



# STATE OF INDIANA

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December 21, 2012

Paul Straughn  
P.O. Box 502  
Mishawaka, Indiana 46546

*Re: Formal Complaint 12-FC-336; Alleged Violation of the Access to Public Records Act by the Office of the Attorney General*

Dear Mr. Straughn:

This advisory opinion is in response to your formal complaint alleging the Office of the Attorney General ("Attorney General") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Gary D. Secrest, Chief Deputy Attorney General, responded on behalf of the Attorney General. His response is enclosed for your reference.

## BACKGROUND

In your formal complaint, you provide that on September 4, 2012, you submitted the following request for records to the Attorney General:

1. Documents that prove or offer evidence that the State of Indiana, Office of the Attorney General conducted or caused to be conducted due diligence or investigation that checked into whether MW told the truth in her statements, verbal and/or written, on why the law firm Yarling & Robinson ("Firm") involuntarily discharged her. This should include, without limitation, interviews of any Firm employees including supervisors or others responsible for evaluating her work product and/or performance, human resources employees, other co-workers, those responsible for her involuntary discharge and who administered and/or informed her of the same, clients she serviced, personnel records including performance reviews and/or evaluations, attendance records, records of any disciplinary actions, complaints, performance awards and/or commendations, and any and all documents that contradict, dispute and/or otherwise discredit or would cause anyone to question her formal written explanation, or any other explanation(s) MW provided to Office of the Attorney General to explain her involuntary discharge from the Firm.



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2. MW, in the formal job application she presented to the State of Indiana, Office of the Attorney General, provided information that she has been involuntarily discharged (“fired”) from her position as a Paralegal at the Firm, the job she held immediately before she was hired as a Case Analyst at the Office of the Attorney General. In her formal written explanation MW states she was “...terminated due to work performance.”

Therefore, the Requestor seeks any and all documents that prove or otherwise offer evidence that the State of Indiana, Office of the Attorney General conducted or caused to be conducted due diligence and properly vetted and investigated MW to determine her suitability and qualifications for the position of Case Analyst to which she was ultimately hired and determined exactly what type of work performance caused the Firm to involuntarily discharge (“fire”) MW. Additionally, the Requestor seeks any and all documents that show the results of that due diligence and /or investigation.

3. Any and all documents that relate and/or pertain to the hiring of MW as a Case Analyst, or in any other position, in the Office of the Attorney General. These should include, without limitation: personnel files, human resources files, interview notes, interview scores and results, test scores and results, evaluations, documents created by those evaluating her candidacy, reference letters, check lists, telephone messages, memoranda, emails, documents required to be completed during the evaluation and hiring process, and any documents executed by any individual(s) who ultimately caused or contributed directly or indirectly to the hiring of MW as a Case Analyst in the Office of the Attorney General.
4. Any and all document(s) that prove or offer evidence that the State of Indiana, Office of the Attorney General conducted or caused to be conducted due diligence or investigation that checked the accuracy, truthfulness, and completeness of any and all statements and representations made by MW, either oral written, in consideration of employment as a Case Analyst in the Office of the Attorney General, or any other Indiana government position. These should include, without limitation, statements, information, and representations contained in her resume, her job application, her curriculum vitae, and any other forms she completed in the employment process; and any statements she made



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- during interviews, the employment process, and/or in furtherance of consideration for employment.
5. Any and all documents that prove or offer evidence that the State of Indiana, Office of the Attorney General conducted or caused to be conducted due diligence and properly vetted and investigated MW, at any time, to determine her suitability and qualifications for the position of Case Analyst to which she was ultimately hired, and that show the results of that vetting and investigation including, without limitation:
    - a) the legitimacy of the school transcripts she provided
    - b) whether she attended the educational institutions listed on her resume
    - c) whether she meets the requirement/criteria and is a certified and/or registered paralegal
    - d) the legitimacy of the dates and titles in her employment history as listed on her resume.
  6. Any and all documents that prove or offer evidence that the State of Indiana, Office of the Attorney General vetted or caused to be vetted MW at any time, to determine her suitability and qualifications for the position of Case Analyst to which she was ultimately hired, and that show results of that vetting, including, without limitation:
    - a) a background investigation
    - b) a criminal history check
    - c) random drug tests, or any other tests or examinations required as conditions of pre-employment and/or continued employment.
    - d) an investigation of her finances, and determined the status of any financial obligations, including student loans
    - e) the unaccounted for period of unemployment from the time she was involuntarily discharged from the Firm, October 2008, until April 27, 2009, when she started as a Case Analyst with the Office of the Attorney General .
  7. Any and all documents that name and/or otherwise identify the individual(s), agency(ies), and/or organization(s) that conducted the due diligence described in Requests 3, 4, and 5.
  8. Copies of any and all school transcripts MW provided to the State of Indiana, Office of the Attorney General.



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9. Any documentary evidence that proves MW holds paralegal certification, and is recognized and qualified as such, from the Indiana Paralegal Association, the National Association of Legal Assistants, or any other recognized and/or accredited organization.
10. Documents that reveal MW's current employment status with the State of Indiana, Office of the Attorney General, or any other Indiana government agency, and that identify her position and/or job title and salary.

On behalf of the Attorney General, Matt Light issued the agency's final written response to your request on October 18, 2012. The response provided:

1. This request relates to information contained within MW's personnel file at the Indiana Office of Attorney General ("OAG"). Confidentiality and disclosure requirements and considerations relating to public agency employee personnel files are governed by Ind, Code § 5-14-3-4(b)(8), which provides that (omitted):

In other words, records relating to the items and categories listed in subdivisions (b)(8)(A), (B), and (C) *must* be disclosed pursuant to public records, while access to records relating to all other items and categories of information in public employees personnel files may be denied at the discretion. Our office has previously provided information to subdivisions (b)(8)(A), (B), and when responding to your previous records requests. We provided MW's currently on file resume and job application on June 8 in response to your records request, and we provided an earlier copy of her resume by email on August 1. Additionally, MW's job application was provided in revised form on August 10 to resolve to the originally redacted portion, even redacted portion involved an involuntary discharge from her previous employer on circumstances to return of a former employee and did not involve any formal disciplinary actions.

This request asks for other information and records in MW's personnel file. As the required portions have been the remaining portions of the file fall within the discretionary denial category and consistent with office we are denying access to the records. However, we can as a courtesy provide information that is responsive to the general nature of your request indicating that we reviewed MW's job application consistent with our Employee Handbook and its included Employment Process and Personnel



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provisions. The pages from the Employee Handbook are enclosed with this response. As you can see in those documents, prospective employees a background check, and additionally checks and other interviews, document checks, and prospective functions are carried out as deemed necessary and appropriate under the circumstances.

Specific to MW's employment application and the questions relating to representations made concerning past employment, our office contacted references at previous places of employment, including the Firm, and the reference at Firm provided a positive reference, indicating that he would hire MW back as a legal assistant, and otherwise provided no information that would raise red flags or significant objections to her suitability as an employee. Per standard procedures, Human Resources reviewed other aspects of her application to evaluate the candidate for employment and a background check was conducted that revealed no problematic issues. MW's personnel file includes no records relating to formal charges of disciplinary actions.

2. Please refer to the response above for Request #1. Per standard procedures Human Resources reviewed MW's job application and related materials and conducted a background check and reference checks. Although, as you indicate, MW's application indicated that she was informed she was being terminated due to work performance, her explanation also states that she had never been reprimanded or written up for any improper or unprofessional acts or omissions. Her explanation goes on to state that further conversations confirmed that MW had not done anything wrong and that a former employee who had worked at the firm for more than 5 years was returning and was selected to replace MW, who had worked at the firm for 9 months. Additionally, as indicated above, the reference at the firm provided positive feedback and indicated that he would rehire MW's as a legal assistant.
3. Please refer to the responses above for Requests #1 and #2 and previous responses to your earlier records requests as this request duplicates previous requests and responses. As indicated above all required components of MW's personnel file have been disclosed. MW was evaluated per standard procedures for her initial hiring as a paralegal in the Civil Litigation Section and later for her transfer to the Licensing Enforcement Section for her current position as a case analyst.



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4. Id.
5. Id.
6. Id. Access to the background check result is denied based on the discretionary denial provisions of I.C. § 5-14-3-4(b)(8). Drugs tests and investigation of finances are not required for the applicable positions. MW was seeking employment during the period specified.
7. Employment screening functions are performed and managed by the Human Resources Department of the OAG. The Employment Process and Personnel Hiring sections of the Employee Handbook specified in the response to Request #1 are enclosed with this response identify job positions that are relevant to these functions depending on the job vacancy. This office does not have any further records that are responsive to this request and that fall outside of the discretionary denial provisions of Ind. Code. § 5-4-3-4(b)(8).
8. The OAG does not maintain any records that are responsive to this request.
9. MW possesses a paralegal associate degree from International Business College, as reflected in the job application and resumes previously provided.
10. Enclosed are copies of print-outs from the OAG's PeopleSoft database that reflect MW's current position and salary.

You believe that the Attorney General has violated the APRA in its response to your request in the following manner:

As to Request 1, contrary to the Attorney General's assertion, you believe that the requested documents do, indeed, fall under I.C. § 5-14-3-4(b)(8)(C), which requires public agencies to produce documents that show 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." The requested documents by their nature must fall under section (C) of (b)(8), as results of the Attorney General's investigation of MW's explanation for her involuntary discharge from a prior job must address "the factual



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basis” for her discharge. The Attorney General claims MW’s involuntary discharge was not the result of a disciplinary action, rather because a former employee wished to return to the job held by MW. The Attorney General ignores and fails to address MW’s written statement that she was terminated for “work performance” reasons and because the Firm “not happy” with her. The Attorney General has offered only unsubstantiated assertions and interpretations of what caused MW’s involuntary discharge, neither of which are properly responsive or relevant. The Attorney General is attempting to reclassify the requested documents in order to assert the agency’s discretion which is contrary to the APRA.

As to request 2, the Attorney General has claimed to have interviewed a reference at the Firm, who provided positive feedback about MW. However, the Attorney General fails to identify this individual or provide documents reflecting this alleged feedback. Nor has the Attorney General made any reference to the documents that report the results of the interview with the Firm.

As to request 5, the Attorney General’s statement that the request duplicates your earlier APRA activity is incorrect. You provide that you have never previously sought the specific documents identified in request 5. As to request 6, you challenge the Attorney General’s ability to deny your request for the background check performed on MW by the Attorney General at the time of employment.

As to request 9, you believe the Attorney General’s response to your request is non-responsive, in that MW claims she holds a paralegal certification, such claims are not proof. The request submitted sought proof, not mere assertions, that MW holds a paralegal certification and is recognized and qualified as such from the Indiana Paralegal Association, the National Associations of Legal Assistants, or any other recognized or accredited organization.

Lastly, you provide that the Attorney General in its response referred to a variety of individuals within the agency that were consulted regarding your public records request. I.C. § 5-14-3-9(c)(2)(B) states that a public agency may deny a written APRA request if the denial includes, in part, the name and title or position of the person responsible for the denial.” You provide that this would require the Attorney General to provide the names of all those persons responsible for the multiple denials that were issued.

In response to your formal complaint, Mr. Secrest provided the following response to each of the allegations contained in your formal complaint:



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As to request 1, the APRA does not require a public agency to produce documents that do not exist and your assertion that the Attorney General is withholding records is without merit. Further, information provided by MW in her employment application regarding her previous employment indicates that she was not discharged as a result of a disciplinary action or formal charges. Thus, the Attorney General has no information that relates to any discipline or formal charges taken with respect to the employee while she was employed by a private law firm or the Attorney General.

As to requests 2, 3, 4, the formal complaint incorrectly asserts that I.C. § 5-14-3-4(b)(8)(c) requires a public agency to provide documentation from a personnel file that is not enumerated within I.C. § 5-14-3-4(b)(8). The background check would not include information specified to be disclosed under I.C. § 5-14-3-4(b)(8)(A)-(C), and if it did, the Attorney General has already disclosed the records in response to your previous requests. Further, the Attorney General does not maintain documentation regarding reference checks and even if it did, the information is not required to be disclosed under I.C. § 5-14-3-4(b)(8). In response to your previous requests, the Attorney General has provided all documentation from the employee's personnel file that is disclosable or for which the Attorney General has exercised its discretion to disclose under I.C. § 5-14-3-4(b)(8). The fact that the records he has received do not fully inform him is not a violation of the APRA.

As to request 5, the Attorney General has already provided all disclosable information from the subject employee's personnel file and referenced I.C. § 5-14-3-4(b)(8) as the basis for any of the documents that the Attorney General may exercise its discretion to deny. Your assertion that the Attorney General has improperly denied this information is without merit.

As to request 6, the Attorney General provided in response to your request that the information and documents required to be disclosed under I.C. § 5-14-3-4(b)(8) have been provided. As to the background check, the Attorney General denied this request as the information is not required under I.C. § 5-14-3-4(b)(8)(A)-(C). The Attorney General does not perform any drug tests or investigation for finances for the subject employee as that information was not required for the positions held. Again, the Attorney General does not have any records that are responsive to your request and is not required to create a record in response to a request.

As to request 7, you allege that you were improperly denied access to documents that identify the those individuals, agencies, or organizations that conducted the due





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diligence process related to requests 3, 4, and 5; the response provided directed you to the Attorney General's Employee Handbook and in particular the job positions that are involved in the filling of a job vacancy. The Attorney General again provided that there were no other documents that were responsive to your request that are not otherwise covered by the discretionary exception outlined in I.C. § 5-14-3-4(b)(8).

As to request 9, the Attorney General provided that the subject employee holds a paralegal associate degree as claimed on both her application and resume, documents which have previously been provided. The Attorney General has no other records that are responsive to your request.

As to your contention that the Attorney General is required to identify the names and titles of all persons that are responsible for the denial, the response provided to your request made clear that the Advisory Division staff was responsible for determining the ultimate response to your request. The person identified in the Attorney General's response was Matt Light, Chief Counsel of Advisory and ADR Services Division for the Attorney General. Mr. Light was the person responsible, which was clear based on all previous communications. It is not a violation of the APRA to consult with staff members of an agency prior to making a final determination.

## 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 Attorney General 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 Attorney General'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). 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. Under the APRA, a public agency denying access in response to a written public records request must put that denial in



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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.*

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



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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 upon receipt of a public records request, but a public agency may withhold any remaining records from the employees' personnel file at their discretion. Subsection (b)(8)(C) specifically requires for a disciplinary action to have occurred. If, for example, an employee had been let go from previous employment due to a downturn in the economy, the requirements of (b)(8)(C) would not apply, as no disciplinary action would have taken place. If a suspension, demotion, or discharge did not occur, again the requirements of the subsection would not apply. Lastly, it is my opinion that an agency would not be required to create a factual basis under (b)(8)(C) if no such record was maintained by the agency upon receipt of the request. See *Opinion of the Public Access Counselor 08-FC0184 and 12-FC-110*.

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*.

As to request 1, you believe that the requested documents fall under I.C. § 5-14-3-4(b)(8)(C), which requires public agencies to produce documents that show 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." In response, the Attorney General has provided that the information provide by the employee in her employment application indicates that she was not discharged as a result of a disciplinary action or formal charges. I.C. § 5-14-3-4(b)(8)(C) is only applicable when an employee has been be suspended, demoted, or discharged as a result of a disciplinary action. Thus, it is my opinion that the Attorney General did not violate the APRA as the employee in question was not discharged as a result of disciplinary action or formal charges. Even assuming for the sake of argument that the employee in question was discharged as a result of a disciplinary action, it is my opinion that the Attorney General would not be required to disclose of all records related to a personnel action. Counselor Neal provided the following analysis in regards to this issue:



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“I.C. § 5-14-3-4(b)(8) does not require an agency to allow inspection of all records related to a personnel action. For instance, I do not think the law would require disclosure of a detailed narrative of the events leading to a suspension or termination. Instead, the factual basis for the action must be disclosed. The agency has the discretion to provide more than that but is only required to disclose the portion of the record identifying the factual basis that lead to the suspension.” *See Opinion of the Public Access Counselor 09-FC-175; see also Opinions of the Public Access Counselor 02-FC-22, 09-INF-16, and 10-FC-249.*

It is my opinion that the Attorney General has made the required disclosures as required by I.C. § 5-14-3-4(b)(8)(A)-(C) in response to your initial request. Further, the Attorney General would not violate the APRA by failing to maintain a record that is responsive to your request, nor would it be required to create a record in response to a request.

As to request 2, you allege the Attorney General has claimed to have interviewed a reference at the Firm, who provided positive feedback about MW. However, the Attorney General fails to identify this individual or provide documents reflecting this alleged feedback. The Attorney General provided that it did not maintain any records regarding any reference checks that were conducted and if it did, such records would not be required to be disclosed under I.C. § 5-14-3-4(b)(8). It is my opinion that the Attorney General did not violate the APRA in response to your second request as the agency did not maintain any records that were responsive. Even if the Attorney General did maintain such records, it would have been in its discretion to provide said records pursuant to I.C. § 5-14-3-4(b)(8).

As to request 5, you allege that the Attorney General’s statement that the request duplicates your previous APRA is incorrect. You provide that you have never previously sought the specific documents identified in request 5. In response, the Attorney General maintains that it has already provided all disclosable information from the subject employee’s personnel file and referenced I.C. § 5-14-3-4(b)(8) as the basis for any of the documents that the Attorney General may exercise its discretion. The public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80.* Thus, if the Attorney General, either in response to the request that is subject of this formal complaint



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or any other previous request, has provided all records that are responsive to your request as required under the APRA, it is my opinion that the agency has not violated the APRA.

As to request 6, you challenge the Attorney General's ability to deny your request for the background check performed on MW by the Attorney General at the time of employment. The Attorney General provided in response to your request that the information and documents required to be disclosed under I.C. § 5-14-3-4(b)(8) have been provided. As to the background check, the Attorney General denied this request as the information is not required under I.C. § 5-14-3-4(b)(8)(A)-(C). It is my opinion that the Attorney General did not violate the APRA in response to your sixth request, as a background check is not listed under the required disclosures under I.C. § 5-14-3-4(b)(8)(A)-(C), the Attorney General has stated it has provided all records as required under (b)(8), and the agency cited to the requisite statutory exemption in denying your request.

As to request 9, you believe the Attorney General's response to your request is non-responsive, in that MW claims she holds a paralegal certification, such claims are not proof. The request submitted sought proof, not mere assertions, that MW holds a paralegal certification and is recognized and qualified as such from the Indiana Paralegal Association, the National Associations of Legal Assistants, or any other recognized or accredited organization. The Attorney General provided that the subject employee holds a paralegal associate degree as claimed on both her application and resume, documents which have previously been provided. The Attorney General has no other records that are responsive to your request. Thus, it is my opinion that the Attorney General complied with the APRA in response to your request, as the agency would not be required to create a record in response to your request nor does the agency violate the APRA by not maintaining a record that is responsive to your request.

Lastly, you provide that the Attorney General in its response referred to a variety of individuals within the agency that were consulted regarding your public records request. I.C. § 5-14-3-9(c)(2)(B) states that a public agency may deny a written APRA request if the denial includes, in part, the name and title or position of the person responsible for the denial. You argue that this would require the Attorney General to provide the names of all those persons who were consulted in denying your request. The Attorney General advised that its previous correspondence made clear that the Advisory Division staff was responsible for determining the ultimate response to your request. The person identified in the Attorney General's response as responsible for the denial was Matt Light, Chief Counsel of Advisory and ADR Services Division for the Attorney General. Section 9(c)(2)(B) states that the name and the title or position of the person



# STATE OF INDIANA

**MITCHELL E. DANIELS, JR., Governor**

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responsible for the denial must be provided in response to a public records request. The Attorney General's denial was signed by Matt Light, Chief Counsel of the Advisory and ADR Services Division for the Attorney General. While Mr. Light may have consulted with other parties within the agency in developing a response to your request, by signing and providing his title and position with the Attorney General, this action signifies that he is the person that is responsible for the denial on behalf of the agency. It is my opinion that section 9(c)(2)(B) would not require a public agency to provide the list of names and titles of all those persons who were consulted prior to the issuance of a denial under the APRA. As Mr. Light was identified as the individual responsible for the denial of your request, it is my opinion that the Attorney General did not violate section 9(c)(2)(B).

## CONCLUSION

For the foregoing reasons, it is my opinion that if the Attorney General, either in response to the request that is subject of this formal complaint or any other previous requests, has provided records that were responsive to your request; the Attorney General has not acted contrary to the APRA. As to all other issues, it is my opinion that the Attorney General did not violate the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage".

Joseph B. Hoage  
Public Access Counselor

cc: Gary Secrest