



# STATE OF INDIANA

**MITCHELL E. DANIELS, JR., Governor**

**PUBLIC ACCESS COUNSELOR  
ANDREW J. KOSSACK**

Indiana Government Center South  
402 West Washington Street, Room W470  
Indianapolis, Indiana 46204-2745  
Telephone: (317)233-9435  
Fax: (317)233-3091  
1-800-228-6013  
[www.IN.gov/pac](http://www.IN.gov/pac)

March 24, 2011

Mr. Richard E. Bush  
4624 S. State Road 257  
Velpen, IN 47590

*Re: Formal Complaints 11-FC-73; Alleged Violation of the Access to  
Public Records Act by the Pike County Commissioners*

Dear Mr. Bush:

This advisory opinion is in response to your formal complaint alleging the Pike County Commissioners (“Commissioners”) violated the Access to Public Records Act (“APRA”), Ind. Code § 5-14-3-1 *et seq.* Enclosed for your reference is the response from the Commissioners’ attorney, Val J. Fleig. I granted your request for priority status under 62 Ind. Admin. Code 1-1-3(3).

## BACKGROUND

In your complaint, you allege that on January 17, 2011, you filed a records request with the Commissioners for a copy of the application of Pike County Highway Bridge Foreman Josh Byrd. In a letter dated January 26, 2011, to this office concerning a previous APRA complaint, the Commissioners’ attorney, Val Fleig, stated that the application did not exist. On March 7th, the Pike County Prosecutor filed a petition stating that the Commissioners’ secretary, Melissa Bryant, admitted to an Indiana State Police investigator that she had shredded the application at the direction of Commissioner Mark Flint. You argue that the Commissioners violated the APRA by unlawfully destroying a public record and, consequently, denying access to the same.

In response to your complaints, Mr. Fleig states that the Commissioners hired Mr. Byrd at a public meeting on January 3, 2011. At that time, he had not yet filed an employment application. On January 13th, Mr. Byrd submitted an application to Ms. Bryant at her courthouse office. Mr. Fleig notes that highway department personnel files are stored at the highway garage. When Ms. Bryant reviewed the application and noticed it was incomplete, she contacted Commissioner Flint and informed him that it was not complete. Commissioner Flint then “rejected the application for its incompleteness, told Melissa Bryant to shred it, and Mr. Byrd would need to fill out a new one.” Mr. Fleig claims that the application was shredded due to the personal data contained therein, such

as Mr. Byrd's social security number. Subsequently, Mr. Byrd asked whether it was legally necessary for him to file an application for a job for which he had already been hired. Mr. Byrd was purportedly concerned about possible unauthorized disclosure of his personal information. In response to those concerns, Mr. Fleig informed him that an application was not required by law. Consequently, Mr. Fleig argues that the application "was rejected and not accepted by the County. For this reason it did not become a part of Mr. Byrd's personnel file or a public record."

## ANALYSIS

The public policy of the APRA states that "(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 Commissioners are a public agency for the purposes of the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Commissioners' public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

A "public record" means any writing, paper, report, study, map, photograph, book, card, tape recording or other material that is created, received, retained, maintained or filed by or with a public agency. I.C. § 5-14-3-2. Therefore, the application at issue here was a "public record" under the APRA when it was received by the Commissioners, even if the Commissioners later deemed the application incomplete. The APRA requires public agencies to protect public records from loss, alteration, mutilation, or destruction, I.C. § 5-14-3-7(a), and to maintain and preserve public records in accordance with applicable retention schedules. *See* I.C. § 5-14-3-4(e). The applicable retention schedule in this case is the County/Local General Retention Schedule, available at [http://www.in.gov/icpr/files/county\\_general.pdf](http://www.in.gov/icpr/files/county_general.pdf), which the Pike County Commission on Public Records adopted at its October 6, 2010, meeting. According to that schedule, employment applications should be retained for three years, and personnel files of public employees should be retained for 75 years.

Mr. Fleig argues that the Commissioners could destroy the application because it was rejected. However, the retention schedule specifies that records may only be destroyed after the expiration of the retention period and upon completion of a Notice of Destruction: "Records listed on this schedule may be destroyed upon completion of a *Notice of Destruction, State Form 44905* and distribution of copies of the form to the Clerk of the Circuit Court of the County and to the INDIANA COMMISSION ON PUBLIC RECORDS, 402 West Washington Street W472, Indianapolis, IN 46204." Because nothing before me indicates that the Commissioners destroyed the application in accordance with the retention schedule, and because I see no other legal basis for the destruction of the application, it is my opinion that the Commissioners violated subsection 4(e) of the APRA by failing to preserve the application in accordance with the applicable records retention schedule.

## CONCLUSION

For the foregoing reasons, it is my opinion that the Commissioners violated the APRA by failing to preserve a public record in accordance with the applicable retention schedule.

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: Val J. Fleig