



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
ANDREW J. KOSSACK

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

December 8, 2010

Mr. Brian G. Waters
601 Franklin Sq., Suite 401
Michigan City, IN 46360

*Re: Formal Complaint 10-FC-299; Alleged Violation of the Access to
Public Records Act by the Indiana Real Estate Commission*

Dear Mr. Waters:

This advisory opinion is in response to your formal complaint alleging the Indiana Real Estate Commission ("IREC") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-3 *et seq.* IREC's response is enclosed for your reference.

BACKGROUND

In your complaint, you allege that IREC denied you access to public records and informed you that IREC would charge you \$0.10 per page for any document that includes confidential information. You submitted your request on November 15, 2010. The next day, IREC Director Jeanette Roberts responded to your request and informed you that IREC would require three to four weeks to prepare the records for inspection. IREC would also require dedicating a member of IREC's staff to observe your inspection to protect the records' contents. You objected to Dir. Roberts' response later that day, arguing that IREC's proposed timeframe was unacceptable and contrary to the APRA. Subsequently, IREC's staff attorney, Jeff Collins, responded by stating that the proposed time period was reasonable in light of the fact that your request sought access to hundreds of disciplinary files and because each page of those files must be reviewed prior to disclosure to ensure that no confidential information is disclosed. Three days later on November 19th, Dir. Roberts informed you that IREC could accommodate your request by having 100 files available for you to review on December 10th for four hours, and those copies of redacted documents would be available upon receipt of the \$0.10 per page copy fee. You argue that IREC's response does not comply with the APRA because you have a hearing scheduled for December 15th before IREC and the requested materials are critical to your defense. IREC's response time would not allow you to review the records prior to the hearing.

Mr. Collins responded to your complaint on behalf of IREC. He argues that IREC's proposed timeframe is reasonable considering the time necessary for staff to comply with the APRA's requirement that nondisclosable information be redacted from public records, the breadth of your request, and the likelihood that a shorter timeframe would cause material interference with the discharge of IREC's functions and duties. Moreover, he claims that IREC's request for copy fees for redacting documents is necessary where IREC must make copies to avoid disclosing confidential information, and that the fee is permissible under the APRA.

Mr. Collins notes that your request encompasses approximately 460 separate litigation files maintained by IREC. Each of those files contains anywhere from 40 to 50 pages of records per file. Thus, the total number of records responsive to your request is likely between 18,000 to 23,000 pages. Mr. Collins states that each page of these records must be reviewed to ensure that no confidential information is disclosed in violation of the APRA. He argues that if each of the files were inspected for only five to six minutes, IREC staff would spend 38 to 46 hours complying with the request. Additionally, staff time is required to ensure that the records are secure during your actual inspection. Mr. Collins claims that requiring IREC to expend that amount of staff time in a shorter time period would materially interfere with IREC's essential functions and duties.

Finally, Mr. Collins states that section 8 of the APRA permits IREC to charge for copies of records. Because IREC must make copies of records that contain confidential information before releasing them for inspection, IREC informed you of the applicability of these charges.

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. IREC does not dispute that it is 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 IREC during regular business hours unless the records are excepted from disclosure as confidential or nondisclosable under the APRA. I.C. § 5-14-3-3(a).

Under the APRA, a request for records may be oral or written. I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. I.C. §5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven days of receipt, the request is deemed denied. I.C. § 5-14-3-9(b). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, Dir. Roberts responded to your request within 24 hours in compliance with the APRA.

Notwithstanding the requirements that agencies respond to public records requests within the timeframes specified in section 9 of the APRA, “[t]he APRA does not set any time periods for *producing* public records, merely for responding to the request.” *Opinion of the Public Access Counselor 02-FC-09* (emphasis added). The public access counselor has stated repeatedly that records must be produced within a reasonable period of time, based on the facts and circumstances. Considering factors such as the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *Opinion of the Public Access Counselor 02-FC-45*.

Here, IREC informed you that it could comply with your November 15th request within three to four weeks. Dir. Roberts’ last communication to you on November 19th informed you that IREC would have 100 files ready for you to review on December 10th, and that you could review additional files at a later date. Mr. Collins argues that IREC required that timeframe to review the thousands of pages of responsive records and determine whether or not they could be released or required redactions. Public officials and employees are subject to criminal prosecution for knowingly or intentionally disclosing confidential information. I.C. § 5-14-3-10(a). As a result, it is reasonable -- and advisable -- for public agencies to review records that could contain confidential information before releasing them for inspection and copying. Here, your request sought access to approximately 20,000 documents that required review and possible redactions. Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. I.C. § 5-14-3-7(a). Under the circumstances outlined by Mr. Collins, it is my opinion that IREC acted reasonably.

Finally, in my opinion IREC did not violate the APRA by charging you for copies of redacted records if such redactions were necessary to both respond to your request and prevent the disclosure of confidential information. It is important to note the plain meaning¹ of subsection 8(a) of the APRA, which generally prohibits a public agency from charging fees for inspecting public records: “*Except as provided in this section*, [a public agency cannot charge a fee to inspect a public record].” I.C. § 5-14-3-8(a)(1) (emphasis added). The “this section” phrase refers, of course, to section 8 of the APRA, which permits public agencies to charge fees for copies of public records. Thus, the plain language of the provision allows for an exception to the general rule that agencies cannot charge a fee for the inspection of records. In other words, if the agency makes copies for a requester in conjunction with the inspection, it appears that the APRA permits the agency to assess the applicable copy fee permitted by section 8. If the General Assembly had intended that no inspection fees were to be assessed under *any* circumstances, it would be nonsensical to include the “Except as provided in this section” language prior to

¹ When interpreting a statute that is unambiguous, courts must give it its clear and plain meaning. *Butler v. Ind. Dep't of Ins.*, 904 N.E.2d 198, 202 (Ind. 2009) (citing *Bolin v. Wingert*, 764 N.E.2d 201, 203 (Ind. 2002)). “If a statute is unambiguous, we may not interpret it, but must give the statute its clear and plain meaning.” *Id.* (citing *Elmer Buchta Trucking, Inc. v. Stanley*, 744 N.E.2d 939, 942 (Ind. 2001)).

such a prohibition. As the Indiana Supreme Court has repeatedly noted, we must “interpret a statute in order to give effect to every word and render no part meaningless if it can be reconciled with the rest of the statute.” *Piven v. ITT Corp.*, 2010 Ind. LEXIS 401 at *14 (Ind. June 28, 2010) (citing *Bagnall v. Town of Beverly Shores*, 726 N.E.2d 782 (Ind. 2000)). If section 8(a) simply read, with no preceding language, “A public agency may not charge any fee under this chapter to inspect a public record,” it would be axiomatic that any fee associated with inspecting public records would be in violation of the APRA. However, because the plain language of the APRA carves out an exception to allow agencies to charge copy fees in conjunction with inspections, it is my opinion that IREC did not violate the APRA by charging you copy fees where it was necessary for the IREC to copy the record prior to the inspection.

CONCLUSION

For the foregoing reasons, it is my opinion that IREC did not violate the APRA.

Best regards,



Andrew J. Kossack
Public Access Counselor

Cc: Jeff Collins