

November 26, 2001

Mr. Michael J. Mullen  
3690 Hogans Run Road  
Columbus, OH 43221

Re: *Advisory Opinion 01-FC-71*;

Alleged Denial of Access to Public Records by the City of Muncie Controller's Office.

Dear Mr. Mullen:

This is written in response to your formal complaint, which was received on November 8, 2001. You have alleged that City of Muncie, specifically the Controller's Office ("City" or "Controller's Office") has violated the Indiana Access to Public Records Act ("APRA,") Indiana Code chapter 5-14-3. Specifically, you allege that the Controller's Office denied you access to public records in response to your October 24th request for copies of public record when you were informed that it may take up to twelve (12) weeks to access these records. Mr. Charles Clark, Corporate Counsel for the City, responded in writing to your complaint. A copy of his response and the attachment are enclosed for your reference. For the reasons set forth below, it is my opinion that based on the information provided to this Office, it appears that the City did not deny you access to public records under the APRA.

#### BACKGROUND

According to your complaint, you sent via facsimile a public records request to Mr. Jerry Chauvin, City of Muncie Controller, for a computerized copy of payroll compensation for employees of the Muncie Police Department for three (3) pay periods. If possible, you asked that this information be produced in spreadsheet form and sent via e-mail to you. In a letter dated October 25th from Mr. Clark, he advised you that you could obtain access to the records you requested both from Mr. Chauvin and Chief Joe Winkle. Due to the volume of public records requested back to January 1, 1980<sup>1</sup>, Mr. Clark informed you that it was "anticipated that a review will take up to 12 weeks." Mr. Clark stated that you can make copies under Indiana Code section 5-14-3-3(b)(2) and that the copying fee is \$0.12 per page to be paid at the end of each day you make copies. You then filed your formal complaint with this Office claiming that Mr. Clark's response to your request constituted a denial of access under the APRA.

In his response, Mr. Clark first pointed out that part of the confusion in this matter may be that his October 25th letter was written in response to another public records request you made dated October 24th that was addressed to Mayor Dan Canan. This other request was forwarded to Mr. Clark by Mr. Chauvin, but not the letter you submitted with your formal complaint. In this request, you asked for a list of all individuals who have or have had police powers under the authority of the Muncie Police

Department between January 1, 1980 and October 25, 2001. You further stated that you wanted personnel file information under Indiana Code section 5-14-3-4(b)(8), as well as information that the Department is not required to disclose, but may under Indiana Code section 5-14-3-4.3. You again stated that this information could be provided to you in spreadsheet form and forwarded to your e-mail address.

Mr. Clark stated that given your request for over twenty (20) years of personnel file information, his estimate of time for you to retrieve this information was "up to 12 weeks." The actual time necessary for this purpose would be a factor of your energy and the volume of public records you wished to review. Under Indiana Code section 5-14-3-3(b)(2), Mr. Clark stated that these public records would be provided to you and that you may make the copies on the City's equipment at the rate of \$0.12 per page. Mr. Clark noted that if you now want only the payroll records, these records are not kept in a format that would permit them to be e-mailed to you.

In addition to your complaint and the Controller's Office's response, I also include as part of the background any contact I may have had with the parties prior to the filing of a formal complaint. Since Mr. Chauvin did contact me about these matters, I am including this information as part of the factual background for this Opinion. On October 26, 2001, I spoke to Mr. Chauvin by telephone about both of your October 24th requests for public records. At that time, I advised Mr. Chauvin that information must be disclosed from payroll records, but that the question is whether or not the information is maintained in a computer database. Mr. Chauvin confirmed that the information is kept electronically, but was not sure if the Controller's Office could provide it in electronic form with reasonable efforts as is required under IC 5-14-3-3(d). Mr. Chauvin also noted that you had sent Chief Winkle a letter for all personnel file info, which is apparently the same letter that was sent to Mayor Canan. I advised Mr. Chauvin at that time that under Indiana Code sections 5-14-3-4(b)(8) and 4.3, there are some limits on what has to be provided.

## 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 Controller's Office is clearly a public agency for the purposes of the APRA. Ind. Code § 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Controller's Office 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). The burden for any nondisclosure generally lies with the public agency, not the person making the request under the APRA. Ind. Code § 5-14-3-1.

Your formal complaint is peculiar in that it appears that the response you received from the City was not related to the October 24th request that you sent to Mr. Chauvin, but rather another request for different and probably more voluminous information that you directed to Mayor Canan. For the purposes of this Opinion, I will address the issues that appear to have been raised by each of your requests and the City's response to them.

First, with respect to your October 24th request to Mr. Chauvin, despite my telephone conversation with him on October 26, 2001, it is unclear whether you received any direct response to this request, either by telephone or in writing. From Mr. Clark's October 25th letter to you, it is clear that he was addressing your requests to Mayor Canan and Chief Winkle for a list of sworn officers for the Muncie Police Department and personnel file information, and not the payroll records you sought from Mr. Chauvin. In his response to your formal complaint Mr. Clark did address the request for payroll records but only to state that they cannot provide it to you by e-mail. For this reason, I would suggest that the Controller's Office, if they have not already done so respond directly to your October 24th request for payroll records. If the Controller's Office cannot provide them in electronic format, arrangements should be made to provide you with access to disclosable information from these public records.

In your October 24th request to Mayor Canan and Chief Winkle you asked for a copy of a list of persons who have or have had police powers under the authority of the Muncie Police Department between January 1, 1980 and October 25, 2001. You also requested any disclosable personnel file information for these employees under Indiana Code sections 5-14-3-4(b)(8) and 4.3. Unfortunately, Mr. Clark's October 25th response to your request and his response to your formal complaint do not address whether such a list exists.

Under the APRA, a public agency is required to respond to requests for public records that are maintained or filed by or with those agencies. A public agency is generally not required to create a public record that does not currently exist in order to respond to a public records request. Without more specific information on this issue, I cannot reach a definitive conclusion on this issue. It is clear under the APRA if such a list does exist, a copy of that list must be provided to you by the City unless there is a statutory basis for its nondisclosure.<sup>2</sup> I suggest that the City respond directly to you about the existence of such a list, and if it does exist, whether or not it will be disclosed to you.

Mr. Clark did, however, in his October 25th response and in response to your formal complaint, state that the City understands that it has a duty to provide disclosable public records to you. In neither response did Mr. Clark address your request for copies of this information in electronic form, only in paper form. In essence, Mr. Clark stated that with respect to disclosable personnel file information under Indiana Code section 5-14-3-4, the City will provide you with access to copy public records in order to satisfy your request. The City would not be required to produce information covered by Indiana Code section 5-14-3-4.3 concerning the job title and job description of law enforcement officers. For this reason, it is my opinion the City did not deny you access to public records under the APRA.

The basis of your complaint is that the expected time for production "up to 12 weeks" is a denial under the APRA. The APRA, however, does not set forth outside time periods for production of public records, only for responding to public records requests. See, Ind. Code §5-14-3-9(a) and (b). A public agency may not "deny or interfere with" your right to inspect or copy public records under the APRA, but the public agency has the option of either providing the requested copies to you or allowing you to make copies on the agency's equipment or your own equipment. Ind. Code §5-14-3-3(b)(2). Mr. Clark estimated that given the volume of public records you had requested copies of, and the City's decision to permit you to make these copies on their equipment, may take up to twelve weeks to accomplish.

Therefore, the City's response to your request for copies of personnel file information did not constitute a denial under the APRA.

## CONCLUSION

It is my opinion that, based upon the information provided to this office, that the City of Muncie, specifically the Controller's Office, did not deny you access to public records under the APRA.

Sincerely,

Anne Mullin O'Connor

Enclosure  
cc: Mr. Charles Clark  
Beasley & Gilkinson LLP

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<sup>1</sup> As will be discussed later, it is clear that Mr. Clark was responding to a different public records request as you only asked Mr. Chauvin for payroll records for the past three (3) pay periods.

<sup>2</sup> Any information not subject to a statutory exception to disclosure must be disclosed under Indiana Code section 5-14-3-6.