



# STATE OF INDIANA

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September 23, 2011

Mr. Justin D. Leighty  
421 S. Second Street  
Elkhart, Indiana 46516

*Re: Formal Complaint 11-FC-219; Alleged Violation of the Access to Public Records Act by the Goshen Police Department*

Dear Mr. Leighty:

This advisory opinion is in response to your formal complaint alleging the Goshen Police Department ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Shannon Marks, Legal Compliance Administrator, responded to your complaint. Her response is enclosed for your reference.

## BACKGROUND

In your complaint, you allege on August 25, 2011, you submitted a written request to the Department for the public portion of the following case reports: 11G0S03728, 11G0S03770, 11G0S03772, and 11G0S03775. The Department responded to your request on August 25, 2011, acknowledged its receipt, and provided that it would follow up with you the following day. On August 26, 2011, the Department provided that as to the specific reports that had been requested, it did not believe that the reports involved an arrest, crime, accident, or complaint, thus I.C. § 5-14-3-5 was not applicable. Further, the records were exempt pursuant to I.C. 5-14-3-4(b)(6).

In response to your formal complaint, the Department provided that your request was denied pursuant to the investigatory records exception provided under I.C. § 5-14-3-4(b)(1) and the deliberative materials exception provided under I.C. § 5-14-3-4(b)(6). Information or records that were available to you pursuant to I.C. § 5-14-3-5 have been provided. In regards to each specific report, the Department provided:

1. 11G0S03770 – No person was arrested, no summons for an offense was issued, nor was any person received in jail or lock-up. The person who contacted the Department did not allege a suspected crime or accident, as the inquiry dealt with a concern about the manner in which a tenant may respond to an eviction proceeding. The Department provided the location of the

inquiry and the time and location of the response. All other records responsive to your request were denied pursuant to the deliberative materials exception found under I.C. § 5-14-3-4(b)(6).

2. 11G0S03772 and 11G0S03775 – Both cases involved a child in need of services. No person was arrested, no summons for an offense was issued, nor was any person received in jail or lockup. No crime, infraction, accident or formal complaint was alleged to have been committed or filed in regards to either case. The Department provided supplementary information to the media report on August 25, 2011.<sup>1</sup>
3. 11G0S03728 – The media report provided in response to your request included the time, date, and location of the occurrence and limited factual circumstances. In regards to the actual incident, the Department was responding to an attempt to locate (“ATL”) for a vehicle issued by the Elkhart Police Department. Members of the Department spotted a vehicle matching the description and pursued the vehicle. The individual driving the vehicle was aware that the Department was in pursuit of him. The individual was pursued outside of the Goshen city limits, at which time the Elkhart Police Department took over as the lead pursuit vehicle. The individual driving the vehicle was not cited for fleeing; the Department has further indicated that it never alleged or had any intent of filing a violation against the individual. Since no arrest was made, the Department maintains that it is not required to provide the name of the individual. Further, the Department never had the opportunity to identify the driver of the vehicle.

#### 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 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).

The APRA requires that certain law enforcement records be made available for inspection and copying. *See* I.C. § 5-14-3-5. Specifically, the APRA obligates law enforcement agencies to maintain a daily log that lists suspected crimes, accidents, or complaints. *See* I.C. § 5-14-3-5(c). The record containing the information must be created not later than twenty-four hours after the incident has been reported to the

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<sup>1</sup> On September 7, 2011, the Department issued a media report which included case numbers 11G0S03770, 3772, and 2775, which I have enclosed for your review.

agency, and the information must be made available for inspection and copying. The following information must be maintained in the daily log:

- (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.
- I.C. § 5-14-3-5(c).

Beyond the requirements of I.C. 5-14-3-5(c), the investigatory records exception to the APRA 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.” *See* I.C. § 5-14-3-2(h). The investigatory records exception does not only apply 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.*

Further, The APRA excepts from disclosure, among others, the following:

- Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.
- I.C. § 5-14-3-4(b)(6).

When a record contains both disclosable and nondisclosable information and an agency receives a request for access to the record, the agency shall “separate the material

that may be disclosed and make it available for inspection and copying.” See I.C. § 5-14-3-6(a). The burden of proof for nondisclosure is placed on the agency and not the person making the request. See I.C. § 5-14-3-1.

The Indiana Court of Appeals addressed a similar issue in *Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ.*, 787 N.E.2d 893 (Ind. Ct. App. 2005):

However, *section 6 of APRA* requires a public agency to separate disclosable from non-disclosable *information* contained in public records. *I.C. § 5-14-3-6(a)*. By stating that agencies are required to separate "information" contained in public records, the legislature has signaled an intention to allow public access to whatever portions of a public record are not protected from disclosure by an applicable exception. To permit an agency to establish that a given document, or even a portion thereof, is non-disclosable simply by proving that some of the documents in a group of similarly requested items are non-discloseable would frustrate this purpose and be contrary to section 6. To the extent that the *Journal Gazette* case suggests otherwise, we respectfully decline to follow it.

Instead, we agree with the reasoning of the United States Supreme Court in *Mink, supra*, i.e., that those factual matters which are not inextricably linked with other non-discloseable materials, should not be protected from public disclosure. See *410 U.S. at 92*. Consistent with the mandate of *APRA section 6*, any factual information which can be thus separated from the non-discloseable matters must be made available for public access. *Id. at 913-14*.

To the extent that records contain information that is not an expression of opinion or speculative in nature, and is not inextricably linked to non-disclosable information, APRA provides that the information shall be disclosed.

Providing that as a background, I will address each case report individually.

11G0S03770

In regards to I.C. § 5-14-3-5, subsection (a) and (b) would not be applicable as the Department has provided that no person was arrested or summoned for an offense or received in a jail or lockup. As the incident did not involve an alleged crime or infraction, I.C. § 5-14-3-5(c)(3) would not be applicable; thus the Department was required to respond pursuant to the requirements of subsections (c)(1)-(2), as it appears the Department treated the incident as a request for assistance. Therefore, the

Department was required to provide the time, substance, and location of the incident and the time and nature of the Department's response. *See* I.C. § 5-14-3-5(c)(1)-(2).

In the report provided by the Department, which was identical to the report you provided, minus the report was labeled "Departmental Memo" as opposed to "Officer's Report", it indicated the time and location of the request for assistance (e.g. July 20, 2011 at 18:00, Brookside Mobile Home Park, Goshen, Indiana).<sup>2</sup> The report further provided the time of the Department's response (e.g. August 24, 2011, 10:30). I am unable to discern from the report the substance of the request for assistance or the nature of the agency's response. As such, if the report was the culmination of what the Department provided in response to your request, it acted contrary to requirements of section 5(c)(1)-(2) of the APRA.

11G0S03772 and 11G0S03775

In regards to I.C. § 5-14-3-5, subsection (a) and (b) would not be applicable as the Department has provided that no person was arrested or summoned for an offense or received in a jail or lockup. As the incident did not involve an alleged crime or infraction, I.C. § 5-14-3-5(c)(3) would not be applicable, thus the Department was required to respond pursuant to the requirements of subsections (c)(1)-(2), as it appears the Department treated the incident as a request for assistance. Therefore, the Department was required to provide the time, substance, and location of the incident and the time and nature of the Department's response. *See* I.C. 5-14-3-5(c)(1)-(2).

In the report provided by the Department in response to your formal complaint, it indicated the time, substance, and location of the incident (e.g. August 1, 2011 at 8:00, Child in Need of Service, 307 S. 7<sup>th</sup> St, Goshen, Indiana; August 24, 2011 at 17:15, Child in Need of Service, 320 Stone Drive, Goshen Indiana). The report further provided the time and nature of the Department's response (Officer responded to a request for welfare check. The residents appeared healthy. Per policy information is referred to DCS for follow up, August 23, 2011 at 12:45; Officer responded to a request for a welfare check. Information forwarded to DCS for follow up, August 24, 2011 at 18:22).

I would note that the reports that you submitted with your formal complaint does not contain all of the information provided by the reports submitted by the Department. The Department provided that the information in its report was supplemented after the forty-eight (48) hour span had passed, thus it was not part of the original record. As such, if the Department timely updated the incident reports pursuant to the requirements of I.C. § 5-14-3-5 with the supplemental information as it was received, it did not violate the APRA.

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<sup>2</sup> I would also note that the report appears to contain a scrivener's error, as the Date Reported is August 24, 2011, while the start time of the incident is listed as July 20, 2011. The incident could have been part of a continuing response or investigation by the Department, however from the documents that have been provided I am unable to make this determination.

11G0S03728

In your formal complaint, the report provided by the Department detailed the time, date, substance, and location of the incident (e.g. 4:46, August 22, 2011, Elkhart PD Pursuit, and CR 17/CR 28 Goshen, IN). The Department has advised the incident was initiated after receiving an ATL (i.e. request for assistance) from the Elkhart Police Department.

The Department responded to the request for assistance when it spotted a vehicle matching the description of the ATL and pursued the vehicle. You have alleged that upon initiating the pursuit, the individual was fleeing from the police which is a crime pursuant to I.C. 35-44-3-3. The Department has maintained that you have equated pursuit to fleeing, which is not necessarily the case in every circumstance. The Department noted that the individual was never arrested, nor did it ever have any intention of making an arrest, as it was assisting and responding to a request for assistance by the Elkhart Police Department.

I.C. § 5-14-3-5(c)(3) is applicable if the incident involves an alleged crime or infraction. I do not have any information before me in regards to why the Elkhart Police Department initiated the ATL for the vehicle. More particularity if the ATL was initiated after the person who owned the vehicle and/or in possession of the vehicle was alleged to have committed a crime or infraction. The Department has indicated that it never arrested or even intended to make an arrest for fleeing due to Elkhart's current investigation of the individual, it was responding to a request for assistance from the Elkhart Police Department, and the individual's ultimate demise as a result of the pursuit. Minus said information, it is my opinion that the requirements of I.C. § 5-14-3-5(c)(3) were not applicable<sup>3</sup>. However the response provided by the Department must still be evaluated pursuant to the requirements of subsection 5(c)(1)-(2) as a request for assistance.

In the report you provided with your formal complaint, the Department identified the time, substance, and location of the request for assistance (e.g. 4:46, Elkhart PD Pursuit, CR 17/CR 28 Goshen, IN) pursuant to I.C. § 5-14-3-5(c)(1). In regards to subsection (c)(2), the Department provided the time of its response (e.g. 4:46), but failed to provide the nature of its response. As such it is my opinion that it acted contrary to the requirements of the APRA.

As to all other records generated or requested of the Department in connection with any of the incidents cited, beyond the requirements imposed by I.C. § 5-14-3-5, the Department has cited the deliberative materials exception provided under I.C. § 5-14-3-4(b)(6) and the investigatory records of a law enforcement agency provided under I.C. §

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<sup>3</sup> I would note that even if I.C. § 5-14-3-5(c)(3) was applicable, there is no requirement that the law enforcement agency release the name of the individual involved in the alleged crime or infraction. The only requirement in regards to identification would be that of the name of the victim, unless the victim was a victim of a crime under I.C. 35-4204. See I.C. 5-14-3-5(c)(3). However, if an arrest was made in connection with the alleged crime, the requirements of subsection (a) would apply, which would require the person be identified by name, age, and address. See I.C. § 5-14-3-5(a).

5-14-3-4(b)(1). I have nothing before me that would indicate that the Department acted contrary to the requirements of the APRA in citing these exceptions and exercising the discretion afforded by the statute in denying your request. However, I would note to the extent that records contain information that is not an expression of opinion or speculative in nature, and is not inextricably linked to non-disclosable information, APRA provides that the information shall be disclosed. If the Department has complied with these provisions of the deliberative materials exception, it has not acted contrary to the APRA.

#### CONCLUSION

For the foregoing reasons, it is my opinion that the Department violated the APRA by failing to comply with the requirements of I.C. § 5-14-3-5(c)(1)-(2) in response to your request. In all other aspects, it is my opinion that the Department complied with the requirements of the APRA.

Best regards,

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

Joseph B. Hoage  
Public Access Counselor

cc: Shannon Marks, Legal Compliance Administrator