



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
ANDREW J. KOSSACK

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

November 5, 2009

Mr. William Holly
DOC # 946422
One Park Row
Michigan City, IN 46360

Re: Formal Complaint 09-FC-229; Alleged Violation of the Access to Public Records Act by the Indiana State Prison

Dear Mr. Holly:

This advisory opinion is in response to your formal complaint alleging that the Indiana State Prison (the "ISP") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*, by denying you access to public records.

BACKGROUND

In your complaint, you allege that on September 24, 2009, you requested access to "any statute, policy, memo, state law, or any governing action that the Indiana State Prison official use, or may use, that is applied to me as a prison, is accessible to me under the Public Access Records [sic] Act." You further allege that the ISP failed to respond to your request within seven (7) days. Your request to ISP, which is attached to your complaint, shows that you requested a copy of the record "that states I'm allowed 'only' thirty (30) minutes out of my cell for shower and rec [sic] while other offenders receive an hour."

My office forwarded a copy of your request to ISP. Mr. Robert Bugher, Legal Services Director for the Indiana Department of Correcion, responded on behalf of ISP. It is my understanding that Mr. Bugher has already sent you a copy of his response. Mr. Bugher states that your request was for information related to recreation privileges for offenders. According to Mr. Bugher, such records "are not public records compiled by the Department of Correcion, but laws enacted by the state legislature and governor. Mr. Holly may access these materials by making an appropriate request in the facility law library." Mr. Bugher futher states that a copy of the statutes in question was sent to you along with your copy of his response to my office.

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.” I.C. § 5-14-3-1. The ISP does not contest that it is 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 public records of the ISP during regular business hours unless the public records are exempt from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a). The burden of proof for nondisclosure of a public record is on the public agency that would deny access to the record. I.C. § 5-14-3-1.

Given that the ISP does not maintain the information you requested, it is my opinion that ISP has not violated the APRA by failing to produce it to you. As Counselor O’Connor opined in 2001, “[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*. Even though the ISP had the ability to *access* the information you sought, the APRA does not require public agencies to acquire documents in response to a public records request simply because that agency has the ability to procure the records. The APRA only requires public agencies to produce public records that are “created, received, retained, maintained, or filed by or with a public agency.” I.C. § 5-14-3-2(m). Thus, ISP was under no obligation to send you the information. Nevertheless, I trust the records enclosed with Mr. Bugher’s response satisfy your needs.

Although I find no violation with regard to the foregoing, it is my opinion that ISP violated the APRA insofar as it failed to respond to your written request within seven (7) days. The APRA provides that an agency’s failure to respond to a written request within seven (7) days constitutes a denial of access. I.C. § 5-14-3-9(b). Under the APRA, a public agency may deny a request if: (1) the denial is in writing or by facsimile; and (2) the denial includes: (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 the title or position of the person responsible for the denial. I.C. § 5-14-3-9(c). In my opinion, the ISP’s failure to provide you with any response violated section 9 of the APRA.

CONCLUSION

For the foregoing reasons, it is my opinion that ISP violated the APRA insofar as it failed to properly respond to your request within seven (7) days. ISP did not otherwise violate the APRA.

Best regards,



Andrew J. Kossack
Public Access Counselor

Cc: Robert D. Bugher, Legal Services Director, Indiana Department of Correction