

June 23, 2005

Michael Hunt
DOC # 961894
Location: 318 D East
Indiana State Prison
P.O. Box 41
Michigan, City, IN 46361-0041

Re: Formal Complaint 05-FC-102; Alleged Violation of the Access to Public Records Act by the Indiana Department of Correction, Indiana State Prison.

Dear Mr. Hunt:

This is in response to your formal complaint alleging that the Indiana Department of Correction, Indiana State Prison ("ISP") violated the Access to Public Records Act ("APRA") by denying your request for records.

BACKGROUND

You mailed a formal complaint to the Office of the Public Access Counselor on May 18, 2005; that complaint was received on May 23, 2005. The complaint stated that it was a third party complaint filed by Helen Coleman for Michael Hunt. I have since spoken with Ms. Coleman, who is your mother, and she has indicated that she is not the party filing these complaints. Based on my conversation with Ms. Coleman I have informed you that I will no longer accept complaints from you filed under her name with her home address. This complaint was opened prior to the call from Ms. Coleman. Therefore, I am treating this as a complaint filed by you.

Your complaint was extremely difficult to discern but from what I can gather, you filed a request for public records with the ISP on April 14 or 15, 2005. The ISP states that the request was filed on the 14th. The ISP provided a copy of the request that you dated April 15, 2005, but was date stamped as "Received" on April 14, 2005. You also complain of a request filed May 13, 2005. Again, the ISP provided a copy of that request which is date stamped on the 13th.

It appears that in regard to the April 15th complaint, you believe that the ISP was required to provide the documents to you within seven (7) days of receipt of your request, or by April 21, 2005. The ISP has provided copies of your request for records, ISP's initial April 14, 2005 response to your request and ISP's April 28, 2005 response to your request. Copies of all documents provided by the ISP are enclosed for your reference.

Barry Nothstine provided you with an initial response on behalf of the ISP by letter dated April 14, 2005. He acknowledged receipt of your request and indicated that the ISP intended to respond to your request within 14 calendar days, or by April 28, 2005. On April 28, 2005 Mr. Nothstine, on behalf of the ISP, provided the response to your request as promised. The ISP's April 28, 2005 response stated,

“Your request listed above concerns a request for document(s) the [sic] made changes in the shower procedure, use of telephones by the offenders, recreation schedule and insufficient time to take a shower on D-East.

That information is contained in the Post Orders for D Cellhouse east side [sic]. According to Administrative Procedure No. 00-04-101 titled The Development, Approval and Implementation of Policy, all Post Orders are considered confidential. Indiana Code 5-14-3-4(a) of the Indiana Access to Public Records Act provides for denying access to confidential records.

I am unable to honor your request for the above reasons.”

Regarding your May 13, 2005 request for records the ISP provided copies of your request and Mr. Nothstine's May 13, 2005 response to your request. It appears that your complaint regarding the May 13th request is that you believe that the ISP improperly denied your request for records. The content of that response, provided the same day that your request was received by the ISP, is summarized in the analysis portion to follow.

ANALYSIS

Timeliness of Response

Any person may inspect and copy the public records of any public agency during the agency's regular business hours. Ind.Code 5-14-3-3(a). Under the Access to Public Records Act, a public agency is required to respond to a request for records within a certain period of time. For requests made by mail or by facsimile the public agency is required to issue a response within seven (7) calendar days. IC 5-14-3-9(b). For requests that are delivered in person, the agency must respond within 24 hours. IC 5-14-3-9(a).

Failure to respond is deemed a denial of the record. If the public agency intends to deny a record, the denial must be in writing and include a statement of the specific exemption or exemptions that apply to the record, and the name and title or position of the person responsible for the denial. IC 5-14-3-9(c). A response may be acknowledgment that the agency received the

request and a statement regarding whether the public agency has responsive records, or when the agency may be able to give a fuller response.

The ISP provided a timely response upon receipt of both of your requests for public records. It is not clear whether your requests for records were hand-delivered or mailed to the ISP. Either way, the ISP's same day response to your requests for records would be timely within the timeframes established by IC 5-14-3-9(a) and (b).

Within the timeframe for response, the law envisions that the agency will issue a letter acknowledging receipt of the request and stating its intentions with respect to compliance with the APRA. The agency is not necessarily required to deny the record during the seven day timeframe, because the agency may not know whether it has responsive records or whether there is a basis for denying all or part of the record. Also, the agency may not be required to produce the record within the seven-day timeframe. Rather, the APRA does not specify when records must be produced. This office has stated that records should be produced within a reasonable time. The ISP's responses to you were appropriate under the APRA, as the ISP was not required to provide you with the documents within seven (7) days.

Denial of Records

April 14th Request

Regarding the April 14th request, the ISP responded that it could not provide you with the requested documents, as they were confidential according to Administrative Procedure No. 00-04-101 and IC 5-14-3-4(a). The ISP's denial does not fully comply with the requirements of the APRA. This office has consistently held that when denying a request for public records an agency should cite to the specific exemption upon which it relies. The ISP has failed to do this. This office can only assume that the ISP may have intended to cite to IC 5-14-3-4(a)(2) in its denial.

Under IC 5-14-3-4(a)(2) an agency may maintain as confidential "[t]hose records declared confidential by rule adopted by a public agency under specific authority to classify public records as confidential granted to the public agency by statute." In order for the ISP to properly rely on the Administrative Procedure No. 00-04-101 it must be able to, at a minimum, provide an Indiana Administrative Code cite that provides the basis for the adoption of Administrative Procedure No. 00-04-101. Citation to a properly promulgated rule would indicate the existence of a specific statute that provides the agency the authority to adopt a rule to classify public records as confidential as required by IC 5-14-3-4(a)(2). The agency could also cite to the specific statutory authority that allows it to adopt a rule to classify records as confidential.

If the Administrative Procedure No. 00-04-101 was adopted according to a rule promulgated in accordance with a statute providing the agency with the specific authority to classify public records as confidential, then the ISP's denial would have been proper. If the agency lacked the authority to classify the records as confidential, and if no other basis existed for denial of the record, then the ISP's denial violated the APRA.

May 13th Request

Regarding the response of the ISP to your May 13, 2005 request, the ISP both acknowledged and responded to your request upon receipt. I note that the ISP's response is a model response to a request for public records. The ISP specifically acknowledged and answered each of the individual items of your request. I will address the ISP's response according to type of response.

Documents that have not been created.

The APRA governs access to the existing public records of a public agency; 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. If an agency receives a request for documents that do not exist or that are not maintained by that agency it has the duty to notify the requestor of that fact. The ISP properly notified you that certain items that you requested do not exist.

Additionally, the ISP went one step further in trying to properly interpret your request. In several instances where the specifically requested document did not exist, the ISP either answered your question directly although it is not required to do so under the APRA, or it pointed out to you other potentially responsive documents. The ISP complied with the APRA when it notified you that the requested documents do not exist and provided you with information concerning the availability of other responsive documents.

Reasonable Particularity

“A request for inspection or copying must . . . identify with reasonable particularity the record being requested . . .” IC 5-14-3-3(a)(1).

In response to your request for a plan of correction submitted by Superintendent Davis and Commissioner Donahue for deficiencies found during Health Department Inspections, the ISP responded, “There is no plan of correction submitted by Commissioner Donahue. As to the plan correction submitted by Superintendent Davis you have not identified the record with reasonable particularity pursuant to Indiana Code 5-14-3-3(a). This facility is 145 years old and it has gone through thousands of inspections during its inception.”

This office has advised agencies to request clarification when a request is not reasonably particular. Agencies are best situated to understand their own record-keeping systems and the reasons why a request may not be reasonably particular to identify the requested record. The ISP did a good job of explaining to you why your request was not reasonably particular. The ISP also narrowed the documents for you by informing you that no such documents existed in regards to Commissioner Donahue. The ISP's response was appropriate under the circumstances and with the information provided by the ISP you should be able to designate a timeframe to the agency in order to obtain the requested documents.

Inspection and Copying

Any person may inspect and copy the public records of a public agency during the agency's regular business hours. IC 5-14-3-3(a). "A public agency may not deny or interfere with the exercise of the right stated in subsection (a). The public agency shall either: (1) provide the requested copies to the person making the request; or (2) allow the person to make copies: (A) on the agency's equipment; or (B) on his own equipment." IC 5-14-3-3(b).

The APRA provides that public agencies may charge a copying fee. IC 5-14-3-8. For state agencies, the Indiana Department of Administration sets the photocopying fee at the average cost per copy or \$0.10 per page, whichever is greater. IC 5-14-3-8(c). Currently, it is the policy of the Department of Administration that the copying fee is \$0.10 per page. Public agencies may also request payment in advance for photocopies. IC 5-14-3-8(e).

Mr. Nothstine has told you that several documents that may be responsive to your request are available in the administration building for review. He also helpfully provided you with the information that the documents you seek may also be available to you for copying and inspection in the Offender Law Library. Additionally he has stated that if you wish to obtain copies of the documents indicated in his response, you may obtain them at the established copying fee of \$0.10 per page. He has provided you with the number of pages of each document as well as the total cost for copying all of the pages. He has stated that if you will provide a remittance slip, he will provide the requested documents.

I do not find that ISP has denied you access to these records when Mr. Nothstine has clearly provided you with alternatives for inspecting and copying the documents or to pay the copying fee at the statutorily allowed rate.

CONCLUSION

For the foregoing reasons, I find that the Department of Correction, Indiana State Prison did not violate the Access to Public Records Act in its May 13, 2005 response to your request for records. However, I find that the Department of Correction, Indiana State Prison should have cited in its response a statute or administrative rule exempting the Post Orders from disclosure, and therefore the ISP violated the Access to Public Records Act in its April 28, 2005 response to you.

Sincerely,

Karen Davis
Public Access Counselor

cc: Barry Nothstine