



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

October 1, 2010

Aaron Isby, DOC # 892219
Wabash Valley Correctional Facility, B102 SCU
6908 S. Old U.S. Hwy. 41
Carlisle, IN 47838

*Re: Formal Complaint 10-FC-199; Alleged Violation of the Access to
Public Records Act by the Indiana Election Division*

Dear Mr. Isby:

This advisory opinion is in response to your formal complaint alleging the Indiana Election Division of the Indiana Secretary of State's Office (the "Division") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*

BACKGROUND

In your complaint, you allege that you submitted a records request to the Division on August 10, 2010. Specifically, you sought access to (1) the identity and full names of donors to the political campaign of former Judge Frederick R. Spencer of Madison County; (2) the same type of information for Judge Rudolph R. Pyle, III; and (3) the full names of the "various elected officials" who wrote certain laws, along with the laws themselves, amendments to them, and "historical notes related to the laws." You claim that the Division never responded to your request.

J. Bradley King and Pamela Potesta, co-directors of the Division, responded to your complaint by sending you a letter and forwarding a copy to my office. They claim that the Division never received your request. They also confirmed with each staff member of the Division that no one else received your request. With regard to the substance of your request, the Division does not maintain any records regarding the campaign finances of Judges Spencer and Pyle; those records should be kept by the Circuit Court Clerk of Madison County pursuant to Ind. Code § 3-9-5-4. As to your request for full names of elected officials who wrote certain laws, the Division states that it maintains no such record and is not required by the APRA to create one to fulfill your request.

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.” I.C. § 5-14-3-1. The Division does not contest that it 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 Division’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

Here, the Division asserts it did not receive your request. If the Division did receive your request, it would have had a duty under the APRA to respond within seven days of receipt. I.C. § 5-14-3-9(b). While a public agency has a duty to respond to a written request for access to records within seven days of receipt of the request, an agency cannot respond to a request it did not receive. Therefore, if the Division did not receive your request, it did not violate the APRA by not responding. *See Opinion of the Public Access Counselor 09-FC-139.*

If the Division does not maintain any records regarding the two judges’ election campaigns, the Division did not violate the APRA by failing to produce them to you. The Division cannot produce records that it does not have. “[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....”).

The Division also argues that it is not obligated to conduct legal research of various laws on your behalf. I agree. Public agencies are under no obligation to create new records in response to a records request. *See Opinion of the Public Access Counselor 06-FC-192.* Your request for information on certain laws is open-ended given that you requested “historical notes related to [the laws].” It is unclear how the Division could comply with such a request. If you request a specific record, the Division should allow you to inspect and copy the record unless an exception to disclosure applies. However, the Division is not obligated to waive the APRA’s copy fees and mail records to you at no cost. I.C. § 5-14-3-8.

CONCLUSION

For the foregoing reasons, it is my opinion that the Division has not violated the APRA.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive style with a large, prominent "A" and "K".

Andrew J. Kossack
Public Access Counselor

cc: J. Bradley King
Pamela Potesta