

May 28, 2008

Jason Smathers
511 Prentiss Way
Avon, Indiana 46123

Re: Formal Complaint 08-FC-124; Alleged Violation of the Access to Public Records Act by the Business Services Division of the Indiana Secretary of State's Office

Dear Mr. Smathers:

This advisory opinion is in response to your formal complaint alleging the Business Services Division of the Indiana Secretary of State's Office ("Secretary") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by charging you a fee to search its records. I have enclosed a copy of the Secretary's response to your complaint for your reference. It is my opinion the Secretary has not violated the Access to Public Records Act.

BACKGROUND

In your complaint you allege that you requested records from the Secretary on May 8, 2008. Specifically, you requested business entity records where the registered agent or principal officer is Robert J. Rousseau. You allege the Secretary indicated you would be charged a \$25 search fee to access the records you requested. You filed this complaint on May 14.

The Secretary responded to the complaint by letter dated May 22 from Jerold Bonnet, General Counsel for the Secretary. Mr. Bonnet contends that the Secretary searched the indices maintained by the office and did not identify any corporation, trademark, or UCC records listed in any index maintained by the office. The Secretary did find a single record in its notary database. Mr. Bonnet contends the Secretary has not denied you access to a record but that you have not identified the record(s) you seek. Further, I.C. 4-5-10 provides that the Secretary may charge a fee for a customized search of the Secretary's databases in an attempt to identify any records containing the words you requested. The specific enhanced access charge for the search is authorized pursuant to I.C. § 4-5-10-2, which was enacted in 1997.

Mr. Bonnet further contends that not all records or filings are maintained in electronic database format. In some cases, only index information regarding certain filings or records is maintained in electronic format. The Secretary does not have the technology capable of

searching photo-scanned documents for specific words. Finally, Mr. Bonnet indicates the Secretary will provide access to any record which is identified with reasonable particularity.

ANALYSIS

The public policy of the APRA states, "(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 Secretary 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 Secretary 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).

A request for inspection and copying must identify with reasonable particularity the record being requested. I.C. § 5-14-3-3(a)(1).

You contend that a public agency may not charge any fee to search for a record, as provided in I.C. § 5-14-3-8(b). Here, though, it is my opinion the fee charged by the Secretary is not a fee to search for a record as contemplated by I.C. § 5-14-3-8(b). In my opinion, the prohibition on a fee to search for a record is a prohibition against charging time and labor to, for instance, look through a file cabinet or computer database to find a record *which has been identified by the requester*.

By way of example, I offer the following: if you requested a copy of all records associated with a particular formal complaint filed in this office, I could not charge a fee to walk to the file cabinet and search for the particular folder containing the records. In other words, I could not charge a fee to search for the record you identified with reasonable particularity. If, however, you had requested a copy of all records associated with any formal complaint containing the words "Jane Doe" anywhere in the text of any associated records, that request would not have been made with reasonable particularity. This office does not maintain any database capable of searching for certain words in all of our records, so there is no way to know which record you seek. Since your request was not made with reasonable particularity, we could not provide access to the records. And the APRA does not require us to search through every record in the office to determine whether a record exists containing those words.

On the other hand, the General Assembly has provided agencies with the option of providing enhanced access to a public record. I.C. § 5-14-3-8(h) authorizes an agency to charge any reasonable fee agreed on in the contract under section 3.5 of the APRA for providing enhanced access to public records. Similarly, I.C. § 5-14-3-3.5 provides that the contract between a state agency and the third party (which provides the enhanced access) may provide for the payment of a reasonable fee to the state agency by either the third party or the person.

While a public agency may not generally charge a fee to search for a record, the APRA is a statute of general application. In some cases, the General Assembly has enacted more specific statutes which supersede the general provisions of the APRA. Not only does I.C. § 4-5-10-2 allow the Secretary to charge fees to provide electronic and enhanced access, but I.C. § 4-5-10-

5(a)(2) allows the Secretary to use the electronic and enhanced access fund to “improve service to customers of the secretary of state.” It is my opinion that the search offered to you by the Secretary is an enhanced customer service provided by the Secretary. This function allows a person to search the records of the Secretary so that person may then identify with reasonable particularity the record(s) to which he or she seeks access. As such, it is my opinion this is not a fee to search for a record, and the Secretary has not violated the Access to Public Records Act.

CONCLUSION

For the foregoing reasons, it is my opinion the Secretary has not violated the Access to Public Records Act.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Jerold Bonnet, Indiana Secretary of State's Office