



STATE OF INDIANA

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September 10, 2012

Scott Malott
DOC 208403
One Park Row
Michigan City, Indiana 46360

Re: Formal Complaint 12-FC-230; Alleged Violation of the Access to Public Records Act by the Montgomery County Sheriff's Department

Dear Mr. Malott:

This advisory opinion is in response to your formal complaint alleging the Montgomery County Sheriff's Department ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* A. Howard Williams, 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 written request for records to the Department in February 2012. You sought copies of all reports, supplemental reports, any statements taken, any audio or video recordings, and a list of any officers on the scene in regards to Case # 2009-03-04703. On February 29, 2012, Mr. Williams responded in writing on behalf of the Department and acknowledged the receipt of your request. Mr. Williams provided that a detailed response would be forthcoming. On July 23, 2012, after receiving no further correspondence from the Department or Mr. Williams, you resubmitted your request. On July 25, 2012, Sheriff Mark A. Casteel responded in writing and denied your request pursuant to the investigatory records exception provided under I.C. § 5-14-3-4(b)(1).

In response to your formal complaint, Mr. Williams advised that the Department responded in writing to your initial request on February 29, 2012. Thereafter, on July 25, 2012, Sheriff Casteel issues a denial pursuant to the investigatory records exception pursuant to I.C. § 5-14-3-4(b)(1). Mr. Williams maintains, as Sheriff Casteel advised prior, that the records you requested are investigatory records of a law enforcement agency that may be produced at the discretion of the agency. As to your request for personnel information related to Deputy Rusk's resignation from the Montgomery Sheriff Police Department, such information may be disclosed at the discretion of the Department pursuant to I.C. § 5-14-3-4(b)(8).

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. Here, the Department responded in writing to your February 2012 request within seven (7) days of receipt. As such, it is my opinion that the Department complied with the requirements of section 9 of the APRA in responding to your request.

Effective July 1, 2012, the APRA provides a public agency shall provide records that are responsive to the request within a reasonable time. *See* I.C. § 5-14-3-3(b). The public access counselor has stated that factors to be considered to be considered in determining if the requirements of section 3(a) under the APRA have been met include, 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 APRA requires an agency to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. *See* I.C. § 5-14-3-6(a). Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. *See* I.C. § 5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. *See* I.C. § 5-14-3-7(c). The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *See Opinion of the Public Access Counselor 02-FC-45*. This office has often suggested a public agency make portions of a response available from time to time when a large number of documents are being reviewed for disclosure. *See Opinions of the Public Access Counselor 06-FC-184; 08-FC-56; 11-FC-172*. Further nothing in the APRA



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indicates that a public agency's failure to provide "instant access" to the requested records constitutes a denial of access. *See Opinions of the Public Access Counselor 09-FC-192 and 10-FC-121.*

Here, the Department issued a final denial in response to your February 2012 request on July 25, 2012. While I am mindful of the extensive nature of the request that was submitted, the requirement to review all records prior to their anticipated disclosure, and all other responsibilities required of the Department, it is my opinion that the Department did not meet its burden to demonstrate that it was reasonable under the APRA to issue a final denial to your request for records over three months after its initial receipt. *See I.C. § 5-14-3-3(b).*

As to the substance of the Department's denial, 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 the Department denied your request for investigatory records, it is my opinion that the Department did not violate the APRA.

The APRA provides that personnel files of public employees and files of applicants for public employment may be excepted from the APRA's disclosure requirements, except for:

- (A) The name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency;
- (B) Information relating to the status of any formal charges against the employee; and
- (C) The factual basis for a disciplinary action in which final action has been taken and that resulted in the employee

being suspended, demoted, or discharged. I.C. § 5-14-3-4(b)(8).

In other words, the information referred to in (A) - (C) above must be released upon receipt of a public records request, but a public agency may withhold any remaining records from the employees personnel file at their discretion. You sought information that was maintained in Officer Rusk's personnel file regarding events that led to his resignation. Pursuant to I.C. § 5-14-3-4(b)(8)(C), the Department would only be required to produce records that provide a factual basis for a disciplinary action in which final action was taken and that resulted in the employee being suspended, demoted, or discharged. As Officer Rusk resigned from the Department, it is my opinion that the Department issued a proper denial to your request for records maintained in the officer's personnel file.

CONCLUSION

For the foregoing reasons, it is my opinion that the Department acted contrary to the APRA by failing to issue a final denial in response to your request in a reasonable period of time. As to the substance of your denial, 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: A. Howard Williams