

May 2, 2005

Sent Via Facsimile

Kevin Corcoran
Staff Writer
Indianapolis Star
Statehouse M-10
200 West Washington Street
Indianapolis, IN 46219

Re: Formal Complaint 05-FC-62; Alleged Violation of the Access to Public Records Act by the Indiana State Police

Dear Mr. Corcoran:

This is in response to your formal complaint alleging that the Indiana State Police (“ISP”) violated the Access to Public Records Act (“APRA”) by failing to create log entries for investigations performed by detectives who are detailed to the Office of the Inspector General (“OIG”). I find that the ISP has not violated the Access to Public Records Act.

BACKGROUND

Pursuant to Executive Order 05-03¹, Governor Mitch Daniels created the Office of Inspector General. The Inspector General is responsible for addressing fraud, waste, abuse, and wrongdoing in state government. The Inspector General initiates, supervises, and coordinates investigations. Exec. Order 05-03 ¶4.a. Under the Executive Order, the Inspector General receives complaints alleging, among other things, a violation of four criminal statutes: bribery; official misconduct; conflict of interest; and profiteering from public service. Exec. Order 05-03 ¶4.c. If the Inspector General has reasonable cause to believe that a crime has occurred or is occurring, he shall report the suspected crime to the Governor and appropriate state or federal law enforcement agencies or prosecuting authorities having jurisdiction over the matter. Exec. Order 05-03 ¶4.d. The Inspector General shall provide staff for the State Ethics Commission and

¹ The Executive Order 05-03 was set to expire upon the enactment of legislation by the General Assembly to codify the measures described in the Executive Order. It was in effect on the date that you requested the records.

assume the responsibility for investigating and initiating administrative, civil recovery, or criminal actions for alleged misconduct. Exec. Order 05-03 ¶7.

Under a January 11, 2005 employee interchange agreement with the OIG, the ISP have placed with the OIG five state troopers and one detective [collectively, “officers”], all employees of the ISP. They remain employees of the ISP, pursuant to Ind. Code 10-11-2. The duties and responsibilities of the officers include those described under Executive Order 05-03, as determined by the Inspector General. Nevertheless, the officers detailed to the Inspector General are subject to the direction and supervision of the ISP.

On March 21, 2005, you sent to Anthony Sommer, ISP Legal Counsel, a request for records. This letter renewed your oral requests for “initial case summaries” prepared by the officers detailed to the OIG. You allege that the initial case summaries have been provided to you in the past under other circumstances in which officers of the ISP have been detailed to other agencies. You believe that the initial case summaries were filed as part of the ISP’s obligation to maintain a daily log of suspected crimes, accidents, and complaints under section 5(c) of the Access to Public Records Act.

Mr. Sommer responded by letter to your written request on March 22. Mr. Sommer denied your request, indicating that officers detailed to the OIG are performing investigations for the OIG. He further stated that the ISP would not generate a separate log or record the information.

You filed your formal complaint with my office on April 1, 2005. You ask that I render an opinion on whether the ISP is in violation of the Access to Public Records Act for failing to create records that satisfy the “daily log” requirement of APRA when the ISP officers have been detailed to another agency. You allege that if the State Police can avoid its obligation when it sends its officers to work for a different agency, it would effectively allow other police departments to avoid the statutory duty to create a daily log.

Prior to receiving your formal complaint, I received a request from Jason Barclay, special counsel to Governor Daniels, for an informal opinion on this same issue. This formal advisory opinion incorporates my response to Mr. Barclay as well.

ANALYSIS

It is the public policy of the State of Indiana that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Providing persons with the 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. IC 5-14-3-1.

Any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as provided in section 4 of the APRA. IC 5-14-3-

3(a). There is no dispute that the ISP is a public agency under the APRA. *See* IC 5-14-3-2 (defining “public agency” to mean any law enforcement agency and specifically naming the ISP). There is also no question that any initial case summaries are public records as defined in the APRA. IC 5-14-3-2 (defining “public record”). Therefore, you may inspect and copy the public records of the ISP, unless a record is subject to nondisclosure under section 4 of the APRA. An agency is not required to create a record to satisfy a request, unless the agency is required to create the record by statute.

Under section 4(b), an agency may disclose or not disclose, in its discretion, certain categories of records. One of the discretionary exemptions to disclosure is for “investigatory records of law enforcement agencies.” IC 5-14-3-4(b)(1). “Investigatory record” means information compiled in the course of the investigation of a crime. IC 5-14-3-2. As I stated earlier, the ISP is a law enforcement agency. Therefore, its investigatory records may be withheld under IC 5-14-3-4(b)(1).

Notwithstanding this discretion accorded a law enforcement agency, certain law enforcement records must be made available for inspection and copying as provided in section 5 of the APRA. IC 5-14-3-4(b)(1). IC 5-14-3-5(c) states:

“*An agency shall maintain a daily log or record that lists suspected crimes, accidents, or complaints, and the following information shall be made available for inspection and copying:*

(1) *The time, substance, and location of all complaints or requests for assistance received by the agency.*

(2) *The time and nature of the agency’s response to all complaints or requests for assistance.*

(3) *If the incident involves an alleged crime or infraction:*

(A) *the time, date and location of occurrence;*

(B) *the name and age of any victim, unless the victim is a victim of a crime under Indiana Code 35-42-4;*

(C) *the factual circumstances surrounding the incident; and*

(D) *a general description of any injuries, property, or weapons involved.*

The information required in this subsection shall be made available for inspection and copying in compliance with this chapter. The record containing the information must be created not later than twenty-four (24) hours after the suspected crime, accident, or complaint has been reported to the agency.”

IC 5-14-3-5(c) (*Emphasis added*).

Hence, if an agency is subject to this provision, it must create the equivalent of a daily log. It is not sufficient for an agency to claim that it does not maintain a record, because this provision, where applicable, imposes an affirmative duty on an agency to create the record within 24 hours after the agency has received the request for assistance.

You allege that the statute requiring a daily log does not specifically exempt the ISP officers who are working for the OIG; therefore, the daily log requirement must be met. In essence, you argue that the ISP *officers* assigned to the OIG are not exempt from the daily log requirement. However, in my opinion, a plain reading of section 5(c) yields a different

conclusion than the one you believe must result where there is no specific exemption for officers who are detailed to the OIG.

Throughout section 5(c), it is apparent that the requirement to maintain a daily log applies to an agency when an agency receives a request for assistance or a report of a suspected crime, accident, or complaint. I supplied the italicized emphasis to section 5(c) above in order to illustrate this point. Here, the agency that receives a request for assistance or a complaint is the OIG, not the ISP. The section 5(c) duty is not a legal obligation of individual persons working for an agency. Hence, it is irrelevant that the ultimate direction and supervision of the officers remains with the ISP. The investigations that are conducted are the result of the OIG having received a request for assistance or a complaint, not the ISP. The OIG directs the investigations. Under the Executive Order, the OIG may conduct criminal investigations, and has the responsibility to investigate criminal violations of any of four crimes.

I do not believe that this common-sense reading of section 5(c) will lead to attempts by law enforcement agencies to circumvent their duty to maintain a daily log. If a law enforcement agency receives a request for assistance or complaint, it remains a duty of that agency to log the complaint, irrespective of how the investigation is conducted or what officers are assigned.

This interpretation is not inconsistent with the instance that you cite of the ISP's investigation into wrongdoing of a former FSSA official. You claim that you received initial case summaries on that matter. However, you state that the State Ethics Commission had referred that matter to *ISP* to investigate. The OIG does not refer the criminal matters it investigates to the ISP when it assigns investigative duties to the individual officers.

You allude in your complaint to the OIG's duty to maintain a daily log of the OIG's complaint investigations. I specifically do not offer any opinion with respect to the OIG's duty to maintain a log, and under what circumstances it is required to do so. This is in part because your complaint was limited to the Indiana State Police. Additionally, I do not offer any guidance with respect to the OIG because with the recent end of the 2005 legislative session, I have not had the opportunity to review legislation creating the Office of the Inspector General in time to issue this advisory opinion within the statutory timeframe. *See* IC 5-14-5-9. I anticipate that there may be provisions concerning the confidentiality of the OIG's investigations that may affect any duty it may have to maintain a daily log.

CONCLUSION

For the foregoing reasons, I find that the Indiana State Police have not violated the Access to Public Records Act.

Sincerely,

Karen Davis
Public Access Counselor

cc: Jason Barclay
Anthony Sommer
David Thomas