

May 27, 2004

Mr. Roger L. Perry
1660 North State Road 46
Columbus, Indiana 47203

*Re: Formal Complaints 04-FC-73, 04-FC-75, and 04-FC-80 consolidated;
Alleged Violation of the Access to Public Records Act by the Bartholomew County
Sheriff's Department*

Dear Mr. Perry:

This is in response to your formal complaints alleging that the Bartholomew County Sheriff's Department (Sheriff) violated the Indiana Access to Public Records Act (APRA) (Ind. Code §5-14-3), when it failed to produce records and/or failed to respond to your various records requests. The Sheriff's responses to your complaints are attached for your review, and I have consolidated the complaints for a single opinion. For the reasons set forth below, I find that the Sheriff violated the APRA with regard to each of your complaints by failing to timely respond to your requests. With regard to your March 29, 2004, request, I further find that the Sheriff violated the APRA by failing to cite to the specific statutory exemptions supporting his nondisclosure. With regard to your April 14, 2004, and April 21, 2004, requests, I further find that the Sheriff violated the APRA by failing to respond to your requests in writing. Those violations notwithstanding, it is my further opinion that the Sheriff is entitled to withhold some information and records you are seeking under one or more of the statutory exemptions now being cited; however, it is the Sheriff's burden to separate the nondisclosable material from those records and to produce the information required to be disclosed under the statute. I offer some guidance to inform the Sheriff's further actions toward that end. With regard to each of your requests, it is my opinion that the Sheriff's continuing failure to provide you access to responsive and nonconfidential information and records consistent with this opinion will result in a continuing violation of the APRA.

BACKGROUND

Formal Complaint 04-FC-73

On March 29, 2004, you personally delivered a written records request to the Sheriff seeking access to records you assert are maintained by that public agency. Specifically, you requested access to “a duty roster, including names and titles, of all people on duty on October 8, 2003, between the hours of 10:00 a.m. and 6:30 p.m. in the Bartholomew County Jail booking and/or holding and/or property room areas.” On April 5, 2004, the Sheriff responded in writing and denied your request. The Sheriff characterized the information requested as “controlled operational information ... protected by law,” but did not cite to any specific statutory exemption supporting nondisclosure. On April 9, 2004, you wrote the Sheriff requesting citation to the specific statutory exemption supporting his nondisclosure. Ten days later the Sheriff responded in writing declining to be more specific and advising you to submit any future correspondence to his counsel. This Complaint followed. In response to the allegations of your complaint, the Sheriff asserts that the responsive records are investigatory records of a law enforcement agency and are exempt from production pursuant to Indiana Code 5-14-3-4(b)(1). The Sheriff further responds that some or all of the responsive records are also protected from disclosure as intra-agency or interagency deliberative material pursuant to Indiana Code 5-14-3-4(b)(6).

Formal Complaint 04-FC-75

On April 14, 2004, you personally delivered a written records request to the Sheriff seeking access to records you assert are maintained by that public agency. Specifically, you requested access to any record bearing your name or a variation of your name and relating to an incident on October 8, 2003, involving any investigation, arrest, search, booking and release, property inventory, or other related matters by personnel of the Bartholomew County Sheriff's Department. Your complaint states that you returned to the Sheriff's Department on April 16, 2004, and were advised that the Sheriff's counsel was reviewing the request. You further indicate that you received a written response from the Sheriff dated April 19, 2004, stating that all of the information requested was protected. The response referenced does not purport to be a written response to your April 14, 2004, record request for records referring to you, but rather, is a follow-up response to your earlier request for a duty roster (*see* 04-FC-73). It does not appear that you received any written response to your April 14, 2004, request. This complaint followed. In response to the allegations of your complaint, the Sheriff asserts that the responsive records are investigatory records of a law enforcement agency and are exempt from production pursuant to Indiana Code 5-14-3-4(b)(1). The Sheriff further responds that some or all of the responsive records are also protected from disclosure as attorney work product pursuant to Indiana Code 5-14-3-4-(b)(2), and as intra-agency or interagency deliberative material pursuant to Indiana Code 5-14-3-4(b)(6).

Formal Complaint 04-FC-80

On April 21, 2004, you personally delivered a written records request to the Sheriff seeking access to records you assert are maintained by that public agency. Specifically, you

requested access to any record regarding a disciplinary complaint, investigation, findings and action taken concerning a specific officer of the Sheriff's Department. Your complaint states that you returned to the Sheriff's Department on April 26, 2004, and at that time you were handed a written response from the Sheriff. The response, dated April 19, 2004, states that all of the information requested was protected. The response referenced does not purport to be a written response to your April 21, 2004, record request for records seeking disciplinary records of a Sheriff's Department officer (indeed, it is dated three days prior to your request). Rather, that written response is a follow-up response to your earlier request for a duty roster (*see* 04-FC-73). It does not appear that you received any written response to your April 21, 2004, request. This complaint followed. The Sheriff responds that the personnel records of his staff are exempt from disclosure pursuant to Indiana Code 5-14-3-4(b)(8). The Sheriff acknowledges that certain personnel information is nonetheless required to be disclosed upon request. This includes the status of any formal charges pending against an employee (IC 5-14-3-4(b)(8)(B)), and the factual basis for any disciplinary action against an employee in which final action has been taken and where the discipline resulted in the employee being suspended, demoted or discharged (IC 5-14-3-4(b)(8)(C)). The Sheriff denies that he has any responsive records relating to the status of any formal charges pending against the officer in question because there are "no pending formal charges" against that officer. The Sheriff declines to produce disciplinary records because he asserts that your request is not specific in that you fail to identify any particular incident for which discipline may have been taken.

ANALYSIS

Indiana Code 5-14-3-3(a) provides that any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as otherwise provided in the APRA. IC 5-14-3-3(a). A request for records may be oral or written. IC 5-14-3-3(a); 5-14-3-9(c). If the request is made in writing, the agency must respond to the request in writing. IC 5-14-3-9(c). If the written request is hand-delivered, the agency must respond in writing within 24 hours. IC 5-14-3-9(a). A timely response does not require production of the records or a denial of production within those statutory time periods; rather, the agency may meet its response obligation by acknowledging the request and stating its intent toward compliance with a date certain for production or further response. If the public agency denies the request, the denial must include "a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record." IC 5-14-3-9(c).

The Sheriff failed to submit timely responses to each of your requests. Each request was written and hand-delivered to the public agency. Because the requests were hand-delivered, the Sheriff was required to respond within 24 hours. Moreover, because the requests were written, the Sheriff's 24-hour responses were required to be in writing. The Sheriff did not respond to your March 29, 2004, request until April 5, 2004. That response was not timely, and for that reason violated the APRA. It does not appear that the Sheriff responded to your April 14, 2004, and April 21, 2004, requests at all. Certainly, the April 19, 2004, letter referenced in your complaints is not a response to those requests. The face of that document indicates that it is specifically a response to your follow-up letter regarding the March 29, 2004, request for a duty roster. The response obligation was not otherwise fulfilled by any oral response you received

when you returned to the Sheriff's Department seeking production of responsive records. As noted, the Sheriff was required to provide a *written* response to your written requests. No other evidence is presented to suggest or show that the Sheriff responded in writing to your subsequent record requests. The Sheriff's failure to respond to each of your requests in writing and in a timely manner violates the APRA. IC 5-14-3-9(a), IC 5-14-3-9(c)(1).

The Sheriff further violated the APRA with regard to the March 29, 2004, request by failing to cite to the specific statutory exemption supporting his nondisclosure of records. While the Sheriff's initial response to that request referenced the statutory exemptions generally (citing to Indiana Code 5-14-3-4), he failed to articulate in that or in the subsequent response which statutory exemption he was relying upon to withhold any responsive records. That denial without citation to the statutory exemption relied upon was contrary to law. IC 5-14-3-9(c)(2).

I write further to address any continuing nondisclosure of responsive records.

With regard to your request seeking duty roster information, the Sheriff now relies on two statutory exemptions to support nondisclosure. These include the investigatory records exemption (IC 5-14-3-4(b)(1)), and the deliberative materials exemption (IC 5-14-3-4(b)(6)). The Sheriff states that any responsive records contain information protected from disclosure by one or both of these exemptions. The investigatory record exemption does not apply to the information you are seeking in your March 29, 2004, request. Significantly, the APRA defines an "investigatory record" to mean "information compiled in the course of the investigation of a crime." IC 5-14-3-2 (defining "investigatory record"). The Sheriff does not meet his burden of proof to establish that the record requested fits within the "investigatory records" exemption. *Cf.* IC 5-14-3-9(g)(1). A duty roster of the employees on duty at on a particular date cannot reasonably be characterized as being a record that was compiled in the course of the investigation of a crime, and the Sheriff does not offer any argument or facts to bring it within that definition. Neither does the Sheriff meet his burden of proof to establish that the record requested fits within the "deliberative materials" exemption or otherwise establish the content of the record with adequate specificity to qualify the record for refuge under this exemption. *Cf.* IC 5-14-3-9(g)(1). The deliberative materials exemption applies to permit a public agency to withhold material that is an expression of opinion or speculation made for the purpose of decision making. IC 5-14-3-4(b)(6). The historical record of who was on duty on a specific date and time is not opinion or speculation made for the purposes of decision making, and cannot be withheld under this exemption. IC 5-14-3-4(b)(6); *see Unincorporated Operating Division of Indiana Newspapers, Inc. v. Trustees of Indiana University*, 787 N.E.2d 893, 913-14 (Ind. Ct. App. 2003). Moreover, even assuming that the record requested could contain information falling under one of these or other exemptions,¹ the Sheriff is advised that the APRA requires him to separate out any nondisclosable information from records that also contain disclosable information, and to produce what is disclosable. IC 5-14-3-3(a), IC 5-14-3-6(a). Assuming your request seeks information related to an arrest incident that occurred on the date in question and

¹ The Sheriff does not rely upon any other provisions to exempt disclosure, but I note that the job titles and job descriptions of law enforcement officers are subject to nondisclosure. *See* IC 5-14-3-4.3.

that involved you, the APRA requires that the Sheriff disclose at least the names of any officers (other than undercover officers) involved in your arrest. *See* IC 5-14-3-5(a)(3)(B).

With regard to your April 14, 2004, request seeking any records that relate to you and an incident on October 8, 2003, involving personnel of the Bartholomew County Sheriff's Department (*see* 04-FC-75), the Sheriff relies on three statutory exemptions to avoid disclosure of responsive records. These include the investigatory records exemption (IC 5-14-3-4(b)(1)), the attorney work product exemption (IC 5-14-3-4(b)(2)), and the deliberative materials exemption (IC 5-14-3-4(b)(6)). The Sheriff states that any responsive records contain information protected from disclosure by one or more of these exemptions. Given the nature of the public agency and the specific request, I have no doubt that some of the information requested falls within these statutory exemptions. However, the Sheriff does not establish, and does not even allege, that *all* of the information requested falls within these exemptions. Indeed, as noted above, Indiana Code 5-14-3-5 provides that a law enforcement agency is required to disclose certain limited information regarding persons arrested and jailed, and regarding the investigation of a crime. This includes identifying information regarding the person arrested or jailed, information concerning the charges and the factual circumstances surrounding any criminal investigation, and information relating to the agency and officers involved. *See* IC 5-14-3-5(a), 5(b) and 5(c). The Sheriff must produce this information in response to your request. The attorney work product exemption protects disclosure of any records that were prepared or compiled by an attorney in reasonable anticipation of litigation. IC 5-14-3-2 (defining attorney work product). Along with the investigatory records exemption, this protects the actual arrest report (considered under Indiana case law to be the work product of the prosecuting attorney) and any other records *created or compiled by counsel*. Records that do not fit within this definition must be produced unless they fall within another exemption. And, with regard to the deliberative materials exemption, that exemption does not protect all matters within the responsive records from disclosure. Rather, as noted above, the APRA requires a public agency to separate disclosable from non-disclosable information contained in public records, and factual matters that are not inextricably linked with other non-disclosable materials (specifically, the opinions and speculation of the author) may not be withheld from public disclosure. IC 5-14-3-6(a); *see Trustees of Indiana University*, 787 N.E.2d at 913-14. To the extent that the responsive records in this matter contain factual or anecdotal information and data, such information and data must be disclosed.

Finally, with regard to your April 21, 2004, request seeking access to any record regarding a disciplinary complaint, investigation, findings and action taken concerning a specific officer of the Sheriff's Department, the Sheriff relies on the personnel file information exemption codified at Indiana Code 5-14-3-4(b)(8). The Sheriff correctly notes that personnel file information is exempt from production at the discretion of the public agency, and acknowledges his obligation notwithstanding that exemption to produce the factual basis supporting any final discipline of an employee that results in the employee's suspension, demotion or discharge. IC 5-14-3-4(b)(8)(C). However, the Sheriff asserts that your request is not reasonably particular because it does not identify a specific incident for which discipline was given. In my opinion your request was reasonably particular in that it identified the specific employee at issue. It may well be that the employee was subject to more than one event of discipline (or that he was

subject to none), but your request read in context with the statute entitles you to the factual basis supporting any (and every) event of final discipline involving that employee that resulted in his suspension, demotion or discharge. A request is not reasonably particular if the public agency cannot discern whether it does or does not have records responsive to the request; that it can identify and has many records that are responsive does not make the request so vague or broad that it relieves the agency of its obligation to provide access to those records. If a responsive record exists that contains this information, the Sheriff must provide you with the factual basis of any final discipline resulting in the suspension, demotion or discharge of the employee named. That said, you are only entitled to the *factual basis* for that final and limited kind of discipline. You are not entitled to anything more than the factual basis; essentially, a brief statement of why the employee was disciplined. Certainly, you are not entitled to all of the content of any or all of the disciplinary records.

CONCLUSION

For the foregoing reasons, I find that the Sheriff violated the APRA with regard to each of your complaints by failing to timely respond to your requests. With regard to your March 29, 2004, request, I further find that the Sheriff violated the APRA by failing to cite to the specific statutory exemptions supporting his nondisclosure. With regard to your April 14, 2004, and April 21, 2004, requests, I further find that the Sheriff violated the APRA by failing to respond to your requests in writing. These violations notwithstanding, I note that the Sheriff has now responded with citation to various statutory exemptions that would support his nondisclosure of at least some of the information requested. The Sheriff is entitled to withhold any records that fall within the statutory exemptions cited, and to separate and produce only that information that is otherwise disclosable. With regard to each of your requests, it is my opinion that the Sheriff's continuing failure to provide you access to responsive and nonconfidential information and records consistent with this opinion will result in a continuing violation of the APRA.

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Mr. Peter Campbell King