



STATE OF INDIANA

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July 18, 2012

Brian Baxter
DOC 937087
P.O. Box 1111
Carlisle, Indiana 47838

Re: Formal Complaint 12-FC-165; Alleged Violation of the Access to Public Records Act by the Indianapolis Metropolitan Police Department

Dear Mr. Baxter:

This advisory opinion is in response to your formal complaint alleging the Indianapolis Metropolitan Police Department ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Andrea Brandes Newsom, Chief Deputy Corporation Counsel, responded on behalf of the Department. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you provide the following:

"According to Informal opinion issued by your office April 20, 2012, I was informed that the police department claims that they have no laboratory or forensic test on the items I requested for and that they would have the remaining records to me within three weeks which I still have not received. I also was never informed by IMPRD that no laboratory of those clothing items were found until Informal Opinion which (GSR testing) forensic work was done on those items by IMPD."

In response to your formal complaint, Ms. Brandes-Newsom advised that your formal complaint arises out of a request for records that you submitted to the Department on January 12, 2012. The Department timely responded to your request and in its response, the Department sought further specificity from you regarding the records that you were requesting. On January 30, 2012, you submitted a "Renewed Public Record Request" in which you provided the necessary particularity that had been requested and also provided a list of the requested items from various cases, identified by case number. On March 6, 2012, you submitted correspondence to the Department seeking further guidance and estimated date as to when the records would be available. You advised the

Department that it had seven days to respond to your status request. The Department timely responded in writing to your request and advised that it was still conducting its search for the records.

At the same time, you submitted a request to the Public Access Counselor's Office for an informal opinion as to whether an agency is required to provide a specific date on which the records would be produced. *See Informal Opinion of the Public Access Counselor 12-INF-19*. In response to your request for an informal opinion, the Department provided to you an estimate that all records responsive to your request would be made available in the next two (2) to three (3) weeks. Regrettably, the Department was unable to locate the requested records during this time period and requires additional time to search for and produce the records that are responsive. The City's Office of Corporation Counsel continues to assist its many clients, including the Department, with public records requests and the Department endeavors to process records requests as efficiently as possible. By adding language inclusive of all branches of the IMPD to your request, you significantly increased the breadth of the search required for records responsive to your request.

The Department would reiterate that it has not records in its possession that are responsive to your request seeking laboratory/forensic testing and examination and autopsy reports for the cases you specified. The search for the remaining records that you have sought continues. The Department believes due to the depth and breadth of the request, its responses have been timely, reasonable, and not in violation of the APRA. The Department will notify you via U.S. Mail as quickly as possible when such items are available for his review.

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)*. A response from the public agency could be an acknowledgement that the request has been received and include information regarding how or when the agency intends to comply. Here, the Department responded to your request in writing within seven (7) days of its receipt. As such, it is

my opinion that it complied with the requirements of the APRA in response to your request.

Generally, if a public agency has no records responsive to a public records request, the agency generally 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 maintain any records that are responsive to your request for laboratory/forensic testing, examination, and autopsy reports for the cases that you have specified. As such, it is my opinion that the Department did not violate the APRA by failing to provide a record that it was not legally obligated to maintain.

Effective July 1, 2012, the APRA provides a public agency shall provide records that are responsive to the request within a reasonable time. See I.C. § 5-14-3-3(b). The public access counselor has stated that factors to be considered to be considered in determining if the requirements of section 3(a) under the APRA have been met include, the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. The APRA requires an agency to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. See I.C. § 5-14-3-6(a). Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. See I.C. § 5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. See I.C. § 5-14-3-7(c). The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. See *Opinion of the Public Access Counselor 02-FC-45*. This office has often suggested a public agency make portions of a response available from time to time when a large number of documents are being reviewed for disclosure. See *Opinions of the Public Access Counselor 06-FC-184; 08-FC-56; 11-FC-172*. Further nothing in the APRA indicates that a public agency’s failure to provide “instant access” to the requested records constitutes a denial of access. See *Opinions of the Public Access Counselor 09-FC-192 and 10-FC-121*.

After submission of your original request to the Department on January 5, 2012, your amended request was submitted on January 30, 2012. Since that time, close to six months have passed since the Department was in receipt of a request from you that was considered to be reasonably particular pursuant to I.C. § 5-14-3-3. While I do note that the Department has been able to inform you that there are no records responsive to certain portions of your request; to date you have yet to have been provided with any

records, informed of the applicable fees associated with the production of any records, or been issued a proper denial pursuant to section 9 of the APRA. Although I am mindful of the additional duties and responsibilities required of the Department and the overall breadth of your request, it is my opinion that the Department has failed to meet its burden to demonstrate that it has complied with the requirements of I.C. § 5-14-3-3(b) in providing the records that are responsive to your request in a reasonable period of time. I would encourage the Department to continue to work diligently in completing its continued search for the records and promptly inform you when the records are available for production.

CONCLUSION

For the foregoing reasons, it is my opinion that the Department has failed to meet its burden to demonstrate that it has complied with the requirements of I.C. § 5-14-3-3(b) in providing the records that are responsive to your request in a reasonable period of time. As to all other issues, it is my opinion that the Department has complied with the requirements of the APRA.

Best regards,

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

Joseph B. Hoage
Public Access Counselor

cc: Andrea Brandes-Newsom