



# STATE OF INDIANA

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July 26, 2013

Mr. George A. Reese  
DOC 862207  
P.O. Box 1111  
Carlisle, Indiana 47838

*Re: Formal Complaint 13-FC-216; Alleged Violation of the Access to Public Records Act by the Harrison County Clerk*

Dear Mr. Reese:

This advisory opinion is in response to your formal complaint alleging the Harrison County Clerk ("Clerk") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Sally A. Whitis, Harrison County Clerk, responded in writing to your formal complaint. Her response is enclosed for your reference.

## BACKGROUND

In your formal complaint, you provide that you submitted a written request for records to the Clerk for a copy of the "agreement on the stipulated polygraph test that George Tuell took" and "the agreement paper between the person that gave Tuell the test." The Clerk responded to your request and advised that the file did not contain a polygraph agreement. You allege that the Chronological Case Summary indicates the records were discussed by the Court as a part of the criminal proceeding.

In response to your formal complaint, Ms. Whitis advised that the Clerk does not maintain any records responsive to your request. Upon receiving your formal complaint, the Clerk researched the Harrison County Prosecutor's file and located a copy of the Stipulation of Admissibility. The Stipulation was not file marked and not part of Mr. Tuell's criminal file maintained by the Clerk. Regardless, a copy of the record is enclosed for your review.

## 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 24 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 (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). A response from the public agency could be an acknowledgement that the request has been received and include information regarding how or when the agency intends to comply.

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...."). Further, an agency is not required to create a record in response to a request. Here, the Clerk has provided that no records responsive to your request are maintained in the Clerk's file. Upon receiving your formal complaint, the Clerk researched the Prosecutor's file and enclosed you will find a copy of the Stipulation of Admissibility. As such, it is my opinion that the Clerk did not violate the APRA by failing to produce a record not maintained by the agency.

#### CONCLUSION

For the foregoing reasons, it is my opinion that the Clerk did not violate the APRA.

Best regards,



Joseph B. Hoage  
Public Access Counselor

cc: Sally A. Whitis