

February 21, 2007

Mr. Amir Sanjari
P.O. Box 789
Andover, MA 01810

Re: Formal Complaint 07-FC-13; Alleged Violation of the Access to Public Records Act by the Indiana Attorney General

Dear Mr. Sanjari:

This is in response to your formal complaint alleging that the Indiana Attorney General (“Attorney General”) violated the Access to Public Records Act (APRA), the Privacy Act, and the Freedom of Information Act (“FOIA”). I find that the Attorney General did not violate the APRA, and that the Attorney General is not subject to the Privacy Act or the FOIA.

BACKGROUND

Your formal complaints are in two parts. First, you filed on January 22, 2007 a complaint that challenged the response of the Attorney General to your December 12, 2006 and December 29, 2006 records requests. You claim that the Attorney General’s responses were a denial of your rights under the APRA, the Privacy Act, and the FOIA. I will call this *Part I* of your complaint.

Next, during the pendency of this complaint, you filed another complaint alleging that the Attorney General failed to respond at all to a new request for records that you faxed to the Attorney General on January 22, 2007. For that complaint, you sought expedited treatment, and alleged circumstances for which I would be required to issue an opinion within seven days. I have designated that part of your complaint as *Part II* and consolidate the two complaints for purposes of this Advisory Opinion, 07-FC-13. Hence, this Opinion is issued within seven days from the filing of your second complaint.

Your request for *Part I* is available at this link [07-FC-13 Part I](#). The request for *Part II* is available at this link [07-FC-13 Part II](#).

I sent the Attorney General a copy of both *Parts* of your complaint. The Attorney General has submitted a response to each complaint, a copy of which is enclosed. For *Part I*, the Attorney General contends that its response to you was consistent with the Access to Public Records Act. The response indicated that:

- All disclosable records would be provided;
- The Attorney General must produce records within a reasonable time, not within the seven days for response;
- The responsive records identified by the Attorney General are extremely voluminous, and the scope of your requests are extremely broad; the Attorney General asked for more specificity, or in the alternative, that you visit the Offices of the Attorney General to review any hard copies and inspect and copy the records during the Office's normal business hours;
- In addition, many of the records that are responsive are in your possession, making even more reasonable your inspection of the files and identification of the records that you do not possess;
- You were told that the copies of the records would be assessed at \$.10 per page, payable in advance in conformance with the Access to Public Records Act. The Attorney General estimates that with 7,000 pages of documents, the fee for copying would be approximately \$700.

In response to *Part II* of your complaint, the Attorney General provided me a copy of the response dated January 25, 2007 that the Attorney General mailed to you at your address in Andover, Massachusetts. The Attorney General contends that *Part II* of your complaint is without merit since you contend that the Attorney General failed to respond at all. The response to your request is similar to the response to *Part I*, in that it raised the need to make your request more specific and set forth the expectation that any copies provided must be paid for in advance. In addition, the Attorney General noted that the APRA does not require a public agency to create a record, or conduct research to compile any record. If no record already exists that would break down the cases into the particular categories you seek, the Attorney General's Office is under no obligation to create a record to satisfy your request for records and has determined it will not voluntarily compile the records. Finally, the documents that would provide the information you seek about general types of cases handled by the Attorney General are not filed, either in paper or by database, by the criteria you specify that would permit the Attorney General to identify the records you seek. Therefore, the Attorney General has asked for either more specificity or that you inspect the records at its offices.

ANALYSIS

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the Access to Public Records Act ("APRA"). Ind. Code 5-14-3-3(a). The Attorney General is a public agency for purposes of the APRA. IC 5-14-3-2(1)(1).¹ "Public

¹ You claim that other laws provide you the right to the records of the Indiana Attorney General. Specifically, you cite the Freedom of Information Act and the Privacy Act as laws under which the Indiana Attorney General is required to provide the records. However, you cite no legal authority for this bare claim of right. State and local government agencies are not covered by the Privacy Act. Dittman v. California, 191 F.3d 1020, 1026, 1029 (9th

record” is any material that is “created, received, retained, maintained, or filed by or with a public agency.” IC 5-14-3-2(m). If a public agency receives a request for a record in person or by telephone, the public agency is required to respond within 24 hours or the record is deemed denied. IC 5-14-3-9(a). If the public agency receives a request for a record via U.S. Mail or facsimile, the public agency is required to respond within seven calendar days, or the request is deemed denied. IC 5-14-3-9(b). However, a response is not necessarily production of the records. Rather, records should be produced within a reasonable time. What is reasonable depends on the facts and circumstances. The number of responsive records and the nature of the requests in terms of their scope are relevant to the inquiry of what is a reasonable time.

If a request is made orally, either in person or by telephone, a public agency may deny the request orally. However, if a request initially is made in writing, by facsimile, or through enhanced access, or if an oral request that has been denied is renewed in writing or by facsimile, a public agency may deny the request if the denial is in writing or by facsimile, and the denial includes:

(A) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and

(B) the name and the title or position of the person responsible for the denial. IC 5-14-3-9(c).

A request must identify the record with reasonable particularity. IC 5-14-3-3(a)(1). If a person requests a record that does not exist, the public agency has not denied the record merely because it refuses to compile or create the record in response to a request for the information. This is because the APRA requires only that a public agency allow inspection and copying of its “public records” which by definition are those that are “created, received, retained, maintained, or filed by or with” a public agency. *See* IC 5-14-3-2(m).

A state agency may charge \$.10 per page for copies of its public records. IC 5-14-3-8(c).

Part I

Your complaint stated that the Attorney General’s office refused to provide the records to you. Because the Attorney General responded to your request in detail, I find it difficult to discern the crux of your complaint because you do not cite anything in particular about the Attorney General’s response that you believe is insufficient under the APRA. Due to such non-specificity, I can surmise only that you believe that your request was sufficiently specific to permit the Attorney General to copy all responsive records and mail them to you.

Cir. 1999); An exception to this rule, however, is the social security number usage restrictions, contained in section 7 of the Privacy Act, which do apply to federal, state, and local government agencies. (section 7, part of Pub. L. No. 93-579, can be found at 5 U.S.C. § 552a note (Disclosure of Social Security Number)). Your request is not covered by this narrow exception because you do not request social security numbers.

In addition, neither FOIA nor the Privacy Act applies to a state attorney general. McClain v. United States Dep't of Justice, No. 97-C-0385, 1999 WL 759505, at *2 (N.D. Ill. Sept. 1, 1999) (dismissing FOIA claims against state attorney general because “[p]laintiff may assert Privacy Act and Freedom of Information Act claims against . . . federal defendants only”), aff'd, 17 Fed. Appx. 471 (7th Cir. 2001).

I have reviewed your request and the Attorney General's response, and find nothing lacking in the Attorney General's response to you. Your requests are extremely broad. As just one example from your four-part request, you sought with respect to Cause No. 20D05-0010 DR 640:

Any and all records and orders in your possession or you are aware of pertaining to the said case either issued, acted upon, consulted upon either locally in Elkhart, or by Indiana Attorney General's office, or any other individual or agency inside or outside Indiana.

Your letter of December 29 to Deputy Attorney General Deanna Brunner practically acknowledges the lack of specificity, where you reiterate that when you asked for "any and all records" you mean "just that, *any and all records*". The Attorney General's request for more specificity, or in the alternative inviting you to visit the Office during regular business hours, was consistent with the Access to Public Records Act. Excerpts from the Attorney General's December 14, 2006 response to you state: "The Office of Attorney General hereby informs you that all public records properly disclosable under the [APRA]...will be disclosed to you in a reasonable time period, as noted above...Please contact our office at (317) 232-6201 to schedule a time to inspect the requisite files."

In your rejoinder to the December 14 responsive letter of the Attorney General, you tell Ms. Brunner that the Attorney General has violated the APRA because the records were not mailed to you within seven days, and you are unable to inspect them personally because you live in another state. There is nothing in the APRA that mandates that a public agency provide the copies of its public records via mail to a requester. Public agencies often do provide records in this way, which demonstrates the public agencies' good faith effort to provide records when personal inspection is difficult. However, as with your request, a request that is not reasonably particular would make it difficult, if not impossible, for the Attorney General to locate, copy, and mail to you all responsive documents. Moreover, a public agency is not required to make the copy of its public records. A public agency may provide the requester the means by which the copies can be made *by the requester* using the public agency's own equipment. See IC 5-14-3-3(b).

You have demonstrated no violation of the Access to Public Records Act in this part of your complaint.

Part II

You allege that the Attorney General did not respond at all to your January 22 request for records. This part of your complaint was filed on February 15. The Attorney General provided me with a copy of its response dated January 25. I have attached a copy of the letter from DeAnna Brunner, Deputy Attorney General in the event that you have never received the letter. Ms. Brunner affirmed that the letter was signed and placed in the outgoing mail on January 25. As your complaint asserts non-response as the sole basis, I can state that your complaint is

without merit. The Attorney General did send out a response well within the seven days required to respond. *See* IC 5-14-3-9(b).

I note as well that the response of the Attorney General appears to meet the requirements of the APRA for the same reasons as the earlier response to your first request. Your January 22 request would seem to require that the Attorney General either locate a document that matches or nearly matches your specifications, or compile the information or data into a document. As noted above, the Attorney General is not required to create or compile a record. Typical among the many different categories of records that you describe, you request that the Attorney General provide a break down by specific data sets or categories of information. As one example, your request was met with a response stating that the Attorney General simply does not compile information about cases in the way you requested it, by the type of defendant or by whether the defendant is an Indiana judge.

Moreover, the Attorney General did not just make a bare request for more specificity. The Attorney General explained for each category of records why the request could not be fulfilled and how you could make your request more specific. In this respect, the Attorney General's response is a model for how a public agency should respond when a request is not reasonably particular.

I recommend that you determine whether you can make your request more specific or particular, or can narrow the scope of the requests in any way. In the alternative, you can visit the Indiana Attorney General's Office during the regular business hours, and with advance notice to Ms. Brunner. If you do not agree with this Advisory Opinion, I hasten to inform you that no appeal lies from this purely advisory opinion. Rather, your recourse is to seek a ruling from an Indiana court compelling the Attorney General to disclose the records. *See* IC 5-14-3-9(e). If you are a prevailing plaintiff, the law would allow your attorney fees, court costs, and reasonable expenses of litigation. If the defendant prevails and the court finds the action frivolous or vexatious, the court could award attorney fees, court costs, and reasonable expenses of litigation to the defendant. IC 5-14-3-9(i).

CONCLUSION

For the foregoing reasons, I find that the Attorney General has not violated the Access to Public Records Act.

Sincerely,

Karen Davis
Public Access Counselor

cc: DeAnna Brunner