

March 12, 2008

Piet Levy
1433 East 83rd Avenue
Merrillville, Indiana 46410

Re: Formal Complaint 08-FC-64; Alleged Violation of the Access to Public Records Act by the Merrillville Police Department

Dear Mr. Levy:

This advisory opinion is in response to your formal complaint alleging the Merrillville Police Department (“Department”) violated the Access to Public Records Act (“APRA”) (Ind. Code 5-14-3) by denying you access to records, namely a series of recordings of 9-1-1 telephone calls. A copy of the Department’s response is enclosed for your reference. It is my opinion that the Merrillville Police Department did not violate the APRA.

BACKGROUND

You submitted this complaint on February 21, 2008, alleging denial of access to tape recordings from February 4 and 5, 2008 of 9-1-1 telephone calls (hereinafter “911 tapes”) related to the disappearance of an individual from a hospital in Merrillville. You allege the Department has denied access based on *Opinion of the Public Access Counselor 07-FC-274*, in which I said “911 tapes may be withheld from disclosure as investigatory records of a law enforcement agency when the agency can sustain the burden of proof of nondisclosure.” You allege my reasoning from that opinion is “very vague, at best” and question its application here. You further indicate the Gary Police Department has provided public access to 911 tapes regarding a shooting death that is still the subject of an open investigation.

The Department responded to the complaint by letter dated February 22 from Chief Joseph Petruch. The Chief asserts the 911 tapes are investigatory records. The Chief provides a list of information the Department disclosed to you but contends the 911 tapes contain information from hospital employees about the victim and procedural details surrounding her disappearance from the hospital. The Department further asserts that disclosure of the 911 tapes may expose the Department’s decision making process in a way that prevents a thorough investigation. Further, the Department contends it is common for investigators to question a caller of a 911 recording and replay the recording during the questioning. Finally, the Chief

contends that the Gary's Police Department's decision to release 911 tapes does not remove the Department's discretion related to 911 tapes.

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. 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).

A "public record" means 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. I.C. § 5-14-3-2(m).

Investigatory records of law enforcement agencies (except those listed in section 5 of the APRA) may be excepted from disclosure at the discretion of the agency. I.C. § 5-14-3-4(b)(1). "Investigatory record" means information compiled in the course of the investigation of a crime." I.C. § 5-14-3-2(h). A law enforcement agency means an agency or department that engages in the investigation, apprehension, arrest, or prosecution of alleged criminal offenders. It includes the state police department, local police or sheriff's departments, and prosecuting attorneys, among others. I.C. § 5-14-3-2(1)(6).

The burden of proof for nondisclosure lies with the public agency that would deny access to the record and not to the person seeking to inspect and copy the record. I.C. § 5-14-3-1.

As you acknowledge, I have previously addressed the issue of 911 tapes claimed as investigatory records of law enforcement agencies, in *Opinion of the Public Access Counselor 07-FC-274*. While I appreciate that you contend my reasoning to be "very vague, at best," I respectfully disagree. Because the issue here so closely mirrors the issue presented in *Opinion of the Public Access Counselor 07-FC-274*, I reaffirm that opinion and provide the pertinent portions of that analysis again here.

The Department denied your request based on the investigatory record exception to disclosure provided in the APRA. I.C. §5-14-3-4(b)(1). You assert your belief the 911 tape cannot be excepted from disclosure by the Department.

It is my opinion that as a general premise, 911 tapes are part of the daily record of activity. It is conceivable that many 911 calls are taken and handled in a routine matter and often do not involve an alleged crime or lead to an investigation of criminal activity. It is my opinion that those 911 tapes are presumed to be public records subject to disclosure under the APRA. See I.C. § 5-14-3-3.

Regarding the issue whether this particular 911 tape may be withheld from disclosure under the investigatory record exception, the Department is a law enforcement agency under the APRA and as such has the discretion to withhold from disclosure investigatory records compiled in the course of the investigation of a crime. I.C. §§ 5-14-3-2(h), 5-14-3-2(l)(6), 5-14-3-4(b)(1). The definition of investigatory record includes records “compiled” during the investigation and not records “created” during the investigation. Because “compiled” is not defined in the APRA, we must look at the plain, ordinary meaning of the word. “When interpreting a statute the words and phrases in a statute are to be given their plain, ordinary, and usual meaning unless a contrary purpose is clearly shown by the statute itself.” *Journal Gazette v. Board of Trustees of Purdue University*, 698 N.E.2d 826, 828 (Ind. Ct. App. 1998). “Compile” means “to gather (materials borrowed or transcribed) into a volume or into orderly form.” *New Illustrated Webster’s Dictionary of the English Language*, J. G. Ferguson Publishing Company, 1992.

The United States Supreme Court addressed the definition of “compile” in a case involving a claim under the Federal Freedom of Information Act (“FOIA”), 5 USCS 552. Under exception 7 of the FOIA, certain “records or information compiled for law enforcement purposes” are excepted from disclosure. The FOIA law enforcement exception is much more limited than the APRA investigatory record exception, but both contain the term “compiled.” 5 USCS 552(b)(7); I.C. § 5-15-3-2(h). The Court said the following:

“As is customary, we look initially at the language of the statute itself. The wording of the phrase under scrutiny is simple and direct: ‘compiled for law enforcement purposes.’ The plain words contain no requirement that compilation be effected at a specific time. The objects sought merely must have been ‘compiled’ when the Government invokes the Exemption. A compilation, in its ordinary meaning, is something composed of materials collected and assembled from various sources or other documents. See Webster’s Third New International Dictionary 464 (1961); Webster’s Ninth New Collegiate Dictionary 268 (1983). This definition seems readily to cover documents already collected by the Government originally for non-law-enforcement purposes.” *John Doe Agency v. John Doe Corp.*, 493 U.S. 146 at 153 (1989).

Because the definition of investigatory records uses the word “compiled” rather than “created,” it is my opinion that records withheld from disclosure using the investigatory records exception need not be created during the course of the investigation. Rather, records gathered in the course of an investigation of a crime, regardless of when they were created, may be withheld from disclosure under this exception. The legislature has put in place this exception to allow law enforcement agencies to conduct their investigations without disclosing all of their investigatory tools, and I believe the legislature could have limited the exception to only records created during the investigation. Since that is not the case, it is my opinion 911 tapes created before an investigation has commenced may be withheld from disclosure using the investigatory records exception, if the law enforcement agency can sustain the burden of proving the 911 tape is part of the materials compiled during the course of a criminal investigation and would fall under the section 4(b)(1) exception.

Here, the Department asserts that the 911 tapes are part of the materials compiled in the investigation of a crime, namely the investigation into the death of an individual. As the Department has indicated, it is common for investigator to use the 911 tapes when questioning the person who placed the 911 call. The officer can then ask questions surrounding the call to gain more information in the investigation. It is my opinion this description as to how the 911 tape will be used sustains the burden of proof placed on the Department by I.C. § 5-14-3-1.

The public access counselor previously addressed the issue of 911 tapes in *Opinion of the Public Access Counselor 06-FC-206*, wherein Counselor Davis rejected a *per se* rule that 911 tapes are always excepted from disclosure. For the reasons outlined previously, I agree with that opinion. But Counselor Davis goes on to suggest that the 911 tapes could not be withheld from disclosure because they were not compiled during the course of an investigation. *Opinion of the Public Access Counselor 06-FC-206* at 4. I believe Counselor Davis was using “created” and “compiled” interchangeably, and as such I do not agree with that opinion.

In *Opinion of the Public Access Counselor 06-FC-206*, Counselor Davis indicated Indiana courts have not addressed the issue whether 911 tapes may be withheld from disclosure under the investigatory records exception but cites an Ohio case wherein the Ohio Supreme Court adopted a *per se* rule mandating disclosure. *State ex rel. Cincinnati Enquirer v. Hamilton County*, 662 N.E.2d 334 (Ohio 1996). That case can be distinguished from the instant matter, though, by the language of Ohio’s investigatory records exception. As the Department points out, Ohio’s investigatory records exception is much more limited than Indiana’s. Ohio law provides the following:

(2) ‘Confidential law enforcement investigatory record’ means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following:

- (a) The identity of a suspect who has not been charged with the offenses to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;
- (b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose the source’s or witness’s identity;
- (c) Specific confidential investigatory techniques or procedures or specific investigatory work product;
- (d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.

Ohio Revised Code §149.43.

Because Ohio’s exception is much more limiting than the APRA’s broad investigatory record exception, I do not believe this case supports a *per se* rule for mandatory disclosure of 911 tapes in Indiana. While other states have also addressed the issue of the release of 911 tapes, none who have addressed it have investigatory record exceptions as broad as the APRA’s. And in states whose courts have allowed the tapes to be excepted from disclosure, the issue

surrounding 911 tapes is the issue of personal privacy of the caller or the victim, which is not addressed in the APRA. It is my opinion 911 tapes may be withheld from disclosure as investigatory records of a law enforcement agency when the agency can sustain the burden of proof of nondisclosure.

Regarding your argument that the Gary Police Department has made similar 911 tapes available for public inspection, this argument is immaterial to the question whether these 911 tapes are appropriately withheld under the investigatory records exception. The investigatory records exception is a discretionary exception, which means each agency has the discretion to withhold records using the exception. *See* I.C. § 5-14-3-4(b)(1). As such, the Gary Police Department's disclosure of investigatory records has no bearing on the Merrillville Police Department's decision to withhold investigatory records.

CONCLUSION

For the foregoing reasons, it is my opinion the Merrillville Police Department did not violate the APRA

Best regards,



Heather Willis Neal
Public Access Counselor

cc: Chief Joesph Petruch, Merillville Police Department