



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

Karen Davis

PUBLIC ACCESS COUNSELOR

402 West Washington Street, Room W460
Indianapolis, IN 46204-2745
Telephone: (317) 233-9435
1-800-228-6013
FAX: (317) 233-3091
www.IN.gov/pac

October 28, 2005

Michael Hunt
DOC #961894
Miami Correctional Facility
P.O. Box 900
Bunker Hill, IN 46914

Re: Formal Complaint 05-FC-197 and 05-FC-201; Alleged Violations of the Access to Public Records Act by the Indiana State Prison

Dear Mr. Hunt:

This is in response to your formal complaint alleging that the Indiana State Prison ("ISP") violated the Access to Public Records Act ("APRA").

BACKGROUND

On September 28, 2005 you filed three formal complaints with the Office of the Public Access Counselor, which were consolidated under formal complaint number 05-FC-197. On October 3, 2005 you filed an additional formal complaint with the Office of the Public Access Counselor. Your complaint was assigned formal complaint # 05-FC-201. I am consolidating 05-FC-197 and 05-FC-201 for issuance in a single advisory opinion. Mr. Barry Nothstine responded to your formal complaints on behalf of the ISP. The ISP's response to complaint 05-FC-197 was dated September 30, 2005. The ISP's response to complaint 05-FC-201 was dated October 6, 2005.

Although your complaints are difficult to discern, I believe your complaints to be as follows. You forwarded written requests for eight records to the ISP. Mr. Barry Nothstine responded to each of your record requests in writing. In order to more easily understand your complaints I have summarized below each request, the ISP's response to your request, your formal complaint regarding the ISP's response and the ISP's response to your formal complaint.

- 1) You requested a record that you believe to have been created by Superintendent Edwin Buss sometime between September 2, 2005 and September 7, 2005. The record was addressed to the employees of the central office, regarding a lockdown in C Cellhouse on September 3, 2005. Your request was received by the ISP on September 12, 2005. Mr. Nothstine responded on September 12, 2005 to inform you that your request had been received and to indicate that he would respond to your request by September 26, 2005.

On September 22, 2005 Mr. Nothstine informed you in writing that the ISP does not have any record covering the requested topic.

You complain that the ISP has violated the APRA because you believe the ISP must have created a record because a visit was terminated and an offender received medical treatment at the hospital.

Mr. Nothstine, in his September 30th response, asserted that there is no such record. He explained that the order to lock down is a verbal order, that the central office administrators were advised by telephone, and that no documents were issued from the Superintendent's Office.

- 2) You requested a record dated September 6, 2005 that you believe to have been created by Superintendent Buss sometime between September 3, 2005 and September 6, 2005, addressed to the Shift Custody Supervisor that indicates that custody staff for C Cellhouse are not to use handcuffs on offenders when offenders are removed from their cells for showers. Mr. Nothstine responded on September 12, 2005 to inform you that your request had been received on September 12, 2005 and to indicate that he would respond to your request by September 26, 2005. On September 22, 2005 Mr. Nothstine informed you in writing that the ISP does not have any record covering the requested topic.

You believe that a record must have been created because you believe that state law requires handcuffs be applied when a unit or facility is locked down for security or safety.

Mr. Nothstine, in his September 30th response, avers that Superintendent Buss has not issued any such order. He further stated that the issue does not appear in the officer's post orders. He explained that it is the custom and practice when showing offenders in a general population cell house to not handcuff them, unless the cell house is locked down.

- 3) You requested a record from Superintendent Buss addressed to the Laundry Department indicating that no laundry service would be processed for the white clothes of C Cellhouse inmates during the lockdown of C Cellhouse beginning on September 5, 2005. You believe the record was created on September 3, 2005. Mr. Nothstine responded on September 12, 2005 to inform you that your request had been received on September 12, 2005 and to indicate that he would respond to your request by September 26, 2005. On September 22, 2005 Mr. Nothstine informed you in writing that the ISP does not have any record covering the requested topic.

You complain that the ISP failed to provide a statement of the specific exemption or exemptions authorizing it to deny your request. You assert that a record must have been created because you believe that a record must be created when no visitors are allowed to enter the facility for safety and security reasons

Mr. Nothstine explained in his September 30th letter that the length of a lockdown determines when laundry will be done. He asserted that an order to launder clothes and bedding is a verbal order; therefore, there is no written record to produce.

- 4) A record, from Superintendent Buss addressed to employees of the Central Office, modifying the lockdown on September 7, 2005 to allow a group of offenders to run rampant in C Cellhouse while continuing the lockdown for other offenders. You believe the record is dated September 7, 2005. Mr. Nothstine responded on September 12, 2005 to inform you that your request had been received on September 12, 2005 and to indicate that he would respond to your request by September 26, 2005. On September 22, 2005 Mr. Nothstine informed you in writing that the ISP does not have any record covering the requested topic.

You complain that the ISP failed to provide a statement of the specific exemption or exemptions authorizing it to deny your request. You assert that a record must have been created because you believe that a record must be compiled when no visitors are allowed to enter the facility for safety and security reasons.

Mr. Nothstine responded in his September 30th letter that the ISP does not allow groups of offenders to run rampant; therefore, there is no record covering the situation that you have suggested.

- 5) A record from Superintendent Buss indicating that all idle offenders in C Cellhouse will not receive five days of recreation each week when a holiday or weekend will occur. Mr. Nothstine responded on September 12, 2005 to inform you that your request had been received on September 12, 2005 and to indicate that he would respond to your request by September 26, 2005. On September 22, 2005 Mr. Nothstine informed you in writing that the ISP does not have any record covering the requested topic at this time. He indicated that a change may be made to the post orders for the operation of C Cellhouse recreation in the future. He further stated that post orders are considered confidential by Department of Correction Policy and Procedures.

You complain that post orders must be disclosed. You state that the ISP's denial does not fully comply with the requirements of the APRA in that the facility has failed to provide a citation to specific statutory authority authorizing it to withhold the record.

Mr. Nothstine responded to this complaint in his September 30th letter. He stated that the record you requested does not exist. The post orders do not currently include the information you seek. He further indicated that pursuant to Administrative Procedure No. 00-04-101 the post orders are to be maintained as strictly confidential.

- 6) You requested the Recreation Policy Operational Procedures for C Cellhouse receipt signed by IDOC officials to enforce no weekend recreation and no holiday recreation for job eligible idle offenders in C Cellhouse. Mr. Nothstine responded on September 12, 2005 to inform you that your request had been received on September 12, 2005 and to indicate that he would respond to your request by September 26, 2005. On September 22, 2005 Mr. Nothstine informed you in writing that the ISP does not have any record covering the requested topic at this time. He indicated that a change may be made to the post orders for the operation of C Cellhouse recreation in the future. He further stated that post orders are considered confidential by Department of Correction Policy and Procedures.

You complain that post orders must be disclosed. You state that the ISP's denial does not fully comply with the requirements of the APRA in that the facility has failed to provide a citation to specific statutory authority authorizing it to withhold the record.

Mr. Nothstine responded to this complaint in his September 30th letter. He stated that the record you requested does not exist. The post orders do not currently include the information you seek. He further indicated that pursuant to Administrative Procedure No. 00-04-101 the post orders are to maintained as strictly confidential.

- 7) Records contained in logbooks for the visiting area and C Cellhouse that indicate the exact number of lockdowns for C Cellhouse since Mr. Milton Williams had been assigned as a case manager in C Cellhouse. Mr. Nothstine responded on September 9, 2005 to inform you that your request had been received on September 9, 2005 and to indicate that he would respond to your request by September 23, 2005. On September 27, 2005 Mr. Nothstine informed you in writing that there is no record or document that contains the information that you have requested.

You believe that the ISP violated the APRA because you assert that the deadline to respond was on September 23, 2005 and you did not receive a response until September 27, 2005. Again you assert that the ISP must maintain the records because you believe that state law requires records to be kept when visitations are terminated.

Mr. Nothstine responded to this complaint in his October 3rd letter. Mr. Nothstine referred to his September 27, 2005 response to you in which he indicated that no such record exists. He also acknowledged that he did not respond to your request on the date specified in his September 9, 2005 response to you.

- 8) You requested records regarding four specifically named employees who were assigned to C Cellhouse. You want the exact dates, by month, day, and year that the employees were assigned to work in C Cellhouse. Mr. Nothstine responded on September 9, 2005 to inform you that your request had been received on September 9, 2005 and to indicate that he would respond to your request by September 23, 2005. On September 27, 2005 Mr. Nothstine informed you in writing that the records you requested regarding two officers are kept in the employee's personnel files. He asserted that the records were being withheld from disclosure pursuant to IC 5-14-3-4(b)(8). He further indicated that no one named Sergeant Timble had ever been employed by the facility. He also informed you that he had two documents that indicate when Unit Team employees Milton Williams and Sheri Hatchel were assigned to C Cellhouse. He informed you that you could obtain the records upon payment of the copy fee of \$0.10 per page, for a total of \$0.20, to his office.

You believe that the ISP violated the APRA because you assert that the deadline to respond was on September 23, 2005 and you did not receive a response until September 27, 2005. You also assert that the ISP's response violated the APRA because you believe that IC 5-14-3-4(b)(8) only applies to the social security number for state employees.

Finally, you complain that you are being denied your right to inspect the two records regarding Mr. Williams and Ms. Hatchel prior to purchasing the records.

Mr. Nothstine responded to this complaint in his October 3rd letter. He explained that the ISP does not keep a record of the specific dates upon which employees are assigned to a

particular cell house. He states that the only records kept are those of the dates of the shifts an officer is assigned to work and the officer's days off. He indicated that those records are maintained in the officer's personnel files and are therefore non-disclosable. For those assignments that are not maintained in the personnel files he has offered to produce copies of those records at a charge of \$0.10 per page. He also acknowledges that he did not respond to your request on the date specified in his September 9, 2005 response to you.

ANALYSIS

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the APRA. IC 5-14-3-3(a). If a public agency receives a request for records via U.S. mail, facsimile, or e-mail, it has seven days in which to respond. IC 5-14-3-9(b). A response may be an acknowledgment that the request for records was received, and a statement of how and when the public agency intends to comply. If the public agency fails to respond within seven days of its receipt of the request, the request is deemed denied.

Timeliness of the Indiana State Prison's Responses to your Requests

The ISP responded to each of your requests within the required seven day period. However, in reply to your request that was received by the agency on September 9, 2005, Mr. Nothstine indicated that a further response would be provided on September 23, 2005. He stated that if he was unable to respond by that date that you would be notified in writing. Mr. Nothstine acknowledges that he was unable to provide you with a response to your request until September 27, 2005. He explained that he had completed three of the four requests that were made by you between September 9th and September 12th. He was then assigned to other tasks and was unable to complete the final response until September 27th.

The APRA does not specify a time for production or inspection of responsive records; however, this office has stated that records must be produced within a reasonable time. Often, this office is asked to make a determination as to the reasonableness of the time for production by a public agency. What is a "reasonable" time period under one circumstance may not be reasonable under other conditions. Production need not materially interfere with the regular discharge of the functions and duties of the public agency. IC 5-14-3-7(a). The determination of what is a reasonable time for production, therefore, depends upon the public records requested and circumstances surrounding the request.

You requested the work schedule assignments for four employees. You did not provide any specific dates for the records that you requested. It is unclear how many records could have been responsive to your request or how long it took Mr. Nothstine to research the records you seek. Regarding this specific request the ISP produced two pages of records in 18 days. However, Mr. Nothstine was actually responding to four requests from you at once and timely responded to three of the four. It is understandable that Mr. Nothstine has many duties that may conflict with his duty to provide you with records. In this instance I do not have enough information regarding your request or the circumstances that delayed the final response to the request to form an opinion as to whether the ISP produced the records within a reasonable time. In any case, it is not a violation of the APRA merely to not respond when promised.

Denial of Records that the ISP does not Maintain

Regarding your requests addressed in paragraphs 1, 2, 3, 4, 5, 6, and 7 you believe the ISP must have created and maintained the records. You assert various reasons to support your belief and cite to numerous statutory authorities. However, you have not cited to any statutory authority that actually requires the ISP to create the requested records. If the ISP does not maintain the record you seek it cannot produce the record. The ISP properly informed you that it does not maintain the records that you requested; therefore, the ISP has not violated the APRA.

If you continue to believe that the ISP maintains the records that you seek and is not being forthcoming with the records, your remedy is to file a lawsuit under IC 5-14-3-9(e).

Further, regarding your requests in paragraphs 4, 5, and 6, you complain that the ISP has violated the APRA by failing to cite to the specific statutory exemption authorizing it to withhold the requested records. To the extent that your requests were denied because the ISP does not maintain the record you seek, the ISP has not violated the APRA. You are correct that the APRA requires a written denial to 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). However, there is no specific statutory exemption regarding records that do not exist. The APRA does not require that an agency create a particular record to satisfy a person's request for information. Rather, the APRA requires only that an agency disclose a record that it maintains upon request, unless an exception to disclosure applies. As the APRA does not require agencies to create records in order to fulfill requests for public records, there is no need for an exemption for a record that does not exist. This office has long held, however, that public agencies should inform the requestor that a record will not be produced on the basis that the agency does not maintain the requested record. The ISP did just that.

Denial of Post Orders

Regarding your requests in paragraphs 5 and 6 you allege that the ISP violated the APRA because it failed to properly cite to IC 5-14-3-4(a)(2) and Administrative Procedure No. 00-04-101 when it indicated that post orders are not disclosable. However, you did not request the post orders in this request and the information you seek is not contained in the post orders. Mr. Nothstine indicated that the requested information would be contained in the post orders in the future, but that the post orders would be confidential. If the ISP was denying you access to the post orders in response to a request for the post orders then I would agree that a more comprehensive response would be required as suggested in *Opinion of the Public Access Counselor* 05-FC-102. However, I find that the ISP did not violate the APRA by suggesting a record that is not responsive to your request would be a confidential record.

Personnel File Exemption

The ISP denied your request for records regarding the schedules of certain employees as explained at paragraph 8 above. The ISP explained that it does not maintain the exact records that you requested. It does maintain records that include a portion of the information you seek. However, the ISP denied disclosure of those records, citing IC 5-14-3-4(b)(8) as the basis for the denial.

Pursuant to IC 5-14-3-4(b)(8), a personnel file of a public employee may be withheld from disclosure at the discretion of the agency. However, the following personnel file information must be disclosed:

- (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
- (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.

The information that you requested does not fall into any of the three above listed categories. If the information is only located in a record specific to an individual employee and only maintained in the personnel files of individual employees the ISP may properly withhold the records. You asserted that IC 5-14-3-4(b)(8) only exempts employee's social security numbers from disclosure. That is incorrect. The personnel file is exempt from disclosure at the agency's discretion except for the above listed information.

Inspection and Copying

The ISP has identified two records that may be disclosed to you. You assert that the ISP violated the APRA because it will not allow you to inspect the records prior to paying to obtain a copy. As a general rule any person may inspect and copy the public records of any public agency during the agency's regular business hours. IC 5-14-3-3(a). "A public agency may not deny or interfere with the exercise of the right stated in subsection (a). The public agency shall either: (1) provide the requested copies to the person making the request; or (2) allow the person to make copies: (A) on the agency's equipment; or (B) on his own equipment." IC 5-14-3-3(b).

However, circumstances may exist where physical inspection of a record is not practical or even possible, and reasonable access can only be accomplished through production of a copy of the record. Such is the case here. Certainly, as an incarcerated offender, it is not possible for you to appear at a public agency during its normal business hours and inspect the records of that agency. See IC 5-14-3-3(a). Your status is no less significant when seeking to inspect the records of the facility where you are incarcerated. The APRA is a statute of general application, which means the APRA governs unless some other more specific statute addresses the issue.

The Department of Correction ("Department"), through its various institutions, is charged with the authority and discretion to ensure the safety and security of the institution and of the offenders under its control. See, e.g., IC 11-11-6-1. In this regard, Indiana law provides the Department and its institutions with the authority to restrict your movement and access within the Department's institutions. This has the net effect of restricting your access to inspect the public records of the facility within the facility where they are kept. See *Opinion of the Public Access Counselor* 04-FC-43. In my opinion, the institutional safety and security restrictions authorized by Indiana law and exercised by the Department and the ISP on your access to areas of the ISP, even to those areas where public records are maintained, does not violate your rights under the APRA. In the circumstances presented here, it was not unreasonable and not a

violation of the APRA for the ISP to require that your access to public records of that institution be limited to having the ISP provide you with copies of the requested records.

CONCLUSION

For the foregoing reasons, I find that the Indiana State Prison did not violate the Access to Public Records Act when it declined to disclose records that it does not maintain. I make no finding as to whether the Indiana State Prison failed to produce records in a timely manner. The Indiana State Prison may properly withhold personnel file information. The Indiana State Prison did not violate the Access to Public Records Act by not making the records available to you for inspection prior to purchasing a copy when the circumstance of your incarceration prevents you from inspecting the record.

Sincerely,

Karen Davis
Public Access Counselor

cc: Barry Nothstine