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May 23, 2005

Herbert Foust
Reg. No. 124101
Putnamville Correctional Facility
1946 W. US Hwy 40
Greencastle, IN 46135

Re: Consolidated Formal Complaints: Alleged Violation of the Access to Public Records Act by:
The Millersburg Police Department 05-FC-72;
Elkhart County Sheriff 05-FC-73;
Lake County Sheriff 05-FC-74;
Porter County Sheriff 05-FC-76;
Newton County Sheriff 05-FC-78

Dear Mr. Foust:

This is in response to your formal complaints alleging that the above named law enforcement agencies violated the Access to Public Records Act ("APRA") by failing to timely respond to your request for records or denying your request for records. My findings are below.

BACKGROUND

On April 22, 2005 you filed seven (7) formal complaints alleging various violations of the APRA. Of those complaints, five (5) allege violations that fall into two general categories. The first issue is whether the agency timely responded within seven (7) days of receipt of your request. The second issue is whether the agency denied your request by requiring you to provide additional information or state your request with "reasonable particularity."

Failure to Timely Respond

Those agencies that you have complained did not reply to your request within seven (7) days of receipt of your request include the Millersburg Police, Elkhart County Sheriff and Lake County Sheriff. The facts of each case are below.

Millersburg Police (05-FC-72) In your complaint you state that you sent a request for records to the Millersburg Police Department ("MPD") on March 24, 2005. As of the date you signed your complaint, April 16, 2005, you had not received a response. The MPD has not responded to this complaint.

Elkhart County Sheriff (05-FC-73) In your complaint you state that you sent a records request to the Elkhart County Sheriff ("Sheriff") on April 7, 2005. You stated that as of April 20, 2005 that you had not received a response. Ms. Julie Dijkstra, on behalf of the Sheriff, responded to this complaint on April 28, 2005.[1] Ms. Dijkstra attached a copy of your request, which was dated April 14, 2005, and stamped "REC'D APR 18 2005". Ms. Dijkstra stated that the letter was mailed on April 16, 2005. She stated that a response was sent to you on April 18, the day that the letter was received.

Lake County Sheriff (05-FC-74) You filed complaints against both the Lake County Sheriff's Department ("Sheriff's Department") and the Lake County Drug Task Force ("Drug Task Force"). I verified with the Sheriff's Department that the Drug Task Force is a subdivision of the Sheriff's Department; therefore, I am treating this as one complaint. Your complaints state that you sent two requests to Sheriff's Department and Drug Task Force on April 7, 2005. You state that you have not received a response from either. The Sheriff's Department responded to this complaint by letter dated May 3, 2005. The Sheriff's Department stated that neither of your requests had been received.

Reasonable Particularity

Several Agencies responded to your requests for documents stating that you would need to provide more information in order for the agency to respond to your request. I am considering these to be issues of whether your request was "reasonably particular." Those agencies are listed below.

Elkhart County Sheriff (05-FC-73) The Sheriff's response to you, dated April 18, 2005, stated "In order to do a thorough check we need a date of birth and S/S number. We often have duplicate names and need identifiers to get the correct person." In its response to this office, the Sheriff stated, "Mr. Foust did not include any identifying information on Carla Deavers and we have files on two separate people by that name. We have no jail records on any Carla Deavers but do have police reports on subjects by that name. Walter Miller, Records Supervisor, sent Mr. Foust a letter on April 18, 2005 requesting either a date of birth or social security number so that we could send him the proper records. We have not received any further information from Mr. Foust."

Porter County Sheriff (05-FC-76) On April 12, 2005 you received a response to your April 7, 2005 request for records from the Porter County Sheriff ("Sheriff"). The Sheriff denied your request stating that the information could not be provided to you without a date of birth and social security number for each person. The Sheriff said that the request could not be completed until that information is supplied. Ms. Barbara Coggins, Records Manager for the Sheriff, sent

[1] Copies of all letters and attachments responding to your formal complaints will be included for your reference.

you a second letter on May 3, 2005 after consulting with this office. She stated that they have two people of the name provided by you and would need additional clarification of which person you were seeking information on. She also requested that you include a time frame for the request.

Newton County Sheriff's Department (05-FC-78) You state that you sent a request for records to the Newton County Sheriff's Department ("Sheriff") on April 7, 2005. On April 12, 2005 you received a letter from, Mr. Patrick Ryan, attorney for Newton County, stating that your request failed to identify with reasonable particularity the record being requested. In addition you also received a letter from Mr. Michael Winkler of the Newton County Jail stating that your response had been received and forwarded to the attorney. He also stated that you "should be more specific in your exact needs." The Sheriff did not respond to this formal complaint.

Additionally, your complaint against the Newton County Sheriff's Department raises an issue that does not fall into the two general categories stated above. That is the question of whether the Sheriff can charge you a $3.00 record check fee prior to the request being processed. The Sheriff responded to this portion of your complaint by providing a copy of IC 10-13-3-30, which the Sheriff believes allows a $3.00 charge to be applied.

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." IC 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." IC 5-14-3-1.

The above named entities are public agencies for the purposes of the Access to Public Records Act. IC 5-14-3-2. Accordingly, any person may inspect and copy the public records during the regular business hours, unless the records are excepted from disclosure as confidential or otherwise nondisclosable under IC 5-14-3-4. IC 5-14-3-3(a).

Timeliness of Response

Any person may inspect and copy the public records of a public agency during the agency's regular hours of business, except as provided in section 4 of the APRA. IC 5-14-3-3(a). An agency is required to respond to a request for records within certain timeframes. If a request is mailed, sent by facsimile, or sent by electronic mail, the agency is required to respond within seven days of its receipt of the request. IC 5-14-3-9(b). A response may be an acknowledgment that the request for records was received, and a statement of how and when the public agency

intends to comply. A failure to respond timely to a request for records is deemed a denial under the APRA. IC 5-14-3-9(a).

The Millersburg Police Department did not respond to this formal complaint. Therefore, I must proceed based upon the information that you have presented. Based upon that information, I find that if the MPD received your request for documents and failed to respond to that request within seven (7) days it violated the APRA.

The Elkhart County Sheriff's Department provided a copy of your request dated April 14, mailed April 16, and received by the Sheriff on April 18. The Sheriff also provided a copy of the response letter that was sent to you. IC 5-14-3-9 provides, "a denial of disclosure does not occur until seven (7) days have elapsed from the date the public agency receives the request." IC 5-14-3-9. The Sheriff responded to your request on the day that it was received by the agency. Accordingly, I find that the Sheriff did not violate the APRA by failing to timely respond.

The Lake County Sheriff responded to this formal complaint by stating that neither of your requests had been received. Therefore, I find that if the Sheriff did not receive your requests, then there is no violation of APRA.

Reasonable Particularity

When a public records request is made, the requestor must make his or her request with reasonable particularity. IC 5-14-3-3(a)(1). There is no Indiana case law defining "reasonable particularity."

> While the phrase "reasonable particularity" appears to be clear, were it necessary to interpret the (APRA) to determine what the General Assembly intended this phrase to mean, courts would rely upon the common and ordinary meaning. "Particularity" is defined as "the state of being particular rather than general" . . . Statutory interpretation also requires that one construe the phrase "reasonable particularity" in light of the entire Public Records Act. *Opinion of the Public Access Counselor 99-FC-21, (Jan, 19, 2000) page 3-4.*

Since the public policy of the APRA favors disclosure and the burden of proof for nondisclosure is placed on the public agency, if an agency needs clarification of a request, then the agency should contact the requestor for more information if it is necessary to respond to the request. *Opinion of the PAC 02-FC-38.* The fact that a request would lead to the production of a voluminous number of public records does not make it nonspecific. *Opinion of the Public Access Counselor 00-FC-15.*

A common factor in your complaints has been a response from the agency stating that the social security number and date of birth are required to provide the documentation requested. It is my opinion that requiring such information that may only be known to the individual who is the subject of the records may constitute a denial of public records, subject to the exceptions discussed below.

In instances where, according to statute, the information sought may only be made available to the subject of the records then it would be appropriate to require such information. This does not appear to be the case for any of the records sought by you, as none of the agencies have denied your request on the basis that the information sought is, by statute, only available to the person who is the subject of the record.

It would also be appropriate to require such information if, due to the manner in which the information is catalogued, the only way it could be accessed is through a search by social security number or date of birth. *See Opinion of the Public Access Counselor 03-FC-69, (September 9, 2003) page 4-5 (Where agency could only retrieve information by name and date it was appropriate to require requestor to provide such information.)*. I note that none of the agencies has alleged that the information cannot be found without the social security number and birth date.

Since the public policy of the APRA favors disclosure and the burden of proof for nondisclosure is placed on the public agency, if an agency needs clarification of a request, then the agency should contact the requestor for more information if it is necessary to respond to the request. *See IC 5-14-3-1*. However, the agency cannot in effect deny you the records by requiring such particularity that you could not possibly provide it. If more than one document, or set of documents, would satisfy the request and the agency cannot determine which is responsive it may provide you with the option to either provide further identifying information to narrow the field, or to obtain copies of all of the documents.

The Elkhart County Sheriff's Department sent you a letter stating that you would have to provide a date of birth and Social Security number "in order to do a thorough check." In its response to this formal complaint the Sheriff stated that it has files on two separate people by the name of Carla Deavers. While it is understandable that the Sheriff wishes to provide you with the information that you requested it cannot impede you from obtaining records by requiring information that is not generally available to the public. On this count I find that the Sheriff did violate APRA by requiring you to submit the social security number and date of birth in order to obtain the requested documents. I recommend that the Sheriff write to you with basic information about the two Carla Deavers to ask that you clarify which of the two individuals you are seeking records for.

The Porter County Sheriff's Department sent you two letters regarding the sufficiency of your request. The first, dated April 12, stated that request was being denied at that time. The letter stated, "in order to be sure we are providing you with information pertaining to the correct individual you are inquiring about, you need to supply date of birth and social security number for each person. So until that information is supplied, your request cannot be completed." For the reasons discussed above, this denial was a violation of APRA.

The May 3 letter stated that the Sheriff had consulted with this office. It stated, "we are within our legal boundaries to ask for clarification on which Tito Caudillo (or Tito Cuadillo per your request) for whom you are seeking information." It is correct that an agency may request clarification, however it may not outright deny your request on that basis. The agency also may

not constructively deny your request by requiring you to "jump through hoops" or provide information that may not be available to you and is not necessary to retrieving the requested information. I must note that the agency's request for clarification based on dates and by providing you with the two names that could be responsive to your request was more suitable. I find that this request for clarification did not violate APRA in the information it sought; however, it did not remedy the earlier violation.

The Newton County Sheriff[2] replied to your request by letter dated April 12, 2005. In that letter Mr. Ryan stated that he had consulted this office. He indicated that you had violated the APRA's requirement that a person state his request with reasonable particularity, and invited you to provide a more specific request or a written supplemental explanation. Unlike the other letters requesting clarification, you were not asked to provide a social security number or date of birth. However, this request for clarification still fails to comply with APRA.

You have not provided a copy of your original request to the agency, so I must rely on the portion of your request quoted in the Sheriff's response. It states "all records (intake, housing, accounting, disciplinary, holding, transport or other data stored manually or by computer) concerning incarceration of myself, Herbert S. Foust." Although it is true that you requested "all records" respecting you that were maintained by the Sheriff, you did make an effort to specify certain types of records in your request. From the above information it is not apparent to this office why *none* of the documents could be identified without further clarification. It appears from the above quotation that at least a portion of the records requested should be identifiable. If any portion of the records sought could be identified from your request the Sheriff should have provided them to you, and then sought further clarification, such as a timeframe.

The letter does not indicate the basis for the Sheriff's determination that it could not identify the requested documents. Since the records sought are within the agency's control, the agency is uniquely situated to know what information is required to retrieve a record. I find that the Sheriff violated the APRA by failing to provide any documents that were retrievable based upon the partial specificity of your request. Additionally, the Sheriff should have provided the requestor with a more specific explanation as to why the request was not sufficiently particular to locate the requested documents.

"Record Check Fee"

Your complaint against the Porter County Sheriff raises one additional issue, not common to the other complaints. Your complaint raises the question of whether the Sheriff may charge you a $3.00 "record check fee" to process your request.

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[2] Mr. Patrick Ryan, attorney for Newton County, has indicated to this office that the Sheriff intends to file suit under 5-14-3. The Public Access Counselor may not issue an advisory opinion concerning a specific matter with respect to which a lawsuit has been filed under Indiana Code 5-14-3. This office has received no notice of any pending lawsuit under 5-14-3 regarding this matter; therefore this opinion must be issued today in accordance with IC 5-14-5-9.

Under the Access to Public Records Act, a public agency may charge a fee to copy a record. IC 5-14-3-8. Generally, a public agency may charge only for the actual cost of copying a record, which is defined in the APRA as the cost of paper and the per-page cost for use of the copying equipment. IC 5-14-3-8(d). However, the APRA states that a public agency shall collect any copying fee that is specified by statute or is ordered by a court. IC 5-14-3-8(f). Also, the APRA provides that an agency may require that the payment for copies be made in advance of the agency providing the copies. IC 5-14-3-8(d).

The Sheriff responded to your complaint by stating that it believes IC 10-3-30 allows it to charge a $3.00 fee. That statute states in relevant part:

> **IC 10-13-3-30**
> **Request for limited criminal history; duties of law enforcement agency and department**
> Sec. 30. (a) Except as provided in subsection (c), on request for release or inspection of a limited criminal history, law enforcement agencies may, if the agency has complied with the reporting requirements in section 24 of this chapter, and the department shall do the following:
> (1) Require a form, provided by law enforcement agencies and the department, to be completed. The form shall be maintained for two (2) years and shall be available to the record subject upon request.
> (2) Collect a three dollar ($3) fee to defray the cost of processing a request for inspection.
> . . .

A "limited criminal history" is a very specific type of request that is defined in IC 10-13-3-11.

> (a) As used in this chapter, "limited criminal history" means information with respect to any arrest or criminal charge, which must include a disposition.
> (b) However, the term includes information about any arrest or criminal charge that occurred less than one (1) year before the date of a request even if no disposition has been entered.

Neither you nor the agency have provided me with a copy of your original request. In your complaint you state that you requested, "all documents specified by I.C. 5-14-3-5 and additional PCSD records pertaining to these individuals and records of their confinement". It does not appear that you have requested a limited criminal history, therefore IC 10-13-3-30 does not apply and the agency may not charge more than the actual cost for copying a record as set out in IC 5-14-3-8(d).

CONCLUSION

For the foregoing reasons, I find that:

The Millersburg Police Department violated APRA by failing to respond to your request for records within seven (7) days.

The Elkhart County Sheriff did not violate APRA, because the Sheriff responded to your request on the day it was received. The Sheriff did violate APRA by requiring you to provide a date of birth and social security number to receive records.

The Lake County Sheriff did not violate APRA because it did not receive your requests.

The Porter County Sheriff violated APRA by denying your request for records on the basis of reasonable particularity and requiring you to provide a date of birth and social security number to obtain records. The Sheriff also violated APRA by charging you an unauthorized fee of $3.00 to obtain records.

The Newton County Sheriff violated APRA by failing to provide any documents that could be identified by your request; or by providing a reason as to why it could not identify the documents based upon your request.

Sincerely,

Karen Davis
Public Access Counselor

cc: Millersburg Town Marshal
Julie Dijkstra
Zon Haralovich
Barbara Coggins
Patrick Ryan