



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

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January 8, 2013

Mr. Michael A. Christianson
DOC 135489
3038 W 850 South
Bunker Hill, Indiana 46914

Re: Formal Complaint 12-FC-350; Alleged Violation of the Access to Public Records Act by the Department of Corrections

Dear Mr. Christianson:

This advisory opinion is in response to your formal complaint alleging the Department of Corrections ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Robert D. Bugher, Chief Counsel, responded in writing on behalf of the Department to your formal complaint. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that you submitted a written request for records to the Department on November 18, 2012. As of December 7, 2012, the date you filed your formal complaint with the Public Access Counselor's Office, your further allege that you have yet to receive any response from the Department.

In response to your formal complaint, Mr. Bugher advised that the Department has no record of receiving your request. Regardless, as the Department is now aware of your request, it has commenced the process of obtaining the GPS information that was provided to the state legislature. In regards to your request for data on the number of individuals on parole or probation, those who violated their parole and probation status, the number of sex offenders on parole or probation, and the number of technical rule violators all within the last ten years, the Department does not have a record that is responsive to your request and is not required to conduct research on your behalf in response to an 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 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 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). A response from the public agency could be an acknowledgement that the request has been received and include information regarding how or when the agency intends to comply. 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).

The Department maintains that it did not receive a request from you. As previous Public Access Counselor’s have provided, the Public Access Counselor is not a finder of fact. See *Opinion of the Public Access Counselor 10-FC-15*. Consequently, I express no opinion as to whether or not Department received your request. Under the APRA, if a 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 public agency may deny a request if: (1) the denial is in writing or by facsimile; and (2) the denial includes: (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 the title or position of the person responsible for the denial. See I.C. §5-14-3-9(c). If the Department received your request and did not respond to it within these timeframes, the Department acted contrary to the APRA. However, if the Department did not receive your request, it was not obligated to respond to it. Regardless, the Department is now in receipt of your request and has commenced the process of obtaining the GPS information that it provided to the state legislature, which I trust is in satisfaction of your formal complaint.

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 such, the Department has indicated that it does not have a record responsive to your request for statistical information concerning parolees, sex offenders, and probationers. As such, it is my

opinion that the Department did not violate the APRA by failing to maintain a record that was responsive to your request that it was not otherwise legally obligated to maintain.

CONCLUSION

For the foregoing reasons, it is my opinion that the Department did not violate the APAR if it never received your request. As to all other issues, it is my opinion that the Department did not violate the APRA.

Best regards,

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

Joseph B. Hoage
Public Access Counselor

cc: Robert Bugher