



STATE OF INDIANA

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February 10, 2011

Mr. Brendan Healey, OBO Ms. Stacy W. St. Clair
Chicago Tribune
435 N. Michigan Ave.
Chicago, IL 60091

Re: Formal Complaint 11-FC-21; Alleged Violation of the Access to Public Records Act by the Office of the Prosecuting Attorney, St. Joseph County

Dear Mr. Healey:

This advisory opinion is in response to your formal complaint on behalf of Ms. Stacy St. Clair and the *Chicago Tribune* alleging that the Office of the Prosecuting Attorney of St. Joseph County ("Prosecutor") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* The Prosecutor's response is enclosed for your reference.

BACKGROUND

In your complaint, you allege that the Prosecutor violated the APRA by applying the investigatory records exception to the APRA with "too broad a brush." Ms. St. Clair requested records from the Prosecutor "relating to Elizabeth Seeberg's sexual battery allegations[, including] police reports, witness statements, victim statements, correspondence with [the University of] Notre Dame officials and other law enforcement agencies, and documents relating to a September 2, 2010 text message Ms. Seeberg received." The Prosecutor denied the request, stating that every responsive document in the Prosecutor's possession fell under the investigatory records exception to the APRA.

You argue that the investigatory records exception applies only in limited circumstances and question whether all of the withheld records fall within the exception. Specifically, you claim that "[d]ocuments created after the investigation or outside the investigation are not covered" by the investigatory records exception. Further, you take the position that the correspondence between the Prosecutor's office and other law enforcement agencies fall outside of the exception because they were extrinsic to any investigation that occurred. "For example, if the entities were coordinating public statements, that [sic] would not be an investigatory record." You also believe that "post-

investigation correspondence should be disclosed.” You also argue that the Prosecutor should release the records listed in Section 5 of the APRA.

In response to your complaint, Patrick J. Higgins, Jr., maintains that the withheld records are all investigatory records exempt from disclosure under subsection 4(b)(1) of the APRA. Mr. Higgins argues that the investigatory records exception applies not only to active investigations, but also to closed investigations and investigations for which no criminal charges were filed. With regard to the daily log information, Mr. Higgins states that the Prosecutor’s general practice is to refer requesters who seek daily log information to the police department that maintains those records. The Prosecutor did not refer Ms. St. Clair to the police department in this instance, however, because the request did not specifically ask for such information. Moreover, the Prosecutor claims that they were “aware that the Tribune already possessed the basic information [in the daily log] as it had been published in their newspaper.” Mr. Higgins claims that the APRA was not intended to require prosecutors to maintain daily logs because prosecutors do not receive reports of criminal activities. Rather, prosecutors typically receive investigatory records from police departments, which act as the first responders.

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 Prosecutor 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 Prosecutor’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). The Prosecutor is also a “law enforcement agency” under subsection 2(l)(6) of 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) (emphasis added). The statutory language is clear and unambiguous that the exception applies not only to those records *created* by law enforcement agencies, but also to those records *compiled* by law enforcement agencies during the investigation of a crime. *Id.* Moreover, previous advisory opinions from this office are in accord with the Prosecutor’s argument that the investigatory records exception does not apply only to records of ongoing or current investigations. *See, e.g., Ops. of the Public Access Counselor 09-FC-227; 09-FC-157.* The exception applies regardless of whether a crime was charged or whether a crime was even committed. *See Unincorporated Operating Div. of Ind. Newspapers, Inc. v. Trs. of Ind. Univ.*, 787 N.E.2d 893, 902 (Ind. Ct. App. 2003) (“The plain language of section 4(b)(1) . . . makes no mention of the likelihood of prosecution.”). 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. For better or worse, neither the APRA nor previous advisory opinions from this office require that

investigatory records be available for public inspection once an investigation is complete. *Id.* (“[The] APRA contains a separate provision for the disclosure of aging documents, which is inapplicable here. *See* I.C. § 5-14-3-4(e) (requiring access to all records, except those concerning an adoption, seventy-five years after the creation of the record).”). 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.* The Prosecutor states that all of the withheld records that are responsive to your request were compiled in the course of its investigation of a crime. As such, it is my opinion that the police reports, witness statements, victim statements, correspondence with other law enforcement agencies concerning the investigation, and other records compiled by the Prosecutor in the course of its investigation are “investigatory records” within the meaning of section 2(h).¹

Regarding a daily log, the APRA requires the following:

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.

I.C. § 5-14-3-5(c). If an agency does not maintain a separate daily log, the agency must produce some record that contains the information required by I.C. § 5-14-3-5(c) to be disclosed. In some jurisdictions, the law enforcement agency will provide a copy of a police report or incident report if the agency does not maintain a daily log. The agency is only required to provide the information listed in I.C. § 5-14-3-5(c), though, and as such

¹ I note that I agree with the *Chicago Tribune's* argument that correspondence between law enforcement agencies could fall outside of the investigatory records exception if such correspondence was unrelated to the investigation of a crime. However, the Prosecutor maintains here that all such correspondence was “investigatory in nature.” As such, it fits within the investigatory records exception.

may redact the remainder of the information contained on the report if it was indeed compiled during the course of the investigation of a crime or is nondisclosable pursuant to another exception.

In my opinion, if a Prosecutor receives a request for daily log information, the Prosecutor satisfies Section 5 of the APRA by arranging for the requester to receive such information from the appropriate police department that maintains the daily log. I cannot agree that prosecutors are without any obligation to respond with information under Section 5 because there may be cases where a prosecutor does, in fact, receive reports of “suspected crimes, accidents, or complaints.” *Id.* However, I agree with the Prosecutor’s argument that, typically, such information is maintained by the police department that acted as the first responder in the matter. As such, in my opinion the Prosecutor would not violate the APRA by referring a requester to the responding police department if the Prosecutor did not receive the initial report of a suspected crime, accident, or complaint.

Here, I agree with the Prosecutor that the request did not specifically seek daily log information. However, I also agree with a 2007 advisory opinion from Counselor Davis, who opined advised “that the Prosecutor’s Office should discuss with the requester the availability of the daily log when an individual is seeking police reports or probable cause affidavits. In spite of the exemption at section 4(b)(1), a person is entitled to information in the daily log.” *Op. of the Public Access Counselor 07-FC-10.* In that case, which was issued in response to similar circumstances, Counselor Davis concluded, “The St. Joseph County Prosecutor’s Office was not required to give you the police reports and probable cause affidavits regarding David Snyder’s case, but should have offered you the daily log.” *Id.* I understand the Prosecutor’s position that such an offer seemed unnecessary given the *Chicago Tribune’s* coverage of the case, but I would encourage agencies not to assume that a requester already has information that the requester has asked for without confirming the same.

Finally, with regard to the argument that the Prosecutor acted arbitrarily and capriciously by withholding all of the investigatory records, that is a determination for a court rather than the public access counselor. *See* I.C. § 5-14-3-9(g)(2).

CONCLUSION

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

Best regards,



Andrew J. Kossack
Public Access Counselor

cc: Patrick J. Higgins, Jr.