



STATE OF INDIANA

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January 25, 2012

Garry F. Otto
DOC 905901
5124 W. Reformatory Road
Pendleton, Indiana 46064

Re: Formal Complaint 12-FC-17; Alleged Violation of the Access to Public Records Act by the Indiana Department of Correction

Dear Mr. Otto:

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.* Robert Bugher, Chief Counsel, responded on behalf of the DOC. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that you submitted a written request to the DOC on or about January 9, 2012 for the following records:

- (1) Name and date of the lower level senator who requested CIF to withhold your outgoing legal mail;
- (2) Who the specific CIF staff person was who gave the order to withhold your outgoing legal mail to courts; and
- (3) Detailed list of what outgoing legal mail claimed to have been sent on December 8, 2011.

On January 9, 2012, Robert Bugher responded to your request on behalf of the DOC. Mr. Bugher provided that as to part (1) and (2), the names and/or date that you requested were not public records, and as such cannot be provided to you pursuant to the APRA. As to part (3), an agency is not required to prepare a list in response to a request for public records. Since the list you sought does not exist, the DOC is not required to produce a record it does not maintain. You further allege that it is the protocol and DOC policy to create the records that you are seeking and pursuant to the APRA it is required to produce said records in response to a request.

In response to your formal complaint, Mr. Bugher advised that you did not make a request for records; rather you submitted a list of questions that you requested the DOC answer. As the DOC is not required to create a new record under the APRA; it did not act contrary to the law in response to your 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 twenty-four 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 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 responded to your request within the timelines provided by section 9 of the APRA.

The APRA requires that a request for inspection or copying must identify with reasonable particularity the record being requested. *See* I.C. § 5-14-3-3(a). While the term “reasonable particularity” is not defined in the APRA, it has been addressed a number of times by the public access counselor. *See Opinions of the Public Access Counselor 99-FC-21; 00-FC-15; 09-FC-24; 11-FC-12*. Counselor Hurst addressed this issue in *Opinion of the Public Access Counselor 04-FC-38*:

A request for public records must “identify with reasonable particularity the record being requested.” IC 5-14-3-3(a)(1). While a request for information may in many circumstances meet this requirement, when the public agency does not organize or maintain its records in a manner that permits it to readily identify records that are responsive to the request, it is under no obligation to search all of its records for any reference to the information being requested. Moreover, unless otherwise required by law, a public agency is under no obligation to maintain its records in any particular manner, and it is under no obligation to *create* a record that complies with the requesting party’s request. *Opinion of the Public Access Counselor 04-FC-38*.



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If a public agency does not maintain any records responsive to a public records request, the agency does not violate the APRA by denying the request. *See Opinions of the Public Access Counselor 01-FC-61 and 08-FC-113.* A public agency is not required to conduct research or create a new record in order to satisfy a public records request. *See Opinions of the Public Access Counselor 03-FC-146; 05-FC-25; 10-FC-56.*

As to parts (1) and (2) of your request, the DOC provided that you are seeking information (i.e. names and/or dates) rather than a record maintained by the DOC. As to part (3), the DOC provided that it did not have a record responsive to your request. You make the general allegation that it is the protocol and policy of the DOC to create the records that you are seeking. However, you do not cite to any statute, administrative rule, internal policy, and/or memorandum that would require the DOC to create the records that were sought. As the DOC does not violate the APRA by failing to provide a record that it does not maintain, nor is it required to create a new record in response to a request, it is my opinion that it did not violate the APRA. I would remind you that the APRA involves the request of records; a public agency does not violate the APRA by failing to respond to questions or generalized inquiries for information when it does not maintain a record that is responsive.

CONCLUSION

For the foregoing reasons, 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", written in a cursive style.

Joseph B. Hoage
Public Access Counselor

cc: Robert Bugher

