



STATE OF INDIANA

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July 20, 2012

Mr. Mark C. Mabrey
PO Box 3032
Evansville, Indiana 47730

Re: Formal Complaint 12-FC-171; Alleged Violation of the Access to Public Records Act by the Davies County Sheriff's Department

Dear Mr. Mabrey:

This advisory opinion is in response to your formal complaint alleging the Daviess County Sheriff's Department ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* A. Howard Williams responded in writing on behalf of the Department to your formal complaint. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you alleged that on May 3, 2012, you submitted a written request to the Department for an electronic copy of a 911 call, a copy of the corresponding dispatch log, and any complaints or other incident reports filed by or involving certain individuals. On May 8, 2012, the Department responded to your request in writing and acknowledged its receipt. Since that time, you have repeatedly made attempts to contact the Department via Mr. Williams and have been unable to receive a response. As of June 22, 2012, the date you filed your formal complaint with the Public Access Counselor's Office, you have yet to receive any records that are responsive to your request.

In response to your formal complaint, Mr. Williams advised that since receiving your request, the Department has been diligently searching its files for any records that would be responsive. The records requested date back to September 2010. Mr. Williams has been advised that the Department located the tapes in question one week ago. At that time it was discovered that the information requested is on the same tape as information involving a murder. The tape in question is in evidence and has been used in a murder trial which is now subject to appeal.

Sheriff Harbstreit has provided that he spoke with Judge Dean Sobecki of the Davies County Superior Court and the Judge was of the belief that you would need a

subpoena to discover the requested information. Thus, until a subpoena is presented, you will not be given access to the tape. Attached with the Department's response is a "Call for Service by Transaction Number" which summarizes the call you had requested.

Mr. Williams apologized for his failing to respond to your inquiries, as he has had limited time to return messages this summer between law enforcement training and conferences. Further, due to his office e-mail having very strong firewalls, certain information is not delivered to his email inbox.

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, you submitted a written request for records to the Department on May 3, 2012. The Department responded to your request on May 8, 2012. As such, it is my opinion that the Department complied with the requirements of section 9 of the APRA by responding in writing to your written request within seven (7) days of its receipt.

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*.

I would note that although certain parts of your request date back to September 2010, the request is not broad. You request sought a 911 tape, the corresponding dispatch report, and any other reports filed by or involving certain individuals. The one-page dispatch report has now been provided to you, approximately seventy-six (76) days after you submitted your request. There was no mention in the Department's response to your formal complaint regarding the availability of any incident reports involving the individuals that you cited. Many of the issues that have arisen regarding your formal complaint could have been easily dealt with had the Department communicated with you during this process or had not waited until a formal complaint was filed to provide the requested records. Although I am mindful of all the other duties and responsibilities required of the Department and Mr. Williams and the frustrating nature of technology, it is my opinion that the Department failed to provide all records that were responsive to your request in a reasonable period of time as required under section 3 of the APRA.

As to the 911 recording, if the Department no longer maintains a copy of the 911 call, then it would not be in violation of the APRA by failing to provide you a copy. 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..."). I would note that your request was made pursuant to the APRA, not via discovery or any other pending or closed civil or criminal litigation. If an agency has a record that is responsive to an APRA request, and is going to deny the request, it must cite to the specific statutory exception(s) authorizing the withholding 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)(2).

CONCLUSION

For the foregoing reasons, it is my opinion that the Department failed to respond to your request within a reasonable period of time as required by I.C. § 5-14-3-3(a). As to all other issues, it is my opinion that the Department complied with the requirements of the APRA if it no longer maintains a copy of the 911 recording that was sought.

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 distinct "Hoage" following.

Joseph B. Hoage
Public Access Counselor

cc: A. Howard Williams