STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
HEATHER NEAL

Indiana Government Center South
402 West Washington Street, Room W460
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

June 10, 2009

Timothy Turner
209 North Main Street
Kokomo, Indiana 46901

Re: Formal Complaint 09-FC-124; Alleged Violation of the Access to Public Records Act by the Howard County Legal Department

Dear Mr. Turner:

This advisory opinion is in response to your formal complaint alleging the Howard County Legal Department ("County") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to records. The County's response to the complaint is enclosed for your reference. It is my opinion the County did not violate the APRA.

BACKGROUND

You allege that on May 6, 2009 you requested copies of electronic mail messages sent and received in the last one hundred days by a number of Howard County officials. By my count, you have requested messages sent and received by nineteen officials. In addition, you requested the total number of messages withheld and the amount of staff time it took to review and sort the messages. You also asked for an accounting of all websites visited by all employees within the county within the last thirty days.

On May 7 County Attorney Lawrence Murrell denied you access to the requested records. Mr. Murrell's letter cited a number of reasons for denial, which I will address in the next section of this opinion. You allege the County has violated the APRA by denying you access to the requested records. You filed the present complaint on May 11.

The County responded to the complaint by letter dated May 22 from Mr. Murrell. Mr. Murrell contends that the primary reason for denial is that the request failed to identify with reasonable particularity the record(s) being requested. Mr. Murrell contends this would be akin to asking, before the advent of electronic mail, for all correspondence for the last one hundred days. Mr. Murrell contends that if and when the County receives a request with enough particularity to determine which messages are sought, the records will be provided, subject to exceptions to disclosure. Regarding the other items you requested, the County contends none are records which have already been created.

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 County is a public agency for the purposes of the APRA. I.C. § 5-14-3-2(m). Any person has the right to inspect and copy the public records of the County 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).

A request for records may be oral or written. I.C. §§ 5-14-3-3(a), 5-14-3-9(c). If the request is delivered by mail, facsimile, or electronic mail and the agency does not respond to the request within seven days of receipt, the request is deemed denied. I.C. § 5-14-3-9(b). The County received your request on May 6 and responded to the request on May 7, well within the seven days allowed by the APRA. *See* I.C. § 5-14-3-9(b).

With your request, you seek "all emails sent and received by you in the last 100 days." The County argues this request does not identify with reasonable particularity the record(s) being requested. The APRA requires that a request for access to records identify with reasonable particularity the record being requested. *See* I.C. § 5-14-3-3(a). "Reasonable particularity" is not defined in the APRA. "When interpreting a statute the words and phrases in a statute are to be given their plain, ordinary, and usual meaning unless a contrary purpose is clearly shown by the statute itself." *Journal Gazette v. Board of Trustees of Purdue University*, 698 N.E.2d 826, 828 (Ind. Ct. App. 1998). Statutory provisions cannot be read standing alone; instead, they must be construed in light of the entire act of which they are a part. *Deaton v. City of Greenwood*, 582 N.E.2d 882 (Ind. Ct. App. 1991). "Particularity" as used in the APRA is defined as "the quality or state of being particular as distinguished from universal." *Merriam-Webster Online, www.m-w.com*, accessed July 18, 2007.

In my opinion, your request is universal rather than particular. You have requested not just an entire category of records, but all records sent or received using a certain form of communication. It is important to remember that electronic mail is a method of communication and not a type of record. Electronic mail is one way an agency might receive correspondence. As Mr. Murrell indicates, and as I often advise people, electronic mail messages are similar to snail mail or facsimile transmissions. And certainly few individuals would disagree that a request for any piece of mail sent or received by an agency or official within the last one hundred days would be considered an overly broad request which does not identify with reasonable particularity the record being requested. The same is true for electronic mail messages. That the correspondence is communicated using a different medium does not change the scenario; in my opinion a request which identifies the records only by the particular method of communication utilized is exactly the type of request that I.C. § 5-14-3-3(a) prohibits.

I have previously issued an advisory opinion in a similar matter regarding a request for access to electronic mail messages. In *Informal Opinion 08-INF-23*, I wrote the following:

> If, on the other hand, the request identified the records with particularity enough that the School could determine which records are sought (e.g. all emails from a person to another for a particular date or date range), the School would be obligated to retrieve those records and provide access to them, subject to any exceptions to disclosure.
> *Informal Opinion 08-INF-23*, available at www.in.gov/pac.

Similarly, it is my opinion here that your request is overly broad. If your request identified particular records in such a way that the agency could identify which records you seek, the agency could better address your request. For instance, you might narrow your request to messages between a county official and certain other individual(s) for certain dates. In some cases, an agency may also be able to sort messages on the basis of the subject of the email. But this type of search is only as good as the information which appears in the "Subject" line of each electronic mail and is only feasible where an agency has the technology to conduct a search other than a manual search.

Regarding the other items you requested, the County asserts that none of the items you requested are maintained as records of the agency. In other words, the County would have to create new documents to provide the requested information. Nothing in the APRA requires a public agency to *develop* records or information pursuant to a request. The APRA requires the public agency to *provide access* to records already created. As such, it is my opinion the County has not violated the APRA for refusing to create new records in order to respond to your request.

I would note that I have previously addressed the issue of a request for access to the internet history of a particular public agency computer. In an informal advisory opinion issued January 4, 2008, I indicated my opinion that generally internet history of a public employee or official is not a public record. You may view the entire opinion at http://www.in.gov/pac/informal/files/informalInquiryInternetHistory86.pdf.

CONCLUSION

For the foregoing reasons, it is my opinion the County has not violated the APRA.

Best regards,

Heather Willis Neal

Heather Willis Neal
Public Access Counselor

Cc: Lawrence Murrell, Howard County Attorney