

November 7, 2003

Mr. Philip Brandt
16574 Cherry Tree Road
Noblesville, IN 46060

Re: Advisory Opinion 03-FC-97, 03-FC-98, 03-FC-99: *Alleged Violation of the Access to Public Record Act by Hamilton County Prosecutor,¹ Hamilton Superior Court 4, Hamilton County Human Resource Director and Hamilton County Auditor*

Dear Mr. Brandt:

This is in response to your formal complaints, received on October 8, 2003. In them, you allege that the Hamilton County Prosecutor's Office (the "Prosecutor's Office"), Hamilton Superior Court 4 (the "Superior Court"), and the Human Resource Director of Hamilton County and Hamilton County Auditor (collectively, the "Auditor's Office") violated the Access to Public Records Act (the "APRA"). Mr. Jeffrey D. Wehmueller responded on behalf of the Prosecutor's Office; The Honorable J. Richard Campbell responded on behalf of the Superior Court; and Mr. Michael A. Howard responded on behalf of the Auditor's Office. A copy of each response is enclosed for your reference.

For the reasons set forth below, it is my opinion that there has been no violation of the APRA.

BACKGROUND

You allege that on September 5, 2003, you took a request for information to the Prosecutor's Office, but were told to take the request to the Auditor's Office. You allege that you proceeded to the Auditor's Office and stated your intention to return on Monday. You further allege that when you returned, you were told that the Superior Court had issued a protective order and that the information would not be disclosed to you.

In its response, the Prosecutor's Office asserts that your request was a request for a disclosure of personnel information generally, and therefore not subject to mandatory disclosure under Indiana Code § 5-14-3-4(b)(8). Additionally, the Prosecutor's Office advises that it does

¹ The Administrative Chief Deputy is an employee of the Hamilton County Prosecutor; therefore, these two complaints were processed as one.

not maintain a record that satisfies your request.² The Prosecutor's Office further alleges that the Superior Court entered a Protective Order preventing disclosure of the information you requested. In the Superior Court's response, Judge Campbell cited the Code of Judicial Conduct and declined to respond to your complaint because of the matters relating to you pending in the Superior Court. Finally, the Auditor's Office acknowledges receipt of your request, and that the names of the County's employees are public records. The Auditor's Office notes that it was in the process of compiling the information you requested, but was precluded from doing so by the terms of the protective order that was issued by the Superior Court. The Auditor's Office states that it will follow the Court's order.

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." Ind. Code § 5-14-3-1. Furthermore, "[t]his chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record." *Id.*

The Prosecutor's Office, the Superior Court, and the Auditor's Office are all public agencies subject to the APRA. IC 5-14-3-2. Therefore, "[a]ny person may inspect and copy the public records of any public agency. . . ." IC 5-14-3-3(a). Public record, for the purposes of the APRA, is defined as "[a]ny . . . material that is *created, received, retained, maintained, or filed* by or with a public agency and which is generated on . . . any . . . material, regardless of form or characteristics." IC 5-14-3-2 (emphasis added).

According to the documents you provided, you requested a copy of a roster of all full and part time employees of the Hamilton County Prosecutor's Office. The Prosecutor's Office contends in response that the request is over broad and seeks generalized personnel information that would not be subject to disclosure pursuant to Indiana Code § 5-14-3-8(b)(8). The Prosecutor's Office further contends that it does not keep a public record with the information you requested. The latter contention is dispositive. The Prosecutor's Office did not deny you access to a public record in violation of the APRA because the record you requested does not exist within the Prosecutor's Office.

Moreover, even assuming that the Prosecutor's Office maintained the record you are seeking, that office is foreclosed from disclosing that information pursuant to the protective order issued by the Superior Court in a pending criminal matter in which you are the defendant. That order, dated September 5, 2003, and entered pursuant to the authority conferred on the court by the rules of the Supreme Court of Indiana, precludes any county agency with information about or concerning the Prosecuting Attorney or her deputies and staff from disclosing such information to you or your representatives. Whether or not the Superior Court properly granted

² According to a conversation Jonathan Bryant, Legal Analyst with this Office, had with Mr. Wehmuller of the Prosecutor's Office, the Prosecutor's Office does not maintain a roster of employees.

the protective order is a question for that court or a court of review, but that determination does not affect the validity of the order as it currently applies to county agencies. I do not find the Prosecutor's Office to be in violation of the APRA by virtue of its compliance with that valid court order from a court of competent jurisdiction.

For the same reasons I do not find the Auditor's Office to be in violation of the APRA. While that office, unlike the Prosecutor's Office, appears to maintain the record you seek and stands ready to provide that information as appropriate under Indiana law, I find that it did not violate the APRA when it denied you access to the record in compliance with and under the authority of the Superior Court's order precluding it from disclosing the information to you or your representative.

With respect to the alleged denial of Access to Public Records by the Superior Court, your complaint does not indicate that you requested public records from the Superior Court. It is my opinion that because you do not indicate that you requested public records from the Superior Court, the Superior Court cannot be found to have denied you access to public records. A public agency must receive a request for public records before it can respond. To the extent that your complaint against the Superior Court is limited to that court's issuance of the protective order, I find that it did not violate the APRA. As stated above, that order was entered pursuant to the authority conferred on the court by the rules of the Supreme Court of Indiana. Whether or not the Superior Court properly granted the protective order is a question for that court or a court of review, but that determination does not affect the validity of the order as it currently applies to county agencies.

CONCLUSION

It is my opinion that there has been no actionable denial of access to public records under the Access to Public Records Act by the Prosecutor Office, Superior Court, or Auditor's Office.

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Mr. Jeffrey D. Wehmueller, Administrative Chief Deputy, Hamilton County Prosecutor
Mr. Michael A. Howard, Counsel for Hamilton County
The Honorable J. Richard Campbell, Hamilton Superior Court 4