

January 18, 2001

Mr. Thomas S. Frailey
Indiana, Illinois, Iowa Foundation for Fair Contracting
600 South Weber Road, Suite 10
Romeoville, IL 60446

Re: *Advisory Opinion 01-FC-02*; ;Alleged Violation of the Access to Public Records Act by the City of South Bend, Department of Public Works.

Dear Mr. Frailey:

This is in response to your formal complaint, which was received on January 5, 2001. You have alleged that the City of South Bend Department of Public Works ("City") violated the Indiana Access to Public Records Act ("APRA") Indiana Code chapter 5-14-3. Specifically, you claim that the City improperly redacted information from photocopies of weekly payroll records that you had requested under APRA. Mr. Thomas Bodnar, Deputy City Attorney, responded in writing to your complaint. A copy of his response is enclosed.

For the reasons stated below, it is my opinion that the City did not have authority under the APRA to redact the information from the provided on weekly payroll records. The failure to provide this information, therefore, was a denial under the APRA and actionable in court under Indiana Code section 5-14-3-9.

BACKGROUND

According to your complaint, on October 13, 2000 you made a written request for copies of certain weekly payroll records submitted to the City's Director of Public Works. On October 19, 2000¹, Mr. Bodnar sent you a letter informing you that you would be provided copies of the payroll records, but that under Indiana Code section 5-14-3-4(c), the City would have to redact all information identifying individuals by name and address. In another letter dated November 8, 2000 the City provided the copies of the payroll records with the names, addresses and social security number information redacted. It is your position that Indiana Code section 5-14-3-4(c) does not apply to your request because your organization is not a commercial entity and would not be using this information for commercial purposes. For this reason, you filed your complaint with this Office in January 2001.

In his response to your formal complaint, Mr. Bodnar stated that it is the City's position that there has been no violation of the APRA with respect to your request and the subsequent disclosure of redacted payroll records. According to Mr. Bodnar, Indiana Code section 5-14-3-4(c) governs the

request you made for copies of the payroll records, not the general rule of the APRA permitting inspection and copying of public records under Indiana Code section 5-14-3-3. Mr. Bodnar claims that the payroll records are submitted to the City under Indiana Code section 5-16-7-1, et seq., but that there is no obligation on the part of the City to publish and disseminate the name and address information provided under Indiana Code section 5-14-3-4(c). With respect to the social security number information, Mr. Bodnar does not cite to any specific statutory authority that permits the City to redact this information, but he did refer to various public policy reasons for nondisclosure and compared the disclosure of this information to the nonmandatory disclosure of public employees' social security numbers from their personnel files under Indiana Code section 5-14-3-4(b)(8).

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." Ind. Code §5-14-3-1. The City is clearly a public agency for the purposes of the APRA. Ind. Code §5-14-3-2.

Any person has the right to inspect and copy the public records of the City during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under Indiana Code section 5-14-3-4. Ind. Code §5-14-3-3(a). A public record is defined as follows:

any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, used, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

Indiana Code § 5-14-3-2. [Emphasis added.] The general rule, therefore, is that a public agency is required to permit inspection and copying of public records under the APRA unless there is a valid statutory exception to disclosure.

Removing or redacting information from a public record is permissible under certain circumstances. "If a public record contains disclosable and nondisclosable information, the public agency shall, upon receipt of a request . . . separate the material that may be disclosed and make it available for inspection and copying." Ind. Code 5-14-3-6(a). A public agency may deny access to a public record by refusing to allow inspection or copying of all or a part of the document. Ind. Code 5-14-3-9(a). Once this denial has occurred, the person denied access may file suit in the circuit or superior court in which the denial took place to compel the public agency to disclose the public records requested. Ind. Code §5-14-3-9(b).

In the case of the weekly payroll records submitted to the City, it is clear that these documents are public records under the APRA. Under the general rule stated at Indiana Code section 5-14-3-3, the

City is required to make these records available for inspection and copying unless there is a valid statutory exception to disclosure under Indiana Code section 5-14-3-4. Mr. Bodnar argues that Indiana Code section 5-14-3-4(c) governs the name and address information contained in these records and that it requires the City to redact this information. My interpretation of that section, however, is that the General Assembly has excepted from the general rule of the APRA any obligation on the part of a public agency to create lists of names and addresses. In this case, the City has received documents and you have asked for copies of those public records. Since you did not ask the City to create a list of names and addresses, it is my opinion that Indiana Code section 5-14-3-4(c) does not apply to the facts presented.

With respect to Indiana Code chapter 5-16-7, which governs the common construction wage, it is the City's position that while this statute may lead to the submission of weekly payroll information to a public agency, there is no obligation on the public agency to disclose it. This interpretation of Indiana Code chapter 5-16-7 totally discounts the existence and application of the APRA to the City. The General Assembly has made it clear that public records of a public agency subject to the APRA are to be open for inspection and copying unless there is specific statutory authority making that information confidential or otherwise nondisclosable. Ind. Code §§ 5-14-3-3(a) and 5-14-3-4(a) and (b). It is my opinion, therefore, that Indiana Code chapter 5-16-7 does not authorized the nondisclosure of name and address information from the weekly payroll records.

Finally, Mr. Bodnar raised the issue of the nondisclosure of social security numbers in relation to your request for public records. The City does not provide any statutory basis for denying access to this information, only public policy reasons why this information should not be disclosed. While I am familiar with many of these public policy concerns, without some statutory basis for denial, the City is not permitted to redact this information.² My own review of the APRA and Indiana Code chapter 5-16-7, which are at issue in this opinion, did not reveal any statutory basis for denying access to the social security information. It is my opinion, therefore, that the City was not authorized to redact this information from the weekly payroll records.

CONCLUSION

It is my opinion that the City of South Bend Department of Public Works did violate the Access to Public Records Act by redacting information from weekly payroll records submitted to the Department without statutory authority to do so. The failure to provide this information is a denial under the Access to Public Records Act that is actionable under Indiana Code section 5-14-3-9.

Sincerely,

Anne Mullin O'Connor

Enclosures

cc: Mr. Thomas Bodnar

¹ Under Indiana Code section 5-14-5-7, this formal complaint should have been filed within thirty (30) days after the denial. The denial did take place more than thirty days prior to the filing of your formal complaint. Typically, such a complaint would be handled on an informal basis, but since this was my error in not recognizing this and the City did not raise this in their response, I will respond with a formal advisory opinion.

² Last year, there were bills introduced and considered, but evidently not enacted, by the U.S. Congress that would have restricted the disclosure of social security number information by state and local government. See H.R. 4857 and S.2876 (2000).