

July 20, 2000

Ms. Kay Bell
R.R. 1, Box 172
Shoals, Indiana 47581

Re: Advisory Opinion 00-FC-18 *Alleged Denial of Access to Public Records by the Indiana Department of Correction.*

Dear Ms. Bell:

This is in response to your formal complaint, which was received on July 7, 2000. You have alleged that the Indiana Department of Correction (“Department”) has violated the Indiana Access to Public Records Act (“APRA”), Indiana Code chapter 5-14-3, by failing to respond to your public records request of June 5, 2000. You had requested copies of monthly prisoner reports for a particular facility. Mr. Robert D. Bugher, Legal Services Director for the Department, responded to your complaint in a letter dated July 7, 2000. A copy of his response is enclosed for your reference.

For the reasons stated below, it is my opinion that the Department did not make a timely response under the APRA when it failed to respond within seven (7) days of the receipt of your June 5th request for access to public records. While there was no duty to produce any disclosable public records in that same seven (7) day period, the Department was obligated to communicate to you the status of your request and failed to do so and therefore, the denial is actionable under Indiana Code section 5-14-3-9.

Mr. Bugher also posed a question as to whether the Department may withhold the public records you requested if these records are disclosable at the discretion of the Department under Indiana Code section 5-14-3-4(b)(6), the exception commonly known as the “deliberative material exception.” It is my opinion that under the APRA, a public agency may change a policy with respect to its exercise of discretion, but such changes must not be made in arbitrary or capricious manner.

BACKGROUND

According to your complaint, you sent a public records request dated June 5, 2000, to Mr. Bugher requesting copies of the monthly prisoner reports for the Otter Creek Correctional Center/CCA for the months February, March, April and May of this year. As of the writing of your formal complaint on June 30, 2000, you had received no response from the Department.

In his response to your complaint, Mr. Bugher admitted that he had received your June 5th request on June 12, 2000. He indicated that he attempted to pull the documents requested together for

you upon receipt of your request, but due to other responsibilities with the Department, he had not responded to your request or provided the requested records to you. Admittedly, Mr. Bugher understands that these other responsibilities are not an excuse for his failure to provide a timely response to your request, but hopes that the Department's efforts to comply with previous requests you have made will indicate that there was no intention to ignore your request.

Mr. Bugher also stated that it is his opinion that the monitoring reports you requested are exempt from disclosure under Indiana Code section 5-14-3-4(b)(6) as deliberative material created for the purposes of decision making. These documents, however, have been disclosed in the past upon request and therefore, Mr. Bugher mailed the documents to you, with confidential information redacted, on July 7, 2000.

In conjunction with his response to your complaint, Mr. Bugher asked for this Office to render an opinion about the disclosability of the monitoring reports you requested given his assertion that these public records are exempt from disclosure under Indiana Code section 5-14-3-4(b)(6). My opinion concerning this issue is included in the Analysis section, below.

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." Ind. Code § 5-14-3-1. The Department is a public agency for the purposes of the APRA. Ind. Code § 5-14-3-2. 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 Indiana Code section 5-14-3-4. Ind. Code § 5-14-3-3(a).

Response to Your Public Records Request

Under the APRA, "if a person requests by mail or by facsimile a copy or copies of a public record, a denial of disclosure does not occur until seven (7) days have elapsed from the date the public agency receives the request." Ind. Code §5-14-3-9(b). It is the responsibility of the public agency to respond to requests for public records within this time period. The APRA does not set any time periods for producing public records, merely for responding to the request.

It is clear that the Department was required to respond to your written request within seven (7) days after its receipt and that this was not done. It was only after you filed a formal complaint with this Office that a response was made to your request, and ultimately, the requested records were produced.

From the facts presented, it is my opinion that the Department did not respond to your June 5, 2000 public records request within the time period required under Indiana Code section 5-14-3-9(b) and that this denial is actionable in court under the APRA. To the Department's credit, upon receipt of your formal complaint, a response was made in the form of the production of the public records you requested. This untimely response, however, does not remedy the violation of the APRA.

Deliberative Material Exception and the Monthly Prisoner Reports

Mr. Bugher raised an additional question in his response to your complaint, specifically whether the monitoring reports you requested are required to be disclosed since he claims they are nondisclosable as deliberative material under Indiana Code section 5-14-3-4(b)(6). Under the APRA, public agencies have been granted discretion as to whether they will disclose certain categories of public records. As such, the Department may withhold from disclosure or choose to disclose:

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.

Indiana Code §5-14-3-4(b)(6). In the prior disclosures of the monthly reports, the Department redacted the confidential information contained therein as is required under Indiana Code section 5-14-3-6(a). The question raised by Mr. Bugher is whether the Department may now withhold the entire document based upon Indiana Code section 5-14-3-4(b)(6), in spite of the disclosure of the deliberative material to you on this and prior occasions.

As a general rule, public agencies may change past rulings or policies, but such change must be explained and reasons for the change must be articulated. *Community Care Centers, Inc. v. Indiana Department of Public Welfare*, 523 N.E.2d 448 (Ind. App. 1988). The APRA provides a standard for reviewing agency discretion, and in this case, that standard would be applied to any decision by the Department to change its practice of disclosing the monthly prisoner report information to you.

As a practical matter, I advise public agencies to be consistent in their exercise of discretion to ensure that they are carrying out the APRA in a uniform manner. The legal standard under the APRA for reviewing public agencies' determinations that a public record falls within one of the exceptions to disclosure under Indiana Code section 5-14-3-4(b) is whether the denial of access was arbitrary or capricious. Ind. Code §5-14-3-9(f)(2). The burden for proof that the denial was arbitrary or capricious lies with the person requesting access. *Id.* The public agency, however, must still meet an initial burden of proof—by proving that the public record falls within any one of the categories listed under Indiana Code section 5-14-3-4(b) and establishing the contents with adequate specificity. Ind. Code §5-14-3-9(f).

Indiana courts have provided some guidance on discretion of public agencies and whether that discretion was exercised in an arbitrary or capricious manner. While these cases were not decided specifically under the APRA, the analysis is still relevant.

Arbitrary or capricious action on the part of an administrative board means willful and unreasonable action, without consideration and in disregard of the facts or circumstances of the case;

action taken without some basis which would lead a reasonable and honest man to such action.

State Board of Tax Commissioners v. Chicago, M. St. P. & PAC R. Co., 96 N.E.2d 279, 282 (Ind. App. 1951). [Citations Omitted.] While this definition of arbitrary and capricious action was articulated almost fifty years ago, the same standard continues to be relied upon by Indiana's Supreme Court in more recent decisions reviewing the actions of public agencies. See, Department of Natural Resources v. Indiana Coal Council, Inc., 542 N.E.2d 1000, 1007 (Ind.1989) and Indiana High School Athletic Association , Inc. v. Carlberg, 694 N.E.2d 222, 233 (Ind. 1998).

The Department has been provided discretion under the APRA to disclose, or not disclose, public records that qualify for the exception under Indiana Code section 5-14-3-4(b)(6). Any change in that exercise of discretion, or the Department's policy about such disclosures, may not be made in an arbitrary and capricious manner, as defined in the court cases cited above. If the Department has some basis for taking this action, that is neither willful or unreasonable in nature, and can articulate reasons to change its disclosure policy with respect to the public records in question, this change may withstand the standard of review under Indiana Code section 5-14-3-9(f). Since this opinion is being written without the benefit of any specific rationale or basis for such a change in policy, I cannot reach any more definitive opinion on this matter. I caution the Department, however, to consider the authority cited above in making its determination whether to change its current policy of disclosing the monthly prisoner reports.

CONCLUSION

It is my opinion that the Indiana Department of Correction failed to respond to your June 5th public records request within the time period required under the Access to Public Records Act and the failure to do so constitutes a denial under the Act. In addition, it is also my opinion that while a public agency may change a policy with respect to its exercise of discretion under the APRA, such changes must not be made in arbitrary or capricious manner.

Sincerely,

Anne Mullin O'Connor

cc: Robert Bugher, Legal Services Director
Indiana Department of Correction
