



# STATE OF INDIANA

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October 4, 2010

Mr. Larry E. Kuhn, DOC # 894858  
4490 W. Reformatory Rd.  
Pendleton, IN 46064

*Re: Formal Complaint 10-FC-205 Alleged Violation of the Access to  
Public Records Act by PEN Products*

Dear Mr. Kuhn:

This advisory opinion is in response to your formal complaint alleging PEN Products, a division of the Indiana Department of Correction, violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*

## BACKGROUND

You allege in your complaint that you sent a records request to PEN Products on August 13, 2010. As of August 30th, you had not received a response. Your request sought a listing of all commissary items sold by PEN Products to the offenders housed at Indiana State Prison, along with other information. My office forwarded your complaint to PEN Products, but as of today we have not received a response.

## 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." I.C. § 5-14-3-1. PEN Products, a division of the Indiana Department of Correction, does not contest that it is 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 PEN Product's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

A request for access to public records may be oral or written. I.C. § 5-14-3-3(a); § 5-14-3-9(c). 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. I.C.

§ 5-14-3-9(b). If the request is delivered in person and the agency does not respond within twenty-four (24) hours, the request is deemed denied. I.C. § 5-14-3-9(a). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. If a request is made orally, either in person or by telephone, a public agency may deny the request orally. I.C. § 5-14-3-9(c). When the request is made in writing and the agency denies the request, the agency must deny the request in writing and must 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. I.C. § 5-14-3-9(c).

Here, it is unclear to me why PEN Products failed to respond to your request. Under the APRA, a public agency that withholds a public record bears the burden of showing that the record is exempt. I.C. §§ 5-14-3-1, 5-14-3-9(f) and (g). Exceptions to disclosure are narrowly construed. I.C. § 5-14-3-1. Because PEN Products has not explained why it denied your request, I cannot find that it has sustained its burden of proof to withhold the requested records. I note, however, that if PEN Products does not already maintain a list of the information you requested, the APRA does not require that it create a new record to satisfy your request. *Opinion of the Public Access Counselor 10-FC-56* (“Where records are not yet created, a public agency does not violate the APRA by refusing to produce them.”)

I encourage PEN Products to either produce the requested records to you or cite to an applicable exception to the APRA that provides it with the legal authority to withhold the records. If the records exist and PEN Products persists in its denial of access following the issuance of an advisory opinion from this office, I leave you to your remedies before a court pursuant to Ind. Code § 5-14-3-9(e).

#### CONCLUSION

For the foregoing reasons, it is my opinion that PEN Products violated the APRA if it failed to respond to your request.

Best regards,



Andrew J. Kossack  
Public Access Counselor