



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

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April 2, 2010

Mr. Clifton B. Davidson
85042-008
Cardinal Unit Fed. Med. Cnt.
P.O. Box 14500
Lexington, KY 40512-4500

*Re: Formal Complaint 10-FC-59; Alleged Violation of the Access to
Public Records Act by the Elkhart Police Department*

Dear Mr. Davidson:

This advisory opinion is in response to your formal complaint alleging the Clerk of the Elkhart Police Department ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* I have enclosed the Department's response for your reference.

BACKGROUND

According to your complaint, you requested access to daily log information and arrest records of the Department on November 19, 2009. On November 30, 2009, you received a response to your request informing you that you should expect the records in about two months (February 1, 2010). You received "a few documents" on January 29, 2010, along with a cover letter. You also received "an internal document from REspondent [sic] which seems to indicate that their search was done as early as December 11, 2009." You believe the Department violated the APRA by failing to respond to your request within seven (7) days, by delaying the production of your requested records, and by "apparently los[ing]" certain attempted robbery records that you requested.

In response to your complaint, the Department states that it received your request on November 23, 2009, and responded to it by letter on November 30, 2009. The Department maintains that the time it took to produce your requested records was reasonable because the age of the records required the Department to search microfiche files to locate them. The reading of microfiche records necessitated the use of a reader owned by Elkhart County, which is located in a neighboring city, because the Department no longer has a reader of its own. Lt. Jeff Bourdon also manually reviewed all relevant

records to determine which ones were responsive and disclosable. Moreover, because of limited staffing during the holiday season, the Department informed you that you should expect your records by February 1st of 2010. The Department also notes that it does not maintain daily log records dating back to 1995. Moreover, although it searched its records for information regarding the robbery that you described, your request was vague insofar as it sought records from the “January, February (or March) robbery of Wilt’s #2 grocery store (1983).” The Department requested that you provide more specific information regarding that robbery.

ANALYSIS

Under the APRA, a request for access to public records may be oral or written. 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. I.C. §5-14-3-9(b). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. I.C. §5-14-3-9(a). 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 responded to your written request within seven (7) days of receiving it. In my opinion, it complied with section 9 of the APRA.

Moreover, it does not appear that the Department violated the APRA when it tried unsuccessfully to locate the robbery records that you requested. Under the APRA, a request for inspection and copying must 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 Counselor Neal noted that “when a public agency cannot ascertain what records a requester is seeking, the request likely has not been made with reasonable particularity.” *Opinion of the Public Access Counselor 08-FC-176*. In my opinion, the Department did not violate the APRA by requesting clarification with regard to your records request. It is my understanding that you did not provide any additional information that would have assisted the Department in identifying the record(s) you seek. I also note that if the Department could not locate records because they were destroyed or otherwise disposed of in accordance with an applicable retention schedule, the Department did not violate the APRA. *See* I.C. § 5-14-3-4(e).

With regard to the time the Department took to produce your records, there are no prescribed timeframes when the records must be produced by a public agency. 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 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. 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 Access to Public Records Act. 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. *Opinion of the Public Access Counselor 02-FC-45*. Here, the Department has described in detail the reasons why it took from the end of November until the end of January to produce the records you requested. In my opinion, the Department has met sustained its burden. Moreover, the Department informed you of its proposed production timeline at the outset, but it appears that you did not object until you filed this complaint. In my opinion, the Department acted reasonably by producing the records in advance of the deadline that it proposed to you.

CONCLUSION

For the foregoing reasons, it is my opinion that the Department did not violate the APRA.

Best regards,



Andrew J. Kossack
Public Access Counselor

Cc: Amber J. Bressler