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October 15, 2012

David R. Hennessy
424 East Wabash Street
Indianapolis, Indiana 46204

Re: Formal Complaint 12-FC-279; Alleged Violation of the Access to Public Records Act by the Indianapolis Metropolitan Police Department

Dear Mr. Hennessy:

This advisory opinion is in response to your formal complaint alleging the Indianapolis Metropolitan Police Department ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Andrea Brandes Newsom, Chief Deputy Corporation Counsel, responded on behalf of the Department. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that on October 12, 2011, you requested "all factual narratives, finding, and reports related to police action shootings." On December 21, 2011, the Department advised that you request lacked sufficient particularity and specificity. On December 28, 2011, you provided further information and explained that you sought factual narratives describing a police officer's discharge of his or her firearm. After numerous calls to the Department, many of which you provide went unreturned, the Department denied your request pursuant to I.C. § 5-14-3-4(b)(1) and again provided that the narrative portion of your request continued to be made without particularity. You maintain that the Department has failed or refused to make available any reports or make any effort to provide the discloseable portions of said reports, as required by section 6 of the APRA.

In response to your formal complaint, Ms. Newsom advised that the Department received your request on October 12, 2011 for "All factual narratives, findings, reports, corrective action reports, or other documents related to all police actions shootings from January 1, 2005 until present." The Office of Corporation Counsel ("OCC") timely responded in writing to your request on October 18, 2011. On December 21, 2011, the OCC sent a subsequent letter to advise that the Department was unable to find any responsive records based on the vague nature of the request. On December 28, 2011, you submitted correspondence to the Department, in which you disputed the vague nature of

the request and provided a brief description of the term “police action shooting.” You further limited your request to those shootings which resulted in the wounding or death of a citizen.

On September 17, 2012, the Department advised that it had collected certain records that were responsive to your request, but the records were to be withheld pursuant to I.C. § 5-14-3-4(b)(8). The Department reiterated that it was still unclear as to your request for “factual narratives”; whether you seek actual narratives of shooting incidents which might be included in a probable cause affidavit or public incident report or whether you seek other narratives which might have been included in an internal review of personnel involved in such incidents.

The Department would argue that I.C. § 5-14-3-3(a)(1) provides that a request for records must identify with reasonable particularity the record being requested. A request likely has not been made with reasonable particularity when an agency cannot ascertain what records a requester is seeking. *See Opinion of the Public Access Counselor 09-FC-24.* The Public Access Counselor has stated that “when a public agency cannot ascertain what records a requester is seeking, the request has likely not been made with reasonable particularity. *See Opinions of the Public Access Counselor 08-FC-176; 10-FC-57; 11-FC-125; 11-FC-126; and 11-FC-127.* Ms. Newsom does provide that the Department did deny you access to certain personnel records which the agency was able to locate pursuant to I.C. § 5-14-3-4(b)(8). The Department has repeatedly asked that you clarify your request for factual narratives and other documents. Without additional particulars, the Department is without sufficient knowledge to begin an electronic or manual search. Until the Department can ascertain which records are sought, it is unable to make any determination of which components of the record are discloseable under the APRA.

The Department uses a police incident reporting system which allows users to search electronically for certain categories of records, such as “robbery” or “gambling investigation.” The system does not contain a category for “police action shooting” or any other characterization for factual narratives or reports which tend to indicate the circumstances of a shooting incident. The APRA does not require public agencies to search through its records, either electronically or manually, to determine what records contain information responsive to a request. *See Opinions of the Public Access Counselor 04-FC-38; 09-FC-124; and 10-FC-57.* Information that would assist the Department in conducting the search would include incident dates, report numbers, or the names of Department employees or citizens that were involved. Without additional details, the Department is unable to conduct a search for any records that are responsive to your request.

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 responded in writing to acknowledge your request within seven (7) days of receipt. As such, it is my opinion that the Department complied with section 9 of the APRA in responding to your request.

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; 05-FC-87; 11-FC-88*. Further, the APRA does not require public agencies to conduct a manual or electronic search of its records to determine what records might contain information that is responsive to a request. *See Opinions of the Public Access Counselor 04-FC-38; 09-FC-124; and 10-FC-57*.

The Indiana Court of Appeals recently addressed the issue of reasonable particularity as defined under the APRA in *Jent v. Fort Wayne Police Dept.*, 973 N.E.2d 30 (Ind. Ct. App. 2012):

In support of its cross-motion for summary judgment, the FWPD asserted that it could not fulfill any part of Jent's records request because the request does not comply with Indiana Code Section 5-14-3-3(a)(1), which requires that the request "identify with reasonable particularity the record being requested." The "reasonable particularity" requirement under this statute has not previously been interpreted by an Indiana court. In the context of the discovery rules, however, a requested item has been

designated with "reasonable particularity" if the request enables the subpoenaed party to identify what is sought and enables the trial court to determine whether there has been sufficient compliance with the request. *In re WTHR-TV*, 692 N.E.2d 1, 6 (Ind. 1998). Here, in essence, the FWPD contends that Jent's request fails the first part of that test, namely, that it does not enable the FWPD to identify the records sought.

Again, Jent requested the following records:

Daily incident report logs of crimes committed from January 1st, 2001[,] through December 8th, 2005[,] containing the crimes of abduction and sexual assault and/or attempted abduction and attempted sexual assault with the victims describing the perpetrator as a[n] Hispanic male with a tattoo of a rose and green stem on the left arm or side and/or if the victim was taken to a[n] abandoned house and/or placed in a van during the commission of the crime.

Appellee's App. at 15. While Jent's request describes the records sought in some detail, the level of detail does not necessarily satisfy the "reasonable particularity" requirement of the statute. In response to a request under APRA, a public agency is required to search for, locate, and retrieve records. Depending upon the storage medium, the details provided by the person making the request may or may not enable the agency to locate the records sought. Indeed, here, the FWPD was unable to fulfill the request using the search parameters Jent provided.

As Sergeant Bubb explained in response to Jent's request, the records are maintained electronically and the "software will not facilitate the production of any kind of list with the parameters [Jent] specified." *Id.* at 17. The FWPD designated Sergeant Bubb's letter as evidence in support of summary judgment. That designated evidence shows that the parameters given in the request are incompatible with the software that manages the electronic data. In other words, the software lacks the capacity to search and retrieve the records requested.

In support of his summary judgment motion, Jent designated as evidence the PAC's advisory opinion. In that opinion, the PAC observed that "incident reports" and "daily logs" might be separate records and that "incident reports are considered investigatory records," which "may be withheld from disclosure at the discretion of the agency." *Id.* at 33 (citing Ind. Code § 5-14-3-4(b)(1)). But the PAC stated that the daily logs must be disclosed under APRA. Further, the PAC stated that "it would not be appropriate for the [FWPD] to deny [Jent] access to the information on the basis that it is stored in a way that would not allow the [FWPD] to

separate the daily log information from the discretionary investigatory record information." Appellant's App. at 35 (emphasis added).

The PAC misconstrues Sergeant Bubb's letter. The letter does not deny Jent's request based on an alleged inability to separate the daily logs from other documents. Rather, the letter gives two other reasons for denying Jent's request: that the FWPD was unable to search its records using the parameters given and that the records requested are excepted from disclosure as investigatory records. The PAC did not express any opinion concerning whether the FWPD's software had the capacity to locate and retrieve the records using the parameters Jent provided.

In short, without designated evidence to the contrary, there is no factual basis to question Sergeant Bubb's statement that the records requested cannot be located or retrieved using the search parameters provided by Jent. Whether a request identifies with reasonable particularity the record being requested turns, in part, on whether the person making the request provides the agency with information that enables the agency to search for, locate, and retrieve the records. Here, the undisputed designated evidence shows that such is not the case and that the FWPD is entitled to summary judgment. *Jent*, 973 N.E.2d at 33-35.

The Department has provided that it is unable to conduct an electronic search of its police incident reporting system with the parameters you have identified in your request. Identifying information that would assist the Department would include the incident dates, report numbers, and name of any Department employees or citizens that were involved. "Whether a request identifies with reasonable particularity the record being requested turns, in part, on whether the person making the request provides the agency with information that enables the agency to search for, locate, and retrieve the records." *Jent*, 973 N.E.2d at 35. The Department has advised that it is unable to search for "police action shootings" or any other characterization that has been provided to produce any records that are responsive to your request. As such, it is my opinion that in light of *Jent* and previous advisory opinions addressing the issue of reasonable particularity, the Department has not violated the APRA in response to your request.¹

¹ I would note that it would appear that the parties could work through many of the issues that have been raised by engaging in an oral conversation regarding the request that has been submitted. Although such action would not be required under the APRA, this would likely allow the Department to receive the clarification it requires to commence a search for the records, which would in turn allow you to receive any records that are responsive in the most efficient manner possible.

CONCLUSION

For the foregoing reasons, 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". The signature is stylized with a large initial "J" and a cursive "Hoage".

Joseph B. Hoage
Public Access Counselor

cc: Andreas Brandes Newsom