

April 11, 2005

Nick L. Wilson
429 Toschlog Road
Richmond, IN 47374

Re: Formal Complaint 05-FC-52; Alleged Violation of the Access to Public Records Act by the City of Richmond

Dear Mr. Wilson:

This is in response to your formal complaint alleging that the City of Richmond ("City") violated the Access to Public Records Act by failing to disclose portions of city employees' cell phone records. I find that the City of Richmond violated the Access to Public Records Act.

BACKGROUND

You requested that the City of Richmond disclose copies of the cellular phone billing records of city employees for 2003 and 2004. On March 2, 2005, John P. Kenny, the City Controller wrote a letter in response to your request. Mr. Kenny informed you that after he conferred with legal counsel for the City, the City had decided that "due to the confidential nature of many city employee's cell phone numbers, we will not be able to provide you with itemized bills of all employee's records. We will be able to provide you with the employee name and the dollar amount spent for that month by employee."

You filed your formal complaint with my office on March 11, 2005. In your complaint, you contend that the City violated the Access to Public Records Act because the denial does not provide specific statutory authority for non-disclosure of the phone numbers shown on the billing records. You also contend that the name and title of the official responsible for the denial is not given. You also state that not all information should be nondisclosable, and the City has a duty to separate the disclosable information from the nondisclosable information.

I sent a copy of your complaint to the City. Mr. Kenny responded, a copy of which is attached for your reference. In his response, Mr. Kenny states that the City has been cooperating to provide you with many records in response to this and other requests. The City is concerned

about the disclosure of numbers pertaining to calls made by the police to confidential informants, victims of crimes, and suspects. According to Mr. Kenny, the City feels that the potential damage that could be caused by providing this information exceeds the intent of the public records law.

ANALYSIS

The preamble to the Access to Public Records Act states: “It is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Providing persons with the 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.” Ind. Code 5-14-3-1.

The burden of proof for nondisclosure of a record is placed on the public agency that would deny access to the record, not on the person seeking the record. IC 5-14-3-1. A public agency may deny a written request for a record if the denial is in writing and the denial includes: 1) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and 2) the name and the title or position of the person responsible for the denial. IC 5-14-3-9(c)(1) and (2).

As you observed in your complaint, the City has not given you a specific exemption or exemptions for denial of the record. It is not sufficient for the City to state that “due to the confidential nature of the many city employee’s cell phone numbers” it is denying you the record. I am not aware of any statute that makes such information confidential, and in any case, the City was required to state what statute makes this information confidential.

In addition, the City’s claim of confidentiality as characterized in its response to your complaint seems to be limited to the cell phone bills of the police, who call confidential informants and victims. Yet, it is my understanding that the cell phone bills do not disclose the nature of the call or reveal the identity or significance of the person called. Also, not all city employees are members of the police force. No rationale for confidentiality of the cell phone records of non-police employees has been proffered by the City. Although I do not find a basis in statute for nondisclosure of the police employees’ cell phone records, even if part of the record or records could be withheld, the remainder of the record must be disclosed. IC 5-14-3-6(a).

Where the City has not stated any specific basis for nondisclosure, it is difficult (and not necessary) to refute the City’s position on its cell phone records. However, I note that the Indiana Court of Appeals has rejected a claim by the City of Elkhart that the cell phone records of its city department heads are not disclosable under IC 5-14-3-4(b)(10), the “administrative and technical information” exception. *City of Elkhart v. Agenda: Open Government, Inc.*, 683 N.E.2d 622 (Ind. Ct. App. 1997).

The failure of the City to disclose the cell phone records of city employees was a violation of the Access to Public Records Act, actionable under IC 5-14-3-9(e).

I find that the City did not violate the requirement that it give the name and title or position of the person responsible for the denial of the record. The denial letter is signed by John P. Kenny, who is the City Controller. Although his letter of denial admits to having consulted with the City's legal counsel, the law does not require that the public agency disclose the name and title of everyone that the public agency consulted with regarding a request for records. In fact, Mr. Kenny was the very person that you sent your request for records to.

CONCLUSION

For the foregoing reasons, I find that the City of Richmond violated the Access to Public Records Act when it denied you part of the city employees' cell phone records.

Sincerely,

Karen Davis
Public Access Counselor

cc: John P. Kenny