



# STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR  
HEATHER NEAL

Indiana Government Center South  
402 West Washington Street, Room W460  
Indianapolis, Indiana 46204-2745  
Telephone: (317)233-9435  
Fax: (317)233-3091  
1-800-228-6013  
www.IN.gov/pac

February 22, 2009

Beverly Perkins  
1237 West Washington  
South Bend, Indiana 46601

*Re: Formal Complaint 09-FC-27; Alleged Violation of the Access to Public Records Act by the City of South Bend Police Department*

Dear Ms. Perkins:

This advisory opinion is in response to your formal complaint alleging the City of South Bend Police Department ("Department") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to records. The Department's response to the complaint is enclosed for your reference. It is my opinion the Department did not violate the APRA.

## BACKGROUND

You allege that on December 19, 2008 you appeared at the Department's office and requested a copy of an October 2004 probable cause affidavit in support of a search warrant. You allege the Department denied you access to the record. Your complaint was postmarked January 15, 2009 and my office received it on January 22.

The Department responded to the complaint by letter dated February 2. The Department contends you did not appear at the Department's office on December 19 but that instead you submitted requests for access to records on two different dates. First, the Department contends it received a requested dated December 26 in which you requested case information and not search warrants. The Department faxed the response the next business day. The Department denied access to the records on the basis of the investigatory records exception found at I.C. § 5-14-3-4(b)(1).

The Department contends that when you appeared at the office on December 29 to retrieve that response letter, you submitted another request at that time. The clerk who received the request telephoned the city attorney's office the next day to indicate the request had been accepted and the office did not maintain the requested record. The Department indicates that search warrants are not police department records. Instead, they are generated through the office of the county prosecuting attorney. The Department contends the clerk telephoned you on the morning of December 30 to inform you the

Department does not maintain the record and to indicate where you might be able to locate a copy of the record.

#### ANALYSIS

The public policy of the APRA states, "[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." I.C. § 5-14-3-1. The Department is clearly a public agency for the purposes of the APRA. I.C. § 5-14-3-2(m). Accordingly, any person has the right to inspect and copy the public records of the Department during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

A request for records may be oral or written. I.C. §§ 5-14-3-3(a), 5-14-3-9(c). 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. I.C. § 5-14-3-9(b). If the request is made in person and the agency does not respond within twenty-four hours, the request is deemed denied. I.C. § 5-14-3-9(a). This office has said twenty-four hours means twenty-four business hours, or the same time the next business day. *See Opinion of the Public Access Counselor 00-FC-28.*

A response could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. When an agency denies access to a record and the request has been submitted in writing, the agency may only deny access to the record by doing so in writing. I.C. § 5-14-3-9(c). Here, the Department does not maintain the record you seek. While a public agency has a duty to provide access to records it maintains, an agency cannot provide access to records which it does not maintain. An agency cannot be found to have denied access to a record it does not maintain. The Department did not deny you access to a record it maintains and as such did not violate I.C. § 5-14-3-9(c) when it failed to respond to you in writing. The response by telephone within twenty-four business hours of receiving the request was appropriate under the APRA.

#### CONCLUSION

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

Best regards,



Heather Willis Neal  
Public Access Counselor

Cc: Thomas Bodnar, Assistant City Attorney, City of South Bend