



STATE OF INDIANA

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December 17, 2009

Mr. Ronnie L. Patton
1112 Teepee Dr.
Kokomo, IN 46902

Re: Formal Complaint 09-FC-273; Alleged Violation of the Access to Public Records Act by the Kokomo Police Department

Dear Mr. Patton:

This advisory opinion is in response to your formal complaint alleging the Kokomo Police Department ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* For the following reasons, my opinion is that the Department did not violate the APRA.

BACKGROUND

In your complaint, you allege that the Department denied your request for access to records regarding the investigation of your son's death. The Department's response to your complaint is enclosed for your review. In it, the Department's Record Unit Supervisor Debora K. Piercy states that the Department considers case reports to be investigatory records that are exempt from disclosure under the APRA. Ms. Piercy further states that a copy of the case report may be obtained upon receipt of a court ordered subpoena.

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 does not dispute 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 Department's public records 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 investigatory records exception to the APRA provides law enforcement agencies with the discretion to disclose or not disclose investigatory records. *See* I.C. § 5-14-3-4(a)(1). 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. Moreover, 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.*

At the same time, previous public access counselors have advised public agencies to be consistent in their exercise of discretion to ensure that they are carrying out the APRA in a uniform manner. *See Opinion of the Public Access Counselor 00-FC-18*. The legal standard under the APRA for reviewing public agencies’ determinations that a public record falls within one of the exceptions to disclosure under Ind. Code § 5-14-3-4(b) is whether the denial of access was arbitrary or capricious.¹ Ind. Code § 5-14-3-9(f)(2). The burden for proof that the denial was arbitrary or capricious lies with the person requesting access. *Id.* The public agency, however, must still meet an initial burden of proof by proving that the public record falls within any one of the categories listed under Indiana Code section 5-14-3-4(b) and establishing the contents with adequate specificity. Ind. Code § 5-14-3-9(f).

Because the Department has proffered an exception to the APRA that permits it to withhold the records you seek (i.e., the investigatory records exception under Ind. Code § 5-14-3-4(b)(1)), it is my opinion that the Department did not violate the APRA. If you believe the Department’s decision was an abuse of its discretion and was either arbitrary or capricious, I leave you to your remedies before a court under Ind. Code § 5-14-3-9(e).

CONCLUSION

For the foregoing reasons, it is my opinion that the Department violated section 9(c) of the APRA by failing to respond to your request but did not otherwise violate the APRA.

¹ Arbitrary or capricious action on the part of an administrative board means willful and unreasonable action, without consideration and in disregard of the facts or circumstances of the case; action taken without some basis which would lead a reasonable and honest man to such action. *State Board of Tax Commissioners v. Chicago, M. St. P. & PAC R. Co.*, 96 N.E.2d 279, 282 (Ind. App. 1951); *See also Department of Natural Resources v. Indiana Coal Council, Inc.*, 542 N.E.2d 1000, 1007 (Ind.1989), *Indiana High School Athletic Association, Inc. v. Carlberg*, 694 N.E.2d 222, 233 (Ind. 1998).

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive style with a large, prominent "A" and "K".

Andrew J. Kossack
Public Access Counselor

cc: Debora K. Piercy, Kokomo Police Department Records Unit