



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
ANDREW J. KOSSACK

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

October 13, 2010

Mr. James A. Hartman
9744 Castle Woods Cove
Indianapolis, IN 46280

*Re: Formal Complaint 10-FC-206; Alleged Violation of the Access to
Public Records Act by the Indiana Horse Racing Commission*

Dear Mr. Hartman:

This advisory opinion is in response to your formal complaint alleging the Indiana Horse Racing Commission ("IHRC") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* IHRC's response to your complaint is enclosed for your reference.

BACKGROUND

In your complaint, you allege that on June 22, 2010, you submitted a records request to IHRC Controller Wendi Samuelson-Dull for information related to the Indiana Thoroughbred Breed Development Fund (the "Fund"), which the IHRC oversees. On June 23, 2010, IHRC Assistant Executive Director Deena Pitman acknowledged your request. IHRC provided responsive documents to you on July 19th. The IHRC responded to most of your request to your satisfaction, but you believe its response was insufficient with regard to that portion of your request that sought "[d]ocumentation of the balance and location of the [Fund]." Specifically, there was an unknown balance missing from the Fund in the amount of approximately \$1 million. You state that Ms. Samuelson-Dull and Mike Smith from the State Budget Agency ("SBA") acknowledged the missing balance, but IHRC's response did not satisfy your request because it does not account for that amount. You sent an email to Ms. Pitman on August 15th in which you informed her that you viewed IHRC's response as incomplete, but as of September 9th you had not received a response.

Ms. Pitman responded to your complaint on behalf of IHRC. In a letter to you dated September 30, 2010, she says that she was out of the office from August 5th to September 27th. During that time, her email account sent automatic responses to all emails she received. The automatic responses noted that Ms. Pitman was out of the office for an extended period and provided a telephone number for inquiries that you

could have used to contact another member of the IHRC. Further, she states that IHRC attempted to respond fully to your June 22nd request and apologized if IHRC misunderstood what you were seeking. After reviewing your August 15th email to her, she is still unclear about exactly what you are requesting. Ms. Pitman included additional documentation with her September 30th letter to you that she hopes satisfies your request, and notes that if you seek documentation regarding the Fund prior to the correction made by SBA, IHRC does not maintain that information. Finally, if you are still not satisfied by IHRC's response, Ms. Pitman states that she will provide other records maintained by IHRC if you can provide additional clarification regarding what you are seeking.

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. IHRC does not contest that it is a “public agency” under the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy IHRC's public records during regular business hours unless the public records are excepted from disclosure as nondisclosable under the APRA. I.C. § 5-14-3-3(a).

As an initial matter, I note that some of the allegations in your complaint are untimely. Formal complaints alleging violations of the APRA must be filed within 30 days of the denial. I.C. § 5-14-5-7. If a request for access to public records is delivered in person or via the telephone and the agency does not respond within 24 hours, the request is deemed denied. I.C. § 5-14-3-9(a). You claim that IHRC initially provided an incomplete response to you on July 19th. You filed your complaint on September 9th, which is more than 30 days after that denial. Consequently, that portion of your complaint is untimely and will not be addressed in this opinion.

With regard to your August 15th request for additional records, the APRA provides that if a request is delivered by mail or facsimile and the agency does not respond to the request within seven days of receipt, the request is deemed denied. I.C. § 5-14-3-9(b). It is unclear when Ms. Pitman received your request, but she states that she was out of the office from August 5th to September 27th. If neither Ms. Pitman nor anyone else at IHRC received your August 15th request until Ms. Pitman returned to work on September 27th, IHRC complied with the APRA when Ms. Pitman responded to your request on September 30th because that was within seven days of her receiving the request. *See Opinion of the Public Access Counselor 02-FC-06* (“Although [the requester] may have received confirmation that the [agency] received the facsimile[, that] does not guarantee that someone actually received the request.”).

Here, it is not clear that the IHRC ever denied your request within the meaning of the APRA. Under the APRA, a request for inspection or copying must identify with reasonable particularity the record being requested. I.C. § 5-14-3-3(a). Upon receipt of your August 15th request for supplementary documentation, Ms. Pitman forwarded you

additional records and requested that you provide clarification about what you are seeking if the supplementary response was not satisfactory. If a public agency cannot identify what records a requester is seeking, it is reasonable to ask the requester to provide clarification. I trust IHRC will release all disclosable records to you upon request.

Finally, if IHRC does not maintain the specific record you seek, it did not violate the APRA by failing to produce it. “[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....”).

CONCLUSION

For the foregoing reasons, it is my opinion that if IHRC did not receive your August 15th request until September 27th, IHRC did not violate the APRA.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive style with a large, sweeping initial 'A'.

Andrew J. Kossack
Public Access Counselor

Cc: Deena Pitman