



# STATE OF INDIANA

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March 7, 2011

Mr. Michael J. Shepard  
1946 W. U.S. Hwy. 40  
Greencastle, IN 46135

*Re: Formal Complaint 11-FC-46; Alleged Violation of the Access to Public Records Act by the Clerk of the Vanderburgh Circuit and Superior Courts*

Dear Mr. Shepard:

This advisory opinion is in response to your formal complaint alleging the Clerk of the Vanderburgh Circuit and Superior Courts (the "Clerk") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-3 *et seq.* The Clerk's response to your complaint is enclosed for your reference.

## BACKGROUND

In your complaint, you allege that on January 13, 2011, you mailed a records request to the Clerk. You claim that proof of the request is "available thru [sic] Putnamville Officials," but do not provide any such "proof" or specify which official(s) could supply it on your behalf. Your request sought access to (1) a report on revenues, (2) requested operations budget, (3) approved budget for operation of the courts, and (4) actual expenditures of the court.

In response to your complaint, the Clerk claims that she was "unaware that such a request was made." With regard to the substance of your request, the Clerk states that the Clerk does not maintain budget records for the judge's offices or any other offices and referred you to the Vanderburgh County Auditor and Vanderburgh County Council for those records. The Clerk forwarded you the Clerk's 2010 and 2011 budget but claims that no other responsive records are maintained at the Clerk's office.

## 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, the Clerk disputes your allegation that it failed to respond to your request and claims that she was unaware that you filed it. Because the public access counselor is not a finder of fact, I express no opinion as to whether or not the Clerk actually responded to your request in a timely manner. If the Clerk received your request and failed to respond to your mailed request within seven days of receiving it, the APRA deems that request denied. 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, if the Clerk failed to deny your request in accordance with subsection 9(c) violated the APRA.

In any event, I understand that the Clerk has now provided you with a copy of all requested budget records that the Clerk maintains. If the Clerk has no other records responsive to your request, the Clerk did not violate the APRA by failing to provide other documents. “[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....”).

I understand that you believe Ind. Administrative Rule 2 requires the Clerk to maintain all of the records you requested, but I see no such requirement in the Rule itself. Admin. R. 2 requires the Clerk to submit some financial records to other agencies, but nothing in the applicable language requires the Clerk to actually maintain the records you requested:

#### Rule 2. Reporting Fiscal Matters

- (A) Preparation of Fiscal Reporting Forms. The Division of State Court Administration (Division), pursuant to these rules and IC 33-24-6-3, shall draft forms to be used in the gathering of revenue, budget and expenditure data from the courts and shall submit the proposed forms to the Supreme Court for approval. The revenue report forms shall collect data on the revenues generated by the operation of the courts within the county, the categories for which monies were collected, the amounts collected in each category, and how the collected funds were distributed. The budget and expenditure forms shall collect data on the requested budgets of the courts and their offices for the upcoming calendar year, the approved budgets for the courts and their offices for the upcoming year, the actual expenditures of the court and their offices during the previous calendar year, specifying the categories for which funds were requested, approved and spent.

After the Supreme Court approves the forms the Division shall distribute the forms to all courts to be used in preparation of reports. All trial courts shall prepare, on forms approved under the provisions of this rule, fiscal reports on the receipt and expenditure of public money by and for the operation of the courts.

- (B) Report of Clerk on Revenues. Within ten (10) days after the close of the calendar year, the Clerk of the Court shall report to the judge of the court, or chief judge of a unified court system, all information necessary for the completion of the revenue report form. In the case of a City or Town Court, if there is no clerk, the judge of a City or Town Court shall prepare such report.
- (C) Report of Judge. The judge of the trial court or the chief judge of a unified court system shall cause the fiscal reports to be filed with the Division no later than twenty (20) days after the end of the calendar year for the reporting period in electronic format as established by the Division.
- (D) Judge's Confirmation of Reporting. The judge of the court or the chief judge of a unified court system shall review all reports and confirm, through a process established by the Division, the completion and filing of all reports.

I see nothing in Admin. R. 2 that requires the Clerk to act as the custodian of all of the records you requested. If you desire access to the records mentioned herein that are not maintained by the Clerk, you should contact the agency to which the records are to be submitted and request them from that agency.

#### CONCLUSION

For the foregoing reasons, if the Clerk failed to respond to your written request within seven days of receiving it, the Clerk violated the APRA. I do not express an opinion as to whether or not the Clerk did or did not receive the request. The Clerk did not otherwise violate the APRA if the Clerk provided you with all responsive records that the Clerk maintains.

Best regards,



Andrew J. Kossack  
Public Access Counselor

Cc: Susan K. Kirk