



**STATE OF INDIANA**  
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April 15, 2013

Ms. Brooke N. O'Shields  
329 Main Street 3D  
Evansville, Indiana 47708

*Re: Formal Complaint 13-FC-112; Alleged Violation of the Access to Public Records Act by the Lafayette Police Department*

Dear Ms. O'Shields:

This advisory opinion is in response to your formal complaint alleging the Lafayette Police Department ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Stacey Mabbitt, Chief Records Technician, responded on behalf of the Department. Her response is enclosed for your reference.

#### BACKGROUND

In your formal complaint, you allege that on March 20, 2013, you contacted the Department by telephone and requested a copy of a probable cause affidavit ("Affidavit") from a criminal matter that occurred on March 11, 2013. You spoke with two representatives of the Department, including Ms. Mabbitt. Ms. Mabbitt informed you that the Affidavit was not a public record. You believe that the Department's denial of your request was improper.

In response to your formal complaint, Ms. Mabbitt advised that it is the Department's policy that once a case is forwarded to the Tippecanoe County Prosecutor ("Prosecutor"), the Department is unable to release information from the matter to the public until a decision has been made by the Prosecutor to file charges. If charges are filed, the Department will not release the information regarding the case until there has been a disposition by the Court so as not to hinder the judicial process. It is Ms. Mabbitt's understanding that any probable cause information is released by the Prosecutor, not the Department. When the Department receives a call requesting information from a case that has been sent to the Prosecutor, the person is advised to contact the Prosecutor or request a subpoena to order the Department to release any information in an ongoing disputed case. Ms. Mabbitt advised that the Department is working under I.C. § 5-14-3-4(b)(1).

## 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 excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A “public record” is defined as 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. *See* I.C. § 5-14-3-2(n). There is no dispute that the Affidavit that has been requested would be considered a “public record” as it is created, retained, and/or maintained by the Department. However, the determination of whether a record is a “public record” under the APRA and whether the agency has the statutory authority to withhold the public record in response to a request is a separate inquiry.

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). Here, you made an oral request of the Department. I.C. § 5-14-3-9(c) provides that if a request is made orally, either in person or by telephone, a public agency may deny the request orally. The Department orally denied your request for a copy of the Affidavit at the time of your initial inquiry. As such, it is my opinion that the Department did not violate the APRA in response to your oral request.

As a refresher for all parties, I would note that if an oral request that has been denied is renewed in writing, a public agency may deny the request if the denial is in writing and includes a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). If you had renewed your oral request in writing, the Department would have thus been required to cite to the specific exemption within the law that would allow it to withhold the record in response to your request.

The investigatory records exception to the APRA provides that a law enforcement agency has the discretion to disclose its investigatory records. *See* I.C. § 5-14-3-4(b)(1). An investigatory record is “information compiled in the course of the investigation of a crime.” *See* I.C. § 5-14-3-2(h). The investigatory records exception does not apply only to records of ongoing or current investigations; rather, it applies regardless of whether a crime was charged or even committed. The exception applies to all records compiled during the course of the investigation, even after an investigation has been completed. The investigatory records exception affords law enforcement agencies broad discretion in

withholding such records. *See Opinion of the Public Access Counselor 09-FC-157*. If the Department had received a written request for the Affidavit, it would retain the discretion to deny the request pursuant to the investigatory records exception as the Affidavit was created, retained, and/or maintained during the course of the investigation of a crime. In response to a written request, the Department would have been required to deny the request in writing, cite to I.C. § 5-14-3-4(b)(1), and provide the name and title or position of the person responsible for the denial. If the Affidavit had been submitted to the Prosecutor, the Affidavit would then also become a public record of the Prosecutor's Office. The Prosecutor would also retain discretion to disclose a record pursuant to the investigatory records exception, as it is considered a law enforcement agency. The Department has provided that it generally releases information regarding a case after the Court has reached a disposition; from what has been provided the Court has yet to reach a disposition in the matter that you have requested the Affidavit for.

Beyond the investigatory records exception, the APRA does require that certain law enforcement records be made available for inspection and copying. *See* I.C. § 5-14-3-5. In this regard, information must be made public in three instances: if a person is arrested or summoned for an offense, if a person is received in a jail or lock-up, and where an agency has received a call regarding a suspected crime, accident, or complaint. *Id.* I.C. § 5-14-3-5(a) provides that if a person is arrested or summoned for an offense, the following information shall be made available for inspection and copying:

- (1) Information that identifies the person including the person's name, age, and address.
- (2) Information concerning any charges on which the arrest or summons is based.
- (3) Information relating to the circumstances of the arrest or the issuance of the summons, such as the:
  - (A) time and location of the arrest or the issuance of the summons;
  - (B) investigating or arresting officer (other than an undercover officer or agency); and
  - (C) investigating or arresting law enforcement agency.

If a person is received in a jail or lock-up, I.C. § 5-14-3-5(b) provides that the following information shall be made available for inspection and copying:

- (1) Information that identifies the person including the person's name, age, and address.
- (2) Information concerning the reason for the person being placed in the jail or lock-up, including the name of the person on who order the person is being held.
- (3) The time and date that the person was received and time and date of the person's discharge or transfer.
- (4) The amount of the person's bail or bond, if it has been fixed.

Finally, I.C. § 5-14-3-5(c) obligates law enforcement agencies to maintain a daily log that lists suspected crimes, accidents, or complaints. *See* I.C. § 5-14-3-5(c). The following information must be maintained in the daily log:

- (1) The time, substance, and location of all complaints or requests for assistance received by the agency.
- (2) The time and nature of the 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 occurrence;
  - (B) the name and age of any victim, unless the victim is a victim of a crime under IC 35-42-4 or IC 35-42-3.5;
  - (C) the factual circumstances surrounding the incident; and
  - (D) a general description of any injuries, property, or weapons involved.

Counselor Neal provided the following guidance regarding a law enforcement agency's requirements pursuant to I.C. § 5-14-3-5(c):

In some instances, a law enforcement agency will not maintain a separate record titled "daily log" but will instead use the daily incident reports to substitute for the daily log. In that case, when the agency receives a request for the daily log information, the agency will generally provide copies of incident reports. In some cases, the agency will redact from the incident report any information not required to be maintained in a daily log. I have advised agencies this is acceptable so long as the daily log information is always available within twenty-four hours and so long as the agency provides at least the information which is required by I.C. § 5-14-3-5(c) to be made available for inspection and copying. *Opinion of the Public Access Counselor 09-FC-93.*

While the Department has the discretion to deny a written request for the Affidavit pursuant to the investigatory records exception, it would still be required to provide information pursuant to section 5 of the APRA. The Department could not deny a request for records made pursuant to section 5 of the APRA by citing to the investigatory records exception.

## CONCLUSION

For the foregoing reasons, it is my opinion that the Department did not violate the APRA in response to your oral 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" at the end.

Joseph B. Hoage  
Public Access Counselor

cc: Stacey Mabbitt