

September 26, 2007

Rebecca Crumes
3044 Nichol
Anderson, Indiana 46011

Re: Formal Complaint 07-FC-256; Alleged Violation of the Access to Public Records Act by the Madison County Circuit Court Clerk

Dear Ms. Crumes:

This is in response to your formal complaint alleging the Madison County Clerk of the Courts ("Clerk") violated the Access to Public Records Act ("APRA") (Ind. Code §5-14-3) by denying you access to records. A copy of the Clerk's response is enclosed for your reference. I find that the Clerk did not violate the APRA by denying you access to voting machine logs which do not exist. I further find that producing the records you requested within a few weeks of your request does not alone constitute an unreasonable amount of time for production, but the Clerk should have had the 2006 election materials unsealed for inspection and copying after the recount and contest filing deadlines had passed.

BACKGROUND

In your complaint you allege you requested a copy of several items related to the 2006 primary election from the Clerk on August 21 and 23, 2007. It is my understanding your complaint addresses the "zero tapes" for Ward 4 Precinct 4 as well as voting machine assignment logs. You indicate the Clerk indicated to you at the time of your request you may view the tapes in September after the transfer cases are cleaned out. You filed your complaint on August 27, 2007.

The Clerk responded to your complaint by letter dated August 29. The Clerk, Ludy Watkins, indicated she has provided you all records you requested to which she has access. She has indicated there were no voting machine assignment logs kept because her office did not realize such logs needed to be kept. The Clerk corrected the process for the May 2007 primary election and has provided you with that log. Regarding the tapes you request, the tapes are maintained in a locked facility for which the Clerk has no key. Any entrance through the door must be done by a member of the Republican and Democratic parties at the same time. Ms. Watkins indicated the door was scheduled to be opened in September as the Clerk prepares for the

November general election. She indicated to you she would contact you at that time so you may view the tapes.

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

A request for records may be oral or written. 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 to the request within 24 hours of receipt, the request is deemed denied. I.C. §5-14-3-9.

Regarding the logs for voting machine assignments, the Clerk has indicated such logs were not maintained for the 2006 elections. While the Clerk has a duty to provide access to public records upon request (I.C. §5-14-3-3), she cannot possibly provide access to records which do not exist. As such, the Clerk did not violate the APRA by indicating her office has no records responsive to the request.

Regarding the zero tapes for the machines from a particular precinct, the Clerk has indicated you may have access to those records when the door is unlocked as the Clerk prepares for the November general election. There are no prescribed timeframes when the records must be produced by a public agency. A public agency is required to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. I.C. §5-14-3-7(a). However, section 7 does not operate to deny to any person the rights secured by section 3 of the Access to Public Records Act. I.C. §5-14-3-7(c). Past public access counselors have said records must be produced within a reasonable period of time, based on the facts and circumstances. Consideration of the nature of the requests (whether they are broad or narrow), how old the records are, whether the records must be reviewed and edited to delete nondisclosable material, as well as other pertinent facts are necessary to determine whether the agency has produced records within a reasonable timeframe. Given that the Clerk's office is in the middle of what is certainly a busy pre-election time in the office, I do not believe producing the records you requested within a few weeks would necessarily be an unreasonable period of time.

In this case, though, since your request involves election materials, we must consider other applicable statutes in addition to the APRA. Election materials must be retained for 22 months following an election and must be sealed during the period for filing a petition or cross-petition for recount of votes or to contest the election. I.C. §3-10-1-31.1. When no recount or contest is filed, the election materials (for elections held after December 31, 2003) must be made available for inspection and copying under the APRA after that filing period has passed. I.C. §3-

10-1-31.1. Once the filing period had passed for the 2006 elections, the Clerk should have had the election materials unsealed so they would be accessible for inspection and copying.

CONCLUSION

For the foregoing reasons, I find that the Clerk did not violate the APRA by denying you access to voting machine logs which do not exist. I further find that producing the records you requested within a few weeks of your request does not alone constitute an unreasonable amount of time for production, but the Clerk should have had the 2006 election materials unsealed for inspection and copying after the recount and contest filing deadlines had passed.

Best regards,



Heather Willis Neal
Public Access Counselor

cc: Ludy Watkins, Madison County Clerk of the Courts