



# STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

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May 22, 2012

Adam Lenkowsky  
118 N. Delaware  
Indianapolis, Indiana 46204

*Re: Formal Complaint 12-FC-123; Alleged Violation of the Access to Public Records Act by the Kokomo Police Department*

Dear Mr. Lenkowsky:

This advisory opinion is in response to your formal complaint alleging the Kokomo Police Department ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Lawrence McCormack, Corporation Counsel, responded on behalf of the Department. His response is enclosed for your reference. I have granted your complaint priority status pursuant to 62 Indiana Administrative Code 1-1-3(3).

## BACKGROUND

In your formal complaint, you allege that you submitted a written request to the Department on May 3, 2012 for all documents showing the factual basis for the disciplinary action of Office Doug Rensenberger pursuant to I.C. § 5-14-3-4(b)(8)(C). On May 10, 2012, the Department responded in writing and denied your request pursuant to I.C. § 5-14-3-4(b)(1). The records that you sought are considered to be investigatory records of the Department, as such the Department may properly deny the request pursuant to (b)(1). The Department cited to *Unincorporated Operating Div. of Ind. Newspapers, Inc. v. Trs. Of Indiana Univ.*, 787 N.E.2d 893 (Ind. Ct. App. 2003) in support of the premise that documents produced during the course of a police investigation fall under section (b)(1) of the APRA.

You allege that the request found in *Unincorporated* is factually distinct from the request that you submitted to the Department. In *Unincorporated*, the request was for "all documents associated with an investigation." Here, you have requested only those documents which show the factual basis for discipline. Further, investigatory records are those "compiled in the course of an investigation of a crime." There is no allegation here that the records were compiled in investigating a crime, rather the records were merely disciplinary.



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In response to your formal complaint, Mr. McCormack advised that the records you sought were investigatory records of the Department. Pursuant to I.C. § 5-14-3-4(b)(1), the Department has discretion on whether to produce investigatory records in response to a request made pursuant to the APRA. The records in question were created during a police investigation of Officer Rensenberger. Although the records were later used as the basis for disciplinary action against Officer Rosenberger, they nevertheless remain investigatory records of the Department. As provided in *Unincorporated*, the investigatory records compiled by a police department that were later used by as a factor in the decision to terminate an employee could be properly denied pursuant to I.C. § 5-14-3-4(b)(1).

## 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).

Under the APRA, a public agency denying access in response to a written public records request must put that denial in writing and include the following information: (a) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and (b) the name and title or position of the person responsible for the denial. See I.C. § 5-14-3-9(c). I note the following analysis provided by Counselor O’Connor:

Under the APRA, the burden of proof beyond the written response anticipated under Indiana Code section 5-14-3-9(c) is outlined for any *court action* taken against the public agency for denial under Indiana Code sections 5-14-3-9(e) or (f). If the public agency claimed one of the exemptions from disclosure outlined at Indiana Code section 5-14-3-4(a), then the agency would then have to either “establish the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit” *to the*



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*court.* Similarly, if the public agency claims an exemption under Indiana Code section 5-14-3-4(b), then the agency must prove to the court that the record falls within any one of the exemptions listed in that provision and establish the content of the record with adequate specificity. There is no authority under the APRA that required the IDEM to provide you with a more detailed explanation of the denials other than a statement of the exemption authorizing nondisclosure, but such an explanation would be required if this matter was ever reviewed by a trial court. (emphasis added). *Opinions of the Public Access Counselor 01-FC-47.*

Here, the Department has cited to I.C. § 5-14-3-4(b)(1) in denying your request for records. The investigatory records exception to the APRA provides that a law enforcement agency has the discretion to disclose or not disclose its investigatory records. There is no dispute that the Department is considered to be a “law enforcement agency.” An investigatory record is “information compiled in the course of the investigation of a crime.” See I.C. § 5-14-3-2(h). The investigatory records exception does not apply only to records of ongoing or current investigations; rather, it applies regardless of whether a crime was charged or even committed. The exception applies to all records compiled during the course of the investigation, even after an investigation has been completed. The investigatory records exception affords law enforcement agencies broad discretion in withholding such records. See *Opinion of the Public Access Counselor 09-FC-157.*

Your request sought records pursuant to I.C. § 5-14-3-4(b)(8)(C). The APRA provides that personnel files of public employees and files of applicants for public employment may be excepted from the APRA’s disclosure requirements, except for:

- (A) The name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency;
- (B) Information relating to the status of any formal charges against the employee; and



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(C) The factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged.  
I.C. § 5-14-3-4(b)(8).

As cited by both parties, *Unincorporated* dealt with a similar factual issue regarding a request for records that was denied pursuant to the investigatory records exception of the APRA. *Unincorporated* held that the disclosure requirements of section 4(b)(8) of the APRA do not trump the remaining exceptions to disclosure in section 4. *Unincorporated*, 787 N.E.2d at 915; *Opinion of the Public Access Counselor 09-FC-244*. The court provided:

If 4(b)(8)(A) through (C) trumped all exceptions to disclosure, one would not expect them to be listed under the section 4(b)(8) exception. More importantly, to read section 4(b)(8)(C) to trump all other exceptions would render other portions of section 4 superfluous.

...

Thus, we hold that sections 4(b)(8)(A), (B), and (C) are exceptions only to the disclosure exceptions listed in sections 4(b)(8) and (12). However, the section 4(b)(8)(A), (B), and (C) exceptions do not trump the remaining disclosure exceptions listed in section 4. *Id.*

In denying your request, the Department has provided that all records responsive to your request are considered "investigatory" and thus I.C. § 5-14-3-4(b)(1) would allow the Department discretion to produce the records in response to an APRA request. I would note that the investigatory records exception is only applicable to investigations involving crimes (or suspected crimes) and not to all investigations generally. If the records here were an investigation into employee misconduct and not a criminal investigation, the exception would not apply. However, Mr. McCormack has provided that the records were compiled by the Department during the investigation of a potential crime. As such, to the extent that the records that were sought were considered to be investigatory records of the Department, it is my opinion the Department did not violate the APRA in denying your request.



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## CONCLUSION

For the foregoing reasons, 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".

Joseph B. Hoage  
Public Access Counselor

cc: Adam Lenkowsky