



STATE OF INDIANA

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November 9, 2009

Mr. Antonio Phillips
DOC # 854421
One Park Row
Michigan City, IN 46360

*Re: Formal Complaint 09-FC-232; Alleged Violation of the Access to
Public Records Act by the Fort Wayne Police Department*

Dear Mr. Phillips:

This advisory opinion is in response to your formal complaint alleging the Fort Wayne Police Department (the "Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*, when it failed to provide you with access to public records. For the following reasons, my opinion is that the Department did not violate the APRA.

BACKGROUND

In your complaint, you allege that you asked the Department "for all the African American males [sic] names on the Ft. Wayne Police Department." You say that the Department responded to you via a letter in which the Department claims it has no records responsive to your request. You further state that you are "sure they do" have such records. You note that you "hope that this office could force them to hand over the much needed information I have requested."

My office forwarded a copy of your complaint to the Department. As of the date of this opinion, we have not received any response.

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." I.C. § 5-14-3-1. The Department does not contest that it is a public agency for the purposes of the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Department during regular business hours unless the public records are exempt from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a). The burden of proof for nondisclosure of a public record is on the public agency that would deny access to the record. I.C. § 5-14-3-1.

Here, the Department responded to your request in writing and informed you that it has no records responsive to your request. If that is true, the Department did not violate the APRA by failing to produce nonexistent records. In 2001, Counselor O'Connor opined "that the 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-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, even if the Department did maintain records responsive to your request, this office does not have the legal authority to "force" public agencies to release any records. See I.C. § 5-14-4-10 (listing powers and duties of the public access counselor). Although I have the authority to issue advisory opinions such as this, only a circuit or superior court of the county in which the denial occurred can compel a public agency to permit you to inspect and copy records. I.C. § 5-14-3-9(e).

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: Russell York, Chief of Police, Fort Wayne Police Department