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

September 13, 2010

Mr. Bob Segall
Channel 13 WTHR
Via Electronic Mail to bsegall@wthr.com

Re: Informal Inquiry 10-INF-40: The Legality of Charging Copy Fees for Inspections of Partially Confidential Public Records

Dear Mr. Segall:

This is in response to your informal inquiry regarding whether or not a public agency may charge copy fees in conjunction with an inspection of public records. Specifically, the issue is whether or not the APRA permits an agency to charge a copy fee when a requester has only requested to inspect the record but confidential information in the original record requires the agency to make a redacted copy before releasing it. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA").

By way of background, your inquiry stems from WTHR's requests to inspect public records maintained by several county auditors' offices throughout the State of Indiana. The forms WTHR wishes to inspect contain some information that is confidential under Indiana law, but the remainder of the forms is disclosable under the APRA. In order for the auditors to provide the forms for you to inspect, the auditors must first make a redacted copy of the original form in order to ensure that no confidential information in the original form is disclosed. *See* I.C. § 5-14-3-10(a) (providing criminal penalties for public employees and officials who knowingly or intentionally disclose information classified as confidential by state statute).

Generally, the APRA permits public agencies to assess copy fees for the copying of public records. *See* I.C. § 5-14-3-8(c) ("The Indiana department of administration shall establish a uniform copying fee for the copying of one page of a standard-sized document by state agencies.") and § 5-14-3-8(d) (non-state agencies "shall establish a fee schedule for the certification or copying of documents"). The copy fee provisions of the APRA are found in section 8. However, subsection 8(a) provides, "Except as provided in this section, a public agency may not charge any fee under this chapter . . . to inspect a public record." I.C. § 5-14-3-8(a).

The auditors argue that the fee they would charge in this case is not an inspection fee because it would not be applied to the inspection of non-confidential records. Rather, the fee would only apply when the APRA requires the auditor to copy a record in order to redact confidential information. In other words, the auditors cannot allow you to inspect the *original* record due to the confidential information contained therein, so you would receive a copy instead and the associated copy fees would apply.

Previous public access counselors have opined that public agencies do not violate the APRA by denying the right to inspect records under certain circumstances. For example, in 2004, Counselor Hurst noted that "in some instances the option of inspection or copying may not be available." *See Opinion of the Public Access Counselor 04-FC-43*. "[C]ircumstances may exist where physical inspection of a record is not practical or even possible, and reasonable access can only be accomplished through production of a copy of the record. Such is the case here." *Id.* In that opinion, Counselor Hurst decided that it was not a violation of the APRA for a public agency to deny an offender's request to inspect public records because the offender could not physically appear at the public agency during its normal business hours. Consequently, Counselor Hurst opined that the requester's only option was to receive copies of the records. Counselor Hurst also noted that, in that case, the agency did not have to waive the applicable copy fees for the requester. He wrote, "While I appreciate that you do not want to pay for copies of records that are responsive to your request, the APRA does entitle the [agency] to recoup the cost of providing you with copies of any responsive records, and to receive that fee in advance of production." *Id.; see also Opinion of the Public Access Counselor 06-FC-113* (Counselor Davis; noting that "the APRA does not require the [agency] to transfer records to a more convenient or accessible location in order to provide an opportunity for you to inspect the records). In a 2005 opinion, Counselor Davis noted that a county recorder could not deny a person's request to inspect public records using the requester's own equipment "without sustaining its burden of showing that the use of [the] equipment to make copies implicates the Recorder's obligations under IC 5-14-3-7(a), or implicates some other legal obligation imposed on the Recorder under the APRA or other relevant law." *Opinion of the Public Access Counselor 05-FC-70.* There, Counselor Davis concluded that a "conclusory statement of the Recorder that she has concerns about the effect on the equipment and documents in the office falls short of meeting a public agency's burden under the APRA." However, where state law or other authority requires a public agency to maintain the confidentiality of certain records, it is clear that a public agency is under no obligation to allow a requester to inspect an *original* version of that record. *See* I.C. § 5-14-3-10(a) (providing that a public employee or official who knowingly or intentionally discloses information that is confidential under state statute commits a Class A misdemeanor).

To my knowledge, however, none of my predecessors addressed directly the question of whether or not the APRA permits a public agency to charge copy fees in conjunction with the inspection of partially confidential records. Consequently, it is important to note the plain meaning[1] of subsection 8(a) of the APRA: "*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 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 statue." *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 an agency would not violate the APRA by charging a requester copy fees where it is necessary for the agency to copy the record prior to the inspection.

The counterargument is, of course, that the APRA requires public agencies to separate disclosable from nondisclosable information if a requested record contains both, so the agency should bear that cost. *See* I.C. § 5-14-3-6(a) ("If a public record contains disclosable and nondisclosable information, the public agency shall, upon receipt of a request under this chapter, separate the material that may be disclosed and make it available for inspection and copying."). However, nothing in section 6 precludes an agency from charging the copy fees permitted by section 8. Granted, the General Assembly's use of the word "shall" mandates that the agency separate the material. However, that fact alone does not negate the applicability of the copy fees allowed by section 8. If it did, public agencies would *never* be able to charge copy fees because section 3 of the APRA states that, in response to a request for copies of public records, "[t]he 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." That language, however, has never been interpreted to require agencies to provide copies at no charge, presumably because such an opinion would nullify section 8 of the APRA. Such an interpretation would not square with commonly accepted principles of statutory construction. Indeed, the Indiana Supreme Court has repeatedly stated that "[w]hen faced with two conflicting statutory provisions, we seek first to harmonize the two." *Klotz v. Hoyt*, 900 N.E.2d 1, 5 (Ind. 2009) (citing *State v. Universal Outdoor, Inc.*, 880 N.E.2d 1188, 1191 (Ind. 2008)). "If the two

[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)).

statutes can be read in harmony with one another, we presume that the Legislature intended for them both to have effect." *Id.* (citing *Burd Mgmt., LLC v. State*, 831 N.E.2d 104, 108 (Ind. 2005)). With these standards in mind, it is my opinion that although section 6 requires public agencies to separate disclosable from nondisclosable material, section 6 does not prohibit agencies from assessing copy fees if such fees are otherwise permitted by section 8.

In order to clarify the scope of this opinion, I note that it applies only to circumstances where, as here, a public agency has not attempted to charge an inspection fee for viewing non-confidential records. It is indisputable that if an agency maintains non-confidential records, those records should be open for inspection free of charge. I.C. § 5-14-3-8(b)(1). Moreover, an agency may not charge a requester for copies of an entire document if only certain pages of the document contain some confidential information. By way of example, if a contract is 100 pages long, and 10 pages contain confidential information, the agency should make the remaining 90 non-confidential pages of the contract available for inspection at no charge. *See* I.C. § 5-14-3-6(a). Also, agencies may not charge requesters for labor or overhead costs associated with making records available for inspection and copying unless expressly authorized by statute.[2] *See* I.C. § 5-14-3-8(d). If a requester pays such a fee, the requester should be permitted to keep the copy. The APRA's copy fee provisions apply only where an agency is actually "*providing* a copy of a public record." I.C. § 5-14-3-8(d). Unless the requester refuses to accept the copy, an agency should not charge a requester for a copy that the agency retains.

Finally, I acknowledge that some agencies might not want to charge copy fees under these circumstances. For example, rather than providing a requester with a redacted copy of the record at issue, the agency might voluntarily make a redacted copy of the record and retain it for use in future inspections. While this would admittedly create additional storage and retention issues for the agency, such a record would presumably be subject to the same standards for retention as the original record because the former is merely a copy of the latter. Moreover, it is my understanding that the most substantial cost to agencies in redacting records for inspection is not the copying costs; it is the labor costs associated with the attorney, public information officer, or other employee who spends time preparing the redacted records. Accordingly, I would advise agencies to consider maintaining redacted copies of partially confidential records for use in future inspections. I note, however, that nothing in the APRA requires agencies to maintain redacted versions of the records or to waive an applicable copy fee.

[2] For example, the APRA permits public agencies to charge requesters the "direct cost of reprogramming a computer system if (1) the disclosable information is [stored electronically]; and (2) the public agency is required to reprogram the computer system to separate the disclosable information from nondisclosable information…." *See* I.C. § 5-14-3-6(c). Under the APRA, "direct cost" means "one hundred five percent (105%) of the sum of the cost of (1) the initial development of a program, if any; (2) the *labor* required to retrieve electronically stored data; and (3) any medium used for electronic output; for providing a duplicate of electronically stored data." I.C. § 5-14-3-2(c) (emphasis added).

If I can be of additional assistance, please do not hesitate to contact me.

Best regards,

Andrew J. Kossack
Public Access Counselor