



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
ANDREW J. KOSSACK

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

June 11, 2010

Mr. Bradley J. Harris
DOC # 163953
3038 W. 850 S.
Bunker Hill, IN 46914

*Re: Formal Complaint 10-FC-123; Alleged Violation of the Access to
Public Records Act by the Wayne County Clerk*

Dear Mr. Harris:

This advisory opinion is in response to your formal complaint alleging the Wayne County Clerk (the "Clerk") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* The Clerk's response to your complaint is enclosed for your review.

BACKGROUND

In your complaint, you allege that you wrote to the Wayne County Voter Registration Office on April 19, 2010. You requested information regarding candidates for judges in the Wayne County courts and for Wayne County Prosecutor. You also sought information regarding contributors to the campaigns of several candidates.

In response to your complaint, Wayne County Clerk Jo Ann Stewart states that she has responded to your request. Ms. Stewart claims that your original request was not specific about what records you were seeking. She states that she will be happy to procure and disclose the requested information once you provide clarification regarding the records you seek.

Ms. Stewart also copied my office on a letter that she sent directly to you. In that letter, she states that she could not respond with information regarding this November's election until after the May primary because the candidates for November were not selected until the primary. Moreover, the Democratic Party has until June 30th of this year to fill any ballot vacancy, and the Libertarian Party and independent candidates have additional time to place candidates on the ballot. Additionally, there are no candidates for judge on this year's ballot and only one candidate for prosecutor. She requests

clarification regarding what finance reports you are seeking and assures you that she will provide you with all responsive records upon receipt of such clarification.

ANALYSIS

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). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. I.C. §5-14-3-9(a). 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. Here, if the Clerk failed to respond to your written request within seven (7) days, the Clerk violated the APRA.

Under the ARRA, a request for inspection or copying must identify with reasonable particularity the record being requested. I.C. § 5-14-3-3(a). Thus, it was reasonable for the Clerk to ask you to provide additional information regarding what specific records you seek. I trust that the Clerk will disclose all non-confidential records once you have identified them with reasonable particularity. I note that the Clerk is not obligated to provide records that do not exist, and she need not create records in response to a request. 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 if the Clerk failed to respond to your written request within seven (7) days, the Clerk violated Section 9 of the APRA. However, it is my opinion the Clerk did not otherwise violate the APRA.

Best regards,



Andrew J. Kossack
Public Access Counselor

Cc: Jo Ann Stewart, Wayne County Clerk