



# STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR  
JOSEPH B. HOAGE

Indiana Government Center South  
402 West Washington Street, Room W470  
Indianapolis, Indiana 46204-2745  
Telephone: (317)234-0906  
Fax: (317)233-3091  
1-800-228-6013  
[www.IN.gov/pac](http://www.IN.gov/pac)

December 5, 2012

Mr. Roy E. Brickey  
DOC 141790  
5501 S. 1100 W.  
Westville, Indiana 46391

*Re: Formal Complaint 12-FC-331; Alleged Violation of the Access to Public Records Act by the Noble County Sherriff's Department*

Dear Mr. Brickey:

This advisory opinion is in response to your formal complaint alleging the Noble 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 in writing to your formal complaint. His response is enclosed for your reference.

## BACKGROUND

In your formal complaint, you provide that you submitted a written request for records to the Department on October 12, 2012 for copies of any disciplinary and arrest records maintained by the Department for Detective Joseph R. Keene. As of November 9, 2012, the date you filed your formal complaint with the Public Access Counselor's Office, you have yet to receive any response from the Department.

In response to your formal complaint, Mr. Williams advised that Mr. Keene had resigned from his position with the Department. You sought information regarding Mr. Keene "relating to any investigation, arrest, bad conduct related to Department duties, or any disposition of any unlawful arrest[sic]." Mr. Williams provided that Mr. Keene has no history of formal disciplinary action and all other information that was requested was exempt from disclosure pursuant to I.C. §§ 5-14-3-4.3, 5-14-3-4(b)(1), and 5-14-3-4(b)(6). The Department will provide all information as required under I.C. § 5-14-3-4(b)(8)(A) minus the exception to disclosure found in I.C. § 5-14-3-4.3. Lastly, the request received by the Department was vague and failed to identify with reasonable particularity the records which were sought.

## 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. *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 acted contrary to section 9(b) of the APRA by failing to respond in writing to your written request within seven (7) days of receipt.

As to the substance of your request, 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. In addition, I.C. § 5-14-3-4.3 provides that nothing in section 4(b)(8) requires a law enforcement agency to release to the public the job title or job information of law enforcement officers. Thus, the Department would be



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required to provide all information listed under I.C. § 5-14-3-4(b)(8)(A)-(C), minus the exception provided in I.C. § 5-14-3-4.3.

In response to your request, Mr. Williams advised that Mr. Keene had no history of formal disciplinary action. 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*. As such, the Department did not violate the APRA by failing to provide records that it did not maintain.

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*. Accordingly, the Department did not violate the APRA in denying your request for any investigatory records that it maintains relating to Mr. Keene.

The APRA requires that a records request “identify with reasonable particularity the record being requested.” I.C. § 5-14-3-3(a)(1). “Reasonable particularity” is not defined in the APRA, but the public access counselor has repeatedly opined that “when a public agency cannot ascertain what records a requester is seeking, the request likely has not been made with reasonable particularity.” See *Opinions of the Public Access Counselor 10-FC-57*; *08-FC-176*. However, because the public policy of the APRA favors disclosure and the burden of proof for nondisclosure is placed on the public agency, if an agency needs clarification of a request, the agency should contact the requester for more information rather than simply denying the request. See generally IC 5-14-3-1; *Opinions of the Public Access Counselor 02-FC-13*; *05-FC-87*; *11-FC-88*. As to the remainder of your request, the Department had advised that your request failed to

clearly identify the records that were sought and that it required further information to accurately identify any additional records maintained by the Department. As a result, I would encourage you to provide the requested clarifying information so that the Department can determine whether it maintains any other records that are responsive to your request.

#### CONCLUSION

For the foregoing reasons, it is my opinion that the Department acted contrary to section 9(b) of the APRA by failing to respond in writing to your written request within seven (7) days of receipt. 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 written in a cursive style with a large initial "J" and a long, sweeping underline.

Joseph B. Hoage  
Public Access Counselor

cc: Sheriff Doug Harp, A. Howard Williams