



STATE OF INDIANA

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May 6, 2011

Ms. Kara Kenney
1330 North Meridian Street
Indianapolis, IN 46202

*Re: Formal Complaint 11-FC-90; Alleged Violation of the Access to
Public Records Act by the White River Township Fire Department*

Dear Ms. Kenney:

This advisory opinion is in response to your formal complaint alleging the White River Township Fire Department (“Department”) violated the Access to Public Records Act (“APRA”), Ind. Code § 5-14-3-1 *et seq.* The Department’s response to your complaint is enclosed.

BACKGROUND

In your complaint, you allege that on January 10, 2011, you began emailing Department Chief Jeremy Pell asking for any documents related to car accidents in which Eric Brown was driving. As of April 5, 2011, when you filed your complaint, you state that Chief Pell had not provided all of the documents you seek. The Department did disclose some records, but none related to June 23, 2008. You note that you are looking for insurance documents, repair estimates, emails, letters, memos, pictures, descriptions, and other related records, but you have not received these records and believe a reasonable amount of time passed since the Department received your request.

In your initial email request dated January 10, 2011, you asked for “any information you have on an accident involving Eric Brown. . . . Any records or documents would help.” Chief Pell promptly responded to that request the following day and inquired as to which accident you were referencing. You replied that you were seeking all accidents in which Eric Brown was driving. On January 13th, Chief Pell responded again by stating that he was researching your request and would provide you with some information as soon as he had it available. After not receiving a response, you sent another email to Chief Pell on February 10th. In that message, you stated, “It’s now been a month since this request. What information can you provide us with?”

On February 14th, you sent Chief Pell another email which reads, in part, “Under IC 5-14-3, I am requesting to view any documents (emails, memos, letters, claims, etc) [sic] pertaining to accidents involving Eric Brown.” You also asked questions of the Department in that email, including: (1) “Did the fire department perform its own investigation on these 3 accidents?”; (2) “Who was determined to be at fault?”; and (3) “Were there claims with insurance over these accidents?”

On February 21st, presumably after you did not receive a response from Chief Pell, you sent another email asking for an update on your February 14th request. On February 22nd, Chief Pell responded via email with an attached letter.

In response to your complaint, Chief Pell and the Department’s¹ attorney, Jeffrey Logston, responded to your complaint. Mr. Logston claims that the Department responded appropriately to your requests and also “made numerous attempts to respond to informal requests for which it had no requirement to do.” He argues that the Department is not required to “explain documents, elaborate on circumstances, describe why documents were produced or not produced, and produce documents that are either protected or just not maintained.”

Chief Pell acknowledges that he exchanged several emails with you in January of this year, but claims that those communications were “informal requests for information or documents.” He adds that he responded to each request as fully as possible in writing or through production of documents even though he was not required to do so. He further states that on February 14th, you “formalized” your request in an email stating that you were seeking records under the APRA. On February 22nd, he responded to that request and informed you that that the Department would release responsive records to you by February 25th and withheld others under Ind. Code § 5-14-3-4(b)(6). According to Chief Pell, the Department made those records available as stated in the February 22nd response.

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 Department does not contest that it 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 Department’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).

¹ I note that Chief Pell and Mr. Logston both refer to the Department as the “White River Township Fire Protection District, Johnson County, Indiana.” However, because Mr. Pell’s letterhead reads, “White River Township Fire Department,” it appears that either name suffices to identify the subject of this complaint. Because you listed the latter name in your complaint form, I will use it to refer to the entity throughout this opinion.

Under the APRA, 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, it appears that the Department initially responded to January 10th emailed request on January 11th, which is within the seven-day period that the APRA prescribes for responding to written requests. However, the Department did not consider your request “formalized” until you sent your February 14th request via email after the Department did not produce any records in response to your January 10th request. If the Department considered your February 14th request a distinct or “formal” request, it should have responded within the seven-day timeframe prescribed by section 9 of the APRA.

The next question is whether the Department failed to produce records within a reasonable amount of time by taking between the date of your initial request, January 10th, and the date of the Department released records to you: February 25th. The APRA provides no firm deadlines for the production of public records. The public access counselor has stated repeatedly that records must be produced within a reasonable period of time, based on the facts and circumstances. Considering factors such as the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *Opinion of the Public Access Counselor 02-FC-45*. Here, the Department does not explain why it required from January 10th to February 25th to procure responsive records and prepare them for release. One implication is that your request was not considered “formalized” until February 14th, but the APRA does not distinguish between formal and informal requests. Your January 10th request asked for “[a]ny records or documents,” and all that the APRA requires of records requests is that it “(1) identify with reasonable particularity the record being requested; and (2) be, at the discretion of the agency, in writing on or in a form provided by the agency.” I.C. § 5-14-3-3(a). Without an explanation from the Department as to why it took the time it did to actually produce responsive records, it is my opinion that the Department has failed to show that its production occurred within a reasonable amount of time.

That said, I agree with the Department insofar as Chief Pell and Mr. Logston argue that public agencies are not required by the APRA to respond to questions or generalized inquiries if such interrogatories are not in the form of requests for actual records. The APRA applies to the required production of existing records, but public agencies need not create new records to answer requester’s questions. *See Op. of the Public Access Counselor 01-FC-60*. Moreover, the Department need not release records that are nondisclosable under Ind. Code § 5-14-3-4(b)(6), although the Department

should separate disclosable material from nondisclosable material in such records (if any) and make the former available for inspection and copying in accordance with section 6 of the APRA.

CONCLUSION

For the foregoing reasons, it is my opinion that the Department has not shown that it produced responsive records to you within a reasonable period of time following your request. The Department should produce any additional responsive, non-confidential records -- including redacted records if they are partially disclosable -- that the Department maintains as soon as practicable. The Department has not otherwise violated the APRA because the APRA does not obligate it to respond to generalized inquiries that are not requests for physical records maintained by the agency.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive, slightly slanted style.

Andrew J. Kossack
Public Access Counselor

cc: Chief Jeremy Pell
Jeffrey Logston