

April 15, 2004

Mr. & Mrs. Lonnie Brumfield
P.O. Box 7
Cloverdale, Indiana 46120

*Re: 04-FC-44; Alleged Violation of the Access to Public Records Act
by the Cloverdale Police Department*

Dear Mr. & Mrs. Brumfield:

This is in response to your formal complaint alleging that the Cloverdale Police Department (Department) violated the Indiana Access to Public Records Act (APRA) (Ind. Code §5-14-3) when it failed to produce a copy of a tape made by the Department in responding to a complaint at your home. A copy of the Department's response to your public records complaint is enclosed for your reference. The Department responds that the tape was an investigatory record of a law enforcement agency and that it was destroyed in accordance with state law. It is my opinion that the tape was a public record subject to the APRA. Because the tape was a public record, the Department was required to preserve the record and protect it from destruction except in accordance with state law. In my opinion, the Department has not shown that its failure to preserve and produce the tape complied with the APRA.

BACKGROUND

On March 8, 2004, you submitted a written request to the Department requesting a copy of a tape made during a complaint investigation at your home. The complaint investigation occurred on August 6, 2003, slightly more than seven months before you made your request. The tape was made by Officer Charles Hallam, the investigating officer. Your request identified the officer who made the recording, the date and time the recording was made, and the general content and participants to conversations that would be reflected on the recording. You also provided the Department with a blank tape upon which to make the requested copy. The face of the request indicates the Department's receipt of your request, and the Department's understanding of the complaint under investigation at that time. The request further contains as an attachment a note prepared by the town marshal to the officer who made the recording. That attachment indicates that the town marshal told Mrs. Brumfield at the time she made the request that the tape was the "personal property" of the officer.

On March 9, 2004, Officer Hallam prepared a note to the town marshal stating that he did “not have a response at this time” and further stating that he was returning the blank tape for the copy to the town marshal because he did not need it.

On March 10, 2004, the town marshal prepared what appears to be an internal statement form describing a conversation he had with Officer Hallam on that date. According to the statement, Officer Hallam told the town marshal that he erased the tape several months earlier. It is not clear if the statement or any other written response was provided to you as a response to your record request; however, your subsequent complaint indicates that the town marshal informed you about Officer Hallam’s representations in the March 10, 2004, note on that date.

This complaint followed.¹ In response, the Department asserts that the tape was purchased by Officer Hallam, and not the Department. That said, the Department does not assert that the tape was not a public record, but instead claims that the tape was destroyed in accordance with the law and was otherwise exempt from production as an investigatory record of a law enforcement agency.

ANALYSIS

Indiana Code 5-14-3-3 provides that any person has the right to inspect and copy the public records of any public agency. Here, there is no suggestion that the Cloverdale Police Department is not a public agency subject to the APRA. The records of that public agency then, are public records, and include any writing, photograph, tape recording, or other material that is created, received, maintained, or filed by or with that public agency. IC 5-14-3-2.

In my opinion, a tape recording created by an officer of the Department during the course of a complaint investigation being conducted by the Department is a public record of the Department. The Department acknowledges that the “recording made by Officer Hallam related directly to an investigation into a report that [your] vehicle was parked illegally,” and asserts that the tape was therefore an investigatory record of the Department. That averment puts to rest any question about whether the tape was or was not a public record of the agency at the time it was created and maintained by the Department. It was. Any suggestion that the tape recording at issue here was the personal property or personal record of the officer is without merit. It does not matter that Officer Hallam purchased the tape used for the recording, if he did. There is no support for any suggestion that this tape was made for the personal use of the officer. Indeed, there is no dispute that the tape was made to memorialize a complaint investigation being conducted by the Department.² As such, the tape was created by the public agency for an official purpose of the agency, and was therefore a public record of the Department.

¹ The complaint notes that two other persons made earlier requests for the same tape and were denied access on the basis that the tape was alleged to be Officer Hallam’s personal property and not a public record of a public agency. You also indicate that one of those people filed a formal complaint with this office challenging the denial. No other complaint was filed in this matter.

² In addition to the Department’s averment above, two letters dated March 16, 2004, and sent by the town marshal to town board member Dennis Padgett and constituent Phyllis Gaddes, express the marshal’s understanding that the

The Department nonetheless contends that you were not denied a public record of a public agency because at the time you made your request the record was no longer in existence. It is true that if a public agency does not maintain a record that is responsive to a request for public records, its failure to tender such a record cannot be considered a denial under the APRA. However, that basic truth cannot be used to circumvent your right to access the public records of public agencies. That is to say, a public agency cannot destroy a record *it is required to maintain*, and then be reasonably heard to assert that its failure to produce a responsive record did not “deny or interfere with the exercise of the right [of access]” set forth in the APRA. *See* IC 5-14-3-3(b). Indeed, the APRA provides that “[a] public agency shall protect public records from loss, alteration, mutilation, or destruction.” IC 5-14-3-7(a).

The Department acknowledges that the tape was destroyed sometime between the date it was made and seven months later when you made your request for that record. The Department further avers that Officer Hallam’s destruction of this public record “conformed to Indiana statutory requirements.” The Department does not provide support for this statement by citation to any approved record retention schedule, local ordinance, or state statute governing preservation and destruction of the Department’s records. *See, e.g.*, IC 5-15-6-3 (governing preservation of public records of local public agencies and requiring that records be kept for three years except under certain circumstances). The Department does cite as support *Johnson v. State*, 507 N.E.2d 980, 982 (Ind. 1987), wherein the court held that the state’s failure to preserve a booking tape in a criminal case did not result in a violation of a defendant’s right to disclosure of exculpatory information under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), where “there [was] no showing ... that the tape represented exculpatory evidence or that it obtained any evidence at all,” and where it “appear[ed] from all of the evidence that the tapes were reused in the normal course of business.” However, *Johnson* does not stand as support for the proposition that the record at issue in that case was properly destroyed in compliance with state record preservation laws, but rather only that the destruction of that record did not entitle the criminal defendant in that case to relief from his criminal conviction. *Johnson*, 507 N.E.2d at 982; *see Jarrett v. State*, 515 N.E.2d 882, 884 (Ind. Ct. App. 1987) (“*Without condoning the loss or erasure of the tape*, this is not a case where the prosecutor or police withheld exculpatory evidence from the defense.”) (Emphasis added).

I offer no opinion on the issue of whether and for how long any public agency should maintain any public record. Indeed, that is a role and policy decision best suited for the Indiana General Assembly and for each specific public agency and the state and local public records commissions having jurisdiction over the public agency. Neither do I offer any opinion on the motive behind the Department’s destruction of the tape at issue. It is suggested that the tape was made and destroyed in the normal course of the Department’s business and following “standard operating procedures regarding records retention.” If that is the case, and if the procedures followed were in compliance with an approved record retention schedule or were otherwise in compliance with state law, the destruction of and failure to produce the record in response to

“tape was to be used as ‘evidence’ in the event of any ‘legal action’ that may stem from the August 6, 2003, incident.”

your request cannot be considered to be a violation of the APRA. However, because the Department has not in my opinion carried its burden to establish these facts, I find that its failure to produce the record violates the APRA. *See* IC 5-14-3-3(b); 5-14-3-7(a).

As a final matter, I address the Department's additional assertion that the record was subject to nondisclosure as an investigatory record of a law enforcement agency. Indiana Code 5-14-3-4(b)(1) provides law enforcement agencies with the discretion to withhold from production "investigatory records." An "investigatory record" is defined as a record containing "information compiled in the course of the investigation of a crime." IC 5-14-3-2. A "crime" means a felony or misdemeanor. IC 35-41-1-6. Assuming that the tape at issue existed and was withheld as an "investigatory record" of a law enforcement agency, it is immediately doubtful that the Department could successfully assert that exemption based on the facts presented here that Officer Hallam was responding to a complaint about an illegally parked car. In any event, whether or not the exemption has legs does not matter because the tape does not exist and the exemption was not asserted in writing in response to the request as would have been required by Indiana Code 5-14-3-9(c)(2)(A).

CONCLUSION

For the reasons set forth above, I find that the Department denied you access to its public records in violation of the APRA.

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Mr. Andrew Soshnick