



STATE OF INDIANA

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September 18, 2009

Mr. Eric M. Cox
The Banner
24 N. Washington St.
P.O. Box 116
Knightstown, IN 46148

Re: *Formal Complaint 09-FC-190; Alleged Violation of the Access to Public Records Act by the Town of Carthage*

Dear Mr. Cox:

This advisory opinion is in response to your formal complaint alleging the Town of Carthage, Indiana ("Town") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*, by denying you access to public records. For the following reasons, my opinion is that the Town violated the APRA when it denied your request for access to personnel records that are disclosable under I.C. § 5-14-3-4(b)(8)(A).

BACKGROUND

In your complaint on behalf of *The Banner*, you allege that the Town violated the APRA by withholding personnel information and other public records regarding the Town's town marshal, Dan Murphy, and interim town marshal, Rick Bush, who is currently the town council president and "is or was a paid deputy for the Town's police department." You further allege that you filed three public records requests with the Town in early July seeking, among other things, personnel information regarding Messrs. Murphy and Bush and copies of Mr. Bush's time cards.

On July 17, the Town's attorney, Adam Forrest, responded to the requests by agreeing to release only their names, job titles, total compensation, and business address and phone number. In his response, Mr. Forrest cited to I.C. § 5-14-3-4(b)(22) in support of the Town's position that the disclosable personnel information was limited to the foregoing because Messrs. Murphy and Bush serve, at times, in an undercover capacity.

You dispute the Town's reliance upon I.C. § 5-14-3-4(b)(22) and argue that neither Mr. Murphy nor Mr. Bush are "undercover officers" within the meaning of that exemption. According to your complaint, the town marshal and interim town marshal are well known in the area, publicly appointed by the town council, and carry out their duties,

for the most part, in an open and obvious manner. You argue that while they “may occasionally work undercover, this should not be allowed to be used as a means for withholding personnel information that must be released under I.C. § 5-14-3-4(b)(8)(A), (B), and (C).”

The Town’s response to your complaint is enclosed for your reference. The Town initially concedes that I.C. § 5-14-3-4(b)(22) does not permit the withholding of personnel file information described in I.C. § 5-14-3-4(b)(8)(B) and (C), but notes that the Town has no responsive documents as to those exemptions. Thus, the only records still at issue are those which fall under I.C. § 5-14-3-4(b)(8)(A), including education and training background information, previous work experience information, and dates of first and last employment. The Town argues that I.C. § 5-14-3-4(b)(22) permits the withholding of such information because Messrs. Murphy and Bush operate in an “undercover capacity” within the meaning of that provision.

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 Town meets the definition of a “public agency” under the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Court during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a). The burden of proof for nondisclosure of a public record is on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record. I.C. § 5-14-3-1.

Notwithstanding subdivision I.C. § 5-14-3-4(b)(8)(A) of the APRA, the name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first employment of a law enforcement officer who is operating in an undercover capacity may be withheld from disclosure at the discretion of the public agency. I.C. § 5-14-3-4(b)(22). The Town contends that Messrs. Murphy and Bush “operate in an undercover capacity” and, as such, 4(b)(8)(A) records related to them are exempt from disclosure. However, it is my opinion the Town has not provided sufficient information to substantiate that claim. Consequently, the Town has inappropriately applied the 4(b)(22) exception.

In its response, the Town included the following language in support of its position:

Clearly, common sense would lead one to the conclusion that there are times when law enforcement personnel, even Town Marshals, conduct investigations in their own jurisdiction or assist other law enforcement personnel in

other jurisdictions with their investigations, and do so without identifying themselves as a law enforcement officers [sic], without wearing the officer's uniform, or without driving the officer's patrol car. As such, these law enforcement personnel are operating in an undercover manner.

* * *

There can really be no doubt that the Town Marshall and interim Town Marshall for the Town of Carthage, Indiana, act in this "undercover agent" manner at times.

Neither of these two excerpts includes any facts suggesting that the town marshal and/or interim town marshal has ever actually operated in an undercover capacity. The former language consists of hypothetical scenarios unconnected to the instant situation; the latter is a conclusory statement that is also devoid of any factual support. Thus, the Town has failed to offer any facts to show that the marshal and interim marshal "operate in an undercover capacity" within the meaning of I.C. § 5-14-3-4(b)(22). Under these circumstances, it is my opinion that the Town cannot carry its burden of proof under I.C. § 5-14-3-1 regarding the nondisclosure of the 4(b)(8)(A) records.

In arguing that 4(b)(22) applies to Messrs. Murphy and Bush, the Town cites to Counselor Neal's 2007 decision regarding the Montgomery County Sheriff's Department. *Opinion of the Public Access Counselor 07-FC-263* (advising that the 4(b)(22) exemption permitted the agency to withhold the job title and job description of a deputy sheriff because he "sometimes work[ed] in an undercover capacity"). The facts underlying that decision are distinguishable from the instant situation, however. In its response to the complaint, the Montgomery County Sheriff's Department explicitly stated that the deputy sheriff subject to the request operated undercover in a plain clothes surveillance capacity. There was also no indication that the Montgomery County deputy sheriff was subject to any public exposure. In the instant matter, however, there are no indications that either Mr. Murphy or Mr. Bush ever *actually* operated in an undercover capacity. Moreover, the Town's marshal is publicly appointed by the Town's council and carries out his/her duties in an open and obvious manner. Consequently, the Town's reliance upon Counselor Neal's opinion is not persuasive.

The Public Access Counselor recognizes the dangers inherent in police work generally and undercover police work in particular. As in the case of the Montgomery County Sheriff's Department, considerable discretion should be granted to law enforcement agencies that withhold 4(b)(8)(A) records on the basis of a 4(b)(22) exemption where the agency responds with factual information demonstrating that the officer is "operating in an undercover capacity." In the instant matter, however, the Town has failed to come forward with anything other than hypothetical and conclusory statements in support of its position. Therefore, it is my opinion that the Town's response is not sufficient to meet its burden of proof to show that the records are exempt from disclosure.

CONCLUSION

For the foregoing reasons, it is my opinion that the Town violated the APRA by refusing to provide personnel records that are disclosable pursuant to I.C. § 5-14-3-4(b)(8)(A).

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive style with a large, sweeping initial 'A'.

Andrew J. Kossack
Public Access Counselor

Cc: Adam G. Forrest, Town Attorney, Town of Carthage, Indiana