



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

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December 4, 2012

Mr. Leslie A. Johnson
2316 Normandy Drive, Apt 2B
Michigan City, Indiana 46360

Re: Formal Complaint 12-FC-340; Alleged Violation of the Access to Public Records Act by the LaPorte County Sheriff's Department

Dear Mr. Johnson:

This advisory opinion is in response to your formal complaint alleging the LaPorte County Sheriff's Department ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Sergeant Allen W. Ott responded in writing 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 on October 25, 2012. On November 5, 2012 you contacted the Department and left a voicemail regarding the status of your request. As of November 27, 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, Sgt. Ott advised that your request for records arose out of a citizen complaint that you filed with the Department regarding the actions of one of its officers. Your request specifically sought the officer's audio and video footage from an in-car camera between the hours of 20:30 through 21:00 on October 25, 2012. In response to your citizen's complaint and formal complaint filed with the Public Access Counselor's Office, Sgt. Ott contacted you by phone on November 2, 2012 and met with you at your home the following day. Sgt. Ott provided that he informed you at that time that the audio/video recording was unable to be retrieved as the officer's camera system was malfunctioning. Sgt. Ott advised that you indicated that you understood the issue and encouraged the Department to get the camera fixed.

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. 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, you submitted a written request for records on October 25, 2012 as part of your citizen’s complaint. The Department was required to respond, in writing, no later than November 1, 2012. Sgt. Ott provided that he spoke with you on November 2, 2012 and met with you at your home the following day to discuss the issues arising from your citizen’s complaint and request for records. According to the letter of section 9 of the APRA, the Department acted contrary to the requirements of the law by failing to respond in writing to your request within in seven (7) days. However, based on the actions of the Department, specifically Sgt. Ott, I do not believe that the Department had any intent to violate the APRA in response to your request.

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, Sgt. Ott has provided that the Department does not maintain any record responsive to your request as the officer’s in-car camera unit was malfunctioning on October 25, 2012. Accordingly, it is my opinion that the Department did not violate the APRA by failing to provide a record it never maintained.

CONCLUSION

For the foregoing reasons, it is my opinion that the Department acted contrary to section 9 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 "H".

Joseph B. Hoage
Public Access Counselor

cc: Sgt. Allen W. Ott