



STATE OF INDIANA

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December 3, 2010

Ms. Michelle Rodenbeck
Big Brothers Big Sisters
2439 Fairfield Ave.
Fort Wayne, IN 46807

Re: Formal Complaint 10-FC-274; Alleged Violation of the Access to Public Records Act by the Wells County Probation Department

Dear Ms. Rodenbeck:

This advisory opinion is in response to your formal complaint alleging the Wells County Probation Department ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*, by denying you access to public records. The Department's response to your complaint is enclosed for your reference.

BACKGROUND

According to your complaint, the Department denied your request for "summary criminal history report[s]." Initially, the Department informed you that the parent and juvenile should appear in person at the courthouse with a release for the information. However, the Department again denied access to the information. Subsequently, the Department suggested that a representative of the agency would have access to the Wells County Clerk's ("Clerk") information and would be able to access the information if the representative presented a release to the Clerk. Again, you allege that you were denied access. You requested assistance from the Department, the Clerk, and the office of Judge David L. Hanselman, but you still have not received the requested records.

In response to your complaint, the Department states that it uses a standard written response to public records requests and that it believes it responded to your request. The Department does not explain why it has not produced the records you requested, but I note that your complaint includes a notice from the Department that it would no longer release such records because it did not maintain the criminal histories and only provided them to the public "as a courtesy service to the community." The Department directed interested parties to contact the Clerk about accessing criminal records.

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.” Ind. Code § 5-14-3-1. The Department is clearly 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 Department’s public records during regular business hours unless the public records are exempted 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. I.C. §5-14-3-3(a); §5-14-3-9(c). If a request is made orally, either in person or by telephone, a public agency may deny the request orally. I.C. § 5-14-3-9(c). 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. I.C. § 5-14-3-9(b). If the request is delivered in person and the agency does not respond within twenty-four (24) hours, the request is deemed denied. I.C. § 5-14-3-9(a). 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. When the request is made in writing and the agency denies the request, the agency must deny the request in writing and must 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. I.C. § 5-14-3-9(c).

Here, it is unclear to me why the Department denied your request. Under the APRA, a public agency that withholds a public record bears the burden of showing that the record is exempt. I.C. §§ 5-14-3-1, 5-14-3-9(f) and (g). Exceptions to disclosure are narrowly construed. I.C. § 5-14-3-1. Because the Department has not provided a justification for withholding the records at issue here, it is my opinion that the Department has failed to carry that burden. If the Department cannot justify withholding the records under the APRA, I encourage the Department to release the records to you as soon as possible. To the extent the Department persists in its denial of access following the issuance of an advisory opinion from this office and you believe the Department to be in violation of the APRA, I leave you to your remedies before a court pursuant to I.C. § 5-14-3-9(e).

However, the Department did not violate the APRA if it does not maintain the criminal history information you requested. 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....”). The APRA does not require public agencies to create public records in order to satisfy 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.”).

I note that the reasons for which limited criminal history information may be disclosed to a noncriminal justice organization or individual are limited by state law. *See* I.C. § 10-13-3-27. Neither the Department nor any other public agency may release limited criminal history information about a person unless a valid reason has been indicated under I.C. § 10-13-3-27. Similarly, any person who requests limited criminal history information under I.C. § 10-13-3-27 may not use it for any reason other than those stated in this statute. Under I.C. § 10-13-3-27, law enforcement agencies shall release or allow inspection of a limited criminal history to noncriminal justice organizations or individuals if the subject of the request has, among other things, “volunteered services that involve contact with, care of, or supervision over a child who is being placed, matched, or monitored by a social services agency or a nonprofit corporation.” I.C. § 10-13-3-27(a)(8).

CONCLUSION

For the foregoing reasons, it is my opinion that the Department has not sustained its burden of proof to show that its failure to produce the records you requested was appropriate under the APRA.

Best regards,



Andrew J. Kossack
Public Access Counselor

cc: Gregory E. Werich