



STATE OF INDIANA

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January 3, 2012

Paul Straughn
P.O. Box 502
Mishawaka, Indiana 46546

Re: Formal Complaint 12-FC-354; Alleged Violation of the Access to Public Records Act by the Office of the Attorney General

Dear Mr. Straughn:

This advisory opinion is in response to your formal complaint alleging the Office of the Attorney General ("Attorney General") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Gary D. Secrest, Chief Deputy Attorney General, responded on behalf of the Attorney General. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you provide that the Attorney General's response to your September 17, 2012 request for public records violates I.C. § 5-14-3-9(c)(2)(B) as the agency failed to provide the names and titles or positions of the person(s) responsible for the multiple denials that were issued. The response that was issued described the complex and multi-layered evaluation process taken by the Attorney General to respond to the request and detailed a number of individuals or departments that were consulted during the process. As such, you allege that the Attorney General should be required to list all persons responsible for the denial and not simply by making vague references to those who took part in the decision-making process.

As to request 2 from the September 17, 2012 request, you allege that the records produced by the Attorney General in response to your request for the job application of a specific individual were incomplete, as the request sought records that "certify" the statements the employee made as a job candidate. The records produced contain no signature, check box certifying the statements provided were true, or any other statement or indication that the information supplied was accurate. In addition, the Attorney General has yet to provide the fourth page of the application.

As to request 3, 4, 8, 14, and 16 you provide that the Attorney General violated the APRA by failing to provide a copy of the background check conducted by the agency



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as to certain employees. You allege that the background check would provide the information that is required to be disclosed under I.C. § 5-14-3-4(b)(8)(A)-(C). As to request 4, you provide the Attorney General cannot deny your request pursuant to I.C. § 5-14-3-4(b)(8)(A), as the record would demonstrate the employment history and education background of the employee in question. As to request 5, 10, 11, 12, 15, and 17, you provide that the Attorney General has incorrectly classified documents as “other information” in order to claim its authority to deny your request. As to request 7, 13, and 18, you doubt the assertion by the Attorney General that it fails to maintain transcripts of the employees in question.

In response to your formal complaint, Mr. Secret advised that the Attorney General complied with the requirements of I.C. § 5-14-3-9(c)(2)(B) in response to your September 17, 2012 request as the response made clear that Matt Light, Chief Counsel of Advisory and ADR Services Division for the Attorney General, was responsible for any denial that was issued. The APRA does not require a public agency to the list of names and titles of all persons who were consulted in responding to the request as long as the name and title of the person responsible for the denial is provided.

As to request 2 from your September 17, 2012 request, the APRA does not require a public agency to produce records that do not exist and your assertion that the Attorney General is withholding records is without merit. The Attorney General did not intentionally fail to produce a disclosable public record in response to your request; page four of the employee’s application is not available and cannot be produced. The Attorney General regrets that this is the circumstance. The employee in question was not asked to recreate the missing information because the lack of information was not discovered until the agency received your request. The Attorney General did confirm in response to your request 3, 4, and 5 that it did conduct a background check as is the standard procedure for the employee in question. The only records that were responsive to your request, that were required to be disclosed under I.C. § 5-14-3-4(b)(8) and that were in the possession of the Attorney General, have been disclosed to you.

As to request 3, the background check does not contain items that are required to be disclosed under I.C. § 5-14-3-4(b)(8). The Attorney General’s position is identical to what was provided in response to request 6 as part of formal complaint 12-FC-336. In addition, no problematic issues were found via the background check, so there are no records relating to any formal charges, disciplinary actions, demotions, or terminations.

As to request 4, the Attorney General does not maintain a resume for the employee in question and is not required to create a record in response to a request. The



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Attorney General did not deny access to records regarding the education and training background and previous work experience of the employee. Rather, the agency indicated in its response that all records had previously been produced; records falling outside the categories of required disclosures were denied consistent with the office policy regarding employee personnel files. Further, this position was supported by the counselor's opinion in 12-FC-336. Your complaint fails to acknowledge that verifications of other facts may be performed orally or through measures beyond obtaining, collecting, or reviewing records.

As to request 5, the background check did not contain items included within I.C. § 5-14-3-4(b)(8). Again, no problematic issues were found in the background check of the employee in question, so there are no records that require disclosure. Further, drug tests and investigation of finances are not required for the position in question, thus the agency does not have any records that are responsive to your request.

As to request 7, it is not a violation of the APRA to advise that the agency has no records in its possession that are responsive to the request, nor does the law require an agency to create new records in response to a request. A public employer may request transcripts for applicants, but there is no requirement that transcripts be provided for a person to be hired by the Attorney General. As to request 8, again the background check did not contain items included in I.C. § 5-14-3-4(b)(8). Further, the information garnered in response to a background check during the hiring process is not required to be disclosed under the discretionary exemption outlines in 4(b)(8). Again, no problematic issues were found through the background check, thus there are no records that are responsive to your request.

As to request 10, the Attorney General did not incorrectly classify records as "other information" in order to permit denial of access to the records that were sought. Rather, the agency indicated that the records in the agency's possession that fall under section 4(b)(8) have already been provided; records outside said categories were denied consistent with agency's policy regarding employee personnel files. Your complaint fails to acknowledge that verifications of other facts may be performed orally or through measures beyond obtaining, collecting, or reviewing records. As to request 11, the Attorney General has provided the employee resume along with the respective job application, which disclosed information concerning the employee's education and training background. Your assertions that the background check produced information that is required to be disclosed under 4(b)(8) is without merit. Again, no problematic issues were found via the background check, thus there is no further documentation to be produced.



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As to request 12, the records requested have previously been disclosed. Again, the agency did not incorrectly classify records as “other information” in order to permit denial of access. Records falling outside the categories of required disclosures were denied consistent with the agency’s policy regarding employee personnel files. As to request 13, the Attorney General did not violate the APRA by providing that it did not have any records that were responsive to your request. No transcripts were requested or provided for the employee in question. Your complaint fails to acknowledge that verifications of other facts may be performed orally or through measures beyond obtaining, collecting, or reviewing records. As to request 14, the results of the background check do not contain information that is required to be included in section 4(b)(8) of the APRA. Again, no problematic issues were found via the background check for the employee in question.

As to request 15, the Attorney General did not incorrectly classify records as “other information” in order to permit denial of access. Records that were in the agency’s possession that fall under section 4(b)(8) were provided in response to your request; records falling outside said categories were denied consistent with the agency’s policy regarding employee personnel files. Further, the information that was garnered in a background check conducted during the hiring process is not required to be disclosed under the discretionary exception outlines in 4(b)(8). Your complaint fails to acknowledge that verifications of other facts may be performed orally or through measures beyond obtaining, collecting, or reviewing records.

As to request 16, the Attorney General has already provided a copy of the employee’s resume and job application, which disclosed information concerning the employee’s education and training background and past employment. Again, no problematic issues were found via the background check that was conducted, so there are no records to produce. As to request 17, the agency did not incorrectly classify records as “other information” in order to permit the denial. Records that were in the agency’s possession that fall under section 4(b)(8) were provided in response to your request; records falling outside said categories were denied consistent with the agency’s policy regarding employee personnel files. As to request 18, an agency does not violate the APRA by providing that it has no records in its possession that are responsive to the request. As to the employee in question, no transcripts were requested by the Attorney General, nor were any provided. Your complaint fails to acknowledge that verifications of other facts may be performed orally or through measures beyond obtaining, collecting, or reviewing records.



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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 Attorney General 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 Attorney General’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). 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. Under the APRA, a public agency denying access in response to a written public records request must put that denial in writing and include the following information: (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 title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). Counselor O’Connor provided the following analysis regarding section 9:

Under the APRA, the burden of proof beyond the written response anticipated under Indiana Code section 5-14-3-9(c) is outlined for any *court action* taken against the public agency for denial under Indiana Code sections 5-14-3-9(e) or (f). If the public agency claimed one of the exemptions from disclosure outlined at Indiana Code section 5-14-3-4(a), then the agency would then have to either “establish the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit” *to the court*. Similarly, if the public agency claims an exemption under Indiana Code section 5-14-3-4(b), then the agency must prove to the court that the record falls within any one of the exemptions listed in that provision and establish the content of the record with adequate specificity. There is no



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authority under the APRA that required the IDEM to provide you with a more detailed explanation of the denials other than a statement of the exemption authorizing nondisclosure, but such an explanation would be required if this matter was ever reviewed by a trial court. *Opinion of the Public Access Counselor 01-FC-47.*

As to your initial allegation that the Attorney General acted contrary to the requirements of I.C. § 5-14-3-9(c)(2)(B) in denying certain parts of your request; the subdivision provides that an agency may deny a written APRA request if the denial includes, in part, the name and title or position of the person responsible for the denial. You argue that this would require the Attorney General to provide the names of all those persons who were consulted in denying your request. The person identified in the Attorney General's response as responsible for the denial was Matt Light, Chief Counsel of Advisory and ADR Services Division for the Attorney General. Section 9(c)(2)(B) states that the name and the title or position of the person responsible for the denial must be provided. The Attorney General's denial to your request was signed by Mr. Light, Chief Counsel of the Advisory and ADR Services Division for the Attorney General. While Mr. Light may have consulted with other parties within the agency in developing a response to your request, by signing and providing his title and position with the Attorney General, this action signifies that he is the person that is responsible for the denial on behalf of the agency. It is my opinion that section 9(c)(2)(B) would not require a public agency to provide the list of names and titles of all those persons who were consulted prior to the issuance of a denial under the APRA. *See Opinion of the Public Access Counselor 12-FC-336; see also Opinion of the Public Access Counselor 05-FC-109.* As Mr. Light was identified as the individual responsible for the denial of your request, it is my opinion that the Attorney General did not violate section 9(c)(2)(B).

The APRA provides that personnel files of public employees and files of applicants for public employment may be excepted from the APRA's disclosure requirements, except for:

- (A) The name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency;
- (B) Information relating to the status of any formal charges against the employee; and



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(C) The factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged. I.C. § 5-14-3-4(b)(8).

In other words, the information referred to in (A) - (C) above must be released upon receipt of a public records request, but a public agency may withhold any remaining records from the employees' personnel file at their discretion. Subsection (b)(8)(C) specifically requires for a disciplinary action to have occurred. If a suspension, demotion, or discharge did not occur, again the requirements of the subsection would not apply. Lastly, it is my opinion that an agency would not be required to create a factual basis under (b)(8)(C) if no such record was maintained by the agency upon receipt of the request. *See Opinion of the Public Access Counselor 08-FC0184 and 12-FC-110.*

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.* The APRA requires a public agency to provide one copy of a disclosable public record but does not require an agency to provide additional copies or to repeatedly provide copies of a particular record. *See I.C. § 5-14-3-8(e).* The Public Access Counselor has issued multiple opinions that have provided that a public agency is not required to provide identical copies of the same record. *See Opinions of the Public Access Counselor 07-FC-19; 08-FC-75; 08-FC-259; and 12-FC-42.* The public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80.*

As to request 2, you allege that the records produced by the Attorney General in response to your request for the job application of a specific individual were incomplete, as the request sought records that "certify" the statements the employee made as a job candidate. In addition, you further allege that the Attorney General has yet to provide the fourth page of the application. In response, the Attorney General advised that the APRA does not require a public agency to produce records that do not exist and your assertion



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that the Attorney General is withholding records is without merit. The Attorney General maintains that it did not intentionally fail to produce a disclosable public record in response to your request; page four of the employee's application is not available and cannot be produced. The only records that were responsive to the request, that were required to be disclosed under I.C. § 5-14-3-4(b)(8), and that were in possession of the agency were disclosed. It is my opinion that the Attorney General complied with the APRA as the agency is not required to create a record in response to a request and the Attorney General has advised that all records required to be disclosed under section 4(b)(8) APRA have been provided. Further, it is my opinion that the Attorney General would not violate the APRA by failing to maintain records that are responsive to your request that it was not otherwise legally obligated to possess.

As to request 3, 4, 8, 14, and 16 you provide that the Attorney General violated the APRA by failing to provide a copy of the background check conducted by the agency as to certain employees. You allege that the background check would provide the information that is required to be disclosed under I.C. § 5-14-3-4(b)(8)(A)-(C). In response, the Attorney General challenged your assertion that the background check contained information required to be disclosed under section 4(b)(8) and in addition, no problematic issues were found in the background check so as to require disclosure. It is my opinion that the Attorney General did not violate the APRA as a background check is not listed under the required disclosures under I.C. § 5-14-3-4(b)(8)(A)-(C), the Attorney General has stated it has provided all records as required under (b)(8), and in the case of denial, the agency cited to the requisite statutory exemption authorizing the withholding of the record as part of the response that was issued. *See Opinion of the Public Access Counselor 12-FC-336.*

As to request 5, 10, 11, 12, 15, and 17, you provide that the Attorney General has incorrectly classified documents as "other information" in order to claim its authority to deny you request. The Attorney General in response provided that it did not incorrectly classify records as "other information" in order to permit denial of access to the records that were sought. Rather, the agency indicated that the records in the agency's possession that fall under section 4(b)(8) have been provided; records outside said categories were denied consistent with the agency's policy regarding employee personnel files. Thus, if the Attorney General provided all information as required under 4(b)(8) in response to your request and cited to the requisite statutory exemption in denying any remaining records that have been requested, it is my opinion that the Attorney General did not violate the APRA.



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As to request 7, 13, and 18, you doubt the claim that the Attorney General fails to maintain transcripts of the employees in question. In response, the Attorney General provided transcripts were not requested or provided for the employees that you have sought. Even if maintained by the Attorney General, a transcript is not required to be disclosed under 4(b)(8)(A)-(C). It is my opinion that the Attorney General complied with the APRA in response to your request, as the agency would not be required to create a record in response to your request nor does the agency violate the APRA by failing to maintain a records that it is responsive to your request that it is not otherwise legally required to possess.

CONCLUSION

For the foregoing reasons, if the Attorney General provided all information as required under 4(b)(8) in response to your request and cited to the requisite statutory exemption in denying any remaining records that have been requested, it is my opinion that the Attorney General did not violate the APRA. As to all other issues, it is my opinion that the Attorney General did not violate the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage".

Joseph B. Hoage
Public Access Counselor

cc: Gary D. Secrest, Matt Light