

April 9, 2007

Ralph D. Hoover
128 S. Main Street
Monticello, IN 47960

Re: Formal Complaint 07-FC-83; Alleged Violation of the Access to Public Records Act by the White County Sheriff

Dear Mr. Hoover:

This is in response to your formal complaint alleging that the White County Sheriff (“Sheriff”) violated the Access to Public Records Act by denying requested records.

BACKGROUND

You complain that the Sheriff’s written response to your request for records of March 29 violated the Access to Public Records Act because the Sheriff did not respond with a statement regarding whether the Sheriff maintains the record, the estimated date that disclosable records will be provided, or the exemption authorizing the Sheriff to withhold certain records. You allege that at least one of the records is needed to present before the White Superior Court; therefore, you requested priority status for your complaint.

I sent a copy of your complaint to the Sheriff. In response, Mr. Howard Williams, representing the Sheriff, submitted a written response. It is attached for your reference. In a nutshell, Mr. Williams explained that the Sheriff intended to comply with the Access to Public Records Act. Because you are simultaneously conducting discovery in a criminal matter concerning these same records, and the discovery matters are being heard by the White Superior Court, there was confusion concerning how the Sheriff was required to respond. The Sheriff is seeking guidance concerning how to respond under these unusual circumstances.

I have granted your request for priority status because you have alleged the circumstances meriting priority status. *See* 62 IAC 1. Therefore, I am issuing this opinion within seven days of receipt.

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 5-14-3-3(a). If a person is entitled to a copy of a public record and the public agency has reasonable access to a machine capable of reproducing the public record, the public agency must provide at least one (1) copy of the public record to the person. IC 5-14-3-8(e).

You requested twelve discrete records, but those requests fall into two main categories: 1) copies of manuals and 2) copies of written policies and procedures. In reviewing the Sheriff’s response, I find that many of the responses, which are set forth by correspondence to the number of your request, state that the record can be obtained from a different agency. However, it is unclear whether or not the Sheriff maintains the record and is asking you to get the record elsewhere, or whether, in fact, the Sheriff does not maintain the record. For example, the Sheriff’s response to #1 for a copy of the owner’s manual for the breath testing device is that the Sheriff does not own the manual; the manual is the property of the Department of Toxicology. This response suggests that the Sheriff may be improperly regarding ownership of the manual as the relevant factor with respect to his obligation under the APRA. However, because the Sheriff does not state that he does not have such a manual, it is difficult to discern the true state of affairs.

In addition, some of the responses do not speak to the record you requested. For example, for your request #11 seeking the policy or procedure regarding impounding and inventorying of vehicles and property discovered in the vehicle, the Sheriff replied: “all vehicles after an arrest are subject to tow and impounded in a locked facility and inventoried by arresting officer or assisting officer...” and continues regarding what occurs thereafter. It is not clear whether this helpful information is the only information available because there is no written policy, or a written policy exists but the Sheriff prefers to summarize the procedure. Some of the responses refer you to the Prosecutor’s office, where “all case information is given” to that office. Again, it is not completely clear that the Sheriff, in giving the records to the Prosecutor, divests himself of them, or retains a copy of it.

If a public agency does not have a record that is being requested, the public agency should make clear that the record is not a “public record” because it is not “created, received, retained, maintained, or filed by or with” that public agency. The foregoing is the definition of a public record. *See* IC 5-14-3-2(m). Only public records are required to be disclosed; a public agency is not required to create or compile a record to satisfy a request for a record.

I find that the Sheriff’s response of March 30 to your request for records does not clearly state whether or not the records you request are or are not maintained by the Sheriff. If the Sheriff does maintain a particular record, he must disclose it even if the record is maintained by the Prosecutor or some other agency. It is not a violation to helpfully inform the requester where the record may be found outside the public agency, but only if the public agency does not maintain the record. Hence, I advise public agencies to first clearly state that the public agency

simply does not have the particular record, if that is the case, before suggesting a different means for obtaining the record.

In addition, this office has stated that the Access to Public Records Act contains no exemption that would allow a public agency to deny a public record because the requester is pursuing litigation against the public agency, or is otherwise involved in a court case in which discovery may provide a means to obtain a public agency's records. Hence, the Sheriff, although subject to a request for production of documents, may not deny your request for records merely because of the ongoing discovery matters.

However, as set forth in IC 5-14-3-8, a public agency is not required to provide more than one copy of a public record. It is my opinion that where a requester is pursuing the same records in discovery, the public agency may respond by stating that the public agency has already provided a specific record and when. I do not believe that the Sheriff had provided any of the requested records at the time of its response to your request, but the Sheriff is not required to provide multiple copies of the very same record.

Also, the fact that the Court has issued an order in response to a motion to compel does not necessarily preclude a request for the same record under the APRA. Of course, if a court issues an order staying the APRA request specifically, the public agency should follow that order. *See 99-FC-1.*

From my review of this matter, many of the records that have been requested using discovery are not the same records as those being requested under APRA, except for "Certifications and Manuals", items #7-10 in the Request for Production in the two criminal matters.

Accordingly, unless the certifications and other materials requested in your March 29 request are subject to a specific order staying production of the record under the APRA, the Sheriff should provide a new response stating one or all the following that apply:

- The Sheriff will disclose the records,
- The Sheriff is denying a specific record, citing the specific exemption that applies to the record, in accordance with IC 5-14-3-9(c),
- The Sheriff does not maintain the record, or
- The requester has already received a copy of the record.

I understand that the manual regarding Alco-Sensors is available for inspection in the White County Sheriff's office.

CONCLUSION

For the foregoing reasons, I find that the White County Sheriff should have explained in his response whether or not the requested records are maintained by the Sheriff, and if so, whether a copy has already been provided or whether the record is exempt under a specific exemption. The Sheriff should provide any non-exempt public records maintained by the Sheriff for which a copy has not already been provided.

Sincerely,

Karen Davis
Public Access Counselor

cc: A. Howard Williams