



STATE OF INDIANA

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April 25, 2013

Mr. Scott Malott
DOC 208403
One Park Row
Michigan City, Indiana 46360

Re: Formal Complaint 13-FC-115; Alleged Violation of the Access to Public Records Act by the Clerk of the Clinton County Court

Dear Mr. Malott:

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

BACKGROUND

In your formal complaint you allege that on two occasions you have submitted a written request for records to the Clerk for copies of a warrant and writ of attachment for Roger Lyman. As of April 8, 2013, the date you filed your formal complaint, you further allege that you have yet to receive any response from the Clerk to either request.

In response to your formal complaint, Ms. Crews advised that the Clerk does not maintain any records that are responsive to your request. Even if the Clerk did maintain copies of such records, Ms. Crews provided that your request would have been denied as the records are confidential.

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).

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 has provided that it did not maintain any records responsive to your specific request. As such, it is my opinion that the Clerk did not violate the APRA by failing to produce a record that it did not maintain.

As a reminder to all parties, 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). Had the Clerk had records responsive to your request, it would have been required to cite to the *specific* exemption within state or federal law that would allow the Clerk to withhold the record (emphasis added). A statement that the record is “confidential”, with nothing more, would be a violation of section 9(c) of the APRA. Further, section 6 of the APRA provides that when a record contains both disclosable and nondisclosable information and an agency receives a request for access, the agency shall “separate the material that may be disclosed and make it available for inspection and copying.” See I.C. § 5-14-3-6(a). Thus if a record contained a social security number, the proper response would be to redact the social security number and disclose the record, with a notation that information had been redacted pursuant to I.C. § 5-14-3-4(a)(12).

CONCLUSION

Based on the foregoing reasons, it is my opinion that the Clerk did not violate the APRA in response to your request.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is stylized and cursive.

Joseph B. Hoage
Public Access Counselor

cc: Sherri N. Crews