



STATE OF INDIANA

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September 29, 2011

Mr. Chad M. Wallace
P.O. Box A
New Castle, Indiana 47362

Re: Formal Complaint 11-FC-224 and 11-FC-225; Alleged Violation of the Access to Public Records Act by the LaPorte County Adult Probation Department; LaPorte County Clerk; LaPorte County.

Dear Mr. Wallace:

This advisory opinion is in response to your formal complaints alleging the LaPorte County Adult Probation Department ("Department") and the LaPorte County Clerk ("Clerk") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Due to the similarity of the allegations in your complaints, I have consolidated the complaints and responded to both herein. Legal counsel, David K. Payne, responded on behalf of the Department, Clerk, and LaPorte County ("County"). His response is enclosed for your review.

BACKGROUND

In your complaint, you allege that you submitted a written request on August 1, 2011 to the Department for information relating to the Behavior Management Services and S.O.A.R., including owner's names, business address, treatment location addresses, clinician names, position titles, employment dates, education levels, licenses held, certifications, success rate of the program, how long the entity has operated in the County, malpractice insurance information, and the names of the presiding officers. You further allege that you had not received a response from the Department as of September 1, 2011, the date that you filed your formal complaint with the Public Access Counselor's Office.

In response to your formal complaint, Mr. Payne advised that Department responded to your first request on August 4, 2011. In that response, Mr. Payne informed you that the LaPorte County Commissioners and the LaPorte County Circuit Court did not possess records responsive to your request for personnel file information relating to S.O.A.R. employees. Mr. Payne explained that even if any LaPorte governmental entity maintained the records, the records would be non-disclosable under I.C. § 5-14-3-4,

which exempts personnel file information. The S.O.A.R program, as provided by Mr. Payne, is a program that convicted sex offenders are referred to for treatment. Such a program is not a division of the County, Department, or Clerk. Mr. Payne advised that the only public records relative to the S.O.A.R program possessed by the County, Clerk, or Department were invoices. This was communicated to you when you made your second request on August 9, 2011. Mr. Payne provided that 79 pages were responsive to your request and would be produced upon receipt of payment by certified check or money order. As of today's date, Mr. Payne advised that he has not received payment from you for the records.

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 and County are public agencies for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the County and 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). 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). 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. Here, Mr. Payne responded to your requests for personnel file information for S.O.A.R employees within the seven (7) day time-frame as required by the APRA.

The APRA provides that personnel files of public employees and files of applicants for public employment may be excepted from the APRA's disclosure requirements, except for:

- (A) The name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency;
- (B) Information relating to the status of any formal charges against the employee; and

(C) The factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged.
I.C. § 5-14-3-4(b)(8).

In other words, the information referred to in (A) - (C) above must be released to you upon request, but a public agency may withhold any remaining personnel records. Because the S.O.A.R. program and its employees are not a division or under the direction of the County, Department, or the Clerk, they are not required to produce records pursuant to Ind. Code § 5-14-3-4(b)(8) (A) – (C).

Generally, 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....”). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. See *Opinion of the Public Access Counselor 10-FC-56*. The County, Department, and Clerk have provided that it only maintains invoices for the S.O.A.R program, and that such invoices will be produced to you upon receipt of payment. The APRA permits a public agency to charge a fee for copies of public records. See I.C. § 5-14-3-8. Additionally, a public agency may require a person to pay the copying fee in advance. See IC 5-14-3-8(e). Nothing in the APRA requires that a public agency waive a copying fee. See *Opinion of the Public Access Counselor 07-FC-124*.

CONCLUSION

For the foregoing reasons, it is my opinion that neither the Department, the County, nor the Clerk violated the APRA.

Best regards,



Joseph B. Hoage
Public Access Counselor

cc: David K. Payne