



STATE OF INDIANA

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June 8, 2012

Krista E. Gerst
3730 Brayden Drive
Evansville, Indiana 47711

Re: Formal Complaint 12-FC-120; Alleged Violation of the Access to Public Records Act by the Vanderburgh County Sheriff's Department

Dear Ms. Gerst:

This advisory opinion is in response to your formal complaint alleging the Town of Vanderburgh County Sheriff's Department ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Joseph H. Harrison, Jr., Attorney, responded on behalf of the Department. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that you submitted a request to the Department for all reports created by Eric Williams regarding an investigation into an incident involving your family. You further allege that the report you received from the Department created by Deputy Lasher contained numerous errors. You also requested a report be created, if one did not exist, regarding whether the Department ever contacted certain individuals to be questioned regarding the incident. You believe the Department did not comply with the APRA in response to your request.

In response to your formal complaint, Mr. Harrison advised that pursuant to I.C. § 5-14-3-4(b)(1), investigatory records of law enforcement agencies are not required to be made available to persons for inspection and copying, except as provided in I.C. § 5-14-3-5(c). Upon receiving your request, the Department provided to you a copy of the Incident/Investigation report related to the November 17, 2011 incident. At some point thereafter, you returned a copy of the incident report and included hand-written comments regarding the Department's investigation. After reviewing your submission, the Department created no additional reports related to the incident. On April 10, 2012, you contacted Sgt. Robinson by telephone and requested copies of additional investigative reports related to the incident. Sgt. Robinson informed you that no additional records responsive to your request were available.

Further, on April 10, 2012, you allegedly sought a request from Sgt. Robinson relating to a January 5, 2012 incident. However, the Department maintains that you never submitted a request for the report to the Department. Regardless, the January 5, 2012 incident report has now been provided, a copy of which is enclosed for your reference.

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 Police 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 twenty-four 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 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.

The APRA requires that certain law enforcement records be made available for inspection and copying. *See* I.C. § 5-14-3-5. Specifically, the APRA obligates 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. *Id.* 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, 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).

Counselor Neal issued an advisory opinion regarding a law enforcement agency's requirements pursuant to I.C. § 5-14-3-5(c):

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 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.*

Beyond the requirements of section 5 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." *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.*

If a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. "[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA." *Opinion of the Public Access Counselor 01-FC-61; see also Opinion of the Public Access Counselor 08-FC-113* ("If the records do not exist, certainly the [agency] could not be required to produce a copy...."). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. *See Opinion of the Public Access Counselor 10-FC-56.*

As applicable here, the Department has provided all reports related to the November 17, 2011 incident have been provided to you. No subsequent reports related to the incident have ever been created. I have reviewed all reports provided by the Department in response to your request related to November 17, 2011, and all information required by I.C. § 5-14-3-5 has been provided. As the Department has provided that all records that are responsive to your request the reports comply with the requirements of I.C. § 5-14-3-5, it is my opinion that the Department did not violate the APRA.

As to the January 5, 2012 incident, the Department has provided it did not receive your request. As previous Public Access Counselor's have provided, the Public Access Counselor is not a finder of fact. *See Opinion of the Public Access Counselor 10-FC-15.* Consequently, I express no opinion as to whether or not Department received your request. Under the APRA, if a request is delivered by mail or facsimile and the agency does not respond to the request within seven days of receipt, the request is deemed denied. *See I.C. § 5-14-3-9(b).* A public agency may deny a request if: (1) the denial is in writing or by facsimile; and (2) the denial includes: (A) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and (B) the name and the title or position of the person responsible for the denial. *See I.C. §5-14-3-9(c).* If the Department received your request and did not respond to it within these timeframes, the Department acted contrary to the APRA. However, if the Department did not receive your request, it was not obligated to respond to it. As the Department has enclosed a copy of the January 5, 2012 incident report, I trust that this is in satisfaction of your request.

CONCLUSION

For the foregoing reasons, it is my opinion that the Department did not violate the APRA if it never received your request for records pertaining to the January 5, 2012 incident. As to all other issues, 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 fluid and cursive, with the first letter of the first name being a large, stylized capital "J".

Joseph B. Hoage
Public Access Counselor

cc: Joseph H. Harrison, Jr.