



STATE OF INDIANA

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July 25, 2016

Mr. Courtney Johnson DOC - #191135
Plainfield Correctional Facility
727 Moon Road
Plainfield, Indiana 46168

Re: Formal Complaint 16-FC-155; Alleged Violation of the Access to Public Records Act by the Marion Police Department

Dear Mr. Johnson:

This advisory opinion is in response to your formal complaint alleging the Marion Police Department ("Department") violated the Access to Public Records Act ("APRA"), Indiana Code § 5-14-3-1 et. seq. The Department responded to your complaint via Thomas Hunt, Esq., Corporate Counsel. His response is enclosed for your review. Pursuant to Indiana Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on July 6, 2016.

BACKGROUND

Your complaint dated June 24, 2016, alleges the Marion Police Department violated the Access to Public Records Act by improperly denying your records request. You requested a copy of your file maintained by the Department. On June 14, 2016 you received a response informing you the Department required a subpoena to release the records. On July 20, 2016 the Department responded to your complaint citing Indiana Code § 5-14-3-4(b)(1), (6) and (25) as its basis for the denial of your request.

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

In its initial denial, the Department describes a general justification for withholding any documents and states that a subpoena is required; however, it fails to state the specific provision of Indiana law which allows nondisclosure. Denials of access must include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and the name and the title or position of the person responsible for the denial. *See Indiana Code § 5-14-5-9(d)*. While the Department provided specific exemptions in its response to the formal complaint filed, it failed to cite a specific statutory justification for its initial denial and has therefore violated the APRA.

In response to your complaint filed with this office, the Department included the specific exemptions permitting it to withhold the records you requested. Among those cited is the investigatory records exemption. This exception to the APRA provides that a law enforcement agency has the discretion to disclose or not disclose its investigatory records. *See Indiana Code § 5-14-3-4(b)(1)*. An investigatory record is "information compiled in the course of the investigation of a crime." *See Indiana Code § 5-14-3-2(h)*. The investigatory records exception does not apply only to records of ongoing or current investigations; rather, it applies regardless of whether a crime was charged or even committed. The exception applies to all records compiled during the course of the investigation, even after an investigation has been completed. The investigatory records exception affords law enforcement agencies broad discretion in withholding such records. The Department is correct in its applying *Althaus v. The Evansville Courier Company*, 615 N.E.2d 441 (Ind. Ct. App. 1993) - this exemption may continue to apply to an investigatory record even after the conclusion of an investigation.

Additionally, you requested officer's notes, and emails between officers, and reports to supervisors. The Department cites Indiana Code § 5-14-3-4(b)(6), which excepts intra-agency or interagency advisory or deliberative material from disclosure. Deliberative materials include information that reflects, for example, one's ideas, consideration and recommendations on a subject or issue for use in a decision making process. *See Opinion of the Public Access Counselor 98-FC-1*. Many, if not most documents a public agency creates, maintains or retains may be part of some decision-making process. *See Opinion of the Public Access Counselor 98-FC-4; 02-FC-13; and 11-INF-64*. The purpose of protecting such communications is to "prevent injury to the quality of agency decisions." *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002).

Finally, you requested a listing of all persons interviewed by police and their statements. The Department denied this request under the criminal intelligence information exception. *See Indiana Code § 5-14-3-4(b)(25)*. This exception seeks to protect the identity of witnesses and appears to be properly applied.

While the Department's initial denial was improper, it appears to have corrected the issue in its response to your complaint. The exceptions listed appear to justify the denial to your records request. It should be noted, however, that Section 6 of the APRA requires a public agency to separate disclosable from non-disclosable information contained in public records. *Indiana Code § 5-14-3-6(a)*. In the event any of the records you requested contain disclosable information, it should be provided to you.

CONCLUSION

Based on the forgoing, it is the opinion of the Public Access Counselor the Marion Police Department has violated the Access to Public Records Act by failing to state a specific exemption permitting the denial of your records in its initial denial letter, but not for ultimately denying your records request.

Regards,

A handwritten signature in black ink, appearing to be 'LHB', written in a cursive style.

Luke H. Britt
Public Access Counselor

Cc: Mr. Thomas Hunt, Esq.