



STATE OF INDIANA

MICHAEL R. PENCE, Governor

**PUBLIC ACCESS COUNSELOR
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May 15, 2013

Mr. Michael P. Pritchett
6640 Intech Blvd
Indianapolis, Indiana 46278

Re: Formal Complaint 13-FC-138; Alleged Violation of the Access to Public Records Act by the Kokomo Police Department

Dear Mr. Pritchett:

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

BACKGROUND

In your formal complaint, you allege that on April 3, 2013 you submitted a written request for records to the Department for photographs prepared in connection with a traffic accident that occurred on March 22, 2013. On April 11, 2013, the Department denied your request in writing pursuant to I.C. § 5-13-3-4(b)(1). The Department advised that it would not release any investigatory records without a court subpoena. You maintain that the Department is arbitrarily defining all photographs as investigatory records.

In response to your formal complaint, Mr. McCormack advised that your request for records that were compiled during the investigation of a crime was denied pursuant to the investigatory records exception found under I.C. § 5-14-3-4(b)(1). Mr. McCormack advised that it was the practice of the Department to not disclose any investigatory records pursuant to the APRA.

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). 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).

A “public record” is defined as any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, retrieved, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics. *See* I.C. § 5-14-3-2(n). The Department has not disputed that the photographs that were sought are “public records.” It is my opinion that the photographs maintained by the Department are “public records” pursuant to the APRA.

As the photographs are considered to be a public record, the next inquiry is whether the Department has discretion to withhold the photographs in response to your request made pursuant to the APRA. 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.*

The Department has advised that the photographs requested meet the statutory definition of “investigatory record” under the APRA and that is the Department’s practice to not disclose investigatory records. You maintain that the Department is arbitrarily defining all photos maintained as “investigatory records.” 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 Opinion of the Public Access Counselor 11-FC-80.* Thus, if the photographs that were requested were compiled by the Department during the course of an investigation of a *crime*, the Department would not violate the APRA by exercising its discretion and denying your request (emphasis added). Alternatively, if no criminal investigation was conducted concerning the traffic accident, the Department may not cite to the investigatory records exception to deny your request.



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CONCLUSION

For the foregoing reasons, it is my opinion that the Department did not violate the APRA in denying your request pursuant to the investigatory records exception if the photographs requested were compiled during the course of an investigation of a crime.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage", written in a cursive style.

Joseph B. Hoage
Public Access Counselor

cc: Lawrence McCormack