



STATE OF INDIANA

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September 6, 2011

Mr. Chad M. Wallace
P.O. Box A
New Castle, Indiana 47362

Re: Formal Complaint 11-FC-189; Alleged Violation of the Access to Public Records Act by the LaPorte County Board of Commissioners

Dear Mr. Wallace:

This advisory opinion is in response to your formal complaint alleging the LaPorte County Board of Commissioners ("Board") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* A copy of your complaint was forwarded to the Board. As of today, we have not received a response.

BACKGROUND

In your complaint, you allege that you submitted a request in writing on July 18, 2011 to the Board for public documents pertaining to Jackie Dermody, Adult Probation Officer, showing her dates of employment, job titles, reasons for leaving, letter asking for her resignation, her letter of resignation, and any credentials, certifications, and licensing she may possess specific to the treatment of sex offenders. In addition, you requested information on the Behavior Management Services, including owner's names, list of individual clinicians, clinician position titles, employment dates, education levels, state and national licenses, education units, business address, treatment location address, a copy of the contract between Behavior Management Services and the LaPorte County Probation Office, and treatment locations provided by LaPorte County. You further allege that you had not received a response from the Board as of August 5, 2011, the date that you filed your formal complaint with the Public Access Counselor's 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." *See* I.C. § 5-14-3-1. The Board is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Board's public

records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply.

The APRA provides that personnel files of public employees and files of applicants for public employment may be excepted from the APRA's disclosure requirements, except for:

- (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.
- I.C. § 5-14-3-4(b)(8).

In other words, the information referred to in (A) - (C) above must be released to you upon request, but a public agency may withhold any remaining personnel records.

Generally, 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.” *Opinion of the Public Access Counselor 01-FC-61*; *see also Opinion of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly the [agency] could not be required to produce a copy....”). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. *See Opinion of the Public Access Counselor 10-FC-56*.

Without the benefit of a response from the Board, it is unclear to me why your request was denied. Under the APRA, a public agency that withholds a public record

bears the burden of proof to show that the record is exempt. *See* I.C. §§ 5-14-3-1, 5-14-3-9(f) and (g). Exceptions to disclosure are narrowly construed. *See* I.C. § 5-14-3-1. As the Board has not provided a justification for withholding the records at issue here, it is my opinion that it has failed to sustain its burden.

If the Board cannot justify withholding the records under the APRA, I encourage the Board to release the records to you as soon as possible. To the extent the Board persists in its denial of access following the issuance of an advisory opinion from this office and you believe the Board to be in violation of the APRA, I leave you to your remedies before a court pursuant to I.C. § 5-14-3-9(e).

CONCLUSION

For the foregoing reasons, it is my opinion that the Board violated the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is stylized with a large initial "J" and a cursive "Hoage".

Joseph B. Hoage
Public Access Counselor

cc: LaPorte County Board of Commissioners