October 12, 2007

William C. Engle
1175 North A Street
Richmond, Indiana 47374

Re: Formal Complaint 07-FC-274; Alleged Violation of the Access to Public Records Act by the Wayne County Prosecuting Attorney's Office

Dear Mr. Engle:

This is in response to your formal complaint alleging the Wayne County Prosecuting Attorney's Office ("Prosecutor") violated the Access to Public Records Act ("APRA") (Ind. Code §5-14-3) by denying you access to records, namely two audio recordings of 9-1-1 telephone calls. A copy of the Prosecutor's response is enclosed for your reference. It is my opinion that the Wayne County Prosecuting Attorney did not violate the APRA.

BACKGROUND

You submitted your complaint to this office on September 12, 2007, alleging a denial of access to public records. Rather than providing a description of the denial of access, you attached ten pages of copies of electronic mail messages regarding the issue. As such, I am characterizing your complaint as I understand it.

You allege you requested from the Wayne County Emergency Dispatch Center ("Dispatch") copies of two particular tape recordings from September 1 and September 7 of 9-1-1 telephone calls (hereinafter "911 tapes") on September 7. The Dispatch director responded, indicating he would ask permission from the Centerville Police Department, who then refused the request. You further allege you requested the 911 tapes again on September 10 from "Dispatch," who told you the 911 tapes had been given to the Prosecutor. On September 11 you requested copies of the 911 tapes from the Prosecutor. You received a response from the County Attorney, who indicated you were denied access to the September 1 tape because it was an investigatory record of a law enforcement agency. He also indicated the September 7 tape did not exist because of an equipment malfunction. You filed your complaint with this office on September 12.

The Prosecutor responded to your complaint by letter dated September 26 from County Attorney Ronald Cross. Mr. Cross contends your September 7 and 10 requests were requests for

information rather than requests for access to records. As such, the Prosecutor considers the September 11 the first request for access to the 911 tapes. The Prosecutor contends that 911 tapes can become investigatory records of law enforcement agencies and as such may be withheld from disclosure at the discretion of the Prosecutor. The Prosecutor asserts that since the definition of investigatory record of a law enforcement agency contains the term "compiled" rather than "created," an agency may claim the investigatory records exception for records it obtains from another agency. The Prosecutor expresses his disagreement with the opinion of Counselor Davis in *Opinion of the Public Access Counselor 06-FC-206*. The Prosecutor then sets out to distinguish the Ohio case *State ex rel. Cincinnati Enquirer v. Hamilton County*, 662 N.E.2d 334 (Ohio 1996) from the present matter since Counselor Davis relied upon the Ohio case in her opinion. Finally, the Prosecutor argues that if the 911 tape becomes relevant to a criminal prosecution, it will be available to defense counsel and could become evidence at trial. In either case, it will likely become a matter of public record.

The Prosecutor indicates the one 911 tape in existence that is responsive to your request was provided to you on September 17.

ANALYSIS

The public policy of the APRA states that "(p)roviding persons with 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." Ind. Code §5-14-3-1. The Prosecutor is clearly a public agency for the purposes of the APRA. I.C. §5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Prosecutor during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. §5-14-3-3(a).

A "public record" means any writing, paper, report, study, map, photograph, book, card, tape recording or other material that is created, received, retained, maintained or filed by or with a public agency. I.C. §5-14-3-2.

Investigatory records of law enforcement agencies (except those listed in section 5 of the APRA) may be excepted from disclosure at the discretion of the agency. I.C. §5-14-3-4(b)(1). "'Investigatory record' means information compiled in the course of the investigation of a crime." I.C. §5-14-3-2(h). A law enforcement agency means an agency or department that engages in the investigation, apprehension, arrest, or prosecution of alleged criminal offenders. It includes the state police department, local police or sheriff's departments, and prosecuting attorneys, among others. I.C. §5-14-3-2(l)(6).

The burden of proof for nondisclosure lies with the public agency that would deny access to the record and not to the person seeking to inspect and copy the record. I.C. §5-14-3-1.

Here your request for access related to two different 911 tapes. Regarding the September 7 tape, the Prosecutor and Dispatch have indicated the tape does not exist because of an equipment malfunction. Specifically, the hard drive on which the calls are recorded did not

function to record the call. Regardless of whether the tape is a public record, no tape exists, so no tape can be produced. As such, I will focus my opinion only on the September 1 tape.

You made your request to the Prosecutor on September 11 for access to the 911 tape of a September 1 call. The Prosecutor denied your request based on the investigatory record exception to disclosure provided in the APRA. I.C. §5-14-3-4(b)(1). You assert your belief the 911 tape is part of the daily record of activity at Dispatch and cannot be excepted from disclosure by the Prosecutor. Further, I understand another argument for disclosure to be that the record was created prior to the start of an investigation and as such should not be subject to the investigatory record exception.

Regarding your contention the 911 tape is part of the daily record of activity at Dispatch and as such cannot be excepted from disclosure by the Prosecutor, it is my opinion that as a general premise, 911 tapes are part of the daily record of activity at Dispatch. It is conceivable that many 911 calls are taken and handled in a routine matter and often do not involve an alleged crime or lead to an investigation of criminal activity. It is my opinion that those 911 tapes are presumed to be public records subject to disclosure under the APRA. I.C. §5-14-3-3. I will later address the issue whether this particular 911 tape was appropriately withheld from disclosure.

To the issue of the Prosecutor's refusal to disclose the record which was created by Dispatch, it is my understanding the record is still under the physical control of Dispatch because it is located on a hard drive under the control of Dispatch. This is important to note because it is the duty of Dispatch under the APRA to protect the record from loss, alteration, mutilation, or destruction. I.C. §5-14-3-7. Arguably an agency cannot do so if it is not in control of the record. Further, Dispatch would be the agency responsible for retention of the record under the county retention schedule adopted pursuant I.C. §5-15-6. Here, though, Dispatch has given custody of the record to the Prosecutor, who has essentially sequestered the record from public access. I do not believe it is a violation of the APRA for one agency who still maintains control of a record to allow another agency the authority to grant access to the record. This happens frequently when a person requests records from a town clerk-treasurer or a county auditor or other public official who will often ask the local legislative or fiscal body for permission before producing the record subject to a request.

Regarding the issue whether this particular 911 tape may be withheld from disclosure under the investigatory record exception, the Prosecutor is a law enforcement agency under the APRA and as such has the discretion to withhold from disclosure investigatory records compiled in the course of the investigation of a crime. I.C. §5-14-3-2(h); I.C. §5-14-3-2(l)(6); I.C. §5-14-3-4(b)(1). As the Prosecutor points out, the definition of investigatory record includes records "compiled" during the investigation and not records "created" during the investigation. Because "compiled" is not defined in the APRA, we must look at the plain, ordinary meaning of the word. "When interpreting a statute the words and phrases in a statute are to be given their plain, ordinary, and usual meaning unless a contrary purpose is clearly shown by the statute itself." *Journal Gazette v. Board of Trustees of Purdue University*, 698 N.E.2d 826, 828 (Ind. App. 1998). "Compile" means "to gather (materials borrowed or transcribed) into a volume or into orderly form." *New Illustrated Webster's Dictionary of the English Language*, J. G. Ferguson Publishing Company, 1992.

The United States Supreme Court addressed the definition of "compile" in a case involving a claim under the Federal Freedom of Information Act ("FOIA"), 5 USCS 552. Under exception 7 of the FOIA, certain "records or information compiled for law enforcement purposes" are excepted from disclosure. The FOIA law enforcement exception is much more limited than the APRA investigatory record exception, but both contain the term "compiled." 5 USCS 552(b)(7); I.C. §5-15-3-2(h). The Court said the following:

> "As is customary, we look initially at the language of the statute itself. The wording of the phrase under scrutiny is simple and direct: 'compiled for law enforcement purposes.' The plain words contain no requirement that compilation be effected at a specific time. The objects sought merely must have been 'compiled' when the Government invokes the Exemption. A compilation, in its ordinary meaning, is something composed of materials collected and assembled from various sources or other documents. See Webster's Third New International Dictionary 464 (1961); Webster's Ninth New Collegiate Dictionary 268 (1983). This definition seems readily to cover documents already collected by the Government originally for non-law-enforcement purposes." *John Doe Agency v. John Doe Corp*., 493 U.S. 146 at 153 (1989).

Because the definition of investigatory records uses the word "compiled" rather than "created," it is my opinion that records withheld from disclosure using the investigatory records exception need not be created during the course of the investigation. Rather, records gathered in the course of an investigation of a crime, regardless of when they were created, may be withheld from disclosure under this exception. The legislature has put in place this exception to allow law enforcement agencies to conduct their investigations without disclosing all of their investigatory tools, and I believe the legislature could have limited the exception to only records created during the investigation. Since that is not the case, it is my opinion 911 tapes created before an investigation has commenced may be withheld from disclosure using the investigatory records exception, if the law enforcement agency can sustain the burden of proving the 911 tape is part of the materials compiled during the course of a criminal investigation and would fall under the section 4(b)(1) exception.

Here, the Prosecutor asserts that the 911 tape was part of the materials compiled in the investigation of a crime or crimes, namely two deaths. In a September 12 electronic mail message to you and others, the Prosecutor said, "it is a common investigative step for the person who placed the 911 call to be given the opportunity to listen to the recording. The officer can then ask questions surrounding the call to gain more information in the investigation." It is my opinion this description as to how the 911 tape will be used sustains the burden of proof placed on the Prosecutor by I.C. §5-14-3-1.

The public access counselor previously addressed the issue of 911 tapes in *Opinion of the Public Access Counselor 06-FC-206*, wherein Counselor Davis rejected a *per se* rule that 911 tapes are always excepted from disclosure. For the reasons outlined previously, I agree with that opinion. But Counselor Davis goes on to suggest that the 911 tapes could not be withheld from disclosure because they were not compiled during the course of an investigation. *Opinion of the*

Public Access Counselor 06-FC-206 at 4. I believe Counselor Davis was using "created" and "compiled" interchangeably, and as such I do not agree with the opinion.

In *Opinion of the Public Access Counselor 06-FC-206*, Counselor Davis indicates Indiana courts have not addressed the issue whether 911 tapes may be withheld from disclosure under the investigatory records exception but cites an Ohio case wherein the Ohio Supreme Court adopted a *per se* rule mandating disclosure. *State ex rel. Cincinnati Enquirer v. Hamilton County*, 662 N.E.2d 334 (Ohio 1996). That case can be distinguished from the instant matter, though, by the language of Ohio's investigatory records exception. As the Prosecutor points out, Ohio's investigatory records exception is much more limited than Indiana's. Ohio law is as follows:

> "(2)'Confidential law enforcement investigatory record' means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following:
>
> (a) The identity of a suspect who has not been charged with the offenses to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;
>
> (b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose the source's or witness's identity;
>
> (c) Specific confidential investigatory techniques or procedures or specific investigatory work product;
>
> (d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.
>
> Ohio Revised Code §149.43.

Because Ohio's exception is much more limiting than the APRA's broad investigatory record exception, I do not believe this case supports a *per se* rule for mandatory disclosure of 911 tapes in Indiana. While other states have also addressed the issue of the release of 911 tapes, none who have addressed it have investigatory record exceptions as broad as the APRA's. And in states whose courts have allowed the tapes to be excepted from disclosure, the issue surrounding 911 tapes is the issue of personal privacy of the caller or the victim, which is not addressed in the APRA. It is my opinion 911 tapes may be withheld from disclosure as investigatory records of a law enforcement agency when the agency can sustain the burden of proof of nondisclosure.

Regarding the Prosecutor's assertion that the 911 tapes will become a matter of public record at some point if they become relevant to a criminal proceeding, either by disclosure to the defense counsel or when introduced in court, I find this argument immaterial to the question whether the records are subject to inspection under the APRA. The APRA does not provide an exception to disclosure or an allowance for records that will eventually become matters of public record.

CONCLUSION

For the foregoing reasons, I find that the Wayne County Prosecuting Attorney did not violate the APRA

Best regards,

Heather Willis Neal
Public Access Counselor

cc: Ronald L. Cross, Wayne County Attorney
Michael Shipman, Wayne County Prosecuting Attorney