



# STATE OF INDIANA

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October 11, 2011

Marvin F. Taylor  
Indiana State Prison  
One Park Row  
Michigan City, Indiana 46360

*Re: Formal Complaint 11-FC-252; Alleged Violation of the Access to Public Records Act by Wishard Health Services*

Dear Mr. Taylor:

This advisory opinion is in response to your formal complaint alleging the Wishard Health Services ("Wishard") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Julie Conrad, Senior Counsel for Wishard, responded on behalf of Wishard. Her response is enclosed for your reference.

## BACKGROUND

In your complaint, you allege that on August 23, 2011, you submitted a written request to Wishard for a:

"Certified copy of your Accredited Quality Assurance Proficiency Testing Standard Report, Wishard Health, Pathology Department from January 1, 1999 to December 1, 1999, laboratory reports conducts specifically on foresis-urine, CAMP-DNA probe-Chlamydia AMP-DNA-widely excepted in the general community. Document Request Exhibit only."

Ms. Conrad responded on behalf of Wishard to your records request and provided that it did not have any records responsive to your request.

In response to your formal complaint, Ms. Conrad provided that Wishard does not perform forensic or "chain of custody" testing, and did not perform such testing in 1999. Further, the Wishard Pathology Department is subject to proficiency testing on GC (*Neisseria gonorrhoeae*) and CT (*Chlamydia trachomatis*), to which Wishard maintains the samples for a period of two years in accordance with CMS and CAP record retention

requirements. As you have requested records from 1999, Wishard does not have any records that are responsive to your request.

## 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. Wishard 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 Wishard’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, Wishard responded to your records request within the timelines prescribed by the APRA.

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*. Here, Wishard provided that it maintains proficiency testing records on GC and CT for a period of two years in accordance with CMS and CAP record retention requirements. You made a request of Wishard for results from testing performed in 1999, which Wishard no longer maintains. Wishard further advised that it did not perform forensic or “chain of custody” testing in 1999, nor does it do so presently. Therefore, it is my opinion that if Wishard did not have any records that were responsive to your request, it did not violate the APRA.

## CONCLUSION

For the foregoing reasons, it is my opinion that Wishard did not violate the APRA in response to your request for records.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

Joseph B. Hoage  
Public Access Counselor

cc: Julie M. Conrad