



STATE OF INDIANA

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January 10, 2011

Mr. Michael A. Windhorn
DOC # 169606
3038 W. 850 S.
Bunker Hill, IN 46914-9810

Re: Formal Complaint 10-FC-311; Alleged Violation of the Access to Public Records Act by the White County Sheriff's Department

Dear Mr. Windhorn:

This advisory opinion is in response to your formal complaint alleging the White County Sheriff's Department ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* I have enclosed the Department's response for your reference.

BACKGROUND

According to your complaint, on July 31, 2010, you wrote to the Department and requested "a copy of [your] entire file from my incarceration in the White County Jail during 2006 and 2007." On August 9th, Jail Commander Stephen Rettig responded to your letter and informed you that you could visit the Department during business hours. Because you are incarcerated, however, you cannot visit the Department in person. On September 11, 2010, you sent another request to the Department, but you did not receive a response. You sent a third letter to the Department on November 9th, which was received by the Department the next day, but you did not receive a response to that letter either. On November 15th, you were in the White County Jail for a court hearing. At that time, you asked an officer if you could see your file, but he said that you would need to ask Jail Commander Serena Day. You spoke with Ms. Day the next day, but she informed you that you "could not have the copies until [you] paid [ten cents] per page. She asked you if you had any money on you at that time, but as a Department of Correction prisoner you did not and could not. A few minutes later, she returned with your file and a copy of the letter from Cdr. Rettig. You claim that she read the bottom part of the letter, which informed you that you could visit the jail during business hours. When you asked to see the file, she refused to provide it until you produced the ten cents per page copy fee first. She left without letting you see the file.

Legal Deputy A. Howard Williams responded to your complaint on behalf of the Department. Mr. Williams states that the Department promptly responded to your request on August 9, 2010. At that time, the Department informed you that records would be available to you for inspection at the jail during regular business hours, and that copies would be ten cents per page. With regard to the substance of your request, Mr. Williams notes that the Department does not maintain most of the records that you requested, and that the remaining portions of your request did not identify the records you sought with reasonable particularity. He argues that the Department is not obligated to manually search through its records to identify responsive records for you.

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. The Department 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 the Department’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).

With regard to the records you requested that the Department does not maintain, if a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the 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....”).

As to the other portions of your request, the APRA requires that a records request “identify with reasonable particularity the record being requested.” I.C. § 5-14-3-3(a)(1). “Reasonable particularity” is not defined in the APRA, but Counselor Neal noted that “when a public agency cannot ascertain what records a requester is seeking, the request likely has not been made with reasonable particularity.” *Opinion of the Public Access Counselor 08-FC-176*. In an opinion last year, Counselor Neal also noted that email “is a method of communication and not a record,” and that requests for records that identify the records by method of communication only are not reasonably particular. *Opinion of the Public Access Counselor 09-FC-124*. In an earlier opinion, which Counselor Neal affirmed in *09-FC-124*, she reasoned:

If, on the other hand, the request identified the records with particularity enough that the School could determine which records are sought (e.g. all emails from a person to another for a particular date or date range), the School would be obligated to retrieve those records and provide access to them, subject to any exceptions to disclosure.

Informal Opinion of the Public Access Counselor 08-INF-23. Mr. Williams is also correct that previous public access counselors have not required public agencies to search through records -- electronically or manually -- to determine what records might contain information responsive to a request. *Id.*; *Opinion of the Public Access Counselor 04-FC-38.* Consequently, it is my opinion that the Department did not violate the APRA by denying the portions of your request that failed to identify the specific records you were seeking. *See* I.C. § 5-14-3-3(a)(1).

That said, it is unclear why -- assuming your allegations regarding Ms. Day are true -- the Department could not allow you to inspect your file while you were at the jail on November 15th and 16th, especially if Ms. Day had the file with her while in your presence. Under the APRA, a public agency that denies or interferes with the right to inspect and copy public records under section 3 bears the burden of showing that the record is exempt from disclosure. 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 the Department has neither refuted your allegations regarding Ms. Day nor provided a justification for withholding the records, it is my opinion that the Department has failed to carry that burden.

CONCLUSION

For the foregoing reasons, it is my opinion that the Department has not met its burden of proof to show that it either (1) did not deny your request to inspect your file while you were at the jail on November 15th and 16th or (2) denied your request for a reason allowed by the APRA. The Department has not otherwise violated the APRA.

Best regards,



Andrew J. Kossack
Public Access Counselor

cc: A. Howard Williams