



STATE OF INDIANA

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November 23, 2011

Mr. Daryl L. Anderson
DOC 171085
5124 W. Reformatory Road
Pendleton, Indiana 46064

Re: Formal Complaint 11-FC-270; Alleged Violation of the Access to Public Records Act by the Lawrence Police Department

Dear Mr. Anderson:

This advisory opinion is in response to your formal complaint alleging the Lawrence Police Department ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Maura J. Hoff, City Attorney, responded on behalf of the Department. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that on September 28, 2011, you submitted two written records requests to the Department for all vehicle maintenance records for two Department vehicles, information regarding who was driving certain Department vehicles on May 12, 2009, and all video and audio footage from said vehicles from May 12, 2009. You requested that the information be released to your Attorney Charles White. On September 29, 2011, City Attorney Maura Hoff responded to your request and acknowledged its receipt. Ms. Hoff advised that the Department would review its records and provide all records responsive to your request in a timely manner. As of October 25, 2011, the date you filed your formal complaint with the Public Access Counselor's Office, you have yet to receive any records or further correspondence from the Department.

In response to your formal complaint, Ms. Hoff advised that you have a pending criminal case with the Marion County Prosecutor's Office. The Department contacted the prosecutor's office who indicated that the records should not be released in this manner and that the deputy prosecutor would contact your attorney to provide the materials via the discovery process. The deputy prosecutor further noted that all records of the Department related to your criminal matter have been provided to your attorney.

Regardless, the Department has provided that there are no records responsive to 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* I.C. § 5-14-3-1. The Department is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Department’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, the Department responded to your request within the timelines proscribed by section 9 of the APRA.

Generally, if a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. “[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA.” *Opinion of the Public Access Counselor 01-FC-61*; *see also Opinion of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly the [agency] could not be required to produce a copy....”). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. *See Opinion of the Public Access Counselor 10-FC-56*. The Department has provided that it did not have any records responsive to your request. As such, it is my opinion that it did not violate the APRA in responding to your request.

The APRA exists to allow persons access to inspect and copy records of a public agency. The APRA operates independently of the discovery process. *See Opinion of the Public Access Counselor 02-FC-38*; *08-FC-24*; *and 09-FC-94*. I am not aware of any language in the Trial Rules that would prohibit a party in litigation from making a public record request under the APRA. The APRA requires a public agency to provide one copy of a disclosable public record. *See* I.C. § 5-14-3-8(e). Here, it is not entirely clear whether you were attempting to make a request for records via the APRA or attempting

to submit a discovery request as you have provided that all records responsive to your request should be provided to your legal counsel.¹

The public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80*. Thus, if you were attempting to assist your legal counsel by making a discovery request of the Department, such matters are not in the purview of this office. *See Opinion of the Public Access Counselor 09-FC-162*. However, if you were making a request for records via the APRA, the Department was required to provide all records responsive to your request or cite to a specific citation in the APRA, state, or federal law that would allow it to deny your request. *See I.C. § 5-14-3-4(9)(c)*. Here the Department has provided that it does not have any records responsive to your request; as such it did not act contrary to the APRA.

The APRA does not prescribe timeframes for the actual production of records. The public access counselor has stated repeatedly that records must be produced within a reasonable period of time, based on the facts and circumstances of the request. Considering factors such as the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. The APRA *requires* the Department to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. *See I.C. § 5-14-3-6(a)*. Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. *See I.C. § 5-14-3-7(a)*. However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. *See I.C. § 5-14-3-7(c)*. The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *See Opinion of the Public Access Counselor 02-FC-45*.

Here, the Department received your written request for records on September 29, 2011. The Department responded in writing to your request on the same day, acknowledging the receipt of both requests, and provided that all records would be provided in a timely manner. You submitted your formal complaint to the Public Access Counselor's Office on October 25, 2011. After receiving your request, the Department corresponded with the Marion County Prosecutor's Office in an attempt to determine whether you were attempting to supplement a previously submitted discovery requests by your attorney or making a request via the APRA. Thereafter, the Department conducted a search of its own records and ultimately found that it had no records responsive to your request. During this time, the Department was required and maintained the regular duties of its office. As the Department has now provided that it did not have any records

¹ In the future, I would note to the Department that all records responsive to a properly submitted APRA request must be provided, minus the applicable statutory exceptions, *regardless* of whether civil or criminal litigation exists involving any party to the request (emphasis added).

responsive to your request, it is my opinion that it has not acted contrary to the APRA and responded to your request within a reasonable period of time.

CONCLUSION

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

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is stylized with a large initial "J" and a cursive "Hoage".

Joseph B. Hoage
Public Access Counselor

cc: Maura J. Hoff