



# STATE OF INDIANA

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May 2, 2013

Mr. Scott Malott  
DOC 208403  
One Park Row  
Michigan City, Indiana 46360

*Re: Formal Complaint 13-FC-114; Alleged Violation of the Access to Public Records Act by the Clinton County Sheriff's Department*

Dear Mr. Malott:

This advisory opinion is in response to your formal complaint alleging the Clinton County Sheriff's Department ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* A. Howard Williams, Legal Deputy, responded in writing to your formal complaint. His response is enclosed for your reference.

## BACKGROUND

In your formal complaint, you provide that the Department has failed to comply with the APRA in responding to a series of requests that you sent in February and March 2013.

In response to your formal complaint, Mr. Williams advised that your initial request that was submitted in February 2013 was properly acknowledged on February 27, 2013. Your request was not ignored as you allege and the Department sent the records, with the respective redactions, that you attached to the formal complaint that was filed. Thereafter, you sent three additional requests for records. The Department properly acknowledged the receipt of your request on March 28, 2013 via certified mail. As to the March 2013 requests, the Department has previously provided you with records related to Department Incident # S10-02756. The Department is not required to obtain records of the Clerk in responding to your request. As to the remaining requests, the Department is not required to create a list or conduct research in response to a request. Further, the records you have sought are considered to be "investigatory" under the APRA and the Department has exercised its discretion to deny your request pursuant to I.C. § 5-14-3-4(b)(1).



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## 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 (emphasis added). *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 responded to your written requests within seven (7) days of its receipt. As such, it is my opinion that it complied with section 9(b) of the APRA in response to your request.

The investigatory records exception to the APRA provides that a law enforcement agency has the discretion to disclose or not disclose its investigatory records. There is no dispute that the Department is considered to be a “law enforcement agency.” An investigatory record is “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*. To the extent you sought investigatory records maintained by the Department, it is my opinion that a violation of the APRA would not occur if the Department exercised its discretion and denied your request pursuant to I.C. § 5-14-3-4(b)(1).

“[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-*



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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*. The Department would not violate the APRA by failing to create a list or conduct research in response to your request. To the extent that you have requested records of the Clinton County Clerk, such requests should be sent directly to the Clerk, not the Department.

## CONCLUSION

For the foregoing reasons, it is my opinion that the Department complied with the requirements of section 9(b) of the APRA in response to your request. It is my opinion that the Department did not violate the APRA by denying your request for investigatory records pursuant to I.C. § 5-14-3-4(b)(1). Lastly, it is my opinion that the Department did not violate the APRA by failing to create a record and/or list in response to your request and by not gathering records from the Clinton County Clerk in order to satisfy your request.

Best regards,

A handwritten signature in black ink that reads "J. Hoage".

Joseph B. Hoage  
Public Access Counselor

cc: A. Howard Williams