



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

August 29, 2011

Mr. Greg D. Sobin
P.O. Box 1111
Carlisle, Indiana 47838

Re: Formal Complaint 11-FC-213; Alleged Violation of the Access to Public Records Act by the Fishers Police Department

Dear Mr. Sobin:

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

BACKGROUND

In your complaint, you allege that you have made four separate requests of the Department for the following records:

- (a) Any incident and arrest reports for Rachael Renee Benningfield.
- (b) Records on all calls/runs to 10904 Nature Trail Drive, Fishers, Indiana 46038.
- (c) Booking photo of Rachael Renee Benningfield from her October 10, 2009 arrest.

As of August 23, 2011, the date you filed your formal complaint with the Public Access Counselor's Office, you further allege that you have not received any records in response to your requests.

In response to your formal complaint, the Department provided that it received your initial request, dated July 8, 2010, for any police reports regarding Rachael Renee Benningfield. The Department responded to your request in writing along with records responsive to that request.

The Department received your second request, dated July 14, 2010, which confirmed your receipt of the first records request sent and again requested any incident reports/case reports generated by Ms. Benningfield or lodged against her and for any

records on all calls/runs to 10904 Nature Trail Drive, Apt. 205, Fishers, Indiana 46038. The Department was not able to find any further records responsive to your initial request and found no reports involving the address provided. The Department responded in writing to your second request and provided that there were no records responsive to your request.

The Department thereafter received your third request, similar to the first two requests, at which point it made contact with the Pendleton Reformatory, to inquire about your status and confirm the receipt of the records that had previously been sent. The Department provided it had no record of receiving your fourth request for a booking photo of Ms. Benningfield, but even if it had, the record is not maintained by the Department.

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, there is some factual dispute as to whether the Department responded to your requests.

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*. If the Department failed to respond to your requests, it acted contrary to section 9 of the APRA. On the other hand, if the Department received your first three requests and provided records in response, then the Department fulfilled its obligations under the APRA.

The Department maintains that it did not receive your fourth request for a booking photo for Ms. Benningfield. If the Department did not receive your request, it was not obligated to respond to it. As provided above, the Public Access Counselor is not a finder of fact. Consequently, I express no opinion as to whether or not the Department received your request. Under the APRA, if a request is delivered by mail or facsimile and the agency does not respond to the request within seven days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). 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. *See* I.C. §5-14-3-9(c). If the Department received your request and did not respond to it, the Department violated the requirements of section 9(c) of the APRA.

I trust that the Department will respond to your request in accordance with the APRA. If you want to ensure that your request reaches the Department in the future, I would advise you to send it via certified-mail or make arrangements to have your request hand-delivered. I would also note for all the parties, for any future records requests that you plan to make of the Department, the APRA does not require a public agency to provide multiple copies of the same record to a requester. *See Opinion of the Public Access Counselor 11-FC-58.*

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.* Thus, even if the Department received your fourth request for a booking photo of Ms. Benningfield, it provided it did not maintain a record responsive to that request. As such, it is my opinion that it did not violate the APRA.

CONCLUSION

For the foregoing reasons, it is my opinion that if the Department failed to respond to your records requests, the Department acted contrary to the APRA. If, however, the Department received and responded to your requests, the Department did not violate the APRA. As the Department did not maintain records responsive to your request for a booking photo of Ms. Benningfield, it is my opinion that it 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: Sergeant Gerry Hepp