



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

March 27, 2012

Mr. Charles E. Evans
DOC 212234
5124 W. Reformatory Road
Pendleton, Indiana 46064

Re: Formal Complaint 12-FC-76; Alleged Violation of the Access to Public Records Act by the Dearborn County Sheriff's Department

Dear Mr. Evans:

This advisory opinion is in response to your formal complaint alleging the Dearborn County Sheriff's Department ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Sheriff Michael R. Kreinhop responded on behalf of the Department. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that you submitted a written request pursuant to the APRA to the Department for a copy of records detailing your attorney visits from June 17, 2010 to November 3, 2010, certain log-book information, and a chronological court transcript from your November 1, 2010 trial. On March 6, 2012, Sheriff Kreinhop responded to your request in writing and provided that as to your requests for records detailing your attorney visits and log-book information, the Department is under no obligation to compile data and deliver those records to you. The APRA requires that the records be made available for inspection and copying upon payment of a statutorily authorized fee amount. The records you have sought are available for inspection during the normal business hours of the Department. As to your request for a chronological court transcript from your November 1, 2010 trial, the Department does not have any record that is responsive to your 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 Department 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

Department'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. Here, the Department responded to your written request within the time guidelines provided by section 9 of the APRA.

The APRA provides that any person may inspect and copy the public records of any public agency, except as provided in the exceptions listed in section 4 of the APRA. *See* I.C. 5-14-3-3(a). A public agency may not deny or interfere with the exercise of the right stated in subsection (a). *See* I.C. 5-14-3-3(b). The public agency shall either:

- (1) provide the requested copies to the person making the request; or
 - (2) allow the person to make copies:
 - (A) on the agency's equipment, or
 - (B) on his own equipment.
- IC § 5-14-3-3(b).

Indiana law provides the following regarding copies of public records:

If:

(1) a person is entitled to a copy of a public record under this chapter;

and

(2) the public agency which is in possession of the record has reasonable access to a machine capable of reproducing the public record; the public agency must provide at least one (1) copy of the public record to the person. However, if a public agency does not have reasonable access to a machine capable of reproducing the record or if the person cannot reproduce the record by use of enhanced access under section 3.5 of this chapter, the person is only entitled to inspect and manually transcribe the record. A public agency may require that the payment for copying costs be made in advance. I.C. § 5-14-3-8(e).

While Section 3(b) of the APRA indicates an agency shall either provide copies or allow access to records, Section 8(e) makes it clear an agency is to provide copies when it has reasonable access to a machine capable of reproducing the record. *See* I.C. §5-14-3-8(e) and I.C. §5-14-3-3(b). Counselor Neal addressed a similar issue and provided:

“The Auditor here asserts the word “provide” in Section 8(e) does not mean the agency must make the copies. “When interpreting a statute the words and phrases in a statute are to be given their plain, ordinary, and usual meaning unless a contrary purpose is clearly shown by the statute itself.” *Journal Gazette v. Board of Trustees of Purdue University*, 698 N.E.2d 826, 828 (Ind. App. 1998). Statutory provisions cannot be read standing alone; instead, they must be construed in light of the entire act of which they are a part. *Deaton v. City of Greenwood*, 582 N.E.2d 882 (Ind. App. 1991). “Provide” means to “supply or furnish,” to “afford or yield,” or “to prepare, make ready, or procure beforehand.” *New Illustrated Webster’s Dictionary of the English Language* 780 (1992). Further, “provide” as used in Section 3(b)(1) clearly means the public agency is to make a copy, as it is followed by “or” and then Section 3(b)(2), which allows the requester to make a copy. We must assume provide was used by the legislature to convey the same meaning in the two different sections. As such, I agree with previous public access counselors that Sections 3(b)(1) and 8(e) together to require a public agency to make copies of records upon request when the agency has reasonable access to a copy machine.” *Opinion of the Public Access Counselor 07-FC-223*.

The APRA permits a public agency to charge a fee for copies of public records. *See* I.C. § 5-14-3-8. Public agencies may require a person to pay the copying fee in advance. *See* I.C. § 5-14-3-8(e). Nothing in the APRA requires that a public agency waive a copying fee. *See Opinion of the Public Access Counselor 07-FC-124*.

The APRA does not specifically require that a public agency mail records in response to a public records request. *See Opinion of the Public Access Counselor 02-FC-05; 05-FC-264; 06-FC-91*. This Office has stated that it is reasonable and *strongly encourages* public agencies to send copies of records to the requester via the U.S. Postal Service where the requester has paid for the applicable postage costs in advance; however the APRA does not specifically provide that the agency would be required to do so (emphasis added). *See Opinion of the Public Access Counselor 09-FC-13; 09-FC-221; 10-FC-59; 12-FC-36*. If the Department has made available all records that are responsive to your request, it is my opinion that the Department did not violate the APRA by failing to mail the records to you.¹

¹ The APRA is distinct from any civil or criminal matter. You have provided that you requested the records at issue in order to file a Petition for Post-Conviction Relief. While the APRA does not specifically require that an agency mail the records that have been requested, this would not limit the power of any

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 Department has indicated that it does not have a copy of the chronological court transcript from your November 1, 2010 trial. As such, it is my opinion that the Department did not violate the APRA by failing to produce a record that it does not maintain.

CONCLUSION

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

Best regards,

A handwritten signature in black ink, appearing to read 'Joe Hoage', with a stylized initial 'J' and 'H'.

Joseph B. Hoage
Public Access Counselor

cc: Sheriff Michael R. Kreinhop