



# STATE OF INDIANA

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November 27, 2012

Mr. David Paul Allen  
5930 Hohman Avenue, Suite 204  
Hammond, Indiana 46320

*Re: Formal Complaint 12-FC-323(a); Alleged Violation of the Access to  
Public Records Act by the East Chicago Police Department*

Dear Mr. Allen:

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

## BACKGROUND

In your formal complaint, you provide that on October 16, 2012, you submitted a written request for records via certified mail to the Department for a copy of "each East Chicago City Court Information dated from November 1, 2011 through the present which is signed by Officer Hector Rosario and/or which identifies him as a witness in any of the following offense categories: Operating While Intoxicated; Operating with at Least .15 Grams; or Operating with at Least .08 but less than .15 Grams." You further advised that in lieu of the information requested, your request would be satisfied with a list of names and case number of the individuals and cases within the parameters of your APRA request. The certified mail receipt provides that the Department received your request on October 17, 2012. As of October 30, 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 to your request.

In response to your formal complaint, Chief Becker advised that the Department did receive your written request for records and has determined that the information you seek is not in the Department's possession; rather it may be found by contacting the East Chicago City Clerk's Office at (219) 391-8491. Chief Becker has also determined that all usage of the breathalyzer machine by Officer Rosario would be a matter of record that is maintained by the State of Indiana's Toxicology Department. The Department forwarded your original request to the Lake County Prosecutor's Office and it may have

been misplaced in the process. Chief Becker apologizes for any confusion or delay this may have caused.

## 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 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). Again, section 9(b) requires that the agency respond within seven (7) days of the receipt of the request; not seven (7) days from when the request was mailed. 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. 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). Here, the Department acted contrary to section 9(b) of the APRA by failing to timely acknowledge the receipt of your request in writing within seven (7) days of receipt.

As to the substance of your request, if a public agency has no records responsive to a public records request, the agency generally 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*. Here, Chief Becker has indicated that the records you seek are not in the Department’s possession and are maintained by the East Chicago City Clerk’s Office and the State of Indiana’s Toxicology Department. As such, it is my opinion that the Department did not violate the APRA by failing to produce a record that it does not maintain.

## CONCLUSION

For the foregoing reasons, it is my opinion that the Department acted contrary to section 9(b) of the APRA by failing to respond in writing to your written request within seven (7) days of 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 "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: Chief Mark J. Becker