



STATE OF INDIANA

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June 27, 2013

Sheriff Thomas J. Grills
210 N Monroe St.
Versailles, Indiana 47042

Re: Informal Inquiry 13-INF-40/13-FC-159; Alleged Violation of the Access to Public Records Act by the Ripley County Auditor and Board of Commissioners

Dear Mr. Grills:

This informal opinion is in response to your inquiry regarding the Ripley County Auditor ("Auditor") and Board of Commissioners ("Board"), who you maintain have violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* John A. Ertel, Attorney, responded in writing on behalf of the Board and Auditor. His response is enclosed for your reference.

BACKGROUND

In your inquiry, you provide that you hand-delivered a written request for records to the Board on April 15, 2013 to which it failed to acknowledge the receipt of the request within twenty-four (24) hours.

In response to your inquiry, Mr. Ertel initially noted that you filed your formal complaint, dated May 23, 2013, with the Public Access Counselor's Office on May 29, 2013. Pursuant to I.C. § 5-14-5-7, a formal complaint must be filed no later than thirty days after a denial has been issued. You have alleged that the Board and/or Auditor violated the APRA on April 16, 2013. Thus, you do not have standing to file a formal complaint and the issue is moot.

Mr. Ertel has been unable to locate a statute indicating that an acknowledgement of the receipt of a request is required to be documented within a twenty-four hour period. Your request was submitted on ecru colored bond stationery of the Sheriff's Department. Mr. Ertel understands that the Auditor filed marked the original request and made a copy of the request, to which a file stamped copy of the request was returned to your office on the date the request was received. As to the substance of your request, the Auditor and Board have provided all public records responsive to your request within eleven days of the receipt of your 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.” *See* I.C. § 5-14-3-1. The Board and Auditor are considered to be public agencies for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Auditor and the Board 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).

As an initial matter, I.C. § 5-14-5-7 provides that a person that chooses to file a formal complaint with the counselor must file the complaint not later than thirty days after the denial. A complaint is considered filed on the date it is received by the counselor or postmarked, if received more than thirty days after the denial that is subject to the complaint. *See* I.C. § 5-14-5-7(b). Your initial request for records was submitted to the Board and/or Auditor on April 15, 2013. You allege that the agencies failed to properly acknowledge the request within twenty-four (24) hours. Your submitted formal complaint was postmarked by the U.S. Postal Service on May 24, 2013. Therefore, you would not have standing to file a formal complaint in regards to the alleged denial that occurred on or about April 16, 2013. However, you are entitled to make an informal inquiry about the state's public access laws. The substance of your formal complaint will be addressed as an informal inquiry. *See* I.C. § 5-14-4-10(5).

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). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, you hand-delivered a written request for records to the Auditor and/or Board on April 15, 2013. Thus, the agencies would have been required to respond, in writing, within twenty-four hours of receipt of your hand-delivered written request. *See Opinions of the Public Access Counselor 05-FC-176; 11-FC-84; 11-FC-308; 12-FC-63; 12-FC-316; 13-FC-10.* Mr. Ertel understands that that when your request was submitted, the Auditor’s office made a copy of the original request, filed-marked the copy, and returned a copy of the request to the individual who presented it. Alternatively, pursuant to documents filed with your formal complaint, Mr. Bill Wagner advised in an April 19, 2013 email that a response was being prepared to your request. Under the former scenario, the Auditor and/or Board complied with the requirements of section 9 if a file-stamped copy of your request was provided on the date of the request’s receipt. Under the latter, the Auditor and/or Board acted contrary to the requirements if an acknowledgment was not issued until four days after the receipt of your hand-delivered request.

The APRA provides a public agency shall provide records that are responsive to the request within a reasonable time. *See* I.C. § 5-14-3-3(b). The public access counselor

has stated that among the factors to be considered in determining if the requirements of section 3(b) have been met include, the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and redacted prior to disclosure. The APRA requires an agency to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. *See* I.C. § 5-14-3-6(a). Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. *See* I.C. § 5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. *See* I.C. § 5-14-3-7(c). The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *See Opinion of the Public Access Counselor 02-FC-45*. This office has often suggested a public agency make portions of a response available from time to time when a large number of documents are being reviewed for disclosure. *See Opinions of the Public Access Counselor 06-FC-184; 08-FC-56; 11-FC-172*. Further nothing in the APRA indicates that a public agency's failure to provide "instant access" to the requested records constitutes a denial of access. *See Opinions of the Public Access Counselor 09-FC-192 and 10-FC-121*. Here, as all records maintained by the Board and/or Auditor were provided within eleven days of the receipt of your request, it is my opinion that the agencies complied with section 3(b) of the APRA in providing all records within a reasonable period of time.

As to Mr. Ertel's inquiry whether the personal credit card statements of public employee's or officials are considered to be public record, it is my opinion under the facts presented, they would not. To be clear, I am not referring to statements and/or information related as to credit cards issued to the county or by the county to a specific employee or official. A public record is defined as 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(n). Generally, the APRA does not require public agencies to produce records that the agency does not 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..."). Under the scenario presented, a public official and/or employee makes a purchase of goods or services on behalf of the county with their personal credit card. Thereafter, the individual presents a request for reimbursement, along with the appropriate receipts and documentation, to the Auditor. The Auditor has not received a copy of the complete credit card statement of the individual employee or a history of reward points. From what Mr. Ertel has provided, the State Board of Accounts has taken no issue with the process utilized by the county. While all documentation maintained by the Auditor regarding the reimbursement would be considered a public record, I do not believe that the remaining portion of a personal credit card statement, which has never been submitted to the Auditor, would be considered a public record. Even if the record was considered to be a public record, it is likely that the confidential provisions of I.C. §

5-14-3-4(a)(5) would be applicable. The ability of a law enforcement agency to receive copies of said records pursuant to a criminal investigation, not pursuant to the APRA, would be an issue beyond the purview of this office.

Please let me know if I can be of any further assistance.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is stylized with a large initial "J" and a cursive "Hoage".

Joseph B. Hoage
Public Access Counselor

cc: John A. Ertel