

June 7, 2005

Sent Via Facsimile

Mr. Wyndan Skye
c/o 4469 Webster Road
Richmond, Indiana 47374

Re: Formal Complaint 05-FC-89; Alleged Violation of the Access to Public Records Act by the Indiana Department of Natural Resources

Dear Mr. Skye:

This is in response to your formal complaint alleging that the Indiana Department of Natural Resources ("DNR") violated the Access to Public Records Act by failing to give you records. I find that DNR violated the Access to Public Records Act, because it failed to timely or adequately respond to your request for a record.

BACKGROUND

You filed your formal complaint with the Office of the Public Access Counselor on May 9, 2005. You allege that the DNR has not responded to your request for a record. You enclosed two letters, each dated March 24, 2005, addressed to John Goss, Executive Director of the DNR, and to Glen Salmon, Director of the Division of Fish and Wildlife. In your letters, you stated that the letter carried a request for information that was being made pursuant to the Indiana Access to Public Records Acts (IC 5-14-3).

The background of your request was that you had attempted to obtain a fishing license. You were unsuccessful because you were told that in order for the agent of the DNR to accept your application, you were required to submit your social security number. You claim that you do not have a social security number, and are therefore unable to submit one. You were told that if the DNR issued you an official determination that no social security number was required in your case, the agent could issue you a fishing license. You indicated in your letters to the DNR that you were requesting either an official determination letter indicating that no mandatory disclosure of your social security number is required to obtain a license, or in the alternative, if a

social security number is mandatory, for the DNR to provide you with copies of all pertinent legal cites “substantiating [DNR’s] claims,” all pertinent official letter rulings or proclamations issued by the DNR, all federal legal authorities substantiating DNR’s claims, and any and all other information relied upon by DNR to substantiate its claim that the social security number is mandatory in order to receive a fishing license in Indiana.

A response to your letter was issued on April 6, 2005, authored by Charles P. White, Attorney for the DNR. In his response, Mr. White stated that there are both state and federal laws that apply to this issue, and that the purpose of those laws is to aid in the enforcement of child support orders. He declined to give you any written waiver of those laws. Nothing in the letter indicated how the DNR intended to respond to your request for a record.

I sent a copy of your complaint to the DNR. I enclose the three page letter of Mr. Adam M. Warnke, Deputy Director and Chief Legal Counsel of the DNR. Prior to his two main arguments, Mr. Warnke points out that IC 14-22-11-3(a) requires that an applicant for a hunting, trapping, or fishing license must provide the applicant’s social security number on the application for a license.

Mr. Warnke proffered two bases for his contention that the DNR had complied with the Access to Public Records Act with respect to its April 6 letter. First, he reasoned that your letter was not a request for a record; rather, he contended that you were asking the DNR to conduct legal research. The APRA does not require an agency to create a record by performing legal research at your request; hence, your letter does not constitute a request for any existing record, and thus cannot be deemed a request for public records.

His second contention is that even if your letter were a request for records, you do not identify the record requested with reasonable particularity. You do not satisfy the requirements of IC 5-14-3-3(a) because you have not identified the record you want.

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." IC 5-14-3-1. Furthermore, "[t]his chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record." IC 5-14-3-1.

A request for a record must identify with reasonable particularity the record being requested. IC 5-14-3-3(a)(1). Since the public policy of the APRA favors disclosure and the burden of proof for nondisclosure is placed on the public agency, if an agency needs clarification of a request, then the agency should contact the requestor for more information if it is necessary to respond to the request. *See generally*, IC 5-14-3-1.

An agency is required to respond to a request for a record that is submitted by U.S. Mail or facsimile within seven (7) days of its receipt of the request, or the request is deemed denied.

IC 5-14-3-9(b). If a request is made in writing, the agency may deny the request if the denial is in writing and the denial includes 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).

If an agency does not have a record that is responsive to a request, or if the agency is unsure because the record is not identified with reasonable particularity, the agency need only indicate so in a responsive letter, issued within seven days of the request. Here, the DNR issued a letter on April 6. This letter was tardy under the requirements of the APRA, but your complaint centers not on the lateness of the response but with the adequacy of it. At first blush, on the face of your complaint letter as well as your request for information, it appears that Mr. Warnke's contentions may hold some validity. In particular, where you requested an official determination letter be issued to you (that would aid you in gaining your fishing license without having to supply a social security number), the DNR is correct that you have not stated a complaint under the Access to Public Records Act. This is because an agency is not required to create a record to satisfy a request, even if the request for issuance of the record is under the auspices of the APRA. Where your request on its face acknowledges that an "official determination letter" would have to be created, I do not find fault with the DNR's response to this part of your request.

However, I find differently with respect to your alternative request. You clearly stated that in the event the requirement to supply a social security number is mandatory, you wanted the the state or federal citation, or any official rulings, in support of the DNR's claim that a person must supply a social security number in order to obtain a fishing license. This request, in my opinion, was stated with reasonable particularity. This is true even if the public agency reading such a request might ponder whether it had any records that contained the legal authority for the mandatory disclosure of a social security number, either on a form, letter, document, or in the Indiana Code on the agency attorney's bookshelf.

Mr. Warnke's protest that your request would require that the DNR perform legal research is well taken in some contexts. Some agency determinations may be based on myriad statutory, regulatory, or administrative provisions, and an agency is not required to assemble these and disclose them upon a person's request.

Nevertheless, I find that with respect to your specific request, the DNR was duty-bound to view your request as a request for a record that contained a citation for the legal basis for the social security disclosure requirement, if one existed. If the DNR did not maintain a record that displayed this legal citation, then the DNR was required to so state in its responsive letter (e.g., "the DNR maintains no record that shows the legal citation for our contention that a social security number is mandatory" would be a sufficient response).¹ Yet, a DNR record containing

¹ This is not to argue that an agency should not be responsive to a request by a citizen for a regulatory agency's legal basis to require a social security number. In fact, state agencies, including the DNR, are required by state law to notify a person that the state agency is required by federal law to obtain the social security number and that the form or application cannot be processed unless the person provides the number. IC 4-1-8-2(a). However, this law does not appear to require that the state agency supply a citation to the federal law in this notification, and the APRA does not require that the agency create such a record if none exists.

the legal citation you requested *does* exist; I found two examples myself. One appears on the DNR fishing license application form itself²; the other is on the DNR's webpage where persons may apply for fishing licenses online. The DNR should have identified at least one of these records to you in response to your request.

I find that the DNR did not timely or adequately respond to your request for a record. In the event that the DNR was not able to discern what record you were requesting, it was obliged to contact you to ask for more specificity. I do note that your request of March 24, 2005 contains a lot of unnecessary and confusing legal terminology, that did not serve your ultimate purpose in getting a record containing pertinent information from the DNR. Although the text of your letter was not so confusing as to excuse the DNR from identifying the record you requested, it is not necessary, or even desirable, to resort to legal terminology to request a record.

CONCLUSION

For the foregoing reasons, I find that the Indiana Department of Natural Resources did not timely or adequately respond to your request for a record. I note that you have now received the legal citation that applies to the public agency's authority to require you to submit a social security number in order to receive a fishing license.

Sincerely,

Karen Davis
Public Access Counselor

cc: Mr. Adam M. Warnke

² The State Form 35872 contains a footnote stating: "The request for your Social Security number is MANDATORY according to IC 14-22-11-3."