



STATE OF INDIANA

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October 29, 2010

Mr. Ryan P. Sink
255 N. Alabama St., 2nd Flr.
Indianapolis, IN 46204

Re: Formal Complaint 10-FC-229; Alleged Violation of the Access to Public Records Act by the St. Joseph County Prosecutor's Office

Dear Mr. Sink:

This advisory opinion is in response to your formal complaint alleging the St. Joseph County Prosecutor's Office ("Prosecutor") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*, by denying you access to public records. A copy of the Prosecutor's response is enclosed for your reference.

BACKGROUND

According to your complaint, the Prosecutor received a records request from you via U.S. Mail on September 20, 2010. As of September 28th, you had not received a response from the Prosecutor. You enclosed with your complaint a tracking receipt showing that a piece of mail was "Delivered, September 20, 2010, 8:03 am, SOUTH BEND, IN 46601."

My office forwarded a copy of your complaints to the Prosecutor. Chief of Staff Patrick J. Higgins, Jr. responded on the Prosecutor's behalf. Mr. Higgins claims that the Prosecutor never received your request. He argues that although the return receipt shows that a piece of mail was delivered somewhere in South Bend, Indiana on September 20th, it does not show who received the document or the specific address to which it was delivered. Mr. Higgins states that after having received your request through the Office of the Public Access Counselor, the Prosecutor will review it and respond accordingly.

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 Prosecutor 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 Prosecutor's public records 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).

Here, the Prosecutor claims it did not receive your request. 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. *See Opinion of the Public Access Counselor 09-FC-44*. If the Prosecutor did receive your request, it had a duty under the APRA to respond within seven days of receipt. I.C. § 5-14-3-9(b). The public access counselor is not a finder of fact, so I do not have the authority to determine, as a matter of fact, whether or not the Prosecutor received your request or not. If the Prosecutor did receive your request and failed to respond, such failure violated the APRA.

Now that the Prosecutor has received your request, I trust that the Prosecutor will grant you access to all responsive, non-confidential records in accordance with the APRA. To the extent the Prosecutor persists in denying access following the issuance of an advisory opinion from this office and you believe such denial is in violation of the APRA, I leave you to your remedies before a court pursuant to Ind. Code § 5-14-3-9(e).

CONCLUSION

For the foregoing reasons, it is my opinion that if the Prosecutor did not receive your request, the Prosecutor did not violate the APRA by failing to respond. If the Prosecutor did receive your request, the Prosecutor violated the APRA by failing to respond in accordance with section 9 of the APRA.

Best regards,



Andrew J. Kossack
Public Access Counselor

cc: Patrick J. Higgins, Jr.