



STATE OF INDIANA

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November 4, 2009

Mr. Clifton Davidson, DOC # 85042-008
Cardinal Unit, FMC P.O. Box 14500
Lexington, KY 40512-4500

*Re: Formal Complaint 09-FC-228; Alleged Violation of the Access to
Public Records Act by the Elkhart Police Department*

Dear Mr. Davidson:

This advisory opinion is in response to your formal complaint alleging that the Elkhart Police Department (the "Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*, by denying you access to public records.

BACKGROUND

In your complaint, you allege that on March 17, 2009, you submitted a written records request to the Department in which you sought documents pertaining to four events: "(1) the May 20, 1994, suicide of patrolman Ernie Hill; (2) the May 18, 1995, police shooting of Derrick Connor; (3) the May 18, 1995, murder of Mark Elwins; and (4) the January or February of 1983 robbery of Wilt's #2 grocery store." You state that you received no response from the Department until April 16, 2009. You allege that in that letter, you were "led to believe that there would be a substantial response to my request." Soon thereafter, you advised the Department in writing that you would pay any reasonable fee and gave the Department permission to "go ahead and process my request and advise [of] the fee."

You did not hear from the Department until July 23rd, when you received "an apology for delays and w[ere] advised 'there is a large quantity of investigative material that must be sorted and copied, which is almost complete.'" You assert that the Department did not communicate with you further until September 10, 2009, when you received several documents that, according to you, did not satisfy your request. You state that the Department's production failed to comply with the APRA in several respects:

1. 5-14-3-7(a): Loss of records relating to Wilts robbery;
2. 5-14-3-1 (generally): Respondents are to acknowledge written requests within seven (7) calendar days and inform petitioners of their intended response: [sic]
3. 5-14-3-5: Permiss[i]ble Arrest records not produced;

4. 5-14-3-5: Permiss[i]ble “daily log or record” information on the Connor, Hill and Elkins incidents not provided;
5. 5-14-3-5: No records at all on the Wilts incident;
6. 5-14-3-4(b)(1): An abuse of discretion regarding further release of information.

My office forwarded a copy of your complaint to the Department. Enclosed is the Department’s response, which was submitted by the City of Elkhart’s attorney, Amber J. Bressler. Ms. Bressler initially notes that you did not request arrest records for any particular individual. She concedes that the Department “outside the required response time,” but attributes some of the delay in the production of records to the fact that the Department’s records manager had to use Elkhart County’s microfilm reader because the Department no longer has a working reader and does not have funding available to replace it. Ms. Bressler states that the non-produced records constituted investigatory records of the Department under Indiana Code 5-14-3-4(b)(1). Ms. Bressler states that the Department has forwarded you all non-investigatory materials contained in those files. The arrest record information is contained in separate files, but the Department did not produce that information because, according to Ms. Bressler, you did not request it. Ms. Bressler responds to your allegation that the *Elkhart Truth* newspaper received records that were not disclosed to you by saying that the newspaper requested personnel file information that was not constitute investigatory records. In closing, Ms. Bressler again asserts that the Department has “disclosed all non-investigatory records contained in the files at issue.”

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.” I.C. § 5-14-3-1. The Department does not contest that it is a public agency for the purposes of the APRA. I.C. § 5-14-3-2. 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 exempt from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a). The burden of proof for nondisclosure of a public record is on the public agency that would deny access to the record. I.C. § 5-14-3-1.

In its response, the Department relies on I.C. § 5-14-3-4(b)(1), the investigatory records exception, as it relates to the requested records. That exception provides that a law enforcement agency has the discretion to disclose or not disclose its investigatory records. An investigatory record is “information compiled in the course of the investigation of a crime.” I.C. § 5-14-3-2(h). The investigatory records exception does not apply only to records of ongoing or current investigations. It does not apply only to an investigation where a crime was charged or an investigation where it was adjudicated that a crime was indeed committed. Instead, the exception applies to all records compiled during the course of the investigation of a crime, even where a crime was not ultimately charged, and even after an investigation has been completed. The investigatory records exception affords law enforcement agencies broad discretion in withholding such records.

See Opinion of the Public Access Counselor 09-FC-157. “Generally, a police report or incident report is an investigatory record and as such may be excepted from disclosure pursuant to I.C. § 5-14-3-4(b)(1).” *Id.* Based on these standards, the Department acted within the discretion when it denied your request for investigatory records.

Regarding a daily log and the information contained therein, the APRA requires the following:

An agency shall maintain a daily log or record that lists suspected crimes, accidents, or complaints, and the following information shall be made available for inspection and copying:

- (1) The time, substance, and location of all complaints or requests for assistance received by the agency.
- (2) The time and nature of the agency's response to all complaints or requests for assistance.
- (3) If the incident involves an alleged crime or infraction:
 - (A) the time, date, and location of occurrence;
 - (B) the name and age of any victim, unless the victim is a victim of a crime under IC 35-42-4;
 - (C) the factual circumstances surrounding the incident; and
 - (D) a general description of any injuries, property, or weapons involved.

The information required in this subsection shall be made available for inspection and copying in compliance with this chapter. The record containing the information must be created not later than twenty-four (24) hours after the suspected crime, accident, or complaint has been reported to the agency.

I.C. § 5-14-3-5(c).

If an agency does not maintain a separate daily log, the agency must produce some record that contains the information required by I.C. § 5-14-3-5(c) to be disclosed. In some jurisdictions, the law enforcement agency will provide a copy of a police report or incident report if the agency does not maintain a daily log. Regardless, the agency is only required to provide the information listed in I.C. § 5-14-3-5(c) and may redact the remainder of the information contained on the report if it was indeed compiled during the course of the investigation of a crime or is nondisclosable pursuant to another exception.

The APRA requires that a records request “identify with reasonable particularity the record being requested.” I.C. § 5-14-3-3(a)(1). Based on the information before me, it appears that you did not specifically request arrest records regarding the specific incidents. Consequently, the Department was under no obligation to produce such records. I trust that if you submit a reasonably particular request for arrest records, the Department will promptly produce all disclosable information to you because Ms. Bressler stated the following in her response: “Mr. Davidson did not request any arrest records pursuant to I.C. § 5-14-3-5, had he done so the Elkhart Police Department would have disclosed the information responsive to such a request.”

After the Department failed to produce any responsive documents in response to the “Wilks request,” you apparently concluded that the Department lost those records in violation of APRA section 7. Section 7 provides, “A public agency shall protect public records from loss, alteration, mutilation, or destruction, and regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees.” If the Department did lose or prematurely destroy such records (or otherwise failed to dispose of them in accordance with applicable record retention standards), the Department may have indeed violated the APRA. However, because it is unclear whether the Department has no responsive records or whether the Department has not produced them to you because all such records are nondisclosable investigatory records, I do not have enough information before me to make such a determination.

Although I find no violation with regard to the foregoing, it is my opinion that the Department violated the APRA insofar as it failed to respond to your written request within seven (7) days. The APRA provides that an agency’s failure to respond to a written request within seven (7) days constitutes a denial of access. I.C. § 5-14-3-9(b). Under the APRA, a public agency may deny a request if: (1) the denial is in writing or by facsimile; and (2) the denial includes: (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. I.C. § 5-14-3-9(c). In my opinion, the Department’s failure to provide you with any response violated section 9 of the APRA.

Moreover, it is my opinion that the Department has not shown that the amount of time the Department took to produce responsive records was reasonable. Although you submitted your request on March 17, 2009, the Department did not send you responsive documents until September 10, 2009. There are no prescribed timeframes when the records must be produced by a public agency, but the burden lies with the public agency to show the time period for producing documents is reasonable. *Opinion of the Public Access Counselor 02-FC-45*. In my opinion, the Department has not met that burden.

CONCLUSION

For the foregoing reasons, it is my opinion that (1) the Department violated the APRA insofar as it failed to properly respond to your request within seven (7) days; (2) the Department has not shown that it produced your records within a reasonable amount of time; and (3) the Department did not otherwise violate the APRA.

Best regards,



Andrew J. Kossack
Public Access Counselor

Cc: Amber Bressler, City of Fort Wayne