



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
HEATHER NEAL

Indiana Government Center South
402 West Washington Street, Room W460
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

April 30, 2009

George Hopkins
517 Birch
Beech Grove, Indiana 46107

Re: Formal Complaint 09-FC-88; Alleged Violation of the Access to Public Records Act by the Indiana Department of Correction

Dear Mr. Hopkins:

This advisory opinion is in response to your formal complaint alleging the Indiana Department of Correction ("Department") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by failing to respond to your request for access to records. A copy of the Department's response to the complaint is enclosed for your reference. It is my opinion the Department's response was untimely under the APRA. Further, it is my opinion the Department may be able to bear the burden of proof to sustain the denial of access but has not yet demonstrated it can sustain the denial.

BACKGROUND

You allege that you mailed a request to the Department for access to a number of records. You mailed the request via certified mail and received confirmation the request was received on March 3, 2009. You allege that as of the date you submitted the complaint you had received no response from the Department. The complaint was postmarked on March 28, and my office received it on April 1.

The Department responded to the complaint by letter dated April 17 from Legal Services Director Robert Bugher. The Department verifies the request was received on March 3. The Department contends the requested records are standards developed by the American Correctional Association and the National Commission on Correctional Health Care. The Department contends the materials may be copyright protected by the respective organizations but may be available directly from those organizations.

ANALYSIS

The public policy of the APRA states, "[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 Department is clearly a public agency for the purposes of the APRA. I.C. § 5-14-3-2(m). Accordingly, any person has the right to inspect and copy the public records of the Department during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

A request for records may be oral or written. I.C. §§ 5-14-3-3(a), 5-14-3-9(c). If the request is delivered by mail and the agency does not respond to the request within seven days of receipt, the request is deemed denied. I.C. § 5-14-3-9(b).

A response could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. There are no prescribed timeframes when the records must be produced by a public agency. A public agency is required to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. I.C. § 5-14-3-7(a). However, section 7 does not operate to deny to any person the rights secured by section 3 of the Access to Public Records Act. I.C. § 5-14-3-7(c). Former public access counselors and I have stated that records must be produced within a reasonable period of time, based on the facts and circumstances.

Here, the Department acknowledges it received the request on March 3 but makes no mention of a response to the request. If the Department received the request on March 3 but did not respond to you within seven days of receipt of the request, the response was untimely under the APRA and the Department effectively denied the request. *See* I.C. § 5-14-3-9(b).

Regarding the substantive issue, whether the records are required to be disclosed, the Department contends the records “may be copyright protected.” An agency must withhold from disclosure certain records declared confidential by, among others, state or federal statute. *See* I.C. § 5-14-3-4(a). Records containing trade secrets are specifically excepted from disclosure pursuant to the APRA. *See* I.C. § 5-14-3-4(a)(4). The Department may be able to bear the burden of proof to sustain the denial of access on the basis of copyright protection should the matter come before a court of law. Here, the Department has not demonstrated it can bear the burden, since the Department has only indicated the records “may be copyright protected.” The agency which would deny access to records bears the burden of proof to sustain the denial. I.C. § 5-14-3-1. Here the Department has not yet done so because it has only indicated the records may be protected. But the Department may be able to bear the burden to sustain the denial if it can demonstrate the records are confidential by state or federal statute (or other provision found in I.C. § 5-14-3-4(a)).

CONCLUSION

For the foregoing reasons, it is my opinion the Department’s response was untimely under the APRA. Further, it is my opinion the Department may be able to bear

the burden of proof to sustain the denial of access but has not yet demonstrated it can sustain the denial.

Best regards,

A handwritten signature in black ink that reads "Heather Willis Neal". The signature is written in a cursive style with a large initial 'H'.

Heather Willis Neal
Public Access Counselor

Cc: Robert Bugher, Indiana Department of Correction