

May 23, 2005

Herbert Foust  
Reg. No. 124101  
Putnamville Correctional Facility  
1946 W. US Hwy 40  
Greencastle, IN 46135

*Re: Formal Complaints 05-FC-77; Alleged Violation of the Access to Public Records Act by the City of Goshen Police Department*

Dear Mr. Foust:

This is in response to your formal complaint alleging that the City of Goshen Police Department ("Department") violated the Access to Public Records Act ("APRA") by failing to adequately respond to your request for records, thereby denying your request for records. I find that the Department violated the Access to Public Records Act.

#### BACKGROUND

On April 20, 2005 you filed a complaint alleging that Department denied you access to public records. That complaint was received in this office on April 22, 2005 and assigned Formal Complaint # 05-FC-77.

On March 18, 2005 you sent a letter to the Department requesting, as stated by the Department:

1. Records, reports, papers statements or other information concerning Herbert Scott Foust being shot in the leg and recovery of a .357 handgun from lot #448 at Brookside Manor in Goshen, Indiana in the month of January 2000.
2. Records, reports, papers, statements or other information in Goshen City Police Department Case # 01 GOS 00136.
3. Records, reports, papers, statements or other information regarding any arrest, detainment, and investigation of Jason Hershberger.

On March 22, 2005 Shannon Marks, Legal Compliance Administrator for the City of Goshen, answered your request stating that the Department will “provide you with the public documents that you have requested with reasonable particularity, to the extent that such documents exist, and provided the documents are not otherwise exempted from disclosure.” She stated that as soon as the Department provided her with the copies that she would contact you to let you know the amount of the copy fees.

On April 7, 2005 you sent a follow up request. Ms. Marks replied on April 12, 2005 by providing you with “copies of all documents provided to me in response to your request by the Goshen Police Department.” She indicated to you that the copy fee was \$1.10. The attached copies however, were only responsive to item #1 of your 3 requests. There was no explanation in the letter as to whether the Department intended to provide the responses to your other two requests or whether the Department intended to deny that portion of your request.

You filed your formal complaint with my office on April 22, 2005. I sent a copy of your complaint to the Department. Ms. Marks responded to your complaint on behalf of the Department, by letters dated April 29 and May 12, 2005. Copies of those letters are attached for your reference. In her letter of May 12 Ms. Marks stated that after further investigation, the Department was able to locate documents that were responsive to your two remaining requests.

She also stated that payment had not been received from you for the original set of documents in the amount of \$1.10. She stated that the additional documents consist of 58 pages and that the copying fee for those documents would be \$5.80. She said that she would forward the additional documents to you upon your payment of \$6.90, the total, including the past due charges, for both sets.

## ANALYSIS

The public policy of the APRA states that “(p)roviding persons with information is an essential function of a representative government and integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” IC 5-14-3-1. Furthermore, “[t]his chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record.” IC 5-14-3-1.

### *Reasonable Production Time*

The APRA does not specify a time for production or inspection of responsive records, but this office has stated that records must be produced within a reasonable time of the request. Often, this Office is asked to make a determination as to the reasonableness of the time for production by a public agency. What is a "reasonable" time period under one circumstance may not be reasonable under other conditions. Production need not materially interfere with the regular discharge of the functions and duties of the public agency. IC 5-14-3-7(a). The determination of what is a reasonable time for production, therefore, depends upon the public records requested and circumstances surrounding the request.

The Department's initial response was made timely, within seven (7) days of receipt. However, the Department failed to follow up, as promised, regarding whether the documents would be made available and what the copying fees would be. Two weeks after receiving the initial response you were required to contact the Department to inquire as to the status of your request. At that time the Department provided part of the documents, which were 15 pages. The Department did not provide you with any expectation of how long it would take to provide documents in the initial letter. If the department did not intend to respond within a matter of days it should have provided you with a timeframe for when you could expect production. The Department has provided no explanation of circumstances that would require two weeks to produce the records. The failure to provide the complete request has prolonged the timeframe for production to the date upon which the Department made the additional copies available (The date that Ms. Marks said they would be available upon payment, May 3).

#### *Denial of Documents*

The reason for the Department's initial failure to provide you all of the documents that you requested is not apparent from the information presented. Considering that the Department readily provided you with the documents concerning yourself, it is not known whether the Department intended to deny your request for the other documents on the false basis that they did not pertain to you or simply made a mistake. While it appears that the Department's failure to provide all the requested documents to you in the first instance could have been simple human error it nevertheless constitutes a violation of the APRA.

#### *Withholding Documents for Payment of Copy Fees*

Under the APRA, the Department may charge a photocopying fee under Indiana Code section 5-14-3-8(c) and collect that fee in advance of producing the records under Indiana Code section 5-14-3-8(e).

Ms. Marks has stated that all of the documents will be available upon payment of the fees for copying both sets of records, including the records that were produced earlier. Although I do not condone your failing to pay the fee that is due and owing the agency, the statute allowing the agency to seek advance payment does not, in my opinion, include payment for records that have already been sent to you. Therefore, the Department may hold the second set of documents until payment is received for only those documents. However, it may not hold documents based on past due payments.

## CONCLUSION

For the foregoing reasons, I find that the City of Goshen Police Department violated the Access to Public Records Act.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Shannon Marks