

April 21, 2003

Mr. Bradley L. Wilson  
HASKIN LAUTER  
255 North Alabama Street  
Indianapolis, IN 46204

Re: *Advisory Opinion 03-FC-26; Alleged Denial of Access to Public Records by the City of Fort Wayne Metropolitan Human Relations Commission.*

Dear Mr. Wilson:

This is written in response to your formal complaint, which was received on April 14, 2003.<sup>1</sup> You have alleged that the City of Fort Wayne Metropolitan Human Relations Commission ("Commission") violated the Indiana Access to Public Records Act ("APRA") Indiana Code chapter 5-14-3. Specifically, you allege that the Commission wrongfully denied you access to the investigative file related to your client's complaint to the Commission. Mr. Gerald Foday, attorney for the Commission, responded in writing to your complaint. A copy of his response is enclosed.

For the reasons set forth below, it is my opinion that the Commission may not rely upon Indiana Code section 5-14-3-4(b)(1) as a basis for its nondisclosure of public records to you. Also, it is my opinion that the federal Freedom of Information Act ("FOIA") exception for law enforcement records does not authorize nondisclosure under the circumstances. It is my opinion that the Commission must provide legitimate statutory bases under the APRA for denying you access to the investigative file, in whole or in part, that you requested.

#### BACKGROUND

According to your complaint, in a letter dated March 18, 2003, you requested on behalf of your client, Ms. Shirley Black, the complete investigative file maintained by the Commission on the complaint she filed against General Electric Industrial Systems. As of the date of your complaint, April 10th, you had not received any response from the Commission. Your March 18th letter was a follow up to your original request to the Commission dated January 23, 2003 and the Commission's response that was dated March 13th. The Commission had denied you access based upon Commission rules and the federal Freedom of Information Act, specifically 5 U.S.C. §552(b)(7)(A). In your March 18th request,

you reasserted your January 23rd request stating that you did not believe that the Commission can rely upon the FOIA because that only applies to federal-level public agencies. You also informed the Commission that they failed to state a specific exception or exceptions under the APRA that would permit them to withhold all or part of the investigation file and they had not done so. You conceded as well that there may be information that is considered nondisclosable under Indiana Code section 5-14-3-4 (b)(6), for deliberative material and that you withdrew your request as it related to that material. When you received no response to your March 18th request, you filed your formal complaint with this Office.

In response to your complaint, Mr. Foday stated that the Commission is a public agency for the purposes of the APRA. He also stated that under the state statute and local ordinance, the Commission is authorized to investigate and hear complaints and that it is their position that they constitute a "law enforcement agency" for the purposes of the APRA. According to Mr. Foday, the Commission's denial of access under the investigatory record exception to the APRA was not arbitrary and capricious as it was done in accordance with clearly authorized and established rules of the Commission. The finding of probable cause by the Commission apparently is merely a determination that there is substantial evidence of misconduct, the next step is conciliatory efforts and then the legal investigation for a determination of whether the case is litigation worthy. The investigative file you requested is still an open and active investigation. This will apparently remain the case until the matter is either set for hearing before the Commission, the complainant requests a right to sue from the United States Equal Employment Opportunity Commission ('EEOC") or the Commission determines that the complaint is not litigation worthy. Finally, Mr. Foday addressed the Commission's reference to the FOIA in his initial response. Mr. Foday stated that since the Commission works closely with the EEOC, for example through work-sharing agreements, the Commission is constantly looking to federal law for guidance on records production that affect records that they consider the property of the federal government. For all of these reasons, it is the Commission's position that they did not violate any laws by failing to provide any part of the investigative file to you upon request.

## 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 Commission is clearly a public agency for the purposes of the APRA. Ind. Code §5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Commission 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(a). The APRA places the burden of proof for any nondisclosure of a public record on the public agency, and not on the person making the request. Ind. Code §5-14-3-1.

The Commission, in its response to your formal complaint, has relied upon Indiana Code section 5-14-3-4(b)(1), which provides that a law enforcement agency has discretion over whether or not to disclose its investigatory records. The Commission asserts in its response to your formal complaint that it is a law enforcement agency under the APRA and therefore, the investigative file that you requested is disclosable at their discretion. They have exercised their discretion not to disclose these public records to you.

Indiana Code section 5-14-3-4(b)(1) provides that a law enforcement agency has discretion over the disclosure of investigatory records. Under Indiana Code section 5-14-3-2, a "public agency" includes "any law enforcement agency, which means an agency or department of any level of government that engages in the investigation, apprehension, arrest or prosecution of alleged criminal offenders." Indiana Code section 22-9-1-12.1 is the enabling provision for the Commission, but it does not state that the Commission is a law enforcement agency as defined under the APRA, but merely has powers to investigate complaints filed with the Commission. Further, "investigatory record" is defined at Indiana Code section 5-14-3-2 as "information that is compiled in the course of the investigation of a crime." Again, while the Commission has statutory authority to investigate complaints, these complaints are not criminal in nature, but civil. For these reasons, it is my opinion that the Commission is not a law enforcement agency for the purposes of the APRA. The Commission may not, therefore, rely upon the investigatory records exception, Indiana Code section 5-14-3-4(b)(1) in order to deny you access the investigative file you requested.

#### *Application of the FOIA to the Commission*

In its original response to your request for access to the investigative file, the Commission claimed that the federal FOIA, in particular 5 U.S.C. §552(b)(7)(A), provided the basis for exempting these public records from disclosure. This federal law exemption provides that an agency may withhold:

records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings.

For the purposes of FOIA "agency" means "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. §552(f)(1). Since the Commission is not a federal executive branch agency, and as discussed above, in my opinion not a law enforcement agency, it is my opinion that the Commission may not rely upon 5 U.S.C. §552(b)(7) to deny you access to the investigative file you requested.

#### *Other Bases for Denial of Access*

In your complaint, you referred to the deliberative material exception, Indiana Code section 5-14-3-4 (b)(6) as a possible basis for the nondisclosure of information from the investigative file that you

requested. This may, in fact, be a legitimate basis for nondisclosure of all or part of the public records from the investigative file of the Commission. You also indicated in your letter to the Commission dated March 18th that you are not seeking deliberative material under the APRA. There may also be other legitimate statutory exceptions to disclosure for public records that are part of the Commission's investigative file. For example, The Commission has relied upon the FOIA in its denial of access to public records. There may in fact be specific federal statutes or regulations related to the EEOC and its dealings with local commissions that may provide some basis for denying access to these public records under federal law, which is authorized under Indiana Code section 5-14-3-4(a)(3). The burden of showing that such legal exemptions to disclosure exist, however, lies with the Commission as set forth at Indiana Code section 5-14-3-1. It is my opinion that to the extent that the Commission cannot provide a legitimate statutory basis for nondisclosure of any public records maintained in its investigative file, then the Commission must disclose those public records to you.

While this Opinion is not intended to hold that you will definitely receive any public records from the Commission's investigative file, the Commission has a responsibility to cite to valid, legal bases for any nondisclosure. The exceptions cited by the Commission to date, the investigatory records exceptions under the APRA and the FOIA, do not provide legitimate bases for nondisclosure of these documents.

## CONCLUSION

It is my opinion that the City of Fort Wayne Metropolitan Human Rights Commission is not a law enforcement agency for the purposes of the APRA and therefore, may not rely upon Indiana Code section 5-14-3-4(b)(1) as a basis for its nondisclosure of public records to you. It is also my opinion that the Commission may not rely upon the federal FOIA exception for law enforcement records as the Commission is not a federal agency for the purposes of FOIA. Finally, it is my opinion that the Commission must provide legitimate statutory bases under the APRA for denying you access to the investigative file, in whole or in part, that you requested.

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: Mr. Gerald Foday w/o enclosures

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<sup>1</sup> You have requested priority status under 62 IAC 1-1-3 and it appears that this is appropriate under the facts presented. For this reason, I am issuing this Opinion within seven (7) days after receipt of your complaint.

<sup>2</sup> Under Indiana Code section 5-14-5-7, formal complaints must be filed within thirty (30) days of the alleged denial of access. With respect to your January 23rd request, the denial occurred when the Commission failed to respond within seven (7) days of receiving your request. While this Opinion focuses on your March 18th request, your earlier request and the Commission's response have been considered in formulating this Opinion.