



STATE OF INDIANA

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October 16, 2012

Mr. John F. Fearing
210 S. 22nd Street
Richmond, Indiana 47374

Re: Formal Complaint 12-FC-302; Alleged Violation of the Access to Public Records Act by the Richmond Police Department

Dear Mr. Fearing:

This advisory opinion is in response to your formal complaint alleging Richmond Police Department ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Chief Kris Wolski responded in writing to your formal complaint. The response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that on September 28, 2012, you appeared at the Department and requested a copy of a police report concerning an automobile accident. The receptionist attempted to contact the appropriate person by telephone, after which she attempted to locate the person within the Department's offices. Upon her return, the receptionist stated that she was unable to find the respective employee. You then asked if Mr. Wampler was available to assist you, to which the receptionist provided that he was out of the office at a meeting. After further questioning, the receptionist provided that no other Department personnel were available at that time to assist you.

As such, you submitted a hand written request for the report and any audio or video recordings from the department's vehicles that were at the scene. As October 9, 2012, the date you filed your formal complaint with the Public Access Counselor's Office, you further allege that the Department has not responded to your request in any fashion.

In response to your formal complaint, Chief Wolski advised that the Department did receive your oral request on September 28, 2012. You requested a copy of an accident report; however you failed to provide the date of the accident. Upon being notified that no one in the traffic division was available to assist you with your request, you asked to speak with Mr. Wampler. The receptionist inquired whether Mr. Wampler was available, at which time you were informed that neither he nor Chief Wolski was in.

You then submitted a written request for the accident report but refused to provide a copy of your telephone number. The receptionist informed you that the information would be provided once it was located. You were further advised that there would be a fee of \$8 for the accident report and that you could stop by later on that day and pick up your copies upon receipt of payment. You thereafter left the building.

At approximately 11:30 a.m., Chief Wolski returned to the Department's offices and was provided a copy of your written request. Chief Wolski located the report and provided a copy to the receptionist, who was informed to disclose the record to you upon receipt of the appropriate fees. Although you provided in your formal complaint that you listed your address with your request, Chief Wolski does not recall seeing the address. Further, Chief Wolski advised the receptionist that the Department did not maintain any audio or video recordings of the incident and informed the receptionist to advise you as such. As you never returned to pick up the report, this information was not communicated. Upon receiving a copy of the formal complaint that was filed, Chief Wolski confirmed again with the appropriate personnel that you had failed to return to pick up the accident report or pay the respective fees.

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).

As an initial matter, I.C. § 5-14-5-7 provides that a person that chooses to file a formal complaint with the Public Access Counselor must file the complaint not later than thirty days after the denial or the person filing the complaint receives notice in fact that a meeting was held by a public agency, if the meeting was conducted secretly or without notice. As such, I will only address those allegations contained in your formal complaint concerning the alleged APRA violations that occurred on or about September 28, 2012. Further I would note that the public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. See *Opinion of the Public Access Counselor 11-FC-80*.

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). A response from the public agency could be an acknowledgement that the request has been received and include

information regarding how or when the agency intends to comply. Under the APRA, a public agency denying access in response to a written public records request must put that denial in writing and include the following information: (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 title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). Here, you hand-delivered a written request for records to the Department on September 28, 2012. The Department maintains that it orally advised you at the time of your written request that you may return later on that day to pick up the requested records, upon receipt of the respective fees. According to the letter of the law, the Department was required to respond, in writing, within twenty-four hours of receipt of your hand-delivered written request and acted contrary to section 9 of the APRA when it failed to do so. *See Opinions of the Public Access Counselor 05-FC-176; 11-FC-84; 11-FC-308; 12-FC-63; 12-FC-162.* I would note that the Department would have been hindered in its efforts to provide a written response if you failed to provide your contact information in the original request. Regardless, as the Department has now informed you in writing that the records are available to be picked up upon receipt of payment of the respective fees; I trust that this is in satisfaction of your formal complaint.

Generally, if a public agency has no records responsive to a public records request, the agency generally 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.* Here, the Department has advised that it does not maintain any audio or video recordings of the accident. As such, it is my opinion that the Department did not violate the APRA by failing to produce a record that does not exist.

CONCLUSION

Based on the foregoing, it is my opinion that the Department acted contrary to section 9 of the APRA by failing to issue a written response within twenty-four hours of receiving your hand-delivered, written request. As the Department has now advised you in writing that the records are available to be picked up upon receipt of the respective fees, I trust that this is in satisfaction of your formal complaint. 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 stylized with a large initial "J" and a cursive "Hoage".

Joseph B. Hoage
Public Access Counselor

cc: Chief Kris Wolski