



STATE OF INDIANA

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April 16, 2009

Marvin Morgan, Jr.
DOC #112768
3038 West 850 South L-130
Bunker Hill, Indiana 46914

Re: Formal Complaint 09-FC-80; Alleged Violation of the Access to Public Records Act by the Anderson Police Department

Dear Mr. Morgan:

This advisory opinion is in response to your formal complaint alleging the Anderson Police Department ("Department") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to records. A copy of the Department's response to the complaint is enclosed for your reference. It is my opinion the Department 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

You allege that on January 26, 2009 you submitted a request to the Department for a number of records. Your request grouped the items into twelve categories. You received a response dated February 2 from the Department; in the response the Department indicated it was assessing the scope and nature of the request. The Department denied you access to the records by letter dated March 4. The Department indicated the 911 tapes you requested were created on an old system and cannot be retrieved. Regarding your eleven other categories, the Department indicated those records are investigatory records of a law enforcement agency and as such you were denied access pursuant to I.C. § 5-14-3-4(b)(1). You do not provide any specific information regarding the nature of your complaint, but you checked the box on the complaint form indicating "Denial of Access." I assume, then, that you believe the Department violated the APRA in denying you access to the requested records.

The Department responded to the complaint by letter dated March 25, 2009 from Lieutenant Jerry Miller. The Department provided copies of correspondence related to the request, including an electronic mail message exchange wherein the keeper of the 911 records indicates the 911 tape you requested from 2001 cannot be retrieved.

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).

The Department contends the 911 tape you requested from a call made in 2001 cannot be retrieved because it was maintained on an outdated recording system which is no longer in use. A public agency shall protect public records from loss, alteration, mutilation, or destruction. I.C. § 5-14-3-7(a). Notwithstanding I.C. § 5-14-3-7, public records subject to Ind. Code 5-15 may be destroyed only in accordance with record retention schedules under I.C. 5-15. I.C. § 5-14-3-4(e). Public records not subject to I.C. 5-15 may be destroyed in the ordinary course of business. I.C. § 5-14-3-4(e). The recordings of 911 calls are records subject to I.C. 5-15 and as such may only be destroyed in accordance with the Department's record retention schedule. So long as recordings of 911 calls are not required to be maintained longer than the seven years that have passed since the record in question was created, the Department has not violated the APRA. If the calls are required to be retained longer than seven years, the Department should take measures to retrieve those records and maintain the records for the time required by the agency's retention schedule.

Regarding the remainder of the records you have requested, the Department has claimed they are investigatory records. 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 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 Department 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 Department 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 Department has met its burden of proof when denying you access but whether the Department 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. After reviewing your requests, it is my opinion the records you have requested in items two through twelve are all investigatory records of the Department, as they were compiled during the course of the investigation of a crime. It is my opinion the Department can bear the burden of proof to sustain the denial of access.

CONCLUSION

For the foregoing reasons, it is my opinion the Department 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: Lt. Jerry Miller, Anderson Police Department