



STATE OF INDIANA

MICHAEL R. PENCE, Governor

PUBLIC ACCESS COUNSELOR
LUKE H. BRITT

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

June 12, 2014

Mr. Joseph H. Blackmer
Miami Correctional Facility
3038 West 850 South
Bunker Hill, IN 46914

Re: Formal Complaint 14-FC-103; Alleged Violation of the Access to Public Records Act by the Elkhart County Sheriff's Department

Dear Mr. Blackmer,

This advisory opinion is in response to your formal complaint alleging the Elkhart County Sheriff's Department ("ECSD") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The Department has responded via Mr. Nathaniel M. Jordan of the law firm of Yoder Ainlay Ulmer and Buckingham. His response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on May 8, 2014.

BACKGROUND

Your complaint dated April 30, 2014 alleges the Elkhart County Sheriff's Department violated the Access to Public Records Act by not providing records responsive to your request in violation of Ind. Code § 5-14-3-3(b).

On January 28, 2014, you made a request to ECSD for "a copy of a letter, addressed to the Elkhart Police Department from the Michigan State Police dated on or about July to October 1982. It concerns any warrants or warrants for Joseph H, Blackmer", along with "a copy of the letter sent to the Michigan State Police by the Elkhart Police for such information."

ECSD received your request on February 7, 2014, and responded on February 11, 2014. ECSD stated the records you request fall under the investigatory record exception to APRA, Ind. Code § 5-14-3-4(b)(1). Furthermore, ECSD states there is "a question as to whether these 'warrant' checks are protected under terminal agency user agreements". Therefore, ECSD denied your request.

On April 2, 2014, you made a similar request to ECSD, requesting “[c]opies of any letters or documents addressed to the Elkhart Police Dept. from the Michigan State Police, dated on or about July to October 1982, concerning any wants or warrants for Joseph H. Blackmer”, as well as “[a]ny letters sent to MI State Police.” You requested these documents as part of a conviction appeal.

ECSD received your request on April 8, 2014, and issued a response on April 16, 2014. ECSD again stated the records you request fall under the investigatory record exception to APRA, Ind. Code § 5-14-3-4(b)(1), and there is “a question as to whether these ‘warrant’ checks are protected under terminal agency user agreements”. Therefore, ECSD again denied your request.

ECSD responded to your formal complaint on May 30, 2014. In their response, ECSD again asserts the requested document is exempted from APRA disclosure requirements as it falls under the investigatory record exception. The document was requested from Michigan State Police as part of a criminal investigation. Additionally, ECSD asserts the record is exempted from disclosure because it “was obtained by a request to Indiana, federal, and multi-state criminal databases.” As a result of an agreement between ECSD and the Indiana Data and Communications System (“IDACS”), ECSD is prohibited from “producing such to anyone other than ‘its own employees and other governmental criminal justice officials with a specific right and need to know.” ECSD cites 240 IAC 5-2-10(h) as authority for the prohibition on disclosing the agreement.

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 Ind. Code § 5-14-3-1. The Elkhart County Sheriff’s Department is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the ECSD’s public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14-3-3(a).

A request for records may be oral or written. See Ind. Code § 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 Ind. Code § 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 Ind. Code § 5-14-3-9(b). A response from the public agency could be an acknowledgement the request has been received and information regarding how or when the agency intends to comply.

ECSD acknowledges it is in possession of a letter from the Michigan State Police from June 2, 1982. They allege this is likely the record you seek. ECSD is withholding this record under the investigatory records exception found at Ind. Code § 5-14-3-4(b)(1).

While this Office has advised in the past the investigatory records exception is to be used judiciously and should be exercised only when the release would cause actual harm to the investigation or an individual, I have not inspected the record to determine if this would be the case. In any case, it is not appropriate for the Public Access Counselor to speculate whether law enforcement agencies are using good judgment in regard to section (b)(1); rather I generally encourage police and sheriff's departments to make that decision in a light most favorable to transparency. If they have made the choice to withhold the letter as an investigatory record, they certainly are within their rights to do so.

Turning toward the issue of the other records requested, the ECSD's asserts the information is confidential as it was collected from the Indiana Data and Communications System ("IDACS"). Title 10 of the Indiana Code deals specifically with the State Police. Under those series of statutes, the legislature has given the State Police authority to adopt rules under the Administrative Code governing law enforcement data. 210 IAC 5-1-1 establishes IDACS and declares the information confidential.

Ind. Code § 5-14- 3-4(a)(2) provides that a public agency may not disclose records that are "declared confidential by rule adopted by a public agency under *specific authority* to classify public records as confidential granted to the public agency by statute." Emphasis added. Although the State Police has authority to adopt rules concerning the establishment of a data system and has general rulemaking authority, I know of no statute which gives the Indiana State Police specific authority to declare records confidential. Therefore, it is my opinion that if the States Police has not been given specific authority to declare records confidential, the Elkhart County Sheriff's Department may not use Indiana Code § 5-14-3-4(a)(2) as justification for withholding. If I become aware of the specific statutory authority or any other provision meeting the standards of (a)(2) or (a)(1) to declare IDACS confidential, I will take that matter into consideration in the future.

Despite my immediate hesitation with the IDACS arguments, I do give credence to the assertion the remainder of the records you seek could be consider investigatory under Ind. Code § 5-14- 3-4(b)(1) and their release at the discretion of ECSD.

CONCLUSION

It is the Opinion of the Public Access Counselor the Elkhart County Sheriff's Department did not violate the Access to Public Records Act.

Regards,

A handwritten signature in black ink, appearing to be the initials 'JTB' with a long, sweeping underline.

Luke H. Britt
Public Access Counselor

Cc: Mr. Nathaniel M. Jordan, Esq.