

May 14, 2007

Dwane G. Ingalls  
1600 S. Paddock Road  
Greenwood, IN 46143

*Re: Formal Complaint 07-FC-96; Alleged Violation of the Access to Public Records Act by the Indianapolis Fire Department*

Dear Mr. Ingalls:

This is in response to your formal complaint alleging that the Indianapolis Fire Department (“IFD”) violated the Access to Public Records Act by refusing to disclose records pertaining to the response and investigation related to the downtown Indianapolis explosions involving Indianapolis Power & Light Company (“IPL”) equipment. I find that the IFD may withhold at its discretion records that are compiled in the course of an investigation of a crime, but must disclose any records not covered by an exemption.

#### BACKGROUND

On March 8, 2007, you requested of the IFD:

“records pertaining to the response, investigation, findings and reports related to the downtown Indianapolis explosions involving Indianapolis Power & Light Company equipment, which occurred during the months of December 2004, January 2005 and September 2005.”

You supplied specific locations and dates in connection with your request.

The IFD sent an initial response on March 15 indicating that you would be contacted as soon as the IFD had compiled responsive records. On April 1 you sent a fax requesting an update of the IFD’s progress. Ms. Lauren Toppen, Assistant Corporation Counsel contacted you on April 4 by telephone. Ms. Toppen told you that she needed to review the files and that you could inspect the documents no later than April 12. Ms. Toppen called you on April 12 to assure

you that she would contact you the next day, Friday, April 13. You sent her a letter on April 12 to say that you expected to see the records on April 13. As of the filing of the complaint on April 13, you have had no further communications with Ms. Toppen or her office. You believe the excessive delays show IFD's intent to not provide the records.

On April 13, Ms. Toppen provided some of the records. Specifically, she reviewed the records and was unable to locate records responsive to any of the locations except 143 West Market Street. However, with respect to these records, Ms. Toppen stated that they constitute investigatory records of law enforcement and would be exempt under IC 5-14-3-4(b)(1). The IFD did provide documents constituting the daily log pursuant to IC 5-14-3-5(c)(3). You filed a supplemental complaint. You contend that the IFD is not a law enforcement agency; therefore, the IFD cannot claim the investigatory record exception. You also contend that not all records concerning the incidents could be considered investigatory records of law enforcement, since that could include potentially all records of the IFD.

On April 30, Ms. Toppen wrote you again, stating that she found records from the other locations, but as with the first location, only the daily log would be provided.

Ms. Toppen provided a response to your complaint asserting that the IFD is a law enforcement agency and providing legal argumentation to support her position. Her response is enclosed.

## ANALYSIS

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the Access to Public Records Act ("APRA"). Ind. Code 5-14-3-3(a). The investigatory records of law enforcement agencies may be excepted at the discretion of the public agency. IC 5-14-3-4(b)(1). However, certain law enforcement records must be made available for inspection and copying as provided in section 5 of the APRA. IC 5-14-3-4(b)(1). These records are commonly referred to as the "daily log." See IC 5-14-3-5(c).

A law enforcement agency is not specifically defined in the APRA. However, the definition of "public agency" includes:

Any law enforcement agency, *which means* an agency or a department of any level of government that engages in the investigation, apprehension, arrest, or prosecution of alleged criminal offenders, such as the state police department, the police or sheriff's department of a political subdivision, prosecuting attorneys, members of the excise police division of the alcohol and tobacco commission, conservation officers of the department of natural resources, gaming agents of the Indiana gaming commission, and the security division of the state lottery commission. IC 5-14-3-2(1)(6)(Emphasis supplied.)

The issue presented by your complaint is two-fold: 1) whether the IFD is a law enforcement agency; and 2) whether its records concerning the downtown explosions involving IPL equipment are investigatory records of law enforcement.

The IFD or fire departments are not specifically included in the definition of a law enforcement agency, but the enumerated agencies are not inclusive because the words “such as” precede the list. Hence, the question is whether the IFD is an agency or a department of any level of government that engages in the investigation, apprehension, arrest, or prosecution of alleged criminal offenders. It seems obvious that the IFD does not apprehend, arrest, or prosecute alleged criminal offenders, so the question remains whether the IFD investigates alleged criminal offenders.

The IFD asserts that it is a law enforcement agency because under IC 36-8-17-7, the fire department investigates and determines the causes and circumstances surrounding each fire occurring within the territory served by the fire department. In so doing, the fire department may enter and inspect any real or personal property, cooperate with the prosecuting attorney and assist the prosecuting attorney with any criminal investigation, and request that the office [state fire marshal] subpoena witnesses under IC 22-14-2-8 or order the production of books, documents and other papers, among other duties. IC 36-8-17-7(b). These investigatory duties are similar to the duties of a coroner when conducting a death investigation, argues the IFD. The Court of Appeals held a coroner was a law enforcement agency in *Heltzel v. Thomas*, 516 N.E.2d 103 (Ind. Ct. App. 1987). The coroner engaged in investigations and by statute was empowered to charge a person with a felony and issue an arrest warrant. *Heltzel at 106*.

In addition to the above authorities, Indiana law provides that the fire chief and the designees of the fire chief in every fire department are assistants to the state fire marshal. IC 36-8-17-5(a). A fire department is required to comply with an order issued by the division under IC 22-14-2-4 that directs the fire department to assist the [division of fire and building safety]. IC 36-8-17-5(b). To carry out the state fire marshal’s responsibility to conduct an investigation into the causes and circumstances surrounding a fire or an explosion, the state fire marshal or a division fire investigator authorized by the state fire marshal may exercise the powers of a law enforcement officer to prevent fires and conduct arson investigations. IC 22-14-2-4.

In an opinion of the Indiana Attorney General, the arson investigation records of the state fire marshal are included in those considered investigatory records of a law enforcement agency under the APRA. 1984 Op. Atty. Gen. Ind. 102.

Although the powers of a fire department are not as broad as those conferred on a coroner under IC 36-2-14, a fire department may conduct investigations into the causes of a fire or explosion. A fire department’s personnel are designated by statute as assistants to the state fire marshal. I find that the IFD is a law enforcement agency under the Access to Public Records Act when it conducts an investigation into the causes of a fire or explosion under the scheme set out in IC 36-8-17.

You believe that if the IFD is a law enforcement agency, all its records would be subsumed under the exception for investigatory records of law enforcement, but I do not think the law supports that conclusion. Not all police department or prosecutor records are investigatory records of law enforcement. “Investigatory record” means information compiled in the course of the investigation of a crime. IC 5-14-3-2(h). Here, the information concerning the

cause of the explosions in downtown Indianapolis that was compiled in the course of the investigation of a crime are investigatory records of law enforcement. The IFD bears the burden of showing that all the records it has denied fit within the investigatory records exception. IC 5-14-3-1; IC 5-14-3-9(g).

Your original complaint asserted that the IFD should have provided the records sooner than April 13. Some of the records were provided April 13, and the remainder was provided April 30. In any case, the only record provided was the daily log, which is the information required to be provided under section 5(c) of the APRA. Under section 5(c), the daily log is required to be created within 24 hours of the call for assistance to the agency. IC 5-14-3-5(c). The IFD does not address the delay in providing the records that it disclosed. I find that the daily log information could have been provided well before April 13 and April 30, since the information from the daily log would have been included in your original request. The IFD could have provided the daily log earlier and later determined that the reports constituted investigatory records of law enforcement.

#### CONCLUSION

For the foregoing reasons, I find that the Indianapolis Fire Department is a law enforcement agency when it conducts investigations into the causes of a fire or explosion under IC 36-8-17.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Lauren Toppen