



STATE OF INDIANA

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December 15, 2009

Mr. Tyrone Frazier
One Park Row
Michigan City, IN 46360

Re: Formal Complaint 10-FC-1; Alleged Violation of the Access to Public Records Act by the Marion County Clerk's Office

Dear Mr. Frazier:

This advisory opinion is in response to your formal complaint alleging the Marion County Clerk's Office ("Clerk") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*, by denying you access to public records. For the following reasons, my opinion is that the Clerk did not violate the APRA. I note that I have granted your request for priority status under 62 Ind. Admin. Code 1-1-3(3).

BACKGROUND

According to your complaint, on October 29, 2009, you requested a certified copy of an affidavit. You allege that you received no response from the Clerk as of November 30, 2009.

The Clerk's chief of staff, Scott Hohl, responded to your complaint on behalf of the Clerk. His response is enclosed for your review. Mr. Hohl enclosed a letter showing that the Clerk did, in fact, respond to your request on November 9th. The Clerk received the request four (4) days earlier on November 5th. In his November 9th letter to you, Mr. Hohl noted that the Clerk has no documents responsive to your request. He recommended that you make a request to Judge Borges instead.

ANALYSIS

The public policy of the APRA states, "[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." I.C. § 5-14-3-1. The Clerk is 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 exempt 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 by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. I.C. §5-14-3-9(b). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Because the Clerk responded to you within seven (7) days of receiving your mailed request, the Clerk complied with section 9 of the APRA.

Moreover, the Clerk did not violate the APRA by failing to produce a record that the Clerk does not have. If a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. “[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....”).

CONCLUSION

For the foregoing reasons, it is my opinion that the Clerk did not violate the APRA.

Best regards,



Andrew J. Kossack
Public Access Counselor

Cc: Scott Hohl, Chief of Staff, Marion County Clerk