



STATE OF INDIANA

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February 8, 2013

Mr. Terrance D. Swann
DOC 956680
One Park Row
Michigan City, Indiana 46360

Re: Formal Complaint 13-FC-12; Alleged Violation of the Access to Public Records Act by the Indianapolis Metropolitan Police Department

Dear Mr. Swann:

This advisory opinion is in response to your formal complaint alleging the Indianapolis Metropolitan Police Department ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Samantha Karn, Corporation Counsel, responded in writing on behalf of the Department to your formal complaint. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you provide that on September 29, 2012, you submitted a written request for records to the Department for "any and all conduct violations, disciplinary sanctions, and/or complaints filed against Detective Tom Tudor, Roy West, Anthony Starks, and Michael Crook." On October 18, 2012, the Department acknowledged the receipt of your request in writing and provided that you would be notified when the agency had completed its search for any records that would be responsive to your request. On November 5, 2012, you submitted a written inquiry regarding the status of your request. The Department responded in writing to your inquiry on November 16, 2012 and advised that its search was still being conducted. On December 16, 2012, you submitted a second written inquiry regarding the status of your request to which the Department has yet to respond. As of January 16, 2013, you have yet to receive any records in response to your request.

In response to your formal complaint, the Department acknowledged the receipt of your September 29, 2012 request in writing on October 17, 2012. The Department received your second, identical request on November 13, 2012. On November 16, 2012, the Department acknowledged in writing the receipt of your second request. On February 8, 2013, the Department provided in writing that there was one record that was

responsive to your request and the associated fees for providing the record. The remaining records you had requested were denied 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 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 information regarding how or when the agency intends to comply. Here, the Department admits that it failed to respond to your initial request within the seven (7) day time frame contemplated under section 9(b) of the APRA. As such, it is my opinion that the Department acted contrary to the requirements of section 9(b) of the APRA in responding to your September request. As to your second request, identical to the original request, that was submitted on November 13, 2012, the Department acknowledged the receipt of the request in writing on November 16, 2012. Thus, as to your second request, it is my opinion that the Department complied with section 9(b) in providing a written response within seven (7) days.

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 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 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 received your original request on or about September 29, 2012. The Department did not respond to the request until October 17, 2012. Ultimately, the Department produced one record responsive to your request over four (4) months after the receipt of your original request; the remaining records were denied pursuant to I.C. § 5-14-3-4(b)(8). While I am mindful of the ongoing duties and responsibilities of the Department, in addition to responding to other record requests that are submitted, and the time required to search and locate all records that were responsive to your request, it is my opinion that the Department acted contrary to section (3)(b) in response to your request in failing to provide all records in a reasonable period of time.

As to the substance of your denial, 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). 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. Thus, as long as the Department produced the required information that was requested pursuant to I.C. § 5-14-3-4(b)(4)(8)(A)-(C), it is my opinion that it did not violate the APRA by denying the remainder of your request for information maintained in the officer's personnel files.

CONCLUSION

Based on the foregoing reasons, it is my opinion that the Department acted contrary to section 9(b) of the APRA by failing to acknowledge in writing the receipt of your September 2012 request for records within seven (7) days. It is my opinion that the

Department failed to comply with section (3)(b) of the APRA in not providing all records responsive to your request in a reasonable period of time. As to all other issues, it is my opinion that the Department complied with 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 distinct "Hoage" following.

Joseph B. Hoage
Public Access Counselor

cc: Samantha Karn