

September 13, 2006

*Sent Via Facsimile*

Bruce A. Brightwell  
1212 State Street  
New Albany, IN 47150

*Re: Formal Complaint 06-FC-139; Alleged Violation of the Access to Public Records Act by the New Albany Police Department*

Dear Mr. Brightwell:

This is in response to your formal complaint alleging that the New Albany Police Department (“Department”) violated the Access to Public Records Act by failing to respond to your request for records. I find that the Department failed to issue a timely response under the Access to Public Records Act.

#### BACKGROUND

You alleged in your formal complaint, filed on August 14, 2006, that the Department did not respond at all to your July 28, 2006 request for records. You requested, pursuant to the Access to Public Records Act, a copy of the photographs taken by the Department of your client’s injuries following an accident.

I sent a copy of your complaint to the Department. Captain Rick Denny of the Department responded by letter, a copy of which is attached for your reference. Captain Denny also telephoned my office to tell me that the photographs you requested have been copied on a disk and had been available for pick-up during the time that you were on vacation. He believes that your complaint was premature, since the Department cannot make photographs available immediately. The evidence technician was on vacation during the time that the Department received your letter. Moreover, the photographs would normally be available only through subpoena. Captain Denny felt that you should have called him or written to follow-up on your request rather than filing a complaint with the Office of the Public Access Counselor.

## ANALYSIS

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the Access to Public Records Act. Ind. Code 5-14-3-3(a). If a public agency receives a request for a record by U.S. Mail or facsimile, the public agency is required to respond within seven calendar days, or the request is deemed denied. IC 5-14-3-9(b). A response could be an acknowledgement that the public agency received the request and would locate and copy any disclosable public records that are responsive to the request. The response of a public agency is timely if it is issued within seven days of receiving the request, even if the person requesting the records does not receive the response within seven days. Although a response is required within certain timeframes, the Access to Public Records Act does not set any deadlines within which the public agency is required to produce the records. Records should be produced within a reasonable time under the circumstances.

A July 28 request, if mailed on that date, would be received on or about July 31, which was a Monday. Even if the person responsible for assembling the records and copying the record was not available to do so, the Department was still required to issue a responsive letter or telephone you within seven days of receiving the request, or by August 7. You filed your complaint one week after that date, having not received a response to tell you that the Department had received your request and intended to comply.

Hence, while your communicating with the Department first may have obviated the need to file this complaint, the complaint is nevertheless meritorious because the Access to Public Records Act makes it incumbent on the public agency to acknowledge a request for records, even if production of the records is not possible during the seven-day time for response.

In addition, I wish to address the Department's assertion that the Department's photographs and videos are not public record without a subpoena. Requiring a subpoena as a prerequisite to receiving a copy of a public record is appropriate only if the record is subject to an exemption under section 4 of the Access to Public Records Act. Records compiled in the course of a criminal investigation are exempt under IC 5-14-3-4(b)(1), at the public agency's discretion. However, records that are not compiled in the course of a criminal investigation are not exempt under section 4(b)(1). Unless a photograph is exempt under section 4(b)(1) or some other provision of the Access to Public Records Act, the Department may not require that an attorney or anyone else obtain a subpoena for a record.

## CONCLUSION

For the foregoing reasons, I find that the New Albany Police Department failed to timely respond to your request for records, in violation of the Access to Public Records Act.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Captain Rick Denny