



STATE OF INDIANA

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July 15, 2011

Mr. Kyle Prall
Citizens Information Associates
1604 Nueces Street
Austin, TX 78701

Re: Formal Complaint 11-FC-150; Alleged Violation of the Access to Public Records Act by the Indianapolis Metropolitan Police Department

Dear Mr. Prall:

This advisory opinion is in response to your formal complaint alleging the Indianapolis Metropolitan Police Department (the "IMPD") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* City of Indianapolis ("City") Chief Deputy Corporation Counsel Andrea Brandes responded on behalf of the IMPD. Her response is enclosed for your reference.

BACKGROUND

In your complaint, you allege that IMPD denied you access to "booking photos/mugshots and arrest information" in violation of the APRA. The IMPD denied your request on the basis that it was of a commercial nature and cited to Ind. Code § 5-14-3-3(d) and (e) and Sec. 285-311 of the Revised Code of the Consolidated City and County of Indianapolis and Marion County (the "City Code"). You replied to IMPD and claimed that because your company, Citizens Information Associates ("CIA") is a media company it is entitled to receive the records. Moreover, you argue that section 3 of the APRA does not permit an agency to deny access to records based on a belief that the information contained therein will be used for commercial purposes; rather, the APRA states that an agency can deny a requester access to additional information if previously-released data is used for commercial purposes.

In response to your complaint, Ms. Brandes argues that CIA is not a news organization because it operates for-profit websites that outline financial terms and membership fees for users of the sites and make use of third-party advertising. Ms. Brandes also points to your duties with respect to strategic business development as listed

on CIA's website. As a result, IMPD determined that CIA intended to use the requested records for commercial purposes and denied the request.

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." I.C. § 5-14-3-1. IMPD is a public agency for the purposes of the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the IMPD's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

The portion of the APRA relevant to this request reads:

[A] public agency that maintains or contracts for the maintenance of public records in an electronic data storage system shall make reasonable efforts to provide to a person making a request a copy of all disclosable data contained in the records on paper, disk, tape, drum or any other method of electronic retrieval if the medium requested is compatible with the agency's data storage system. I.C. § 5-14-3-3.

* * *

A state agency may adopt a rule under IC 4-22-2, and a political subdivision may enact an ordinance, prescribing the conditions under which a person who receives information on disk or tape under subsection (d) may or may not use the information for commercial purposes, including to sell, advertise, or solicit the purchase of merchandise, goods, or services, or sell, loan, give away, or otherwise deliver the information obtained by the request to any other person for these purposes. Use of information received under subsection (d) in connection with the preparation or publication of news, for nonprofit activities, or for academic research is not prohibited. A person who uses information in a manner contrary to a rule or ordinance adopted under this subsection may be prohibited by the state agency or political subdivision from obtaining a copy or any further data under subsection (d).

I.C. §§ 5-14-3-3(d), (e). IMPD cites to Indpls. Code § 285-311 as the local ordinance that provides the City the authority to deny CIA's request.

Here, the parties dispute whether or not CIA is a commercial entity or a news organization for purposes of the APRA. However, the question is not *what kind of entity* requests access to electronic information but *for what purpose* that information is used by the requester. Subsection 3(e) states that agencies may prescribe "conditions under which *a person who receives information . . .* may or may not use the information for commercial purposes. . . ." The provision later exempts the usage of information "for the publication of news," but presumably even news organizations could be restricted from

using the information for strictly commercial purposes because subsection 3(e) simply applies to “a person who receives [the electronic] information.” For example, if a newspaper received the type of records sought in the request at issue here, it could publish a story about some aspect of the arrest process generally or about the particular arrestees specifically and fall under subsection 3(e)’s exemption for “publication of news.” However, the plain language of the provision suggests that the same newspaper could be restricted from establishing a for-profit, fee-based database on its website that used the information to “sell, advertise, or solicit the purchase of merchandise, goods, or services.” I.C. § 5-14-3-3(e).

That said, I agree with CIA that the APRA -- for better or worse -- does not permit agencies to deny requests under subsection 3(e) where the requester has not already used previously-received information for commercial purposes. The only reference to denying a request in subsection 3(e) is the following: “A person who uses information in a manner contrary to a rule or ordinance adopted under this subsection *may be prohibited by the state agency or political subdivision from obtaining a copy or any further data under subsection (d)*” (emphasis added). The provision does not appear to permit agencies to deny requests based on the expected use of the requester; rather, it is only after a requester has used information for commercial purposes in violation of the conditions prescribed by the public agency that the agency may prohibit the requester from receiving additional information. Thus, while IMPD was not permitted to deny this request on the basis of subsection 3(e) of the APRA, IMPD could deny future requests from CIA if IMPD can prove CIA used information for purposes contrary to Indpls. Code § 285-311.

CONCLUSION

For the foregoing reasons, it is my opinion that IMPD did lack the authority to deny your request under Ind. Code § 5-14-3-3(e) if CIA had not already used information received through a previous request for commercial purposes. If CIA receives and uses the information for commercial purposes, however, the APRA permits IMPD to deny future requests from CIA under Ind. Code § 5-14-3-3(e) and Indpls. Code § 285-311.

Best regards,



Andrew J. Kossack
Public Access Counselor

cc: Andrea L. Brandes