



STATE OF INDIANA

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April 25, 2012

Bradford M. Bentley
1975 Clark Road
Indianapolis, Indiana 46224

Re: Formal Complaint 12-FC-83; Alleged Violation of the Access to Public Records Act by the Indianapolis Department of Safety

Dear Mr. Bentley:

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

BACKGROUND

In your formal complaint, you allege that on January 17, 2012 you hand-delivered a written public records request to the City’s Office of Corporation Council. You requested a series of e-mails from two police officers from their departmental e-mail accounts. You also sought text messages from a cell phone provided by the Department. On March 27, 2012, you were informed by the Department that it did not retain text messages. You allege that the Department had previously provided text messages to local media. You further allege that you provided Department with the necessary guidance on how to procure the text messages directly from its cell-phone provider.

In response to your formal complaint, Ms. Brandes-Newsom advised that the City of Indianapolis (“City”) timely acknowledged your request for records submitted on January 17, 2012 and January 18, 2012 on January 23, 2012. As to your request for text messages, the Department provided that neither it, nor Verizon Wireless, have any records that were responsive to your request.

Verizon Wireless provides cellular and communications services to the City. According to the terms of service for corporation clients, text messages are retained on Verizon’s servers for a period of no more than three to five days (“Vendor Retention Period”). Verizon does not have the ability to retain text messages outside of its normal retention period upon request, but must receive a request for temporary retention of a

message or particular messages prior to the expiration of the Vendor Retention Period. Procedurally, the City or the Department would have to receive a request for public records for text messages and communicate it to Verizon prior to the expiration of the Vendor Retention Period. As applicable to your request, you would have been required to submit the request to the Department on or before January 13, 2012. As your requests were not submitted until January 17 and January 18, 2012, the request fell outside the Vendor Retention Period. It is Verizon's policy that a request for public records submitted to an agency client is insufficient to compel Verizon to produce the requested text messages, as Verizon will only preserve and provide records if a request qualifies for product through its L.E.R.T.¹ In this instance, L.E.R.T. would not have been able to assist with the request because a public records request falls outside of Verizon's specific directive to work only within the scope of law enforcement investigatory matters and those matters involving court orders, subpoenas, and warrants.

The Department does not dispute that text messages are a public record pursuant to I.C. § 5-14-3-2(n). The broader issue implicated by the request is one of record retention. Text messages are not susceptible to retention by the City for several reasons. First, text messages are inherently transitory. They are short-lived, used for communicating in the briefest of manners, often in abbreviated "shorthand" benefiting the brief and temporary nature of texting. Second, the City has no independent mobile telecommunications expertise and opted to engage the services of a private vendor, Verizon, to provide such equipment, services, and IT support for the City's mobile telecommunications needs. The City has no control over text messages once they are transmitted over Verizon's network and then managed on Verizon's servers consistent with the Vendor Retention Period. Third, the City has no mechanism by which to interface with Verizon and download for storage on City-owned services. Imposing on the City the burden of obtaining sufficient server capacity and engaging the services of individuals with the specific technical expertise for this activity would be financially devastating.

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-

¹ L.E.R.T. is Verizon's "Law Enforcement Resource Team", a centralized service division of the company which facilitates the company's response to legal process for customer information through subpoenas, court ordered surveillance, and search warrants.

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.

A public record is defined as any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics. *See* I.C. § 5-14-3-2(n). The Department does not dispute that a text message would qualify as a “public record” pursuant to the APRA.

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*.

However, the APRA requires public agencies to maintain and preserve public records in accordance with applicable retention schedules. *See* I.C. § 5-14-3-4(e). A public agency shall protect public records from loss, alteration, mutilation, or destruction. *See* I.C. § 5-14-3-7(a). A public agency shall further take precautions that protect the contents of public records from unauthorized access, unauthorized access by electronic device, or alteration. *See* I.C. § 5-14-3-7(b). If the Department failed preserve its records in accordance with the applicable retention schedule and/or failed to protect its records from loss, alteration, or destruction, it is my opinion that it violated I.C. §§ 5-14-3-4(e) and 5-14-3-7.

CONCLUSION

Based on the foregoing, if the Department failed preserve its records in accordance with the applicable retention schedule and/or failed to protect its records from loss, alteration, or destruction, it is my opinion that it violated I.C. §§ 5-14-3-4(e) and 5-14-3-7.

Best regards,

A handwritten signature in black ink, appearing to read "Joe Hoage". The signature is written in a cursive style with a large initial "J" and "H".

Joseph B. Hoage
Public Access Counselor

cc: Andrea Brandes-Newsom