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August 16, 2013

Mr. Dale Edward Henselmeier
DOC 983364
1946 U.S. Highway 40
Greencastle, Indiana 46135

Re: Formal Complaint 13-FC-210; Alleged Violation of the Access to Public Records Act by the Indiana State Department of Toxicology

Dear Mr. Henselmeier:

This advisory opinion is in response to your formal complaint alleging the Indiana State Department of Toxicology ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Teri Kendrick, General Counsel, responded on behalf of the Department. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that the Department improperly denied your request for a copy of a toxicology laboratory report pertaining to a matter before the Marion County Superior Court pursuant to Cause No. 49-F19-0803-CM-54915.

In response to your formal complaint, Ms. Kendrick advised that the requested toxicology report is considered to be an investigatory record. Under the APRA, an "investigatory record" is defined as a record compiled by law enforcement in the course of the investigation of a crime. The investigatory records exception provides that a law enforcement agency has discretion to disclose its investigatory records. The exception applies not only to ongoing or current investigations, but to all records compiled during the course of an investigation, even where a crime was not ultimately charged, and even after an investigation is completed.

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). Counselor O'Connor provided the following analysis regarding section 9:

Under the APRA, the burden of proof beyond the written response anticipated under Indiana Code section 5-14-3-9(c) is outlined for any *court action* taken against the public agency for denial under Indiana Code sections 5-14-3-9(e) or (f). If the public agency claimed one of the exemptions from disclosure outlined at Indiana Code section 5-14-3-4(a), then the agency would then have to either "establish the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit" *to the court*. Similarly, if the public agency claims an exemption under Indiana Code section 5-14-3-4(b), then the agency must prove to the court that the record falls within any one of the exemptions listed in that provision and establish the content of the record with adequate specificity. There is no authority under the APRA that required the IDEM to provide you with a more detailed explanation of the denials other than a statement of the exemption authorizing nondisclosure, but such an explanation would be required if this matter was ever reviewed by a trial court. *Opinion of the Public Access Counselor 01-FC-47*.

In denying your request the Department, in writing, cited to I.C. § 5-14-3-4(b)(1), the investigatory records exception. The investigatory records exception to the APRA provides that a law enforcement agency have the discretion to disclose its investigatory records. This is not to say that all records maintained by a law enforcement agency are considered investigatory. An investigatory record is "information compiled in the course of the investigation of a crime." *See* I.C. § 5-14-3-2(h). The investigatory records exception does not apply only to records of ongoing or current investigations; rather, it

applies regardless of whether a crime was charged or even committed. The exception applies to all records compiled during the course of the investigation, even after an investigation has been completed. The investigatory records exception affords law enforcement agencies broad discretion in withholding such records. *See Opinion of the Public Access Counselor 09-FC-157.* There is no dispute that the records sought pursuant to your request are considered to be investigatory under the APRA. Thus, it is my opinion that the Department did not violate the APRA in denying your request. Although such a request would not generally be made pursuant to the APRA, if a copy of the laboratory report you requested from the Department was provided to your attorney of record during the criminal proceedings, you may consider submitting a request directly to the attorney.

CONCLUSION

For the foregoing reasons, it is my opinion that the Department did not violate the APRA in response to your request.

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: Teri Kendrick