

May 23, 2008

Jeffrey Lynn Bringle
Box 3465 Virginia Street
Columbus, Indiana 47203

Re: Formal Complaint 08-FC-128; Alleged Violation of the Access to Public Records Act by the Bartholomew County Recorder's Office

Dear Mr. Bringle:

This advisory opinion is in response to your formal complaint alleging the Bartholomew County Recorder's Office ("Recorder") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by preventing you from making copies of public records using your digital camera. I have enclosed a copy of the Recorder's response to your complaint for your reference. It is my opinion the Recorder may not prohibit you from making copies of public records using your digital camera without sustaining the burden of proof.

BACKGROUND

In your complaint you allege that on May 8, 2008 you appeared at the Recorder's office and began inspecting public records. You then began to copy a record using your digital camera, and an employee of the Recorder instructed you to stop. The Recorder indicated that to obtain a copy of a record, you must pay the \$1.00 per page copy fee. You allege the Recorder then indicated she would seek a written opinion from the county attorney regarding the issue. You allege you have contacted the Recorder's office several times since that date and have been told you cannot inspect the records.

The Recorder's office responded to the complaint by letter dated May 20 from Bartholomew County Recorder Betty Jean Beshear. The Recorder contends that you appeared at the office on May 8 and insisted on inspecting original documents even though copies are available for viewing at the public terminals in the office. The Recorder indicates she "did have a problem with him taking photographs of these documents with his digital camera and asked him to stop since the recorders are to charge for copies of recorded documents." The Recorder then indicates she contacted me by telephone, and I indicated you had a right to inspect the records and use your digital camera. The Recorder further indicates that I suggested she contact

her county attorney. The Recorder contends that when she indicated she need to get clarification from the county attorney regarding copy fees, you left the office.

I recall this telephone conversation with the Recorder. As I recall, I did indicate to the Recorder, as she recalls, that you have the right to inspect the records and use your digital camera. It is my recollection I advised the Recorder to contact her county attorney if she decided to prohibit you from using your digital camera because the Recorder would bear the burden of proof in court to sustain the denial.

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 Recorder 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 Recorder 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 public agency may not deny or interfere with the exercise of the right stated in subsection (a). 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 the person's own equipment.

I.C. § 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. I.C. § 5-14-3-7(a). The foregoing section does not operate to deny any person the rights secured by section 3 of the APRA. I.C. § 5-14-3-7(c).

“Copy,” for the purposes of the APRA, includes “transcribing by handwriting, photocopying, xerography, duplicating machine, duplicating electronically stored data onto a disk, tape, drum, or any other medium of electronic data storage, and reproducing by any other means. I.C. § 5-14-3-2(b). Certainly this definition includes using a digital camera, which would be “reproducing by any other means.”

The question here is whether the Recorder is required to allow a person to make a copy of a record using a digital camera provided by the person where the agency would prefer to use its own equipment to make the copy. The Recorder indicates that she is required to charge \$1.00 per page for copies of records.

This issue has been addressed by former Public Access Counselor Karen Davis in *Opinion of the Public Access Counselor 05-FC-70*. In a nearly identical situation to the present matter, a person was stopped while making digital camera copies of records in the Allen County

Recorder's office. Counselor Davis found support for the notion that a public agency's discretion is somewhat limited under I.C. § 5-14-3-3(b)(1) and (2), relying partly upon the APRA's provision that any person may "inspect and copy" the public records of a public agency. I.C. § 5-14-3-3(a).

Counselor Davis further opined as follows:

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.

Opinion of the Public Access Counselor 05-FC-70.

I agree with the opinion presented by Counselor Davis and agree that a person has a right to make a copy of a record using his own equipment. To the extent the Recorder can demonstrate how the use of a digital camera to make copies would result in the loss, destruction, mutilation, or alteration of records, the Recorder may be able to sustain the denial of access. If the Recorder cannot sustain the burden of proof, it is my opinion the Recorder must allow you to use your digital camera to make copies of records. Given that the Recorder must regulate any

material interference with the regular discharge of the functions or duties of the agency or employees (*See* I.C. § 5-14-3-7(a)), the Recorder may need to set a mutually convenient appointment or series of appointments during business hours to allow you to continue to make the copies you seek to make.

CONCLUSION

For the foregoing reasons, it is my opinion the Recorder may not prohibit you from making copies of public records using your digital camera without sustaining the burden of proof.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Betty Jean Beshear, Bartholomew County Recorder