND

In your complaint you allege that you submitted a request for copies of records to the Commission on December 20, 2007. Upon receipt of the copies, you were charged \$.35 each for black and white 8.5" by 11" copies and \$2.50 each for 24"x36" copies. You allege the charge of \$.35 for black and white copies is excessive. You mailed this complaint on December 28, and I received it on December 31.

The Commission responded to your complaint by letter dated January 16, 2008. The Commission's copy fees were charged in accordance with an ordinance in place since the early 1990's. As I understand it, the Commission has now changed its copy fees to \$.05 per page, which represents \$.01 per page for paper, \$.03 per page for the copier maintenance contract, and \$.01 for toner. The Commission indicates the copier maintenance contract price is high due to the age of the machine. Further, the Commission indicates you have filed a lawsuit against the Commission but indicates it does not address the issue raised here.

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." I.C. §5-14-3-1. The

Commission is clearly a public agency for the purposes of the APRA. I.C. §5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Commission during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. §5-14-3-3(a).

The fiscal body (as defined in I.C. §36-1-2-6) 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. The fee for certification of documents may not exceed five dollars (\$5) per document. The fee for copying documents may not exceed the greater of:

- (1) ten cents (\$0.10) per page for copies that are not color copies or twenty-five cents (\$0.25) per page for color copies; or
- (2) the actual cost to the agency of copying the document.

A fee established under this subsection must be uniform throughout the public agency and uniform to all purchasers. I.C. §5-14-3-8(d).

Here, you present the question whether the Commission's ordinance setting a fee of \$.35 for non-color copies violates the APRA. As you may have found, the *Handbook on Indiana's Public Access Laws* ("Handbook") published by this office contains an indication on page 21 that a public agency may not include labor and overhead when calculating actual cost for copies. *Handbook* at 21. You will note, though, that the *Handbook* was last updated in December 2003. My office is currently working to update the *Handbook* to reflect current law. Since the *Handbook* was last updated in 2003, it does not reflect legislative changes from 2004 to 2007.

In 2007, a change was made to I.C. §5-14-3-8(d) by House Enrolled Act 1379, striking the language "As used in this subsection, '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." The language was replaced with the language noted previously in this opinion, which allows an agency to charge an amount not to exceed \$.10 per page *or* the actual cost to the agency. I.C. §5-14-3-8(d). Regardless of whether the striking of the language was intentional or inadvertent, the language of section 8(d) as it stands now allows a public agency that is not a state agency to charge a copy fee not to exceed its actual cost. Since actual cost is no longer defined in the APRA and since the General Assembly struck the language indicating labor and overhead costs could not be included, the Commission may pass an ordinance establishing a copy fee that does not exceed the actual cost of copying a record.

Here, the Commission has now indicated its intention to charge a fee of \$.05 per page for non-color copies. It is my opinion this is not an excessive fee under the APRA.

Finally, you pray for relief which cannot be granted by the public access counselor (i.e. compel a change in the ordinance and order reimbursement for excessive charges). The role of the counselor in such matters is to issue advisory opinions. I.C. §5-14-4-10. The counselor has no authority to enforce the laws, compel action, or render an ordinance void.

CONCLUSION

For the foregoing reasons, it is my opinion the Commission has not violated the APRA.

Best regards,



Heather Willis Neal
Public Access Counselor

cc: Robert Thompson, Jr., Porter County Plan Commission