

June 12, 2006

Christopher Mason
411 West First Street
New Albany, IN 47150

Re: Formal Complaint 06-FC-81; Alleged Violation of the Access to Public Records Act by the Clark County Recorder's Office

Dear Mr. Mason:

This is in response to your formal complaint alleging that the Clark County Recorder's Office ("Recorder") violated the Access to Public Records Act by charging you an excessive fee for copies. I find that the Clerk could not charge \$1 per page fee until July 1, 2006, when the amendatory act was effective.

BACKGROUND

You complain that you were charged for copies made by the Recorder during April 2006 in excess of the allowed amount. Although you do not clearly state it, it appears that the copies that you received from the Recorder in April were printouts made from digital records maintained by the Recorder. On January 3, 2006, I sent you a letter advising you that the Clark County Recorder could not charge \$1 per page for copies printed from digital images stored in a computer, because those were not copies made using a "photographic process," as allowed in Indiana Code 36-2-7-10. *Opinion of the Public Access Counselor, 05-FC-243.*

Acknowledging that the legislature amended Indiana Code 36-2-7-10 in the 2006 General Assembly, you nevertheless believe that you were charged \$1 per page in error during April, because the enrolled act that amended the Recorder's Statute does not take effect until July 1, 2006. You also provided me with a copy of a resolution of the Clark County Council dated February 10, 2003. Resolution No. 6-2003 provides that all Clark County offices may charge a fee not to exceed the actual cost of copying, such fee to be established by the individual offices. The Clark County Council deferred to each office and agency to determine its own "actual cost of copying."

I sent a copy of your complaint to the Recorder. The County Attorney Daniel Moore sent me a copy of a letter that Recorder Shirley Nolot sent to the Clark County Prosecutor's Office regarding your allegations that your company was overcharged for the *number* of copies during the month of April. In addition, the letter recites that Recorder Nolot began charging \$1 per page when the enrolled act was signed into law by the Governor, apparently sometime before April 1. Aside from this letter, a copy of which is enclosed for your reference, the Recorder has not responded to your allegation that the amendment is effective on July 1, 2006 and not before.

ANALYSIS

Under the Access to Public Records Act ("APRA"), public agencies may charge a fee to provide a copy of a public record. For a public agency that is not a state agency, the fiscal body of the public agency, or the governing body if there is no fiscal body, shall establish a fee schedule for the certification, copying, or facsimile machine transmission of documents. IC 5-14-3-8(d). The fee may not exceed the actual cost of certifying, copying, or facsimile transmission of the document by the agency, and the fee must be uniform throughout the public agency and uniform to all purchasers. *Id.* As used in subsection (d), "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. *Id.* Notwithstanding subsection (d), a public agency shall collect any certification, copying, facsimile machine transmission, or search fee that is specified by statute or is ordered by a court. IC 5-14-3-8(f).

Prior to the enactment of House Enrolled Act 1102, under IC 36-2-7-10(b)(5), the county recorder was permitted to charge one dollar (\$1) per page not larger than eight and one-half (8 ½) inches by fourteen (14) inches for furnishing copies of records produced by a *photographic process*, and two dollars (\$2) per page that is larger than eight and one-half (8 ½) inches by fourteen (14) inches. (Emphasis supplied).

In HEA 1102, the legislature amended Indiana Code 36-2-7-10(b)(5) by striking the words "produced by a photographic process." P.L. 169-2006, SECTION 50. IC 36-2-7-10(b)(5) now requires the Recorder to collect "One dollar (\$1) per page...for furnishing copies of records..." Public Law 169-2006, SECTION 50 states that SECTION 50 will be effective July 1, 2006. SECTION 86 of P.L. 169-2006 states that "an emergency is declared for this Act."

Under IC 1-1-3.1-3(c), when an act contains a declaration that an emergency exists, and the act provides that a provision of the act takes effect on a specified date and approval of the act occurs on or before the specified date, then the provision takes effect on the specified effective date. Further, in the absence of express language to the contrary, an amendatory act ordinarily is construed as prospective and not retroactive. *State ex rel. Mental Health Commissioner v. Estate of Lotts* 332 N.E.2d 234, (Ind. Ct. App. 1975).

Therefore, it is my opinion that the Clark County Recorder may not charge \$1 per page for computer generated printouts until July 1, 2006. In addition, Resolution No. 6-2003 does not establish a fee schedule for copying, as contemplated by IC 5-14-3-8(d). Hence, it is my opinion that unless the Clark County Council establishes a fee schedule for all county offices, or for each

county office based on the office's report of its "actual cost of copying," a lower fee is also not valid under the Access to Public Records Act. *See Opinion of the Public Access Counselor 03-FC-14.*

CONCLUSION

For the foregoing reasons, I find that the Clark County Recorder may not charge \$1 per page for computer generated printouts until the effective date of SECTION 50 of House Enrolled Act 1102, July 1, 2006.

Sincerely,

Karen Davis
Public Access Counselor

cc: Daniel Moore