

November 13, 2003

Larriante Sumbry
965137, C-265
Indiana Department of Correction
Indiana State Prison
P. O. Box 41
Michigan City, IN 46361-0041

Re: Formal Complaint 03-FC-107: *Alleged Violation of the Access to Public Records Act
by the Public Defender Council*

Dear Mr. Sumbry,

This is in response to your formal complaint, received on October 20, 2003. In it, you allege that the Public Defender Council (the "Council") violated the Access to Public Records Act (the "APRA"). Specifically, you allege that you requested public records by letter dated September 29, 2003, and that the Council failed to respond within seven (7) days. Mr. Larry A. Landis, Executive Director of the Council, responded in writing to your complaint. A copy of his response is enclosed for your reference.

For the reasons set forth below, it is my opinion that the Council did not deny you access to public records in violation of the APRA.

BACKGROUND

You allege that on September 29, 2003, you sent a letter to Larry Landis, Executive Director of the Council. You also allege that as of October 16, 2003, you had received no response from the Council. According to the letter you enclosed with your complaint, you requested the following:

- Pamphlet on how to represent yourself;
- Pamphlet on conflict of interest;
- Self-service Legal Clinic Handbook of practice and internal procedures;
- Self-service annual report;
- Civil tort handbook;

- Manual on civil rights books;
- Manual on state writ of habeas corpus;
- Clermont's Black Letter on Civil Procedure;
- Civil rights protections in the United States;
- Brief summaries of Constitutional amendments, federal laws, and executive orders;
- Manual on the Bill of Rights; and
- Manual on Pro Se litigants.

In his response, Mr. Landis states that the Council does not have any of the items you requested. Mr. Landis also questions whether the items you requested are public records.

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.” Ind. Code § 5-14-3-1. Furthermore, “[t]his 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.” *Id.*

The Council is a public agency for the purposes of the APRA. IC 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Council during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under Indiana Code section 5-14-3-4. IC 5-14-3-3(a).

It is the responsibility of the public agency to respond to requests for access to public records within a specified time period. The APRA does not set any time periods for producing public records, merely for responding to the request. “If a person requests by mail . . . a copy or copies of a public record, a denial of disclosure does not occur until seven (7) days have elapsed from the date the public agency receives the request.” IC 5-14-3-9(b). Once a denial has occurred under the APRA, a person may file suit in the circuit or superior court in the county in which the denial took place to compel the public agency to disclose the public records requested. IC 5-14-3-9(d).

Although you allege that the Council failed to respond to your request, Mr. Landis states that the Council does not have any of the records you requested. Although the Council failed to respond to your request within the statutory time period, it is my opinion that the Council's failure is not actionable because the public records you requested do not exist. The APRA governs access to the existing public records of a public agency; 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.

CONCLUSION

Because a public agency cannot disclose a public record that does not exist, it is my opinion that the Council did not deny you access to public records in violation of the Access to Public Records Act.

Sincerely

Michael A. Hurst
Public Access Counselor

cc: Larry A. Landis, Executive Director, Indiana Public Defender Council