

January 14, 2008

Carmen Posey  
DOC #872420  
Pendleton Correctional Facility  
PO Box 601 F-Unit  
Pendleton, Indiana 46064-0601

*Re: Formal Complaint 08-FC-32; Alleged Violation of the Access to Public Records Act by the Elkhart County Sheriff's Department*

Dear Mr. Posey:

This is in response to your formal complaint alleging the Elkhart County Sheriff's Department ("Department") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to records. A copy of the Department's response to your complaint is enclosed for your reference. It is my opinion that while there is no exemption to disclosure in the APRA for ongoing litigation, the Department did not violate the APRA when it understood your request to be part of the discovery process in an ongoing court proceeding.

#### BACKGROUND

In your complaint you allege that you submitted a request for copies of records to the Department on December 10, 2007. You submitted the request as a Subpoena Duces Tecum and then Motion to Compel. You allege the Department did not respond to your request. You requested priority status for this complaint since you require the records for a proceeding before another public agency. Your request for priority status has been granted, pursuant to 62 IAC 1-1-3.

The Department responded to your complaint by letter from attorney Nathaniel Jordan. Mr. Jordan contends that you are in litigation with Elkhart County in Elkhart Superior Court No. 3. He further contends that you denominated your discovery request as a Subpoena Duces Tecum and a Motion to Compel. As such, the Department viewed your request as a part of the litigation process rather than a request under the APRA. Mr. Jordan further contends the public access counselor should not intervene in pending litigation. Mr. Jordan responded to your discovery request by letter dated January 9.

## ANALYSIS

The 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." I.C. §5-14-3-1. The Department 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 Department 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 records may be oral or written. I.C. §5-14-3-3(a); §5-14-3-9(c). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven days of receipt, the request is deemed denied. I.C. §5-14-3-9(b).

There is no exception in the Access to Public Records Act allowing a public agency to deny access to public records on the basis that the requester is involved in litigation with the agency. As a general rule, any records responsive to a request and not exempt from disclosure under the APRA must be produced. I.C. §5-14-3-3(a).

Here, though, you submitted your request in the form of a Subpoena Duces Tecum and subsequently a Motion to Compel. As such, the Department interpreted this not as a request for access to records under the APRA but instead a part of the discovery process, over which the court has jurisdiction. I agree with Mr. Jordan that the public access counselor should not intervene in pending litigation. Further, if a lawsuit is filed with respect to a public access matter, the public access counselor is precluded from issuing an opinion. I.C. §5-14-4-10(6). I do not understand the pending litigation to be a controversy regarding public access, but I do agree that since you submitted your request as a Subpoena Duces Tecum and Motion to Compel, this is a matter for the court rather than this office.

## CONCLUSION

For the foregoing reasons, it is my opinion the Department has not violated the APRA.

Best regards,



Heather Willis Neal  
Public Access Counselor

cc: Nathaniel Jordan, Yoder, Ainlay, Ulmer & Buckingham, LLP  
Trevor Wendzonka, Elkhart County Sheriff's Department