



STATE OF INDIANA
MICHAEL R. PENCE, Governor

PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317) 234-0906
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

June 3, 2013

Ms. Jeanann G. Freier
788 Eastbrook Lane
Crown Point, Indiana 46307

Re: Formal Complaint 13-FC-136; Alleged Violation of the Access to Public Records Act by the Crown Point Police Department

Dear Ms. Freier:

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

BACKGROUND

In your formal complaint, you provide that on March 14, 2013 you appeared at the Crown Point Fire and Rescue Department ("Fire Department") to seek information about your ambulance call that occurred on January 26, 2013. You were informed by Mark Baumgardner, Assistant Director, that you were entitled to all information requested as it related to your own ambulance call. You signed a medical release and were informed that a representative would have the information together in a few days and would contact you at that time. On March 21, 2013, you contacted Mr. Baumgardner regarding the status of your request. Mr. Baumgardner informed you that he was very busy and had yet time to collect the information requested. Mr. Baumgardner promised to contact you the following week when the requested information was ready.

On March 27, 2013, you again contacted Mr. Baumgardner regarding the status of your request. The following day you contacted Mr. Baumgardner again and picked up a portion of the requested information. Your request for a specific paramedic's resume was denied, as you were informed that it was "personnel information." You contacted Mr. Baumgardner again on April 11, 2013 regarding your request, specifically copies of audio recordings from the 911 call that was placed and EMS inter-unit radio communication. You were informed that the information was being prepared by the Department.

On April 18, 2013, you went directly to the Department to request a copy of the audio recordings. You were informed by Commander Justin Maupin that the Department was very busy and did not have time to review and provide the recordings requested. You were eventually informed that you need to submit a written request to the Chief of Police. You delivered your request for records to the Department on April 18, 2013. You spoke to Mr. Nicholls on April 19, 2013 who confirmed the receipt of your request. Mr. Nicholls informed you that the records would be provided in a few days.

On April 22, 2013, Mr. Nicholls contacted you regarding an issue that had arisen in making the copies of the recordings. The device that copied the emergency communication recordings was not functioning properly and had been sent for repairs. Once returned to the Department, a copy of the recording would be provided. On April 30, 2013, your husband contacted Mr. Nicholls regarding the status of your request and left a message. Upon not receiving a return call, your husband contacted Mr. Nicholls on May 1, 2013. Mr. Nicholls again informed your husband that there were issues in making copies of the recordings. IT Personnel from the City were now looking into the issue. Mr. Nicholls was unable to provide you at that time with a firm deadline when the records would be provided. You believe that the Department is not providing records in a reasonable period of time and fear that the records will never be provided.

In response to your formal complaint, Mr. Nicholls advised that the City of Crown Point and Mayor David Uran have always been committed to openness and transparency. At the present time, it is Mr. Nicholls' belief that most of the records responsive to your request have been provided. Unfortunately, the Department, along with its service providers, are continuing to struggle with reconstructing the computer system which holds the audio recordings. The Department's efforts are continuing, although burdensome, and immediately upon reconstruction of the computer system, a copy of the audio recording will be provided.

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). 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.

The APRA provides a public agency shall provide records that are responsive to the request within a reasonable time. *See* I.C. § 5-14-3-3(b). The public access counselor has stated that among the factors to be considered in determining if the requirements of section 3(b) have been met include, the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and redacted prior to disclosure. The APRA requires an agency to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. *See* I.C. § 5-14-3-6(a). Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. *See* I.C. § 5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. *See* I.C. § 5-14-3-7(c). The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *See Opinion of the Public Access Counselor 02-FC-45*. This office has often suggested a public agency make portions of a response available from time to time when a large number of documents are being reviewed for disclosure. *See Opinions of the Public Access Counselor 06-FC-184; 08-FC-56; 11-FC-172*. Further nothing in the APRA indicates that a public agency's failure to provide "instant access" to the requested records constitutes a denial of access. *See Opinions of the Public Access Counselor 09-FC-192 and 10-FC-121*.

The APRA requires public agencies to maintain and preserve public records in accordance with applicable retention schedules. *See* I.C. § 5-14-3-4(h). 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).

Here, your written request for records was submitted to the Department on April 18, 2013. The Department, via Mr. Nicholls, acknowledged the receipt of your request the following day. Your formal complaint was filed on May 2, 2013. As noted by all parties, the majority of all records that are responsive to your request have been provided by either the Fire Department or the Department. The remaining issue stems from your request for certain 911 recordings. The Department has no intention of denying your request. However, the device that copied the emergency communication recordings is not functioning properly and the Department and City are working with the vendor to address the issue. Until the device is repaired, the Department is unable to provide you with a copy of the recordings. You doubt the technology difficulties that the Department has encountered regarding the retrieval of the recordings. As the Department has provided all records responsive to your request, minus the 911 recordings, and has documented extensively in writing its efforts to retrieve the recordings from the malfunctioning device, it is my opinion at this time the Department has complied with

section 3(b) of the APRA in providing all records responsive to your request in a reasonable period of time.

Although your formal complaint was filed against the Department, you provided an overview of your request that was submitted to the Fire Department. As to your request for a resume of a specific employee of the Fire Department, the APRA provides that that certain personnel records may be withheld from disclosure:

(b) Except as otherwise provided by subsection (a), the following public records shall be excepted from section 3 of this chapter at the discretion of a public agency:

(8) Personnel files of public employees and files of applicants for public employment, except for:

(A) the name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency;

(B) information relating to the status of any formal charges against the employee; and

(C) the factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged.

However, all personnel file information shall be made available to the affected employee or the employee's representative. This subdivision does not apply to disclosure of personnel information generally on all employees or for groups of employees without the request being particularized by employee name. I.C. § 5-14-3-4(b)(8).

In other words, the information referred to in (A) - (C) above must be released upon receipt of a public records request, but a public agency may withhold any remaining records from the employees personnel file at their discretion. As to your request of Mike Kowal, the Fire Department would be required to provide the information delineated in section 4(b)(8)(A)-(C) in response to your request. If the record maintained by the Fire Department that includes the information required to be disclosed is Mr. Kowal's resume, the Fire Department would be required to provide the record. Information contained in the resume beyond that which is required to be provided by statute may be redacted at the Fire Department's discretion.

CONCLUSION

For the foregoing reasons, it is my opinion that the Department has currently complied with the requirements of section 3(b) of the APRA in providing all records responsive to your request in a reasonable period of time.

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" at the end.

Joseph B. Hoage
Public Access Counselor

cc: David H. Nicholls