



STATE OF INDIANA

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August 4, 2010

Mr. Ted A. Czanderna
212 N. 6th St.
West Terre Haute, IN 47885

Re: Formal Complaint 10-FC-165; Alleged Violation of the Access to Public Records Act by the Family and Social Services Administration

Dear Mr. Czanderna:

This advisory opinion is in response to your formal complaint alleging the Family and Social Services Administration ("FSSA") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* FSSA's response to your complaint is enclosed for your reference. I note that I granted your request for priority status under 62 Ind. Admin. Code 1-1-3(3).

BACKGROUND

In your complaint, you allege that you requested information from FSSA for "[U.S. Department of Housing and Urban Development ("HUD")]’s Section ‘8’ program recertification that pays toward [your U.S. Department of Agriculture ("USDA") mortgage.]” The information “[c]oncerns payment of mileage the same as state employees to Medicaid recipients that [sic] require what medical bill they have paid to the medical mileage....” You claim that the State of Indiana “has agreed to pay [you] without applying the [reimbursements] to one or more of [y]our medical bills,” which is problematic for you and other individuals who apply for USDA food stamps and mortgages and HUD’s Section 8 housing program. You state that FSSA has provided you with some information, but that what you have received does not include “a receipt [for] what it has been applied to per doctor or supplier or transportation,” and you need that information “to do good business with the Federal Government.”

In response to your complaint, FSSA states that it is unsure how to respond to your complaint because you do not identify specific dates of FSSA’s alleged denials or what specifically you requested from FSSA. FSSA attorney Elizabeth Karlson further responds that “FSSA would be more than happy to provide [you] with records maintained

by FSSA which are properly disclosable under APRA (and which are not confidential, deliberative, etc.) within a reasonable period” provided that you submit a request with reasonable particularity. Ms. Karlson further states that you may contact her directly to communicate your request to her.

I also note that subsequent to the submission of your complaint, you also submitted a letter to you from Kristina Moorhead of FSSA’s Office of Medicaid Policy and Planning (“OMPP”). In that letter, Ms. Moorhead informed you that OMPP is not involved in administering HUD and the documentation that HUD requires. She also stated that OMPP “will not be changing the spend-down report issued to members at this time.”

ANALYSIS

The public policy of the APRA states that “(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 does not dispute that it is a public agency for the purposes of the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy FSSA’s public records during regular business hours unless the records are excepted from disclosure as confidential or nondisclosable under the APRA. I.C. § 5-14-3-3(a).

Here, it is unclear to me what specific records you requested from FSSA because I do not have a copy of any of your requests to the agency. As a result, it is equally difficult to discern whether or not FSSA even maintains the records you require, such as unspecified “receipts” for “doctor or supplier or transportation.” Based on Ms. Moorhead’s response to you, it appears that you have requested that FSSA (through OMPP) include additional information in its spend-down reports. However, nothing in the APRA requires a public agency to create a record in response to a request. *See Opinion of the Public Access Counselor 10-FC-56* (“Where records are not yet created, a public agency does not violate the APRA by refusing to produce them.”) Further, if FSSA has no records responsive to your request, FSSA did not violate the APRA by failing to provide you with responsive information. “[T]he APRA governs access to the public records of a public agency that exist; 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.” *Opinion of the Public Access Counselor 01-FC-61*; *see also Opinion of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly the [agency] could not be required to produce a copy....”).

It is my understanding that FSSA is willing to produce to you any non-confidential records that FSSA maintains. I trust that FSSA will respond to your satisfaction at that time once FSSA receives a reasonably particular request from you.

CONCLUSION

For the foregoing reasons, it is my opinion that FSSA did not violate the APRA by refusing to create records in response to your request or by failing to produce records that FSSA does not maintain.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive style with a large, sweeping initial 'A'.

Andrew J. Kossack
Public Access Counselor

Cc: Elizabeth Karlson