

3. Officials have attributed Indiana’s 15-year suspension of the death penalty to the state’s inability to acquire lethal injection drugs. *See, e.g.*, Whitney Downard and Niki Kelly, *State Seeks Execution Date for Convicted Fort Wayne Murderer*, THE CAPITAL CHRONICLE (June 26, 2024), available at <https://indianacapitalchronicle.com/2024/06/26/states-seeks-execution-date-for-convicted-fort-wayne-murderer/>.

4. Former Indiana Governor Eric Holcomb confirmed this when, in June 2024, he announced the recommencement of executions in Indiana prisons, beginning with the execution of Mr. Corcoran, stating: “After years of effort, the Indiana Department of Correction has acquired a drug -- pentobarbital – which can be used to carry out executions. Accordingly, I am fulfilling my duties as governor to follow the law and move forward appropriately in this matter.” Press Release, Eric Holcomb, Governor, Indiana, Governor Eric J. Holcomb and Attorney General Todd Rokita Seek Execution Date for Convicted Murderer (June 6, 2024) (attached hereto as Exhibit A).

5. In an effort to inform the public of the cost expended by the State to acquire pentobarbital, in June 2024, the Plaintiff requested public records from IDOC showing the cost of the drug.

6. After months of unresponsiveness, Defendant continues to refuse to disclose the requested records as required by APRA.

7. On September 27, 2024, Indiana Attorney General Todd Rokita filed a motion with the Indiana Supreme Court to set an execution date for death row inmate Benjamin Ritchie and, as of the date of filing, Mr. Ritchie is still awaiting execution.

PARTIES

8. Plaintiff, States Newsroom, Inc. d/b/a *The Indiana Capital Chronicle* is an independent, state-focused nonprofit news organization operating in the state of Indiana.

9. Defendant, Indiana Department of Correction, is a public agency as defined by APRA that operates within various counties in Indiana, including Marion County where the agency's principal office is located. *See* Ind. Code § 5-14-3-2(q)(1).

JURISDICTION AND VENUE

10. This action arises from IDOC's refusal to provide public records to the *Capital Chronicle* following a request by one of its reporters under APRA. Ind. Code § 5-14-3 *et seq.*

11. This Court has jurisdiction over the subject matter of this action and IDOC. *See* Ind. Code § 5-14-3-9.

12. Venue is both proper and preferred in Marion County pursuant to Indiana Trial Rule 75(A)(8) and Indiana Code § 5-14-3-9(e),¹ and also under Indiana Trial Rule 75(A)(5).

THE ACCESS TO PUBLIC RECORDS ACT ("APRA")

13. APRA provides:

A fundamental philosophy of the American constitutional form of representative government is that government is the servant of the people and not their master. Accordingly, it is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Providing persons with the 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. This chapter *shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency* that would deny access to the record and not on the person seeking to inspect and copy the record.

Ind. Code § 5-14-3-1 (emphasis added).

14. APRA defines "public record" as "any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained,

¹ "Any person who has been denied the right to inspect or copy a public record by a public agency may file an action in the circuit or superior court of the county in which the denial occurred to compel the public agency to permit the person to inspect and copy the public record."

maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.” Ind. Code § 5-14-3-2(r).

15. A “public agency” under APRA includes “[a]ny board, commission, department, division, bureau, committee, agency, office, instrumentality, or authority, by whatever name designated, exercising any part of the executive, administrative, judicial, or legislative power of the state.” Ind. Code § 5-14-3-2(q)(1).

16. “If the public agency does not deny the request, *within a reasonable time after the request is received* by the agency the public agency shall either: (1) provide the requested copies to the person making the request;” or “(2) allow the person to make copies[.]” Ind. Code § 5-14-3-3(b)(1)–(2) (emphasis added).

17. Ind. Code § 5-14-3-9(d)(e) allows a plaintiff “who has been denied the right to inspect or copy a public record by a public agency [to] file an action in the circuit or superior court of the county in which the denial occurred to compel the public agency to permit the person to inspect and copy the public record.”

18. Under APRA, this Court reviews the matter *de novo*, with the burden of proof for nondisclosure on the public agency denying access. *See* Ind. Code § 5-14-3-1; *see also* Ind. Code § 5-14-3-9(f).

19. “In any action filed under this section, a court shall award reasonable attorney’s fees, court costs, and other reasonable expenses of litigation to the prevailing party if: . . . the plaintiff substantially prevails.” Ind. Code § 5-14-3-9(i).

FACTS

Plaintiff's Public Records Request

20. On June 30, 2024, *Capital Chronicle* editor-in-chief Niki Kelly, in the scope of her employment, submitted the following public records request (the "Request," attached hereto as Exhibit B) to the IDOC: "I am seeking the cost of acquiring the drug pentobarbital to resume executions. Indiana law shields the entity the drugs were bought from but not the cost. A redacted invoice would meet the request." *Id.*

21. Defendant delivered a letter via email to Ms. Kelly responding to the APRA Request on July 5, 2024 (attached hereto as Exhibit C), acknowledging receipt and asserting that "Indiana law prohibits the disclosure of information reasonably calculated to lead to the identity of a person who enters into a contract with IDOC for the issuance or compounding of lethal substances necessary to carry out an execution by lethal injection. I.C. § 35-38-6-1(f)." *Id.*

22. Defendant concluded its response by stating: "IDOC is currently evaluating what, if any, information regarding its lawful procurement of the lethal chemical pentobarbital it may disclose without contravening Indiana law, including but not limited to the information that forms the basis for your request." *Id.*

23. On August 16, 2024, after receiving no responsive records and no written denial from IDOC, Ms. Kelly emailed IDOC for a status update.

24. After another week went by, IDOC sent Ms. Kelly an email on August 23, 2024 (attached hereto as Exhibit D), stating "IDOC's position remains unchanged from the response [] provided to you on July 5, 2024. The agency is managing dozens of requests for information about its execution procedures and its lawful procurement of pentobarbital as well as the litigation pending in Cause No. 24S-SD-00222. IDOC is unable to provide you with a specific timeframe

for processing your request. The agency will issue a response to you in due course, as appropriate under the law.” *Id.*

Plaintiff’s PAC Complaint

25. On September 27, 2024, 89 days after making the Request and receiving no responsive records and no written denial from Defendant, the *Capital Chronicle* filed a formal complaint with the Office of the Public Access Counselor (“PAC”) (the “First PAC Complaint”) (attached as Exhibit E).

26. In the First PAC Complaint, Plaintiff asserted IDOC violated APRA by failing to act on the pending Request within a reasonable time. *Id.*

27. APRA explicitly states: “if the public agency does not deny the request, within a reasonable time after the request is received by the agency the public agency shall either: (1) provide the requested copies to the person making the request;” or “(2) allow the person to make copies . . .” Ind. Code § 5-14-3-3(b)(1)–(2).

28. At the time of filing the First PAC Complaint, IDOC had neither denied the request—which had been pending for nearly three months—nor disclosed the records.

29. On October 8, 2024, during the pendency of the First PAC Complaint, IDOC, through chief legal counsel Anna Quick, sent Ms. Kelly a written denial (attached hereto as Exhibit F) refusing to disclose the records referenced in the Request.

30. In the denial, IDOC asserted that “[r]ecords responsive to [the] request are being withheld from disclosure and are not being produced in this response in accordance with and as permitted by the laws of the State of Indiana.” *Id.*

31. Specifically, IDOC claimed the requested records were shielded from disclosure by two of APRA’s exemptions—Indiana Code § 5-14-3-4(a)(1) and (a)(8)—and three of the act’s

discretionary exceptions—Indiana Code § 5-14-3-4(b)(2), (b)(6), and (b)(7).

32. On October 9, 2024, Plaintiff withdrew the First PAC Complaint (attached hereto as Exhibit E), and the same day filed a second formal complaint with the PAC (“Second PAC Complaint”) (attached hereto as Exhibit G), asserting the agency improperly denied access to disclosable public records in violation of APRA.

33. On November 8, 2024, IDOC filed a written response to the Second PAC Complaint (attached hereto as Exhibit H), reiterating its assertion that multiple exemptions and exceptions under APRA—including the discretionary exception for diaries, journals, and personal notes—were appropriately applied and justify the denial.

34. This time, however, IDOC further asserted that the agency is “particularly bound by Indiana Code § 35-38-6-1(f),” which declares confidential the identities of various persons that are connected with the carrying out of death sentences in Indiana and “[i]nformation reasonably calculated to lead to the identity of a person described this subsection[.]” *Id.*

35. IDOC argued to the PAC that the agency’s “ultimate concern is about reverse [] engineering” because “the information the Complainant seeks could reasonably lead to the identity of those protected by this statute, particularly given the transparency tools that are publicly available for searching state government records, transactions, and information.” *Id.*

The PAC Informal Opinion

36. On December 6, 2024, the PAC issued an informal opinion regarding Plaintiff’s Second PAC Complaint via a letter rather than a published advisory opinion (attached hereto as Exhibit I).

37. In the opinion, the PAC did not reach a definitive conclusion about whether Indiana Code § 35-38-6-1(f) declares confidential the requested records showing the cost of

pentobarbital, which would make the records exempt from disclosure under Indiana Code § 5-14-3-4(a)(1).

38. Instead, the PAC observed that “the legislature has not defined the term ‘reasonably calculated [,]’” as that term is used in Indiana Code § 35-38-6-1(f), and “case law does not exist either addressing these matters.” *Id.*

39. Additionally, the PAC acknowledged APRA’s mandate “to interpret the access laws liberally in favor of transparency,” and how courts, as a result, construe and apply exceptions to disclosure narrowly. *Id.*

COUNT I
Failure to Respond to APRA Request Within a “Reasonable Time”
Indiana Code § 5-14-3-9(d); § 5-14-3-3(b)

40. Plaintiff incorporates the previous paragraphs of the Complaint as though fully set forth herein.

41. Ms. Kelly made her APRA Request for the cost of acquiring the drug pentobarbital on June 30, 2024, and IDOC did not meaningfully respond for over 100 days, after Plaintiff filed the First PAC Complaint, when the agency denied the Request.

42. IDOC claimed that it required months to “evaluat[e] what, if any, information regarding its lawful procurement of the lethal chemical pentobarbital it may disclose without contravening Indiana law, including but not limited to the information that forms the basis for [the] request.” Ex. C.

43. Indiana Code § 5-14-3-9(d) requires an agency to respond to an APRA request within a reasonable time after the request was received by the agency.

44. Under APRA, an agency’s response to a public records request must be either release of the public records requested, allowing the requester to make copies of the subject

records, or a denial relying on applicable exceptions warranting nondisclosure.

45. IDOC did not respond to the Request by providing the requested copies, allowing *Indiana Capital Chronicle* to make copies, or providing a final denial of disclosure under Indiana Code § 5-14-3-9(d) within a reasonable time after the request was received by the agency.

46. As a result, IDOC violated Indiana Code § 5-14-3-3(b). The Court should issue an order declaring the Defendant's delay unreasonable and directing the agency to hereinafter respond to all APRA requests within a reasonable time in accordance with Indiana Code § 5-14-3-3(b).

COUNT II
Denial of Right to Inspect or Copy Public Records
Indiana Code § 5-14-3-3(b)

47. Plaintiff incorporates the previous paragraphs of the Complaint as though fully set forth herein.

48. IDOC's refusal to provide records constitutes an unlawful denial of disclosure and interference with Plaintiff's right to inspect and copy public records, in violation of Indiana Code § 5-14-3-3(b).

49. Under APRA, Plaintiff is entitled to inspect and copy the records sought in the Request in the absence of an applicable exemption or exception to disclosure.

50. Indiana Code § 35-38-6-1(f) does not apply to the requested records because disclosing the cost of acquiring the drug pentobarbital would not reveal the identities of persons connected with the execution of death sentences in Indiana and is not "[i]nformation reasonably calculated to lead to the identity" of such a person.

51. Indiana Code § 5-14-3-4(a)(1) is also inapplicable because the records sought have been not declared confidential by state statute.

52. Even if the requested records contain both disclosable and nondisclosable

information, APRA mandates public agencies to “separate the material that may be disclosed and make it available for inspection and copying.” Ind. Code § 5-14-3-6(a).

53. IDOC violated APRA by denying Plaintiff’s access to the public records sought in the request. This Court should issue an order both concluding that the requested records are disclosable under APRA and compelling IDOC to disclose the records.

54. APRA requires the court to “award reasonable attorney’s fees, court costs, and other reasonable expenses of litigation to the prevailing party if . . . the plaintiff substantially prevails.” Ind. Code § 5-14-3-9(i)(1).

REQUESTED RELIEF

WHEREFORE, Plaintiff, the *Indiana Capital Chronicle* respectfully requests this Court:

55. Expedite the hearing of this action as required under Indiana Code § 5-14-3-9(l).

56. Issue an order requiring Defendant to disclose the public records requested on June 30, 2024, identifying the amount of public revenue spent by the State of Indiana to procure the lethal injection drug pentobarbital.

57. Issue an order requiring Defendant to hereinafter respond to all APRA requests within a reasonable time in accordance with Indiana Code § 5-14-3-9(d).

58. Award Plaintiff reasonable attorney’s fees and costs in an amount to be shown to the Court.

59. Award any other relief deemed just and proper by the Court.

Dated: January 21, 2025

Respectfully submitted,

/s Kristopher L. Cundiff

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