



STATE OF INDIANA

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October 2, 2012

Mr. Clay M. Howard
DOC 112612
5501 S. 1100 W.
Westville, Indiana 46391

Re: Formal Complaint 12-FC-285; Alleged Violation of the Access to Public Records Act by the Clerk of the Miami County Circuit Court

Dear Mr. Howard:

This advisory opinion is in response to your formal complaint alleging the Clerk of the Miami County Circuit Court ("Clerk") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Tawna L. Leffel, Clerk, responded in writing to your formal complaint. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that you submitted a written request for records to the Clerk during the first week of September 2012. Your request sought a probable cause affidavit from Cause No. 52-C01-0204-FB-00049. As of September 26, 2012, the date you filed your formal complaint with the Public Access Counselor's Office, you further allege that the Clerk has failed to respond to your request in any fashion.

In response to your formal complaint, Ms. Leffel advised that the Clerk has no record of receiving your request. In addition, the Clerk has reviewed its files and does not have a probable cause affidavit for the cause number that was requested.

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).

As previous Public Access Counselor's have provided, the Public Access Counselor is not a finder of fact. *See Opinion of the Public Access Counselor 10-FC-15*. Consequently, I express no opinion as to whether the Clerk 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)*. If the Clerk received your request and did not respond to it within these timeframes, the Clerk acted contrary to the APRA. However, if the Clerk did not receive your request, it was not obligated to respond to it.

Regardless, the Clerk has advised that it does not maintain a probable cause affidavit for the cause number that was requested. Generally, if a public agency has no records responsive to a public records request, the agency generally 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*. As such, the Clerk did not violate the APRA by failing to provide a record that it did not maintain.

CONCLUSION

For the foregoing reasons, it is my opinion that the Clerk did not violate the APRA if it did not receive your request. In addition, the Clerk did not violate the APRA by failing to produce a record that it did not maintain.

Best regards,

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

Joseph B. Hoage
Public Access Counselor

cc: Tawna L. Leffel