



STATE OF INDIANA

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March 23, 2010

Ms. Alexandra Sondeen
Mr. John Rumbach
The Herald
216 E. 4th St.
P.O. Box 31
Jasper, IN 47547-0031

*Re: Formal Complaint 10-FC-46; Alleged Violation of the Access to
Public Records Act by the Dubois County Auditor*

Dear Ms. Sondeen and Mr. Rumbach:

This advisory opinion is in response to your formal complaint alleging the Dubois County Auditor (the "Auditor") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*, by failing to respond to your access to public records. I have enclosed the Auditor's response to your complaint for your review.

BACKGROUND

According to your complaint, you asked to inspect and copy documents submitted to the Auditor's office by Ms. Christine St. John, a county employee in the prosecutor's office. In response, the Auditor provided you with a copy of two complaint letters, but not the documents that you requested. The next day, you received a fax from the Auditor denying your request and identifying the records you sought as time cards.

In response to your complaint, the Auditor's attorney, Mr. Arthur C. Nordhoff, Jr., states that the time cards are the subject of complaint letters filed by two Dubois County deputy prosecutors concerning a third deputy prosecutor. The "time cards" are computer entries made by the prosecutor's office employees to a closed computer file maintained by the prosecutor. According to the prosecutor, the time cards were removed without the prosecutor's permission and contrary to his instructions. Access to the master time file requires a password to which employees of the prosecutor do not have.

Mr. Nordhoff further states that upon receipt of your request, the Auditor provided copies of the complaint letters that were filed but denied access to the time

cards because they were “a confidential record of the Prosecutor; a record if kept in the Auditor’s Office is normally treated as being part of an employee’s confidential personnel file; and documents which the Auditor had been instructed by me to deliver to the State Board of Accounts for investigation to determine whether formal charges should be filed.” Mr. Nordhoff notes that he could “find nothing in the [public access] statutes nor their annotations to indicate that time records are not confidential records.” As a result, the Auditor denied the request.

Mr. Nordhoff also provides some background regarding the third parties who maintain that the records should be kept confidential:

The County is between four parties in this inter-office battle: a Prosecutor who states that documents are his confidential records which were unlawfully removed from his computer; two Deputy Prosecutors of the office who had gained access, whether authorized or unauthorized, to the documents; a Deputy Prosecutor who may feel that his computer entries are confidential, and a newspaper who desires to conduct their own investigation of the matter. The County stands to be the subject of litigation either way. The subject records are being delivered to the State Board of Accounts for audit, and should they believe that the records should be released, then we feel that they could do so.

(Auditor’s Response at 2.)

ANALYSIS

The public policy of the APRA states, “[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. The Auditor does not contest that it is a “public agency” under the APRA. IC 5-14-3-2. Accordingly, any person has the right to inspect and copy the Auditor’s public records during regular business hours unless the public records are excepted from disclosure as nondisclosable under the APRA. I.C. § 5-14-3-3(a).

Here, the Auditor states that its research produced “nothing in the statutes nor their annotations to indicate that time cards are not confidential records. However, under the APRA the burden of proof for nondisclosure lies with the public agency that would deny access to the record and not to the person seeking to inspect and copy the record. I.C. § 5-14-3-1. When the request is made in writing and the agency denies the request, the agency must deny the request in writing and must include in the denial “a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record. . . .” I.C. § 5-14-3-9(c)(2). The Auditor has alluded to the time cards

being personnel files, but it is not clear to me whether the time cards were actually personnel files when in the prosecutor's office. Moreover, they were not submitted to the Auditor with the understanding that they were to be maintained as personnel files by the Auditor; rather, they were part of the complaint file. While I sympathize with the prosecutor's situation insofar as the prosecutor maintains the records were removed from the prosecutor's office without permission, the APRA applies to the agency that is currently in possession of the records. Any alleged impropriety on the part of the prosecutor's employees should be handled internally in that office or by application of relevant criminal charges for theft, computer tampering, etc. Regardless, if the Auditor cannot cite a section of the APRA that justifies the Auditor's withholding these records, the records should be made available for inspection and copying pursuant to section 3 of the APRA. At this point, it is my opinion that the Auditor has not sustained its burden to show that the APRA permits the Auditor to withhold the time cards.

CONCLUSION

For the foregoing reasons, it is my opinion that the Auditor has not sustained its burden to show that an exception to section 4 of the APRA permitted or required the Auditor to withhold the requested records. Unless the Auditor can cite to an applicable exception to the APRA, the Auditor should make the records available for inspection and copying.

Best regards,



Andrew J. Kossack
Public Access Counselor

Cc: Arthur C. Nordhoff, Jr.