



STATE OF INDIANA

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February 8, 2013

Lamarr T. Crittenden
DOC 148648
3038 West 850 South
Bunker Hill, Indiana 46914

Re: Formal Complaint 13-FC-36; Alleged Violation of the Access to Public Records Act by the Indianapolis Metropolitan Police Department

Dear Mr. Crittenden:

This advisory opinion is in response to your formal complaint alleging the Indianapolis Metropolitan Police Department ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Samantha Karn, Corporation Counsel, responded on behalf of the Department. Her response is enclosed for your reference. I granted your complaint priority status pursuant to 62 IAC 1-1-3(3).

BACKGROUND

In your formal complaint, you allege that you submitted a written request for records to the Department on or about January 14, 2013. As of February 4, 2013, the date you filed your formal complaint with the Public Access Counselor's Office, you further allege that the Department has failed to respond to your request in any fashion.

In response to your formal complaint, Ms. Karn advised that the Department received your request for records on January 23, 2012. The Department responded in writing to your request on January 29, 2013. The Department advised that it did not maintain any records that were responsive to the request that was submitted. Ms. Karn noted that if you are able to provide the Department with further identifying information regarding your request (i.e. incident report numbers), the Department would conduct a supplementary search.

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 exempted 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 (emphasis added). *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 seven-day time period for the Department to respond to a request pursuant to I.C. § 5-14-3-9(b) does commence until the date the Department received the request; not the date the request was placed in the mail. The Department has provided that it received your request on January 23, 2013, to which it issued a written response on January 29, 2013. As such, it is my opinion that the Department complied with section 9(b) of the APRA in response to your request.

As to the substance of your request, the APRA requires that a records request "identify with reasonable particularity the record being requested." I.C. § 5-14-3-3(a)(1). "Reasonable particularity" is not defined in the APRA, but the public access counselor has repeatedly opined that "when a public agency cannot ascertain what records a requester is seeking, the request likely has not been made with reasonable particularity." *See Opinions of the Public Access Counselor 10-FC-57; 08-FC-176*. However, because the public policy of the APRA favors disclosure and the burden of proof for nondisclosure is placed on the public agency, if an agency needs clarification of a request, the agency should contact the requester for more information rather than simply denying the request. *See generally* IC 5-14-3-1; *Opinions of the Public Access Counselor 02-FC-13; 05-FC-87; 11-FC-88*. Further, the APRA does not require public agencies to conduct a manual or electronic search of its records to determine what records might contain information that is responsive to a request. *See Opinions of the Public Access Counselor 04-FC-38; 09-FC-124; and 10-FC-57*.

The Indiana Court of Appeals recently addressed a similar request in *Jent v. Fort Wayne Police Dept.*, 973 N.E.2d 30 (Ind. Ct. App. 2012):

In support of its cross-motion for summary judgment, the FWPD asserted that it could not fulfill any part of Jent's records request because the request does not comply with Indiana Code Section 5-14-3-3(a)(1), which requires that the request "identify with reasonable particularity the record being requested." The "reasonable particularity" requirement under this statute has not previously been interpreted by an Indiana court. In the context of the discovery rules, however, a requested item has been designated with "reasonable particularity" if the request enables the subpoenaed party to identify what is sought and enables the trial court to

determine whether there has been sufficient compliance with the request. *In re WTHR-TV*, 692 N.E.2d 1, 6 (Ind. 1998). Here, in essence, the FWPD contends that Jent's request fails the first part of that test, namely, that it does not enable the FWPD to identify the records sought.

Again, Jent requested the following records:

Daily incident report logs of crimes committed from January 1st, 2001[,] through December 8th, 2005[,] containing the crimes of abduction and sexual assault and/or attempted abduction and attempted sexual assault with the victims describing the perpetrator as a[n] Hispanic male with a tattoo of a rose and green stem on the left arm or side and/or if the victim was taken to a[n] abandoned house and/or placed in a van during the commission of the crime.

Appellee's App. at 15. While Jent's request describes the records sought in some detail, the level of detail does not necessarily satisfy the "reasonable particularity" requirement of the statute. In response to a request under APRA, a public agency is required to search for, locate, and retrieve records. Depending upon the storage medium, the details provided by the person making the request may or may not enable the agency to locate the records sought. Indeed, here, the FWPD was unable to fulfill the request using the search parameters Jent provided.

As Sergeant Bubb explained in response to Jent's request, the records are maintained electronically and the "software will not facilitate the production of any kind of list with the parameters [Jent] specified." *Id.* at 17. The FWPD designated Sergeant Bubb's letter as evidence in support of summary judgment. That designated evidence shows that the parameters given in the request are incompatible with the software that manages the electronic data. In other words, the software lacks the capacity to search and retrieve the records requested.

In support of his summary judgment motion, Jent designated as evidence the PAC's advisory opinion. In that opinion, the PAC observed that "incident reports" and "daily logs" might be separate records and that "incident reports are considered investigatory records," which "may be withheld from disclosure at the discretion of the agency." *Id.* at 33 (citing Ind. Code § 5-14-3-4(b)(1)). But the PAC stated that the daily logs must be disclosed under APRA. Further, the PAC stated that "it would not be appropriate for the [FWPD] to deny [Jent] access to the information on the basis that it is stored in a way that would not allow the [FWPD] to separate the daily log information from the discretionary investigatory record information." Appellant's App. at 35 (emphasis added).

The PAC misconstrues Sergeant Bubb's letter. The letter does not deny Jent's request based on an alleged inability to separate the daily logs from other documents. Rather, the letter gives two other reasons for denying Jent's request: that the FWPD was unable to search its records using the parameters given and that the records requested are excepted from disclosure as investigatory records. The PAC did not express any opinion concerning whether the FWPD's software had the capacity to locate and retrieve the records using the parameters Jent provided.

In short, without designated evidence to the contrary, there is no factual basis to question Sergeant Bubb's statement that the records requested cannot be located or retrieved using the search parameters provided by Jent. Whether a request identifies with reasonable particularity the record being requested turns, in part, on whether the person making the request provides the agency with information that enables the agency to search for, locate, and retrieve the records. Here, the undisputed designated evidence shows that such is not the case and that the FWPD is entitled to summary judgment. *Jent*, 973 N.E.2d at 33-35.

The Department has provided that it is unable to locate records responsive to your request with the information that you provided. Identifying information that would assist the Department would include the incident report number for the referenced dispatch transcript. "Whether a request identifies with reasonable particularity the record being requested turns, in part, on whether the person making the request provides the agency with information that enables the agency to search for, locate, and retrieve the records." *Jent*, 973 N.E.2d at 35. As such, it is my opinion that in light of *Jent*, the Department has not violated the APRA in response to your request.

CONCLUSION

Based on the foregoing reasons, it is my opinion that if the Department received your written request for records on January 23, 2013 and responded in writing on January 29, 2013, it complied with the requirements of section 9(b) of the APRA. As your request failed to identify the records sought with reasonable particularity, it is my opinion that the Department complied with section 3(a)(1) of the APRA in response to your request.

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" following.

Joseph B. Hoage
Public Access Counselor

cc: Samantha Karn