



# STATE OF INDIANA

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February 11, 2011

Mr. Warren A. Auxier  
P.O. Box 215  
Hanover, IN 47243

*Re: Formal Complaint 11-FC-23; Alleged Violation of the Access to Public Records Act by the Jennings County Commissioners*

Dear Mr. Auxier:

This advisory opinion is in response to your formal complaint alleging the Jennings County Commissioners ("Commissioners") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* The Commissioners' responses are enclosed for your reference.

## BACKGROUND

The parties in this matter have submitted several separate sets of documents to this office, so I summarize the relevant facts as follows. Mr. Auxier contends that he submitted records requests to the Commissioners on both December 13, 2010, and December 28, 2010. The former asked for contracts, agreements, and memoranda of understanding that are currently in effect between the Jennings County EMS and Dr. Thomas Barely or St. Vincent Jennings Hospital. The latter request was for an agreement that Jennings County EMS Rescue 20 has with its supervising hospital(s). Mr. Auxier states that he hand delivered both requests to Commissioner Jeff Day. He also claims that, after not receiving responses to these requests, he followed up with the Jennings County Auditor ("Auditor") on December 17th, the Jennings County attorney on December 22nd and January 4th, and by attending the Commissioners' public meeting on January 10th. As of January 11th, Mr. Auxier still had not received any verbal or written response to his requests. He alleges that the Commissioners' failure to respond violated the APRA and claims that the Jennings County EMS Rescue 20 agreement -- which he has confirmed exists -- is not exempt from disclosure under the APRA.

In response, Shawn K. Loudon, the attorney representing Jennings County, states that neither he nor the Auditor has any record of the December 13th and December 28th requests. He states that he will be happy to formally respond to Mr. Auxier's requests if he is "ever . . . sent copies." I note, however, that copies of Mr. Auxier's requests were

attached to his complaint, which my office sent in full via facsimile to the Commissioners.

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

Under the APRA, 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 (7) days of receipt, the request is deemed denied. I.C. §5-14-3-9(b). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. I.C. §5-14-3-9(a). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. If an agency denies a request that was submitted in writing, the agency must issue its denial in writing and must include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record along with the name and title or position of the person responsible for the denial. I.C. § 5-14-3-9(c). Here, Mr. Auxier has submitted documentation showing that he hand delivered written requests to the Commissioner on December 13th and December 28th. The Commissioners’ failure to deny or otherwise respond to those requests in accordance with subsection 9(c) violated the APRA.

It remains unclear why the Commissioners have refused to release records responsive to Mr. Auxier’s requests. Although the Commissioners received copies of Mr. Auxier’s requests in the documentation that my office forwarded to them, the Commissioners have not explained the substance of their denial of access. Under the APRA, a public agency that withholds a public record bears the burden of proof to show that the record is exempt. I.C. §§ 5-14-3-1, 5-14-3-9(f) and (g). Exceptions to disclosure are narrowly construed. I.C. § 5-14-3-1. Because the Commissioners have not provided a justification for withholding the records at issue here, it is my opinion that they have failed to sustain their denial.

If the Commissioners cannot justify withholding the records under the APRA, I encourage them to release all responsive records to you as soon as possible. To the extent the Commissioners persists in denying you access following the issuance of an advisory opinion from this office and you believe they are in violation of the APRA, I leave you to your remedies before a court pursuant to Ind. Code § 5-14-3-9(e).

CONCLUSION

For the foregoing reasons, it is my opinion that the Commissioners violated the APRA by failing to respond to the requests you submitted on December 13th and December 28th of 2010.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive style with a large, sweeping initial 'A'.

Andrew J. Kossack  
Public Access Counselor

cc: Shawn K. Loudon