

December 22, 2006

Sent Via Facsimile

Mr. Kevin R. Knuth
1211 West Wayne Street
Fort Wayne, IN 46802

Re: Formal Complaint 06-FC-206; Alleged Violation of the Access to Public Records Act by the Allen County Sheriff's Department

Dear Mr. Knuth:

This is in response to your formal complaint alleging that the Allen County Sheriff's Department ("Department") violated the Access to Public Records Act by failing to disclose a copy of the 911 call tape and other records in connection with a domestic battery call to the Department. I find that the Department violated the Access to Public Records Act when it failed to sustain its burden of showing that the 911 call tape is an investigatory record of law enforcement, and also failed to provide the daily log upon your request.

BACKGROUND

As Chairman of the Allen County Democratic Party, on November 13, 2006 you requested: 1) a copy of any 911 calls placed from 13019 Liberty Mills Road on Thursday, November 9, 2006; and 2) any reports, documents, call sheets in regards to the Allen County Police Departments response to 13019 Liberty Mills Road on Thursday, November 9, 2006. To this request, you received a response from the Assistant Allen County Attorney John Feighner. He denied the records with the following statement: "The information which you seek is part of a preliminary investigation—investigatory records of law enforcement agencies—which has been referred to the Indiana State Police. In accordance with directives from law enforcement authorities, the Allen County Police Department and the Allen County Sheriff, pursuant to Ind. Code §5-14-3-4(b)(1), will not, at this time, release any investigatory records or materials which are the subject thereof pending review and decision by law enforcement authorities."

You wrote Mr. Feighner to challenge this denial, citing caselaw to argue that a 911 tape does not automatically fall into the category of an investigatory record. You claim that because the 911 tape was created prior to any investigation into the incident at 13019 Liberty Mills Road, the tape could not be “compiled in the course of a criminal investigation” within the meaning of the investigatory records exception. In a November 30 letter to you, Mr. Feighner reasserts the investigatory records exception with respect to the 911 tape.

In a November 20 letter to Mr. Feighner, you leave for the moment the issue concerning the 911 tape to claim that there is still information that cannot be protected under the “investigatory records exemption.” You cited section 5(c) of the APRA and state that the call sheet and other documents would be part of the daily log, and should be disclosed. Mr. Feighner wrote you on November 21 to report to you the daily log information: “1. On November 9, 2006, at 10:11 a.m., a request for assistance was received by the Allen County Police Department at 13019 Liberty Mills Road, Fort Wayne, Indiana. 2. An officer of the Allen County Police Department promptly responded to the request for assistance. The matter was promptly then referred to the Indiana State Police Department for investigation.” You wrote back to demand to see the daily log document itself rather than to receive the log information in a letter from the attorney. On November 21, the call sheet was provided to you.

In your formal complaint, you complain that the call sheet you received does not contain the same information as a call sheet disclosed to the media; the media’s call sheet includes the name of the officer who was dispatched. You would like my opinion on what documents the Allen County Sheriff’s Department can share with the media, but not with other people who request those documents. In addition, you challenge the Department’s assertion that it can withhold a 911 tape as part of an investigation when the call is made prior to any such investigation occurring.

I sent a copy of your complaint to the Department. Mr. Feighner has provided a response, a copy of which is enclosed for your reference. Mr. Feighner disputes that Indiana law requires that a 911 tape is disclosable. He also contends that your November 20 letter referred for the first time to your desire for the daily log regarding the incident. When you articulated this request, the Department promptly responded with the substance of the daily log information in letter form. When you subsequently again asked for the actual call sheet, that was provided to you. The Department cannot control the types of records provided by a different police agency, if in fact the media was given the officer’s name as part of the call sheet.

Mr. Feighner provided a copy of the Department’s two-page policy concerning disclosure of records, effective February 2, 1984, following the adoption by the legislature of the Access to Public Records Act. The policy has been ratified by current Sheriff James Herman. The policy includes as “Investigations Records” case reports, interview tapes, and teletype messages. Under a category called “Admin. Information/Records & Security” are listed telephone tapes and radio tapes. Mr. Feighner writes that the reason for exempting this information from disclosure is to provide for proper investigatory procedures for law enforcement agencies including the Indiana State Police, as appropriate, the Allen County Police Department, and the Allen County Prosecutor. The Allen County Sheriff’s Department contends that it properly refused to produce the 911 telephone call tape or to allow you access to listen to the 911 tape since the tape was

excepted from disclosure pursuant to the policy adopted February 2, 1984, and ratified by each successive Sheriff and also consistent with the Allen County Prosecutor's directive that the 911 call was part of the investigatory materials and was not to be released to third parties or the public. The limited release of the call sheet information pursuant to IC 5-14-3-5 complies with the statutory obligations and was consistent with directives from law enforcement agencies.

ANALYSIS

The Access to Public Records Act states:

[G]overnment is the servant of the people and not their master. Accordingly, it is the public policy of the state 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. This 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.

Ind.Code 5-14-3-1.

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 ("APRA"). Ind. Code 5-14-3-3(a). A public agency may deny a written request for a record if the denial is in writing and if 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).

Your complaint raises two issues. The first is whether the 911 tape is a disclosable public record. The second issue is whether the call sheet provided to you is consistent with the requirement for creation and disclosure of the daily log. The facts raise a third issue concerning the call sheet: whether you were initially denied the call sheet when you requested it.

Disclosure of the 911 Tape

A public agency may, at its discretion, withhold investigatory records of law enforcement agencies. However, certain law enforcement records must be made available for inspection and copying as provided in section 5 of [IC 5-14-3]. 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(h).

While the Department complied with the requirement that the agency denying a record cite an exemption to disclosure, the assertion made by the Department that the 911 tape is an investigatory record of law enforcement is belied by the Department's responses to your requests and to this complaint. First, the Department admits that the criminal investigation has been

turned over to the State Police. As the Department's November 21 letter recites, the criminal investigation was referred to the State Police very early in the investigation, shortly after the responding officer's arrival on the scene. Since the Department must be able to show that this particular 911 tape was compiled in the course of the Department's investigation, the Department's referral to the State Police casts doubt on the 911 tape's status as the Department's investigatory record.

Second, the Department seems to rely on other police agencies' directives. While police agencies are free to coordinate investigations, a police agency may not mandate that a different public agency withhold a record maintained by that agency. Only if the record meets a statutory exemption may the public agency withhold it.

Third, the Department relies on a two-page policy concerning disclosure of records. The telephone tapes are listed under Admin. Information/Records & Security. "Admin." refers to "Administrative," according to the Department. It appears that the Department regards all such 911 tapes as exempt, in accordance with this policy. This *per se* rule, that 911 call tapes are exempt under the Department's policy, is not sufficient to deem a particular 911 tape as one "compiled in the course of an investigation of a crime." If the Department denies a record as an investigatory record of law enforcement, it must be ready and able to make a particularized showing that the 911 tape was compiled in the course of an investigation of a crime.

You have raised a question whether a 911 tape, a disclosable public record upon creation, may ever be exempt under the investigatory records exception merely because it was later compiled in the course of a criminal investigation. Indiana courts have not considered this question, but the Ohio Supreme Court has held, in reference to a 911 tape regarded by police as investigatory, that "once clothed with the public records cloak, the records cannot be defrocked of their status." *State ex rel. Cincinnati Enquirer v. Hamilton Cty.* 662 N.E.2d 334, 338 (Ohio 1996). In that case, the Ohio Supreme Court rejected a case-by-case approach and adopted a *per se* rule that would mandate *disclosure*.

On the information and argument before me, the Department would not satisfy even a case-by-case approach for nondisclosure, where the Department asserts that all 911 tapes are nondisclosable. It is my opinion that the Department may not withhold the 911 tape as an investigatory record of law enforcement, since the record has not been compiled in the course of the Department's investigation.

Call Sheet and Daily Log

There are two issues concerning the Department's response to your requests. Each concerns the call sheet that you received, so I am consolidating discussion under one heading. You essentially complain that the call sheet that was disclosed to you was incomplete. It did not contain the same information as that disclosed to the media; specifically, the name of the officer dispatched. Your complaint does not specifically raise any issues concerning the Department's original denial letter of November 15, which was not accompanied by any records. The Department asserted that once you invoked the daily log provision in IC 5-14-3-5(c), you were

promptly given the substance of the daily log and the actual call sheet when you asked for it in your letters of November 20 and November 21.

In my opinion, the Department violated the APRA when it denied the call sheet, because the Department maintained this record when you first asked for it on November 13 (“any reports, documents, call sheets...”). The Department declined to give you any records on November 15, citing the investigatory records exception. A person requesting records that fall within the exemption for investigatory records of law enforcement is not required to cite to or invoke IC 5-14-3-5(c). Requiring persons to invoke IC 5-14-3-5(c) would violate the policy of the Access to Public Records Act favoring openness. More importantly, IC 5-14-3-4(b)(1) itself contains an exception to nondisclosure: IC 5-14-3-5, which includes the daily log. Hence, the Department should have disclosed the daily log without a specific demand for it.

You raise a concern that the call sheet is not complete. According to IC 5-14-3-5(c):

“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 IC 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.”

Indiana Code 5-14-3-5 does not specifically require that the log contain the officer's name, only that the nature of the agency's response be included. The Department states that it did not disclose different information to the media, so your complaint that the Department has not provided the same information to you as it had to the media does not have merit. However, the daily log of the Department must contain the information in (3), because the incident involved an alleged crime or infraction. Despite the fact that the State Police took over the investigation, the Department may not ignore the plain mandate of section 5(c) that *if the incident involves an alleged crime or infraction*, the daily log must contain the name and age of any victim, the factual circumstances, and a description of any injuries, property, or weapons involved. This information in the daily log is required when a call for assistance is received, not solely when the criminal investigation is completed by the public agency that receives the call. A more narrow reading of section 5(c) would violate the policy of the APRA in favor of liberal construction of the APRA.

CONCLUSION

For the foregoing reasons, I find that the Allen County Sheriff's Department violated the Access to Public Records Act.

Sincerely,

Karen Davis
Public Access Counselor

cc: John O. Feighner