



# STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR  
JOSEPH B. HOAGE

Indiana Government Center South  
402 West Washington Street, Room W470  
Indianapolis, Indiana 46204-2745  
Telephone: (317)233-9435  
Fax: (317)233-3091  
1-800-228-6013  
www.IN.gov/pac

January 3, 2012

John B. Felder  
727 Moon Road  
Plainfield, Indiana 46158

*Re: Formal Complaint 11-FC-311; Alleged Violation of the Access to Public Records Act by the Indiana Parole Board*

Dear Mr. Felder:

This advisory opinion is in response to your formal complaint alleging the Indiana Parole Board ("Board") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Randall Gentry, Vice Chairman, responded on behalf of the Board. His response is enclosed for your reference.

## BACKGROUND

In your formal complaint, you allege that you submitted a request to the Board for a transcribed copy of a January 6, 2006 Board hearing. You provide that your request was made pursuant to I.C. § 11-9-1-2. As of December 28, 2011, the date you filed your formal complaint with the Public Access Counselor's Office, you further allege that you have yet to receive any records or a response from the Board to your request.

In response to your formal complaint, Mr. Gentry advised that the Board does not maintain transcripts of its hearings. Mr. Gentry further provided that the Board has received numerous requests from you regarding this issue over the course of several years and has always responded. In its response to your formal complaint, the Board has submitted all previous correspondence, as well as a copy of your December 6, 2006 clemency hearing results.

## 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 Board 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 Board'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, you allege that you have never received a response from the Board. The Board has provided that it has responded to all of your requests regarding this issue over the course of several years. The public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80*. If the Board failed to respond to your request, then it is my opinion that it has acted contrary to the APRA. However, if the Board responded to your request, it is my opinion that it has not violated 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, the Board has provided that it does not maintain transcripts of its hearings; as such it is my opinion that the Board did not act contrary to the APRA by failing to create a new record in response to your request. Mr. Gentry has provided that it is possible that a VHS copy of the January 6, 2006 hearing may still be available. In addition, he has outlined the procedure for you to request and receive a VHS copy of the hearing, if the Board has retained the record beyond the requisite retention schedule.



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## CONCLUSION

For the foregoing reasons, it is my opinion that the Board did not act contrary to the APRA if it responded to your December 2011 request. As to all other issues, it is my opinion that the Board did not violate the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage".

Joseph B. Hoage  
Public Access Counselor

cc: Randall Gentry