



STATE OF INDIANA

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August 19, 2014

Ms. Katherine A. Toomey
1899 Pennsylvania NW, Ste. 600
Washington, DC 2006

Re: Formal Complaint 14-FC-154; Alleged Violation of the Access to Public Records Act by the Indiana Department of Correction

Dear Ms. Toomey,

This advisory opinion is in response to your formal complaint alleging the Indiana Department of Correction ("DOC") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The DOC has provided a response to your complaint via Counsel, Mr. Robert Bugher, Esq. His response is attached for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on July 18, 2014.

BACKGROUND

Your complaint dated July 18, 2014, alleges the Indiana Department of Correction violated the Access to Public Records Act by not providing records responsive to your request in violation of Ind. Code § 5-14-3-3(b).

On or about May 29, 2014 you delivered a public records request to the DOC seeking documentation related to drugs used in Indiana offender executions. The DOC acknowledged having records which would partially satisfy your request; however, they have chosen to withhold them based on a number of statutory grounds. Specifically, you requested the following:

1. The supplies (including the number, size and concentration of vials) of any and all drug intended or considered for use in executions currently in the possession of the IDOC.
2. The expiration date of any and all drugs intended or considered for use in executions currently in the possession of the IDOC.
3. The lot numbers of any and all drugs intended or considered for use in executions currently in the possession of the IDOC.

4. Any and all drug inventory logs and or drug chain of custody documents related to any drug intended or considered for use in executions from January 1, 2012 to the present.
5. Any and all activity by the Indiana DOC from January 1, 2012 to the present to purchase or acquire any drugs for use in past or future executions, including purchase orders, invoices, checks, money orders, receipts, memoranda, and correspondence.
6. Documents regarding the manufacturers and/or distributors of any and all drugs intended or considered for use in executions from January 1, 2012 to the present.
7. Any correspondence between the Indiana DOC and any party, including other state DOCs, hospitals, pharmacies, and state and federal agencies, from January 1, 2012 to the present regarding drugs intended or considered for use of executions.
8. Any correspondence between the Indiana DOC and any party from January 1, 2012 to the present regarding execution protocols, regulations, guidelines, checklists, notes, or other documents that instruct or direct the carrying out of an execution.

The DOC acknowledged the existence of all of these documents except for Number 7. As for all of the other documents, the DOC has put forth several justifications for withholding the information. DOC argues that records responsive to Numbers 1, 2, and 3 are contained in product packaging which they do not define as public records pursuant to Ind. Code § 5-14-3-2(o); the records responsive to Numbers 1, 2, 3, 4, 5, 6, and 8 would identify a person or organization which would assist in the execution process – records declared confidential by Ind. Code § 35-38-6-6; DOC also claims the release of these records would have the potential to result in physical harm as referenced in 210 IAC 1-6-2(3)(C); finally, the records responsive to Number 8 would represent administrative information which would jeopardize a security system – the release of which would be discretionary under Ind. Code § 5-14-3-4(b)(8)¹.

The DOC reasserts these justifications in their response, omitting the 210 IAC 1-6-2(3)(C) argument. Additionally, they have released information responsive to Number 8.

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 Ind. Code § 5-14-3-1. The Indiana Department of Correction is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the DOC’s public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14-3-3(a).

¹ It is assumed DOC intended to reference Ind. Code § 5-14-3-4(b)(10).

Product Packaging

The DOC alleges some of the information is found on product packaging and is therefore not public record under Ind. Code § 5-14-3-2(o), however, that statute reads:

"Public record" means any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, **or any other material, regardless of form or characteristics.**

Emphasis added.

The DOC has not identified any statutory or authoritative case law declaring product packaging to be exempt from the definition of public record. While an argument could possibly be made that it would not be subject to a retention schedule as transitory material, I am not compelled by the argument it is exempt merely because it exists on a package. The DOC maintains the information and is in the custody of the DOC, therefore it is public record. Ind. Code § 5-14-3-2(o) is clearly not intended to be an exhaustive list and this Office is familiar with multiple examples of unorthodox or untraditional forms of public records.

Identification of Those Who Assist in Executions

Ind. Code § 35-38-6-6(e) declares as confidential the identity of those who assist in an execution.

The department of correction:

(1) shall keep confidential the identities of persons who assist the superintendent of the state prison in an execution; and

(2) may:

(A) classify as confidential; and

(B) withhold from the public;

any part of a document relating to an execution that would reveal the identity of a person who assists the superintendent in the execution.

Again, the DOC has not identified any authority as a basis for categorizing manufacturers of drugs as an assistant to execution. They are not an agent of, nor a party to, the death penalty process. The manufacturers are vendors of the chemicals – not the facilitators or curators of executions. There is no Indiana case law or statute defining "assist," so if it is necessary to interpret the law to determine what the General Assembly intended this phrase to mean, courts would rely upon the common and ordinary, dictionary meanings

of the word used. *Crowley v. Crowley*, 588 N.E.2d 576, 578 (Ind. App. 1992). From the Oxford Dictionary of English, 2010, Oxford University Press, “assist” means to “help (someone); typically by doing a share of the work”.

By DOC’s logic, everyone in the nexus of the execution would presumably fall into the “assistant” category – the sentencing judge and jury; the prosecutor making the State’s case; the legislators who passed the death penalty statute, etc. This would be an absurd result. The circle of assistants would be limited to those actually performing the execution itself and not all of those involved in the chain of events leading up to the event.

Information which might Result in Physical Harm to Another Person

DOC also argues in its denial the release of information would potentially cause physical harm to another person. Indiana Administrative Code 210 Section 1-6-2(3)(C) states:

- (3) Confidential information shall include, but is not limited to, the following:
 - (A) Offender diagnostic/classification reports.
 - (B) Criminal intelligence information.
 - (C) Information that, if disclosed, might result in physical harm to that person or other persons.

The DOC does not states why the release would cause harm to an individual, however, at the risk of stating the obvious, lethal drugs would concededly fall into this category. It stretches the bounds of logic, however, the purpose of this administrative rule would be targeted at lethal injection drugs. In fact, the scope of the rule clearly addresses offender information and not jail or prison documentation. It is my opinion the DOC’s interpretation of this rule is erroneous.

Protection of Security Systems

Although DOC has provided a portion of the records it claims to potentially jeopardize the security system of the prison under Ind. Code § 5-14-3-4(b)(10), I do not find this to be an applicable argument as well. The release of the information sought is not germane to the integrity of any prison security system. It is not logical to assert the release of execution drugs would compromise the safety measures of the institution itself.

The burden of justifying the withholding of records is clearly upon the public agency in APRA disputes. See Ind. Code § 5-14-3-1. The Indiana Department of Correction has not met its burden of substantiating nondisclosure.

CONCLUSION

For the foregoing reasons, it is the Opinion of the Indiana Public Access Counselor the Indiana Department of Correction has violated the Access to Public Records Act.

Regards,

A handwritten signature in black ink, appearing to be 'LHB', written in a cursive style.

Luke H. Britt
Public Access Counselor

Cc: Mr. Robert Bugher, Esq.