



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

October 17, 2011

Mr. Mychel R. Dillard
89 Mangum Street, SW #206
Atlanta, Georgia 30313

Re: Formal Complaint 11-FC-238; Alleged Violation of the Access to Public Records Act by the Posey County Security Center

Dear Mr. Dillard:

This advisory opinion is in response to your formal complaint alleging the Posey County Security Center ("Center") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* W. Trent Van Haften, Attorney, responded on behalf of the Center to your complaint. His response is enclosed for your reference.

BACKGROUND

In your complaint, you allege on August 1, 2011 and August 8, 2011, you submitted to the Center a written request for copies of the intake photographs, names, and charges for any individuals arrested during the period of July 24, 2011 through July 31, 2011. On August 19, 2011, the Center responded in writing to your records request and provided that a record of the intake photographs, names, and charges did not exist and it was not required to create a record in response to a public records request. The Center did provide that you would be allowed to examine the records. You believe that the records do exist in paper or electronic format and the Center acted contrary to the APRA in denying your request.

In response to your formal complaint, the Center provided that you were advised that public records were available for inspection and copying during its regular business hours. Further, your request failed to specifically identify the records that were sought and your request would require the Center to compile various records into a single record. In addition, your failure to personally inspect and copy any records responsive to your request does not translate into a denial under 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 Center 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 Center’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, the Center did not respond to your initial August 1, 2011 written request until August 19, 2011. As such, the Center acted contrary to section 9 in failing to respond to your request within the timeframes prescribed by the APRA.

You specifically requested “intake photographs, names, and charges for persons arrested by the Center during the period of July 24, 2011 through July 31, 2011.” The Center advised that your request failed to identify with reasonable particularity the record being requested. The APRA requires that a records request “identify with reasonable particularity the record being requested.” *See* I.C. § 5-14-3-3(a)(1). “Reasonable particularity” is not defined in the APRA, but the public access counselor has repeatedly opined that “when a public agency cannot ascertain what records a requester is seeking, the request likely has not been made with reasonable particularity.” *Opinions of the Public Access Counselor 10-FC-57; 08-FC-176*. However, because the public policy of the APRA favors disclosure and the burden of proof for nondisclosure is placed on the public agency, if an agency needs clarification of a request, the agency should contact the requester for more information rather than simply denying the request. *See generally* I.C. 5-14-3-1; *Ops. of the Public Access Counselor 02-FC-13; 11-FC-88*. After reviewing your request, it is my opinion that it identifies with reasonable particularity the records that were sought and is not overly broad. As such, it is my opinion that the Center did not meet its burden in denying your request for lack of particularity.

The Center argues that the APRA specifically prohibits the compilation of records in response to a request pursuant to I.C. § 5-14-3-3(f) and Opinion of the Public Access Counselor 06-FC-33. I would note that subsection (f) provides the following:

“Notwithstanding the other provisions of this section, a public agency is not required to create or provide *copies of lists of names and addresses* (including electronic mail account addresses) unless the public agency is required to publish such lists and disseminate them to the public under a statute.” I.C. § 5-14-3-3(f).

Subsection (f) deals specifically with requests for lists of names and addresses. Here your request of the Center asked for intake photographs, names, and charges of individuals arrested during the period of July 24, 2011 through July 31, 2011. Thus subsection (f) is not applicable to the request. *See Opinion of the Public Access Counselor 08-FC-141.*

In *Opinion of the Public Access Counselor 06-FC-33*, Counselor Davis found that the agency was not required to compile the information requested concerning individuals convicted of arson and their sentences. *See Opinion of the Public Access Counselor 06-FC-203.* Counselor Davis reasoned that only if the Clerk already maintained the record would it be obligated to disclose the record. *Id.* Here, the Center is already required to maintain a record identifying the name and information concerning any charges on which an arrest was made pursuant to I.C. § 5-14-3-5(a). Section 5(a) provides that:

If a person is arrested or summoned for an offense, the following information shall be made available for inspection and copying:

- (1) Information that identifies the person including the person’s name, age, and address.
- (2) Information concerning any charges on which the arrest of summons is based.
- (3) Information relating to the circumstances of the arrest or issuance of the summons, such as the
 - (A) Time and location of the arrest or the issuance of the summons;
 - (B) Investigating or arresting officer (other than an undercover officer or agent); and
 - (C) Investigating or arresting law enforcement agency.

Further, an agency is required to maintain a daily log that lists suspected crimes, accidents, or complaints. *See I.C. § 5-14-3-5(c); See Opinion of the Public Access Counselor 10-FC-109.* In some instances, a law enforcement agency will not maintain a separate record titled “daily log” but will instead use the daily incident reports to substitute for the daily log. *See Opinion of the Public Access Counselor 09-FC-93.* In that case, when the agency receives a request for the daily log information, the agency will generally provide copies of incident reports. *Id.* Typically, the agency will redact from the incident report any information not required to be maintained in a daily log. *Id.*

As the Center is already required to make the daily log available listing suspected crimes, accidents, or complaints, it is not being asked to compile information or create a new record in response to a request. It is only being asked to provide records for those individuals arrested for a specific period. *Id.* Thus, it would be required to provide the information specified in I.C. § 5-14-3-5 in response to a records request. However, although a public record, booking photos are not referenced in I.C. § 5-14-3-5. As such, the Center would not be required to compile a list of booking photos for individuals arrested in response to a generalized request as you have made here. However, after receiving the information made available to you under I.C. § 5-14-3-5, it would allow you to then make a specific request of the Center for individual booking photos, if you so desired.

The Center further provided that public records may exist within your general request, but you must avail yourself to the Center to receive them. The opportunity to personally inspect and copy the records applying to specific individuals has been made known to you. As it is my opinion that the Center would be required to provide the names and addresses of all individuals who were arrested in response to your request, the issue remains to what extent you must avail yourself to the Center to receive the copies.

The Access to Public Records Act provides that any person may inspect and copy the public records of any public agency, except as provided in the exceptions listed in section 4 of the APRA. *See* I.C. 5-14-3-3(a). A public agency may not deny or interfere with the exercise of the right stated in subsection (a). *See* I.C. 5-14-3-3(b). The public agency shall either:

- (1) provide the requested copies to the person making the request; or
 - (2) allow the person to make copies:
 - (A) on the agency's equipment, or
 - (B) on his own equipment.
- IC § 5-14-3-3(b).

Indiana law provides the following regarding copies of public records:

If:

(1) a person is entitled to a copy of a public record under this chapter;

and

(2) the public agency which is in possession of the record has reasonable access to a machine capable of reproducing the public record; the public agency must provide at least one (1) copy of the public record to the person. However, if a public agency does not have reasonable access to a machine capable of reproducing the record or if the person cannot reproduce the record by use of enhanced access under section 3.5 of this chapter, the person is only entitled to inspect and manually transcribe the record. A public agency may require that the payment for copying costs be made in advance.

I.C. § 5-14-3-8(e).

While Section 3(b) of the APRA indicates an agency shall either provide copies or allow access to records, Section 8(e) makes it clear an agency is to provide copies when it has 5-reasonable access to a machine capable of reproducing the record. *See* I.C. §5-14-3-8(e) and I.C. §5-14-3-3(b). Counselor Neal addressed this exact issue and provided:

“The Auditor here asserts the word “provide” in Section 8(e) does not mean the agency must make the copies. “When interpreting a statute the words and phrases in a statute are to be given their plain, ordinary, and usual meaning unless a contrary purpose is clearly shown by the statute itself.” *Journal Gazette v. Board of Trustees of Purdue University*, 698 N.E.2d 826, 828 (Ind. App. 1998). Statutory provisions cannot be read standing alone; instead, they must be construed in light of the entire act of which they are a part. *Deaton v. City of Greenwood*, 582 N.E.2d 882 (Ind. App. 1991). “Provide” means to “supply or furnish,” to “afford or yield,” or “to prepare, make ready, or procure beforehand.” *New Illustrated Webster’s Dictionary of the English Language* 780 (1992). Further, “provide” as used in Section 3(b)(1) clearly means the public agency is to make a copy, as it is followed by “or” and then Section 3(b)(2), which allows the requester to make a copy. We must assume provide was used by the legislature to convey the same meaning in the two different sections. As such, I agree with previous public access counselors that Sections 3(b)(1) and 8(e) together to require a public agency to make copies of records upon request when the agency has reasonable access to a copy machine.” *Opinion of the Public Access Counselor 07-FC-223*.

Thus, if the Center has reasonable access to a machine capable of reproducing the records, it must provide at least one (1) copy of the public record to you.

The Center cites to *Opinion of the Public Access Counselor 10-FC-191* for the premise that it is only required to make the public records available for inspection and copying. Counselor Kossack provided in 10-FC-191 that “It is my understanding that the Sheriff has located responsive records and has offered to make those available to you for inspection and copying. I trust this satisfies your complaint.” *See Opinion of the Public Access Counselor 10-FC-191*. I would note Counselor Kossack relied in his holding that the sheriff also offered the opportunity to download the video onto a flash drive to fulfill the records request, which is similar to the request here, which provided that the records could also be sent via e-mail as opposed to sending paper copies. *Id.*

One final issue of note, I.C. § 5-14-3-3(e) provides the following:

A state agency may adopt a rule under IC 4-22-2, and a political subdivision may enact an ordinance, prescribing the conditions under which a person who receives information on disk or tape under subsection (d) may or may not use the information for commercial purposes, including to sell, advertise, or solicit the purchase of merchandise, goods, or services, or sell, loan, give away, or otherwise deliver the information obtained by the request to any other person for these purposes. Use of information received under subsection (d) in connection with the preparation or publication of news, for nonprofit activities, or for academic research is not prohibited. A person who uses information in a manner contrary to a rule or ordinance adopted under this subsection may be prohibited by the state agency or political subdivision from obtaining a copy or any further data under subsection (d).

The provision does not permit agencies to deny requests based on the expected use of the request; rather, it is only after a requester has used information for commercial purposes in violation of the conditions prescribed by the public agency that the agency may prohibit the requester from receiving additional information. *See Opinion of the Public Access Counselor 11-FC-150*. KR D Media Group produces a crime-fighting publication titled *Caught Up*. *Caught Up* is described by the KR D Media Group as:

This brand of publications is wildly popular and sells out on every newsstand they hit! Not only does *Caught Up* help the police and law enforcement to find wanted individuals and help cities lower their crime rates, but it also keeps moms and dads aware of sex offenders that may be lurking in their area. You can get your 20 pages of informative fun by: visiting one of our local retailers, ordering a subscription, or simply viewing our most current issue online today!
http://www.caughtuplive.com/index.php?pr=About_Us

Thus, Center would act within its statutory authority if it were to deny any future requests from you if it can cite to a relevant local ordinance and show that you had previously used information in a manner contrary to the ordinance.¹ *See Opinions of the Public Access Counselor 07-FC-16; 10-FC-85*. Subsection 3(e) would also apply to electronic data that is produced on paper and electronic records that are delivered via e-mail. *Id*; *See also Informal Opinion of the Public Access Counselor 10-INF-6*.

¹ Opinions of the Public Access Counselor 07-FC-163 and 11-FC-150 illustrate resolutions enacted by the City of Indianapolis and the Owen County Board of Commissioners passed in light of I.C. § 5-14-3-3(e).

CONCLUSION

For the foregoing reasons, it is my opinion the Center acted contrary to section 9 of the APRA in failing to respond to your written request within seven (7) days. It is my opinion that your request was reasonably particular pursuant to the APRA and that the Center must comply with I.C. § 5-14-3-5 in responding to it. However, although a public record, booking photos are not provided for in I.C. § 5-14-3-5 and as such it is my opinion that the Center would not be required to compile a new record or list in response to your general request. Further, it is my opinion that if the Center has reasonable access to a machine capable of reproducing the records, it must provide at least one (1) copy of the public record to you. Lastly, it is my opinion that the Center would act within its statutory authority under I.C. § 5-14-3-3(e) if it were to deny any future requests from you if it can cite to a relevant local ordinance and show that you had previously used the information for commercial purposes and contrary to the ordinance.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

Joseph B. Hoage
Public Access Counselor

cc: W. Trent Van Haften