

August 31, 2005

Donald E. Mahone  
DOC # 856518  
Indiana State Prison  
P.O. Box 41  
Michigan City, IN 46361-0041

*Re: Formal Complaint 05-FC-157; Alleged Violation of the Access to Public Records Act by the East Chicago Police Department.*

Dear Mr. Mahone:

This is in response to your formal complaint alleging that the East Chicago Police Department (“Department”) violated the Access to Public Records Act by denying you access to public records.

#### BACKGROUND

On August 1, 2005 you filed a complaint with the Office of the Public Access Counselor. Your complaint was assigned formal complaint # 05-FC-157. In your complaint you state that on June 22, 2005 you sent a request to the Department for records concerning the “conduct history” of past and present officers. You specified by name the six retired officers whose records you seek. Attorney Thomas D. Ryan responded on behalf of the Department by letter dated June 28, 2005. He stated, “[p]ursuant to IC 5-14-3-4(a)(8)(C)<sup>1</sup> you are only entitled to some of the information that you have requested.” You complain that you only requested the conduct history of the officers and nothing else. Your complaint also indicates that as of July 25, 2005 you had not received the records from the Department.

Mr. Ryan responded to your formal complaint by letter dated August 15, 2005. Mr. Ryan indicated that he responded to your request by informing you that you were only entitled to some of the information that you requested. He also states that he contacted this Office prior to responding to your request and was advised that he only needs to make the records available to you for copying during normal business hours. Finally, he stated that he will make available to you any records to which you are legally entitled.

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<sup>1</sup> The correct citation is IC 5-14-3-4(b)(8)(C).

## 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. Ind. Code 5-14-3-3(a). "A public agency may not deny or interfere with the exercise of the right stated in subsection (a). The public agency shall either: (1) provide the requested copies to the person making the request; or (2) allow the person to make copies: (A) on the agency's equipment; or (B) on his own equipment." IC 5-14-3-3(b).

A public agency that receives a request for a record by mail, facsimile, or e-mail, must respond to the request within seven calendar days. IC 5-14-3-9(b). A denial, if any, to a written request for records must be in writing and must include 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).

The Department did respond to your request within seven days. The Department, in its response, informed you that you are only entitled to some of the information that you requested pursuant to IC 5-14-3-4(b)(8)(C). The APRA provides exemptions for non-disclosure of records in section 4. IC 5-14-3-4. The exemption for personnel file information at IC 5-14-3-4(b)(8) allows the agency, at its discretion, to withhold personnel file information except that certain personnel file information must be disclosed. The information that you have requested, the "conduct history" of certain officers, would be disclosable under IC 5-14-3-4(b)(8)(C) only to the extent that it falls into 8(C), which states that the factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged must be disclosed.

The Department stated that pursuant to IC 5-14-3-4(b)(8)(C) that you are only entitled to some of the information that you had requested. If several records are responsive to a request the agency must specify the exemption or exemptions that apply to those records that it is withholding.<sup>2</sup> While the Department is not required to explain the law to you, it is required to indicate whether it is denying access to part or all of the records that you have requested and specify the exemption allowing it to withhold those records. To be clear, the Department should have indicated that it would exercise its discretion to withhold personnel records pursuant to IC 5-14-3-4(b)(8). It should have then indicated that, pursuant to IC 5-14-3-4(b)(8)(C), it would provide the factual basis for any disciplinary action in which final action had been taken and that resulted in the employee being suspended, demoted, or discharged. Your confusion may have arisen from the fact that the Department cited to subsection (a)(8), and stated that you were entitled to "some of the information" that you requested. Had the Department clearly explained that you would receive the factual basis for any disciplinary action in which final action had been

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<sup>2</sup> For example, the Department may have records of complaints regarding the conduct of employees that did not result in formal charges or one of the three types of disciplinary action; such a record would be disclosable at the agency's discretion under IC 5-14-3-4(b)(8). If the agency intends to withhold such a record it should inform you that it is doing so pursuant to IC 5-14-3-4(b)(8). Another example of responsive documents that the Department would not be required to disclose pursuant to IC 5-14-3-4(b)(8)(C) would be formal charges against an employee that did not result in the employee being suspended, demoted, or discharged.

taken and that resulted in the employee being suspended, demoted, or discharged pursuant to IC 5-14-3-4(a)(8)(C) you would most likely have understood what you could expect to receive from the Department. By specifying what records would and would not be provided the agency could have avoided your confusion as to what records you would receive.

Additionally, you complained that you had not yet received the records from the Department. The Department is not required to forward copies of records to you. It may, as it has done, inform you that the records are available for review and copying during normal business hours.<sup>3</sup> I advise public agencies to be consistent in their exercise of discretion to ensure that they are carrying out the APRA in a uniform manner. Agencies' actions are subject to an arbitrary and capricious standard; therefore, the agency should apply a consistent policy regarding whether it will make and mail copies of records for requestors.

### CONCLUSION

For the foregoing reasons, I find that the East Chicago Police Department did not violate the Access to Public Records Act when it informed you that the records are available for copying during normal business hours. Additionally, the East Chicago Police Department could withhold personnel files under IC 5-14-3-4(b)(8)(C); however, it did not describe which records it was withholding from disclosure.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Thomas D. Ryan

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<sup>3</sup> If the documents are not readily available during normal business hours, as in this case where older records may be archived, it is advisable that agencies communicate to the requestor an estimated time frame for gathering the records and invite the requestor to contact the agency to arrange in advance a time to review the records. In this way the agency can make certain that it has time to gather the records prior to the requestor's visit and ensure that the records are available when the requestor arrives at the agency's place of business to inspect the records.