



STATE OF INDIANA

MICHAEL R. PENCE, Governor

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March 15, 2013

Mr. Henry David King Jr.
DOC 114945
1 Park Row
Michigan City, Indiana 46360

Re: Formal Complaint 13-FC-88; Alleged Violation of the Access to Public Records Act by the Fayette County Clerk

Dear Mr. King:

This advisory opinion is in response to your formal complaint alleging the Fayette County Clerk ("Clerk") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Ms. Melinda Sudhoff, Fayette County Clerk, responded in writing to your formal complaint. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint you allege you submitted a written request for records to the Clerk on February 19, 2013. In your request, you sought copies of jury questionnaires that were provided in your trial under Cause No. 21-C01-0007-CF-165. On February 22, 2013, Ms. Sudhoff responded in writing to your request and provided that questionnaires were not in the file maintained by the Clerk.

In response to your formal complaint, Ms. Sudhoff advised that the questionnaires were not in the case file that was referenced in your request. In Ms. Sudhoff's eleven year tenure as Clerk, she has no recollection of the questionnaires being part of the case file maintained by the Clerk. In Fayette County, the Circuit Court Bailiff is the designated Administrator of the jury process and Ms. Sudhoff is unaware of the procedures or record retention policy utilized by the Bailiff.

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 Clerk 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 Clerk'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). A response from the public agency could be an acknowledgement that the request has been received and include information regarding how or when the agency intends to comply. Here you submitted your request on February 19, 2013 to which Ms. Sudhoff responded in writing on February 22, 2013. Thus, it is my opinion that the Clerk complied with the requirements of section 9(b) of the APRA in responding to your request within seven (7) days of its receipt.

“[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 Clerk advised that it did not maintain any records in response to your request. As such, it is my opinion that the Clerk did not violate the APRA by failing to provide records in response to your request that it did not maintain.

As the Clerk has provided that the Circuit Court Bailiff is the designated administrator of the jury process in Fayette County, I would suggest that you submit a request directly to the Bailiff and/or the Fayette County Circuit Court. The APRA requires public agencies to maintain and preserve public records in accordance with applicable retention schedules. *See* I.C. § 5-14-3-4(h). A public agency shall protect public records from loss, alteration, mutilation, or destruction. *See* I.C. § 5-14-3-7(a). A public agency shall further take precautions that protect the contents of public records from unauthorized access, unauthorized access by electronic device, or alteration. *See* I.C. § 5-14-3-7(b). Judicial retention schedule 90-9-05 provides that Jury Questionnaire Forms shall be destroyed after two years from the date of creation. Admin. R. 7, Schedule 90-9-05. *See also Opinion of the Public Access Counselor 04-FC-78*. The agency that maintains or did maintain the jury questionnaires forms that would be responsive to your request would not violate the APRA if the records were destroyed pursuant to the applicable retention schedule prior to receiving your request.



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CONCLUSION

Based on the foregoing, it is my opinion that the Clerk did not violate the APRA in response to your request.

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: Ms. Melinda Sudhoff