

May 15, 2003

Michael J. Kruk
315 N. Lafayette Road
South Bend, IN 46601

Re: *Advisory Opinion 03-FC-28*; Alleged Denial of Access to Public Records by the Town of Bourbon.

Dear Mr. Kruk:

This is in response to your formal complaint, which was received on April 21, 2003. You have alleged that the Town of Bourbon ("Town") violated the Indiana Access to Public Records Act ("APRA") Indiana Code chapter 5-14-3. Specifically, you claim that the Town is obligated to collect certified payrolls from contractors on a federally funded project on the Bourbon Senior Citizens Center and make that payroll information available to you under the APRA. Mr. Robert Murphy, Consultant to the Town on this project¹, responded in writing to your complaint. A copy of his response is enclosed. For the reasons set forth fully below, it is my opinion that the Town violated the APRA by failing to cite to a specific statutory basis or bases for denying you access to portions of the certified payroll records. It is also my opinion that there is no statutory basis for denying you access to the personal information in those records. Further, the Town may not charge you fees for obtaining copies of these public records except as authorized under Indiana Code section 5-14-3-8(d).

BACKGROUND

According to your complaint, on April 9, 2003 you submitted a request to the Town to access certified payrolls for the Bourbon Senior Citizens Center Project. You state that this is a federally funded project, so under Title 29, Part 5, Section 5.5(a)(3)(ii)(A) of the Code of Federal Regulations², weekly payrolls are to be submitted, making them a public record of the Town. On April 15th, you received a letter from Mr. Robert Murphy, consultant to the Town, advising you that personal information such as the name, address and social security number of the employee would be redacted from these records prior to providing you with copies. In addition, Mr. Murphy stated that you would be charged various fees related to compiling your request. First, there would be a secretarial fee of \$20.00 (twenty dollars) per hour for the time spent redacting "personal information" from these public records. In addition, you would be charged a per-page copying fee of \$0.10 (ten cents) and the cost of postage. You believe that the Town has violated the APRA by improperly requiring the redaction of information from the certified

payrolls and by attempting to collect fees other than those authorized under Indiana Code section 5-14-3-8(d). You then filed your formal complaint with this Office.

In response to your formal complaint, Mr. Murphy stated that as the certified grant administrator under contract with the Town, all certified payrolls on the Senior Citizens Center Project are submitted to him. Mr. Murphy states that, even in his possession these are Town records, and thus he does not dispute that they are subject to the APRA.

Mr. Murphy explained that his response to your April 9th request was based upon advice he had received on a similar project he supervised in the Town of Syracuse, Indiana through the Indiana Department of Commerce. According to the material provided with his response, the Department of Commerce contacted the Housing and Urban Development agency (HUD) and inquired about the disclosure of the certified payroll records. A staff person from HUD responded by email indicating that while HUD may not disclose these records without removing the personal information, she did not provide any specific legal authority for the redaction of the same information for the Town of Syracuse. Mr. Murphy also received a letter from the Town Attorney for Syracuse stating that he should not release the personal information, but again no legal authority was provided for this conclusion. While these formed the basis for his response to your April 9th request, Mr. Murphy stated that he should have received a legal opinion from the Town Attorney for Bourbon regarding your request, but did not. He further stated that he would not release the information you requested without the authorization of the Town Attorney. Finally, Mr. Murphy further stated that he is a private contractor and as such, he could charge the fees stated in his April 15th letter to you.

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 Town 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 Town 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. As an example, after the contractor submits the wage schedule required under federal law to the Town that document is a public record subject to the APRA. In this case, the contractor is submitting these payroll records to Mr. Murphy, who acknowledged that he has these records but that they are public records of the Town.

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). The public agency, however, is required to state the statutory basis for any denial of access to all or part of a public record. Ind. Code 5-14-3-9(c)(2). 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 Town, it is clear that these documents are public records under the APRA. Mr. Murphy stated in April 15th letter to you that HUD and the Indiana Department of Commerce require him to redact any personal information in the payrolls, such as the name, address and social security numbers for the employees listed. Under the general rule stated at Indiana Code section 5-14-3-3, the Town 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. The burden is on the public agency to justify any nondisclosure. Ind. Code §5-14-3-1. One of these exceptions is for information that is required to be maintained as confidential under federal law. Ind. Code § 5-14-3-4(a)(3). This statute appears to be the basis for Mr. Murphy's denial, but he never specifically referred to this provision or any provision of federal law in his April 15th letter. Your request for access to these public records was in writing and under Indiana Code section 5-14-3-9(c), the Town was required to state the specific statutory basis or bases for the denial to you in writing but did not do so. It is my opinion that the Town violated the APRA by failing to provide the statutory basis for the denial on April 15, 2003.

Mr. Murphy argues that both the HUD and the Indiana Department of Commerce prohibit him from releasing personal information to you that is contained in the certified payrolls. While these agencies oversee the federal program under which the Town received the funds for the Senior Citizens Center Project, the objections of these agencies are not adequate to support a denial under the APRA. I have reviewed the federal regulations cited in the supporting documents provided with Mr. Murphy's response, in particular 24 CFR 85.42³ and 24 CFR 570.508⁴. Neither of these federal regulations state that the Town may not disclose information from the certified payrolls, but essentially direct the reader to the APRA as the authority governing the Town in such matters.

While I am familiar with and understand many of the concerns raised with respect to the disclosure of personal information by public agencies, without some statutory basis for denial, the Town is not permitted to redact this information. I cannot locate any statutory bases for denying access to the name, address or social security number or other personal information from these certified payroll records. The

burden for showing that there is some statutory basis for denying you access to this personal information lies with the Town and thus far, no such authority has been provided. It is my opinion, therefore, that the Town is not authorized to redact this information from the weekly payroll records.

As to the copying and other fees related to your request, Mr. Murphy stated that he considers these records as Town records, but as a private contractor with the Town he thinks that he may charge the fees listed, including secretarial time of \$20.00 per hour, copying and postage. It is my opinion that if these records are public records of the Town, then the Town may only charge fees that are authorized under the APRA. Under Indiana Code section 5-14-3-8(d), the Town may charge a copying fee for photocopies, but this fee must be the "actual cost" of that copying. The General Assembly has defined "actual cost" as the

cost of paper and the per-page cost for use of copying or facsimile equipment and *does not include labor costs or overhead costs.*

Indiana Code §5-14-3-8(d) [Emphasis added.] Therefore, the Town may not charge a person the cost of labor to prepare or retrieve public records under Indiana Code section 5-14-3-8(d), so the proposed "secretarial fee" stated by Mr. Murphy is not valid under the APRA. The Town may charge the per-page copying fee that has been set by the Town fiscal body under Indiana Code section 5-14-3-8(d). There is nothing in the APRA that deals with the cost of mailing public records, but it is my position that so long as a public agency charges only the actual cost of that mailing, then the policy and spirit of the APRA are met.⁵ For these reasons, it is my opinion that the Town may not charge the secretarial costs listed in Mr. Murphy's April 15th letter to you, but may charge the actual cost of copying as set by the Town fiscal body.

CONCLUSION

It is my opinion that the Town of Bourbon violated the APRA when it failed to state a specific statutory basis for the proposed redaction of personal information from the certified payroll records you requested. It is also my opinion that there appears to be no statutory authority that would permit the Town to redact this information from the payroll records. Finally, the Town may only charge the copying fees provided under Indiana Code section 5-14-3-8(d).

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: : The Honorable Jacqueline Murphy w/o enclosure

- ¹ I spoke to Clerk-Treasurer Jacqueline Murphy and she advised me that Mr. Murphy would be responding on behalf of the Town.
- ² Under this provision, the payroll records must contain the following information: name, address, social security number of each worker, his or her correct classification, hourly rates of wages paid, daily and weekly number of hours worked, deductions made and actual wages paid.
- ³ 24 CFR 85.42 contains the retention and access requirements for records of grantees under HUD programs. This provision, with respect to public access, merely states that the federal Freedom of Information Act, 5 U.S.C. §552 does not apply to grantees, but recognizes that grantees may be subject to state public access laws. See 24 CFR 85.42(f).
- ⁴ 24 CFR 570.508 states that notwithstanding 24 CFR 85.42 (see footnote 3, above) the recipient of a grant "shall provide reasonable access to citizens regarding the past use of Community Development Block Grant funds, consistent with state and local laws regarding privacy and obligations of confidentiality."
- ⁵ I have also consulted the State Board of Accounts on this issue and was told that there is no prohibition on collecting mailing costs as a general rule, but a public agency should check with the State Board to determine if there is any reason they may not be reimbursed for the actual cost of mailing.