

November 26, 2003

Mr. Larriante J. Sumbry
DOC No. 965137, C-433
Indiana State Prison
P.O. Box 41
Michigan City, Indiana 46361-0041

*Re: Formal Complaint 03-FC-113
Alleged Denial of Access to Public Records by the Indiana Attorney General*

Dear Mr. Sumbry:

This is in response to your formal complaint alleging that the Indiana Attorney General violated the Access to Public Records Act (APRA) (Ind. Code 5-14-3-1 *et seq.*), when he failed to respond to your October 20, 2003, request for records within the time period allotted by statute. The Attorney General has submitted a response to your complaint, and a copy of that written response is enclosed for your reference. For the reasons set forth below, I find that the Attorney General did not violate the APRA as alleged in your complaint.

BACKGROUND

On October 20, 2003, you signed a letter addressed to Deputy Attorney General David Steiner requesting access to records you assert are maintained by the Attorney General. Specifically, your request seeks the following records and/or information:

- Attorney General Annual Report;
- Attorney General Professional Services Contracts;
- Definition of duties and responsibilities of the Attorney General;
- Criteria for becoming Attorney General;
- Types of complaints investigated by Attorney General;
- Names of staff employed by Attorney General;
- Attorney General Handbook of Practice and Internal Procedures;
- Attorney General Code of Ethics;
- Attorney General Civil/Criminal Complaint Form; and
- Legislative laws to which the Attorney General must adhere.

Your records request is signed, simply, "Sumbry," and contains neither your full name, your offender number, your return address, nor any other contact information for the public agency to use in responding to the request.

On October 23, 2003, your records request was received by the Attorney General as indicated by the timestamp on the request and as acknowledged by the Attorney General's response to your complaint. The Attorney General did not respond to your records request until November 5, 2003, thirteen (13) days after receipt. That response indicates that the Attorney General is "in the process of locating and reviewing any information [it] might have that meets your request," and that any responsive records that are properly disclosable under the APRA "will be disclosed to you in a reasonable time period."

On October 30, 2003, on the seventh day after your request was received by the Attorney General, but before the Attorney General mailed his response, you brought this complaint alleging that the Attorney General violated the APRA by failing to respond to your request within seven (7) days. The Attorney General responds to your complaint alleging that the complaint was premature, that it was not directed to the appropriate employee of the public agency directly responsible for responding to public records requests, and that any delay in responding to your request was the result of your failure to provide contact information to facilitate that response.

ANALYSIS

Your complaint was premature. A public agency that receives a request for records under the APRA has a specified period of time to respond to the request. IC 5-14-3-9. A timely response to the request does not mean that the public agency must expressly deny or produce the documents that are responsive to the request within the statutorily prescribed time period. Of course, a public agency is free to take either of those actions, but may also comply with its response obligation under the statute by acknowledging receipt of the request and indicating the specific actions the agency is taking toward production. When a public records request is made in writing and delivered to the public agency by mail or facsimile, the public agency is required to respond to that request within seven (7) days of *receipt* of the request. IC 5-14-3-9(b). If that period of time elapses without a response, the request is presumed denied. IC 5-14-3-9(b). When a public records request is denied, the requesting party may bring an action under the APRA (IC 5-14-3-9(d)), or may file a formal complaint with this office (IC 5-14-5-6). You signed your records request on October 20, 2003. Although there is no suggestion of when you mailed the request, I assume for purposes of this opinion that you mailed the request on the same day you signed it. For requests tendered by mail, the date of *receipt* by the public agency is the operative trigger to begin the statutorily prescribed response time. IC 5-14-3-9(b). Consistent with the practice in other contexts, this office calculates and assumes *receipt* within three (3) days of the date of mailing (*Cf.* Ind. Trial Rule 6(E); Ind. Appellate Rule 25(C)), or, in this case, October 23, 2003. And, in fact, that is the date the Attorney General shows receipt of the request. Thus, the Attorney General had until the end of the day on October 30, 2003, to respond to your request. Your complaint alleging that the Attorney General violated the APRA by failing to timely respond is signed and dated on October 30, 2003, *prior to the time the Attorney*

General's response was due. Because the Attorney General was not in violation of the APRA at the time you prepared your complaint, your complaint was premature and no violation can be said to have occurred at that time and based on the allegations of that complaint.¹

Although I find the complaint was premature, I do not think that conclusion fatal to my authority to address the question of the Attorney General's delay in responding to your records request. *Compare* IC 5-14-4-10(5), 10(6) (generally setting forth authority of Public Access Counselor to issue opinions upon request and at any time) *with* IC 5-14-5-7 (providing that a properly filed formal complaint that requires a formal written advisory opinion must be filed *no later than* thirty (30) days from the date of denial). In this case it is clear that although the Attorney General still had time to respond to your records request on the date you submitted your complaint -- the last day for the response -- he ultimately failed to do so. In my opinion this delay should not be charged to the Attorney General.

The Attorney General asserts that the delay was in part excused by your failure to direct the records request to the specific person in the public agency that is designated to respond to such requests. The APRA does not place on the requesting party the burden to identify and direct a public records request to a specific person within the public agency. The APRA requires only that the request identify the records sought with reasonable particularity and that, at the discretion of the public agency, it be in writing on or in a form provided by the agency. IC 5-14-3-3(a). A denial is presumed to occur when a response is not forthcoming within the requisite time from the date "the *public agency* receives the request." IC 5-14-3-9(b) (emphasis added). It is the public agency, not the requesting party, that has the obligation to direct the request to the appropriate individual within the agency that is responsible for the response, and the agency's failure to do so within the response period cannot excuse a delay in the response.

The Attorney General's additional point merits a different conclusion. The Attorney General asserts that he could not respond to the records request within the prescribed time period, that is, by October 30, 2003, because the request did not contain any contact information to enable and facilitate a timely response. The Attorney General notes that your request did not contain a return address or other contact information, and was signed with only your last name. The Attorney General also asserts that the envelope that carried your request was not attached to the request after it was opened at that office. Thus, even assuming the envelope contained your full name, offender number, and return address, it could not inform the Attorney General to facilitate a response to your request. Whatever else might be said for the Attorney General's failure to retain that envelope with your records request, or the resources that are readily available to that agency to research and access your contact information from the Indiana Department of Corrections, it is at least as easy a matter for you to include your contact information within the four corners of the records request to enable and facilitate a timely

¹ I note that you have previously submitted premature complaints under similar circumstances. *See, e.g., Advisory Opinion 03-FC-89, Alleged Denial of Access to Public Records by the Indiana Secretary of State*, issued October 22, 2003. You can avoid this issue and the possibility of having future complaints returned by allowing sufficient time for the public agency to respond to your records request before you bring your complaint. A good rule of thumb would be to allow for 13 days from the date of your request. That period will cover the time it takes for your request to reach the public agency, a seven-day response period, and an additional three days for the response to reach you.

response. In my opinion, that is what is anticipated by the APRA when it establishes the response obligations of the public agency, and I am unwilling to charge any delay in response against the public agency where that delay is the result of the requesting party's failure to include contact information.² The Attorney General notes that he obtained your contact information, at least in part, when this office provided him with a copy of your complaint on November 3, 2003. A response was thereafter tendered within two days. In my opinion, the time and content of the Attorney General's response under these facts complies substantially if not fully with the APRA.

CONCLUSION

For the reasons set forth above, I find that the Attorney General did not violate the APRA by failing to respond to your request for public records within seven (7) days of receipt.

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Mr. David Steiner, Deputy Attorney General
Mr. Gregory F. Zoeller, Deputy Attorney General

² Certainly the public agency is under no more an obligation to research and independently obtain your contact information than are you to research and identify a specific employee within the agency to whom to direct your request in the first instance.