



STATE OF INDIANA

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February 2, 2011

Ms. Debbie D. Hagan
4453 Strickland Dr.
Owensboro, KY 42301

Re: Formal Complaint 11-FC-07; Alleged Violation of the Access to Public Records Act by the Indiana Family and Social Services Administration

Dear Ms. Hagan:

This advisory opinion is in response to your formal complaint alleging the Indiana Family and Social Services Administration ("FSSA") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* FSSA's response to your complaint is enclosed for your reference.

BACKGROUND

In your complaint, you allege that you submitted a series of questions to FSSA's media contact, Marcus Barlow, on October 29, 2010. On November 6th, you received a letter dated November 1st from Scott Newton of FSSA's Office of General Counsel. Mr. Newton's letter acknowledged your request and informed you that he forwarded it to a colleague for further action. On November 15th, Kristina Moorhead of the Office of Medicaid Policy and Planning responded to you and informed you that providing you with information relevant to your inquiries would not be possible unless FSSA reprogrammed its computer system. You sent a supplementary request to Ms. Moorhead and Mr. Newton on November 23rd, but as of December 27th you had not received a response.

After you filed your complaint, you followed up with FSSA and informed the agency that you were aware that a reporter had obtained information similar to that which you requested in your October 29th request. The reporter sent you a copy of his request and the response from FSSA. When you sent the report to Ms. Moorhead and inquired as to why someone else had obtained information that FSSA refused to provide to you, Ms. Moorhead stated that FSSA's records policy changed. Formerly, FSSA produced reports for individuals at FSSA's expense. However, due to budget cuts, FSSA can no longer absorb the cost of paying data analysts to run reports that are not for internal FSSA use.

In response to your complaint, Mr. Newton states that FSSA has now provided you with some of the information you sought. The undisclosed information was not produced by FSSA due to the fact that FSSA would have to reprogram its computer system in order to release it.

ANALYSIS

Under the ARRA, a request for inspection or copying must identify with reasonable particularity the record being requested. I.C. § 5-14-3-3(a). While the term “reasonable particularity” is not defined in the APRA, it has been addressed a number of times by the public access counselor. *See Opinions of the Public Access Counselor 99-FC-21* and *00-FC-15* for two examples. Counselor Hurst addressed this issue in *Opinion of the Public Access Counselor 04-FC-38*:

A request for public records must “identify with reasonable particularity the record being requested.” IC 5-14-3-3(a)(1). While a request for *information* may in many circumstances meet this requirement, when the public agency does not organize or maintain its records in a manner that permits it to readily identify records that are responsive to the request, it is under no obligation to search all of its records for any reference to the information being requested. Moreover, unless otherwise required by law, a public agency is under no obligation to maintain its records in any particular manner, and it is under no obligation to *create* a record that complies with the requesting party’s request.

Opinion of the Public Access Counselor 04-FC-38 (2004), available at <http://www.in.gov/pac/advisory/files/04-FC-38.pdf>. In reviewing your request, it appears that you requested *information* rather than *records*. Public agencies are not obligated to create records in response to a request or to answer generalized inquiries. *See Op. of the Public Access Counselor 10-FC-120*. 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.” Because FSSA is not obligated to create a new record in response to a request or to answer generalized inquiries, it is my opinion that FSSA did not violate the APRA by failing to provide answers to your questions.

I recognize that the supplementary materials that you provided suggest that FSSA acted inappropriately by providing answers to similar questions from a member of the news media. Again, however, the APRA does not require FSSA to create records in response to any request. Because an agency’s voluntary creation of new records in response to a public records request is not addressed by the APRA, it is not within the purview of this office to question whether or not FSSA acted appropriately, in light of its budget situation, when it modified its policy of creating new reports for outside entities.

That said, it appears that FSSA ultimately created a document that provides information responsive to many of your inquiries. It is unclear whether the information provided by FSSA satisfies your complaint. To the extent that you submit a request for access to FSSA's electronic records that contain additional information, the APRA contains special provisions regarding electronically stored records. *See* I.C. § 5-14-3-3(a). Specifically, the APRA requires that "a public agency that maintains . . . public records in an electronic data storage system shall make reasonable efforts to provide to a person making a request a copy of all disclosable data contained in the records on paper, disk, tape, drum, or any other method of electronic retrieval if the medium requested is compatible with the agency's storage system." *Id.* A public agency has the discretion to either grant or deny another public agency's request to "use an electronic device to inspect and copy public records containing information owned by or entrusted to the agency." *See* I.C. § 5-14-3-3(c)(2). Thus, the APRA requires FSSA to make "reasonable efforts" to provide a copy of electronic data responsive to your request.

Finally, I note that the APRA does not require -- or even permit -- FSSA to disclose confidential information contained within its electronic records. If confidential information is contained within electronic records responsive to a request, FSSA cannot release such records without first reprogramming its system to ensure that no confidential information is released. Accordingly, the APRA provides that a public agency may charge a person who makes a request for disclosable information the agency's direct cost of reprogramming a computer system if: (1) the disclosable information is stored on a computer tape, computer disc, or a similar or analogous record system; and (2) *the public agency is required to reprogram the computer system to separate the disclosable information from nondisclosable information.* I.C. § 5-14-3-6(c) (emphasis added). "Direct cost" means one hundred five percent (105%) of the sum of the cost of: (1) the initial development of a program, if any; (2) the labor required to retrieve electronically stored data; and (3) any medium used for electronic output; for providing a duplicate of electronically stored data onto a disk, tape, drum, or other medium of electronic data retrieval under section 8(g) of this chapter, or for reprogramming a computer system under section 6(c) of this chapter. I.C. § 5-14-3-2(c). Thus, if FSSA must reprogram its computer system in order to create disclosable versions of records containing the information you seek, FSSA may charge you its direct costs incurred in doing so.

CONCLUSION

For the foregoing reasons, it is my opinion that FSSA did not violate the APRA.

Best regards,



Andrew J. Kossack
Public Access Counselor

cc: Scott Newton