



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

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February 13, 2012

Marvin F. Taylor
One Park Row
Michigan City, Indiana 46360

Re: Formal Complaint 12-FC-35; Alleged Violation of the Access to Public Records Act by the Marion County Sheriff's Department

Dear Mr. Taylor:

This advisory opinion is in response to your formal complaints alleging the Marion County Sheriff's Department ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Kevin Murray, Legal Counsel, 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 on January 26, 2012 to the Department for a criminal history for Scott Gorman. You believe you have demonstrated that that you meet the criteria of I.C. 10-13-3-27(a)(6) and (7) that requires the Department to release the information. You submitted with your formal complaint correspondence from 2009, where the Department denied your request due to failure to meet the criteria of I.C. § 10-13-3-27.

In response to your formal complaint, Mr. Murray advised that I.C. § 5-14-5-6 limits the authority of the Public Access Counselor's Office to Indiana Code 5-14-3 matters, with no jurisdiction for issues related to I.C. § 10-3-3. The Department denied your request due to you failed to demonstrate that the subject of the request was the subject of any of the criteria contained in I.C. § 10-13-3-27(a)(6) or (7). Your request also failed to demonstrate that you were a noncriminal organization entitled to receive a limited criminal history under I.C. § 10-13-3-27(a) or (b). Further, the Indianapolis Metropolitan Police Department ("IMPD") is the keeper of limited criminal histories, not the Department; a fact which was communicated to you in a January 30, 2012 correspondence.



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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. Here, the Department responded to your request within the timelines provided by section 9 of 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*. Here, the Department has provided that the IMPD, not the Department, is the official keeper of limited criminal histories. Your requests for limited criminal histories should thus be directed to the IMPD, a fact which was communicated to you in a January 30, 2012 correspondence from the Department. As such, it is my opinion that the Department did not violate the APRA by failing to provide a record that it does not maintain.



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The APRA states that a public agency may not disclose records that are declared confidential by state statute.” See I.C. § 5-14-3-4(a)(1). Indiana law provides that limited criminal history information may not be released except under specific circumstances. See I.C. § 10-13-3-27. “Limited criminal history” is defined as information with respect to any arrest or criminal charge, which must include a disposition.” See I.C. § 10-13-3-11. Limited criminal history is subject-specific; in other words, a limited criminal history relates to a particular person about whom the information pertains. See generally I.C. § 10-13-3. Indiana Code § 10-13-3-31 provides:

Release of data to subject person; fee; challenge of data authorized Sec. 31. (a) Unless otherwise prohibited by law, a criminal justice agency that maintains criminal history data, upon request and proper identification of the person about whom criminal history data is maintained, shall provide that person with a copy of the person's criminal history data for a reasonable fee. (b) Any person may challenge the information contained in the person's criminal history data file.

I.C. 10-13-3-27(a)(6) and (7), which you have alleged is applicable to your request, provides the following:

- (a) Except as provided in subsection (b), on request, a law enforcement agency shall release a limited criminal history to or allow inspection of a limited criminal history by noncriminal justice organizations or individuals if the subject of the request:
 - (6) has charged that the subject’s rights have been abused repeatedly by criminal justice agencies;
 - (7) is the subject of a judicial decision or determination with respect to the setting of a bond, plea bargaining, sentencing, or probation. I.C. § 10-13-3-27(a)(6), (7).

The Department has provided that even if it maintained limited criminal histories, you failed to demonstrate that the subject of the request, Scott Gorman, was the subject of any criteria contained in (a)(6) or (7). In addition, you failed to show that you were a noncriminal justice organization entitled to receive a limited criminal history pursuant to I.C. § 10-13-3-27(a) or (b). If in the future should you chose to submit a request for a limited criminal history to any public agency, you must demonstrate that the *subject* of the request (in this case Scott Gorman), not the requestor of the criminal limited history, would qualify pursuant to one of the provisions listed in I.C. § 10-13-3-27(a) (emphasis added).



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As to the Department's contention that the authority of the Public Access Counselor is limited to I.C. 5-14-3 matters, I would note that I.C. 5-14-5-6 provides the following:

A person or a public agency denied:

- (1) the right to inspect or copy records under I.C. 5-14-3;
- (2) the right to attend any public meeting of a public agency in violation of I.C. 5-14-1.5; or
- (3) any other right conferred by I.C. 5-14-3 or I.C. 5-14-1.5 or any other state statute or rule governing access to public meetings or public records;

may file a formal complaint with the counselor under the procedure prescribed by this chapter or make an informal inquiry under I.C. § 5-14-10(5).

The Public Access Counselor's Office has responded to informal inquiries and formal complaints from the public, media, and public agencies dealing with access to limited criminal histories specified in I.C. § 10-13-3, or its predecessor I.C. § 5-2-5, since 2000. *See Opinions of the Public Access Counselor 00-FC-02; 01-FC-11; 04-FC-97; 05-FC-72; 10-FC-116; and 11-FC-216.* I am unaware of any case law or statute that has prohibited the Public Access Counselor from addressing issues related to I.C. § 10-13-3. Thus, it is my opinion that a formal complaint may be filed with the Public Access Counselor's Office in regards to access to a limited criminal history pursuant to I.C. § 5-14-5-6(3), as a limited criminal history is a public record pursuant to I.C. § 5-14-3-2(n) to which access is governed by I.C. § 10-13-3-27.

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 that reads "J. Hoage".

Joseph B. Hoage
Public Access Counselor

cc: Kevin Murray