STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE

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

May 21, 2012

Officer Patrick Cassin
Porter County Sheriff's Office
2755 South State Road 49
Valparaiso, Indiana 46383-7913

Re: Informal Inquiry 12-INF-24; Animal Control Ordinances

Dear Mr. Cassin:

This is in response to your informal inquiry regarding a variety of issues concerning the Access to Public Records Act ("APRA"), Ind. Code. § 5-14-3-1 *et seq.*, which have arisen in the process of Porter County ("County") revising its Animal Control Ordinances. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response to your inquiry. My opinion is based on the applicable provisions of the APRA.

BACKGROUND

The County is in the process of revising its Animal Control ordinances. As part of this process, the County is creating a Trap-Neuter-Return program ("TNR") for feral cats, collecting and maintaining new records on owners of aggressive animals, and creating a database of livestock owners to ensure the expedited return of any stray, larger animals. In creating the TNR, owners and caretakers of feral cats will be authorized to manage colonies. The contact information for the colony managers will be maintained by the Porter County Sheriff's Department ("Department").

You have been advised by Laura Nirnberg, Best Friend's Animal Sanctuary, that maintaining this contact information creates a conflict of interest, in that people who object to TNR will request the colony manager's contact information from the Department and then use that information to undermine local TNR efforts and harass colony managers. The current Department policy is that in order to request such information, the requestor must identify the person with reasonable specificity, by providing the person's name, address, and social security number. You believe that the requirement of reasonable particularity would prevent the sort of interference that Ms. Nirnberg has cautioned against. Ms. Nirnberg has further suggested that the Department could require the contact information to be maintained by a third-party, non-for profit entity, in order to prevent the disclosure of the contact information. The same privacy

concerns would apply to the owners of aggressive animals and local owners of livestock.

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." *See* I.C. § 5-14-3-1. Accordingly, any person has the right to inspect and copy IPS's records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within twenty-four hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c).

The APRA requires that a records request "identify with reasonable particularity the record being requested." I.C. § 5-14-3-3(a)(1). "Reasonable particularity" is not defined in the APRA, but the public access counselor has repeatedly opined that "when a public agency cannot ascertain what records a requester is seeking, the request likely has not been made with reasonable particularity." *See Opinions of the Public Access Counselor 10-FC-57 and 08-FC-176*. However, because the public policy of the APRA favors disclosure and the burden of proof for nondisclosure is placed on the public agency, if an agency needs clarification of a request, the agency should contact the requester for more information rather than simply denying the request. *See generally* IC 5-14-3-1; *Opinion of the Public Access Counselor 02-FC-13*.

In regards to the contact information that is to be maintained by the Department, I.C. § 5-14-3-3(f) provides the following:

> (f) Notwithstanding the other provisions of this section, a public agency is not required to create or provide copies of lists of names and addresses (including electronic mail account addresses) unless the public agency is required to publish such lists and disseminate them to the public under a statute. However, if a public agency has created a list of names and addresses (excluding electronic e-mail addresses) it must permit a person to inspect and make memoranda from the list unless access to the list is prohibited by law.

It would not appear from your inquiry, that the anticipated request of the contact information would be considered for a political or commercial purpose.

In regards to reasonable particularity, it is my opinion that a request received by the Department for "the contact information (i.e. list of names and addresses) for all Colony Manager's" would be reasonably particular under I.C. § 5-14-3-3(a). If the County maintained such a list, it would be required to comply with the APRA in producing the record. I am not aware, nor have you referenced, any state or federal statute that would make the contact information confidential. The APRA does not contain a general "privacy exception." If the Department did not maintain such a list, it would not be required to create a list in response to a request. I do not believe that the requestor would be required to provide a social security number and date of birth for a colony manager in order to receive the contact information.

It would not appear that the contact information would be required to be published and disseminated to the public pursuant to a state statute. Pursuant to subsection (f), if the Department created a list of names and addresses for the Colony Managers, it would *not* be required to produce a copy of the list in response to a request. However, the Department would be required to allow the list to be inspected and allow the requestor to make memoranda from the list, unless access to the list is prohibited by law, which does not appear to be applicable here.

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. *See* I.C. §5-14-3-2. Generally, the APRA does not require public agencies to produce records that the agency does not physically maintain. "[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA." *Opinion of the Public Access Counselor 01-FC-61*; *see also Opinion of the Public Access Counselor 08-FC-113* ("If the records do not exist, certainly the [agency] could not be required to produce a copy….").

However, the Indiana Court of Appeals held in *Knightstown* that because a private entity created a settlement agreement *for* a public agency, the settlement agreement was a public record subject to disclosure under the APRA. *Knightstown*, 838 N.E.2d at 1134. The Court did not find that the language "created, received, retained, maintained or filed by or with a public agency" in I.C. §5-14-3-2 excepted from the definition records created *for* or *on behalf of* a public agency. Furthermore, the Court said it would amount to a tortured interpretation of the statute if private attorneys could ensconce public records in their file room in order to deny the public access. *Id.* at 1133. In other words, where records are created or maintained for a public agency but kept in the possession of an outside entity, the Court of Appeals ruled that the agency is obligated to retrieve the records and make them available for inspection and copying upon request. *See Opinion of the Public Access Counselor 10-FC-219*

As applicable here, the Department could not bypass the requirements of disclosure of the contact information by having a separate, non-governmental entity maintain the record. From you have provided, the non-governmental entity would be

maintaining the record for or on behalf of the Department. As such, the record would still be considered a public record of the Department for the purposes of the APRA.

If I can be of additional assistance, please do not hesitate to contact me.

Best regards,

Joseph B. Hoage
Public Access Counselor