



# STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

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June 8, 2012

Randall S. Tison  
DOC 127788  
P.O. Box 1111  
Carlisle, Indiana 47838

*Re: Formal Complaint 12-FC-121; Alleged Violation of the Access to Public Records Act by the Indiana Department of Child Services*

Dear Mr. Tison:

This advisory opinion is in response to your formal complaint alleging the Department of Child Services ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*

## BACKGROUND

On April 30, 2012, you submitted a written request for records to the Department for copies of any interviews, in audio form, conducted with certain individuals in regards to Case No. 01-33624 and Cause No. 82D2-0110-CF-791. On May 3, 2012, Attorney Mary Jane Humphrey denied your request as the records you sought, if any existed, were confidential pursuant to I.C. § 31-33-18-1. On May 18, 2012, Deputy General Counsel John Wood further advised in writing that the Department did not have any records that were responsive to your request, as all records had been turned over to local law enforcement. Mr. Wood further maintained that even if the Department did have records that were responsive, I.C. § 31-33-18-1 would prohibit their disclosure and you have not provided any information that would entitle you to access pursuant to I.C. § 31-33-18-2.

## 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." See I.C. § 5-14-3-1. The Department is a public agency for the purposes of the APRA. See I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Department's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. See 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 twenty-four 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 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 Department complied with the requirements of section 9 of the APRA in responding in writing to your written request for records within seven (7) days of receipt.

Generally, 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*. Here, the Department advised that all records that were responsive to your request have been turned over to the local law enforcement agency. As such, it is my opinion that the Department did not violate the APRA by failing to maintain a record that was responsive to your request.

Further, I.C. § 5-14-3-4(a)(1) provides that an agency may not disclose, except pursuant to statute or court order requiring disclosure, any record declared confidential by state statute. I.C. § 31-33-18-1 states:

- (a) Except as provided in section 1.5 of this chapter, the following are confidential:
  - (1) Report made under this article
  - (2) Any other information obtained, reports written, or photographs taken concerning the reports in the possession of:
    - (A) the division of family resources;
    - (B) the county office;
    - (C) the Department; or
    - (D) the department of child services ombudsman as established by IC 4-13-19-3.
- (b) Except as provided in section 1.5 of this chapter, all records held by:
  - (1) the division of family resources;
  - (2) a county office;
  - (3) the Department;
  - (4) a local child fatality review team established under IC 31-33-24;



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(5) the state child fatality review committee established under IC 31-33-25; or  
(6) the department of child services ombudsman established by IC 4-13-19-3;  
regarding the death of child determined to be a result of abuse, abandonment,  
or neglect are confidential and may not be disclosed.

I.C. § 31-33-18-2 lists certain parties to which the prohibition of disclosure found under I.C. § 31-33-18-1 do not apply. You have made no argument in your request submitted to the Department or in your formal complaint that the records you requested do not fall within I.C. 31-33-18-1 or that you would be entitled to the records pursuant to a specific subsection I.C. 31-33-18-2. As such it is my opinion that had the Department maintained the records that were responsive to your request, I.C. § 31-33-18-1 would have prohibited their disclosure.

## CONCLUSION

For the foregoing reasons, it is my opinion that the Department did not violate the APRA.

Best regards,

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

Joseph B. Hoage  
Public Access Counselor

cc: Mary Jane Humphrey, John Wood