



STATE OF INDIANA

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August 4, 2009

Scott Severns
10293 North Meridian Street #150
Indianapolis, Indiana 46290

Re: Formal Complaint 09-FC-170; Alleged Violation of the Access to Public Records Act by the Indiana Family and Social Services Administration

Dear Mr. Severns:

This advisory opinion is in response to your formal complaint alleging the Indiana Family and Social Services Administration ("FSSA") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to records. A copy of FSSA's response to the complaint is enclosed for your reference. It is my opinion FSSA must provide you, as the representative of your client, the opportunity to examine the contents of your client's case file and all documents and records to be used by FSSA at a hearing. It is my opinion, though, that nothing in the APRA requires FSSA to allow you to log in to FSSA's electronic data storage system.

BACKGROUND

You filed the present complaint on July 28, 2009, alleging that FSSA denied you access to an online case record for a food stamp and Medicaid beneficiary. You requested priority status, indicating you need the records for a proceeding before another public agency. Pursuant to 62 IAC 1-1-3(3), your request for priority status has been granted.

You followed the complaint with an electronic mail message dated July 31 wherein you allege that FSSA has attempted to respond to your request by gradually providing more and more print-outs of various screens and documents maintained in its electronic files. You further allege that FSSA denies access to online material or a way to copy the material to a disk. You contend the records FSSA has provided are "incomplete and unworkable." You contend that some text is cut off of the screen shots and that certain fields containing definitions of cryptic codes are not attached, so the codes are undecipherable. You contend that compliance with state and federal law can only be done by FSSA's provision of online access and electronic copies of the records.

FSSA responded to the complaint by letter dated August 3 from General Counsel Jessaca Turner Stults. FSSA contends that “the safeguarding of and access to the information” you seek is governed not by the APRA but by federal law. FSSA concedes that federal law does require the agency to provide your client, or you as your client’s representative, the opportunity to examine the content of the case file and all documents and records to be used at a hearing. FSSA contends it has provided you copies of all such records. Finally, FSSA contends that because it is charged with maintaining as confidential the records of all other individuals, it cannot allow you access to the electronic data management system.

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.

FSSA argues that the records at issue are governed not by the APRA but instead by federal law. I do not agree. FSSA is clearly a public agency for the purposes of the APRA. I.C. § 5-14-3-2(m)(1). Accordingly, any person has the right to inspect and copy the public records of the FSSA 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).

‘Public record’ means “any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics. I.C. § 5-14-3-2(n).

The records at issue here are, as I understand it, electronically stored data maintained by FSSA. They are indeed public records of a public agency. While the records may be created, received, maintained, retained or filed pursuant to federal law and while federal law may govern maintenance of and access to the records, they are nonetheless public records pursuant to the APRA. And while many of the records maintained by FSSA may be excepted from disclosure pursuant to federal law, they are still public records – confidential public records, but public records nonetheless. *See* I.C. § 5-14-3-4(a)(3). Former counselors have likewise addressed APRA issues related to records maintained by FSSA pursuant to federal law. *See Opinions of the Public Access Counselor 03-FC-93, 05-FC-145, and 07-FC-75.*

The next issue, then, is whether you are entitled to access to the records you have requested. The APRA provides that, unless access is specifically required by a state or federal statute or court order under the rules of discovery, records required to be kept

confidential by federal law may not be disclosed by a public agency. I.C. § 5-14-3-4(a)(3). Generally, 42 C.F.R. § 431 requires FSSA to safeguard, or keep confidential, most of the information it maintains about applicants and recipients. As such, as a general rule the records you have requested are records that FSSA may not disclose absent a state or federal statute or order of the court. I.C. § 5-14-3-4(a)(3).

Because you are the representative of an applicant or recipient, though, you are entitled, pursuant to federal law, access to certain records pertaining to your client and only your client:

The applicant or recipient, or his representative, must be given an opportunity to—

(a) Examine at a reasonable time before the date of the hearing and during the hearing:

- (1) The content of the applicant's or recipient's case file; and
- (2) All documents and records to be used by the State or local agency or the skilled nursing facility or nursing facility at the hearing; . . .
42 C.F.R. § 431.242 (1992).

Based on the foregoing federal regulation, it is my opinion you are entitled to examine the content of your client's case file and all documents and records to be used at a hearing.

FSSA contends it has provided you access to all records to which you are entitled access pursuant to 42 C.F.R. § 431.242 (1992). You argue that the copies you have received are incomplete and unworkable because parts of the text are missing and some of the "cryptic codes" are rendered useless with a key to unlock those codes. Nothing in the APRA addresses the latter claim. Nothing in the APRA provides how records must be created or what language they must contain, so I cannot find that FSSA must explain what various codes or other text mean.

As to your first claim, that the records you have received are incomplete, it is my opinion that FSSA must provide you access to examine all records which are described in 42 C.F.R. § 431.242(a) (1992). You contend that in order to fully examine the records, you must be allowed electronic access to FSSA's data management system. I do not agree. The APRA provides that a person is entitled to inspect and copy records of a public agency. I.C. § 5-14-3-3(a). When a public agency maintains records in an electronic data storage system, the agency shall make reasonable efforts to provide a requestor with all disclosable data if the medium requested is compatible with the agency's data storage system. I.C. § 5-14-3-3(d). Here, FSSA has a duty to safeguard the information related to all other applicants and recipients. *See* 42 C.F.R. § 431. As such, the agency cannot reasonably provide you electronic access to the entire data management system; in doing so, FSSA would violate state and federal law requiring it to maintain those records as confidential. The agency must make reasonable efforts, though, to provide you with *all* disclosable data. I.C. § 5-14-3-3(d). If copying the

records to a disc or drive is something the agency can do through reasonable efforts, it is my opinion the agency should do so since that is how you have requested the records. If such a transfer is not compatible with the agency's data management system, the agency should provide you screen shots of all disclosable data. This means that in those places where text is missing or cut off from a record you have previously received, the agency should provide you a better copy which includes all information from the files.

CONCLUSION

For the foregoing reasons, it is my opinion FSSA must provide you, as the representative of your client, the opportunity to examine the contents of your client's case file and all documents and records to be used by FSSA at a hearing. It is my opinion, though, that nothing in the APRA requires FSSA to allow you to log in to FSSA's electronic data storage system.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Jessaca Turner Stults, Indiana Family and Social Services Administration