



# STATE OF INDIANA

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August 22, 2011

Mr. Larry T. Outlaw  
3038 W. 850 South  
Bunker Hill, Indiana 46914

*Re: Formal Complaints 11-FC-196; Alleged Violation of the Access to Public Records Act by the Pendleton Correctional Facility*

Dear Mr. Outlaw:

This advisory opinion is in response to your formal complaint alleging the Pendleton Correctional Facility ("PCF") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* David W. Barr responded on behalf of the PCF. His response is enclosed for your reference.

## BACKGROUND

In your complaint, you allege that on June 24, 2011 you submitted a written request to the PCF for ". . . names, D.O.C. Numbers, cell location(s) to all the assault victims that occurred in GCH from May 2010 to May 2011. i.e. Assault(s) that occurred as a result of a spear type when it happened through the cuff-port or/ behind the door."

David Barr responded on behalf of PCF to your request in writing on June 28, 2011. Mr. Barr acknowledged receipt of your request and that he would attempt to respond to the request within fourteen (14) calendar days. On July 15, 2011, Mr. Barr provided in writing that the PFC was denying your request pursuant to 210 IAC 1-6-4(a) and AP 01-04-104, which provide that divulging information about other offenders is prohibited. Mr. Barr further cited I.C. § 5-14-3, in that an agency may not disclose information that could jeopardize the safety and security of the agency.

In response to your formal complaint, Mr. Barr advised that the denial was made pursuant to 210 IAC 1-6-4(a), AP 01-04-104, and I.C. § 5-14-3. He further provided that your request was not necessarily a request for records but asking for a list of offenders who had been assaulted. As the PCF did not maintain such a list, there were no records responsive to your request; as such the PCF was not required to create a new record in response to your request.

## 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. The PCF 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 the PCF’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, the PCF responded to your request within the seven-day time period required by the APRA.

As to the substance of your records request, it is unclear from PCF’s response the relevance of 210 I.A.C. 1-6-4(a) in regards to your request. 210 I.A.C. 1-6-4(a) permits offenders to inspect copies of their own record, whereas here you have requested information on other offenders. Under the APRA, a public agency that withholds a public record bears the burden of proof to show that the record is exempt. I.C. §§ 5-14-3-1, 5-14-3-9(f) and (g). In my opinion, a citation to 210 I.A.C. 1-6-4(a) is insufficient to sustain that burden.

The APRA provides a number of categories of records which may be disclosed by an agency at the agency’s discretion. A listing of such records may be found in I.C. § 5-14-3-4(b). One group of records which may be disclosed at the discretion of the agency, which the PCF has cited, is the following:

Records requested by an offender that:

- (A) contain personal information relating to:
    - (i) a correctional officer (as defined in IC 5-10-10-1.5);
    - (ii) the victim of a crime; or
    - (iii) a family member of a correctional officer of the victim of a crime; or
  - (B) concern or could affect the security of a jail or correctional facility.
- I.C. § 5-14-3-4(b)(23).

The APRA defines “offender” as “a person confined in a penal institution as the result of the conviction for a crime.” I.C. § 5-14-3-2(i). Because you are an offender, the Facility may withhold from disclosure records that “concern or could affect the security” of the Facility. *See* I.C. § 5-14-3-4(b)(23). The Facility contends that I.C. § 5-14-3-4(b)(23) excepts the records from disclosure. Based on the information provided by PCF, it appears the records you have requested, if they do in fact exist, would be excepted from disclosure based on this provision.

I would note that in denying a request for public records under the APRA, the PCF is required to cite the specific exemption or exemptions authorizing the withholding of a public record. *See* I.C. § 5-14-3-9(c). Making a general reference to I.C. § 5-14-3, as the PCF provided in denying your request, is contrary to the requirements of the APRA.

Moreover, if a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. “[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....”). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. *See Opinion of the Public Access Counselor 10-FC-56*. Thus, the PCF did not violate the APRA by failing to produce a record in response to your request when no such record existed.

#### CONCLUSION

For the foregoing reasons, it is my opinion that the PCF acted contrary to the requirements of the APRA by making a general reference to I.C. § 5-14-3 in denying your request. In all other aspects, it is my opinion that the PCF did not violate the APRA.

Best regards,

A handwritten signature in black ink, appearing to read 'J. Hoage', written in a cursive style.

Joseph B. Hoage  
Public Access Counselor

cc: David W. Barr