



STATE OF INDIANA

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October 19, 2011

Tri-Force, Inc.
Attention: Shana Penn
55850 Currant Road
Mishawaka, Indiana 46545

Re: Formal Complaint 11-FC-249; Alleged Violation of the Access to Public Records Act by the Goshen Police Department

Dear Ms. Penn:

This advisory opinion is in response to your formal complaint alleging that the Goshen Police Department ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Shannon Marks, Legal Administrator, responded on behalf of the Department. Her response is enclosed for your reference.

BACKGROUND

In your complaint, you allege that on September 2, 2011, you submitted a written request to the Department for all records relating to the investigation, trial, conviction, and sentencing of your client, Jose Mendoza. On September 9, 2011, the Department denied your request in writing pursuant to I.C. § 5-14-3-4(b)(1) & (2). You allege that the Department is unable to assert its discretion in denying your request as the records were used as evidence and exhibits that were uttered or published in a court proceeding.

In response to your formal complaint, Ms. Marks provided that the Department provided you a copy of the Incident Offense Report pertaining to Mr. Mendoza's arrests, but all other records were denied pursuant to the discretion afforded to the Department pursuant to I.C. § 5-14-3-4(b)(1).

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." See I.C. § 5-14-3-1. The Department is a public agency for the purposes of the APRA. See I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the

Department's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). 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. *See* I.C. § 5-14-3-9(b). 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 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. *See* I.C. § 5-14-3-9(c). 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 Department responded to your request within the seven (7) day time-frame as required by 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." *See* I.C. § 5-14-3-2(h). The investigatory records exception does not apply only to records of ongoing or current investigations; rather, it applies regardless of whether a crime was charged or even committed. The exception applies to all records compiled during the course of the investigation, 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.* As such, to the extent that the records you requested were investigatory records of a law enforcement agency, the Prosecutor did not violate the APRA by exercising its discretion and denying your request pursuant to I.C. § 5-14-3-4(b)(1).

Not all information compiled by a law enforcement agency, however, is subject to the investigatory records exception. For example, Indiana Code sections 5-14-3-5(a) and (c) of the APRA set forth the information about arrests and suspected crimes, accidents or complaints that must be provided upon request and for which a law enforcement agency may not claim the investigatory records exception. Also, it is clear from the definition of investigatory record that not all investigations are subject to this exception. Law enforcement agencies may conduct investigations, such as internal investigations concerning the violation of a departmental rule, for example, that are not crimes and therefore not subject to the exception under I.C. § 5-14-3-4(b)(1). *See Opinion of the Public Access Counselor 03-FC-75*. Here, it is my opinion that the Incident Report provided by the Department complied with the requirements of I.C. § 5-14-3-5.

Furthermore, I.C. § 5-14-3-4(b)(2) provides that a public agency has discretion to withhold a record that is the work product of an attorney representing, pursuant to state

employment or an appointment by a public agency: a public agency; the state; or an individual.

“Work product of an attorney” means information compiled by an attorney in reasonable anticipation of litigation and includes the attorney’s:
(1) notes and statements taken during interviews of prospective witnesses; and
(2) legal research or records, correspondence, reports, or memoranda to the extent that each contains the attorney’s opinions, theories, or conclusions.
I.C. § 5-14-3-2(p).

To the extent that the records you requested would be considered the work product of an attorney pursuant to the APRA, is it my opinion that the Department did not act contrary to the APRA in citing I.C. § 5-14-3-4(b)(2) to deny your request.

In regards to your allegation that the Department is barred from denying your request pursuant to I.C. § 5-14-3-4(b)(1) due to the records were already used as evidence during a public criminal trial of Mr. Mendoza, I would initially note that you have not identified in your request submitted to the Department what specific records were introduced into evidence during Mr. Mendoza’s criminal trial. You specifically submitted a request to the Department for all records relating to the investigation, trial, conviction, and sentencing of your client, Jose Mendoza. It cannot be assumed that all of the records requested of the Department were introduced into evidence during the trial. The court in *Indianapolis Newspapers* addressed the issue of waiver of discretion:

Waiver is the voluntary and intentional relinquishment of a known right. *City of Evansville v. Follis*, 161 Ind.App. 396, 402, 315 N.E.2d 724, 727 (1974). See also 28 AM. JUR. 2D *Estoppel and Waiver* § 197 (2000) (defining waiver as the voluntary and intentional relinquishment of a known right, claim, or privilege). We can envision a situation in which a state agency might relinquish the protections afforded by APRA's exceptions. If, for example, an agency allowed one party access to materials and then in turn denied another party access to the same materials based upon an exception to APRA, the agency might well be held to have waived the applicable APRA protections. *Cf. Cooper*, 594 F.2d at 487-88; *Zuern*, 564 N.E.2d at 84. Nor do we believe that such a conclusion would frustrate the underlying purpose of the APRA exceptions, for if the agency has already disclosed the allegedly nondiscloseable materials, the purpose of the APRA exceptions will have already been compromised. Moreover, in such a case, the decision to deny access after allowing others access could be considered an arbitrary and

capricious abuse of discretion. See I.C. § 5-14-3-9(f)(2); *Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ.*, 787 N.E.2d 893, 919 (Ind. Ct. App. 2005); *Opinion of the Public Access Counselor 08-FC-151*.

I have nothing before me to indicate that the Department, in response to a public records request, has previously allowed access to any records relating to the investigation, trial, conviction, and sentencing of Mr. Mendoza or introduced any records at the criminal trial of Mr. Mendoza. See *Opinion of the Public Access Counselor 11-FC-83*. Consequently, it is my opinion that the Department did not waive its right to withhold the records at issue here.

CONCLUSION

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

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is stylized with a large initial "J" and a cursive "Hoage".

Joseph B. Hoage
Public Access Counselor

cc: Shannon Marks