



STATE OF INDIANA
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October 12, 2012

Joseph Shabazz
305 W. Lawrence Apt. B
Mishawaka, Indiana 46545

Re: Formal Complaint 12-FC-280; Alleged Violation of the Access to Public Records Act by the St. Joseph County Prosecutor's Office

Dear Mr. Shabazz:

This advisory opinion is in response to your formal complaint alleging the St. Joseph County Prosecutor's Office ("Prosecutor") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Lora Bentley, Director of Media Relations and Special Projects, responded on behalf of the Prosecutor. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that on September 14, 2012, you submitted a request to the Prosecutor for the number of police misconduct complaints of any type that had been filed against Tim Corbett, Commander of the Metro Homicide Unit. In response, the Prosecutor denied your request in writing pursuant to I.C. § 5-14-3-4(b)(8). You believe that the Prosecutor has improperly denied your request for records under the APRA.

In response to your formal complaint, Ms. Bentley confirmed that the Prosecutor received your hand-delivered, written request on September 14, 2012. You request sought: "The number of police misconduct complaints lodged of any type against Tim Corbet, Commander of the Metro Homicide Unit between 2000-2011." On September 14, 2012, the Prosecutor responded in writing to your request and advised that your request was denied pursuant to I.C. § 5-14-3-4(b)(8). Although you specifically asked to be provided with "the number" of police misconduct complaints, the Prosecutor interpreted your request to seek the actual documents which were complaints of misconduct (i.e. actions related to Commander Corbett's law enforcement duties). The Prosecutor does not maintain any records of this nature.

Under the APRA, the Prosecutor maintains that public agencies have the discretion to withhold complaints unless disciplinary action is taken that resulted in

suspension, demotion, or discharge. In those cases, (b)(8)(C) requires the agency to provide the factual basis for the disciplinary action, but not the complaint itself. As applied to Commander Corbett, there was only one disciplinary action which resulted in a suspension, but it was not related to his duties as Commander. The Prosecutor does not believe that it was a document that was responsive to your request.

Upon receiving the Prosecutor's response, you contacted the agency and expressed your displeasure with its decision. At that time, the Prosecutor conducted a second review of the records and determined that the only record which could remotely be said to be responsive to your request was a copy of a 2006 Office Disciplinary Notice. The record had previously been provided to several media outlets in St. Joseph County. The Prosecutor thereafter provided you with a copy of the notice to you.

The Prosecutor had difficulty in construing your request with the requirements of the APRA. While the Prosecutor clearly recognizes the spirit of the APRA, it does not maintain that public agencies are required to provide documents which are not plainly responsive to a request. Members of the public can make broad requests; however the Prosecutor would provide that the risk of narrowing a request by modifiers should rest with the requestor, not the public agency.

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 Prosecutor 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 Prosecutor'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 twenty-four 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 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, the Prosecutor responded in writing to your hand-delivered written request on the date of its receipt, as such it is my opinion that it complied with section 9 of the APRA.

The APRA requires that a records request “identify with reasonable particularity the record being requested.” I.C. § 5-14-3-3(a)(1). “Reasonable particularity” is not defined in the APRA, but the public access counselor has repeatedly opined that “when a public agency cannot ascertain what records a requester is seeking, the request likely has not been made with reasonable particularity.” *See Opinions of the Public Access Counselor 10-FC-57; 08-FC-176*. However, because the public policy of the APRA favors disclosure and the burden of proof for nondisclosure is placed on the public agency, if an agency needs clarification of a request, the agency should contact the requester for more information rather than simply denying the request. *See generally IC 5-14-3-1; Opinions of the Public Access Counselor 02-FC-13; 05-FC-87; 11-FC-88*.

The plain language of your request sought “The number of police conduct complaints lodged, of any type, against Tim Corbett, Commander of the Metro Homicide Unit between 2000-2011.” Taking a literal interpretation, the Prosecutor could have responded that it was not required under the APRA to conduct research in response to a request for records. As your request did not seek actual records, rather only the number of police misconduct complaints that had been filed; the Prosecutor would have complied with the requirements of the APRA in responding in such a fashion. *See Opinions of the Public Access Counselor 03-FC-146; 05-FC-25; 12-INF-01*.

Rather than taking this limited approach, the Prosecutor interpreted your request as one for actual documents that were complaints of police misconduct, in that the actions were related to Commander Corbett’s law enforcement duties. The Prosecutor has stated that it does not maintain any records that are responsive to your request as it relates to Commander Corbett’s law enforcement duties. 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....”). As such, the Prosecutor would not have violated the APRA by failing to produce a record that it did not maintain.

After communicating with the Prosecutor your displeasure with its response, the Prosecutor conducted a further review of its records. The Prosecutor adopted a broad interpretation of your request and provided you with a record relating to a 2006 Office Disciplinary Notice against Commander Corbett. The record had previously been provided to local media outlets. The Prosecutor thereafter provided you with a copy of the notice. 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

(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).

In other words, the information referred to in (A) - (C) above must be released upon receipt of a public records request, but a public agency may withhold any remaining records from the employee's personnel file.

I am not aware of any prior case law, advisory opinion issue by the Public Access Counselor's Office or statute that definitively provides what type of records can, may, or shall be kept in an employee's personnel file. The Indiana Commission on Public Records' general retention schedule that is applicable to all state agencies defines a personnel file as:

[a] state agency's documentation of the employee's working career with the state of Indiana. Typical contents could include the Application for Employment, PERF forms, Request for Leave, Performance Appraisals, memos, correspondence, complaint/grievance records, miscellaneous notes, the Add, Rehire, Transfer, Change form from the Office of the Auditor of State, Record of HRMS Action, and/or public employee union information. Disclosure of these records may be subject to IC 5-14-3-4(b)(2)(3)(4) & (6), and IC 5-14-3-4(b)(8). *See* Records Retention and Disposition Schedule, State Form 5 (R4/ 8-03).

As applicable here, if Commander Corbett was not subject to suspension, demotion, or discharge or any formal charges in response to any complaint that have been filed, related to his law enforcement duties or otherwise, and said complaints were maintained in Commander Corbett's personnel file, the Prosecutor would have discretion to deny your request for the complaints pursuant to I.C. § 5-14-3-4(b)(8). If Commander Corbett had been subject to such discipline as contemplated under I.C. § 5-14-3-4(b)(8)(C), it would only have been required to provide a factual basis for the disciplinary action. As the Prosecutor has provided you with the factual basis for the sole disciplinary action filed against Commander Corbett as contemplated under I.C. § 5-14-3-4(b)(8)(C), it is my opinion that it has not violate the APRA.

CONCLUSION

For the foregoing reasons, it is my opinion that the Prosecutor did not violate the APRA.

Best regards,

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

Joseph B. Hoage
Public Access Counselor

cc: Lora Bentley