



STATE OF INDIANA

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November 15, 2010

Mr. Michael J. Shepard
Putnamville Correctional Facility
1946 W. U.S. Hwy. 40
Greencastle, IN 46135

*Re: Formal Complaint 10-FC-245; Alleged Violation of the Access to
Public Records Act by the Indiana State Police*

Dear Mr. Shepard:

This advisory opinion is in response to your formal complaint alleging the Indiana State Police ("ISP") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* The ISP's response to your complaint is enclosed for your reference.

BACKGROUND

In your complaint, you allege that you requested access to "an incident report, follow-up, findings and final disposition of a request for investigation and documentary evidence submitted with an attached sworn affidavit referencing a failed sexual assault investigation on Feb. 03, 2010 by the Vanderburgh County Sheriff's Office...." As of October 10th, you had not received a response to your request.

In response to your complaint, ISP Legal Counsel Lt. Mark Carnell states that the ISP responded to your request within seven days as required by the APRA. However, unbeknownst to the ISP, you had been transferred to another facility and the response did not reach you. The ISP was not aware of your current address until after you filed your formal complaint. As to the substance of your request, the ISP did not conduct any investigation regarding the alleged February 3, 2010, incident. As such, the ISP has no records responsive to your request. Moreover, if the ISP did have such records, they would be exempt from disclosure at the ISP's discretion under the investigatory records exception to the APRA.

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.” I.C. § 5-14-3-1. The ISP is 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 ISP’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

A request for records may be oral or written. I.C. §5-14-3-3(a); §5-14-3-9(c). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. I.C. §5-14-3-9(b). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. I.C. §5-14-3-9(a). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, the ISP responded to your request within seven days. Because the ISP had no notice of your new address, however, the response did not reach you. Under such circumstances, it was incumbent upon you to inform the ISP of your new address because the ISP was operating under the impression that it could respond to you at the address you originally provided. The ISP made a good faith effort to provide you with a timely response. Under such circumstances, it is my opinion that the ISP complied with the APRA’s response requirements.

In any event, the ISP avers that it has no records responsive to your request because it never conducted an investigation regarding the alleged February 3, 2010, incident. If a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. “[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA.” *Opinion of the Public Access Counselor 01-FC-61*; see also *Opinion of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly the [agency] could not be required to produce a copy....”).

Moreover, it is apparent that if the ISP did maintain the records you requested, the ISP could withhold them under the investigatory records exception to the APRA. The investigatory records exception to the APRA provides that a law enforcement agency has the discretion to disclose or not disclose its investigatory records. An investigatory record is “information compiled in the course of the investigation of a crime.” I.C. § 5-14-3-2(h). The investigatory records exception does not apply only to records of ongoing or current investigations. It does not apply only to an investigation where a crime was charged or an investigation where it was adjudicated that a crime was indeed committed. Instead, the exception applies to all records compiled during the course of the investigation of a crime, even where a crime was not ultimately charged, and even after an investigation has been completed. The investigatory records exception affords law enforcement agencies broad discretion in withholding such records. See *Opinion of the*

Public Access Counselor 09-FC-157. “Generally, a police report or incident report is an investigatory record and as such may be excepted from disclosure pursuant to I.C. § 5-14-3-4(b)(1).” *Id.*

CONCLUSION

For the foregoing reasons, it is my opinion that the ISP did not violate the APRA.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive style with a large, sweeping initial 'A'.

Andrew J. Kossack
Public Access Counselor

cc: Lt. Mark Carnell