

June 9, 2004

Ms. Barbara A. Worden
1386 West County Road 600 South
Clayton, Indiana 46118

*Re: 04-FC-79; Alleged Violation of the Access to Public Records Act by the
Hendricks County Sheriff's Merit Board*

Dear Ms. Worden:

This is in response to your formal complaint alleging that Hendricks County Sheriff, on behalf of the Hendricks County Sheriff's Merit Board (Sheriff)¹ violated the Indiana Access to Public Records Act (APRA) (Ind. Code §5-14-3), when he responded to your request for records. Specifically, you allege that the Sheriff's response was deficient in that it did not include records that were responsive to your request. The Sheriff responds that he produced all of the records he has that are responsive to your request. A copy of the Sheriff's response is enclosed for your review. While I find the Sheriff's response to your request for records deficient in part, for the reasons set forth below I decline to find that the Sheriff withheld records in violation of the APRA.

BACKGROUND

You submitted your request for records to the Sheriff on March 26, 2004. Your request sought records showing the dates of appointment and terms of service for persons serving on the Sheriff's Merit Board, the procedures for electing the Merit Board members from the county force, and the minutes of Merit Board meetings from January 2003 through the date of your request. The Sheriff produced records responsive to your request on April 29, 2004.² In response to your request for dates and terms of appointment of current members of the Merit Board, the Sheriff cited you to the Indiana statute governing merit board appointments and produced only the minutes of the January 13, 2003, meeting which, according to your complaint, show only when the Board elected its own officers. You claim that this document does not respond to your request for records showing the dates and terms of appointment for all of the members, and no other documents were submitted that are responsive to this request. In response to your request for records showing the procedures established by the Merit Board for

¹ The record request was directed to the Hendricks County Sheriff, and the Sheriff responded to the request on behalf of the Sheriff's Merit Board.

² No claim is made here alleging that the Sheriff failed to timely acknowledge your request under Indiana Code 5-14-3-9(b).

election of the two members from the county force, the Sheriff responded that he was “unable to provide you with any documents relating to [this request] because they do not exist or cannot be located.” You challenge the response as ambiguous and note that it does not provide you with information on the existence and the accessibility of any responsive documents. You further assert that the minutes you received refer to a “Rules and Regulations Manual” that was not produced. No challenge is made regarding the Sheriff’s production of minutes in response to your third request.

In answer to your complaint, the Sheriff clarifies the response that covered his earlier production. Through counsel, the Sheriff avers that he has “provided the documents responsive to [your] request.” The Sheriff further states that he “does not possess ‘*any document that describes the procedures*’ for the election of Board Members apart from the procedure described in [Indiana Code] 36-8-10-2.” (Emphasis in original). The Sheriff goes on to state that the Rules and Regulations Manual was not produced because it was not responsive to your request; that is, it does not contain any procedures for election of representatives to the Merit Board.

ANALYSIS

Indiana Code 5-14-3-3(a) provides that any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as otherwise provided in the APRA. IC 5-14-3-3(a). A “public record” means any writing, paper, report, study, map, photograph, tape recording or other material that is created, received, retained, maintained or filed by or with a public agency. IC 5-14-3-2. A public agency is not required to create a record in response to a request, and it is not required to produce a record it does not have. If an agency does not have a responsive record, it should say so, but its failure to produce a record it does not have and is not required to have is not a denial under the APRA.

Here, the Sheriff produced records and information responsive to your requests. Whether he produced *all* of the public records that are responsive to your request is the question raised now. The Sheriff says he did.

Initially, I must agree with you that the Sheriff’s letter covering the April 29, 2004, production was deficient with regard to your request for procedures. The records *either* exist and cannot be located *or* they do not exist; the Sheriff cannot have it both ways, and he is in the best position to know whether or not the records responsive to your request exist. However, the Sheriff now clarifies that response and expressly avers, through legal counsel, that he has produced all of the public records (*see* IC 5-14-3-2) that are responsive to your requests. I understand his averment to mean that the Sheriff (and, recall that the Sheriff in this context means the Sheriff’s Merit Board too) (*see* Note 1), does not have any other records that are responsive to your request.³ Whether he should is a different question perhaps informed by other statutes not at issue based on the allegations of your complaint. In any event, the Sheriff’s prior production and statement that he has produced all of the public records that are responsive to

³ If this understanding is not accurate, the Sheriff or counsel should correct it and further clarify the Sheriff’s response or produce any additional records that are responsive to your request. The Sheriff’s nondisclosure of any other responsive records would violate the APRA.

your request creates a factual dispute that cannot be resolved in an advisory opinion in this forum. If you have evidence to dispute the Sheriff's assertion, or if you can show that the Sheriff is required to maintain other records that he now claims he does not have, you have the right under the APRA to pursue a civil action in a court of competent jurisdiction and seek all available remedies, including attorney fees and costs. *See* IC 5-14-3-9, 9(i). Based on the record before me, I decline to find a violation of the APRA where the Sheriff is alleged to have failed to tender records he claims he does not have.

CONCLUSION

For the foregoing reasons, I find that the Sheriff did not violate the APRA by failing to produce records he claims he does not have and where there is no evidence to suggest that the Sheriff is required to maintain those records.

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Mr. Stephen H. Shroyer