

November 29, 1999

Mr. Michael Duke
5180 E. 100 N
Marion, Indiana 46952

Re: *ADVISORY OPINION No. 99-FC-14:*

Denial of Access to Public Records by the Grant County Board of Commissioners.

Dear Mr. Duke:

This is in response to your formal complaint, which was received October 29, 1999. You have asked whether the failure to allow inspection of public records, the failure to produce public records and the alleged destruction of public records by Grant County Board of Commissioners (hereinafter, "Commissioners,") violated the Indiana Access to Public Records Act (hereinafter "APRA.") Your colleague, Ms. Carol Bone, made the public records request in question on October 25, 1999. The Commissioners, through their legal counsel, Mr. Bruce Elliott, responded in a letter, which was faxed to me on November 8, 1999. Mr. Elliott has stated that the Commissioners did not violate the APRA in dealing with the written public records request submitted by Ms. Bone and copies of the public records requested, which are maintained in the County Auditor's Office, were attached to his response. A copy of his response is enclosed.

For the reasons stated below, it is my opinion that the Commissioners did not violate the APRA in responding that they did not have public records concerning the private prison proposal. If the public records requested were maintained in the County Auditor's Office, it was not a violation of the APRA to refer you to that office to access them. Further, the Commissioners did not violate the APRA by failing to produce public records that did not exist at the time of your request. Finally, any concerns or complaints that you may have concerning the alleged unlawful destruction of public records should be directed to the prosecuting attorney as this falls within his or her jurisdiction under the Preservation of Public Records Act, Indiana Code chapter 5-15-6.

BACKGROUND

According to the information provided in your complaint, Ms. Bone hand delivered a request on October 25, 1999, to the Commissioners' office asking for the opportunity to inspect, and if necessary, copy of all public records relating to the proposal by Wackenhut Corporation or any other person or entity to place a private prison in Grant County, Indiana. Ms. Bone was permitted access to the minutes of the Commissioners' meetings, which are maintained in the County Auditor's Office, but was provided a written note from Ms. Colleen Compton, Chief Deputy for

the Commissioners, that stated that there were no "records left on Wackenhut Prison Facilities up here in the Commissioners' office." In addition, Ms. Bone had asked to see travel reimbursement documents related to a trip related to the private prison proposal on May 27, 1999 but such records were not produced in response to her request.

In his response, Mr. Elliott noted that Ms. Compton's note related to letters that were submitted to the Commissioners concerning the private prison proposal. Those letters had been transferred to the County Auditor, the recordkeeper for the Commissioners. Copies of the letters were attached to Mr. Elliott's response of November 8, 1999 and are enclosed for your review. According to Mr. Elliott, when Ms. Bone asked for copies of public records, she asked for copies of any documents with the letterhead of Wackenhut Corporation and there were no such records in the Commissioners' office. Mr. Elliot stated that the County has destroyed no documents. With respect to the travel reimbursement documents, Mr. Elliott has responded that no claims have been made and no expenses paid for the May 1999 trip, therefore, the County had no public records that were responsive to Ms. Bone's request.

The questions presented in your complaint, therefore are:

1. Did the Commissioners violate the APRA when they failed to allow the inspection of public records as requested in written public records requests and referred you to the County Auditor's Office to access available records?
2. Did the Commissioners violate the APRA by failing to produce public record that did not exist at the time of the first public records request?
3. Did the Commissioners violate the APRA by destroying public records?

ANALYSIS

There is no question that Grant County, Indiana, and the Commissioners, are subject to the provisions of the Access to Public Records Act (hereinafter, "APRA.") "It is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government." Ind. Code $\text{\textasciixchar"27}$ 5-14-3-1. Further, the Indiana General Assembly has provided that the APRA is to be liberally construed in favor of this policy and the burden of proof for nondisclosure of a public record lies with the public agency, not the person seeking access to the public record. Id.

A public record is defined to include any information, in whatever form, that is filed with, created, received or maintained by a public agency. Ind. Code $\text{\textasciixchar"27}$ 5-14-3-2. Public records are to be available for copying and inspection unless the public record is confidential under Indiana Code subsection 5-14-3-4(a) or nondisclosable at the agency's discretion under Indiana Code subsection 5-14-3-4(b). A public agency, therefore, is obligated to produce any disclosable public record that is maintained by the agency.

Right to Inspect Public Records

Under the APRA, "(a)ny person may inspect and copy the public records of a public agency during the regular business hours of the agency, except as provided in section 4 [Indiana Code section 5-14-3-4] of this chapter. Ind. Code §5-14-3-3(a). Further, a public agency may not deny or interfere with the exercise of the right to inspect and copy public records. Ind. Code §5-14-3-3 (b).

"Inspect" includes the right to do the following:

- (1) *Manually transcribe and make notes, abstracts, or memoranda.*
- (2) *In the case of tape recordings or other aural public records, to listen and manually transcribe or duplicate, or make notes, abstracts, or other memoranda from them. . .*

* * *

"Copy" includes transcribing by handwriting, photocopying, xerography, duplicating machine, duplicating electronically stored data onto a disk, tape, drum, or any other medium of electronic data storage, and reproducing by any other means.

Indiana Code section 5-14-3-2. (Emphasis added.)

Under the facts presented, the public records request clearly stated that Ms. Bone wanted an opportunity to inspect and, if necessary, copy the public records requested. The Commissioners responded to her request by providing access to minutes of the Commissioners, maintained by the County Auditor, and providing a written note confirming that there were no other public records "left" in the Commissioners' office concerning Wackenhut Corporation.

The APRA does not directly address the issue, but it is clear that the intent of the General Assembly was to permit the inspection and copying of original public records. Public agencies are charged with the dual responsibility of providing access to these public records and with preserving the same under Indiana Code section 5-14-3-7(a)-there would be no need to preserve photocopies of original public records unless some statute required multiple copies to be maintained by the public agency. While the circumstances surrounding the conversation between Ms. Bone and Ms. Compton are not clear, the Commissioners should be commended for its prompt response and production of some public records upon receipt of the public records request on October 25, 1999. The APRA does not require production of public records within any specific time period, only a response to the request. See, Ind. Code § 5-14-3-9. The Commissioners should have provided Ms. Bone with the opportunity to inspect the original public records, but Ms. Bone was properly referred to the County Auditor to obtain access to any materials concerning proceedings of the Commissioners that are maintained by the Auditor. See, Ind. Code § 36-2-2-11.

It is my opinion that, if the Commissioners did not have possession of any additional public

records responsive to Ms. Bone's request, the Commissioners' staff did properly direct her to the County Auditor's Office to view the minutes of the Commissioner's meetings. Unfortunately, there seems to have been some miscommunication concerning any other public records relating to the private prison proposal. Copies of the letters received concerning the private prison proposal are attached to the Commissioners' response, but in order to remedy the failure to allow inspection of the original public records, it is my opinion that the Commissioners should ensure that Ms. Bone has an opportunity to inspect the original public records at issue in the office of the County Auditor.

Failure to produce public records upon request

In your complaint, you allege that the Commissioners failed to produce travel reimbursement documentation for a trip that county officials took in May 1999. The Commissioners have responded that they had no records reflecting the reimbursement of travel expenses. The question is whether the City improperly denied access to these public records in violation of the APRA.

- (a) A denial of disclosure by a public agency occurs when the person making the request is physically present in the office of the agency, makes the request by telephone, or requests enhanced access to a document and:
- (1) the person designated by the public agency as being responsible for public records release decisions refuses to permit inspection and copying of a public record when a request has been made; or
 - (2) twenty-four (24) hours elapse after any employee of the public agency refuses to permit inspection and copying of a public record when a request has been made; whichever occurs first.

Indiana Code section 5-14-3-9. Public agencies are only required to produce public records that exist; there is no duty to produce public records in order to respond to a public records request. *See generally*, Ind. Code α 5-14-3-3.

With respect to your requests for travel reimbursement documents that the Commissioners had concerning travel by county officials in connection with the private prison proposal, the Commissioners have responded that, at the time of your request and as of their response to your formal complaint, there are no public records of reimbursement. It is my opinion, therefore, that the City did not violate the APRA by failing to produce records that did not exist.

Destruction of Public Records

You have alleged in your complaint the Commissioners have destroyed public records and request that this Office investigate the matter or refer it to the proper authorities for action. The Commissioners deny that any improper destruction of public records has taken place.

The retention and destruction of public records at the local level is not governed by the APRA, but by the Preservation of Public Records Act, Indiana Code chapter 5-15-6. Under Indiana Code

section 5-15-6-8, if a public record has been knowingly or willfully destroyed by the Commissioners, and it has not been destroyed in accordance with an order or duly approved retention schedule of the Grant County Local Public Records Commission, this constitutes a Class D felony. Criminal prosecutions within Grant County fall within the jurisdiction of your local prosecuting attorney. For this reason, I recommend that, if you have evidence of improper destruction of public records you forward that information to the Grant County Prosecuting Attorney for review.

CONCLUSION

It is my opinion that that the Grant County Board of Commissioners did not violate the APRA in responding that the Commissioners did not have public records concerning the private prison proposal or by referring you to the County Auditor's Office to obtain such records. The failure to produce public records that did not exist at the time of your request did not violate the APRA. Any concerns or complaints that you may have concerning the unlawful destruction of public records should be directed to the prosecuting attorney as this falls within his or her jurisdiction under the Preservation of Public Records Act, Indiana Code chapter 5-15-6.

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: Mr. Bruce N. Elliot, Attorney
Grant County, Indiana