



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

February 7, 2011

Mr. Michael J. Shepard
DOC # 181080
Putnamville Correctional Facility
1946 W. U.S. Hwy. 40
Greencastle, IN 46135

Re: Formal Complaint 11-FC-13; Alleged Violation of the Access to Public Records Act by the Vanderburgh County Prosecutor's Office

Dear Mr. Shepard:

This advisory opinion is in response to your formal complaint alleging the Vanderburgh County Prosecutor's Office ("Prosecutor") violated the Access to Public Records Act ("APRA"), I.C. § 5-14-3-1 *et seq.* The Prosecutor's response is enclosed for your reference.

BACKGROUND

In your complaint, you allege that the Prosecutor denied your request for public records dated December 6, 2010. You sought access to (1) "an Application & Info. for 'Protective Order'"; (2) a "Victim Impact Assistance Application & Info."; and (3) a copy of a search warrant, warrant affidavit, and warrant return in Cause No. 82CO1-0704-FB-448.

Gary Schutte responded to your complaint on behalf of the Prosecutor. He states that the Prosecutor sent you all responsive records regarding (2) and (3) above. The Prosecutor does not maintain any other records responsive to your request. He states that protective orders and similar records are filed with the relevant courts.

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 Prosecutor does not contest that it is a “public agency” under 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 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). 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, it is unclear when the Prosecutor responded to your request, although the Prosecutor claims that it ultimately provided you with all responsive records. If the Prosecutor failed to respond to your mailed request within seven days of receiving it, the APRA deemed your request denied at that point. Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and must include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. I.C. § 5-14-3-9(c). Consequently, the Prosecutor’s failure to deny your request in accordance with subsection 9(c) violated the APRA.

That said, if the Prosecutor has now provided you with all responsive records that the Prosecutor has, it substantially complied with the APRA. If the Prosecutor does not maintain the other records you requested, the Prosecutor did not violate the APRA by failing to produce them. “[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 Prosecutor should have responded to your request within seven days but did not otherwise violate the APRA.

Best regards,



Andrew J. Kossack
Public Access Counselor

cc: Gary Schutte