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) 234-0906
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

November 26, 2012

Ms. Sudeshna Chowdhury
3209 E. 10th Street R11 Fountain Park
Bloomington, Indiana 47408

Re: Formal Complaint 12-FC-328; Alleged Violation of the Access to Public Records Act by the Indiana Department of Child Services

Dear Ms. Chowdhury:

This advisory opinion is in response to your formal complaint alleging the Indiana Department of Child Services ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq*. John Wood, Deputy General Counsel, responded in writing on behalf of the Department. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you provide that the Department improperly denied your request for records pursuant to I.C. § 31-27-4-21. You initially submitted a written request for records to the Department requesting certain raw data regarding foster care children maintained by the Department in its internal database. The Department denied you request for individual case information in writing pursuant to I.C. § 31-27-4-21(b). The Department further provided that apart from the confidentiality issue, certain information that you are requesting would require the Department to write a program to extract from the database the specific information that was sought and produce a report containing the data in a readable form. The Department noted that this process would be time consuming and costly to you. The Department encouraged that a meeting be arranged to discuss the specific focus of your inquiry with you, your advisor, and Department staff.

You thereafter inquired for a list of what databases maintained by the Department that would be available. You noted that pursuant to I.C. § 5-14-3-6, the Department is required to segregate out confidential information from otherwise disclosable public records. You provided that you still wanted the individualized case data with the identifying information removed. In response, the Department again noted that the individualized case data that you are seeking was confidential pursuant to I.C. 31-27-4-21. Although the Department would not be able to provide individualized data, it would be able to provide information in the aggregate.

In response to your formal complaint, Mr. Wood advised that you requested to obtain from the Department individual case information about every child within the foster care system in the state. Your request included, but not limited to, the child's age, gender, county, years of entry and exit from foster care system, and reason for out of home placement. The Department denied your request, in writing, pursuant to I.C. § 5-14-3-4(a)(1); 5-14-3-4(a)(3); 31-27-3-18(b); 31-27-4-21(b); 31-27-5-18(b); 31-27-6-16(b). Mr. Wood provided that the records you sought concern individual facts about children and their families that have been created or maintained by the Department in connection with placement and care of those children in foster care under the jurisdiction of the Department and the juvenile court. The statutes applicable to children in licensed foster care state that "the department shall keep records regarding children and facts learned about children and the children's parents or relatives confidential." While the statutes do provide that certain persons may be given access, you do not provide that you fall into any such category.

Mr. Wood stated that it is your contention that the Department would be able to provide all requested information if it either deleted or disguised the names of each individual child to whom the records relate. The Department contends that statutory language does not provide that the records regarding foster children and their families are not confidential if the child's name is disguised by use of initials or some other method of redacting the actual name. In addition, Title IV-E of the Social Security Act, 42 U.S.C. 670 *et seq*. contains confidentiality provisions applicable to cases of children in foster care placement. Approximately fifty percent of the foster care cases in the Department system are eligible for Title IV-E assistance. For those cases, 42 U.S.C. 671(a)(8) provides that the state plan must provide safeguards "which restrict the use of or disclosure of information concerning individuals assisted under the State plan to purposes directly connected with" specified activities listed in clauses (A) through (E). The statutes contains a separate provision which provides that the safeguards "shall prohibit disclosure to any committee or legislative body, other than those specifically listed in (D), of any information which identifies by name or address any such applicant or recipient." The federal law thus recognizes the distinction between complete confidentiality of information and redaction of certain personally identifiable information such as a name or address.

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 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 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 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 a public agency denying access in response to a written public records request must put the denial in writing and include the following information: (a) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and (b) the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). Counselor O'Connor provided the following analysis regarding section 9:

> Under the APRA, the burden of proof beyond the written response anticipated under Indiana Code section 5-14-3-9(c) is outlined for any *court action* taken against the public agency for denial under Indiana Code sections 5-14-3-9(e) or (f). If the public agency claimed one of the exemptions from disclosure outlined at Indiana Code section 5-14-3-4(a), then the agency would then have to either "establish the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit" *to the court*. Similarly, if the public agency claims an exemption under Indiana Code section 5-14-3-4(b), then the agency must prove to the court that the record falls within any one of the exemptions listed in that provision and establish the content of the record with adequate specificity. There is no authority under the APRA that required the IDEM to provide you with a more detailed explanation of the denials other than a statement of the exemption authorizing nondisclosure, but such an explanation would be required if this matter was ever reviewed by a trial court. *Opinion of the Public Access Counselor 01-FC-47.*

Here, the Department denied your request pursuant to I.C. 5-14-3-4(a)(1); 31-27-3-18(b); 3-27-4-21(b); 31-27-3-18(b); 3-27-5-18(b); and 31-27-6-15(b). The statutes provide that the Department shall keep records regarding children and facts learned about children and the children's parents or relatives confidential. *See* I.C. §§ 31-27-3-18(b) [child caring institutions]; 31-27-4-21(b) [foster family homes]; 31-27-5-18(b) [group homes for children]; 31-27-6-15(b)[child placing agencies]. Each of the respective statutes provides in subsection (c) certain parties that would be allowed access to the confidential records. *See* I.C. §§ 31-27-3-18)(c); 31-27-4-21(c); 31-27-5-18(c); 31-27-6-15(c). You have not provided any information that would qualify you to receive information under subsection (c). As such, it is my opinion that the Department complied with the requirements of section 9(c) of the APRA in denying your request.

When a record contains both disclosable and nondisclosable information and an agency receives a request for access, the agency shall "separate the material that may be

disclosed and make it available for inspection and copying." *See* I.C. § 5-14-3-6(a). The burden of proof for nondisclosure is placed on the agency and not the person making the request. *See* I.C. § 5-14-3-1. The Indiana Court of Appeals provided the following guidance on a similar issue in *Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ.,* 787 N.E.2d 893 (Ind. Ct. App. 2005):

> However, *section 6 of APRA* requires a public agency to separate dislcosable from non-dislcosable *information* contained in public records. *I.C. § 5-14-3-6(a).* By stating that agencies are required to separate "information" contained in public records, the legislature has signaled an intention to allow public access to whatever portions of a public record are not protected from disclosure by an applicable exception. To permit an agency to establish that a given document, or even a portion thereof, is non-dislcosable simply by proving that some of the documents in a group of similarly requested items are non-discloseable would frustrate this purpose and be contrary to section 6. To the extent that the *Journal Gazette* case suggests otherwise, we respectfully decline to follow it.
>
> Instead, we agree with the reasoning of the United States Supreme Court in *Mink, supra*, i.e., that those factual matters which are not inextricably linked with other non-discloseable materials, should not be protected from public disclosure. See *410 U.S. at 92*. Consistent with the mandate of *APRA section 6*, any factual information which can be thus separated from the non-discloseable matters must be made available for public access. *Id*. at 913-14.

The burden is on the agency to separate the disclosable information and make it available for inspection and copying. *See* I.C. § 5-14-3-6; *See also Opinion of the Public Access Counselor 11-INF-33.* If confidential information is contained within electronic records responsive to a request, the APRA provides that a public agency may charge a person direct cost of reprogramming a computer system. I.C. § 5-14-3-6(c). I.C. § 5-14-3-2(c) provides:

> "Direct cost" means one hundred and five percent (105%) of the sum of the cost of:
>
> (1) the initial development of a program, if any;
> (2) the labor required to retrieve electronically stored data; and
> (3) any medium used for electronic output;
>
> for providing a duplicate of electronically stored data onto a disk, tape, drum, or other medium of electronic data retrieval under section 8(g) of this chapter, or for reprogramming a computer system under section 6(c) of this chapter.

The statutes cited by the Department in denying your request provide that records regarding children and facts learned about children and the children's parents or relatives are confidential. From reviewing the records and/or information that you have sought, the main focus on your inquiry deals with information about the child and facts learned about the child by the Department. I do not believe that the Department would comply with the statutes that have been cited in your denial and the APRA by solely removing or disguising the child's name and thereafter providing all other requested factual information. The statute specifically provides that records regarding children *and* facts learned about the children and the children's parents or relatives are confidential (emphasis added). To the extent that the Department maintains information in its database that would not fall under the confidentiality provisions of the statutes listed in your denial or any other applicable state or federal statute, the Department would be allowed to charge you the direct cost of any reprogramming required in order to separate out the nondisclosable information in the Department's database. As provided in the Department's response, to avoid your incurring any unnecessary fees, prior to the commencement of any reprogramming it may be beneficial to all parties to arrange a meeting to discuss the information that the Department maintains that it would not be prohibited from disclosing and whether that information would be the type that would assist you in your research.

CONCLUSION

For the foregoing reasons, it is my opinion that the Department did not violate the APRA in response to your request.

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: John Wood