



# STATE OF INDIANA

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July 7, 2011

Mr. Pete A. Nickeas  
*The Times of Northwest Indiana*  
601 West 45th Street  
Munster, IN 46231

*Re: Formal Complaint 11-FC-140; Alleged Violation of the Access to Public Records Act by the Lake County Sheriff's Department*

Dear Mr. Nickeas:

This advisory opinion is in response to your formal complaint alleging the Lake County Sheriff's Department (the "Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* The Department's response from its attorney, John P. Bushemi, is enclosed for your reference.

## BACKGROUND

In your complaint, you allege that on May 11, 2011, you requested a recording of a 911 call that leg investigators to search for a body in the Colfax Mobile Home Park in Gary, Indiana. The call occurred on or about May 1, 2011. You also requested transcripts of radio traffic related to that 911 call. On June 2, 2011, you contacted Department Public Information Officer Robert Arnold to inquire about the status of the request. He informed you that the Department had not yet approved the release of the records. On June 6th, Mr. Arnold sent you an email stating that the Department's "official response is that we will not release the recording unless compelled to do so." When you asked him to cite an exception to the APRA that permitted the Department's denial of your request, he stated that the information was part of an ongoing investigation.

In response to your complaint, Mr. Bushemi argues that the Department's denial was permitted under the investigatory records exception to the APRA. He explains that the Department and the Lake County Prosecutor's Office ("Prosecutor") are still conducting an investigation concerning the death of a minor child, which began prior to May 11th and continued as of June 22nd (the date of the Prosecutor's response). Two individuals have already been charged with murder, but it remains possible that others will be charged as well. Mr. Bushemi states that the 911 recording and radio transcripts

were compiled into a file by the Department during the course of the investigation. The Department concluded that because the investigation is ongoing, releasing the records would negatively impact the investigation. Specifically, the 911 recording and radio transcripts contain facts that have not been disclosed to the general public that, if disclosed, could alter statements from witnesses not yet interviewed in the investigation. These records may be used by investigators to question the caller and other persons of interest in the case. Finally, Mr. Bushemi argues that disclosing the radio transcripts could expose the Department's decision making process in a way that could prevent thorough investigation of the crime. On these bases, the Department exercised its discretion to deny access to the records under subsection 4(b)(1) of the APRA.

## ANALYSIS

The investigatory records exception to the APRA provides that a law enforcement agency has the discretion to disclose or not disclose its investigatory records. *See* I.C. § 5-14-3-4(b)(1); *Op. of the Public Access Counselor 09-FC-157*. The APRA defines an investigatory record as “information compiled in the course of the investigation of a crime.” I.C. § 5-14-3-2(h). Here, Mr. Bushemi states that “[t]he requested records (the 911 recording and transcripts of subsequent law enforcement radio traffic) have been gathered, or *compiled, into a file by the Sheriff's Department during the course of this criminal investigation*” (emphasis added). If that is the case, the Department did not violate the APRA by denying your request because the records fall within the APRA's definition of an investigatory record under subsection 2(h). *See Op. of the Public Access Counselor 08-FC-64*.

That said, it appears that the Department's response did not comply with the APRA's provisions governing procedures related to denying a records request. *See generally* I.C. § 5-14-3-9. Under the APRA, when a records request is made in writing and an 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). In other words, the Department's denial should have cited to Ind. Code § 5-14-3-4(b)(1) as the basis for its denial rather than merely stating that the Department would “not release the recording unless compelled to do so.” Moreover, under the APRA, if a request is sent via email, 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). 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. It appears that the Department did not respond to your May 11th request until June 2nd, and that was only after you telephoned the Department to inquire about the status of the request. As such, it was deemed a denial on or about May 18th (depending on when the Department received your email), and the Department was obligated to provide you with a written response at that time. The Department's apparent failure to do so constitutes a procedural violation of section 9 of the APRA, but the substance of the Department's denial was justified under subsection 4(b)(1).

## CONCLUSION

For the foregoing reasons, it is my opinion that the Department should have responded to your emailed request within seven days in accordance with section 9 of the APRA. The Department did not otherwise violate the APRA because its denial was permissible under the investigatory records exception to the APRA found in Ind. Code § 5-14-3-4(b)(1).

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: John P. Bushemi