



STATE OF INDIANA

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July 30, 2010

Mr. Eriks Z. Berzups
11703 Maple St.
Fishers, IN 46038

Re: Formal Complaint 10-FC-154; Alleged Violation of the Access to Public Records Act by the Monroe County Sheriff's Department

Dear Mr. Berzups:

This advisory opinion is in response to your formal complaint alleging the Monroe County Sheriff's Department (the "Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* The Department's response to your complaint is enclosed for your review.

BACKGROUND

In your complaint, you allege that you requested records from the Monroe County Sheriff's Department on May 13, 2010. In response to your request, attorney A. Howard Williams, the legal deputy for the Department, sent you an acknowledgment of your request on May 21, 2010. Mr. Williams noted that the Department intended to comply with the APRA and informed you that a more detailed response would follow that letter. As of June 25, 2010, you had not received any additional response.

In response to your complaint on behalf of the Department, Mr. Williams states that your request sought information related to an employee of the Department named Jeffrey Brahaum. He assures me that the Department will release all information regarding Mr. Brahaum that is required to be released by the APRA. He further states that there are no records available regarding the following items in your request: (1) Department employees' use of NCIC and IDAC for the past two years; (2) time cards or records that show the dates an employee worked (Mr. Williams claims those records are submitted to the Monroe County Auditor); (3) a code of conduct; (4) personnel policies for the city and police department. Mr. Williams also argues that your request for "Police Department Policies & Procedures" is not reasonably particular. Finally, Mr. Williams responds that your questions regarding Mr. Brahaum's use of a police vehicle are interrogatories rather than requests for specific records.

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 a “public agency” under 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 excepted from disclosure as nondisclosable under the APRA. I.C. § 5-14-3-3(a).

A request for records may be oral or written. I.C. §5-14-3-3(a); §5-14-3-9(c). 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. I.C. §5-14-3-9(b). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. I.C. §5-14-3-9(a). 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, it appears that the Department sent you a response within seven (7) days in compliance with the APRA.

There are no prescribed timeframes when the records must be actually *produced* by a public agency. The public access counselor has stated repeatedly that records must be produced within a reasonable period of time, based on the facts and circumstances. 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. 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. 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. 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. *Opinion of the Public Access Counselor 02-FC-45*. Here, it is unclear why the Department did not respond to you with a more detailed response between May 21st and June 25th. As a result, it is my opinion that the Department has not met its burden to show that the time it took to make your requested records available to you was reasonable.

With regard to your request for all Department policies and procedures, I agree with Mr. Williams that such a request is not made with reasonable particularity. Under the ARRA, a request for inspection or copying must identify with reasonable particularity the record being requested. I.C. § 5-14-3-3(a). While the term “reasonable particularity” is not defined in the APRA, it has been addressed a number of times by the public access counselor. See *Opinions of the Public Access Counselor 99-FC-21* and *00-FC-15* for two examples. That said, if the Department was unsure about what records you were

requesting, it is the Department's responsibility to respond to you and ask you to clarify your request.

With regard to your questions about Mr. Brahaum's use of a police vehicle, it does appear that the questions were in the form of interrogatories rather than requests for actual records. Counselor Hurst addressed this issue in *Opinion of the Public Access Counselor 04-FC-38*:

A request for public records must "identify with reasonable particularity the record being requested." IC 5-14-3-3(a)(1). While a request for *information* may in many circumstances meet this requirement, when the public agency does not organize or maintain its records in a manner that permits it to readily identify records that are responsive to the request, it is under no obligation to search all of its records for any reference to the information being requested. Moreover, unless otherwise required by law, a public agency is under no obligation to maintain its records in any particular manner, and it is under no obligation to *create* a record that complies with the requesting party's request.

Opinion of the Public Access Counselor 04-FC-38 (2004), available at <http://www.in.gov/pac/advisory/files/04-FC-38.pdf>.

As to your request for records that the Department does not maintain, the Department has not violated the APRA by failing to provide you with such records. As the public access counselor has repeatedly stated, if a public agency has no records responsive to a public records request, an 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....").

Regarding your request for personnel file information on Mr. Brahaum, the APRA provides that personnel files of public employees and files of applicants for public employment may be excepted from the APRA's disclosure requirements, except for:

- (A) The name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency;
- (B) Information relating to the status of any formal charges against the employee; and
- (C) The factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged.

IC 5-14-3-4(b)(8). In other words, the information referred to in (A) - (C) above should be released to you upon request. I trust the Department will release that information to you as soon as is practicable.

CONCLUSION

For the foregoing reasons, it is my opinion that the Department has not sustained its burden to show that it produced your requested records within a reasonable amount of time. I trust the Department will release all responsive records to you as soon as possible. To the extent an agency persists in its denial of access following the issuance of an advisory opinion from this office, I leave you to your remedies before a court pursuant to Ind. Code § 5-14-3-9(e).

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive, slightly slanted style.

Andrew J. Kossack
Public Access Counselor

Cc: A. Howard Williams