

September 12, 2003

Kathleen J. Tretter  
Editor: Ferdinand News  
P.O. Box 38  
Ferdinand, IN 47532

Dear Ms. Tretter:

This is in response to your formal complaint, which was received August 15, 2003. You have alleged that the Ferdinand Police Department (“Department”) violated the Indiana Access to Public Records Act (“APRA”), Indiana Code chapter 5-14-3. Specifically, you claim that the Department improperly denied you access to various public records by citing to various exceptions for personnel file information, interagency or intra-agency deliberative materials, and investigatory records of a public agency. Philip C. Schneider, Special Counsel to the Town of Ferdinand, Indiana, 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 the Department did not improperly deny you access to public records, and that in fact those public records which must be disclosed to you pursuant to your request have already been disclosed.

#### BACKGROUND

On August 7, 2003, you requested from the Clerk-Treasurer for the Town of Ferdinand employment records of former Ferdinand police officer Devon Bancroft, including any supporting documentation from his fellow officers, concerning the events leading to his suspension and subsequent dismissal. In your request, you note that you hand-delivered the same, triggering the twenty-four (24) hour mandatory response time established by the APRA.

On August 12, 2003, well after the mandatory response time, you seem to have received the first response to your request from Philip C. Schneider, Special Counsel to the Town of Ferdinand. Mr. Schneider claimed the following exceptions from the APRA’s requirement of disclosure: investigatory records of law enforcement agencies, found at 5-14-3-4(b)(1); records that are intra-agency or interagency advisory or deliberative material, found at 5-14-3-4(b)(6);

and personnel files of public employees, found at 5-14-3-4(b)(8). After receiving Mr. Schneider's response, you filed your formal complaint with this office.

In response to your complaint, Mr. Schneider has repeated his claim that the same three exceptions noted above apply.

## 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.

The Department 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 Department 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, the Department has cited to three (3) different exceptions in support of its denial. In your complaint, you claim that the Department violated the APRA by failing to produce public records in reliance upon the personnel file exception, the deliberative material exception and the exception for investigatory records of a law enforcement agency. In the following paragraphs I have analyzed the three exceptions cited for the Department's denial of access to public records.

### *The Investigatory Records of a Law Enforcement Agency Exception*

The first exception to disclosure cited by the Department, Indiana Code section 5-14-3-4(b)(1), provides that a law enforcement agency has discretion over whether or not to disclose its investigatory records. Investigatory records are defined as "information compiled in the course of the investigation of a crime." Ind. Code § 5-14-3-2. A crime is defined as a misdemeanor or a

felony. Ind. Code §35-41-1-6. The Department's Police Department, as a law enforcement agency, has discretion over the disclosure of investigatory records—they may either disclose or not disclose these public records in response to a public records request under the APRA.

Not all information compiled by a law enforcement agency, however, is subject to the investigatory records exception. For example, Indiana Code sections 5-14-3-5(a) and (c) of the APRA set forth the information about arrests and suspected crimes, accidents or complaints that must be provided upon request and for which a law enforcement agency may not claim the investigatory records exception. Also, it is clear from the definition of investigatory record that not all investigations are subject to this exception. Law enforcement agencies may conduct investigations, such as internal investigations concerning the violation of a departmental rule, for example, that are not crimes and therefore not subject to the exception under Indiana Code section 5-14-3-4(b)(1).

With respect to your formal complaint, therefore, it is my opinion that the Department may only withhold public records under the investigatory records exception if that information related to an investigation of a crime. Because the public records previously released indicate that Mr. Bancroft's actions were of a criminal nature, it is my opinion that any undisclosed records are subject to this exception.

#### *The Deliberative Material Exception*

The Department also cited to Indiana Code 5-14-3-4(b)(6) as the basis for denying access to information contained in administrative investigation files. This exception under the APRA allows a public agency discretion as to whether to disclose the following information:

Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purposes of decision making.

There is very little case law interpreting this statutory provision, in particular, what is deliberative material. "Generally, when construing a statute, the interpreting body attempts to give words their plain and ordinary meanings." *Indiana Wholesale Wine v. State of Indiana, Alcoholic Beverage Commission*, 695 N.E.2d 99,103 (Ind. 1998), citations omitted. Non-technical, undefined words are to be defined by their ordinary and accepted dictionary meaning. *Bulkomatic Transport v. Department of Revenue*, 629 N.E.2d 955, 957 (Ind. Tax 1994), citations omitted. The plain meaning of "deliberative" is "assembled or organized for [or] . . . characterized by or for use in deliberation or debate." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 349 (1981). "Deliberation" means "thoughtful and lengthy consideration . . . [t]houghtfulness in decision or action." *Id.*

In the context of the Act, deliberative material includes information that reflects, for example, one's ideas, consideration and recommendations on a subject or issue for use in a decision-making process. Many, if not most documents that a public agency creates, maintains or retains may be part of some decision making process. In order to withhold them from disclosure under Indiana Code 5-14-3-4(b)(6), however, the documents must also be interagency or intra-

agency records that are advisory or deliberative and that are expressions of opinion or speculative in nature.

In 1998, the Indiana Court of Appeals rendered a decision in *The Journal-Gazette v. The Board of Trustees of Purdue University*, 698 N.E.2d 826, that provided an interpretation of Indiana Code section 5-14-3-4(b)(6). One of the issues in that case was whether certain documents related to an internal grievance process concerning an alleged NCAA violation were properly withheld from disclosure under Indiana Code 5-14-3-4(b)(6). After considering the various documents in the *Journal-Gazette* case, the Court of Appeals determined that documents gathered during the course of the internal grievance process were interagency documents, statements of opinion and used for a decision making purpose. In any event, the Court held that many of the documents requested concerning the investigation could lawfully be withheld from disclosure under the deliberative material exception.

Therefore, given the similarities between the *Journal-Gazette* case and circumstances underlying your complaint, it is my opinion that the public records not already disclosed are intra-agency and deliberative in nature, and fall within the exception.

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

Under Indiana Code section 5-14-3-4(b)(8), 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, the Department was not obligated to disclose information from personnel files on a generalized group of employees nor to disclose any items not listed under (A)-(C), above. While the APRA requires a public agency to provide certain information from personnel files, there is no requirement that even if a public record expressing an opinion of a particular officer was maintained in an officer's personnel file that the Department would have to disclose it to you.

Enclosed with your complaint was a file of the information you have already received as a result of your original request. This information includes items from subsections (A)-(C), noted above. It is my opinion that the information required to be disclosed under the personnel file exception has already been disclosed.

#### CONCLUSION

Because the Department has already released the required information as directed by the personnel files exception, and because the public records in question are intra-agency and deliberative in nature, and because the public records pertain to the investigatory records of law enforcement agencies relating to a crime or crimes, it is my opinion that there has been no violation of the APRA.

Sincerely,

Sandra K. Barger  
Acting Public Access Counselor