



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

May 31, 2012

David Williams
DOC 931247
3038 West 850 South
Bunker Hill, Indiana 46914

Re: Formal Complaint 12-FC-127; Alleged Violation of the Access to Public Records Act by the Gary Police Department

Dear Mr. Williams:

This advisory opinion is in response to your formal complaint alleging the Gary Police Department (“Department”) violated the Access to Public Records Act (“APRA”), Ind. Code § 5-14-3-1 *et seq.* Commander Peter Sormaz responded on behalf of the Department. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that you submitted a written request for records to the Department for a copy of Officer Mobley’s and Willie Wilson’s complete statements from Case No. 08-88279. As of May 21, 2012, the date you filed your formal complaint with the Public Access Counselor’s Office, you further allege that you have yet to receive any response from the Department.

In response to your formal complaint, Commander Sormaz provided that the Department does not have any records that are responsive to your request. Commander Sormaz advised that you should contact the Lake County Prosecutor’s Office, referencing 45-H03-0809-CM-2023, for information regarding the records that you have requested.

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 twenty-four 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 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, the Department acted contrary to the APRA by failing to respond to your written request within seven (7) days of its receipt.

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*. The Department has advised that it does not maintain any records that are responsive to your request. Accordingly, it is my opinion that the Department did not violate the APRA by failing to produce a record that it does not maintain.

As provided by Commander Sormaz, I would encourage you to file a records request with the Lake County Prosecutor’s Office, who the Department has indicated would likely have records that are responsive to your request. I would note that it would appear that the records that you seek are investigatory. Investigatory records of law enforcement agencies are generally not confidential; however, the APRA does provide that such records may be disclosed at the discretion of the public agency. 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 apply only to records of ongoing or current investigations; rather, it applies regardless of whether a crime was charged or even committed. The exception applies to all records compiled during the course of the investigation, 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.*



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Finally, you provided in your formal complaint that your request was necessary for a future post-conviction relief hearing. The APRA provides the right to inspect and copy records of a public agency. However, it is separate and distinct from other court proceedings, both civil and criminal. While an agency may be provided with discretion or even required to deny a request made pursuant to the APRA, the same discretion or obligation may not be available in a separate criminal or civil proceeding.

CONCLUSION

For the foregoing reasons, it is my opinion that that Department acted contrary to the requirements of the APRA by failing to respond to your request within seven (7) days of its receipt. As to all other issues, it is my opinion that the Department did not violate the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "Joe Hoage".

Joseph B. Hoage
Public Access Counselor

cc: Commander Peter Sormaz