



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
HEATHER NEAL

Indiana Government Center South
402 West Washington Street, Room W460
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

May 26, 2009

Paul Ogden
118 North Delaware Street
Indianapolis, Indiana 46204

Re: Formal Complaint 09-FC-108; Alleged Violation of the Access to Public Records Act by Corrections Corporation of America

Dear Mr. Ogden:

This advisory opinion is in response to your recent formal complaint alleging Corrections Corporation of America ("CCA"), which operates Marion County Jail II through an agreement with the Marion County Sheriff's Department, violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) and I.C. § 5-23-7-1 by denying you access to records. A copy of CCA's response to the complaint is enclosed for your reference. It is my opinion that CCA is not a public agency for the purposes of the APRA and that CCA has not violated the APRA by denying you access to records which are not directly related to a public-private agreement.

BACKGROUND

You allege that CCA has denied you access to public records. You allege, and provide copies of letters demonstrating, that you sent to CCA a letter dated April 17, 2009 wherein you requested three categories of records. All of the records you requested relate to legal representation of CCA by the law firm Barnes & Thornburg LLP. CCA responded by letter dated April 24 from counsel. CCA denied you access to the records you requested on the basis that the records are not subject to I.C. § 5-23-7-1 because the records are outside the scope of the public-private agreement. You filed the present complaint on April 24, alleging CCA has denied you access to public records, in violation of the APRA.

CCA responded to the complaint by letter dated May 22 from attorney William Hahn. CCA contends, and asserts that you acknowledge, it is not a public agency for the purposes of the APRA. Instead, CCA operates under a fee-for-service agreement with the Marion County Sheriff's Department to operate Marion County Jail II. CCA asserts that the Indiana Supreme Court's decision in *Indianapolis Convention & Visitors Ass'n v. Indianapolis Newspapers*, 755 N.E.2d 208 (Ind. 1991) supports its denial of access to the records you have requested, as those records are not related to the public-private

agreement by which CCA operates the Jail II. CCA acknowledges that there are a number of records CCA maintains which relates to the housing of inmates at the Jail II which would be subject to public inspection. But CCA asserts that the relationship between CCA and its outside counsel is not directly related to the public-private agreement.

ANALYSIS

The public policy of the APRA states, "[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." I.C. § 5-14-3-1. Any person has the right to inspect and copy the public records of a public agency during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

In the formal complaint you filed with this office, you have not asserted CCA is a public agency. In your April 17 letter to the Jail II, you assert that because CCA has entered into a contract with the Sheriff for operation of the Jail II, I.C. § 5-23-7-1 subjects CCA to the APRA. The APRA places the burden of proof for nondisclosure on the public agency. *See* I.C. § 5-14-3-1. But the burden of proving that an entity is a "public agency" within the meaning of the Access to Public Records Act is on the person asserting his rights under the APRA. *Perry County Development Corp. v. Kempf*, 712 N.E.2d 1020 (Ind. Ct. App. 1999). You have not asserted CCA is a public agency. CCA has asserted it is not a public agency and relies upon case law as well as the APRA definition of a "public agency." In my opinion, CCA is not a public agency for the purposes of the APRA.

You asserted in your April 17 letter to CCA, though not in your complaint to my office, that CCA is subject to the APRA via I.C. § 5-23-7-1 because CCA has entered into a public-private partnership to operate the Jail II. But I.C. § 5-23-7-1 does not provide that the entirety of an entity's records are subject to the APRA when that entity has entered into such a partnership or agreement. Instead, I.C. § 5-23-7-1 provides that certain records of the entity are subject to inspection and copying:

Records of an operator that is a party to a public-private agreement are subject to inspection and copying to the same extent the records would be subject to inspection and copying if the operator were a public agency under IC 5-14-3. This section is limited to records directly relating to the public-private agreements.
I.C. § 5-23-7-1.

CCA does not disagree it is an operator which is a party to a public-private agreement. Because it is, I.C. § 5-23-7-1 requires CCA to make available for inspection and copying records *directly relating* to the public-private agreements. As CCA contends, the Indiana Supreme Court has held that the Indiana General Assembly did not intend to require an entity which is a party to such an agreement to open all of its records:

If the relationship is, in fact, a fee-for-service (or goods) agreement, then, clearly, an entity is not maintained or supported by public funds. Otherwise, any entity who performed any service or provided any good for any governmental entity would find its business records available for public inspection under the Public Records Act. We do not perceive this to be the legislature's intent in passing the Public Records Act. *Indianapolis Convention & Visitors Ass'n v. Indianapolis Newspapers*, 755 N.E.2d 208, 213 (Ind. 1991)

While the court's analysis related to the difference between a public agency and an entity engaged in a fee-for-service arrangement, the opinion can certainly be applied to the issue of which records of such an entity are open to inspection. The court said it was not the legislature's intent to open all the business records of any entity which performs a service for a governmental entity. *Id.* And I.C. § 5-23-7-1 further clarifies that only those records directly relating to the public-private agreement are open to inspection.

CCA has provided a copy of the operating agreement governing the relationship between CCA and the Sheriff's Department. The agreement obligates CCA to provide a number of management services, including such services as food service, transportation, telephone privileges, inmate work programs, and others. I find no provision in the agreement obligating CCA to provide legal counsel as part of the agreement. I agree with CCA; I could envision a whole host of records which would be subject to inspection and copying. For instance, records related to the provision of transportation, food service, telephone privileges, and the other services enumerated in the contract are the types of records which CCA would be required to make available for inspection and copying.

In my opinion, though, I.C. § 5-23-7-1 does not extend to all the business records of an entity engaged in a public-private agreement. CCA contends the records you have requested relate to CCA's payment and selection of legal services, which do not involve the Sheriff's Department nor do they directly relate to the housing of inmates. I agree.

While I have previously opined, and still maintain the opinion, that certain information contained in invoices for legal services maintained for public agencies must be made available for inspection and copying, the present issue is distinguished from my prior opinions. Those opinions related to public agencies. And for public agencies, all records are public records and must be open for inspection and copying unless an exception to disclosure applies. *See* I.C. § 5-14-3-3(a). Here, though, CCA is not a public agency. Because only those records which are directly related to the agreement are open for inspection and copying and because it is my opinion the records you have requested are not directly related to the agreement, it is my opinion CCA is not required to allow you to inspect and copy those records.

CONCLUSION

For the foregoing reasons, it is my opinion that CCA is not a public agency for the purposes of the APRA and that CCA has not violated the APRA by denying you access to records which are not directly related to a public-private agreement.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: William Hahn, Barnes & Thornburg LLP
Jeff Conway, Marion County Jail II