

July 20, 2005

Michael McCune
D.O.C. # 17894
Wabash Valley Correctional Facility
P.O. Box 1111
Carlisle, IN 47838

Re: Formal Complaint 05-FC-119; Alleged Violation of the Access to Public Records Act by the Indiana Department of Correction, Wabash Valley Correctional Facility.

Dear Mr. McCune:

This is in response to your formal complaint alleging that the Department of Correction, Wabash Valley Correctional Facility ("DOC") violated the Access to Public Records Act ("APRA") by denying you access to certain records and by requiring you to pay the copying fee to obtain records.

BACKGROUND

On June 20, 2005 you wrote to the Office of the Public Access Counselor alleging violations of the APRA by the DOC. Your complaint alleged that you had filed requests for public records with the DOC; however, you did not provide copies of the requests. You did provide copies of two responses from the DOC regarding your records requests. You allege that the DOC violated the APRA when it told you that you could not obtain a copy of the requested facility incident report pursuant to 210 IAC 1-6-2(3)(e). You also allege that it was a violation of the APRA for the DOC to deny you access to copies of checks from offender spending accounts, not your own. Finally, you believe that the request of the DOC that you pay the copying fee prior to obtaining the copies is a denial of access to public records.

Mr. Rich Larsen responded to your formal complaint by letter dated June 21, 2005. A copy of that letter is enclosed for your reference. Regarding the incident report, Mr. Larsen reiterated his June 2, 2005 letter to you stating that you could not have access to the report pursuant to 210 IAC 1-6-2-(3)(e) as it contained internal investigation information.

He also stated that you could not obtain copies of the requested checks pursuant to Department of Correction policy 02-01-101, IC 11-8-2-5(a)(1), IC 11-8-2-5(a)(2) and IC 11-11-6-1.

ANALYSIS

The Access to Public Records Act provides that any person may inspect and copy the public records of any public agency, except as provided in the exceptions listed in section 4 of the APRA. Ind. Code 5-14-3-3(a). A public agency may not deny or interfere with the exercise of the right stated in subsection (a). IC 5-14-3-3(b). A denial, if any, to a written request for records must be in writing and must include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record, and the name and the title or position of the person responsible for the denial. IC 5-14-3-9(c).

The DOC is clearly a public agency for the purposes of the APRA. IC 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the DOC during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under IC 5-14-3-4. IC 5-14-3-3(a).

Incident Report

A public agency may deny disclosure of a public record if one of the exceptions listed in IC 5-14-3-4 applies. An agency must not disclose a record declared confidential by rule adopted by a public agency under specific authority to classify public records as confidential granted to the public agency by statute. IC 5-14-3-4(a)(2). Under IC 11-8-5-2(a), the Department of Correction may classify as confidential information maintained on a person who has been committed to the department, including information relating to a pending investigation of alleged criminal activity or other misconduct, information which, if disclosed, might result in physical harm to that person or other persons, and information required by law or promulgated rule to be maintained as confidential. The Department of Correction has classified as confidential "internal investigation information." Ind. Admin. Code tit. 210, Rule 1-6-2 (2003).

According to Mr. Larsen's correspondence your request for the incident report was denied because it is internal investigation information that is non-disclosable pursuant to 210 IAC 1-6-2(3)(e).¹ The denial of your request pursuant to 210 IAC 1-6-2(3)(e) was appropriate and therefore did not violate the APRA.

¹ You requested that the Office of the Public Access Counselor review the document to determine if it is a record containing information on an internal investigation. You believe that it is not because the incident was caught on tape and because the staff has stipulated that your injuries were not serious. The Public Access Counselor does not have the authority to review records "in camera" as would a court. Therefore, I cannot do as you have requested. Additionally, I do not find the fact that the incident was caught on tape or that staff members have made statements regarding your injuries to have any bearing upon whether the incident report contains information of an internal investigation.

Request for Copies of Checks

You have requested copies of 37 checks issued by the business office. Mr. Larsen has stated that those checks were not drawn on your account and pertain to expenditures of other offenders. He stated that you were denied access to those checks pursuant to Department of Correction Policy # 02-01-101, IC 11-8-2-5(a)(1), IC 11-8-2-5(a)(2) and IC 11-11-6-1. Further Mr. Larsen states that policy does not allow offenders to have property that could pose a danger to the safety and security of the facility pursuant to 210 IAC 1-6-2.

As discussed above, one of the exceptions to disclosure under the APRA is for records that are "declared confidential by rule adopted by a public agency under" specific statutory authority to do so. IC 5-14-3-4(a)(2). While the DOC may have had authority to promulgate 210 IAC 1-6-2, it is not clear how the rule applies to this record. The record does not seem to fit any of the specific types of information that are restricted by that rule. If the DOC intends to rely on a more general exception under that rule it must provide a specific pinpoint cite and an explanation of how the requested record fits into that category. Further IC 5-14-3-9(c) provides that a denial must include "a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record." IC 5-14-3-9(c)(2)(A). It is not readily apparent that the requested records would fit the category of property that could pose a danger to the safety and security of the facility, without further explanation.

Additionally, the DOC must rely directly upon a specific statute or upon rules that are promulgated under the statutory authority to declare records confidential rather than a policy. Therefore, the DOC may not rely upon DOC Policy #02-01-101 in denying your request for records. It is also unclear how the DOC intends to rely upon IC 11-8-2-5(a)(1), IC 11-8-2-5(a)(2) and IC 11-11-6-1, as these statutes seem to relate to the Commissioner's powers to organize and administer the DOC and a general authority to adopt policies and procedures, rather than a specific authority to declare a record confidential as required by IC 5-14-3-4(a)(2).

I find that the DOC made an improper denial of your request for copies of checks from the accounts of other offenders when it failed to properly cite to a specific statutory exemption or appropriate rule in its denial of the record. Additionally, if it is not apparent from the face of the rule or statute, as is the case here, the agency must provide further explanation as to how the record fits into the exemption. The agency has the burden of proving that the record is exempt from disclosure. IC 5-14-3-9(f).

Copying Fees

The APRA provides that a public agency may charge a copying fee under IC 5-14-3-8. For state agencies, the Indiana Department of Administration sets the photocopying fee. IC 5-14-3-8(c). The Department of Administration has set the copying fee at \$0.10 per page. The DOC may appropriately charge you \$0.10 per page for the copies. You contend that free copies of these records are available to you under the grievance procedure but that you did not receive them. That is not an issue under APRA. If some other process allows you to obtain the records that you seek at no cost, then you must follow that procedure. The Office of the Public Access Counselor cannot help you resolve issues that are outside of the scope of the APRA. It is not a denial of access for a public agency to require advance payment for copies. IC 5-14-3-8(e).

CONCLUSION

For the foregoing reasons, I find that the Department of Correction did not violate the Access to Public Records Act when it denied you access to the incident report and required you to pay the copying fee to obtain records. I find that the Department of Correction did violate the Access to Public Records Act when it failed to provide a proper explanation and citation when it denied you access to the checks.

Sincerely,

Karen Davis
Public Access Counselor

cc: Rich Larsen