



# STATE OF INDIANA

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November 28, 2011

Henry D. King  
Indiana State Prison  
Michigan City, Indiana 46360

*Re: Formal Complaint 11-FC-276; Alleged Violation of the Access to Public Records Act by the Fayette County Sheriff's Department*

Dear Mr. King:

This advisory opinion is in response to your formal complaint alleging the Fayette County Sheriff's Department ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* My office forwarded a copy of your complaint to the Department, but we have not yet received a response.

## BACKGROUND

In your formal complaint, you allege that you submitted a written request to the Department on June 30, 2011 for a copy of the visitation records for attorney Ronald Urdal. You maintain that the Department did not respond to your request pursuant to the requirements of the APRA and you filed a formal complaint with the Public Access Counselor's Office on August 30, 2011. Your complaint was rejected by the Public Access Counselor's Office as being untimely filed. On October 4, 2011, you submitted an identical records request to the Department to which again you allege that the Department failed to respond to pursuant to the requirements of the APRA. As of October 28, 2011, the date you filed your formal complaint with the Public Access Counselor's Office, you have yet to receive a response from the Department.

## 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." See I.C. § 5-14-3-1. The Department is a public agency for the purposes of the APRA. See I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Department's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. See I.C. § 5-14-3-3(a).

Generally, 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....”). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. See *Opinion of the Public Access Counselor 10-FC-56*.

If the Department did not receive your request, it was not obligated to respond to it. As previous Public Access Counselor’s have provided, the Public Access Counselor is not a finder of fact. See *Op. of the Public Access Counselor 10-FC-15*. Consequently, I would be unable to express no opinion as to whether or not the Department received your request. Under the APRA, if a request is delivered by mail or facsimile and the agency does not respond to the request within seven days of receipt, the request is deemed denied. See I.C. § 5-14-3-9(b). A public agency may deny a request if: (1) the denial is in writing or by facsimile; and (2) the denial includes: (A) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and (B) the name and the title or position of the person responsible for the denial. See I.C. §5-14-3-9(c).

Without the benefit of a response from the Department, it is unclear to me why your request was denied. Under the APRA, a public agency that withholds a public record bears the burden of proof to show that the record is exempt. See I.C. §§ 5-14-3-1, 5-14-3-9(f) and (g). Exceptions to disclosure are narrowly construed. See I.C. § 5-14-3-1. Because the Department has not provided a justification for withholding the records at issue here, it is my opinion that it has failed to sustain its burden pursuant to the APRA.

#### CONCLUSION

For the foregoing reasons, it is my opinion acted that the Department acted contrary to the APRA by failing to respond to your request for records.

Best regards,



Joseph B. Hoage  
Public Access Counselor

cc: Fayette County Sheriff’s Department