

May 9, 2002

Mr. Michael Mullen
KittyShark Productions
P.O. Box 321
Frazeysburg, OH 43822-0321

Re: *Advisory Opinion 02-FC-14*;

Alleged Denial of Access to Public Records by the Ball State University Department of Photographic Services.

Dear Mr. Mullen:

This is in response to your formal complaint, which was received on April 16, 2002. You have alleged that Ball State University's Department of Photographic Services ("BSU,") violated the Indiana Access to Public Records Act, ("APRA,") Indiana Code chapter 5-14-3. Specifically, you claim that BSU improperly denied you access to photographs of members of the BSU Police Department by citing to exemptions for personnel file information and security information. Mr. Jon H. Moll, Attorney for BSU, responded in writing to your complaint and a copy of his response is enclosed for your reference.

For the reasons set forth below, it is my opinion that Ball State University may not rely upon Indiana Code section 5-14-3-4(b)(10), the exception for administrative or technical information that may jeopardize a record keeping or security system to deny you access to the electronic photographic images of its police officers. If these images are part of the officers' personnel files and the University has not previously disclosed the information without the implied or expressed consent of the individual officer, the failure to disclose the information to you under Indiana Code section 5-14-3-4(b)(8) would not violate the APRA.

BACKGROUND

In your complaint, you allege that you sent a public records request via e-mail to BSU on February 23, 2002. You requested copies of electronic photographic images of every member of the BSU Police Department, similar to the image you had requested and been provided for the BSU Police Chief earlier in that month. On February 28th, Mr. John Huffer of BSU sent an email reply to your request asking how you intended to use these photographic images and you advised him by e-mail and letter dated March 4, 2002 that you planned to post them on your website www.bsupolice.com. On March 15, 2002, you received a letter from Mr. Moll denying your request in reliance upon the APRA exceptions to disclosure for security information and personnel file information.

It is your position that these photographic images are not part of the officers' personnel files, therefore, that exception is not valid. You further state that it is your interpretation of the APRA that the

exception for security system information applies to public records such as diagrams of burglar alarms, not photographs of police officers who by the very fact that they wear uniforms present themselves as such to the public. You argue that BSU treats the police officers as public figures when it releases photos in conjunction with press releases. For these reasons, you believe you were denied access in violation of the APRA and filed your formal complaint on April 16, 2002.

In response to your complaint, Mr. Moll stated that BSU properly denied you access to the photographic images under Indiana Code sections 5-14-3-4(b)(8) and (10), the security and personnel file exceptions.¹ According to Mr. Moll, police and other public security personnel would be "vulnerable to harm from unregulated reproduction of their photographs" because they are occasionally involved in investigations of drug cases or other undercover work. For this reason, Mr. Moll indicates that BSU may lawfully rely upon Indiana Code section 5-14-3-4(b)(10) since disclosure would jeopardize the BSU security system. Further, Mr. Moll states that the photographic images are part of the personnel files for BSU police officers and that they are not required to disclose that information 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 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. Furthermore, "[t]his chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record." Ind. Code § 5-14-3-1.

BSU 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 BSU 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). Since it is the public policy of the APRA that it is to be construed liberally in favor of disclosure, exceptions to that general rule of disclosure are to be narrowly construed. Ind. Code §5-14-3-1.

Liberal construction of a statute requires narrow construction of its exceptions. In the context of public disclosure laws . . .

"[E]xceptions to a statute and its operation should be strictly construed by placing the burden of proving the exception upon the party claiming it. Other states, in examining their respective 'Open Door' or 'Sunshine' laws, follow these same mandates, particularly the principle of strict construction of statutory exceptions."

Robinson v. Indiana University, 659 N.E.2d 153, 156 (Ind. App. 1995) [Citations omitted] quoting

Common Council of City of Peru v. Peru Daily Tribune, Inc. 440 N.E. 2d 726, 729 (Ind. App. 1982) [Citations omitted].

While it only takes one valid exception to support the nondisclosure of a public record, BSU has cited two (2) different exceptions in support of its denial. In your complaint, you claim that BSU violated the APRA by failing to produce public records in reliance upon the security system information exception and the personnel file exception. In the following paragraphs, these exceptions will be analyzed given the facts provided.

The Exception for Administrative or Technical Information that would Jeopardize a Security System

The APRA provides an exception to disclosure under Indiana Code section 5-14-3-4(b)(10) that states that a public agency has discretion to disclose, or not disclose:

(a) administrative or technical information that would jeopardize a record keeping or security system.

In order to determine the intent of the General Assembly in enacting this language, we must rely upon the rules of statutory construction set forth by our Indiana courts. Fortunately, the Indiana Court of Appeals has already considered this exception to disclosure and provided helpful guidance for the purposes of this Opinion.

In *City of Elkhart v. Agenda: Open Government*, 683 N.E.2d 622 (1997) *transfer den.* 698 N.E.2d 1184 (Ind. 1998), the Indiana Court of Appeals reviewed a case in which the City had claimed Indiana Code section 5-14-3-4(b)(10) as authority for the nondisclosure of 1993 cellular telephone bills for the mayor and other City department heads. City officials denied Agenda: Open Government access because they believed that, with respect to an earlier public records request for similar information, the requestor had misused the E-911 system to discover the origin of the telephone numbers listed in the cellular telephone records.

The Court determined that the E-911 system did constitute a "record keeping or security system" under the APRA. The real question, according to the Court was whether the telephone numbers constituted "administrative" or "technical" information the disclosure of which would jeopardize that E-911 system.

The term "technical" may be defined as "of or relating to technique" and "marked by or characteristic of specialization." . . . the term "administrative" may be defined as "of or relating to administration."

City of Elkhart, at 626-7. Applying these meanings to the terms used in Indiana Code section 5-14-3-4(b)(10), the Court held that telephone numbers were neither technical nor administrative information. The Court also reviewed the City's assertion that they were authorized to deny under this exception to disclosure because of the alleged prior misuse of the information by the requestor. The Court had no

authority to deny access under this APRA exception to nontechnical and nonadministrative information based upon the prior misuse nor on the condition that the requestor provide assurance that the information would not be misused.

Applying the analysis supplied in the *City of Elkhart* case, I agree that the system in which BSU stores its electronic photographic images may be a record keeping or security system. The individual images, however, do not constitute technical or administrative information that would jeopardize that system. Further, BSU's concerns about the possible misuse of these photographic images is not a basis for denial under Indiana Code section 5-14-3-4(b)(10).² For these reasons, it is my opinion that BSU may not deny you access to the electronic photographic images under the authority of Indiana Code section 5-14-3-4(b)(10).

The Personnel File Exception, Indiana Code §5-14-3-4(b)(8)

BSU has also cited to Indiana Code section 5-14-3-4(b)(8), commonly known as the personnel file exception as authority for its denial. Under this exception, a public agency generally has discretion over the disclosure of the information maintained in their employees' personnel files. However, the General Assembly provided exceptions to this provision that permit any person to obtain the following information from these files:

- (A) the name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency;
- (B) information relating to the status of any formal charges against the employee; and
- (C) information concerning disciplinary actions in which final action has been taken and that resulted in the employee being disciplined or discharged.

However, all personnel file information shall be made available to the affected employee or his representative. This subdivision does not apply to disclosure of personnel information generally on all employees or for groups of employees without the request being particularized by employee name.

Indiana Code §5-14-3-4(b)(8).

Under this provision, BSU is only obligated to produce, upon request, the information concerning specific employees that is listed under (A), (B) and (C). It is your contention that the information you requested, however, is not part of the personnel files of BSU police officers, but are files of a separate department of BSU and that this exception would not apply. As noted above, this exception to disclosure must be narrowly construed in favor of access. See, *Robinson v. Indiana University*, 659 N.E.2d 153, 156 (Ind. App. 1995).

While Indiana Code section 5-14-3-4(b)(8) sets forth what information must be disclosed from a personnel file, it does not list what documents or information are to be considered part of the personnel file. Also, the traditional notion of a personnel file—a file folder with documents—may not be appropriate

given the use of computers today. BSU may not, however, now claim that these public records are part of the personnel file merely to avoid disclosure in this instance. It is my opinion that BSU has the burden of showing that the electronic photographic images are in fact part of the personnel files for these officers in order to be able to validly claim this exception. From my perspective, it is not impossible that such information would not be part of an employee's personnel file so I have continued with my analysis below.

It is clear from your complaint, and Mr. Moll's response, that BSU does disclose these electronic photographic images under certain circumstances. Indiana Code section 5-14-3-4(b)(8) is a discretionarily disclosable category of records, with the exception of items listed under (A), (B) and (C) of that subsection. This means that, if the photographic images are in fact part of the personnel file, BSU has discretion to disclose this information, not disclose this information or disclose some, but not all of the information in personnel files. Under the APRA, the standard for reviewing such exercises of discretion is whether the public agency was "arbitrary and capricious" in its denial of access. Ind. Code §5-14-3-9(f). BSU's prior disclosure of the police chief's photo, or of individual officers under certain circumstances may not, therefore, mean that BSU had been arbitrary and capricious in denying your request for all police officers' photos. BSU must show that the decision not to disclose to you under the circumstances is not arbitrary and capricious given prior disclosures of similar information in the past.

While it is not clear from Mr. Moll's response, it appears that BSU has drawn a distinction for the prior disclosures of board of trustees' pictures and other BSU administrators from the police officers' photos. Mr. Moll indicates that these persons may be "public figures" while police officers are not. While I agree with you that police officers are typically in uniform, which makes them identifiable to the public or "public figures" in a sense, the standard under the APRA is not whether the person is a public figure. The standard for nondisclosure under Indiana Code section 5-14-3-4(b)(8) is whether the public agency's failure to disclose under the circumstances is arbitrary or capricious based on prior disclosures of the same information. It is difficult to determine whether BSU has any set policy with respect to disclosure of these photographic images, but Mr. Moll indicates that all prior disclosures of individual officers' photos have only been done in the past with the expressed or implied consent of the officers. Mr. Moll noted that these disclosures are made because BSU considers there to be a legitimate public interest that would justify publication of the photograph. This may be a condition for disclosure under BSU's policy, but again, it is BSU's burden to show that their denial of access in your case is not inconsistent with their discretionary disclosures in other cases.

For the reasons stated above, it is my opinion that BSU may be able to rely upon Indiana Code section 5-14-3-4(b)(8) for its decision not to disclose the photographic images you requested so long as this information is in fact part of the employees' personnel files. Further, BSU's denial of the photographic images in this case would not violate the APRA so long as the prior disclosures were only done with the express or implied consent of the individual officers involved. Since I do not have any information to suggest that BSU has disclosed these photographic images of individual BSU police officers under other circumstances, I must reach this conclusion.

CONCLUSION

It is my opinion that Ball State University may not rely upon Indiana Code section 5-14-3-4(b)(10), the exception for administrative or technical information that may jeopardize a record keeping or security system to deny you access to the electronic photographic images of its police officers. If these images are part of the officers' personnel files and the University has not previously disclosed this information under Indiana Code section 5-14-3-4(b)(8) without the implied or expressed consent of the individual officer, the failure to disclose to you under the circumstances would not violate the APRA.

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: Mr. Jon H. Moll, DeFur Voran

¹ Mr. Moll also raised the issue of the use of the photographic images without the consent of the police officers as constituting the tort of invasion of privacy under Indiana case law. Since this Office is only authorized to render opinions on the state's public access laws, this issue will not be addressed in the body of this Advisory Opinion. The appropriate forum for this issue would be a trial court.

² See footnote 1.