



STATE OF INDIANA

MICHAEL R. PENCE, 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

June 10, 2013

Mr. Jason T. Myers
DOC 154417
5124 Pendleton Road
Pendleton, Indiana 46064

Re: Formal Complaint 13-FC-142; Alleged Violation of the Access to Public Records Act by the Correctional Industrial Facility

Dear Mr. Myers:

This advisory opinion is in response to your formal complaint alleging the Correctional Industrial Facility ("CIF") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*

BACKGROUND

In your formal complaint, you provide that on April 24, 2013 you submitted a written request for records to the CIF. You allege that the CIF has failed to respond in writing to your request. You have spoken with Ms. Martin, your casework manager, who informed you that the agency was unable to understand what records you were seeking and needed further information in order to comply with 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 CIF 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 CIF'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. Here, if the CIF failed to respond in writing to your written request it acted contrary to the requirements of section 9(b) of the APRA.

As to the substance of your request, the APRA requires that a records request “identify with reasonable particularity the record being requested.” I.C. § 5-14-3-3(a)(1). “Reasonable particularity” is not defined in the APRA, but the public access counselor has repeatedly opined that “when a public agency cannot ascertain what records a requester is seeking, the request likely has not been made with reasonable particularity.” *See Opinions of the Public Access Counselor 10-FC-57; 08-FC-176*. However, because the public policy of the APRA favors disclosure and the burden of proof for nondisclosure is placed on the public agency, if an agency needs clarification of a request, the agency should contact the requester for more information rather than simply denying the request. *See generally IC 5-14-3-1; Opinions of the Public Access Counselor 02-FC-13; 05-FC-87; 11-FC-88*. Further, the APRA does not require public agencies to conduct a manual or electronic search of its records to determine what records might contain information that is responsive to a request. *See Opinions of the Public Access Counselor 04-FC-38; 09-FC-124; and 10-FC-57*. The CIF orally informed you on multiple occasions that it was not able to understand what records and/or forms that you were seeking copies of. As the CIF has indicated as such, you are required under the APRA to provide further specific information that would enable the CIF to retrieve the records that were sought.

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*. Your request, in part, sought notarized affidavits from three individuals regarding your alleged loss of property that occurred in April 2013. The CIF would not be required to create new records in order to satisfy your request. If such records were not maintained by the CIF prior to your request, the agency would not violate the APRA by failing to create a new record.

CONCLUSION

For the foregoing reasons, it is my opinion that the CIF acted contrary to the requirements of section 9(b) of the APRA if it failed to respond in writing within seven (7) days of the receipt of your request.

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: Bruce Helming