



STATE OF INDIANA

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August 20, 2012

Mr. Randall S. Tison
DOC 127788
P.O. Box 1111
Carlisle, Indiana 47838

Re: Formal Complaint 12-FC-227; Alleged Violation of the Access to Public Records Act by the Vanderburgh County Sheriff's Department

Dear Mr. Tison:

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

BACKGROUND

In your formal complaint, you allege that you submitted a written request for records to the Department on or about July 30, 2012. As of August 13, 2012, the date you filed your formal complaint with the Public Access Counselor's Office, you further allege that the Department has failed to respond to your request in any fashion.

In response to your formal complaint, the Sgt. Robinson advised that the Department received your request on August 1, 2012. On August 2, 2012, the Department denied your request in writing, in part, pursuant to I.C. § 5-14-3-4(b)(1). The Department further advised that it did not maintain any records responsive to the remaining portion of your request and that it was not required to create a list in response to your request.

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 (emphasis added). *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 seven-day time period for the Department to respond to a request pursuant to I.C. § 5-14-3-9(b) does commence until the date the Department received the request; not the date the request was placed in the mail. Here, the Department received your request on August 1, 2012 and responded in writing on August 2, 2012. As such, it is my opinion that the Department complied with the requirements of section 9 of the APRA in responding to your request.

The APRA provides that a law enforcement agency retains the discretion to disclose its investigatory records. *See* I.C. § 5-14-3-4(b)(1). An investigatory record is defined as “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.* To the extent that you sought investigatory records of the Department, it would not have violated the APRA by exercising its discretion and denying your request pursuant to I.C. § 5-14-3-4(b)(1).

Generally, 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*. To the extent that your request sought records not maintained by the Department, it is my opinion that the Department did not violate the APRA by failing to produce records that it did not maintain.



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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", written in a cursive style.

Joseph B. Hoage
Public Access Counselor

cc: Sgt. Noah Robinson