



STATE OF INDIANA

MICHAEL R. PENCE, Governor

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March 15, 2013

Mr. Aaron Isby
DOC 892219
P.O. Box 1111
Carlisle, Indiana 47838

Re: Formal Complaint 13-FC-83; Alleged Violation of the Access to Public Records Act by the Indiana Department of Administration

Dear Mr. Isby:

This advisory opinion is in response to your formal complaint alleging the Indiana Department of Administration (“Department”) violated the Access to Public Records Act (“APRA”), Ind. Code § 5-14-3-1 *et seq.* Charlene Burkett responded in writing to your formal complaint. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint you allege you submitted a written request for records to the Department on February 13, 2013. On February 19, 2013, Ms. Burkett responded in writing to your request. As to your request for a copy of a specific contract, Ms. Burkett advised that the correctional facility where you were housed was reviewing the request and determining whether you are allowed to have a copy. If allowed, Ms. Burkett determined that the cost would be \$3.60. Ms. Burkett advised that the Department did not maintain any records responsive to your request for the names of certain private health care companies and the individuals that serve on said company’s Board of Directors. As to your third request for “memos that the private medical health care company has issued about not paying for indigent prisoners medication”, Ms. Burkett advised that the request could not be fulfilled as it was not reasonably particular.

You allege that Ms. Burkett entered into a conspiracy with the Department to deny your request improperly under the APRA. You further allege that Ms. Burkett has no authority over state contracts in her position with the Bureau and your request was submitted to the Department. You further request that all copy fees be waived for your request.

In response to your formal complaint, Mr. Burkett advised that the response to your request complied with the APRA and you are responsible for any copy fees for the records that have been requested.

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. Here you submitted your request on February 13, 2013 to which Ms. Burkett responded on behalf of the Department on February 19, 2013. Thus, it is my opinion that the Department complied with the requirements of section 9(b) of the APRA in responding to your request within seven (7) days of its receipt.

The APRA permits a public agency to charge a fee for copies of public records. *See* I.C. § 5-14-3-8. Additionally, a public agency may require a person to pay the copying fee in advance. *Id.* Nothing in the APRA requires that a public agency waive a copying fee. *See Opinion of the Public Access Counselor 07-FC-124.* It is my opinion that the Department did not violate the APRA by refusing your request to waive all applicable copy fees in response to your 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.* Here, the Department provided that it did not maintain any records in response to your request for the names of certain private health care companies and the individuals that serve on said company’s Board of Directors. It is my opinion that the Department did not violate the APRA by failing to provide records that it was not otherwise legally obligated to maintain.



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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*. Here the Department advised that your request for “memos, that the private medical health care company has issued about not paying for indigent prisoners medication” was not made with reasonable particularity. Your request was not denied; the Department requested further specific information from you so that the request could be fulfilled. I would encourage you to provide further information to the Department so that your request may be fulfilled. As such, it is my opinion that the Department did not violate the APRA.

CONCLUSION

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

Best regards,

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

Joseph B. Hoage
Public Access Counselor

cc: Charlene Burkett