

November 14, 2000

Ms. Sarah L. Nagy
9595 Whitley Dr., Suite 202
Indianapolis, Indiana 46240

Re: Advisory Opinion 00-FC-37 *Denial of Access to Public Records by the Indiana Department of Correction.*

Dear Ms. Nagy:

This is in response to your formal complaint¹, which was received on October 17, 2000. You have alleged that the Indiana Department of Correction ("Department") has violated the Indiana Access to Public Records Act ("APRA") Indiana Code chapter 5-14-3. Specifically, you cite the following two bases for your complaint: the Department's alleged failure to respond to your requests dated August 1 and August 9, 2000 within the time periods specified under the APRA and the Department's ultimate production of records that were not responsive to your requests. Mr. Edward Cohn, Commissioner of the Department, responded in writing to your complaint in a letter dated October 26, 2000. A copy of his response is enclosed for your reference.

For the reasons stated below, it is my opinion that the Department denied you access to public records when it failed to respond to your public records requests within twenty-four (24) hours of receipt of your requests as required under Indiana Code section 5-14-3-9. This denial is actionable under Indiana Code section 5-14-3-9(d). The Department's production of records in response to your August 9th request was not a denial under the APRA with respect to items 17-39. The Department's failure to cite an exception to disclosure or to specifically inform you that they do not maintain all of the information you requested under items 1-16 of your August 9th request was a denial under the APRA.

BACKGROUND

According to your complaint, you made a written public records request by hand-delivery to the Department on August 1, 2000 requesting access to 70 different items.² In your opening paragraph in that request, you noted that you had made previous requests for most of these items to the Department. You then made an additional request that was also hand-delivered to the Department on August 9, 2000 requesting another 39 items.

On August 9, 2000, you personally contacted this Office and faxed copies of your requests to the Department to me. I then contacted Robert Bugher, Chief Legal Officer for the Department, who

advised me that he would fax a response to you. Approximately one month later, your paralegal, Raymond Cox, contacted this Office to inform me that you had never received any response to the two written requests for access to public records delivered in early August. On that day, September 11, 2000, I contacted Ms. Pam Pattison, Public Information Officer for the Department, and advised her of this problem. Ms. Pattison looked into your requests and followed up with me that same day to tell me that she was making contact with the persons in the Department concerning your requests. I passed this information on to Mr. Cox on the same day.

On September 20, 2000, I received another call from Mr. Cox advising me that you had not yet received a response to your two public records requests. I again contacted Ms. Pattison who then looked into the matter. I contacted Mr. Cox on October 5, 2000 and informed him that Ms. Pattison had compiled many of the public records in question and that there would be between 6,000 and 7,000 pages copied for you.

On October 13, 2000, Ms. Pattison telephoned me to inform me that Mr. Cox had communicated to her that you no longer wanted all the public records you had requested from the Department. I also received a copy of a letter to you from Ms. Pattison, which was dated October 13, 2000, informing you that the Department was providing the information you had requested regarding items 1 -16 of your second request of August 9th. Ms. Pattison also informed you in this letter that, with regard to items 17 - 39 of the August 9th request, you need to contact the LaPorte County Prosecutor's Office directly because the Department does not maintain those records. You then filed your formal complaint, which was received on October 17th in this Office, alleging that the Department had violated the APRA by failing to respond in a timely manner to your requests and by failing to provide documents that were responsive to your August 9th request.

In his response to your complaint, Commissioner Cohn stated that Ms. Pattison had a conversation with Mr. Cox, on October 6, 2000 informing him that most of the information requested in your two August requests had been provided to you on or before June 16, 2000. On October 12, 2000, Ms. Pattison contacted Mr. Cox to inform him that the additional information requested was available and, at that time, Mr. Cox stated that you were no longer interested in obtaining any information requested prior to your August 9th request. With respect to that request, the Department produced to you the statistics regarding inmates' deaths in the format in which the Department keeps this information. Ms. Pattison asked Mr. Cox for a letter from you confirming that you were no longer interested in obtaining any information prior to August 9, 2000, however, no such communication has been received by the Department.

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." Ind. Code § 5-14-3-1. The Department is clearly a public agency for the purposes of the APRA. Ind. Code § 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Department during regular business hours

unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under Indiana Code section 5-14-3-4. Ind. Code § 5-14-3-3(a).

Failure to Respond within Time Period under APRA

It is the responsibility of the public agency to respond to requests for public records within a specified time period. The APRA does not set any time periods for producing public records, merely for responding to the request. While this response has not been defined under the APRA, what is contemplated is a communication to the requestor. For example, a public agency may respond that the request has been received, whether there are any records that will be produced, that the records requested are confidential or otherwise nondisclosable, or that the public agency needs more time to compile the records requested. A response may also provide the records requested, or notify the requestor that the public records requested are available for his or her inspection.

A public agency is required to make a response to a request made in person within twenty-four (24) hours after it has been received; the failure to do so constitutes a denial under the APRA. Ind. Code § 5-14-3-9(a)(2). Once a denial has occurred under the APRA, a person may file suit in the circuit or superior court in which the denial took place to compel the public agency to disclose the public records requested. Ind. Code § 5-14-3-9(d).

Under the facts presented, it is my opinion that the Department failed to respond to your hand delivered written request of August 1 and August 9, 2000 within the twenty-four (24) hour statutory time period required under the APRA. These failures constituted denials under Indiana Code section 5-14-3-9 (a)(2) and are actionable in court.

Production of records that were not responsive to your request

You also complain that the Department did eventually produce records in response to your August 9th request that were not responsive to that request. The Department responded to this allegation by stating that they provided you with the information you requested in response to your items numbered 1 through 16 in the format in which it is maintained. As to items 17-39, the Department did not produce any documents stating that it did not have any information responsive to these items.

First, with respect to the response to items 1-16, I reviewed the information produced for you by the Department. You asked for information concerning offender deaths over the past 1 to 10 years that occurred in the Westville Correctional Facility ("WCF.") Specifically, you asked for the names of the inmates who died, the dates of the deaths, the causes of the deaths, and the numbers of all inmates, however, you did not specify whether you wanted the inmate's DOC number or the quantity of deaths that occurred for those years. The Department provided you with information that includes the data you requested for most of the time period requested. The Department did not provide information on causes of death for the years 1991, 1992, and 2000, and the names of offenders, dates of death, and numbers of inmates who died for the time period after approximately February 26, 2000. If the Department had this information in any form, that information should have been produced in response to your request. The failure to provide this missing information without citing to any exception to disclosure under the

APRA, or the indication that the information does not exist, was a denial under the APRA. If the Department did not have all of the information requested, they should have specifically informed you of this in their letter of October 13th.³ If the Department has not compiled this information, there is nothing in the APRA that requires them to create a new record in response to a request. If the Department does not have information within these documents about certain offenders or facilities, you may make a more particular request⁴ for that information.

With respect to your items numbered 17-39 in your August 9th request, the Department stated that they have no records responsive to these items. This was an appropriate response under the APRA and not a denial.

CONCLUSION

It is my opinion that the Indiana Department of Correction failed to respond within the time period required under Indiana Code section 5-14-3-9(a)(2) to your public records requests of August 1 and August 9, 2000 and these constitute denials that are actionable under Indiana Code section 5-14-3-9 (d). The Department's production of records in response to your August 9th request was not a denial under the APRA with respect to your items numbered 17-39. The Department's failure to provide an explanation for not providing all of the information you requested under items 1-16, however, without citing to any exception to disclosure under the APRA or an indication that the information does not exist, was a denial under the APRA.

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: Mr. Edward Cohn, Commissioner
Department of Correction

¹ As part of your complaint, you included a new public records request to the Department for some of the items you requested in the requests that are the subject of this opinion. This opinion will not address this new request.

² I use this term to refer to the varied requests you have made of the Department some of which were

phrased as "any and all information" and others more specific requests for information.

³ In a telephone conversation with Ms. Pattison this morning, she did confirm that this is all of the information that the Department has compiled.

⁴ This has been done in your request that accompanied your formal complaint.
