

June 17, 2004

Ms. Tonya L. Coffman
4906 Pembridge Drive
Indianapolis, Indiana 46254

*Re: 04-FC-95; Alleged Violation of the Access to Public Records Act by the
Indianapolis Fire Department*

Dear Ms. Coffman:

This is in response to your formal complaint alleging that the Indianapolis Fire Department (Department) violated the Indiana Access to Public Records Act (APRA) (Ind. Code §5-14-3) when it failed to respond to your written request for records in a timely manner, and when its response failed to provide you with records or a date certain for production. For the reasons set forth below, I find that the Department's response acknowledging your request was deficient because it failed to provide you with a date certain for production or further response. It is my further opinion that the Department's failure to timely acknowledge your request would constitute a violation of the statute, but I decline to find that the Department's response was not timely based on the record presented, and defer that question of fact to a court of competent jurisdiction in any civil action you might bring against the Department under Indiana Code 5-14-3-9.

BACKGROUND

Your complaint alleges that you submitted a written request for records to the Department seeking your personnel records and specifically records concerning decisions regarding your job performance.¹ Your request was submitted by United States Mail, Certified,

¹ You do not include a copy of your written request, but in a prior informal inquiry you indicated that you previously sought and were denied records regarding memoranda prepared by your supervisors and others in the Department complaining about your job performance. According to your informal inquiry, the Department denied your prior request asserting that the documents you sought were not personnel records but rather were "deliberative materials" subject to exemption under Indiana Code 5-14-3-4(b)(6). I provided you with an informal inquiry response, attached as support to your current complaint and incorporated here, opining that you were entitled to your own personnel file information pursuant to Indiana Code 5-14-3-4(b)(8), and that any documents alleged and ultimately established to be "deliberative materials" rather than personnel file information were nonetheless required to be produced with nondisclosable opinion and speculation redacted or otherwise separated from the disclosable material in the responsive record. *See* IC 5-14-3-6; *Unincorporated Operating Division of Indiana Newspapers v. Trustees of Indiana University*, 787 N.E.2d 893, 913-15 (Ind. Ct. App. 2003).

Return Receipt Requested. You indicate that the request was submitted on May 21, 2004, but the payment receipt is dated May 20, 2004. According to the signed return on the certified mail return receipt, the Department received your request but failed to date the signature on the receipt. The Department responded in writing on June 2, 2004. The Department's response acknowledges your request and that public agency's intention to review its records in light of the prior opinions issued by this office. While the Department promised production of any non-exempt responsive records, it failed to identify a date certain for production or any further response. This complaint followed.²

ANALYSIS

A public agency that receives a request for records under the APRA has a specified period of time to respond to the request. IC 5-14-3-9. A timely response to the request does not mean that the public agency must expressly decline to produce or produce the documents that are responsive to the request within the statutorily prescribed time period. Of course, a public agency is free to take either of those actions, but may also comply with its response obligation under the statute by acknowledging receipt of the request and indicating the specific actions the agency is taking toward production. This includes, in my opinion, providing a date certain when the requesting party may expect production or a further response (*e.g.*, a new anticipated date of production or perhaps a denial with citation to appropriate authority supporting the nondisclosure). When a public record request is made in writing and delivered to the public agency by mail or facsimile, the public agency is required to respond to that request within seven (7) days of *receipt* of the request. IC 5-14-3-9(b). If that period of time elapses without a response, the request is presumed denied. IC 5-14-3-9(b). Absent evidence to the contrary, and consistent with the practice in other contexts, this office calculates receipt within three (3) days of the date of mailing. *Cf.* Ind. Trial Rule 6(E); Ind. Appellate Rule 25(C).

Your complaint alleges that the Department's written response is defective for the reasons that it is untimely and because it fails to provide you with a date certain for production or further response. Regarding the latter issue, the Department's written response quite clearly fails to provide you with a date certain for production or further response. I do not think this demonstrates any bad faith on the part of the Department. Indeed, the written response just as clearly indicates that the Department is reviewing its prior response to your request in the context of the informal opinion issued by this office regarding employment records and the deliberative materials exemption, and that it will produce any responsive records in accordance with that opinion. That said, the APRA places the burden of response and production on the public agency, and this office has long held that this requires something more than a statement by the public agency that it will comply when and if records are located in response to an inquiry. In keeping with the spirit of the APRA and the burden imposed on the public agency, it is not too

² Indiana Code 5-14-5-8 requires that I immediately forward a copy of any properly filed formal complaint to the public agency that is subject to the complaint. I do so with this opinion. Normally, the complaint is forwarded to the public agency before an opinion is composed in order that the agency be afforded an opportunity to respond and to facilitate resolution of the complaint. While the Department may certainly prepare and file a response to the complaint, its response is unnecessary to resolution of your claim based on a plain reading of the statutes at issue and the facts asserted in the complaint.

much to require the public agency to identify specific dates for production or for when you can expect a further response. That was not done here. Accordingly, it is my opinion that the response is deficient. The Department can avoid any continuing violation of the APRA by providing you with the responsive documents or advising you in writing when you can expect production or a further response. The Department is further advised that any production or further response must occur within a reasonable time of the request.

I am not so willing to find a violation of the APRA regarding the timeliness of the response based on the record presented. The date of receipt is relevant to this inquiry, and it is in question both because the Department failed to reflect it in the field provided specifically for this purpose on the postal form that accompanied the request, and because the date you submitted the request is also uncertain on this record. While I do not make a specific finding on this point, I offer the following opinion for purposes of informing any further action you may take in this matter. The written response was due within seven days of receipt. Assuming you submitted the request on May 21, 2004, as alleged, I would presume receipt on May 24, 2003 (May 23, 2004, was a Sunday). The Department may well offer evidence to the contrary. Assuming the Department received the request on or before May 24, 2004, its response would have been due no later than June 1, 2004 (May 31, 2004, was a holiday). In that event, the response dated June 2, 2004, was one day late. Given the record presented and the closeness of the dates, I defer any findings on this point to a court of competent jurisdiction in any civil action you might bring against the Department under Indiana Code 5-14-3-9.

CONCLUSION

For the reasons set forth above, I find that the Department's response to your record request was deficient in that it failed to identify a date certain for production or any further response to your request. If the Department failed to respond to your request within seven days of receipt – a finding not made on this record – its response would also be untimely under the statute. The Department's response otherwise indicates its good faith in complying with your request and the provisions of the APRA.

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Ms. Ellen S. Gabovitch