



# STATE OF INDIANA

**MICHAEL R. PENCE, Governor**

**PUBLIC ACCESS COUNSELOR  
LUKE H. BRITT**

Indiana Government Center South  
402 West Washington Street, Room W470  
Indianapolis, Indiana 46204-2745  
Telephone: (317)233-9435  
Fax: (317)233-3091  
1-800-228-6013  
[www.IN.gov/pac](http://www.IN.gov/pac)

October 29, 2013

Mr. John Emry, Esq.  
62 W. Jefferson St.  
Franklin, IN 46131

*Re: Formal Complaint 13-FC-287; Alleged Violation of the Access to Public Records Act by Morgan County Sheriff's Department*

Dear Mr. Emry,

This advisory opinion is in response to your formal complaint alleging that the Morgan County Sheriff's Department ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The Department has responded to your complaint by way of Mr. Peter R. Foley, Esq. His response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on September 30, 2013.

## BACKGROUND

Your complaint dated September 30, 2013, alleges that the Morgan County Sheriff's Department violated the Access to Public Records Act by denying your request in violation of Ind. Code § 5-14-3-3(b).

Your complaint states that on September 21, 2013, your client, Ms. Amy Wangler requested from the Department a copy of a jail video which depicted an incident on July 15, 2013. Attached to your complaint is a letter from Major David A. Rogers denying your request and stating a request for a copy of a jail video must be accompanied by a subpoena.

In Mr. Foley's response to my Office, he argues the denial was justified because the video recording has been taped over and no longer exists. It was destroyed after 30 days. Additionally, the recording may not be subject to disclosure if it would compromise the security measures of the jail. As it may also be an investigatory record, it would also fall into a non-disclosure exception to the APRA.

## 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 Ind. Code § 5-14-3-1. The Morgan County Sheriff’s Department is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the Department’s public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14- 3-3(a).

A request for records may be oral or written. See Ind. Code § 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 Ind. Code § 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 Ind. Code § 5-14-3-9(b). A response from the public agency could be an acknowledgement the request has been received and information regarding how or when the agency intends to comply.

Ind. Code § 5-14-3-2(o) states that a public record is:

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.

Under this definition, the record of the jail video is clearly a public record. The operative consideration in the present case is the destruction of the video. The recording would be subject to the retention schedule promulgated by the Indiana retention schedule for local governments set forth by the Indiana Commission on Public Records. For routine surveillance videos, the jail would be required to destroy the record after 30 days. The caveat to the destruction is that if illegal activity were captured on the tape, the video must be retained for the duration of the criminal proceedings or ten (10) years after the illegal activity was recorded. The schedule is found online:

[http://www.in.gov/icpr/files/county\\_general.pdf](http://www.in.gov/icpr/files/county_general.pdf).

This Office does not consider the retention schedules for the purposes of violations under the APRA. The Department has stated in their response that pepper balls (a form of inmate control) were used to subdue combative inmates. The Department has not indicated the incident rose to the level of illegal or criminal activity. If it were, then the

video would be subject to the retention schedule and must be kept for the period set forth in the schedule.

The response by the Department also raises the argument of the investigatory records and security measures exception. If the video depicted the illegal activity described above, the department may withhold the record under Ind. Code § 5-14-3-4(b)(1) as defined by section 5-14-3-2(i). The security measures found under Ind. Code § 5-14-3-4(b)(23)(B) would also apply if the video were to compromise jail security. This seems unlikely; however, I am not a finder of fact and cannot speak to the accuracy of that claim. The issue would be addressed at the trial court level.

Based on these standards, the Department has appropriately complied with the APRA in denying your request. The Department is justified in denying the video if it was retained and the burden of proving the exception was met. It would require a subpoena for production from a trial court if it was in their custody.

#### CONCLUSION

For the foregoing reasons, it is the Opinion of the Office of the Public Access Counselor the Morgan County Sheriff's Department did not violate the Access to Public Records Act.

Regards,

A handwritten signature in black ink, appearing to be 'LHB', written in a cursive style.

Luke H. Britt  
Public Access Counselor

Cc: Peter R. Foley, Esq.