



STATE OF INDIANA

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January 31, 2012

Ashley M. Ulbricht
1256 Mossy Lane
Mishawaka, Indiana 46544

Re: Formal Complaint 12-FC-07; Alleged Violation of the Access to Public Records Act by the St. Joseph County Police Department

Dear Ms. Ulbricht:

This advisory opinion is in response to your formal complaints alleging the St. Joseph County Police Department ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Eric Tamashasky, Legal Deputy, responded on behalf of the Department. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that you submitted a written request to the Department for "any and all information in regards to Saint Joseph County Police Incident number 2011-33233, including all photographs, CAD reports, squad card videos, 911 calls, and radio traffic information between police and dispatch that would have been recorded." You initially met with the Department on December 21, 2011 and inquired who the appropriate person you needed to speak with regarding your request. You were directed to contact Lt. Croymans for the 911 calls, CAD Reports, and radio traffic information, and Capt. Rutkowski for photographs and squad car videos. After speaking with Capt. Rutkowski, he informed you that the photographs existed and that you would need to speak to an individual named "Bambi" to obtain them. He further provided that there were no squad car videos in regards to this incident. You informed Capt. Rutkowski that you would be submitting a written request for the records.

On December 22, 2011, you were provided with the photographs that you had sought. On December 27, 2011, you personally delivered a written request to Lt. Croymans and Capt. Rutkowski. On December 29, 2011, Capt. Rutkowski provided written notice that squad car videos did not exist. As of January 12, 2012, aside from the photographs that you received and Capt. Rutkowski's written notice regarding the lack of squad card video, you have yet to receive any further correspondence or records from the Department in response to your request.

In response to your formal complaint, Mr. Tamashasky advised that both Lt. Croymans and Capt. Rutkowski received your written request on December 28, 2011. As to the request submitted to Lt. Croymans, Mr. Tamashasky provided that he contacted you by phone the first business day after receiving your written request and informed you that he mailed the items to you that day. The records were sent regular postal service, not certified mail. Upon receipt of your formal complaint, Lt. Croymans immediately remade the copies and mailed a complete version of the records to you via certified mail, at no cost. He followed up the second disclosure by contacting you by phone and speaking to you regarding the records that had been sent.

As to the request submitted to Capt. Rutkowski, he responded to your request in a timely fashion and provided that beyond the photographs that had already been disclosed, there were no other records maintained by the Department that were responsive to your request. As to your prior oral requests submitted to Capt. Rutkowski, he responded to those requests orally and assisted you with receiving the photographs that were provided.

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.

As to your initial oral request of Capt. Rutkowski, he orally acknowledged your oral request and assisted you in gaining access to the photographs that were requested. You thereafter submitted a written request to which Capt. Rutkowski responded to, in writing, one business day after the request was submitted. He advised in his response that the Department had provided all records that were responsive to your request. Thus, as to the portion of your requests that were handled by Capt. Rutkowski, it is my opinion

that the Department did not violate section 9 of the APRA. As to the written request submitted to Lt. Croymans, the Department provided he responded to your request within one business day of its receipt by mailing to you the records that were sought and contacting you by telephone that he was sending the requested items. The records were not sent to you via certified mail, but I would note that the APRA does not require as such. 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*. If the Department failed to respond to your request in writing within seven days of its receipt as you have alleged, it acted contrary to the APRA. However, if the Department produced and mailed all records that were responsive to your request within one business day, it did not violate 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*. The Department has provided that all records responsive to your request have been provided. Accordingly, it is my opinion that the Department does not violate the APRA by failing to provide records that it does not maintain.

CONCLUSION

For the foregoing reasons, if the Department failed to respond to your written request that was submitted to Lt. Croymans within seven days of its receipt, it acted contrary to the APRA. But, if the Department produced all records that were responsive to your request within one business day, it did not violate the APRA. As to all other issues, it is my opinion that the Department did not violate the APRA.

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: Eric Tamashasky