



# STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR  
ANDREW J. KOSSACK

Indiana Government Center South  
402 West Washington Street, Room W470  
Indianapolis, Indiana 46204-2745  
Telephone: (317)233-9435  
Fax: (317)233-3091  
1-800-228-6013  
www.IN.gov/pac

March 25, 2010

Mr. Russ McQuaid  
6910 Network Place  
Indianapolis, IN 46278

*Re: Formal Complaint 10-FC-51; Alleged Violation of the Access to Public Records Act by the Marion County Sheriff's Department*

Dear Mr. McQuaid:

This advisory opinion is in response to your formal complaint alleging the Marion County Sheriff's Department (the "Sheriff") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* I have enclosed the Sheriff's response from Sheriff's Counsel Kevin Murray.

## BACKGROUND

According to your complaint, you requested access to off-duty work permits of Lt. Tim Motsinger and Maj. Lincoln Plowman. The Sheriff denied your request, citing I.C. § 5-14-3-4(b), but you believe the common practice of the Sheriff is to release off-duty work permits. Specifically, you claim that *The Indianapolis Star* recently requested -- and received -- the off-duty work permits of Col. John Layton. You also argue that the term "off-duty" indicates that the employee is not engaged in duties or compensated labor for the public entity. Consequently, you do not believe the personnel records exception to the APRA would apply to off-duty work permits.

In response to your complaint, Mr. Murray reiterates that the Sheriff denied your request for off-duty work permits pursuant to "Indiana Code 5-14-3-4(b)" and that the Sheriff's "prior and current practice is to produce employee records that are authorized for production by the employee." Mr. Murray claims that "[t]here has been no change in this practice."

## ANALYSIS

The public policy of the APRA states, "[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. The Sheriff is a “public agency” under the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Sheriff’s public records during regular business hours unless the public records are excepted from disclosure as nondisclosable under the APRA. I.C. § 5-14-3-3(a).

Personnel files of public employees are generally excepted from disclosure at the discretion of the agency, except for the items specifically required by the APRA to be disclosed. I.C. § 5-14-3-4(b)(8). However, all personnel file information shall be made available to the affected employee or employee’s representative. I.C. § 5-14-3-4(b)(8). However, “this office has recognized that records may relate to a particular employee and the person’s employment without automatically bringing the record within the ambit of the personnel file exception.” *Opinion of the Public Access Counselor 04-FC-238*. Moreover, under the APRA the burden of proof for nondisclosure lies with the public agency that would deny access to the record and not to the person seeking to inspect and copy the record. I.C. § 5-14-3-1. Here, the Sheriff notes that it classifies the off-duty work permits as “employee records,” but it is not clear whether the records are contained within the employees’ personnel files. Because the discretionary exception to disclosure pertains only to that information contained within the personnel *files* of public employees, it is my opinion that the Sheriff has not met its burden to show that the records are except from disclosure under Ind. Code § 5-14-3-4(b)(8). In other words, while I agree that some off-duty work permits or similar records could be exempt from disclosure under subsection 4(b)(8) of the APRA where those records are in fact contained within the personnel files of public employees, it is my opinion that the Sheriff has not yet shown that the particular records requested here are subject to that exception.

I also note that when a records request is made in writing and the agency denies the request, the agency must deny the request in writing and must include in the denial “a statement of the *specific exemption* or exemptions authorizing the withholding of all or part of the public record. . . .” I.C. § 5-14-3-9(c)(2) (emphasis added). Here, the Sheriff cited to subsection 4(b) of the APRA, but it was not entirely clear what exception the Sheriff was relying upon.

Finally, it appears there is a factual dispute between the parties regarding whether or not the Sheriff released similar records to *The Indianapolis Star*. As I am not a finder of fact, I express no opinion on that issue. However, I note that the Indiana Court of Appeals has held that “the decision to deny access [to public records] after allowing others access could be considered an arbitrary and capricious abuse of discretion.” *Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ.*, 787 N.E.2d 893, 919 (Ind. Ct. App. 2005), *citing* I.C. § 5-14-3-9(f)(2). Again, in a court action to compel the release of the off-duty work permits, the burden of proof would be on the Sheriff to show that its decision to withhold the records was within the discretion provided to public agencies under subsection 4(b)(8) of the APRA.

CONCLUSION

For the foregoing reasons, it is my opinion that the Sheriff has not met its burden to show that the requested records are exempt from disclosure under the APRA.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive style with a prominent, sweeping flourish at the end of the name.

Andrew J. Kossack  
Public Access Counselor

Cc: Michael C. Healy