

July 16, 2004

Mr. Roger L. Perry
1660 N. St. Rd. 46
Columbus, IN 47203

Re: Advisory Opinion 0-FC-102; Alleged Denial of Access to Public Records by the
Bartholomew County Sheriff's Department

Dear Mr. Perry:

This is in response to your formal complaint, which was received on June 16, 2004. You have alleged that the Bartholomew County Sheriff's Department ("Sheriff") has violated the Indiana Access to Public Records Act ("APRA"), Ind. Code 5-14-3. Specifically, you allege that the denial of access to public records in response to your May 17, 2004 request violated the APRA. Mr. Perry King, City Attorney, responded to your complaint on behalf of the Sheriff. A copy is enclosed for your reference.

BACKGROUND

According to your complaint, you hand delivered a written request for access to public records to the Sheriff on May 17, 2004. You asked for the opportunity to inspect or obtain copies of the following:

(a)ll documents, statements, papers, publications or other recordings in relation to the June 10, 2003 Execution Sale and conveyance, executed by the Sheriff of Bartholomew County, of the real property known as Lot One Perry Plaza.

On May 19, 2004, you returned to the Sheriff's office to pick up the requested records. At that time, the Sheriff's office advised you that they had no records for you. On the same day, Mr. King sent a letter to you denying your request as follows:

(Y)our request of May 17, 2004 is so broad in nature that it is impossible for the Department to determine exactly the nature of your request. In addition, without waiving the above objection, please note the Department, in its discretion has determined that the records you seek are exempt from disclosure based on the following provisions of Indiana law:

1. IC 5-14-3-4(b), which provides, in pertinent part:
 - (1) investigatory records of law enforcement agencies;

- (2) the work product of an attorney representing, pursuant to state employment of an appointment of public agency, a public agency; the state; or an individual;
- (6) records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

In addition, Mr. King's letter to you states:

Furthermore, to the extent that you are seeking records that have already been published or available at the Bartholomew County Courthouse, it is not incumbent upon the Department to produce such records that are available through the clerk of the Bartholomew Circuit Court as a result of the litigation you instituted in this matter.

After receiving Mr. King's denial letter, you filed your formal complaint with this Office. In addition to the above facts, your complaint states that Major Marvin Williams, of the Sheriff's Office, had previously presented the requested documents and allowed you to review them.

In response to your complaint, Mr. King faxed to this office a letter in which he advised that your complaint was very similar, if not a duplicate of a requested tendered by a Mr. David Woolf, and that the Sheriff will make available "an exact duplicate of items referenced" in Mr. David Woolf's request for access to public records on July 16, 2004.

ANALYSIS

Any person has the right to inspect and copy the public records of the Sheriff during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under Indiana code section 5-14-3-4. Ind. Code § 5-14-3-3(a).

The bases of the Sheriff's denial of your May 17, 2004 public records request were that the request was not reasonably particular under the APRA, the Sheriff had discretion under I.C. 5-14-3-4(b) to withhold those records, and that the Sheriff is not required to provide those documents when they can be obtained in the Bartholomew County Courthouse.

Reasonable Particularity

When a public records request is made, the requestor must make his or her request with reasonable particularity. Ind. Code § 5-14-3-3(a)(1). There is no Indiana case law defining "reasonable particularity."

While the phrase "reasonable particularity" appears to be clear, were it necessary to interpret the (APRA) to determine what the General Assembly intended this phrase to mean, courts would rely upon the common and ordinary meaning. "Particularity" is defined as "the state of being particular rather than general" . . . Statutory interpretation also requires that one

construe the phrase "reasonable particularity" in light of the entire Public Records Act. *Opinion of the PAC, 99-FC-21, (Jan, 19, 2000) page 3-4.*

Since the public policy of the APRA favors disclosure and the burden of proof for nondisclosure is placed on the public agency, if an agency needs clarification of a request, then the agency should contact the requestor for more information if it is necessary to respond to the request. *Opinion of the PAC 02-FC-38.* While asking for "all documents, statement, papers, publications, or other recordings" is a general request, that request has been made more particular by limiting the records to those in relation to the June 10, 2003 Execution sale, executed by the Sheriff of Bartholomew County, of the real property known as Lot One Perry Plaza. The fact a request would lead to the production of a voluminous number of public records does not make it nonspecific. *Opinion of the PAC, 00-FC-15.*

After reviewing your request for access to the public records of the Sheriff, it is my opinion that your request was reasonably particular so that the Sheriff should have known which public records you wanted to inspect.

Discretionary Access

The second reason provided for denial of your May 17, 2004 request for access to records was the records requested were subject to I.C. 5-14-3-4(b). Under this statute, public agencies have been granted discretion as to whether they will disclose certain categories of information, including: (1) investigatory records of a law enforcement agency; (2) the work product of an attorney representing a public agency, the state, or an individual (pursuant to state employment or an appointment by a public agency) or (3) records that are intra-agency or interagency advisory or deliberative material.

Your complaint states that you were previously allowed access to the records outlined in your May 17, 2004 request. The issue raised is whether the Sheriff may now withhold those documents in spite of the disclosure of that material to you on prior occasions. As a general rule, public agencies may change past rulings or policies, but such change must be explained and reasons for the change must be articulated. Community Care Centers, Inc. v. Indiana Department of Public Welfare, 523 N.E.2d 448 (Ind. App. 1988).

A law enforcement agency must be conscious of the fact that, upon review of the denial of access, a person can bring forward proof that the denial was "arbitrary and capricious" under Indiana Code section 5-14-3-9(f). For this reason, it is important that a law enforcement agency exercise consistency in any policies concerning the disclosure of public records." *Opinion of the PAC, 99-FC-7.*

The legal standard under the APRA for reviewing public agencies' determinations that a public record falls within one of the exceptions to disclosure under Indiana Code 5-14-3-4(b) is whether the denial of access was arbitrary or capricious. Ind. Code 5-14-3-9-(f). The burden of proof that the denial was arbitrary or capricious lies with the person

requesting the access. *Id.* The public agency, however, must still meet an initial burden of proof—by proving that the public record falls within any one of the categories listed under Indiana Code section 5-14-3-4(b) and establishing the contents with adequate specificity. Ind. Code 5-14-3-9(f). *Opinion of the PAC, 00-FC-18.*

Indiana courts have provided some guidance on discretion of public agencies and whether that discretion was exercised in an arbitrary or capricious manner. While these cases were not decided specifically under the APRA, the analysis is still relevant. *Opinion of the PAC, 00-FC-18.*

Arbitrary or capricious action on the part of an administrative board means willful and unreasonable action, without consideration and in disregard of the facts or circumstances of the case; action taken without some basis which would lead a reasonable and honest man to such action. *Opinion of the PAC, 00-FC-18.* Citing State Board of Tax Commissioners v. Chicago, M. St. P & PAC R.Co., 96 N.E.2d 279, 282 (Ind. App. 1951).

As set forth above, any change in the exercise of discretion or the policy about such disclosures, may not be made in an arbitrary and capricious manner. “If the (agency) has some basis for taking this action, that is neither willful or unreasonable in nature, and can articulate reasons to change its disclosure policy with respect to the public records in question, this change may withstand the standard of review under Indiana Code section 5-14-3-9(f).” *Opinion of the PAC, 00-FC-18.*

As stated in your complaint, the Sheriff’s Office had previously allowed you access to the records you requested on May 17, 2004. Additionally, Mr. King advised this office that access to the requested documents would be forthcoming on July 16, 2004 after notice of a formal complaint was forwarded to him. As such, it is my opinion that the previous denial to access to these records under I.C. 14-3-4(b) was arbitrary and capricious, and is a violation of the APRA. Furthermore, the Sheriff did not meet the agency’s burden of proof of establishing that the public records requested fall within any of the categories listed or by establishing the contents with adequate specificity. Ind. Code 5-14-3-9(f).

Availability of Records at Other Agencies

The final reason for denial of your May 17, 2004 request for access to records is that the records you seek from the Sheriff are readily available through the Bartholomew County Courthouse (“Courthouse”). It is Mr. King’s assertion that because those records are available through the Courthouse, you should obtain the records from the Courthouse and not the Sheriff’s Office. 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.” Ind. Code 5-14-3-1. The APRA was enacted to permit citizens of Indiana broad and easy access to public documents. When a request is made to an agency, that agency has a duty to disclose those records unless they fall within one of the exceptions permitted under I.C. 5-14-3-4, regardless of whether or not those records can be obtained through a different agency. In fact, it is well within the rights of

the requestor to ask for the same documents from multiple agencies. Under that scenario, each agency maintaining the requested records is required to provide what disclosable records they have, regardless of whether or not those records held by each agency are identical. The Sheriff's Office may not refuse to comply with your request and point you to another agency for the sake of its own convenience. Doing so is contrary to the spirit of the APRA, and discourages access to public records.

CONCLUSION

It is my opinion that the Bartholomew County Sheriff's Department denial of your May 17, 2004 public records request was in violation of the APRA.

Sincerely,

Karen Davis
Public Access Counselor

cc: Sheriff Kenneth Whipker, c/o Perry King: w/out enclosures