



# 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](http://www.IN.gov/pac)

September 10, 2012

Michael A. Mills  
2222 Candlewich Drive  
Fort Wayne, Indiana 46804

*Re: Formal Complaint 12-FC-223; Alleged Violation of the Access to Public Records Act by the Allen County Sheriff's Department*

Dear Mr. Mills:

This advisory opinion is in response to your formal complaint alleging Allen County Sheriff's Department ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* John O. Feighner, Attorney, responded on behalf of the Department. His response is enclosed for your reference.

## BACKGROUND

In your formal complaint, you allege that you hand-delivered a written request to the Department on July 20, 2012 for copies of the following:

1. "Request Allen County Police Department ("ACPD") Officer Hegbli's full video recording of the traffic stop on Saturday, June 2, 2012 with Allen County Councilman Paul Moss. I am also requesting both audio recordings which are recorded separately (the recording from Officer Hegbil's portable recorder at which is on his person and the separate inside the squad car recording).
2. Request all audio radio traffic recordings from all dispatch channels (example: dispatch channel, information channel, and all personal channels) from both ACPD dispatch and also Fort Wayne Police Department ("FWPD") dispatch. This is the time period between 12:00 a.m. Saturday June 2, 2012 till 6:00 a.m. June 2, 2012.
3. Request all entry's made by the ACPD dispatch on the Spillman system and the FWPD dispatch spillman entry's between 12:00 a.m. Saturday June 2, 2012 till 6:00 a.m. June 2, 2012.
4. Request the same things from ACPD Officer Stuckey as I did for ACPD Officer Hegbli (#1 request and #2 request).
5. Request to who was the individual that was in ACPD Officer Stuckey's squad car during the time of assisting ACPD Officer Hegbli on his traffic stop with suspect Allen County Councilman Paul Moss Saturday June 2, 2012.



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6. Request all incident reports (spillman, computer, or hand written) by both ACPD Officer Hegbli and ACPD Officer Stuckey pertaining to Allen County Councilman Paul Moss pull over event Saturday June 2, 2012.
7. Request all incident reports (spillman, computer, or hand written) by FWPD Officer Irick pertaining to Allen County Councilman Paul Moss pull over event Saturday June 2, 2012.
8. Request full shift recordings (both audio recordings from their portable recording device [stated in request #1] and inside squad car recording device, along with the video recordings). From both ACPD Officer Hegbli and ACPD Officer Stuckey on their entire 3<sup>rd</sup> shift duties beginning on Friday night arrival for duty on June 1, 2012 till the morning at the end of their shift Saturday, June 2, 2012.
9. Request all video and audio recording form their squad cars on both ACPD Officer Hegbli and ACPD Officer Stuckey four days of working prior to June 1, 2012 and four days of working after June 1, 2012.”

On the same day the Department received your hand-delivered written request; the Department acknowledged its receipt and provided you with a date-stamped copy of the request. Five days later, Mr. Feighner responded in writing to your request and provided the following:

1. A copy of the video recording is being copied and would be made available. There is no separate audio recording.
2. Your request was overly broad and may contain confidential investigatory communications pertaining to other matters, as well as confidential citizen communications. If you please narrow your request, it will be forwarded to the Consolidation Communication Partnership (“CCP”), which is a separate agency. The Department does not have custody of records of the FWPD. A copy of your request will be forwarded to Timothy Lee, Executive Director of the CCP. Please confirm in writing that you seek the audio radio traffic recording from the June 2, 2012 traffic stop.
3. There are no Department reports or entries made on the Department’s Spillman system pertaining to your request. Other entries made are beyond the scope of your request and are overly broad. Further, the Department does not produce FWPD dispatch entries or officer reports on the spillman system.
4. The full video recording is being copied. There are no separate audio recordings.
5. The information on the civilian was provided.
6. Officer Hegbli nor Officer Stuckey authored a report pertaining to the traffic stop.



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7. The Department does not have the alleged reports or other information of the FWPD. You should direct your inquiry to the appropriate party within the FWPD.
8. The video and/or audio recording are being copied and will be provided. The request for full shift recording for each officer is overly broad and may encompass confidential law enforcement communications, pending investigations, and other privacy matters unrelated to this issue and will not be produced without further demonstration that your request is reasonable within the terms of the APRA. The Department has a policy of restricting access to confidential investigatory materials and some or many of the communications may relate to the same.
9. Your request is overly broad and may encompass law enforcement investigatory materials and other third-party communications which are unrelated to the subject of your request and the same is unreasonable and overly burdensome.

The Department further provided that any information not disclosed would be exempt pursuant to the investigatory records exception found under I.C. § 5-14-3-4(b)(2). You provide that you retired from the Department on June 29, 2007 and all information that you have requested should be made available under the APRA. As of August 13, 2012, the date you filed your formal complaint with the Public Access Counselor's Office, you have not received any further correspondence from the Department since its July 25, 2012 response from Attorney Feighner.

In response to your formal complaint, Mr. Feighner advised that since he responded in writing to your request for records on July 25, 2012, he has had no further contact with you nor have you made arrangements to pick up the video recording from Captain Rayl at the Department. Mr. Feighner provided that the Department has promptly provided the squad car recordings from Officer Hegbli and Stuckey to all those who have requested, including the media. Approximately fifteen years ago, the Department adopted the policy that investigatory records were defined within the scope of exempt records pursuant to the APRA. There is no legal precedence from the Public Access Counselor's Office which would require the Department to produce investigatory records or third-party communications in response to an APRA request. In addition, the Department continues to maintain that as there are no audio recordings or miscellaneous incident reports that are responsive to your request.



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## 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). A response from the public agency could be an acknowledgement that the request has been received and include information regarding how or when the agency intends to comply. Here, the Department responded in writing to your written request on the day of its receipt by providing you with a date-stamped copy of the request. As such, it is my opinion that the Department complied with the requirements of section 9(b) of the APRA in responding to your request.

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 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*.

The Department has consistently provided that it does not maintain any audio recordings in connection with the traffic stop, nor did Officers Hegbli and Stuckey author an incident report in connection with the stop. You believe said audio recordings and



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reports should be made available pursuant to the APRA. As such, if the Department maintains audio recordings from the traffic stop or a report authored by Officer Hegbli and Stuckey and has failed to either provide the records or cite to an appropriate statutory citation authorizing the records withholding, it has acted contrary to the APRA. However, if the Department does not maintain any such records relating to the traffic stop, it did not violate the APRA by failing to produce a record that it does not maintain.

The same analysis would apply to your request to the Department for reports generated by the FWPD in connection with the traffic stop. The Department has provided that it does not maintain any such records created by the FWPD. As such, I would encourage you to file a public records request directly with the FWPD. To the extent you seek audio radio traffic recordings of both the Department and FWPD, Mr. Feighner has advised that the CCP maintains said records and he has informed the agency's executive director of your expected request. Again, I would encourage you to submit your request directly to the CCP. As to your request for the video recording of the traffic stop, the Department has provided upon contact with Captain Rayl and payment of the appropriate fees, a copy will be provided. The Department has not received any further correspondence from you since its July 25, 2012 response. Accordingly, I would encourage you to contact Captain Rayl to facilitate the production of the video recording.

The APRA requires that a records request "identify with reasonable particularity the record being requested." I.C. § 5-14-3-3(a)(1). "Reasonable particularity" is not defined in the APRA, but the public access counselor has repeatedly opined that "when a public agency cannot ascertain what records a requester is seeking, the request likely has not been made with reasonable particularity." *See Opinions of the Public Access Counselor 10-FC-57; 08-FC-176*. However, because the public policy of the APRA favors disclosure and the burden of proof for nondisclosure is placed on the public agency, if an agency needs clarification of a request, the agency should contact the requester for more information rather than simply denying the request. *See generally IC 5-14-3-1; Opinions of the Public Access Counselor 02-FC-13; 06-FC-197; 11-FC-88; 12-FC-44*. Here, the Department denied in part certain aspects of your request due to it being overly broad. As opposed to denying your request, the proper response by the Department would have been to request that you clarify your request so that it may provide all records responsive to it. *See Opinion of the Public Access Counselor 12-FC-14*. As such, the Department acted contrary to the APRA in denying your request in light of it being overly broad. However, as you are now aware that the Department seeks further details in order to further clarify your request, I would encourage you to submit the appropriate follow-up information so that your request may be facilitated.



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As cited to by the Department in response to your request, the APRA provides that a law enforcement agency retains the discretion to disclose its investigatory records. *See* I.C. § 5-14-3-4(b)(1). An investigatory record is defined as “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.* To the extent that the Department denied your request for investigatory records, it would not have violated the APRA by exercising its discretion pursuant to I.C. § 5-14-3-4(b)(1).

## CONCLUSION

For the foregoing reasons, it is my opinion that the Department acted contrary to the APRA by denying your request due to it being overly broad. As to all other issues, if the Department did not maintain any records that are responsive to your request or to the extent you were denied access to investigatory records maintained by the Department, it is my opinion that the Department did not violate the APRA.

Best regards,

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

Joseph B. Hoage  
Public Access Counselor

cc: John O. Feighner