



STATE OF INDIANA

MICHAEL R. PENCE, Governor

**PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE**

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

June 25, 2013

Mr. Aaron Ross
4490 W. Reformatory Road
Pendleton, IN 46064

Re: Formal Complaint 13-FC-113(a); Alleged Violation of the Access to Public Records Act by the Indianapolis Metropolitan Police Department

Dear Mr. Ross:

This is in response to your formal complaint alleging the Indianapolis Metropolitan Police Department violated the Access to Public Records Act ("APRA"). Pursuant to Ind. Code § 5-14-3-9(e), I issue the following opinion in response to your complaint. My opinion is based on applicable provisions of the APRA, I.C. § 5-14-3-1 *et seq.* Ms. Samantha DeWester, City Prosecutor and Public Access Counselor, responded on behalf of the Indianapolis Metropolitan Police Department ("IMPD"), City of Indianapolis Office of Corporation Counsel and the City of Indianapolis (the "City").¹ Her response is enclosed for your reference.

BACKGROUND

You allege in your complaint that the IMPD violated the APRA by denying you access to public records. You submitted a request dated March 13, 2013 to the IMPD for "All 'call-logs' and 'CADS' under case number '090025584' for the date of February 24, 2009 at approximately 12:10 a.m." from "Officer Michael O'Day I.D. 03969", "Officer Eric Forestal Unit 0351", "Officer Harper IMPD H3998", "Officer L. McCready IMCFSA M3108", and "Officer J. Martin IMPD M5961".

Ms. Zaida Maldonado-Prather responded to your request on behalf of the IMPD and the City in a letter dated March 20, 2013, informing you that the IMPD had initiated a search for records responsive to your request. Ms. Maldonado-Prather also noted that responsive records would be examined to determine "whether they contain any material which by statute shall or may be withheld from public inspection and copying", and that the IMPD would notify you when this process has been completed. You filed your formal complaint

¹ As the OCC and IMPD are departments of the City, I refer to both collectively as the "City" herein.



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on April 3, 2013 (received by the Office of the Public Access Counselor on April 8, 2013), asserting that the IMPD had not responded to your request, and that the IMPD denied you access to public records.

Ms. DeWester's response on behalf of IMPD, the OCC and the City states that the OCC received your request (dated March 13, 2013) on March 19, 2013. According to Ms. DeWester, Ms. Zaida Maldonado-Prather sent a written acknowledgment of your request the day after it was received by the City, informing you that the IMPD had initiated a search for records responsive to your request. On April 3, 2013, Ms. Maldonado sent you a letter advising you that IMPD had completed its search and that responsive records were available for inspection or copying. Ms. DeWester also states that the IMPD received additional correspondence from you dated April 2, 2013 and April 5, 2013 in which you asked for updates on the status of your initial request. Ms. Maldonado sent a second response on April 5, 2013 informing you that responsive records were available for you to inspect or copy.

According to the City's response to your complaint, the City received a check in the amount of \$2.28 to pay copying fees associated with your request on April 26, 2013, and mailed the responsive records to you on the same day. The City believes that production of these records has fulfilled your request, and Ms. DeWester states that all records responsive to your request have been provided to you. Ms. DeWester explains that the City has a large volume of pending public records requests, and in light of the nature of the request, Ms. DeWester argues that the time the City has taken in disclosing responsive records has been reasonable under the APRA.

You and Ms. Angela Ross (your wife) submitted additional documents that appear to be intended to support your complaint. The Office of the Public Access Counselor received an "affidavit" and three accompanying exhibits from Ms. Ross on May 1, 2013. The "affidavit" alleges that Ms. Ross sought the same records you requested from IMPD in your March 13, 2013 request through in-person visits to both the IMPD and the Marion County Prosecutor's Office on March 4, 2013. Ms. Ross alleges in the "affidavit" that she did not receive the requested records immediately upon request. The Office of the Public Access Counselor sent a letter to Ms. Ross dated May 1, 2013 seeking "clarification regarding your intentions with respect to the affidavit/correspondence we received today." On May 21, 2013, the Office of the Public Access Counselor received a letter from you dated May 17, 2013. In this letter, you indicate that you intended the "affidavit" to "prove that the [IMPD] entered into a 'conspiracy' to withhold exculpatory evidence i.e., the call-log's and CAD'S from me, in order to 'obstruct justice' in my criminal



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proceeding's". You further allege that the documents you received from the OCC were "piecemealed' and incomplete."

ANALYSIS

As an initial matter, I note that your May 21, 2013 correspondence appears to raise a number of concerns or issues that are beyond the purview of the Office of the Public Access Counselor. The duties of the public access counselor are defined in I.C. §5-14-4-10, and include issuing "advisory opinions to interpret the *public access laws* upon the request of a person or a public agency". See I.C. 5-14-4-10(6) (emphasis added). Therefore, in this opinion I address only those issues arising from interpretation of the APRA; namely whether the IMPD has violated the APRA by failing to respond timely or by failing to produce the records you requested within a reasonable time.

Further, 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 *Opinions of the Public Access Counselor 11-FC-80, 11-FC-213*. If, as you allege, the City has failed to provide all discloseable records responsive to your request, it acted contrary to section 9 of the APRA. On the other hand, if the City has provided all records responsive to your request, then the City fulfilled its obligations under the APRA.

The APRA provides that a complaint arising from denial of access to records must be filed with the Office of the Public Access Counselor within thirty (30) days of the denial. See I.C. §5-14-5-7. Though you suggest in your correspondence dated May 17, 2013 that you have been repeatedly denied access to the records you request, I can only address the denial of access alleged in your formal complaint on April 8, 2013. As a result, I restrict my analysis in this opinion to issues arising from your March 13, 2013 request, and I do not address any violation of the APRA that may have occurred with respect to previous requests made by you or by other parties on your behalf.

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. Accordingly, any person has the right to inspect and copy a public agency's 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 by mail, email or facsimile and the agency does not respond to the



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request within seven 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 information regarding how or when the agency intends to comply. Here, the City received your request on March 19, 2013 and sent a written acknowledgment of your request on March 20, 2013, which is well within the time limitation imposed by the APRA.

After acknowledgment of a request, the APRA does not prescribe timeframes for the actual production of records. In accordance with section 3(b) of the APRA, the public access counselor has stated repeatedly that records must be produced within a reasonable period of time, based on the facts and circumstances. Considering factors such as the nature of the requests (whether they are broad or narrow), how extensive the process is to gather and redact the records, and whether the records must be reviewed by counsel and redacted to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe.

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. 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 APRA. I.C. §5-14-3-7(c). Thus, under section 7, the City should not permit employees to neglect their essential duties in order to respond to public records requests, but the City cannot simply ignore requests either, even when facing the high volume of pending public records requests described by Ms. DeWester. 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.*

However, if a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request or by failing to produce such records. “[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 Opinions of the Public Access Counselor 08-FC-113, 11-FC-213.*

To apply these standards to the present situation, the City attributes any delay in producing the records you requested to the fact that the City has a large volume of pending public records requests. Further, the City states that after responsive records are found, the Office of Corporation Counsel for the City must “review any responsive records to determine if they contain items which shall or may be withheld by law” before such records can be made available for your review. The City received your request on



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March 19, 2013, and states that all responsive records were provided to you on April 26, 2013.

According to Ms. DeWester, the City has already provided you with all records in the City's or the IMPD's custody that are responsive to your request. Assuming that the City has indeed provided all responsive records to you, I cannot say that the City has violated Sections 3(b) or 7 of the APRA by taking an unreasonably long time to produce records responsive to your request, or by denying you access to public records. If, as you suggest in your May 17, 2013 letter, the City has not provided all existing responsive records to you, then the City may be in violation of Section 3(b) of the APRA.

CONCLUSION

For the foregoing reasons, it is my opinion that if all responsive records have in fact been provided to you, the City has not violated the APRA by denying you access to records or by taking an unreasonably long time to produce responsive records. However, if the City has not provided all existing records responsive to your March 13, 2013 request as part the response provided to you on April 26, 2013, the City may have acted contrary to the APRA.

Please contact me if I can be of additional assistance.

Best regards,

Jennifer L. Jansen
Acting Public Access Counselor

Cc: Ms. Samantha DeWester, City Prosecutor and Public Access Counselor