

August 10, 2005

David M. Burks-Bey
#872875
E-304
Miami Correctional Facility
P.O. Box 900
Bunker Hill, IN 46914

Re: Formal Complaint 05-FC-133; Alleged Violation of the Access to Public Records Act by the Miami Correctional Facility

Dear Mr. Burks-Bey:

This is in response to your formal complaint alleging that the Miami Correctional Facility (“Facility”) violated the Access to Public Records Act (“APRA”) by failing to respond to your request for records.

BACKGROUND

You sent by interdepartmental mail to the Facility in which you are housed, a written request for records dated June 29, 2005. You state that you have never received a response. You requested various pieces of information regarding certain named personnel of the Miami Correctional Facility. Having received no response, you filed a formal complaint with my office on July 11, 2005. I sent a copy of your complaint to the Facility. I received a written response from Mr. Robert D. Bugher, Legal Services Director of the Indiana Department of Correction, the state agency to which Facility belongs.

In his response, Mr. Bugher admits that the Facility did not make the information available in a timely manner. He also states that he has provided you with part of the information that you sought, including the first names of three individual employees, position descriptions for certain of the positions that you sought, and all records relating to the particular tort claim that you requested. He cites serious safety and confidentiality concerns associated with providing offenders with access to personal information related to staff. He also cites IC 5-14-3-4(b)(10), which excludes “administrative or technical information that would jeopardize a

record keeping or security system.” Finally, he cites Department of Correction policy related to “standards of conduct” that discourages staff in the Facility from personal contact with an offender beyond that necessary for the proper supervision and treatment of the offender and prohibits employees from sharing personal information about themselves with offenders. I have enclosed a copy of his response.

ANALYSIS

Any person may inspect and copy the public records of any public agency during the agency’s regular business hours, except as provided in section 4 of the APRA. Ind. Code 5-14-3-3(a). A denial of disclosure by a public agency occurs when the person making the request is physically present in the office of the agency, makes the request by telephone, or requests enhanced access to a document, and twenty-four (24) hours elapse after any employee of the public agency refuses to permit inspection and copying of a public record when a request has been made. IC 5-14-3-9(a). If a person requests by mail or by facsimile a copy of a record, a denial of disclosure does not occur until seven (7) days have elapsed from the date the public agency receives the request. IC 5-14-3-9(b).

There are twenty discretionary exceptions to disclosure in section 4 of the APRA. For these exceptions, the public agency may or may not allow inspection and copying of the record, in its discretion. These exceptions are to be narrowly construed to effectuate the purposes of the APRA, which encourages disclosure. IC 5-14-3-1. Therefore, the burden for showing that the record may not be disclosed is on the public agency denying the record, not on the person requesting it. IC 5-14-3-1; IC 5-14-3-9(g).

First, you assert in your record request to the Facility that you had requested the record “in-person” because you had sent the request via interdepartmental mail; hence, the Facility had 24 hours in which to respond. In order to invoke the 24 hour response time, you would have to be physically present in the Facility’s “office;” and you were not “physically present” in the public agency’s office merely because you reside in the Facility and you sent the request via interdepartmental mail. Therefore, the Facility had seven days in which to respond. I cannot ascertain from Mr. Bugher’s response to your complaint when the Facility issued a response, although he appears to acknowledge that either the response or production of records was tardy. Nevertheless, unless the Facility failed to issue a written response to you within seven days after it received your request, a response would *not* have been tardy under the APRA.

Second, the Facility relies on Department of Correction policy and IC 5-14-3-4(b)(10) to deny you certain personnel file information about Facility employees. In comparing your request with the Facility’s response to your complaint, it appears that you are being refused the bulk of employee personnel files, including performance standards (state form 7345) for individual employees, and all disciplinary action and complaints taken or filed against the specified Facility employees.

Under IC 5-14-3-4(b)(8), personnel files of public employees are not disclosable at the agency’s discretion. Certain information, however, must be disclosed upon request. This includes, in relevant part, the employee’s job description, information relating to the status of

any formal charges against the employee, and the factual basis for any final disciplinary action resulting in suspension, demotion, or discharge. IC 5-14-3-4(b)(8).

The Facility cites IC 5-14-3-4(b)(10) as authority for its refusal to provide information about employees. Under this exception, an agency may not disclose “administrative or technical information that would jeopardize a record keeping or security system.” In *City of Elkhart v. Agenda: Open Government, Inc.*, 683 N.E.2d 622 (Ind. Ct. App. 1997), the court held that this exception was not appropriate where the agency speculated that future misuse of the information was likely, where the information was harmless on its face. The court held that section 4(b)(10) provides a discretionary exception for public records containing a “type” of information due to its nature and not because a speculated “use” of the information would jeopardize a record keeping or security system. *Id. at 627.*

The Facility’s denial of the personnel file information because your potential use of it could jeopardize security in the Facility is equally unavailing. However, the Facility may not disclose much of an employee’s personnel file under IC 5-14-3-4(b)(8). Specifically, the Facility may deny a portion of form 7345 containing performance standards and notations about the employee’s performance, since that information is not among the types of information that must be disclosed under IC 5-14-3-4(b)(8)(A). Form 7345 contains the job description which must be disclosed, although if the Facility provided this information from a different record, that would be sufficient. The Facility is also required to disclose, if any, information relating to the status of formal charges and the factual basis for final disciplinary action that resulted in the employee being suspended, demoted, or discharged. The Facility’s denial of this information was in violation of the APRA, and its continued denial of these records is a continuing violation of the APRA, actionable under IC 5-14-3-9(e).

A public agency must not disclose any information that is declared confidential by state statute. IC 5-14-3-4(a)(1). Also, a public agency may not disclose a record declared confidential by agency rule where the agency has express rulemaking authority to classify certain public records as confidential. IC 5-14-3-4(a)(2). The Facility would be well advised to determine whether any of its information or records are expressly declared confidential by statute, or are classified confidential by agency rule, when responding to record requests. Some of the Facility’s legitimate policy concerns may have been provided for in statute. However, because the legislature rather than a public agency sets policy with respect to disclosure of public records, the Facility’s plea for consideration of security concerns must always find expression in applicable law.

CONCLUSION

For the foregoing reasons, I find that the Miami Correctional Facility has violated the Access to Public Records Act.

Sincerely,

Karen Davis
Public Access Counselor

cc: Mr. Robert Bugher