



# STATE OF INDIANA

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September 29, 2011

Mr. Ronald E. Pridemore  
1924 Hollace Chastain Road  
Mitchell, Indiana 47446

*Re: Formal Complaint 11-FC-229; Alleged Violation of the Access to Public Records Act by the Mitchell City Police Merit Board*

Dear Mr. Pridemore:

This advisory opinion is in response to your formal complaint alleging the Mitchell City Police Merit Board ("Board") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Phil Tincher, President, responded on behalf of the Board. His response is enclosed for your review.

## BACKGROUND

In your complaint, you allege that you submitted a written request to the Board on August 3, 2011 for transcripts generated by the stenographer at the August 9, 2010 Board hearing and the normal meeting minutes taken by the secretary or his designee. As of September 6, 2011, the date you filed your formal complaint with the Office of the Public Access Counselor, you have yet to receive any records responsive to your request.

In response to your formal complaint, Mr. Tincher provided that the August 9, 2010 Board meeting was called by the City of Mitchell ("City"), not the Board, to hear charges against a former police officer who had been terminated by the City Board of Works. At the hearing, the former officer's attorney provided that since the officer was no longer an employee of the City, he could not be tried by the Board. In light of this factor, the hearing was cancelled.

The Board maintains that the City, not the Board, hired the stenographer to take minutes of the hearing.<sup>1</sup> As the City had called the hearing and hired a stenographer, the Board did not record or take minutes of the hearing. Mr. Tincher requested a copy of the

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<sup>1</sup> In light of the Board's response to your formal complaint, it would logically follow that the City would have the records you sought of the Board regarding the August 9, 2011 Board hearing and would be required to produce the records in response to a public records request.

transcript from the stenographer, but to date has yet to receive a copy. As such, the Board does not have any records that are responsive to your request.

## 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 Board 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 Board’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. *See* I.C. § 5-14-3-9(b). 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 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, I have nothing before me that would indicate that the Board responded in writing to your August 3, 2011 request as required by the APRA. I would note that the Board has provided that you have made a number of requests for records associated with the August 9, 2010 hearing and it has informed you that it did not have any records responsive to your request. However, it would appear that the Board failed to respond in writing to your August 3, 2011 request; as such it is my opinion that it violated the ODL.

A “public record” means any writing, paper, report, study, map, photograph, book, card, tape recording or other material that is created, received, retained, maintained or filed by or with a public agency. *See* I.C. § 5-14-3-2. The stenographer transcripts and meeting minutes at issue here would be a “public record” pursuant to the APRA. The APRA requires public agencies to protect public records from loss, alteration, mutilation, or destruction, I.C. § 5-14-3-7(a), and to maintain and preserve public records in accordance with applicable retention schedules. *See* I.C. § 5-14-3-4(e).

If a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. “[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-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.* Here, the Board has provided that it does not have any records responsive to your request and thus, in my opinion it did not violate the APRA.

However, the issue still remains whether the Board should have a record of the August 9, 2010 meeting. Police merit commissions are required to keep a permanent record of its proceedings. *See* I.C. § 36-8-3.5-9(a). The APRA provides that public agencies must maintain and preserve public records in accordance with the applicable retention schedules. *See* I.C. § 5-14-3-4(e). The Board has not disputed that I.C. § 36-8-3.5-9(a) is applicable to them or, regardless of whether the City or Board called the August 9, 2010 meeting, the Board was the agency that actually convened. Therefore, the Board was required to keep a permanent record of the August 9, 2010 meeting and in my opinion violated the APRA pursuant to I.C. § 5-14-3-4(e) when it failed to do so.<sup>2</sup>

### CONCLUSION

For the foregoing reasons, it is my opinion that the Board acted contrary to the section 9 of the APRA by failing to respond in writing to your written request within seven (7) days of receipt. If the Board does not have a record responsive to your request, it did not violate the APRA. Finally, the Board violated I.C. § 5-14-3-4(e) by failing to preserve a permanent record of the August 9, 2010 hearing.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is stylized and cursive.

Joseph B. Hoage  
Public Access Counselor

cc: Phil Tincher

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<sup>2</sup> If the Board has any questions or concerns regarding the applicable retention schedules, I would encourage them to contact the Indiana Commission on Public Records.