

December 4, 2003

Mr. Larriante J. Sumbry
DOC No. 965137, C-433
Indiana State Prison
P.O. Box 41
Michigan City, Indiana 46361-0041

*Re: Formal Complaint 03-FC-119
Alleged Denial of Access to Public Records by the Lake Superior Court
Formal Complaint 03-FC-123
Alleged Denial of Access to Public Records by the Lake County Council
Formal Complaint 03-FC-125
Alleged Denial of Access to Public Records by Lake Superior Court Clerk*

Dear Mr. Sumbry:

This is in response to your formal complaints against the public agencies referenced above alleging violations of the Access to Public Records Act (APRA) (Ind. Code 5-14-3-1 *et seq.*), for failure to respond to your requests for access to public records within seven (7) days after receiving your requests. Each party against whom you have complained has responded in writing to your complaint. A copy of each response is enclosed for your reference. For the reasons set forth below, I find that there has been no violation of the APRA as alleged in your complaints. However, with regard to Formal Complaint 03-FC-123, I find that the Lake County Council violated the APRA by failing to provide you with the proper form to request access to public records.

BACKGROUND

03-FC-119

On October 27, 2003, you signed a letter addressed to Ms. Anna Anton, the Lake Superior Court Clerk (the "Clerk"), requesting access to records you assert are maintained by the Clerk. Specifically, your request seeks the following records and/or information:

- Entry of Judgements;
- Abstract of Judgements; and
- Adoption of Judge Pro-Tempore Samuel Capps Recommendation.

Your records request is signed, simply, "Sumbry," and contains neither your full name, your offender number, your return address, nor any other contact information for the public agency to use in responding to the request.

On October 29, 2003, your records request was received by the Clerk as indicated by the timestamp on the request and as acknowledged by the Clerk's response to your complaint. The Clerk responded to your request by letter dated November 3, 2003, within seven (7) days of receipt. That response indicates that the records you requested do not exist.

On November 5, 2003, on the sixth day after the Clerk received your request, and two (2) days after the Clerk responded, you brought this complaint alleging that the Clerk violated the APRA by failing to respond to your request within seven (7) days. The Clerk responds to your complaint alleging that the complaint was premature, and that the Clerk complied with the requirements of the Access to Public Records Act.

03-FC-123

On November 6, 2003, you signed a letter addressed to Mr. Will Smith, Jr., of the Lake County Council (the "Council") requesting access to records you assert are maintained by the Council. Specifically, your request seeks the following records and/or information:

- Lake County Civil Judges Contracts/Malpractice Insurance;
- State of Indiana Tort Liability Act; and
- Name of Insurance Agency.

Your records request is signed, simply, "Sumbry," and contains neither your full name, your offender number, your return address, nor any other contact information for the public agency to use in responding to the request. On November 14, 2003, you brought your formal complaint.

The Council responded to your complaint through its attorney by letter dated November 24, 2003. The Council asserts that it has prepared a request for public records form, and states that in the event you submit your request on the form provided, the request will be acted on promptly. The Council did not provide you with that form in a timely response for your request for records.

03-FC-125

On November 11, 2003, you signed a letter addressed to the Clerk requesting access to records you assert are maintained by the Clerk. Specifically, your request seeks the Chronological Case Summaries on Cause Numbers 45D02-0303-CT-47; 45D02-0304-CT-55; and 45D02-0304-CT-57. Your records request is signed, simply, "Sumbry," and contains neither your full name, your offender number, your return address, nor any other contact information for the public agency to use in responding to the request.

On November 13, 2003, your records request was received by the Clerk as indicated by the timestamp on the request and as acknowledged by the Clerk's response to your complaint. The Clerk responded to your request by letter dated November 18, 2003, within seven (7) days of receipt. That response requests copying costs for the records you requested.

On November 20, 2003, on the seventh day after the Clerk received your request, and two (2) days after the Clerk responded, you brought this complaint alleging that the Clerk violated the APRA by failing to respond to your request within seven (7) days. The Clerk responds to your complaint alleging that the complaint was premature, and that the Clerk complied with the requirements of the Access to Public Records Act.

ANALYSIS

As explained at length in Advisory Opinion 03-FC-113, dated November 26, 2003, each of your complaints was premature. A public agency that receives a request for records under the APRA has a specified period of time to respond to the request. IC 5-14-3-9. A timely response to the request does not mean that the public agency must expressly deny or produce the documents that are responsive to the request within the statutorily prescribed time period. Of course, a public agency is free to take either of those actions, but may also comply with its response obligation under the statute by acknowledging receipt of the request and indicating the specific actions the agency is taking toward production. When a public records request is made in writing and delivered to the public agency by mail or facsimile, the public agency is required to respond to that request within seven (7) days of *receipt* of the request. IC 5-14-3-9(b). If that period of time elapses without a response, the request is presumed denied. IC 5-14-3-9(b). When a public records request is denied, the requesting party may bring an action under the APRA (IC 5-14-3-9(d)), or may file a formal complaint with this office (IC 5-14-5-6). For requests tendered by mail, the date of *receipt* by the public agency is the operative trigger to begin the statutorily prescribed response time. IC 5-14-3-9(b). Consistent with the practice in other contexts, this office calculates and assumes *receipt* within three (3) days of the date of mailing, unless evidence proves otherwise (*Cf.* Ind. Trial Rule 6(E); Ind. Appellate Rule 25(C)).¹

With regard to the subject matter of Formal Complaint 03-FC-119, you signed your records request on October 27, 2003. Although there is no suggestion of when you mailed the request, I assume for purposes of this opinion that you mailed the request on the same day you signed it. The Clerk received your request on October 29, 2003. Thus, the Clerk had until the end of the day on November 6, 2003, to respond to your request. Your complaint alleging that the Clerk violated the APRA by failing to timely respond is signed and dated on November 5, 2003, *prior to the time the Clerk's response was due*. Because the Clerk was not in violation of the APRA at the time you prepared your complaint, your complaint was premature and no

¹ I note that you have previously submitted premature complaints under similar circumstances. *See, e.g., Advisory Opinion 03-FC-89, Alleged Denial of Access to Public Records by the Indiana Secretary of State*, issued October 22, 2003. You can avoid this issue and the possibility of having future complaints returned by allowing sufficient time for the public agency to respond to your records request before you bring your complaint. A good rule of thumb would be to allow for 13 days from the date of your request. That period will cover the time it takes for your request to reach the public agency, a seven-day response period, and an additional three days for the response to reach you.

violation can be said to have occurred at that time and based on the allegations of that complaint. In fact, the Clerk responded to your request by letter dated November 3, 2003. The Clerk's response satisfied the Clerk's obligations under the APRA.

With regard to the subject matter of Formal Complaint 03-FC-123, you signed your records request on November 6, 2003. Although there is no suggestion of when you mailed the request, I assume for purposes of this opinion that you mailed the request on the same day you signed it. Consistent with the calculation of time set forth above, I would ordinarily presume that the Council received your request on the third day after it was sent, or November 9, 2003; however, because November 9, 2003, fell on a Sunday, I presume that the Council received your request on the next business day, Monday, November 10, 2003. Thus, the Council had until the end of the day on November 17, 2003, to respond to your request. Your complaint alleging that the Council violated the APRA by failing to timely respond is signed and dated on November 14, 2003, *prior to the time the Council's response was due*. Because the Council was not in violation of the APRA at the time you prepared your complaint, your complaint was premature and no violation can be said to have occurred at that time and based on the allegations of that complaint.

Although I find your complaint was premature, I do not think that conclusion fatal to my authority to address the question of the Council's ultimate failure to respond to your records request. *Compare* IC 5-14-4-10(5), 10(6) (generally setting forth authority of Public Access Counselor to issue opinions upon request and at any time) *with* IC 5-14-5-7 (providing that a properly filed formal complaint that requires a formal written advisory opinion must be filed *no later than* thirty (30) days from the date of denial). In response to your complaint, the Council states that requests for access to its public records are processed by the Auditor. According to the Council, the Auditor has prepared a request for public records form, and states that your request will be acted upon promptly if you submit your request on the form provided by the Auditor. The APRA provides, in relevant part, that "[a] request for inspection or copying *must . . . be, at the discretion of the agency, in writing on or in a form provided by the agency.*" IC 5-14-3-3(a) (emphasis added). The Auditor has the discretion not to process a request that is not submitted on the Auditor's form. However, should the Auditor exercise that discretion, it is my opinion that the Auditor may not simply ignore the request. Instead, the Auditor must submit to the requestor within the time period set forth by the APRA a response which explains the policy, and must include the form so the requestor can resubmit the request. It is my opinion that the breach of this duty deprives the requestor of the opportunity to inspect and copy the Auditor's public records. The record before me provides no evidence that either the Auditor or the Council met this duty. Therefore, it is my opinion that the Council violated the APRA by failing to respond to your request within the relevant time period to explain the Auditor's policy and include the correct form for your request.

With regard to the subject matter of Formal Complaint 03-FC-125, you signed your records request on November 11, 2003. Although there is no suggestion of when you mailed the request, I assume for purposes of this opinion that you mailed the request on the same day you signed it. The Clerk received your request on November 13, 2003. Thus, the Clerk had until the end of the day on November 20, 2003, to respond to your request. You brought your complaint

alleging that the Clerk violated the APRA by failing to timely respond on November 20, 2003, *prior to the time the Clerk's response was due*. Because the Clerk was not in violation of the APRA at the time you prepared your complaint, your complaint was premature and no violation can be said to have occurred at that time and based on the allegations of that complaint. In fact, the Clerk responded to your request by letter dated November 18, 2003. The Clerk's response satisfied the Clerk's obligations under the APRA.

CONCLUSION

For the reasons set forth above, I find that the Clerk and the Council did not violate the APRA by failing to respond to your request for public records within seven (7) days of receipt. However, with regard to Formal Complaint 03-FC-123, I find that the Lake County Council violated the Access to Public Records Act by failing to provide you with the proper form to request access to public records. On that point, while I find that it is appropriate for the Council to require requests for access to public records to be submitted on a form provided by the Auditor, it is my opinion that the Council has the duty to timely respond to your request if only to provide you with the form required by the Auditor, instead of merely refusing to process your request.

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Ms. Anna Anton, Lake Superior Court Clerk
Mr. Ray L. Szarmach, Attorney for Lake County Council
Mr. Edward H. Feldman, Attorney for Lake Superior Court Clerk