



# STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR  
JOSEPH B. HOAGE

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

November 28, 2011

Rocky M. Shroyer  
4490 W. Reformatory Road  
Pendleton, Indiana 46064

*Re: Formal Complaint 11-FC-274; Alleged Violation of the Access to Public Records Act by the Indiana Department of Correction*

Dear Mr. Shroyer:

This advisory opinion is in response to your formal complaint alleging the Indiana Department of Correction ("DOC") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Michael Barnes, Attorney, responded on behalf of the DOC. His response is enclosed for your reference.

## BACKGROUND

In your formal complaint, you allege that on August 1, 2011 you submitted in writing two separate records requests to the DOC. On August 12, 2011, Robert Bugher responded in writing to your request, acknowledged its receipt, and provided that due to the breadth of the request it would take time to analyze and produce documents that were responsive to it. Mr. Bugher provided that the DOC would provide records responsive to your request as soon as possible. On September 28, 2011, you sent correspondence to Mr. Bugher inquiring as to the status of your request, to which you failed to receive a response. As of October 27, 2011, the date you filed your request with the Public Access Counselor's Office, you have yet to receive any records that were responsive to your request.

You specifically requested the following records from the DOC:

- (1) All documents relating to the payment of tort, sexual harassment, and civil rights claims to claimants, including but not limited to, employees, visitors, contractors, and prisoners, and/or their attorney, pursuant to judgments and/or settlements by the DOC (on behalf of itself and all branches, divisions, units, offices, and institutions and facilities under its control, or their agents) from January 1, 2005 to present. Such documents include, but are not limited to:

- a. Documents stating or pertaining to the legal claim that forms the basis for each judgment and/or settlement;
  - b. For each judgment and/or settlement, the most recent complaint detailing the legal demand;
  - c. For each judgment and/or settlement, any case management order detailing the legal demand;
  - d. All settlement agreements and documents relating to disbursement;
  - e. Any record of the imposition or sanctions by a court and payments thereof;
  - f. If payment was made pursuant to a judgment, the jury verdict and/or findings of fact and conclusions of law forming the basis for the judgment;
  - g. Any and all records of payment to plaintiff's, counsel, court officers, experts, receivers, and/or special masters.
- (2) All documents relating to the cost DOC has incurred on behalf of itself and all of the branches, divisions, units, officers, and institutions and/or facilities under its control, or their agents in the defense of tort, sexual harassment and civil rights claims by claimants or litigants other than DOC employees during the time period of January 1, 2005 to the present.
- (3) All safety inspection reports of Pendleton Correctional Facility conducted by any state, federal, local, or corrections agency from the time period beginning January 2005 to present. This includes but is not limited to:
- a. Physical;
  - b. Air quality/ventilation;
  - c. Water quality;
  - d. Drinking water;
  - e. Asbestos and PCB;
  - f. Food;
  - g. Housing;
  - h. Prisoner safety;
  - i. PCF fire drills;
  - j. PCF monthly safety inspections;
  - k. ACA inspections and site visits;
  - l. Department of Health inspections and site visits;
  - m. Job-work assignment areas;
  - n. Tool control; and
  - o. Any other safety issues; and
  - p. Sanitation
- (4) All documents relating to all disciplinary actions against the DOC medical providers by any licensing authority.
- (5) Names of all doctors, nurses, physician assistants, and mental health providers contracted and/or employed by the DOC.
- (6) All records related to DOC medical staff practicing with restricted or suspended licenses.
- (7) Records of all prisoner deaths from 2004-2011.
- (8) Records of prisoners death were medical negligence was a factor.

- (9) All post-mortem records and documents regarding prisoner deaths.
- (10) All records of staff and prisoner assaults requiring medical treatment from 2004 through present.
- (11) All records from DOC medical providers who have been disciplined or fired during the time period of January 1, 2004 to present.
- (12) Names of all disciplined and/or terminated medical staff members and the disciplinary actions taken.
- (13) Names of all DOC, Pendleton Correctional Facility staff, employees, and contractors with arrest records.
- (14) The number of prisoner deaths and prisoner assaults at the Pendleton Correctional Facility, each year, beginning on January 1, 2004 to the present.

In response to your formal complaint, Mr. Barnes advised that the DOC did act contrary to the APRA in failing to respond to your written request within seven days. As to the substance of your request, Mr. Barnes provided the following:

- (1) You requested records dating back to 2005. The DOC only keeps records of litigation for three years after the matter is resolved. Your request is a blanket request and not reasonably particular. Mr. Barnes provided that the proper place to obtain these documents would be the court where the action was filed. The files kept at the DOC's legal department are litigation files and contain privileged material subject to I.C. § 5-14-3-4(b)(2). The DOC does not have any records responsive to your request for records of payment as such records are kept by the State Auditor.
- (2) There are no records responsive to your request
- (3) Your requested material that would endanger the safety and security of a correctional facility, as such the information is exempt pursuant to I.C § 5-14-3-4(b)(23).
- (4) The information requested is for employees of Corizon, a private company. The DOC does not have the authority or ability to provide the requested information.
- (5) See (4).
- (6) See (4).
- (7) The information requested is kept by the county vital statistic or health departments. The DOC, pursuant to I.C. § 5-14-3-3(f), is not required to compile a list is such list is not required by statute or otherwise available.
- (8) See (7) and to the extent that your request asks for legal conclusions, the DOC does not act and will not act as your legal counsel.

- (9) Postmortem and autopsy records are protected under exceptions for provisions of medical records. *See* I.C. §§ 5-14-3-4(a)(9) and (11). In addition, such records are not maintained by the DOC.
- (10) The records are considered to be investigatory and pursuant to I.C. § 5-14-3-4(b)(2), the DOC has denied your request. In addition, certain records would be considered medical records, which are confidential pursuant to I.C. § 5-14-3-4(a)(9).
- (11) The records requested are information about private employees held by a private company, Corizon. The DOC has no authority or ability to provide this information.
- (12) See (11).
- (13) Such records are exempt pursuant to I.C. § 5-14-3-4(b)(8).
- (14) You have previously been provided this information pursuant to a prior APRA request.

#### 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 DOC is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the DOC’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, the DOC acted contrary to section 9 of the APRA by responding to your original records request eleven days after its receipt.

I will address each of your requests made of the DOC separately, identified by the numerical designations noted above:

(1) The DOC provided that it only keeps records of litigation for three years after the matter is resolved. The APRA requires public agencies to maintain and preserve public records in accordance with applicable retention schedules. *See* I.C. § 5-14-3-4(e). As long as the records you seek were disposed of in accordance with an applicable retention schedule, the Department did not violate the APRA by failing to maintain them beyond the retention period. *See Opinion of the Public Access Counselor 11-FC-133.*

As to the remaining records, the APRA further provides that a request for inspection or copying must identify with reasonable particularity the record being requested. *See* I.C. § 5-14-3-3(a) and *Opinion of the Public Access Counselor 11-FC-274.* The APRA does not require that a public agency search all of its records for any reference to the information being requested. *See Opinion of the Public Access Counselor 04-FC-38.* Unless required by law, public agencies are under no obligation to create a record that complies with the requesting party's request. *Id.* As the DOC does not maintain a specific record responsive to your request, it is not required to create a new record. The DOC has provided that the proper place to obtain the documents that you have requested would be the court where the action is filed. I would note that if a public agency has records that are responsive to a reasonably particular records request, it is required under the APRA to provide said records, minus the applicable exceptions, regardless of who it considers to be the proper agency for which the request should be submitted to.

Pursuant to I.C. §5-14-3-4(b)(2) a public agency has the discretion to withhold a record that is the work product of an attorney representing, pursuant to state employment or an appointment by a public agency; a public agency; the state; or an individual.

“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.

I.C. § 5-14-3-2(p).

To the extent the remaining records that you requested under (1) would be considered the work product of an attorney, the DOC acted within its discretion provided by the APRA in denying your request.

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....”). The DOC has provided that it does not maintain records of payment as you have requested under (1), and such records may be requested from the State Auditor.

(2) The DOC provided that it does not have any records responsive to your request.

(3) The APRA provides a number of categories of records which may be disclosed by an agency at the agency’s discretion. A listing of such records may be found in I.C. § 5-14-3-4(b). One group of records which may be disclosed at the discretion of the agency, which the DOC has cited, is the following:

Records requested by an offender that:

(A) contain personal information relating to:

(i) a correctional officer (as defined in IC 5-10-10-1.5);

(ii) the victim of a crime; or

(iii) a family member of a correctional officer of the victim of a crime; or

(B) concern or could affect the security of a jail or correctional facility.

I.C. § 5-14-3-4(b)(23).

The APRA defines “offender” as “a person confined in a penal institution as the result of the conviction for a crime.” *See* I.C. § 5-14-3-2(i). Because you are an offender, the DOC may withhold from disclosure records that concern or could affect the security of a jail or correctional facility. *See* I.C. § 5-14-3-4(b)(23)(B)). The DOC contends that I.C. § 5-14-3-4(b)(23)(B) is applicable here as your requests pertain to inspection reports conducted on the Pendleton Correctional Facility. Based on the information provided by DOC, the records you have requested would be excepted from disclosure based on this provision of the APRA.

(4) – (6) The information that you requested concerns employees of Corizon, a private company. The DOC has advised that it does not have the authority or ability to provide the requested information. From the DOC’s response, if it is providing that it does not have any records that are responsive to your request, it has not acted contrary to the APRA. However, if the DOC does have records that are responsive to your request, it must specifically 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). Providing that it “does not have the authority or ability to provide the requested information” would fail to meet the requirements of a public agency’s response to a public records request pursuant to I.C. § 5-14-3-9(c) if the DOC did have records that were responsive to your request.

(7) The DOC does not have any records that are responsive to your request; such information is kept by the county vital statistic and health departments.

(8) The DOC does not have any records that are responsive to your request.

(9) Any records the DOC has that are responsive to your request are made confidential pursuant to I.C. § 5-14-3-4(a)(9) and (11). As such records are confidential; the DOC is prohibited from disclosing said records in response to a request made under the APRA. Certain information that you have requested may be available from the Coroner of the county for which the facility is located.

(10) The investigatory records exception to the APRA provides that a law enforcement agency has the discretion to disclose or not disclose its investigatory records. An investigatory record is “information compiled in the course of the investigation of a crime.” *See* I.C. § 5-14-3-2(h). The investigatory records exception does not apply only to records of ongoing or current investigations; rather, it applies regardless of whether a crime was charged or even committed. The exception applies to all records compiled during the course of the investigation, even after an investigation has been completed. The investigatory records exception affords law enforcement agencies broad discretion in withholding such records. *See Opinion of the Public Access Counselor 09-FC-157*. “Generally, a police report or incident report is an investigatory record and as such may be excepted from disclosure pursuant to I.C. § 5-14-3-4(b)(1).” *Id.* As such, it is my opinion that the DOC did not violate the APRA in response to your request found under (10).

The DOC also noted that certain records that would be responsive to your request are confidential pursuant to I.C. § 5-14-3-4(a)(9). As such records are confidential; the DOC is prohibited from disclosing them in response to a public records request.

(11) – (12) See the analysis found under (4)-(6).

(13) 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. As the DOC has provided that the records you have requested go beyond the requirements found

under (b)(8), it did not act contrary to the APRA in exercising the discretion afforded it under the law and denying your request.

(14) The APRA provides that if:

- (1) a person is entitled to a copy of a public record under this chapter; and
- (2) the public agency which is in possession of the record has reasonable access to a machine capable of reproducing the record; the agency must provide *at least one copy* of the public record to the person . . . I.C. § 5-14-3-8(e), *emphasis added*.

Thus, a public agency is required to provide one copy of a disclosable public record but does not require an agency to provide additional copies or to repeatedly provide copies of a particular record. See I.C. § 5-14-3-8(e). If the DOC has already provided you with one copy of the requested records, it has not violated the APRA.

The APRA does not prescribe timeframes for the actual production of records. The public access counselor has stated repeatedly that records must be produced within a reasonable period of time, based on the facts and circumstances of the request. Considering factors such as the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. The APRA *requires* the Department to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. See I.C. § 5-14-3-6(a). Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. See I.C. § 5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. See I.C. § 5-14-3-7(c). The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. See *Opinion of the Public Access Counselor 02-FC-45*.

Under such circumstances, it is my opinion that DOC has not acted unreasonably. Under the APRA, a public agency shall “regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees.” See I.C. § 5-14-3-7(a). See also *Opinion of the Public Access Counselor 09-FC-115* (two months was not an unreasonable production time where agency director and records request handler recently assumed the duties of another position and needed time to review and redact confidential information); see also *Opinion of the Public Access Counselor 07-FC-327* (three months was not an unreasonable amount of time to respond to seven requests with approximately 1000 pages of responsive documents; 34 days was not unreasonable amount of time to produce three-page document considering number of other pending requests). You made fourteen separate, broad requests of the DOC to produce records pursuant to the APRA. The DOC was required to communicate with all



departments within the agency that might have records responsive to your request. Each of the departments was required to search and review its records, in some cases back to 2008, in an effort to fulfill your request. Upon production of the documents, the records were then reviewed in order to determine whether information was required to be withheld or redacted before making the information available. While responding to your request, the DOC was required to maintain the normal duties of the agency and respond to any other requests made pursuant to the APRA. As such, I do not believe the DOC took an unreasonable amount of time to collect, review, and provide correspondence to you in light of the breadth and extensive nature of your requests.

#### CONCLUSION

For the foregoing reasons, it is my opinion that the DOC acted contrary to section 9 of the APRA by failing to respond to your written request within seven days. If the DOC does not maintain any records that are responsive to your requests made under (4)-(6) and (11) – (12), then it has not acted contrary to the APRA. But, if the DOC does maintain certain records that would be responsive to said requests, it acted contrary to the APRA by failing to comply with the requirements of I.C. § 5-14-3-9(c) in denying your request. As to all other issues, it is my opinion that the DOC did not violate the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "Joe Hoage". The signature is written in a cursive style with a large initial "J" and "H".

Joseph B. Hoage  
Public Access Counselor

cc: Michael Barnes