STATE OF INDIANA

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April 20, 2010

Mr. Michael A. Wilkins
o/b/o WTHR
450 East 96th Street
Suite 340
Indianapolis, IN 46240

Re: Formal Complaint 10-FC-71; Alleged Violation of the Access to Public Records Act by the City of Carmel

Dear Mr. Wilkins:

This advisory opinion is in response to your formal complaint on behalf of WTHR, which alleges the City of Carmel (the "City") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq*. I have enclosed the City's response for your reference.

BACKGROUND

A. <u>WTHR's Complaint</u>

According to your complaint, beginning on February 22, 2010, WTHR served a series of public records requests on the City. The requests sought information regarding two alleged assaults involving Carmel High School students. The first incident took place on January 22nd (the "school bus incident"); the second incident took place in a school locker room (the "locker room incident"). The City responded to each request and subsequently provided additional responses, including a redacted police report for each of the two incidents. The City claimed its redactions were justified under Ind. Code § 5-14-3-4(a)(1) and the investigatory records exception in Ind. Code § 5-14-3-4(b)(1).

In support of your position that the City's reliance upon Ind. Code § 5-14-3-4(a)(1) is misplaced, you offer several arguments. First, you note that section 4(a)(1) of the APRA provides that documents that are confidential under some other state statute are nondisclosable under the APRA, but the City has not cited to any other statute in support of its claim that juvenile records are confidential. Second, you note that to the extent that the alleged suspects are juveniles (a fact that you claim Carmel has neither confirmed nor denied), Ind. Code § 31-39-3-2 requires certain information to be

disclosed, including the circumstances immediately surrounding the alleged offense; the identity of the victim(s); any instrument of physical force used; and the identity of the perpetrator, if the offense is one over which a juvenile court does not have jurisdiction. The City has refused to disclose much of this information, including the names of the victims, the circumstances immediately surrounding the alleged offense, the instrument of physical force used, and the identity of the perpetrators.

As to the City's citation to Ind. Code § 5-14-3-4(b)(1), you claim that the City has also failed to disclose information that is required to be disclosed by section 5 of the APRA, which enumerates certain information that law enforcement agencies must include in a "daily log or record that lists suspected crimes, accidents, or complaints." Ind. Code § 5-14-3-5(c). Specifically, you claim that the City's responses do not include the substance of the complaints or the factual circumstances surrounding the incident:

> The heavily redacted documents provide little, if any, factual substance. With regard to the "bus incident" [the City] has redacted all of the factual substance except the fact that the victim claims he was assaulted on the back of a school bus while returning from a basketball game. How many players assaulted him? What was the nature of the assault? What were the victim's injuries? It is clear that these facts are contained within the report and constitute both the "substance" of the complaint and the "factual circumstances surrounding the incident," yet [the City] has redacted all of these facts. The report on the "locker room incident" is similarly lacking in substance and factual circumstances. In its unredacted state, the report apparently contains enough information to warrant a child abuse complaint with [the Indiana Department of Child Services]; however, as redacted by the City, the report omits all substance and factual circumstances sufficient to support that conclusion. Because the reports do not include the "substance of the complaints" and the "factual circumstances surrounding the incidents," they fail to satisfy the City's obligations under this statute.

[Complaint at 4].

You also argue that the City abused the discretion provided to it under Ind. Code § 5-14-3-4(b)(1) by arbitrarily and capriciously redacting information in the police reports. You state that "[t]he information contained in the redacted documents is so selective that the redactions can only be considered arbitrary and capricious. Entire sentences, perhaps even paragraphs have been redacted from both reports." [Complaint at 5]. By way of example, you cite to the fact that the City revealed the age, sex, and race of the victim of the locker room incident but refused to release the same information regarding the school bus incident.

On February 25, 2010, WTHR served a separate request on the City seeking "any and all communications involving the school bus incident." The City responded by claiming that such communications were protected from disclosure by the investigatory records exception. You argue that such a response is inadequate to satisfy the City's burden under the APRA to "establish[] the content of the [withheld] record with adequate

specificity and not by relying upon a conclusory statement or affidavit." Ind. Code § 5-14-3-9(g)(1)(B). You claim the City has the burden to show what efforts were made to locate all documents and electronic communications responsive to the request and, if any are responsive, to then show why those documents and communications fall within the investigatory records exception. Further, you state that "[a]t a minimum, we believe the City can meet its burden only by showing what efforts it made to locate all documents and communications responsive to WTHR's request and by submitting a log identifying with specificity (including at least the date, author, and recipient of any responsive documents and communications) which documents it is withholding on the basis of an exception." [Complaint at 6].

B. The City's Response

My office forwarded a copy of your complaint to the City. Paul D. Vink, outside counsel for the City, responded on its behalf. Mr. Vink denies the City violated the APRA. Mr. Vink stresses that the two redacted police reports are part of an ongoing criminal investigation that are excepted from disclosure under Ind. Code § 5-14-3-4(b)(1), which provides that "[i]nvestigatory records of law enforcement agencies" are except from disclosure.

Mr. Vink also argues that the City has complied with the requirements of section 5(c) of the APRA. Specifically, the City disclosed that it is investigating two incidents -- the locker room incident and the bus incident -- and that it is gathering facts to determine whether the incidents warrant criminal charges. He notes that the City has released its "logbook entry, report detail documents relating to these two incidents, as well as redacted police reports that describe the general nature of the alleged assaults, when they occurred, and the Carmel Police Department's ongoing investigation." [Response at 3].

> With respect to the locker room incident, among other things, [the City] has provided the date and location the incident occurred (January 8, 2010 in the Carmel High School locker room), the factual circumstances surrounding the incident (a boy was involved in an altercation with another person or persons that may have resulted in criminal confinement, sexual battery, and/or criminal deviate conduct when the victim's shorts were pulled down), and that [the City] is not aware that a weapon was involved or injuries sustained. With respect to the school bus incident, among other things, [the City] has disclosed the date and location the incident occurred (January 22, 2010 in a school bus traveling through Hendricks County), the factual circumstances surrounding the incident a boy was allegedly attacked twice in the back of a school bus by several basketball players that may constitute battery, criminal deviate conduct, and criminal confinement), and that [the City] is not aware that a weapon was involved or that any significant injury was sustained.

[*Id.*]. Mr. Vink claims that the foregoing shows that the City has complied with subsection 5(c) of the APRA. Mr. Vink acknowledges that the City has redacted portions of the police reports but argues that "the [APRA] requires [disclosure of] 'the factual

circumstances surrounding the incident,' which is decidedly different than requiring [disclosure of] 'the factual details of the incident.'" [*Id.*]

Regarding the City's refusal to release the names of the victims and alleged perpetrators, Mr. Vink notes that the victims' names are nondisclosable due to Ind. Code § 5-14-3-5(c)(3)(B), which states that the identity of a person who is the victim of a sex crime is confidential. With regard to the names of suspects, Mr. Vink notes that nothing in the APRA requires disclosure of such information.

Further, Mr. Vink denies that the City acted arbitrarily and capriciously by redacting portions of the police reports. In response to the disparity of information released regarding the victims of the locker room and bus incidents, Mr. Vink cites to the fact that "revealing such information about [the locker room incident] victim in a school with hundreds of students that fit the profile is very different from giving the same information in the context of a couple dozen students on a bus, only a couple of which may fit the profile." [Response at 4]. Mr. Vink also notes that other than the information required to be disclosed by section 5(c) of the APRA, the APRA recognizes that investigatory records of law enforcement agencies are except from disclosure under subsection 4(b)(1).

Finally, Mr. Vink denies that the City has an obligation to disclose all internal communications relating to the school bus incident or create a log that lists each communication and the reason for its non-production. He then cites to Counselor Neal's decision in *Opinion of the Public Access Counselor 08-INF-23* for his position that the City need not "conduct a city-wide search of all email and document management systems to determine if anyone in [the City] government may have mentioned the two incidents prior to the beginning of the police investigation." [Response at 6]. He notes that records responsive to such a request, if any, would likely be subject to one or more of the following exceptions to the APRA: privileged attorney-client communications, interagency advisory/deliberative materials, or investigatory records under Ind. Code §§ 5-14-3-4(a)(1), 5-14-3-4(b)(1), and 5-14-3-4(b)(6).

ANALYSIS

The public policy of the APRA states, "[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 City is a "public agency" under the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the City's public records during regular business hours unless the public records are excepted from disclosure under the APRA. I.C. § 5-14-3-3(a).

I. <u>Daily Log Information</u>

As an initial matter, it appears that this dispute is largely the result of what WTHR

describes as an inadequate "daily log," which is a record referenced in subsection 5(c) of the APRA. The City maintains that it has produced the relevant daily logs in this matter, [*see* Response at 3, referring to "logbook"], and argues that it has complied with the APRA's requirements for daily logs by supplementing its logbook with redacted police reports.

The APRA requires law enforcement agencies to maintain a daily log that lists suspected crimes, accidents, or complaints. *See* I.C. § 5-14-3-5(c). The record containing the information must be created not later than twenty-four hours after the incident has been reported to the agency, and the information must be made available for inspection and copying. The following information must be maintained in the daily log:

> (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,[1] 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.

I.C. § 5-14-3-5(c). WTHR claims that the "log maintained by the Carmel Police Department does not satisfy the City's obligations under [subsection 5(c) of the APRA] because it fails to provide much of the crucial information explicitly made public by that exception. Therefore, [the City] has attempted to bootstrap compliance by relying on part -- but not all -- of the incident report, which otherwise would likely fall within the investigatory records exception." [Reply at 1]. Counselor Neal issued an advisory opinion regarding a similar situation:

> In some instances, a law enforcement agency will not maintain a separate record titled "daily log" but will instead use the daily incident reports to substitute for the daily log. In that case, when the agency receives a request for the daily log information, the agency will

[1] Because the victims in each incident were victims of crimes under Ind. Code § 35-42-4 [Response at 3; FN 1], the City acted appropriately by not releasing their names. *See also* I.C. § 5-14-3-5(c)(3)(B). WTHR argues that Ind. Code § 31-39-3-2 requires the City to release the identities of the victims and suspects in these matters. Chapter 3 of Ind. Code § 31-39 deals generally with the confidentiality of juvenile delinquency records. Ind. Code § 31-39-3-4 provides that all law enforcement records related to *juvenile offenders* are confidential and available only in accordance with Ind. Code § 31-39-4. *See J.B. v. State of Indiana*, 868 N.E.2d 1197, 1200 (Ind. Ct. App. 2007). That section "requires law enforcement agencies to take appropriate actions to protect the records 'from unauthorized disclosure.'" *Id.*, citing I.C. § 31-39-3-4(b). Here, the City claims that this section has no applicability to the instant matters (presumably because none of the suspects are juvenile offenders, although the City has not explicitly said so), and I have no information indicating that any *juvenile* offenders have been apprehended or sought for the commission of any offenses. *See* I.C. § 31-39-3-2(6)-(7). Consequently, these provisions do not appear to apply.

> generally provide copies of incident reports. **In some cases, the agency will redact from the incident report any information not required to be maintained in a daily log. I have advised agencies this is acceptable so long as the daily log information is always available within twenty-four hours and so long as the agency provides at least the information which is required by I.C. § 5-14-3-5(c) to be made available for inspection and copying.**

Opinion of the Public Access Counselor 09-FC-93 at 3 (emphasis added). Thus, if the City released all of the information required by subsection 5(c), the City did not violate the APRA by releasing the information via incident reports provided that such information was available within twenty-four hours of the request for assistance and the incident reports contained all information that the APRA requires to be disclosed. *Id.*

The parties dispute whether the City has, through the incident reports, disclosed all information as required by subsection 5(c). WTHR maintains that despite the City's production of redacted incident reports, the City has failed to disclose the factual circumstances surrounding the incidents as required by Ind. Code § 5-14-3-5(c)(3). The nature of what kind of information constitutes the "factual circumstances surrounding the incident" is unclear because the APRA does not define the term. *See generally* I.C. § 5-14-3-2. A 2004 informal opinion from Counselor Davis provides some guidance:

> As you characterize it, the log is deficient because it often has only one-word responses to the elements included in IC 5-14-3-5(c)(3)(C) and (D). You state that for example, the log may simply say "burglary" where you believe the law would require a fuller explanation of the factual circumstances and a description of the injuries, property, or weapons involved. Further, you suggest that this part of the log should approximate what an investigating officer would tell his chief or a prosecutor in summarizing an incident.
>
> IC 5-14-3-5 does not contain any specific standard regarding how extensive the "factual circumstances" and "general description" must be. However, **I agree that a one word description such as "burglary" for the factual circumstances surrounding the alleged crime or infraction is not sufficient. Rather, a reasonable interpretation of the requirement to create and disclose a log would contemplate that the description in (C) and (D) would serve to inform a person of the circumstances that led to the police being summoned to investigate, a brief summary of what they found at the scene, and a further indication of the items in (D). To illustrate, the log entry currently showing "burglary" might be illuminated in the following way: "police were summoned on report of sounds of breaking glass; when officer arrived, he saw signs of forcible entry in residence; numerous items inside the house missing and homeowner injured in altercation with suspect."**
>
> Obviously, it would be difficult to set out a specific standard with respect to the completeness of the log. However, **I doubt that your suggested standard is the one required by the statute, where an officer's statement of the crime or infraction reported to a prosecutor or chief might include his or her impressions of who a likely suspect is or the incident's similarity to other incidents, as**

> **examples. Those impressions may well be part of the investigatory record that could be withheld under the exception for investigatory records at IC 5-14-3-4(b)(1).**

Informal Inquiry Re: Law Enforcement Records and the Access to Public Records Act at 2 (November 23, 2004), available at http://www.in.gov/pac/informal/files/Hoosier_State_Press_Association_memo.pdf.

With regard to the two incidents at issue, the City released the following information concerning the school bus incident: "a boy was involved in an altercation with another person or persons that may have resulted in criminal confinement, sexual battery, and/or criminal deviate conduct when the victim's shorts were pulled down." [Response at 3]. With respect to the locker room incident, the City released information stating that "a boy was allegedly attacked twice in the back of a school bus by several basketball players that may constitute battery, criminal deviate conduct, and criminal confinement." [*Id.*] WTHR views this information as insufficient because, in the case of the bus incident, it fails to reveal how many players assaulted the victim, the nature of the assault, and the victim's injuries. [Complaint at 4]. As Counselor Davis acknowledged in her opinion, it is difficult to define the contours of the "factual circumstances" standard. While I share WTHR's concerns regarding the amount of information released by the City, the vagueness of the language in section 5 and the precedent from Counselor Neal lead me to the conclusion that the City substantially complied with subsection 5(c).

A contrary opinion (i.e., that the City violated the APRA by failing to include additional details such as those requested by WTHR) would leave law enforcement agencies with little guidance upon which to rely when deciding what details must be released and what details may be withheld during criminal investigations. Moreover, such an opinion would require the City to release additional information from a record that is typically classified as an investigatory record. *See* I.C. § 5-14-3-4(b)(1). 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).") Finally, a contrary decision would not reconcile with Counselor Davis' reasoning in her informal inquiry cited above, where she noted that details such as "the officer's . . . impressions of who a likely suspect is or the incident's similarity to other incidents" would constitute the type of information that "may well be part of the investigatory record that could be withheld under the exception for investigatory records at IC 5-14-3-4(b)(1)." Counselor Davis issued her opinion acknowledging the vagueness of section 5 in November of 2004. The General Assembly has met six times since that time and has not seen fit to clarify the law. The City appears to have acted in compliance with the guidance contained in advisory opinions issued by Counselors Davis and Neal. As a result, I am reluctant to opine that the City has violated section 5 of the APRA.

II. The Arbitrary and Capricious Standard

The APRA provides that any person may file a case in superior court to compel the

production of records following the denial of access to such records by a public agency. *See generally* I.C. § 5-14-3-9. The court reviews the matter *de novo*, and the applicable burden of proof regarding whether the public agency violated the APRA is whether the public agency's decision was arbitrary or capricious. Ind. Code 5-14-3-9(f). In a court case, the burden of proof that the denial was arbitrary or capricious lies with the person who requested access. *Id*. The public agency, however, must still meet an initial burden of proof by proving that the public record falls within any one of the categories listed under Indiana Code section 5-14-3-4(b) and establishing the contents with adequate specificity. *Id.*; *Opinion of the Public Access Counselor, 00-FC-18.* It is important to clarify that the arbitrary and capricious standard mentioned in section 9 of the APRA applies only when a requester files a court action; it does not apply at this stage, as Counselor O'Connor explained in a 2001 opinion:

> Under the APRA, the burden of proof beyond the written response anticipated under Indiana Code section 5-14-3-9(c) is outlined for any ***court action*** taken against the public agency for denial under Indiana Code sections 5-14-3-9(e) or (f). If the public agency claimed one of the exemptions from disclosure outlined at Indiana Code section 5-14-3-4(a), then the agency would then have to either "establish the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit" ***to the court***. Similarly, if the public agency claims an exemption under Indiana Code section 5-14-3-4(b), then the agency must prove to the court that the record falls within any one of the exemptions listed in that provision and establish the content of the record with adequate specificity. ***There is no authority under the APRA that required the [public agency] to provide you with a more detailed explanation of the denials other than a statement of the exemption authorizing nondisclosure, but such an explanation would be required if this matter was ever reviewed by a trial court.***

Opinion of the Public Access Counselor 01-FC-47 (emphasis added). Nevertheless, WTHR argues that the City acted arbitrarily and capriciously by redacting large portions of the incident reports prior to producing them. The City claims that the incident reports are investigatory records of a law enforcement agency under Ind. Code § 5-14-3-4(b)(1). Investigatory records are defined in the APRA as records that are compiled by a law enforcement agency during the course of the investigation of a crime. I.C. § 5-14-3-2(h). Counselor Neal applied the exception to incident reports in a recent opinion:

> The so-called "investigatory records exception" is one of the broadest exceptions in the APRA. The exception allows a law enforcement agency to withhold nearly all records it compiles during the course of the investigation of a crime. Generally, incident reports are considered investigatory records because they are compiled during the course of the investigation of a crime. As such, the Department would be within its authority to withhold copies of the incident reports.

Opinion of the Public Access Counselor 09-FC-93. In that case, the requester/complainant argued that the public agency violated the APRA by refusing to produce incident reports that contained confidential information. Counselor Neal noted that if the incident reports were excepted from disclosure under the investigatory records

exception, "the issue of whether the [public agency] is required to sort the records as you requested is moot because the [public agency] is not required to provide you access to the records at all." *Id.* at 3. Similarly here, if the incident reports are indeed investigatory records, the City was not obligated to produce the records at all. The fact that the City released portions of the records in an attempt to comply with section 5 of the APRA does not mean that the City did not have the discretion to redact the remaining portions of the records. Because the City has stated that the incident reports are records that were compiled during the course of a criminal investigation, [Response at 3], it seems unlikely that a court would find that the City acted arbitrarily and capriciously by redacting the reports because the City was under no obligation to release those records in the first place. *Opinion of the Public Access Counselor 09-FC-93* at 3; I.C. § 5-14-3-4(b)(1).

III. WTHR's Request for "Any and All Communications"

It appears that the City initially cited to the investigatory records exception in denying WTHR's request for "any and all communications involving the school bus incident." In its response to this complaint, however, the City argues that WTHR's request was overly broad and offers no explanation for its initial citation to the investigatory records exception. Consequently, the City has not met its burden to show that the investigatory record exception applies.

It appears, however, that the request was not made with "reasonable particularity" as required by Ind. Code § 5-14-3-3(a)(1). A request for inspection or copying must identify with reasonable particularity the record being requested. I.C. § 5-14-3-3(a). While the term "reasonable particularity" is not defined in the APRA, it has been addressed a number of times by the public access counselor. *See Opinions of the Public Access Counselor 99-FC-21* and *00-FC-15*. Counselor Hurst addressed the concept in *Opinion of the Public Access Counselor 04-FC-38*:

> A request for public records must "identify with reasonable particularity the record being requested." IC 5-14-3-3(a)(1). While a request for *information* may in many circumstances meet this requirement, when the public agency does not organize or maintain its records in a manner that permits it to readily identify records that are responsive to the request, it is under no obligation to search all of its records for any reference to the information being requested. Moreover, unless otherwise required by law, a public agency is under no obligation to maintain its records in any particular manner, and it is under no obligation to *create* a record that complies with the requesting party's request.

Opinion of the Public Access Counselor 04-FC-38 (emphasis in original), available at http://www.in.gov/pac/advisory/files/04-FC-38.pdf. In my opinion, a request for "any and all communications" regarding a certain subject is not made with reasonable particularity because a public agency would not be able to readily identify what records would be subject to that request. *Id.*

I note that in her 2008 informal opinion, Counselor Neal explained that if "a request identified the records with particularity enough that the [public agency] could determine

which records are sought (e.g. all emails from a person to another for a particular date or date range), the [public agency] would be obligated to retrieve those records and provide access to them, subject to any exceptions to disclosure. It is my opinion the APRA draws a distinction here in that the law requires retrieval but not research." *Informal Inquiry 08-FC-34 re: Carmel Clay Schools*, available at http://www.in.gov/pac/informal/files/Carmel_Clay_Schools.pdf. Thus, if WTHR were to submit supplementary requests that include greater specificity as suggested in the foregoing opinions, the City must produce responsive records unless an exception to the APRA applies.

WTHR also argues that the City can satisfy its burden "only by showing what efforts it made to locate all documents and communications responsive to WTHR's request and by submitting a log identifying with specificity (including at least the date, author, and recipient of any responsive documents and communications) which documents it is withholding on the basis of this exception." [Complaint at 5]. If this matter were to proceed to judicial review, such a response might be required in the realm of the discovery process, but the APRA does not require the type of response described by WTHR. The APRA does not obligate public agencies to create records -- such as privilege logs -- in response to a request. *See Opinion of the Public Access Counselor 09-FC-285* at 3. Moreover, "[t]he APRA does not state that ***a public agency*** must identify with particularity the records being withheld in response to [a] request." *See Opinion of the Public Access Counselor 03-FC-45* (emphasis added). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and must include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. I.C. § 5-14-3-9(c). The City initially cited an inapplicable exemption, but it appears that the City's denials otherwise complied with the requirements of section 9 of the APRA.

CONCLUSION

For the foregoing reasons, if the relevant daily log information was not available within twenty-four hours (through its daily log and/or incident reports), the City violated subsection 5(c) of the APRA. With regard to WTHR's most recent request, the City initially cited an APRA exception that does not appear to apply. However, because it seems that WTHR's request was not made with the requisite particularity, in my opinion the City has not otherwise violated the APRA.

Best regards,

Andrew J. Kossack
Public Access Counselor

Cc: Paul D. Vink