

August 24, 2007

Thomas A. John  
20 North Meridian Street; Suite 400  
Indianapolis, Indiana 46204

*Re: Formal Complaint 07-FC-249; Alleged Violation of the Access to Public Records Act by the Marion County Election Board*

Dear Mr. John:

This is in response to your formal complaint alleging the Marion County Election Board (“Board”) violated the Access to Public Records Act (“APRA”) (Ind. Code §5-14-3) by failing to completely fulfill your request for records; specifically, you allege the Board has not produced the records you request in a reasonable period of time. I find that the Board should immediately produce all records it has finished reviewing and has not violated the APRA so long as it does provide all disclosable records to you by August 31, the date the Board has given you for completion of the request.

#### BACKGROUND

In your complaint you allege that you submitted a request on May 21 to the Board for the following:

1. All electronic correspondence of Ms. White and Election Staff members between April 23, 2007 and May 9, 2007.
2. All electronic versions of any lists of poll workers who took the poll workers oath and were scheduled to work in a precinct polling place during the 2007 Primary Election and did not appear.

You received a response to your request dated May 29 from Lauren Toppen of the Office of Corporation Counsel. Ms. Toppen indicated the Board had initiated a search of its records to identify and collect records responsive to your request. On June 27, you sent an electronic mail (email) message to Ms. Toppen to inquire about the status of the request. On June 28, Ms. Toppen indicated the correspondence had been gathered and was being reviewed for disclosure. On July 1, you asked for an estimated time of completion. Ms. Toppen responded on July 3, indicating the review would be completed within the week. You again emailed Ms. Toppen on

July 12 inquiring about the status. On July 13, Ms. Toppen indicated the documents would be available for you on July 16. On July 17, Ms. Toppen sent you a letter and documents responsive to your request. The response totaled 173 pages.

On July 19, you emailed Ms. Toppen indicating a clarification was necessary. You received only communication between Ms. White and Board staff, but you clarified in your July 19 email the request was for all emails to or from Ms. White or the Board staff between April 23 and May 9. You requested Ms. Toppen immediately let you know how long it would take the Board to complete your request. On July 19, Ms. Toppen emailed you indicating the Board would begin to gather and produce the documents. On July 20, you indicated to Ms. Toppen you would like to receive a time estimate quickly. You also indicated you would accept partial production as documents became available. On July 20, Ms. Toppen indicated she would pass that information to the Board. On July 25, Ms. Toppen indicated the Board anticipated two weeks for completion of your request. On August 8, Ms. Toppen emailed you indicating she had not heard whether the documents were ready. You responded, indicating you would take partial production of any documents ready for you. Ms. Toppen responded the same day indicating the Board had just received the emails and was beginning their review. She further indicated partial production would be made at some point.

You filed your complaint on August 17 after not receiving any further documents. You alleged priority status, indicating at least one of the requested documents was needed for a proceeding to be conducted by another public agency, namely the Indiana Election Division of the Indiana Secretary of State. Because this fulfills one of the reasons for receiving priority status listed in 62 IAC 1-1-3, priority status was granted.

The Board responded to your complaint on August 22 by letter from Ms. Toppen. Ms. Toppen asserts the time the Board has taken to complete production for the request has been reasonable. Ms. Toppen asserts the number of documents currently being reviewed for the request after your clarification is far greater than the number of documents reviewed for the original response. The number of records currently under review totals more than one thousand records. Ms. Toppen asserts she has been in regular communication with you to update you on the progress of the response. Ms. Toppen indicates the Board has been diligently working to compile the records, albeit during non-business hours. She further indicates the review of the remaining emails will be completed by August 31.

## 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." I.C. §5-14-3-1. Any person has the right to inspect and copy the public records of a public agency during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. §5-14-3-3(a).

The Board is clearly a public agency for the purposes of the APRA. I.C. §5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Board during

regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. §5-14-3-3(a).

A request for records may be oral or written. I.C. §5-14-3-3(a); §5-14-3-9(c). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven days of receipt, the request is deemed denied. I.C. §5-14-3-9(b).

A response could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. There are no prescribed timeframes when the records must be produced by a public agency. A public agency is required to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. I.C. §5-14-3-7(a). However, section 7 does not operate to deny to any person the rights secured by section 3 of the Access to Public Records Act. I.C. §5-14-3-7(c). The public access counselor has stated that records must be produced within a reasonable period of time, based on the facts and circumstances. Consideration of the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material are necessary to determine whether the agency has produced records within a reasonable timeframe.

This office has often suggested a public agency make portions of a response available from time to time when a large number of documents is being reviewed for disclosure. See *Opinion of the Public Access Counselor 06-FC-184* and *Office of the Public Access Counselor Informal Inquiry Response May 10, 2006*. The burden lies with the public agency to show the time period for producing documents is reasonable. *Opinion of the Public Access Counselor 02-FC-45*.

Here, your initial request was made on May 21. Assuming the Board received your request on or after May 22, the Board's response on May 29 was timely. Between your request on May 21 and initial production by the Board on July 17, you and Ms. Toppen exchanged approximately five emails and a phone call. Any inquiries related to the status of production were initiated by you, but Ms. Toppen was prompt in responding to any inquiry received from you. After the initial production was made and you further clarified your request, you and Ms. Toppen exchanged approximately eight emails before you filed your complaint. Your allegation is that the Board is "engaged in a form of tactical delay." Ms. Toppen has asserted the Board is working diligently to fulfill the request but is doing so after business hours in an effort to regulate any material interference with the regular discharge of duties.

While I understand time is of the essence in this matter because you seek to address concerns related to the administration of elections in Marion County prior to the next election in November, I do believe the Board has demonstrated it is working to produce the documents you requested in a reasonable amount of time. The Board estimates it is reviewing more than one thousand email messages. Before being able to review the messages, the Board first had to request the messages from the Marion County Information Services Agency. I do not believe five weeks to be an unreasonable amount of time to procure and complete the review of over a thousand messages. What I do find unreasonable, though, is that the Board has not provided you any documents since July 19. As has long been the suggestion of this office, when documents in

response to a request are voluminous, the agency should provide documents in the interim as they become available. So at regular reasonable intervals, the agency should provide the documents available at that time. This further displays the effort the agency is making to provide transparency in government and provide access to public records.

#### CONCLUSION

For the foregoing reasons, it is my opinion the Marion County Election Board should immediately provide to you any documents responsive to your request for which it has completed its review. Further, it is my opinion the amount of time the Board has taken to complete the request is not unreasonable so long as the Board does produce the remaining documents on August 31 as it has indicated it will do.

Best regards,



Heather Willis Neal  
Public Access Counselor

cc: Lauren Toppen, Office of Corporation Counsel, City of Indianapolis  
Elizabeth White, Marion County Clerk of the Courts