

March 14, 2006

Martin A. Jones
#995077
Pendleton Correctional Facility
P.O. Box 30
Pendleton, IN 46064

Re: Formal Complaint 06-FC-36; Alleged Violation of the Access to Public Records Act by the Pendleton Correctional Facility

Dear Mr. Jones:

This is in response to your formal complaint alleging that the Pendleton Correctional Facility ("Facility") violated the Access to Public Records Act ("APRA") by failing to disclose a record.

BACKGROUND

You filed a formal complaint with the Office of the Public Access Counselor on February 13, 2006. You allege that on January 23, 2006, you requested a copy of a statement of Office C.E. Faulds. You claim that this statement was given during the investigation of your tort claim against the Facility. You allege that your tort claim was denied, and you now wish to obtain a copy of the Faulds statement that was compiled by the Facility regarding its investigation into the loss of your headphones.

I sent a copy of your complaint to the Facility. Mr. David Barr, Administrative Assistant, issued a letter and provided documentation in response. I have enclosed a copy of the Facility's response for your review. Mr. Barr explained that your request for the Faulds statement was denied because by Facility policy, all documents within the tort claim file are confidential and protected by attorney work product privilege. Once the file is completed at the facility level the file is sent to Legal Division at Central Office, or sent to the Attorney General's office if appropriate.

The Facility's denial letter of February 9, 2006, gave two reasons for the denial. The first was that the documents or material dealing with litigation or anticipated litigation are confidential as attorney work product. The second reason is that the information you seek is classified as confidential pursuant to Administrative Rule 210 IAC 1-6-2. Mr. Barr highlighted 210 IAC 1-6-2(3)(E), which states that internal investigation information is confidential. He also cited Indiana Code 5-14-3-4(a)(2), which provides that a public agency must withhold records declared confidential by rule adopted by a public agency under specific authority to classify public records as confidential granted to the public agency by statute.

ANALYSIS

Any person may inspect and copy the public records of any public agency during the agency's regular business hours, except as provided in section 4 of the Access to Public Records Act. Ind. Code 5-14-3-3(a). A public agency may deny a written request for a record if the denial is in writing and the denial includes a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record, and the name and the title or position of the person responsible for the denial. IC 5-14-3-9(c). Exceptions to disclosure are to be narrowly construed. The burden of proof is on the public agency that would deny a record. IC 5-14-3-1.

Two types of records that may be withheld from disclosure are relevant to the Faulds statement. The first is a record that has been declared confidential by rule adopted by a public agency under specific authority to classify public records as confidential granted to the public agency by statute. Under IC 11-8-5-2, the Department of Correction, the agency responsible for the Facility, may classify certain records as confidential. From my the relevant portion of the statute, the Department of Correction may classify as confidential personal information about a committed person relating to a pending investigation of alleged criminal activity or other misconduct. IC 11-8-5-2(a)(2). The Department of Correction has promulgated 210 IAC 1-6-2. Under 210 IAC 1-6-2, internal investigation information is confidential. It is not apparent to me that the Facility's investigation of a tort claim is classified as confidential under its rule, or permitted to be classified as confidential under the statute. The statement given in your tort claim investigation does not relate to a committed person's alleged criminal activity or other misconduct. It is to this part of the statute that the rule relates making "internal investigation information" confidential, from my review of the statute. It is my opinion that the Facility may not withhold the Faulds statement under IC 5-14-3-4(a)(2) unless it can show that the Faulds statement, as material compiled in its investigation of your tort claim, meets the exception. It is the Facility's burden to sustain its denial on this basis.

It is also my opinion that the Facility has not properly withheld the Faulds statement as attorney work product. Under IC 5-14-3-4(b)(2), the work product of an attorney representing, pursuant to state employment or an appointment by a public agency, (A) a public agency, (B) the state, or (C) an individual, may be withheld at the discretion of the agency. "Work product of an attorney" means information compiled by an attorney in reasonable anticipation of litigation and 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. IC 5-14-3-2(p).

The essential function of the work product exception to discoverability is to protect from disclosure an attorney's "mental impressions, conclusions, opinions, or legal theories." *Hicks v. State*, 544 N.E.2d 500 (Ind. 1989). Based on the definition of attorney work product contained in the APRA and caselaw regarding attorney work product, it is my opinion that the Faulds statement, to the extent it was generated during an internal investigation of your tort claim at the Facility, does not meet the attorney work product exception. It does not contain the attorney's opinions, theories, or conclusions, from the information presented by the Facility. It is also my opinion that the Facility may not regard every document that finds its way into the Facility's litigation file as attorney work product, as stated in the Facility policy. Each specific document in a litigation file must be evaluated to determine whether it meets the attorney work product exception or some other exception in the APRA.¹

CONCLUSION

For the foregoing reasons, it is my opinion that the Pendleton Correctional Facility has not sustained its burden of proof in denying you a copy of the Faulds statement. Unless the Facility can sustain its denial under the original bases or some other exception, it must disclose the Faulds statement to you.

Sincerely,

Karen Davis
Public Access Counselor

cc: David Barr

¹ For example, a public agency may withhold, in its discretion, information that is intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making. IC 5-14-3-4(b)(6). I do not express any opinion regarding whether the Faulds statement fits this exception.