

June 9, 2004

Ms. Robin J. Fults
2504 West 200 North
Danville, Indiana 46122

*Re: 04-FC-81; Alleged Violation of the Access to Public Records Act by the
Hendricks County Board of Commissioners and Hendricks County
Council*

Dear Ms. Fults:

This is in response to your formal complaint alleging that the Hendricks County Board of Commissioners and the Hendricks County Council (County) violated the Access to Public Records Act (APRA) (Ind. Code 5-14-3-1 *et seq.*), when the County failed to produce records responsive to your record request within a reasonable time of receipt of that request. The County did not respond to your complaint in writing, but did copy me on its subsequent production. In addition, the County further contacted me through counsel and set forth the reasons for its delay in producing records in response to your request. For the reasons set forth below, I find that the County did not unreasonably delay its production in response to your request for records.

BACKGROUND

You submitted your written record request to the County on March 11, 2004. That request sought a job description, policies and procedures for hiring county employees, the factual bases for final disciplinary actions taken against three county employees, the date and times to establish that criminal background checks were performed on two county employees, and any policies or procedures regarding nepotism in the county. The County responded to your record request in writing on the following day. That response, submitted by counsel, acknowledged your request and promised production, but failed to provide you with a date certain for the production or any further response. Notwithstanding that deficiency in the County's response, your complaint indicates that you were in regular contact with counsel for the county regarding the status of your request. However, when no production was forthcoming by May 10, 2004, two months after you submitted your request, you brought this complaint challenging the delay in production.

The County did not submit a written response to your complaint, but did copy this office on its subsequent production, dated May 17, 2004.¹ The production includes copies of public records held by these governing bodies of the County (the Board and Council). Those records are alleged to be responsive to your requests seeking the job description, the policy and procedures for hiring new employees, and the policies and procedures regarding nepotism. With regard to the remaining items sought in your request, the letter covering the production states that the County Commissioners and County Council do not have responsive records, and directs you as appropriate to the public agencies that may have the information you are seeking. With regard to your request for the factual bases supporting disciplinary action against two of the three employees that were the subject of your record request, and whether and when criminal background checks were performed on two others, the production letter indicates that the information was being compiled for a response by the County Sheriff. Counsel for the County clarified this response to advise me that it is his understanding that the Commissioners and the Council do not have records relating to disciplinary and background information for employees of the Sheriff's Department.

With regard to the timing of the production, the specific issue raised in your complaint, the counsel for the County contacted this office and advised that the production was accomplished as quickly as possible given constraints and staffing resources at the times relevant to your request. Specifically, the County indicates that the County's Human Resources Director resigned the same week the County received your request and that a new County Administrator was recruited and hired in April. That new County Administrator was responsible for and in fact compiled and prepared the response and production. The County's counsel and the County Administrator both indicated that the request required that the administrator search and review numerous documents to make a comprehensive production. Your complaint and counsel's response further indicate that the County was in regular contact with you regarding the status of your request as it was under review.

ANALYSIS

A public agency that receives a request for records under the APRA has a specified period of time to respond to the request. IC 5-14-3-9. This office has frequently and long held that a timely response to the request does not mean that the public agency must expressly decline to produce or produce the documents that are responsive to the request within the statutorily prescribed time period. Of course, a public agency is free to

¹ The production is curious for the fact that it responds to your various requests outlined above and set out in your written record request, but it also supposes to respond to a variety of other requests for information that are not set forth in your written record request. Many of those requests are not requests for records, but rather questions (e.g., "Why can the name of one elected official accused of wrongdoing be released and not the other?"). Of course, the APRA does not apply to require a public agency to answer questions; rather it only applies to require production of the public records of a public agency. In any event, your complaint does not raise any issues regarding production or failure to produce records not requested in your March 11, 2004, written record request, and no opinion is offered here regarding the sufficiency of the County's response to items or questions not set forth in that written request.

take either of those actions, but may also comply with its response obligation under the statute by acknowledging receipt of the request and indicating the specific actions the agency is taking toward production. There are practical reasons for such a rule. A public agency may be able to produce public records immediately in some cases, but more time may be required for production when records are not in a central repository, are archived off-site, include information that may require counsel or other review for confidentiality, or include disclosable and nondisclosable information that the public agency must separate for purposes of producing what is disclosable. Other factors related to the business functions of the office and duties of the staff responsible for that production as well as the nature and circumstances surrounding the records requested may effect resolution of the question. At bottom, interpreting Indiana Code 5-14-3-3 and 5-14-3-9 to require public agencies to produce records within a specific period of time would have the effect, in some cases, of requiring public agencies to stop activity on all other matters in order to provide the records requested. While providing information is an essential function of public agencies, the APRA also specifically provides that public agencies shall regulate any material interference with the regular functions or duties of their offices. IC 5-14-3-1; IC 5-14-3-7(a).

Initially, I note that the County's letter acknowledging your record request was deficient in that it did not provide you with a date certain for production or further response. I think that in keeping with the burden of production imposed upon it by the statute, the County's written acknowledgment of your request should have provided you with that information. That said, it is certain that the County was in regular contact with you regarding the status of the request over the time period that it was pending with the County.

With regard to timing, I must agree that two months is a long period of time to wait for production of records in response to a record request. However, based on the facts provided, I decline to find that time unreasonable and in violation of state law in this matter. First, it matters and, I think, demonstrates good faith, that the counsel for the County was in regular contact with you regarding the status of your request. The delay in production was throughout that time and now attributed to staffing issues within the public agencies involved. In particular, your request seeking the records of multiple public agencies coincided with the departure of the County's Human Resources Director. It is my understanding that timing was lost both because this person would have been responsible for fulfilling your request and because the remaining human resources were focused on finding staff to cover that and the other functions of that position. A County Administrator was thereafter hired (in April) and was tasked with the responsibility of fulfilling your request as part of his other new duties. The documents submitted in support of your complaint indicate too that you contacted and were contacted by that person on occasion, and his response apologizes for the delays in production which he attributes in part to his "learning curve" in a new position with the County. The response also indicates that it required review by legal counsel, and I quite agree given the nature of the request that it was appropriate for the County to seek that review to avoid releasing

any personnel or other related information that may be protected as confidential under state or federal law.²

Let me be clear. It should not be your responsibility that the public agency from which records are requested does not have sufficient staff to compile and produce records responsive to a record request. Indeed, complying with a record request in a timely manner is one of the duties of every public agency. However, the facts and circumstances here do not paint a picture of an agency that maintains a minimal staff routinely incapable of complying with a simple record request. Rather, it seems clear that the staffing issues giving rise to the production delay coincided with your request, and the agency attempted to keep you apprised of its attempts to comply while that request was pending. Given the additional appropriateness of legal review prior to production, I cannot find under these circumstances that the delay was unreasonable *in violation of law*.

CONCLUSION

For the reasons set forth above, I find that the County did not violate the APRA when it responded to your record request.

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Mr. Gregory E. Steuerwald

² It appears also that the delay was in part attributable to the County waiting for another public agency, specifically, the County Sheriff, to share any responsive documents to be included. When that was not forthcoming, the production was made with those records and responses that were in the control and custody of the County Board and the County Council. It is not clear to me whether the Sheriff has since responded by providing either the Commissioners and the Council with any records, or by providing you with any records directly. If not, the failure of that public agency cannot be attributed to the Board or the Council. You may want to renew your request for Sheriff's Department records with the Sheriff's Department.