

January 7, 2008

Vickie Graziani
c/o John Emry
62 West Jefferson Street
Franklin, Indiana 46131

Re: Formal Complaint 08-FC-6; Alleged Violation of the Access to Public Records Act by the Vevay Police Department

Dear Ms. Graziani:

This advisory opinion is in response to your formal complaint alleging the Vevay Police Department ("Department") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to records. I am enclosing a copy of the Department's response for your reference. It is my opinion the Department has violated the APRA by denying you access to records related to the August 24, 2005 incident. Further, the Department has not yet proven the record related to the September 28, 2005 incident is nondisclosable under the APRA.

BACKGROUND

In your complaint you allege that you requested from the Department incident or police reports for law enforcement activity at the Switzerland County High School for August 24, 2005 and September 28, 2005. You allege that the Department denied your request. You do not indicate the date you requested the record but indicate the denial of access occurred on December 7, 2007. You filed this complaint on December 10.

The Department responded to your complaint by undated letter from Police Chief Brian Morton. Chief Morton indicated the requested record was prepared in anticipation of litigation and a copy was provided to the Department's legal counsel. The Police Chief contends the record is privileged communication.

ANALYSIS

The public policy of the APRA states, "(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." I.C. §5-14-3-1. Any

person has the right to inspect and copy the public records of a public agency during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. §5-14-3-3(a).

The Department is clearly a public agency for the purposes of the APRA. I.C. §5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Department during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. §5-14-3-3(a).

Investigatory records of law enforcement agencies shall be excepted from disclosure at the discretion of the public agency. I.C. §5-14-3-4(b)(1). "Investigatory record" means information compiled during the course of the investigation of a crime. I.C. §5-14-3-2(h).

Certain records of law enforcement agencies, though, must be disclosed: information relating to arrest and summons, information relating to a person received in jail or lock-up, and daily log information. I.C. §5-14-3-5. The daily log that lists suspected crimes, accidents, or complaints, and the following information shall be made available for inspection and copying:

- (1) The time, substance and location of all complaints or requests for assistance.
- (2) The time and nature of agency's response to all complaints or requests for assistance.
- (3) If the incident involves an alleged crime or infraction:
 - (A) The time, date and location of the occurrence;
 - (B) The name and age of any victim, unless it's a victim under Ind. Code 35-42-4;
 - (C) The factual circumstances surrounding the incident; and
 - (D) A general description of any injuries, property, or weapons involved.

This information must be made available for inspection and copying. The record must be created no later than 24 hours after the suspected crime. I.C. §5-14-3-5(c).

The Department does not address your request related to the August 24, 2005 record(s). To the extent records exist which are not investigatory records or otherwise nondisclosable, the Department is required by the APRA to disclose those records or provide the statutory authority authorizing or requiring nondisclosure. I.C. §5-14-3-9.

Regarding the record related to the September 28, 2005 incident, the Department contends the responsive record was prepared in anticipation of litigation and as such is privileged communication. The APRA provides an exception to disclosure for work product of an attorney representing a public agency. I.C. §5-14-3-4(b)(2). "Work product of an attorney" means information compiled by an attorney in reasonable anticipation of litigation. The term includes the attorney's:

- (1) notes and statements taken during interviews of prospective witnesses; and
- (2) legal research or records, correspondence, reports, or memoranda to the extent that each contains the attorney's opinions, theories, or conclusions.

I.C. §5-14-3-2(p).

This definition does not except from disclosure records created by a public agency and sent to an attorney in anticipation of litigation. As such, it is my opinion this exception does not apply to the September 28 record.

While the Department's response to your complaint was a two-line letter absent any statutory authority, I am interpreting the letter to also invoke the attorney client privilege. The source of the attorney-client privilege in Indiana is found in Ind. Code §34-46-3-1, which provides that the confidential communications between attorney and client are privileged and may be kept confidential. I.C. §34-46-3-1(1); *See Buntin v. Becker*, 727 N.E.2d 734, 740-41 (Ind. Ct. App. 2000). The APRA exempts from disclosure any records declared confidential by state statute. I.C. §5-14-3-4(a)(1). Of course, the public agency must establish that the records at issue fall within this exemption, and the applicability of the privilege must be established as to each question asked or document sought. *Buntin*, 727 N.E.2d at 740-41; *Owens v. Best Beers of Bloomington, Inc.*, 648 N.E.2d 699, 702 (Ind. Ct. App. 1995). The essential prerequisites to invocation of the privilege are (1) the existence of an attorney-client relationship; and (2) presence of a confidential communication. *Buntin*, 727 N.E.2d at 740-41; *Mayberry v. State*, 670 N.E.2d 1262, 1266 (Ind. 1996).

Here, the Department indicates there exists a relationship between the Department and an attorney. The Department indicates that the record was given to the attorney but goes no further to address the invocation of the attorney-client privilege. To withhold the record from disclosure, the Department must establish the record falls within the exemption. The burden of proof rests with the public agency to sustain its denial of access under the APRA. I.C. §5-14-3-9(f).

CONCLUSION

For the foregoing reasons, it is my opinion the Department has violated the APRA by denying you access to records related to the August 24, 2005 incident. Further, the Department has not yet proven the record related to the September 28, 2005 incident is nondisclosable under the APRA.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Brian Morton, Chief, Vevay Police Department