



# STATE OF INDIANA

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August 23, 2011

Mr. Gary F. Otto  
5124 W. Reformatory Road  
Pendleton, Indiana 46064

*Re: Formal Complaint 11-FC-194; Alleged Violation of the Access to Public Records Act by the Ivy Tech Community College, Correctional Industrial Facility*

Dear Mr. Otto:

This advisory opinion is in response to your formal complaint alleging the Ivy Tech Community College, Correctional Industrial Facility ("College") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Evelyn Hicks, Program Director, responded to your complaint. Her response is enclosed for your reference.

## BACKGROUND

In your complaint, you allege that you submitted a written request to the College on July 20, 2011 for the following:

- (1) Ivy Tech enrollment form from January 24, 2011;
- (2) Test scores used to enroll in the College;
- (3) Record of your graduating the Ivy Tech Building Maintenance;
- (4) Record that you received a three-month credit for graduating Ivy Tech Building Maintenance;
- (5) Record that his EPRD changed from March 20, 2013 to December 20, 2012 for graduating Ivy Tech Building Maintenance.

Although not entirely clear from your complaint, it would appear that you have yet to receive any of the records requested from the College; or you have not been satisfied with the records that have been produced.

In response to your formal complaint, Ms. Hicks responded on behalf of the College. Ms. Hicks advised that the College works under a contract with the Department of Corrections ("DOC") to provide educational services to the Correctional Industrial

Facility. Pursuant DOC Policy 01-04-104, educational records are classified as restricted information. The College's policy in regards to offender educational records is that all information, restricted and unrestricted, is provided to and the property of the DOC to ensure that distribution of the records adheres to the DOC policies. The DOC in turn makes the unrestricted records accessible via the individual's case manager. Ms. Hicks has provided that you have been informed, both verbally and in writing, that your education records must be obtained through your case manager or other DOC staff. Upon receiving your July 20, 2011 request, the College informed your case manager and a response was provided to you by the DOC.

In regards to the individual parts of your complaint, Ms. Hicks provided:

- (1) The College enrollment form is for office use only and is not given to any college student. Verification of your start and complete dates was made available to you through your case manager.
- (2) A copy of your previous scores has already been provided to your case manager, who has provided a copy to you.
- (3) Students receive a certificate, but do not graduate from the Building Maintenance class. A copy of your certificate was placed in your offenders' packet, with the original in your portfolio; the DOC will provide you with your portfolio upon your release.
- (4) The College has submitted a Verification of Completion of Education program to the DOC via a May 27, 2011 email. Per the DOC, it has received your paperwork and has processed the time credit.
- (5) As of July 21, 2011, your EPRD date is December 12, 2012. This information is available for your review via your case manager.

#### 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 College 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 College'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. Here, the College responded to your request within the seven-day time period required by the APRA.

One exception to disclosure under the APRA is for records that are "declared confidential by rule adopted by a public agency under" specific statutory authority to do so. *See* I.C. §5-14-3-4(a)(2). The DOC has authority under I. C. § 11-8-5-2(a) to promulgate administrative rules to "classify as confidential . . . personal information maintained on a person who has been committed to the department or who has received correctional services from the department." I.C. § 11-8-5-2(b) provides that the Department may keep confidential information from the offender or other persons unless ordered to disclose (e.g. court order, for research purposes, employees of the DOC if required to perform their duties, etc.).

The Department has classified certain offender records as confidential pursuant to 210 IAC 1-6-2, which provides that an offender, or his agent's, rights to access confidential or restricted information are set forth at 210 IAC 1-6-4. 210 IAC 1-6-2(2)(a) provides that educational records are restricted information. DOC Policy 01-04-104, which further addresses access to offender records, is based upon the Department's administrative rules. Educational records are classified as restricted information pursuant to DOC Policy 01-04-104. As such, the College is required to comply with the requirements imposed by the DOC in regards to the disclosure of information to offenders. To ensure compliance, the College provides all educational records to the DOC, who then distributes the records, once requested, to the offender's case manager.

In regards to your enrollment form, the College has provided that this form is for office use only and not provided to any student. Under the APRA, a public agency that withholds a public record bears the burden of showing 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. The College has not disputed that the enrollment form is a "record" for the purposes of the APRA. If the enrollment form is made confidential by state or federal law, exempt from disclosure pursuant to the APRA, or the DOC has restricted your access to it pursuant to 210 IAC 1-6-2(2)(a) or Policy 01-04-104, the College did not act contrary to the APRA by failing to disclose it. If the enrollment form did not meet one of the exceptions provided, it is my opinion that the College violated the APRA in failing to disclose it.

In regards to your prior test scores and record of you graduating from the Ivy Tech Building Maintenance, the College has provided that a copy of your prior scores have been provided to your case manager and a copy of the certificate showing your completion of all requirements of the Building Maintenance program has been provided. The College has advised it has no further records responsive to your requests. 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*. Thus, the College did not violate the APRA by failing to produce records that do not exist.

The College has provided that the verification records necessary to process your time credit has been forwarded to the DOC, who has indicated they have received the necessary information. The DOC has advised they have processed your ninety (90) day time credit and your new EPRD is December 20, 2012. The College has provided all records responsive to your request to the DOC, who has provided the records to your case manager, as such; the College did not violate the APRA in regards to records pertaining to your credit time.

#### CONCLUSION

For the foregoing reasons, if the enrollment form that you requested was made confidential by state or federal law, exempt from disclosure pursuant to the APRA, or the DOC has restricted offender access pursuant to Policy 01-04-104, the College did not violate the APRA. If the enrollment form can not be classified as an exception, the College acted contrary to the APRA when it denied your request. In all other aspects of your complaint, it is my opinion that the College did not act contrary to the APRA.

Best regards,

A handwritten signature in black ink, appearing to read 'J. Hoage', written in a cursive style.

Joseph B. Hoage  
Public Access Counselor

cc: Evelyn Hicks