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May 31, 2013

Mr. Stephen W. McIntyre
309 N. Jefferson Street
Huntington, Indiana 46750

Re: Formal Complaint 13-FC-141; Alleged Violation of the Access to Public Records Act by the Huntington County Sheriff's Department

Dear Mr. McIntyre:

This advisory opinion is in response to your formal complaint alleging the Huntington County Sheriff's Department ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Robert S. Garrett, County Attorney, responded on behalf of the Department. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you provide that you were charged with one count of Theft, as a Class D Felony, under Cause Number 35-D01-1304-FD-00078 in the Huntington Superior Court. At the time of the charge, you were employed as a Jailer in the Huntington County Jail under the direction of Huntington County Sheriff Terry Stoffel. You are alleged to have knowingly and intentionally exerted unauthorized control over property belonging to Officer Dave McVoy, specifically cash monies, sometime between April 3, 2013 through April 18, 2013. The cash in question was monies garnered from Officer McVoy's operation of a soft drink sale conducted in the Department's employee break room.

On April 19, 2013, your attorney filed a written request for records to the Department for copies of all business records related to the purchase and sale of beverages in the Department's employee break room. On April 22, 2013, the Department denied your request pursuant to the investigatory records exception and cited to I.C. § 5-14-3-4(b). You assume that the Department was referring to I.C. § 5-14-3-4(b)(1).

You disagree with the Department's reliance on the investigatory records exception to deny your request. You note that the request is seeking records that are, or should have been, kept in the Department's ordinary course of business. As applicable here, Officer McVoy was operating a business in the Department with the presumed

supervision of Sheriff Stoffel. While Officer McVoy was likely running the business, the Department is responsible for the operation of this business since it was being conducted within the confines and under the supervision of the Department. Accordingly, the Department would have access to the records of the operation. Investigatory records are those records that would be created specifically in response to a criminal act occurring or are the direct result of a criminal investigation. You maintain that investigatory records are not those records that are kept in the ordinary course of business that are created everyday as a direct result from the operation of the business. You argue that the APRA does not support the Department's position, in that any record "touched upon" by a criminal investigation would become an investigatory record. Although there are certain records that may be "compiled" because of a criminal investigation that may be exempt, none of those exceptions would be applicable here. You find further support for your position in Indiana Rules of Evidence 803(6), (8).

In response to your formal complaint, Mr. Garrett provided that he responded to your request for records on April 22, 2013. At the time of his response it was Mr. Garrett's understanding that the Department maintained certain records which were responsive to your request, which were part of the ongoing criminal investigation. The Department exercised its discretion and denied your request as the request sought investigatory records of a law enforcement agency. Since that time, Mr. Garrett has been informed by Sheriff Stoeffel that the Department does not maintain any records responsive to your request. You have been informed of this via the Department's response to your Request for Production of Documents directed to a Third Party. However, if the Department did maintain records responsive to your request, Mr. Garrett advised that your request could be denied at the Department's discretion pursuant to the investigatory records exception pursuant to I.C. § 5-14-3-4(b).

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 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. *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 include information regarding how or when the agency intends to comply. Here, the Department complied

with the requirements of section 9(b) of the APRA by responding to your written request, in writing, within seven (7) days of its receipt.

Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). Counselor O'Connor provided the following analysis regarding section 9:

Under the APRA, the burden of proof beyond the written response anticipated under Indiana Code section 5-14-3-9(c) is outlined for any *court action* taken against the public agency for denial under Indiana Code sections 5-14-3-9(e) or (f). If the public agency claimed one of the exemptions from disclosure outlined at Indiana Code section 5-14-3-4(a), then the agency would then have to either “establish the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit” *to the court*. Similarly, if the public agency claims an exemption under Indiana Code section 5-14-3-4(b), then the agency must prove to the court that the record falls within any one of the exemptions listed in that provision and establish the content of the record with adequate specificity. There is no authority under the APRA that required the IDEM to provide you with a more detailed explanation of the denials other than a statement of the exemption authorizing nondisclosure, but such an explanation would be required if this matter was ever reviewed by a trial court. *Opinion of the Public Access Counselor 01-FC-47*.

In denying your request the Department, in writing, cited to I.C. § 5-14-3-4(b) and stated that “the records requested for public release are excepted from release at the discretion of the Huntington County Sheriff’s Department as investigatory records.” The written denial was signed by Mr. Garrett and provided his title as Huntington County Attorney. As such, it is my opinion that the Department complied with the requirements of section 9 of the APRA in denying your request. Although here there was no confusion as to which exemption the Department was relying on to deny your request, I would note that in the future, when the Department denies a request pursuant to the investigatory records exception, it should ensure that it to cites to the specific exemption, I.C. § 5-14-3-4(b)(1), as opposed to a general reference to I.C. § 5-14-3-4(b).

The Department has now provided that it does not maintain any records that would be responsive to your request. “[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA.” *Opinion of the Public Access Counselor 01-FC-61; see also Opinion of the Public Access Counselor 08-*

FC-113 (“If the records do not exist, certainly the [agency] could not be required to produce a copy...”). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. As such, it is my opinion that the Department did not violate the APRA by failing to produce records that do not exist.

Although moot in light of the Department not maintaining any records that would be responsive to your request, it is my opinion that the Department could have withheld records responsive, at its discretion, pursuant to the investigatory records exception found under I.C. § 5-14-3-4(b)(1). The investigatory records exception to the APRA provides that a law enforcement agency has the discretion to disclose its investigatory records. This is not to say that all records maintained by the Department are considered investigatory. 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*. You specifically sought copies of all business records related to the purchase and sale of beverages in the Department’s employee break room. If the Department had maintained records responsive to your request, those records that had been compiled by the Department during the course of its theft investigation would be disclosable at the Department’s discretion. Alternatively, if no such criminal investigation had been conducted by the Department and the requested records existed, in such a scenario the investigatory records exception would not be applicable and the records would be required to be disclosed.

CONCLUSION

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

Best regards,

A handwritten signature in black ink, appearing to read 'J. Hoage', written in a cursive style.

Joseph B. Hoage
Public Access Counselor

cc: Robert S. Garrett