

August 11, 2005

Sonny Henry
D.O.C. # 935520
P.O. Box 1111
Carlisle, IN 47838

Re: Formal Complaint 05-FC-141; Alleged Violation of the Access to Public Records Act by the Hammond Police Department.

Dear Mr. Henry:

This is in response to your formal complaint alleging that the Hammond Police Department (“Department”) violated the Access to Public Records Act (“APRA”) by denying your request for public records.

BACKGROUND

On July 19, 2005 you filed a formal complaint with the Office of the Public Access Counselor. Your complaint was assigned formal complaint # 05-FC-141. You state that in response to your request for four (4) latent print cards the Department stated that you must obtain a court order to receive the requested records.

Ms. Kristina C. Kantar, City Attorney, responded to your complaint on behalf of the Department by letter dated July 25, 2005. A copy of that letter is enclosed for your reference. Ms. Kantar stated that you were not told that a court order was required to obtain the requested documents. Ms. Kantar also included correspondence between the Department and you, regarding your request. None of the correspondence indicates that you must obtain a court order to receive the documents. Additionally, your original request is not included in the correspondence. However, a July 6, 2005 letter to you from Ms. Kantar indicates that the request had been received, that the Department was investigating the request, and that all disclosable documents would be released to you within thirty (30) days.

On July 12, 2005 Penny Pennington of the Department’s Records Division wrote to you stating that she was enclosing “another” copy of the file that you requested. She indicated that the enclosed file contains all of the documents that the Records Department has for that case.

An undated letter from you, that was received by the Law Department on July 15, 2005 states that you are not sure if you covered it in your first letter, but that you need a copy of the four (4) latent print cards. You also requested a written copy of the "911 phone and or [sic] radio dispatch" tapes. Ms. Kantar responded to this request by letter dated July 18, 2005. She informed you that the 911 tapes are erased after two (2) years. She also indicated that the fingerprint cards were destroyed in 2002. She attached "all surviving documents pertaining to your request," and indicated that no other documents exist.

On July 19, 2005 the Department received another letter from you, dated July 16, in which you again request the fingerprint cards and the 911 phone and radio dispatch tapes. On July 20, 2005 Ms. Pennington responded with a letter stating that 911 dispatch tapes are kept for a period of two years and that the tapes requested by you were no longer available. She also indicated that your request for the fingerprints had been forwarded to the Bureau of Identification Division.

My office contacted Ms. Kantar in order to clarify this response, which was mailed to you *after* Ms. Kantar's letter informing you that the records had been destroyed. Ms. Kantar indicated that she has confirmed that the records have been destroyed. She had forwarded that information to Ms. Pennington. Ms. Pennington had not received that communication when she responded to your letter; and, therefore, was under the mistaken impression that another department was still reviewing the request.

ANALYSIS

Any person may inspect and copy the public records of any public agency during the agency's regular business hours, except as provided in section 4 of the APRA. IC 5-14-3-3(a). If a request is made in writing, the agency may deny the request if the denial is in writing and the denial includes a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record, and the name and the title or position of the person responsible for the denial. IC 5-14-3-9(c).

There is some dispute as to whether the Department told you that you must obtain a court order to access the requested documents. Generally, no court order is required to obtain disclosable records. If the agency told you that you would need a court order, then the agency would have been required to cite to the specific exemption upon which it was relying. Failure to do so would be a violation of the APRA. If the Department does not have the authority to withhold the requested records, then it would be in violation of APRA to require you to obtain a court order to receive the records.

However, a public agency is not required to disclose a record that it does not maintain and is not required to maintain. If the public agency has received a request for a record, and the agency does not maintain the record, it should so state in its response to the request. The Department has no duty to provide you with documents that the Department does not maintain. The Department does have a duty to inform you of whether it does not have the records you seek. The Department has informed you in correspondence several times that the records were destroyed and that it no longer maintains the records you seek.

IC 5-14-3-7(a) imposes a duty on public agencies to protect public records from loss, alteration, mutilation, or destruction. IC 5-15 applies to certain records of public agencies that are required to be maintained for a period of time, and destroyed only in accordance with an established record retention schedule. IC 5-14-3-4(e)(1) states that public records subject to Indiana Code 5-15 may be destroyed only in accordance with record retention schedules under IC 5-15. Therefore, while the Department may assert that it no longer maintains the requested document, a public agency cannot destroy a record it is required to maintain. If the Department has destroyed the records in accordance with a properly approved retention schedule, its assertion that it no longer has the records is not a violation of the APRA. If the records were improperly destroyed, then the Department would be in violation of the APRA.

Finally, the Department did not address whether it maintained the fingerprints and tapes in its July 12th response to your initial document request. However, you stated in your letter of July 15th that you were uncertain as to whether you requested those records in the earlier request. Therefore, I cannot find that the Department's failure to address those specific documents prior to receiving the July 15th letter to be a violation of the APRA.

CONCLUSION

For the foregoing reasons, I find that the Hammond Police Department did not violate the Access to Public Records Act when it responded to your request for records and informed you that it does not maintain the records you seek.

Sincerely,

Karen Davis
Public Access Counselor

cc: Kristina C. Kantar