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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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ANDY RUTTEN,  
*Complainant,*

v.

ST. JOSEPH COUNTY,  
*Respondent.*

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Formal Complaint No.  
22-FC-91

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Luke H. Britt  
Public Access Counselor

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BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging that St. Joseph County violated the Access to Public Records Act.<sup>1</sup> Michael P. Misch filed an answer on behalf of the county. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on May 26, 2022.

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<sup>1</sup> Ind. Code § 5-14-3-1-10.

## BACKGROUND

This case involves a dispute about whether St. Joseph County (County) violated the Access to Public Records Act (APRA) by denying access to records of the Humane Society of St. Joseph County.

On March 19, 2022, Andy Rutten (Complainant) filed a public records request to the St. Joseph County for the following:

All complaints and/or reports pertaining to animals at the above address prior to 5/19/2022.

On May 23, 2022, the County denied Rutten's request. The County asserted the Humane Society of St. Joseph County (Humane Society) was not a public agency for purposes of APRA under Indiana Code section 5-14-3-2.1. The County contracts with the Humane Society, a nonprofit corporation, to provide services under the local animal control ordinance.<sup>2</sup> The County argues that the Humane Society is a private entity; and thus, APRA does not apply to the organization's records.

On May 25, 2022, Rutten filed a formal complaint with this office. Rutten argues that because the Humane Society is delegated authority to enforce the animal control ordinance, APRA applies in this case. Rutten asserts that the Humane Society—by contract and ordinance—issues county permits and licenses, inspects and investigates reports and complaints, captures animals, and collects fees and fines.

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<sup>2</sup> See St. Joseph County Ordinance No. 33-17

On June 6, 2022, St. Joseph County filed an answer to Rutten’s complaint. The County reiterates that the Humane Society is a nonprofit corporation; and thus, is not part of county government. Additionally, the County argues the Humane Society is excluded from APRA in accordance with Indiana Code section 5-14-3-2.1 because the organization is a provider of goods, services, or other benefits.

## ANALYSIS

### 1. The Access to Public Records Act

The Access to Public Records Act (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. St. Joseph County is a public agency for purposes of APRA; and therefore, subject to its requirements. *See* Ind. Code § 5-14-3-2(q). As a result, unless an exception applies, any person has the right to inspect and copy the county’s public records during regular business hours. Ind. Code § 5-14-3-3(a).

Indeed, APRA contains mandatory exemptions and discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a) to -(b).

## **2. Definition of public agency**

While any person has the right to inspect and copy the public records of a public agency,<sup>3</sup> this right does not generally extend into the private sector. Therefore, our analysis begins with the definition of a public agency.

Under APRA, public agency means:

Any board, commission, department, division, bureau, committee, agency, office, instrumentality, or authority, by whatever name designated, exercising any part of the executive, administrative, judicial, or legislative power of the state.

Ind. Code § 5-14-3-2(q)(1). Historically, this office has applied this statute as a functional equivalency test (i.e., is the private actor performing the functional equivalent of a public agency).

Undoubtedly, the Humane Society of St. Joseph County, all else being equal, is a private entity organized as a domestic nonprofit corporation in Mishawaka, Indiana.

When a private entity, however, is delegated a governmental power, its functions related to those powers become subject to oversight and accountability vis-à-vis the Access to Public Records Act.

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<sup>3</sup> Ind. Code § 5-14-3-3(a).

The Humane Society enforces portions of St. Joseph County Ordinance No. 33-17. Notably, Section 90.01 grants specific authority to any private entity:

charged with, or contracted with and given authority for the enforcement of the provisions of this chapter for and on behalf of St. Joseph County

The Humane Society has an appropriation in the County budget to perform these services and holds itself out on its paperwork to be an instrumentality of St. Joseph County.<sup>4</sup>

Enforcement of ordinances is unquestionably a government function. This is especially so when there are fees and fines involved, numerous examples of which are scattered throughout Ordinance No. 33-17. A private entity is deemed a state actor when the state delegates a traditionally public function to the entity itself. *Wade v. Byles*, 83 F.3d 902, 905 (7th Cir.1996).

But for the delegation of authority from the County, the Humane Society could not enforce the ordinance.

## **2.1 Providers of goods and services**

A notable exception to APRA's definition of "public agency" are providers of goods, services, or other benefits.<sup>5</sup> These are quid quo pro arrangements where a private entity enters into an agreement with a government unit to perform a service or provide goods.

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<sup>4</sup> See 2022 St. Joseph County Adopted Budget and the Humane Society of St. Joseph County's Department of Animal Welfare "Animal Welfare Alert" form.

<sup>5</sup> Ind. Code § 5-14-3-2.1.

The County claims this is the case for the Humane Society as well. A similar argument was made in *Indianapolis Convention & Visitors Association, Inc. v. Indianapolis Newspapers, Inc.*, 577 N.E.2d 208 (Ind.1991). In that case, the Indiana Supreme Court rejected the ICVA's argument that it was merely a provider of goods and services because it contracted with the Capital Improvement Board of Marion County.

In part, the court reasoned that private, contracted entities are considered providers of goods and services when "measured goods or services [are] given in exchange for payment based on identifiable quantities of goods or services." *Id.* at 214.

Here, there is an actual appropriation in the St. Joseph County budget outsourcing the enforcement of a local ordinance to a private third party. It does not appear any agreement provides for the payment or negotiation of fees to the entity in exchange for goods, services, or other benefits, which are critical elements of Indiana Code section 5-14-3-2.1.

Enforcement of local ordinances is different than, say, the paving contract for the courthouse parking lot or the maintenance agreement for the copiers in the recorder's office. There is little comparison between a provider of goods and services and the outsourcing of a government regulatory function.

Notably, it bears mentioning that the entirety of the Humane Society's records are not necessarily public under APRA. Documents that are not part of the County's government functions would not be subject to APRA. Adoption

records of animals, for example, are not a government function. Only those records relating the exercise of government authority (i.e., those actions enumerated in the local ordinance) are subject to disclosure.

### **CONCLUSION**

Based on the foregoing, it is the opinion of this office that the Humane Society of St. Joseph County is a public agency when performing the functions associated with a local regulatory ordinance. Therefore, its records germane to those functions are disclosable public records as if it were an inter-county agency.



Luke H. Britt  
Public Access Counselor

Issued: August 16, 2022