

September 22, 2006

C. Abraham Murphy  
McMains LaPointe, P.C.  
20 North Meridian Street  
Suite 9000  
Indianapolis, IN 46204

*Re: Informal Inquiry Response: Denial of Access to List of Library Advocates by the Indianapolis-Marion County Public Library*

Dear Mr. Murphy:

As counsel for the American Federation of State, County, and Municipal Employees, Council 62 (“AFSCME”), you have requested an informal opinion from the Office of the Public Access Counselor. Pursuant to Ind.Code 5-14-4-10(5), I am issuing this letter in response to your request.

Specifically, you have asked me to issue an opinion regarding whether the Indianapolis-Marion County Public Library (“IMCPL” or “Library”) violated the Access to Public Records Act when it denied a list of names, addresses, and other information about persons who have signed up to be Library Advocates.

#### BACKGROUND

In April 2006, David Warrick, Executive Director of AFSCME, requested a copy of

“A list of all individuals who have expressed a desire to be a “Library Advocate” by signing up on the IMCPL web site, completing and returning a “I want to become a Library Advocate!” card, etc.”

Mr. Warrick requested specifically that the list include the person’s name, address, city, state, zip code, e-mail, and phone number.

On May 1, 2006, the IMCPL's Chief Executive Officer Linda Mielke wrote Mr. Warrick a letter denying the request. The IMCPL based its denial of the record on two exemptions. The first was under Indiana Code 5-14-3-4(a)(2), providing that documents "declared confidential by rule adopted by a public agency under specific authority to classify public records as confidential granted to the public agency by statute."

The second exemption was for "Library or archival records which can be used to identify any library patron" under Ind. Code 5-14-3-4(b)(16). Ms. Mielke stated that the IMCPL has adopted a policy that states that library records that can be used to identify any library patron are confidential records, and are not available for public disclosure.

You sent me an e-mail challenging this denial. AFSCME maintains that the exemption for patrons of the library is inapplicable to Library Advocates for several reasons:

"First, one can be a Library Advocate without ever being a patron. There is no requirement that Library Advocates donate funds, hold library cards, utilize services provided by IMCPL, or even ever physically visit a library branch."

In addition, you allege that in becoming a Library Advocate, individuals expressly agree to the public disclosure of their names to their elected officials. Because the IMCPL website describes a Library Advocate as persons who have committed themselves to publicly expressing or advocating on behalf of the IMCPL through letter writing campaigns, it is incongruous for IMCPL to say that it must protect the identity of its Library Advocates when these individuals have agreed to have their identity publicly disclosed. Finally, AFSCME contends that the intent of the exemption is to protect patrons from having their reading, viewing, or research materials and records publicly disclosed. AFSCME's request for records does not seek this type of information.

I sent a copy of your request for an informal opinion to the IMCPL. In response, I received a letter from Robert B. Scott, an attorney representing the IMCPL. Mr. Scott confined his argument to the exemption at IC 5-14-3-4(b)(16), but believes that IC 5-14-3-4(a)(2) protecting records classified as confidential by agency rule is authority to withhold the records. I offer no opinion on this exemption.

Mr. Scott argues under IC 5-14-3-4(b)(16), the IMCPL could classify the library patron records as confidential, and the IMCPL has done just that in adopting a policy that any information the Library maintains on patrons and their use of library materials is private and confidential. In addition, Library policy states that "library records that can be used to identify any library patron are confidential records, and are not available for public disclosure."

Mr. Scott argues that the policy applies to the list of Library Advocates, because Library Advocates are patrons of the library. He relied on the dictionary definition of "patron," which would not limit a patron to only those who hold library cards. Rather, a library card bestows the benefits of membership to the Library. Notwithstanding the fact that the majority of individuals who signed up as Library Advocates are existing library cardholders, the Library has considered

anyone who uses its facilities, regardless of whether they use or possess a library card, as a library patron. Moreover, the IMCPL does not solicit the general public to be Library Advocates because the IMCPL does no mass mailings to the general public, and does not arrange for media releases or paid advertising in the newspaper or on the radio. Rather, the IMCPL places its brochures within the numerous branch facilities and has included the program on the Library's own website. The IMCPL promises that the identities of persons who sign up as Library Advocates will remain confidential.

## ANALYSIS

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the Access to Public Records Act ("APRA"). Ind. Code 5-14-3-3(a). The APRA either requires or permits a public agency to withhold a record if the record falls within any one of the classifications of records in IC 5-14-3-4.

The APRA is to be liberally construed to implement the policy of openness. IC 5-14-3-1. Liberal construction of the APRA requires that exceptions to disclosure be narrowly construed to effectuate the purpose of the statute. The burden of proof for nondisclosure of a record is on the public agency that denies access to the record. IC 5-14-3-1.

When construing public disclosure laws, Indiana courts have held that although the exceptions should be construed strictly, this does not mean that expressed exceptions specified by the legislature are to be contravened. *Journal Gazette v. Board of Trustees of Purdue University*, 698 N.E.2d 826, 828 (Ind. Ct. App. 1998) (citations omitted).

The exemption at issue in this matter is IC 5-14-3-4(b), allowing a public agency to withhold

"Library or archival records: (A) which can be used to identify any library patron..."

Although several terms used in the APRA are defined in IC 5-14-3-2, the words "library patron" or "patron" are not defined. Yet, construction of the term is critical to determining whether the IMCPL can withhold the list of Library Advocates under the exemption. The Indiana Code relating to public libraries states that the State shall encourage the establishment of public libraries, and that public libraries are to provide free library services for all individuals in order to meet the educational, informational, and recreational interests and needs of the public. IC 36-12-1-8. Library services include providing reference, loan, and related services to library patrons. IC 36-12-1-8(c). The law also provides that library boards are to adopt policies on the appropriate use of Internet and other computer networks by library patrons in all areas of the library. IC 36-12-1-12. Indiana Code 36-12 does not further define "library patrons."

There is no Indiana case law defining "library patron" or "patron." Were it necessary to interpret the APRA to determine what the General Assembly intended this phrase to mean, courts would rely upon the common and ordinary, dictionary meanings of the words used. *Crowley v. Crowley*, 588 N.E.2d 576, 578 (Ind. Ct. App. 1992). "Patron" is defined as "1. A person who is a customer, client, or paying guest, especially a regular one, of a store, hotel, or

the like. 2. a person who supports with money, efforts, or endorsement an artist, charity, etc." RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (2001), 971. Rules of statutory interpretation also require that one construe the phrase "library patron" in light of the entire APRA. *Deaton v. City of Greenwood*, 582 N.E.2d 882, 885 (Ind. Ct. App. 1991).

It is my opinion, based on the above authorities, that the IMCPL may withhold the list of Library Advocates, because this list is a "library record...which can be used to identify any library patron." The IMCPL has stated that it invites individuals to sign up as Library Advocates by soliciting persons who visit library branches or visit the IMCPL's website. The individuals who sign up to participate as Library Advocates are predominantly library cardholders, according to the IMCPL. Even if not library cardholders, one can be a patron of the library by visiting the library and using reference or other materials, which is implicit in the General Assembly's use of "library patron" to describe library services. The plain meaning of patron includes not only customers and clients, but also those who support something with money, efforts, or endorsement. Because the IMCPL solicits persons who are likely to patronize the library, and because by signing up to be called upon to offer public support for the library, one may be called a patron, I think that the IMCPL has met its burden of proving that the list of Library Advocates falls within the exemption in IC 5-14-3-4(b)(16). The IMCPL's promise to not share the person's information with anyone is indicative of the IMCPL's treatment of the list of Library Advocates as private patron information, although such a promise of confidentiality would not by itself support withholding the record in the absence of an exemption.

Support for the IMCPL's denial of the record is not diminished by the policy behind the library patron exemption: that library patrons' borrowing and usage habits remain private. True though this purpose may be, the exemption as written protects the mere identity of a library patron.

Also unavailing is your position that it is incongruous for IMCPL to say that it must protect the identity of its Library Advocates when these individuals have agreed to have their identity publicly disclosed. First, I find no support for your assertion that Library Advocates have committed themselves to public advocacy at the moment they sign up. In fact, the Library Advocates are not conscripted to publicly support the IMCPL once having signed up. Rather, the list is used to solicit individuals to do a specific thing to support the IMCPL at some time in the future. As the IMCPL observed, a Library Advocate could agree to write anonymous letters to legislators. In any case, the issue is not whether a Library Advocate could agree to publicly support the IMCPL and thereby reveal they are a library patron. The question is whether a list of persons who are Library Advocates is subject to privacy protections under the library patron exemption. I believe that the plain meaning of "library patron" would include Library Advocates, under the facts presented to me.

As you may know, you may file a lawsuit to compel the IMCPL to disclose the record in the event that you believe you are entitled to the list in spite of this opinion. If you do so and you prevail, you would be entitled to attorney fees, court costs, and reasonable expenses of litigation. IC 5-14-3-9(i).

Sincerely,

Karen Davis  
Public Access Counselor

cc: Robert B. Scott