



# STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

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August 20, 2012

Philip G. Yeary  
DOC 169399  
1946 W. U.S. 40  
Greencastle, Indiana 46135

*Re: Formal Complaint 12-FC-231; Alleged Violation of the Access to Public Records Act by the Rising Sun Police Department*

Dear Mr. Yeary:

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

## BACKGROUND

In your formal complaint, you allege that on May 18, 2012, you submitted a request for records to the Department. Your request primarily sought daily log information for certain individuals and dates pursuant to I.C. § 5-14-3-5. On June 1, 2012, the Department acknowledged the receipt of your request in writing, advised that the Department would need approximately thirty days to obtain the requested documents, and cited to I.C. § 5-14-3-4(b)(2) as it applied to your request. On June 7, 2012, you responded to the Department's acknowledgement and provided that it was your belief that the Department's need for an additional thirty days was excessive. On August 7, 2012, the Department provided certain records that were responsive to your request and advised that all other records maintained by the Department were considered attorney-work product and thus confidential under the APRA.

In response to your formal complaint, Chief Hewitt advised that the records that were responsive to your request are considered to be investigatory work product and thus will not be released. Further, many of the records that you seek are not maintained by the Department. The portion of your request dealing with log sheets, call center information, and inmate/arrest information should be directed to the County Sheriff or the Ohio County 911 Communication Center, who maintains such records.

## 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, the Department responded to your written request for records, dated May 18, 2012, on June 1, 2012. As such, the Department violated the APRA by failing to respond to your 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 APRA does require that certain law enforcement records be made available for inspection and copying. *See* I.C. § 5-14-3-5. In this regard, information must be made public in three instances: if a person is arrested or summoned for an offense, if a person is received in a jail or lock-up, and where an agency has received a call regarding a suspected crime, accident, or complaint. *Id.* I.C. § 5-14-3-5(a) provides that if a person is arrested or summoned for an offense, the following information shall be made available for inspection and copying:

- (1) Information that identifies the person including the person’s name, age, and address.
- (2) Information concerning any charges on which the arrest or summons is based.



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- (3) Information relating to the circumstances of the arrest or the issuance of the summons, such as the:
- (A) time and location of the arrest or the issuance of the summons;
  - (B) investigating or arresting officer (other than an undercover officer or agency); and
  - (C) investigating or arresting law enforcement agency.

If a person is received in a jail or lock-up, I.C. § 5-14-3-5(b) provides that the following information shall be made available for inspection and copying:

- (1) Information that identifies the person including the person's name, age, and address.
- (2) Information concerning the reason for the person being placed in the jail or lock-up, including the name of the person on who order the person is being held.
- (3) The time and date that the person was received and time and date of the person's discharge or transfer.
- (4) The amount of the person's bail or bond, if it has been fixed.

Finally, I.C. § 5-14-3-5(c) 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 agency, and the information must be made available for inspection and copying. *Id.* 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 or IC 35-42-3.5;
  - (C) the factual circumstances surrounding the incident; and
  - (D) a general description of any injuries, property, or weapons involved.

Counselor Neal provided the following guidance regarding a law enforcement agency's

requirements pursuant to I.C. § 5-14-3-5(c):

In some instances, a law enforcement agency will not maintain a separate record titled “daily log” but will instead use the daily incident reports to substitute for the daily log. In that case, when the agency receives a request for the daily log information, the agency will generally provide copies of incident reports. In some cases, the agency will redact from the incident report any information not required to be maintained in a daily log. I have advised agencies this is acceptable so long as the daily log information is always available within twenty-four hours and so long as the agency provides at least the information which is required by I.C. § 5-14-3-5(c) to be made available for inspection and copying. *Opinion of the Public Access Counselor 09-FC-93.*

Here the Department has advised that your request for records regarding log sheets, call center information, and inmate/arrest information were not maintained by the Department and that you should make a request of the County Sheriff or the Ohio County 911 Commission Center for this information. If the Department did not maintain any records under I.C. § 5-14-3-5 regarding the individuals and dates noted in your request, it is my opinion that it did not violate the APRA in response to your request. Further, an agency would not violate the APRA by failing to cite to a statutory exception authorizing withholding, when the agency does not maintain any records that are responsive to the request.

I would note that any records maintained by the Department beyond those required under I.C. § 5-14-3-5 are likely to be considered investigatory records. The APRA provides that a law enforcement agency retains the discretion to disclose its investigatory records. 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 you sought investigatory records of the Department, it would not have violated the APRA by exercising its discretion and denying your request pursuant to I.C. § 5-14-3-4(b)(1). The Department would be required to cite to the specific statutory citation in denying your request pursuant to the investigatory records exception (e.g. I.C. § 5-14-3-4(b)(1)) and provide the name and title of the person responsible for the denial. *See* I.C. § 5-14-3-9(c).



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Further, pursuant to I.C. §5-14-3-4(b)(2) a public agency has the discretion to withhold a record that is the work product of an attorney representing, pursuant to state employment or an appointment by a public agency: a public agency; the state; or an individual.

“Work product of an attorney” means information compiled by an attorney in reasonable anticipation of litigation and includes the attorney’s:

- (1) notes and statements taken during interviews of prospective witnesses; and
- (2) legal research or records, correspondence, reports, or memoranda to the extent that each contains the attorney’s opinions, theories, or conclusions.

I.C. § 5-14-3-2(p).

If the Department was going to deny a request pursuant to the attorney-work product exception, it would be required to cite to I.C. § 5-14-3-4(b)(2) and provide the name and title of the person responsible for the denial.

## CONCLUSION

For the foregoing reasons, it is my opinion the Department acted contrary to the requirements of the APRA by failing to respond to your request pursuant to the requirements of section 9. 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 "J. Hoage".

Joseph B. Hoage  
Public Access Counselor

cc: Chief David Hewitt