



STATE OF INDIANA

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September 9, 2016

Michael A. Hollon - #8210
Westville Correctional Facility
5501 South 1100 West
Westville, Indiana 46391

Re: Formal Complaint 16-FC-180; Alleged Violation of the Access to Public Records Act by the State of Indiana, Indiana Department of Correction

Dear Mr. Hollon:

This advisory opinion is in response to your formal complaint alleging the State of Indiana, Indiana Department of Correction ("DOC") violated the Access to Public Records Act ("APRA"), Indiana Code § 5-14-3-1 et. seq. DOC has responded to your complaint via Mr. Joel Lyttle, Esq., DOC Counsel. His response is enclosed for your review. Pursuant to Indiana Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on August 1, 2016.

BACKGROUND

Your complaint dated July 25, 2016, alleges DOC violated the Access to Public Records Act by improperly denying your records request. You have been seeking a copy of the justification letter which resulted in you being placed in segregated housing. Your request was denied by DOC on July 22, 2016, because the records were deemed confidential by DOC. On August 15, 2016 DOC responded. DOC contends the justification letter is an intra-agency deliberative material subject to release at its discretion, citing Indiana Code § 5-14-3-4(b)(6).

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

In its original denial, DOC cited internal policy and various Indiana code provisions. However, these provisions appear to discuss the powers of the Commissioner and the procedure for involuntary segregation of an offender. While these code provisions may tangentially be related to the record you are requesting, these provisions do not state the record requested is confidential. Further, neither the administrative code provision nor the statutory provisions cited make the requested record confidential. This is DOC Policy, however, as I noted in *Advisory Opinion 16-FC-96*, policy alone cannot make records confidential without statutory authority giving discretion to make the records confidential. While DOC may have the right to declare certain records confidential, DOC has not specifically cited the provision. Therefore, its original response was improper. This conclusion is supported by the fact DOC abandoned these provisions and instead raises a completely different defense to this office.

DOC raises the deliberative materials exemption. The General Assembly has provided that records which qualify as deliberative materials may be disclosed at the discretion of the public agency. *See Indiana Code § 5-14-3-4(b)(6)*.

The subdivision provides:

Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

Deliberative materials include information which reflects, for example, one's ideas, consideration and recommendations on a subject or issue for use in a decision-making process. *See Opinion of the Public Access Counselor 98-FC-1*. The purpose of protecting such communications is to "prevent injury to the quality of agency decisions." *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002).

The record in question was used by DOC to decide whether to put you in involuntary segregation. This is clearly a decision which affects the operations of Westville Correctional Facility. Therefore, it is understandable that release of this letter may affect DOC's decision making process, not just in your case, but in all cases where an offender is put into segregation. Therefore, DOC's use of the deliberative materials exemption is proper.

CONCLUSION

Based on for forgoing, it is the opinion of the Public Access Counselor the State of Indiana, Indiana Department of Correction violated the APRA by failing to provide proper statutory justification in its denial, but not for denying access to the record.

Regards,

A handwritten signature in black ink, appearing to be 'LHB', with a long, sweeping underline that extends to the left.

Luke H. Britt
Public Access Counselor

Cc: Mr. Joel D. Lyttle, Esq.