March 17, 2004

Mr. Joseph M. Hero
11723 South Oakridge Drive
St. John, Indiana 46373

Re: Formal Complaint 04-FC-25; Alleged Violation of the Access to Public Records Act by the Town of St. John

Dear Mr. Hero:

This is in response to your formal complaint, received on February 16, 2004, alleging that the Town of St. John (Town) violated the Indiana Access to Public Records Act (APRA) (Ind. Code §5-14-3-1 *et seq*.), when it denied your request for public records. A copy of the Town's written response is attached for your review. For the reasons set forth below, it is my opinion that the Town denied your request for records in violation of the APRA.

BACKGROUND

On or about February 6, 2004, you made a written request for public records with the Town of St. John. Specifically, you requested access to public records as follows:

1. A copy of memos or letters of Mr. Fryzel or Chief Guzik regarding computer problems from August 2003 to date; and
2. View of all memos, letters, documents concerning computer problems from August 2003 to present.[1]

On February 9, 2004, the Town responded in writing and denied you access to all of the responsive records and to each part of those records. The Town relied on three exemptions to support its nondisclosure. First, the Town declared the records to be exempt from disclosure as intra-agency deliberative material made for the purpose of decision-making pursuant to Indiana Code 5-14-3-4(b)(6). The Town also asserted that the records were exempt from disclosure as

[1] This was your second record request to the Town. On December 30, 2003, you requested copies of all "requests by the FBI and/or State Police for town documents since 1/1/03; and memos regarding such requests." On the following day the Town responded that it had no documents responsive to the request "inasmuch as the Federal Bureau of Investigation has made no formal requests for public records."

administrative or technical information that would jeopardize a record keeping or security system pursuant to Indiana Code 5-14-3-4(b)(10). Finally, the Town asserted that the records were exempt from disclosure pursuant to Indiana Code 5-14-3-4(b)(12) on the basis that they were specifically prepared for discussion or developed during discussion in an executive session authorized by the Indiana Open Door Law. The Town's response did not identify what records were subject to what exemptions, but rather asserted in conclusory fashion that all of the records were exempt under all of the exemptions. This complaint followed. Your complaint challenges both the February 9, 2004 denial, and the December 31, 2003, response to your first records request. *See* Note 1.

In response to your complaint, the Town maintains its assertion that the December 31, 2003, response was proper in that it did not have any records that were responsive to the letter of your request; that is, requests received by the FBI and/or State Police, and memoranda responsive to such requests. With regard to your more recent request, the Town relies on the same exemptions asserted in its February 9, 2004, denial letter. The Town does not seek to apply any specific exemption to any specific responsive records, but rather generally asserts that all of the records are subject to all of the exemptions. Moreover, the Town does not address or in any manner acknowledge its obligation under Indiana Code 5-14-3-6 to separate disclosable from nondisclosable information and produce disclosable information that may make up a portion of the responsive records.[2]

ANALYSIS

I first address the issues raised by your December 30, 2003, request, and the Town's response to that request. The Town's response was not a denial under the APRA. Significantly, the Town responded that it did not have any records that were responsive to your request. The APRA governs only access to public records of public agencies. If a public agency does not have a record that is responsive to your request, it is not required to create such a record, and its failure to produce a record that is not responsive to the request cannot be characterized to be a denial of the record. That said, I understand your complaint to assert that the Town understood your request to identify responsive records that it did possess -- specifically, the same records subsequently identified as responsive to your February 6, 2004, request -- but relied on the precise language of your request to avoid disclosure. While I cannot find a violation based on the evidence presented, I do note that you may present any evidence supporting your claim to a court of competent jurisdiction in any civil action you bring against the Town pursuant to Indiana Code 5-14-3-9. Because you solicited this opinion from the Office of the Public Access Counselor, should you prevail in any such action, the court is required to award you attorney fees in pursuing that action. IC 5-14-3-9(i).

With regard to the later request and denial letter, it is my opinion that the Town denied you access to public records in violation of the APRA. The public policy of the APRA states:

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[2] In the letter requesting a response to the complaint, this office noted that when a record contains disclosable and nondisclosable information, the public agency must separate and produce the disclosable information. IC 5-14-3-6; *see An Unincorporated Operating Division of Indiana Newspapers, Inc. v. The Trustees of Indiana University*, 787 N.E.2d 893, 913-14 (Ind. Ct. App. 2003).

> [I]t is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Providing 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.

IC 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.* Accordingly, "[a]ny person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as provided in section 4 of this chapter." IC 5-14-3-3(a). Moreover, when a public record contains disclosable and nondisclosable information, the public agency is required to separate the material that may be disclosed and make it available for inspection and copying. IC 5-14-3-6(a). Because the public policy of the APRA requires a liberal construction in favor of disclosure (*see* IC 5-14-3-1), exemptions to disclosure must be construed narrowly. *Robinson v. Indiana University*, 659 N.E.2d 153, 156 (Ind. Ct. App. 1995). However, a liberal construction of the APRA does not mean that the exemptions set forth by the legislature should be contravened. *Hetzel v. Thomas*, 516 N.E.2d 103, 106 (Ind. Ct. App. 1987).

The Town asserts that the records include "memoranda, letters and/or documents" that were prepared by "Town Officials and/or employees at the specific request of the Town's legislative body." The records are described as being "prepared and communicated for the purpose of assessing 'issues' that the Town was experiencing with its computers, as well as for an evaluation of computer security matters." The "documents contain detailed accounts of problems the Town was experiencing with its computers and computer security matters, as well as expressions of opinion as to the cause of such problems." The Town's response to your record request denied you access to all of the records responsive to your request, and to every part of the responsive records. However, it is my opinion that the Town has not met its burden of establishing that the responsive records fall within the exemptions claimed. More certainly, the Town has failed to meet its burden of establishing that every part of every responsive record is nondisclosable, and that no part of the requested records could be separated and disclosed pursuant to statute.

The Town first contends that the nondisclosure was proper under the deliberative materials exemption. This exemption provides that "records that are intra-agency or interagency advisory or deliberative material . . . that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making" are excepted from public disclosure at the discretion of the public agency. IC 5-14-3-4(b)(6). The exemption applies to protect the deliberative material of both staff of the public agency and deliberative material prepared by a private contractor under contract with the public agency. IC 5-14-3-4(b)(6). The purpose of this exemption is to "prevent injury to the quality of agency decisions" by encouraging "frank discussion of legal or policy matters in writing." *Newman v. Bernstein*, 766

N.E.2d 8, 12 (Ind. Ct. App. 2002); *see Unincorporated Operating Division of Indiana Newspapers, Inc. v. Trustees of Indiana University*, 787 N.E.2d 893, 909-10 (Ind. Ct. App. 2003).

Despite the general and conclusory nature of the foregoing description of the documents at issue in this matter, I have no difficulty believing that some portion of some or all of the responsive records may meet the deliberative privileges exemption to disclosure in Indiana Code 5-14-3-4(b)(6). The Town establishes the general nature of the records with sufficient specificity for me to understand that they at least contain the opinions, advice and recommendations of staff regarding the possible cause and resolutions for problems with the Town's computers. Certainly, an exchange of ideas among Town officials and employees regarding the cause and possible resolution of computer and computer security issues fits within this exemption. In my opinion the Town has made an adequate showing that some portion of some or all of the responsive record fall within the deliberative materials exemption.

That said, the exemption does not protect all matters within the responsive records from disclosure. Rather, as noted above, the APRA requires a public agency to separate disclosable from non-disclosable information contained in public records. IC 5-14-3-6(a). Thus, the most recent court to address application of this exemption held that factual matters which are not inextricably linked with other non-disclosable materials (specifically, the opinions and speculation of the author) should not be protected from public disclosure. *See The Trustees of Indiana University*, 787 N.E.2d at 913-14. *But see Journal Gazette v. Board of Trustees of Purdue University*, 698 N.E.2d 826, 831 (Ind. Ct. App. 1998) (wherein the court applied the exemption to permit disclosure of a group of documents as a whole). In *Trustees of Indiana University*, disclosable factual matters included such information as whether or not an incident happened. In that manner the court distinguished disclosable factual matters from non-disclosable opinions or speculation concerning the incident or about the impact or effect of the incident. To the extent that the responsive records in this matter contain factual or anecdotal information and data, such information and data must be disclosed. Here, the Town's own description of the records clearly indicate that they contain factual information regarding the nature and extent of computer problems being experienced by the Town, and the description suggests other factual matter in the records at issue. It simply cannot be – and the Town does not even attempt to allege – that every word or sentence or paragraph of every responsive document is an expression of opinion or speculation. It is my opinion that any factual data or material is disclosable, and its nondisclosure violates the APRA. The Town should review the responsive records consistent with this opinion and disclose any factual data or material previously withheld. The Town's failure to do so would in my opinion constitute a continuing violation of the APRA.

Similarly, the Town cannot rely on the security system exemption to withhold production of all of the responsive records in this matter. Indiana Code 5-14-3-4(b)(10) provides that "[a]dministrative or technical information that would jeopardize a record keeping or security system" shall be excepted from the disclosure requirements of the APRA at the discretion of the public agency. In *City of Elkhart v. Agenda: Open Government*, 683 N.E.2d 622, 626-27 (Ind. Ct. App. 1997), the Indiana Court of Appeals addressed the security system exemption and found

that it was not applicable to restrict disclosure of telephone numbers. In that case, a newsletter editor sought the 1993 cellular telephone bills for the Mayor of Elkhart and other city department heads. The city responded that an earlier and similar request resulted in the requestor misusing the Emergency 911 system by running the numbers through the system to obtain the identities of the persons belonging to the numbers. The city declined to produce the telephone records without assurances from the newsletter editor that no such misuse would occur with the records produced in response to the most recent request. The city relied upon the security system exemption to avoid production of the cellular telephone bills of the city officials. The city argued that the Emergency 911 system was a security system, and that the phone records of the city officials contained "technical" or "administrative" information (the phone numbers themselves) that if disclosed would jeopardize that Emergency 911 system. That is to say, if the requestor misused the system to trace the origin of the numbers, the security system would be jeopardized. The court found this argument unconvincing. Relying on common definitions of "technical" and "administrative,"[3] the court found that telephone numbers in and of themselves constitute neither technical nor administrative information. Applied to the Emergency 911 security system underpinning the city's argument, the court characterized the telephone numbers as "innocuous," and stated:

> [A]ny prior alleged misuse or speculated future misuse of information *which is innocuous on its face* is irrelevant. Section 4(b)(10) provides a discretionary exception for public records containing a "type" of information due to its nature and not because of a speculated "use" of the information would jeopardize a record keeping or security system.

683 N.E.2d at 627 (emphasis added). In *City of Elkhart*, the telephone numbers being sought by the newsletter editor were not part of the security system their disclosure was said to endanger. While they could be used, or misused, to burden and jeopardize that system, they were in and of themselves unrelated technically, administratively, or otherwise to the security system and like any number of things that could have had that same effect. They were not a "type" of technical or administrative information related to the security system that would, if disclosed, jeopardize the system.

Here, the request sought records related to computer problems, and the Town's response indicates that such records exist. In my opinion, the Town's conclusory statement that the records include information that may jeopardize computer security is not sufficient to establish a basis for this exemption. Indeed, the Town has failed to identify any aspect of the record that permits an understanding of how the information being protected is of the "type" of technical or administrative information that due to its nature if disclosed would jeopardize the record keeping and security system of the Town. There is not even an allegation that the records contain "technical information" regarding the security system that, if disclosed, could jeopardize that system. Neither is it apparent from the Town's response that the records contain administrative information in that it is "of or relating to administration" of a security system. *See City of*

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[3] The court found that "technical may be defined as of or relating to technique and marked by or characteristic of specialization," and that "administrative may be defined as of or relating to administration." *City of Elkhart*, 683 N.E.2d at 626-27 (internal quotations and citations omitted).

Elkhart, 683 N.E.2d at 627; *see also* MERRIAM-WEBSTER ONLINE (http://www.m-w.com/, last accessed March 17, 2004) (defining "administration" as the "act or process of administering" and "administer" as "to manage affairs"). In any event, even assuming that the records at issue contain some information that fits within this exemption, it is not conceivable and not alleged that all of the content of these documents fall within this exemption, and the Town's failure to seek to separate disclosable from nondisclosable information cannot stand under Indiana Code 5-14-3-6(a).

The Town's final argument is that the nondisclosure was proper under the executive session materials exemption. This exemption allows for the nondisclosure of records "specifically prepared for discussion or developed in executive session." IC 5-14-3-4(b)(12). The Town essentially asserts that every responsive record was prepared specifically for discussion in an executive session of the Town's governing body, specifically to discuss the implementation of security systems under Indiana Code 5-14-1.5-6.1(b)(2)(C). The Town correctly observes that its governing body may meet in executive session to discuss the implementation of a security system. *See* IC 5-14-1.5-6.1(b)(2)(C). However, the Town has not met its burden of establishing that every record responsive to your request falls within this exemption. To meet this exemption, the Town would have to establish, with sufficient detail, that each record at issue was "specifically prepared" for the purpose of discussion in an executive session designed and noticed to address the implementation of a security system. While the Town offers up that conclusory statement, it does not support it with any detail that permits me to find that every memorandum and every letter and every other "document" characterized to be responsive falls within that exemption. Indeed, the Town has offered no evidence (e.g., a meeting notice or memorandum) that any executive session was ever noticed or held for the purpose of discussing computer security, let alone the implementation of a *security system* of any sort. Moreover, the Town's description of the responsive records belies the claim. The Town asserts that the Town Council ordered the records prepared for a discussion *by the Town Council* in executive session. But elsewhere, the Town acknowledges that the records were used by town personnel and employees as an exchange of ideas to both identify problems and to vet out solutions. Moreover, the nature of the records request and the Town's response suggests that some records that are responsive were prepared as part of an internal investigation and perhaps even as part of a police investigation. Whether or not any specific record or any portion of any specific record would fall within the executive sessions exemption, the Town has not met its burden in this matter of establishing application of the exemption to the content of any record.

Neither do I think that the exemption, narrowly construed, is intended to be used in the manner the Town seeks to use it here. Any document can be discussed or used in an executive session, but that it *can be discussed or used* in a proper executive session does not itself qualify the document for nondisclosure under Indiana Code 5-14-3-4(b)(12). If that were the standard, then a budget or invoice or utility bill or any number of other documents that are otherwise innocuous and clearly subject to disclosure would become subject to nondisclosure by virtue of the fact that they could be used by the governing body to discuss its strategy regarding the purchase of a parcel of land (or, for some other purpose appropriate for an executive session). Here, the responsive records were prepared apparently by multiple and unknown authors. While

all of these records may or may not have all been prepared at the behest of the Town's legislative body, and while every record at issue may have value to the Town and the Town's governing body in an executive session that might later be conducted to discuss the implementation of a security system, they cannot, without more, be fairly characterized as having been "specifically prepared for discussion" in any such prospective executive session.

As you know, this opinion is advisory only. Notwithstanding any action the Town may take in response to this opinion, you have the right under the Access to Public Records Act to file an action against the Town in the circuit or superior court of the county in which the denial occurred. IC 5-14-3-9(d). A court is in the best position to review the evidence and resolve any evidentiary disputes regarding the content of the records, including to conduct an *in camera* review of the documents being withheld to further determine the propriety of each exemption claimed. Should you prevail in that action, the Access to Public Records Act provides that you will be entitled to your attorney fees. IC 5-14-3-9(i) (providing for fees to prevailing party who first seeks an informal inquiry response or a formal opinion from the Public Access Counselor). I hope the comments and opinions expressed above are of assistance in informing your decision about how next to proceed.

CONCLUSION

For the reasons set forth above, it is my opinion that the Town's December 31, 2003, response to your record request was not a denial and did not otherwise violate the APRA. It is my further opinion that the Town's February 9, 2004, denial of your subsequent record request violates the APRA. The Town should separate the disclosable information from any information that is properly nondisclosable, and produce the disclosable information. The Town's continuing failure to do so constitutes a continuing violation of the APRA.

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Mr. David Austgen