

November 14, 2005

Sent Via Facsimile

John Emry
62 West Jefferson Street
Franklin, IN 46131

Re: Formal Complaint 05-FC-211; Alleged Violation of the Access to Public Records Act by the Indiana Parole Board

Dear Mr. Emry:

This is in response to your formal complaint alleging that the Indiana Parole Board ("Parole Board") violated the Access to Public Records Act by not responding to your requests for certain parole records of Clark Goodwin. I find that the Indiana Parole Board violated the Access to Public Records Act.

BACKGROUND

On September 21, 2005, you mailed to Raymond Rizzo, Chairman of the Indiana Parole Board, a request for a record. The Parole Board received the request on September 23, 2005. You allege that the Parole Board failed to respond to this written request as well as to earlier requests for the record. On behalf of Mr. Clark Goodwin, you requested a copy of "documents including statement and reports the Indiana Parole Board considered at its August 2, 2005 hearing on Mr. Goodwin's request for a pardon." You filed your formal complaint with the Office of the Public Access Counselor on October 14, 2005.

I sent a copy of your complaint to the Parole Board, to Chairman Rizzo's attention. He responded by letter, a copy of which is enclosed for your reference. He included a copy of a letter to you dated October 14, 2005. In Chairman Rizzo's letter, he stated that the response to your request for records was tardy due to other duties of the eight-member office that competed with your request. Chairman Rizzo continued that he would make available to you copies of the Parole Board's vote on the clemency petition as well as the videotape of the public hearing. He

claimed that the remainder of the pardon file itself was “interagency advisory or deliberative material between the Parole Board and the Governor that are expressions of opinion or are of a speculative nature and are communicated for purposes of decision-making and therefore confidential pursuant to Ind. Code 5-14-3-4(b)(6).”

ANALYSIS

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the Access to Public Records Act (“APRA”). Ind. Code 5-14-3-4(b)(6). The Parole Board is a public agency under the APRA. IC 5-14-3-2(l). If a public agency receives a request for a record via U.S. Mail, the public agency must respond to the request within seven (7) days of receipt, or the request is deemed denied. IC 5-14-3-9(b). A public agency may deny a written request for a record if: 1) the denial is in writing, and 2) the denial includes a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record, and the name and the title or position of the person responsible for the denial. IC 5-14-3-9(c). If a record contains disclosable and nondisclosable information, the public agency shall, upon receipt of a request under the APRA, separate the material that may be disclosed and make it available for inspection and copying. IC 5-14-3-6(a).

The Parole Board has acknowledged that it did not respond to your request until October 14, 2005. Because the Parole Board received your request on September 23, 2005, it was required to issue a response by September 30, 2005. The Parole Board’s tardy response was in violation of the Access to Public Records Act.

In its belated response, the Parole Board stated it would permit inspection and copying of the videotape of the public hearing and the “vote sheet” on which the members’ votes were recorded. The Parole Board otherwise claimed that the “pardon file” contained deliberative material subject to exemption under the APRA.

Under IC 5-14-3-4(b)(6), a public agency may withhold “records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making. Hence, the Parole Board may withhold a record that meets all three elements of the deliberative materials exception: 1) is intra-agency or interagency advisory or deliberative material, 2) that contains expressions of opinion or is of a speculative nature, and 3) that is communicated for the purpose of decision making.

A pardon file is not a single, discrete record. Rather, the pardon file likely contains many different records. The APRA requires that a public agency claiming an exemption for a record is required to deny the record with a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record. IC 5-14-3-9(c)(2)(A). Without the public agency specifying what record an exemption pertains to, a person requesting the record cannot understand what records are subject to a specific exemption. The public agency is not required to disclose information in the record to the extent that the purpose for the exemption is vitiated. However, the public agency must at least identify what specific record it is withholding.

Even if the pardon file could be deemed a single record, the APRA requires that if a record contains disclosable and nondisclosable information, the public agency is required to separate the nondisclosable information and to make the disclosable part of the record available for inspection and copying. Again, any part of the pardon file that contains information that does not meet every element of the deliberative materials exception must be disclosed to you.

My opinion is consistent with the Indiana Court of Appeals' holding in *The Indianapolis Star v. Trustees of Indiana University*, 787 N.E.2d 893 (Ind. Ct. App. 2003). In *The Indianapolis Star*, the court examined *Journal Gazette v. Bd. of Trustees of Purdue Univ.*, 698 N.E.2d 826 (Ind. Ct. App. 1998), wherein a different panel of the Court of Appeals had held that records submitted as part of the grievance process were subject to exemption under IC 5-14-3-4(b)(6), without the necessity for Purdue to specifically prove the exception for each individual document. 698 N.E.2d at 831. The *Indianapolis Star* court expressly declined to follow the holding in the *Purdue* case, citing section 6 of the APRA:

“By stating that agencies are required to separate ‘information’ contained in public records, the legislature has signaled an intention to allow public access to whatever portions of a public record are not protected from disclosure by an applicable exception. To permit an agency to establish that a given document, or even a portion thereof, is non-discloseable simply by proving that some of the documents in a group of similarly requested items are non-discloseable would frustrate this purpose and be contrary to section 6.”

The Indianapolis Star, 787 N.E.2d at 914.

In addition to the above holding, *The Indianapolis Star* court found that “factual matters which are not inextricably linked with other non-discloseable materials, should not be protected from public disclosure.” *Id.* at 914.

In my opinion, the Parole Board did not entirely satisfy the requirements of IC 5-14-3-9(c). The Parole Board should reexamine the pardon file and determine whether the information contained in the file is nondisclosable under the deliberative materials exception or other exception to disclosure contained in section 4. If some of the records contained in the pardon file do not meet the statutory exceptions, those records should be disclosed. I also write to clarify that records that meet the deliberative materials exemption are *not* confidential; they may be disclosed or not disclosed in the public agency's discretion.

CONCLUSION

For the foregoing reasons, I find that the Indiana Parole Board violated the Access to Public Records Act.

Sincerely,

Karen Davis
Public Access Counselor

cc: Chairman Raymond Rizzo