



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

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January 23, 2012

Michael J. Shepard
3500 N. Harlan Avenue
Evansville, Indiana 47711

Re: Formal Complaint 12-FC-15; Alleged Violation of the Access to Public Records Act by the Vanderburgh County Clerk

Dear Mr. Shepard:

This advisory opinion is in response to your formal complaint alleging the Vanderburgh County Clerk ("Clerk") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Susan Kirk, Clerk, responded on behalf of the Clerk. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that you submitted a written request to the Clerk on December 31, 2011 for the Vanderburgh County Clerk's Office Policy Manual. As of January 13, 2012, the date you filed your formal complaint with the Public Access Counselor's Office, you further allege that you have not received a response from the Clerk.

In response to your formal complaint, Ms. Kirk advised that the Clerk does not maintain a Vanderburgh County Clerk's Office Policy Manual. In addition, you were provided with a copy of the Clerk's APRA Manual, the only policy manual maintained by the Clerk related to the APRA. Ms. Kirk stated that the Clerk responds to all written APRA requests within seven days of receipt.

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 Clerk 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 Clerk'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).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within twenty-four hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the 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). 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 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. *See* I.C. § 5-14-3-9(c). 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.

The public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80*. Here, you provided that the Clerk did not respond to your request. The Clerk advised that it responded to your request within seven days of receipt. If the Clerk did not respond to your request, then it acted contrary to the APRA. But, if the Clerk responded to your written request within seven days of receipt, it did not violate the APRA.

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*. Here the Clerk provided that it did not have a record responsive to your request for the Vanderburgh County Clerk’s Office Policy Manual. Alternatively, in response to your request the Clerk provided you with a copy of its policy manual related to the APRA. As such, it is my opinion that the Clerk did not violate the APRA by failing to provide a record which it did not maintain.



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CONCLUSION

For the foregoing reasons, it is my opinion that the Clerk did not violate the APRA if it responded to your written request within seven days of its receipt. As to all other issues, it is my opinion that the Clerk did not violate the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage", written in a cursive style.

Joseph B. Hoage
Public Access Counselor

cc: Susan Kirk