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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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THEOTIS D. TOLLIVER,  
*Complainant,*

v.

GARY POLICE DEPARTMENT,  
*Respondent.*

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Formal Complaint No.  
19-FC-119

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Luke H. Britt  
Public Access Counselor

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BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Gary Police Department violated the Access to Public Records Act.<sup>1</sup> City Attorney Rodney Pol, Jr. filed an answer on behalf of the department. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on October 31, 2019.

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<sup>1</sup> Ind. Code § 5-14-3-1, to -10.

## BACKGROUND

Theotis D. Tolliver (“Complainant”), an offender imprisoned at Wabash Valley Correctional Facility, contends that he filed a public records request—dated September 28, 2019— with the Gary Police Department seeking the following records:

A certified copy of the probable cause affidavit for (Raymond Young) arrest on 9/16/2008 at 1612 Maryland Street Gary, IN 46407, on the charge of possession of marijuana;

A certified copy of the arrest of any (warrants) served at the time of Young’s 9/16/2008 arrest.

Tolliver asserts that GPD never responded to his request. As a result, on October 31, 2019, Tolliver filed a formal complaint<sup>2</sup> with this office alleging the department violated the Access to Public Records Act.

The Gary Police Department filed an answer to Tolliver’s complaint with this office on November 20, 2019. GPD denies that it violated APRA as alleged by Tolliver. In sum, the department argues that it never received the records request Tolliver included with the formal complaint he filed with this office.

GPD acknowledges that it received an invalid *subpoena duces tecum* from Tolliver in June 2019 seeking the same information. The department concluded the subpoena was invalid because it did not include a cause number for the court and the title of the action as required by the Indiana Trial

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<sup>2</sup> Tolliver originally filed a formal complaint dated October 11, 2019, and received by this office on October 21, 2019. This office returned the complaint to Tolliver as untimely with instructions to refile after enough time elapsed.

Rules. As a result, GPD did not produce the documents requested.

GPD notes that Tolliver knows the proper procedure for filing a records request under APRA because he has filed at least three prior complaints with this office.

## ANALYSIS

### 1. The Access to Public Records Act (“APRA”)

It is the public policy of the State of Indiana that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Ind. Code § 5-14-3-1.

The Access to Public Records Act (“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.” *Id.* The Gary Police Department is a public agency for the purposes of APRA; and thus, is subject to the act’s requirements. Ind. Code § 5-14-3-2(q). Unless otherwise provided by statute, any person may inspect and copy the department’s public records during regular business hours. Ind. Code § 5-14-3-3(a).

Under APRA, “public record” means:

any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic

or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

Ind. Code § 5-14-3-2(r). Although public records are presumptively disclosable, APRA contains both mandatory and discretionary exceptions to disclosure.<sup>3</sup>

## **2. No Request; No Denial**

The crux of this complaint is a factual dispute about whether the Gary Police Department received Tolliver's request for records. Tolliver argues the agency never responded; and thus, violated APRA. Conversely, GPD argues that it never received Tolliver's request; and thus, the department could not have improperly denied the request.

Here, based on the evidence provided to this office, there is no way to determine conclusively whether Tolliver sent the request or whether GPD received it.

Under APRA, if a person requests by mail or by fax a copy or copies of a public record, a denial of disclosure does not occur until seven days have elapsed from the date the public agency receives the request. Ind. Code § 5-14-3-9(c).

APRA also expressly states that a public agency may deny a written request if:

- (1) the denial is in writing or by facsimile; and
- (2) the denial includes:

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<sup>3</sup> Ind. Code § 5-14-3-4(a) and (b).

(A) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and

(B) the name and the title or position of the person responsible for the denial.

Ind. Code § 5-14-3-9(d). Indeed, if Tolliver mailed the request and the Gary Police Department received it, then the request was deemed denied by operation of law after seven days went by without a response from the agency.

What is more, APRA expressly states that an agency may deny a written request if the denial is in writing and includes a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record and the person responsible for the denial.

Subsections (c) and (d) operate in harmony to avoid an agency simply ignoring a request for records. An agency's failure to respond for seven days triggers a denial and, the denial triggers the requirement for a written explanation by the agency.

On the other hand, it is important to observe that a public agency has no duty under APRA to respond to a request it never received. GPD argues just that.

Instead, GPD insinuates Tolliver's complaint is rooted in a previous request for production of the same documents he made during the summer with an invalid subpoena.

GPD correctly notes that a dispute over the validity of a subpoena seeking the production of documents is not governed by APRA or any other public access laws; and thus, is

not appropriate for the formal complaint process administered by this office.

Regardless, there is not enough here to conclude that the Gary Police Department received Tolliver's request and ignored it in violation of the Access to Public Records Act.

## **CONCLUSION**

Based on the foregoing, it is the opinion of this office that the Gary Police Department did not violate the Access to Public Records Act.

A handwritten signature in black ink, appearing to read 'LH Britt', with a stylized flourish at the end.

Luke H. Britt  
Public Access Counselor