

June 24, 2004

Mr. Herbert S. Foust, No. 124101  
Putnamville Correctional Facility  
1946 U.S. Highway 40  
Greencastle, Indiana 46135

*Re: 04-FC-97; Alleged Violation of the Access to Public Records Act by the Elkhart County Sheriff's Department*

Dear Mr. Foust:

This is in response to your formal complaint alleging that the Elkhart County Sheriff's Department (Sheriff's Department) violated the Indiana Access to Public Records Act (APRA) (Ind. Code §5-14-3) when it charged you a fee for public records that you assert is not authorized by statute. The Sheriff's Department did not submit a written answer to your complaint.<sup>1</sup> For the reasons set forth below, I find that the Sheriff's Department charged you a fee for records that is not authorized by statute and that violates the APRA.

#### BACKGROUND

According to your complaint, on May 9, 2004, you submitted a written request for records to the Sheriff's Department. Your request sought all records relating to your own incarceration within the Elkhart County Security Center. The Sheriff's Department responded in writing on May 13, 2004. In its response, the Sheriff's Department requested that you complete a "Request for Limited Criminal History Information" form, which the Sheriff's Department provided, and return the completed form with a fee of \$3.00. That letter also stated that you would need to obtain subpoenas for some of the records you were seeking. You assert that you had a relative call the Sheriff's Department to question the fee, and your relative was told that the fee was a "research fee and that no copying fees were required." This complaint followed. In your complaint you assert that you paid the fee to facilitate your receipt of records, but you contend that the fee was illegal. You do not offer any complaint otherwise challenging the Sheriff's Department's response or any subsequent production.

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<sup>1</sup> Pursuant to Indiana Code 5-14-5-8, this Office forwarded a copy of your complaint and confirmed receipt by the Sheriff's Department on June 15, 2004, through facsimile transmission, and requested a response to the complaint by June 22, 2004. The Sheriff's Department did not submit a response to your allegations.

## ANALYSIS

Indiana Code 5-14-3-8(d) permits local public agencies to charge a fee for copies of public records, and to set that fee in a fee schedule adopted by the fiscal body or by the public agency's governing body. However, the fee may not include labor or overhead, and may not exceed the actual cost of the copy. IC 5-14-3-8(d). "Actual cost" is expressly defined as meaning "the cost of paper and the per-page cost for use of copying ... equipment." IC 5-14-3-8(d). Notwithstanding these provisions, a public agency may collect other fees authorized or set by statute or as ordered by a court. IC 5-14-3-8(f).

The Sheriff's Department does not answer the allegations of your complaint, therefore those allegations are uncontested for purposes of this advisory opinion. In my opinion the Sheriff's Department charged you a fee that is not authorized by statute. The Sheriff's Department did not support its fee request with citation to any statute authorizing the fee requested, and it does not now allege or otherwise establish that any records you requested fall within any other statutory fee provisions.<sup>2</sup> Absent specific statutory authority, the Sheriff's Department may not charge you any fee other than a per-page copy fee for the kinds of records that are the subject of your request, and that copy fee must be established in a fee schedule adopted by the agency's fiscal body and may not exceed the actual cost of the copy. Unless the Sheriff's Department can establish that the records you are seeking fall within another statutory fee provision, its request that you pay a \$3.00 search or service fee for the records you requested violates the APRA.

I write further to comment on the nature of your request and the Sheriff's Department's statement that you are required to obtain subpoenas for some of the records you requested. First, every record the Sheriff's Department maintains is a "public record" under Indiana law. IC 5-14-3-2. Under the APRA, you do not need a subpoena for any records maintained by any public agency. Rather, it is sufficient that you make your request by simple letter, as you did here, and that request requires a response and production from the public agency that receives it. IC 5-14-3-3, IC 5-14-3-9.

That said, not every public record is required to be disclosed (IC 5-14-3-4), and production of some records, like your own medical records, may require that you submit additional documentation such as a written release. When a public agency receives a request for records that it is required to withhold under Indiana Code 5-14-3-4(a), or that it is permitted to withhold under Indiana Code 5-14-3-4(b), it may exempt those records from disclosure. However, if a public agency withholds any records from production, it must cite to the specific statutory exemption that authorizes the nondisclosure. IC 5-14-3-9(c)(2)(A).

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<sup>2</sup> In reading the Sheriff's Department's letter requesting the fee, it appears that it understood your request for records to be a request for a limited criminal history. Indiana Code does contain special fee provisions for limited criminal histories. However, your record request did not purport to seek limited criminal history information on anyone. Even if it did, I am immediately doubtful that you are entitled to limited criminal history information on anyone and for any purpose authorized by Indiana statute. *See* IC 10-13-3-27.

It appears from your request that *some* of the records you requested may be subject to one or more of the statutory exemptions. *See e.g.*, IC 5-14-3-4(b)(1) (exempting the investigatory records of law enforcement agencies). It is, of course, the public agency's burden to assert and cite to any applicable exemptions. However, should the Sheriff's Department elect to withhold any of its records under this or other statutory exemptions, Indiana Code 5-14-3-5(b) nonetheless requires that it provide you with certain limited information regarding your incarceration.

#### CONCLUSION

For the reasons set forth above, I find that the Sheriff's Department charged you a fee for records that is not authorized by statute and that violates the APRA.

Sincerely,

Michael A. Hurst  
Public Access Counselor

cc: Captain Bradley Rogers