

March 30, 2004

Mr. Donald A. Talucci
4359 Clinton Street
Indianapolis, Indiana 46226

*Re: 04-FC-33; Alleged Violation of the Access to Public Records Act by the
Indiana Attorney General*

Dear Mr. Talucci:

This is in response to your formal complaint alleging that the Office of the Indiana Attorney General (OAG) violated the Indiana Access to Public Records Act (APRA) (Ind. Code §5-14-3) when it responded to your request for public records. Specifically, you assert that the OAG violated the APRA when it failed to produce public records in response to your request without citing to the specific statutory exemption supporting nondisclosure. For the reasons set forth below, I find your complaint without merit.

BACKGROUND

On March 1, 2004, this office received your formal complaint alleging that the OAG violated the APRA. Neither your complaint nor the narrative in support of the complaint set forth any facts establishing the nature of your request for records or the date it was alleged to be denied. Your complaint merely asserts that the OAG's response to a record request you submitted to that office violated the APRA because it failed to produce responsive records without citing to the specific statutory exemption supporting nondisclosure. Two letters from the OAG are attached to your complaint as supporting documents and form the factual basis for this opinion. Your request apparently sought copies of an executive order issued by former Indiana Governor Evan Bayh, and "any and all applicable constitutional, statutory, Indiana Code, common law, etc. in reference to enactment, enforcement, and violation of Executive Orders." In letters dated December 9, 2003, and January 30, 2004, the OAG responded and reiterated that it did not maintain copies of executive orders issued by the Office of the Governor, and that your request was otherwise not reasonably particular. With regard to your general request for all laws applicable to executive orders, the OAG further advised you that it was not authorized by its

enabling legislation to provide legal research or legal advice and counsel to the public. The January 30, 2004, letter also noted that the response tendered was in conformity with advice and guidance offered by this office regarding the OAG's obligations in responding to your request. That is to say, I advised that office that it was acting within the law to respond as it did.

This complaint followed. Your complaint seeks an opinion finding the OAG in violation of the APRA, and requests priority status and expedited consideration.

ANALYSIS

As a threshold matter, I decline to find your complaint subject to priority status and expedited review pursuant to Indiana Administrative Code 62 IAC 1-1-3. Your complaint in that regard fails to cite to the specific criteria upon which you base your request for expedited status, and it is not otherwise apparent from reviewing the factors how any of them can be asserted to be applicable to your claim. Moreover, you fail to offer any facts establishing a basis for expedited review under any of the criteria set forth in the Indiana Administrative Code.

On the merits, I decline to find the OAG in violation of the APRA. The APRA governs the public records of public agencies, and provides that any person may inspect and copy the public records of any public agency during the regular business hours of the public agency except as otherwise provided in the APRA. IC 5-14-3-3(a). A "public record" for this purpose is defined as any writing or other material that is "created, received, retained, maintained, or filed by or with a public agency." IC 5-14-3-2. The APRA contains 31 separate categories of statutory exemptions to disclosure of public records. IC 5-14-3-4. If a public agency denies a request for public records maintained by the agency, the APRA requires that the public agency provide a statement citing to the specific statutory exemption supporting the nondisclosure. IC 5-14-3-9(c)(2)(A).

The OAG's response to your record request was not a "denial" of public records maintained by that agency, and as such did not require citation to any exemption supporting nondisclosure. In particular, the OAG responded to your request seeking a copy of a former Governor's executive order by advising you that it did not maintain a document responsive to that request. If a public agency does not have a document that is responsive to a record request, it cannot be said to have denied access to a public record of that public agency. *See* IC 5-14-3-2, 5-14-3-3(a). Neither was the OAG's response to your request for all laws applicable to executive orders a denial of public records under the APRA. By the plain language of the response, the OAG was not responding that it maintained but was not disclosing records identified as responsive to your request. Indeed, the OAG response affirmatively stated that it could not identify what you were even requesting, and asked that you clarify your request to make it reasonably particular. Pursuant to Indiana Code 5-14-3-3(a)(1), a public agency is entitled to a request that identifies with reasonable particularity the record being requested. IC 5-14-3-3(a)(1). I agree with the OAG that your request did not identify with any reasonable particularity by name or content the record or records you were requesting. Indeed, phrased as it was, your request sought copies of the entire body of state constitutional, statutory and common law inasmuch as virtually every law may impact or relate to the "enactment, enforcement, and

violation of Executive Orders.” Moreover, I read your request and your subsequent complaint not as a request for the public records of a public agency under the APRA, but rather as a request for legal research services and legal advice. Certainly, in order to respond to your request the OAG would be required to engage in a legal analysis, that is, offer the Attorney General’s legal interpretation determining which laws are responsive. The APRA does not require a public agency to provide legal research and legal advice. To the extent that the OAG’s response declined to provide you with legal advice, the response was not a denial of public records under the APRA. *See* IC 5-14-3-2, 5-14-3-3(a).

CONCLUSION

For the reasons set forth above, it is my opinion that the OAG’s response to your record request was not a “denial” of public records maintained by that agency, and as such did not require citation to any exemption supporting nondisclosure. Accordingly, your complaint that the OAG denied you access to public records in violation of the APRA is without merit.

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Mr. Gregory F. Zoeller