

June 19, 2001

Mr. Steve Kepley  
9177 State Rd. 64  
Georgetown, IN 47122

*Re: Advisory Opinion 01-FC-31; Alleged Violations of the Access to Public Records Act by the Family and Social Services Administration and State Personnel Department.*

Dear Mr. Kepley:

This is in response to your formal complaint, which was received on June 14, 2001. You have alleged that the Family and Social Services Administration ("FSSA") and the State Personnel Department ("State Personnel") violated the Indiana Access to Public Records Act ("APRA") Indiana Code chapter 5-14-3. Specifically, you claim:

1. that the charging of ten cents (\$.10) per page is improper;
2. that the FSSA failed to provide the public records you requested;
3. that you should not have to pay the direct cost for retrieval of email messages;
4. and that you should not have to pay the direct cost of the re-creation of the record you requested.

Ms. Elizabeth A. Brown, Deputy General Counsel for the FSSA, responded in writing to your complaint. Mr. Keith Beesley, attorney with State Personnel, responded on behalf of his department. Copies of their responses are included for your reference.

## BACKGROUND

According to your complaint, you have tried for some time to obtain public records from the FSSA and State Personnel. You concede that you have been able to obtain some of the records you have requested, but you contend that you have not received all of the records. According to your complaint, you have not received the following:

1. All training records for Carol Raney in the FSSA.
2. Training records for Kitty McMullins, John Kaiser, and Bruce Weidner, including specific training comments and evaluations that the trainers would have given Kitty McMullins after TANF, Food Stamps and Medicaid training.
3. Employee fact files and evaluations for Shirley Howard and Richard

Lanahan.

#### 4. Second Party Reviews

You admit that you have received some of the records you have requested, and that you have been given an opportunity to receive copies of these records. For those copies, the FSSA charged you ten cents (\$.10) per page. Some of the records you requested are no longer readily available because they have been deleted from the FSSA and State Personnel computers.

In response to your complaint, Ms. Brown stated it is the policy of the FSSA to charge the statutorily prescribed copying fee of ten cents (\$.10) per page. With respect to the records you requested but claim that you have not received, Ms. Brown provided three responses. First, she stated that it is unclear whether some of the documents exist, but she added that if the records do exist you would be provided a copy of them. Second, she asserts that some of the documents do not exist. Third, she asserts that you have already received some of the documents, and that you have now requested additional records. With respect to the deleted email messages, Ms. Brown stated that you were told that you could have access to those records, but that you would be required to pay the direct cost of reprogramming the computer. Finally, with respect to the deleted information, Ms. Brown stated that you were advised that some of the records you requested might have to be constructed from the database, and if that were the case you would be responsible for the direct cost of that programming. You were advised that if you could provide certain case number and/or caseworker information then the FSSA might have been able to prepare the reports without needing the reprogramming; however, you have not provided that information to this point.

Mr. Beesley, in response to your complaint, stated that the only issues to be resolved between you and State Personnel is the propriety of Mr. Beesley's email response of May 1, 2001. Mr. Beesley advised that he was following my interpretation of the APRA when he advised that you would bear the direct cost of retrieving the email messages you requested.

#### 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." Ind. Code § 5-14-3-1. The FSSA and State Personnel are both public agencies for the purpose of the APRA. Ind. Code § 5-14-3-2. Therefore, any person has the right to inspect and copy the public records of these agencies during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under Indiana Code section 5-14-3-4. Ind. Code § 5-14-3-3.

However, Indiana Code section 5-14-3-3 provides in relevant part that "a request for inspection and copying must identify with *reasonable particularity* the record being requested." (Emphasis added.) While the phrase "reasonable particularity" appears to be clear, 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 meaning. *Crowley v. Crowley*, 588 N.E.2d 576, 578 (Ind. App. 1992). "Particularity" is defined as "the state of being particular rather than general." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1981), 956.

Statutory interpretation also requires that one construe the phrase "reasonable particularity" in light of the entire APRA. *Deaton v. City of Greenwood*, 582 N.E.2d 882, 885 (Ind. App. 1991). Since the APRA favors disclosure and the burden of proof for the nondisclosure is on the public agency, the agency should contact the requestor for more information if it is necessary to respond to a request.

It is my opinion that the initial burden, requesting records with reasonable particularity, was upon you. Ms. Brown in her response indicated that one of the difficulties in this on-going process was the fact that you have made numerous and on-going requests for records, including modifications of previous requests, and that you have contacted a number of different people in the FSSA regarding your requests. Although this may have caused some confusion within the FSSA, the burden was on them to seek clarification of your request. Therefore, to the extent that your request was unclear initially or became unclear during the process the burden was on the FSSA to seek clarification of your request.<sup>1</sup>

Based on a discussion you had with my staff attorney Sandy Barger and your complaint, you have made four complaints against the FSSA and one against State Personnel. I have addressed each of those below.

### **Ten Cents (\$.10) Per Page Copy Fee**

In your complaint, you agree that the FSSA can charge up to ten cents (\$.10) per copy, however, you contend that the FSSA has failed to charge that amount uniformly as required under Indiana Code section 5-14-3-8(c). You contend that the local Department of Family and Children office has allowed copies of file material to be released to clients and their representatives without cost. You also contend that information has been released to other employees without a charge. Ms. Brown states in her response that "it is the policy of the FSSA to charge the statutorily prescribed copying fee of 10 cents per page for copies provided under the Access to Public Records Act." However, she did state that if it would not be cost effective to process the payment then the fee is waived. As an example, she stated that if the requested document is two pages in length then the fee would be waived because it is not cost effective to process a twenty cent (\$.20) payment. It is my opinion that it is not a violation of the APRA for the FSSA to charge ten cents (\$.10) per page. Furthermore, it is not a violation for the FSSA to determine that for a small number of documents it is not cost effective for the FSSA to process the payment and consequently waive the fee as long as this is done in a uniform manner.

### **Production of Documents**

You have alleged that the FSSA has failed to provide several documents that you requested. In a conversation that you had with my staff attorney on June 15, 2001, you stated that your complaint was that the FSSA has failed to produce the records you requested and not that the FSSA failed to respond to

your request. There is no statutorily required amount of time under the APRA in which a public agency must produce documents; only time frames in which to respond to requests. Ind. Code § 5-14-3-9. When there is an allegation that the public agency failed to produce records the public agency must show that the public agency did not have to provide the requested documents by statute. Specifically you contend that you have not been provided copies of the following:

1. All training records for Carol Raney in the FSSA.
  2. Training records for Kitty McMullins, John Kaiser, and Bruce Weidner, including specific training comments and evaluations that the trainers would have given Kitty McMullins after TANF, Food Stamps and Medicaid training.
  3. Employee fact files and evaluations for Shirley Howard and Richard Lanahan.
- Second Party Reviews.

First, you contend that you have not been provided copies of all the training records for Carol Raney. In response, Ms. Brown stated that any training records of Ms. Raney are located at her previous worksite, which is outside of the central office, and those records were not transmitted to the central office when she transferred. However, according to Ms. Brown the FSSA is attempting to ascertain if there are any records concerning Ms. Raney that satisfy your request. Ms. Brown did state that if those records do exist you would be given a copy of them. Since I have been unable to determine when you requested these records, I cannot conclude that the FSSA's failure to provide the requested documents is unreasonable. However, it is my opinion that stating that the FSSA is unsure that the documents exist, but that the files would be reviewed and all documents that satisfy your request would be provided is not a violation of the APRA.

Second, you contend that the FSSA has failed to provide you with training records for Kitty McMullin, John Kaiser, and Bruce Weidner. According to Ms. Brown's response, you have been provided all the documents that you have requested with respect to these individuals. Ms. Brown stated in her response that the Clark County Office of Family and Children has reviewed their records and determined that no additional training records are available for these individuals. It is my opinion that with respect to the information you have already received, the FSSA is not required to provide you with additional copies of the information. Ind. Code § 5-14-3-8(e)(2). Furthermore, it is not a violation of the APRA for a public agency to state that the records you requested do not exist.

Third, you claim that you have not been provided fact files and evaluations for Shirley Howard and Richard Lanahan. In response, Ms. Brown stated that the FSSA is trying to ascertain your status as a union representative in order to determine whether the requested records can be excepted from disclosure at the discretion of the agency or whether they are disclosable to you in your capacity as a union representative. It is my opinion that the FSSA has not violated the APRA by attempting to

determine your status as representative in order to determine whether you are entitled to copies of the records that you requested.

Finally, you contend that you have not received copies of the Second Party Review ("SPR") reports. According to Ms. Brown, you have been provided copies of two SPR reports. She also asserted in her response that you were also provided fact files for a number of employees and those files, according to her response, would have included SPR reports for those employees. You have requested additional SPR reports, however, the FSSA was unclear which SPR reports you were seeking and was unable to determine if the requested report exists. As stated above, the burden is on the public agency to seek clarification when a request for records is unclear. Therefore, it is my opinion that the FSSA should have contacted you to seek clarification on the exact report you were requesting rather than just stating that it is unable to determine whether the report you requested exists.

### **Direct Cost for Retrieval of Deleted E-mail.**

You also requested email messages for certain employees in the Department of Family and Children, the FSSA, and State Personnel.<sup>2</sup> Both State Personnel and the FSSA provided some of the information. However, you were told that some of the email messages had been deleted but could be retrieved with considerable work by a network technician. Further, if you wanted those records then you would be responsible for the direct cost associated with the retrieval of those records.

A public agency may charge the direct cost of any reprogramming necessary to separate disclosable from the nondisclosable information. Ind. Code § 5-14-3-6(c). A public agency may also charge the direct cost for providing a duplicate of a computer tape, computer disc, microfilm, or similar analogous record system containing information owned by the public agency. Ind. Code § 5-14-3-8(g). Direct cost is defined as:

One hundred five percent (105%) of the sum of the cost of:

1. The initial development of a program, if any;
2. The labor required to retrieve electronically stored data; and
3. Any medium used for electronic output; for providing a duplicate of electronically stored data onto a disk, tape, drum, or other medium of electronic data retrieval under section 8 (g) of this chapter, or for reprogramming a computer system under section 6(c) of this chapter.

Ind. Code §5-14-3-2.

You contend that you should not be responsible for the direct cost of retrieving these email messages because the work necessary for their retrieval is not reprogramming. While the term "reprogram" appears to be clear, were it necessary to interpret the APRA to determine what the General Assembly

intended this work to mean, courts would rely upon the common and ordinary meaning. *Crowley v. Crowley*, Id. "Reprogram" is defined as "to rewrite or revise a program esp. of a computer." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1985), 1001. If it is necessary to rewrite or revise the existing computer programs at the FSSA and State Personnel in order to fulfill your request, then the FSSA and State Personnel can charge you the direct cost of that reprogramming under the APRA. It is the FSSA and State Personnel's burden to show that the work necessary for retrieval of the records you are seeking constitutes reprogramming. If the FSSA and State Personnel can show that in order for the email messages you are seeking to be retrieved the computers must be reprogrammed, then it is my opinion that under the APRA these agencies can charge you the direct cost for doing such reprogramming.

### **Cost to Re-create Deleted Information**

According to your complaint, you have also requested records that have apparently been deleted from the Clark County Department of Family and Children's computers. You contend that the County Director should be responsible for the direct cost of reprogramming the computer because you believe he caused the information to be deleted. The APRA, however, does not address this issue. The APRA provides that a public agency may charge the direct cost of any reprogramming necessary to separate disclosable and non-disclosable information, and for providing a duplicate of a computer tape, computer disc, microfilm, or similar analogous record system containing information owned by the public agency. Ind. Code §§ 5-14-3-6(c) and 5-14-3-8(g). Therefore, if the document you requested no longer exists, and the FSSA is willing to re-create the document, then the FSSA may charge you the direct cost of the reprogramming of its computers. The reason that the computers must be reprogrammed to provide the documents is irrelevant. It should be noted that according to Ms. Brown's response you were told that you could avoid the cost of the reprogramming of the computers by providing certain case number or caseworker information. However, at the time of her response you had not provided that information.

### **CONCLUSION**

It is my opinion that it is not a violation of the APRA for the Family and Social Services Administration to waive the fee in cases when it is not cost effective to process the payment so long as that policy is applied uniformly. Although the Family and Social Services Administration should have sought clarification as to which SPR report you were seeking, with respect to the other documents requested it is my opinion that the responses by the Family and Social Services Administration did not violate the APRA. If the Family and Social Services Administration and State Personnel Department can support their burden of proving that reprogramming is necessary for retrieving the deleted emails and the re-creation of deleted information, then it is my opinion that these agencies can charge you the direct cost of that reprogramming.

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: Ms. Elizabeth Brown, Deputy General Counsel

Family and Social Services Administration

Mr. Keith Beesley, Attorney, State Personnel

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<sup>1</sup>See Advisory Opinion of the Public Access Counselor, 99-FC-21.

<sup>2</sup>You have provided no information concerning the Clark County Department of Family and Children, therefore, I will limit my response to the FSSA and State Personnel's request for payment of the direct cost of reprogramming their computers.

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