



STATE OF INDIANA

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January 4, 2012

Michael J. Shepard
3500 N. Harlan Avenue
Evansville, Indiana 47711

Re: Formal Complaint 11-FC-298; Alleged Violation of the Access to Public Records Act by the Evansville Police Department – Internal Affairs Unit

Dear Mr. Shepard:

This advisory opinion is in response to your formal complaint alleging the Evansville Police Department – Internal Affairs Unit (“Department”) violated the Access to Public Records Act (“APRA”), Ind. Code § 5-14-3-1 *et seq.* Brian Talsma, Internal Affairs Supervisor, responded on behalf of the Department. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege on November 9, 2011 you submitted a written request to the Department for records pursuant to the APRA. You specifically requested a copy of Incident Report # 11-13142 (“Incident Report”) and formal sworn complaints filed against Detective Brievogel and Officer Graham on July 6, 2011. As of December 5, 2011, the date you filed your formal complaint with the Public Access Counselor’s Office, you allege that the Department has failed to respond to your request for records in any fashion.

In response to your formal complaint, Mr. Talsma advised that the Department has not denied your right to access to the records of the Department. Your previous requests for the Incident Report and formal complaints were directed by Internal Affairs to the Records Department and the attention of Sgt. Darren Sroufe. Mr. Talsma personally hand delivered the requests to the Records Supervisor and was informed the proper steps were taken to accommodate your request. As to the formal complaint filed against Officer Graham, the incident was investigated and found to have no merit. Mr. Talsma further advised that no sworn complaint was ever filed against Detective Breivogel.

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. *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, you have alleged that the Department has failed to respond to your request for copies of the Incident Report and formal complaints filed against Officer Graham and Detective Breivogel. Mr. Talsma provided that your requests were forwarded to the Department’s Records Division, as Internal Affairs was not responsible for responding to such requests. It is my opinion that the Department has not met its burden in establishing that it responded to your request within the timelines provided by the Section 9 of the APRA, and as such acted contrary to the APRA.

Generally, 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 Department has provided that it does not have a record responsive to your request for a formal sworn complaint filed against Detective Breivogel; therefore, it is my opinion that the Department did not act contrary to the APRA by failing to provide a record that it does not maintain.



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As to the formal complaint filed against Officer Graham, Mr. Talsma provided that the incident was investigated and subsequently found to have no merit. Mr. Talsma provided that your APRA requests were forwarded to Sgt. Sroufe with the Department's Record Division. Without the benefit of a response from the Department specifically addressing the production of the Incident Report or the formal complaint filed against Officer Graham, it is unclear to me why your request was denied. Under the APRA, a public agency that withholds a public record bears the burden of proof to show that the record is exempt. *See* I.C. §§ 5-14-3-1, 5-14-3-9(f) and (g). Exceptions to disclosure are narrowly construed. *See* I.C. § 5-14-3-1. Because the Department has not provided a justification for withholding the records at issue here, it is my opinion that it has failed to sustain its burden pursuant to the APRA.

CONCLUSION

For the foregoing reasons, it is my opinion that the Department acted contrary to the APRA in failing to respond to your request within the timelines provided by Section 9 and in failing to provide proper justification for withholding a copy of the Incident Report and the formal complaint filed against Officer Graham. As to your request for a copy of the formal complaint filed against Detective Breivogel, it is my opinion that the Department did not violate the APRA in response to your request.

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: Brian Talsma