



STATE OF INDIANA

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April 2, 2009

Carrie Gutman
116 East Berry Street
Lincoln Tower, Suite 302
Fort Wayne, Indiana 46802

Rebecca Green
The Journal Gazette
600 West Main Street
Fort Wayne, Indiana 46801

*Re: Formal Complaints 09-FC-71 and 09-FC-82; Alleged Violation of the
Access to Public Records Act by the City of Fort Wayne*

Dear Ms. Gutman and Ms. Green:

This advisory opinion is in response to your formal complaints alleging the City of Fort Wayne and the Fort Wayne Police Department (hereinafter, collectively, the "City") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to video recordings from in-car video cameras. Because your complaints are against the same agency and concern the same records, I have consolidated the complaints and issue this one response. It is my opinion the City can likely bear the burden of proof to sustain the denial of access based on the investigatory records exception to disclosure and as such has not violated the APRA.

BACKGROUND

Ms. Gutman filed a complaint on March 3, 2009, alleging that on February 25 the City denied access to "copies of the squad car camera video during the Jose Lemus-Rodriguez incident." The City denied access to the records on the basis of I.C. § 5-14-3-4(b)(1), which excepts from disclosure at the discretion of the agency the "investigatory records of a law enforcement agency." You contend that the City's statement that the requested records are investigatory records is not sufficient and that the denial was not supported by appropriate evidence that nondisclosure is essential.

Ms. Green filed a complaint on March 23, 2009, alleging denial of the same records by the same agency. Ms. Green contends that the City's denial is arbitrary because there is no possibility of future arrests and because all internal and external

inquiries have been concluded. Ms. Green also cites the APRA's burden of proof, which is placed on the public agency who would deny access. Further, Ms. Green contends that the City's assertion of the investigatory records exception is contrary to the City's reason for denying access during the past year. Ms. Green alleges the City has claimed the tapes could not be released because of pending civil litigation and because of a threat to officers' safety.

In both complaints, you cite Judge Magistrate Cosbey's decision to deny the City's request for a protective order, rendered in *The Estate of Jose Baudilio Lemus Rodriguez v. City of Fort Wayne, Indiana, et.al.*, United States District Court, Northern District of Indiana, Fort Wayne Division, Case No. 1:08-CV-0267. In addition, you both requested priority status for the complaint, but neither of you alleged any of the circumstances provided in 62 IAC 1-1-3. As such, priority status was not granted.

The City responded to the complaint by letter dated March 11, 2009 from City Attorney Carol Taylor. The City contends the Fort Wayne Police Department is clearly a law enforcement agency for the purposes of the APRA. Further, the City asserts that the video recordings of a police pursuit that ended in an officer involved shooting death investigated by the Indiana State Police, the Fort Wayne Police Department, and the Allen County Prosecutor's Office falls within the investigatory records exception to disclosure provided in I.C. § 5-14-3-4(b)(1). The City's cites my *Opinion of the Public Access Counselor 07-FC-338* (available at www.in.gov/pac), wherein I opined that "a video recording could be an investigatory record of a law enforcement agency so long as the video involves a criminal investigation."

The City contends that Judge Magistrate Cosbey's decision has no bearing on an analysis under the APRA, as that opinion involved a motion for a protective order restricting the defendant in civil case from releasing a copy of discovery materials. The City contends the standards for granting a protective order and determining whether a record is disclosable pursuant to the APRA are different. Finally, the City addresses your contention that the events occurred on a public street and can be described by eyewitnesses and as such the tapes should be released. The City contends that this has no bearing on whether the tapes must be released as the legislature did not intend for the exception to apply only when the crime takes place behind closed doors with no witnesses.

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 City 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 City 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).

The APRA excepts from disclosure, at the discretion of the public agency, “investigatory records of law enforcement agencies.” *See* I.C. § 5-14-3-4(b)(1). The Fort Wayne Police Department is clearly a law enforcement agency for the purposes of the APRA. *See* I.C. § 5-14-3-2(m)(6). “Investigatory record’ means information compiled during the course of the investigation of a crime.” I.C. § 5-14-3-2(h).

The so-called “investigatory records exception,” found at I.C. § 5-14-3-4(b)(1), is one of the broadest exceptions to disclosure found in the APRA. Nothing in the APRA provides that the exception applies only to ongoing or open investigations. Nothing provides that records covered under the exception must be disclosed once an investigation is complete. Further, nothing in the exception provides that records covered under the exception must be disclosed if no charges are filed regarding the crime which was investigated.

The burden of proof for nondisclosure lies with the public agency that would deny access to the record and not to the person seeking to inspect and copy the record. I.C. § 5-14-3-1. The APRA places the burden of proof to sustain the denial on the public agency when a controversy regarding access to records is considered by the circuit or superior court (*See* I.C. § 5-14-3-9(e) through (g)). In initially denying access to a record, though, the agency is required only to include in the denial “a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; . . .” I.C. § 5-14-3-9(c)(2). In my opinion, the City has fulfilled that obligation by citing I.C. § 5-14-3-4(b)(1) when denying you access to the records.

If the issue is brought to court, the City meets its burden by “(A) providing that the record falls within one (1) of the categories of exempted records under section 4(b) of this chapter; and (B) establishing the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit; . . .” I.C. § 5-14-3-9(g). Further, a burden would be placed on you: “a person requesting access to a public record meets the person’s burden of proof under this subsection by proving that the denial of access is arbitrary and capricious.” I.C. § 5-14-3-9(g)(2).

The question here, then, is not whether the City has met its burden of proof when denying you access but whether the City can meet the burden of proof to sustain the denial if you file action in circuit or superior court to compel the agency to permit you to inspect and copy the records. Former Counselor Hurst considered a similar issue regarding records maintained by the Indiana State Police:

The ISP avers that the records created and included as part of the laboratory files at issue were prepared and maintained in support of a criminal investigation and thus fall within the investigatory records exemption. In my opinion, this averment meets the ISP’s burden of establishing the content of the documents with adequate specificity to demonstrate that it is a record that was compiled by a law enforcement agency in the investigation of a crime, and as such falls within the investigatory records exemption codified at Indiana Code 5-14-3-4(b)(1). Moreover, there is no evidence or even allegation that the ISP is exercising its discretion to withhold the requested

records in a manner that is arbitrary and capricious. Indeed, the ISP avers -- and a review of the prior opinions of this office demonstrates -- that the ISP routinely exercises its discretion to withhold its investigatory records. While you are, of course, free to pursue and use the information alleged to be contained in these records through judicial proceedings collaterally attacking your conviction, I conclude that the ISP did not violate the APRA when it denied access to the criminal investigation laboratory records at issue here.

Opinion of the Public Access Counselor 04-FC-39.

Similarly, here, the City contends the tape recordings at issue were created and included as part of the criminal investigation into the incident. In my opinion, the City has established the content of the documents with adequate specificity to demonstrate that the tapes were compiled by a law enforcement agency in the investigation of a crime, and as such fall within the investigatory records exception to disclosure. And a review of prior opinions of this office demonstrates that the Fort Wayne Police Department routinely exercises its discretion to withhold its investigatory records. As such, it is my opinion you have not proven the City's (Department's) exercise of its discretion was arbitrary and capricious.

Regarding your contention that the incident occurred on a public street and that there were eyewitnesses to the incident, neither of those circumstances would affect the investigatory nature of the records. Nothing in the APRA generally nor the investigatory records exception specifically would void the investigatory records exception on either basis.

Finally, you cite Judge Magistrate Cosby's denial of the City's protective order motion. I agree with the City that the standards for granting a protective order and determining whether a record is disclosable pursuant to the APRA are different. And while the issue of the public's right to access to records generally was considered, the order did not address the specific exception to disclosure upon which the City relies in denying access to a request made pursuant to the APRA.

CONCLUSION

For the foregoing reasons, it is my opinion the City can likely bear the burden of proof to sustain the denial of access based on the investigatory records exception to disclosure and as such has not violated the APRA.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Carol Taylor, City of Fort Wayne