



STATE OF INDIANA

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November 13, 2012

Mr. Chester Wilms, Jr.
DOC 943594
P.O. Box A
New Castle, Indiana 47362

Re: Formal Complaint 12-FC-329; Alleged Violation of the Access to Public Records Act by the Allen County Prosecutor's Office

Dear Mr. Wilms:

This advisory opinion is in response to your formal complaint alleging the Allen County Prosecutor's Office ("Prosecutor") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* David McClamrock, Deputy Prosecuting Attorney, responded in writing to your formal complaint. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you provide that the Prosecutor violated the APRA by failing to provide you with a probable cause affidavit that would corroborate the testimony of Detective Miguel Rivera concerning the involvement of other officers in your arrest.

In response to your formal complaint, Mr. McClamrock advised that you have requested a record that does not exist. You have been informed on multiple occasions that the Prosecutor does not maintain such a record. To the extent you seek a copy of the existing probable cause affidavit under Cause No. 02-D04-9709-CF-527, a copy will be provided upon request.

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 Prosecutor 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 Prosecutor'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). 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.

As provided in the Mr. McClamrock's response, the Prosecutor does not maintain any record that is responsive to your request. 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*. As such, it is my opinion that the Prosecutor did not violate the APRA by failing to provide a record in response to your request that it does not maintain.

I would also note regarding any future records requests that you may wish to submit to the Prosecutor, the APRA requires a public agency to provide one copy of a disclosable public record but does not require an agency to provide additional copies or to repeatedly provide copies of a particular record. *See* I.C. § 5-14-3-8(e). If the Prosecutor has previously provided you with a copy of a record maintained by the agency, it would be under no obligation to provide you with multiple copies of an identical record.



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CONCLUSION

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

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage".

Joseph B. Hoage
Public Access Counselor

cc: David McClamrock