



# STATE OF INDIANA

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August 21, 2013

Mr. David R. Frohwerk  
DOC 985446  
5501 S. 1100 West  
Westville, Indiana 46391

*Re: Formal Complaint 13-FC-217; Alleged Violation of the Access to Public Records Act by the Public Defender of Indiana*

Dear Mr. Frohwerk:

This advisory opinion is in response to your formal complaint alleging the Public Defender of Indiana ("Public Defender") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Stephen T. Owens responded in writing to your formal complaint. His response is enclosed for your reference.

## BACKGROUND

In your formal complaint you allege that in June 2013, you submitted a written request for records to the Public Defender. You specifically requested that the agency produce an index of all petitions for Post-Conviction Relief wherein the Public Defender was providing representation between January 2009 to the present; proof of claim that the Public Defender does not handle cases according to the petitioner's race; proof of claim that the Public Defender does not handle cases according to the petitioner's county of residence at the time of conviction; proof of claim that the Public Defender does not handle cases in the order which they are received; proof of claim that the Public Defender does not give preference to cases for which it qualifies for and/or complied with the terms and conditions of any government funding; all accounting records of the agency from 2009-2012; and proof of claim that the Public Defender did not represent Joseph Robinson.

On July 9, 2013, the Public Defender informed you that it did not possess most of the records that were sought or the ability to obtain and index the information as requested. The agency informed you that it would retain the authority to charge a fee of \$.10 per page and would require payment prior to production. The Public Defender further noted that records produced pursuant to your request would be voluminous. You allege that the Public Defender's response to your request violated the APRA as it did not

indicate the respective copying fees, aside from a general reference, and that it required that all copying fees be paid prior to production.

In response to your formal complaint, Mr. Owens provided that all information requested is not readily available. Moreover, the information that is available is grouped in terms of fiscal years, rather than calendar year. Regardless, the Public Defender has now compiled information in order to satisfy your request. A copy of the information provided by the Public Defender is enclosed for your review and was previously provided on August 8, 2013.

## 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 Public Defender 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 Public Defender’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. Here, the Public Defender received your request for records on June 20, 2013, to which it acknowledged the receipt of the request, in writing, on July 9, 2013. Accordingly, it is my opinion that the Public Defender acted contrary to the requirements of section 9(b) of the APRA by failing to, at a minimum, acknowledge the receipt of your request in writing within seven (7) days of the receipt.

For state agencies, the Indiana Department of Administration shall establish a uniform copying fee for the copying of one page of a standard-sized document by state agencies. *See* I.C. § 5-14-3-8(c). The fee may not exceed the average cost of copying records by state agencies or ten cents per page. *Id.* A state agency may not collect more than the uniform copying fee for providing a copy of a public record. A fee established under this subsection must be uniform throughout the public agency and uniform to all purchasers. *Id.* A public agency may require that payment for copying costs be made in advance. *See* I.C. § 5-14-3-8(e). It is my opinion that the Public Defender did not violate the APRA by requiring the payment of all copying fees prior to disclosure.

“[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 or answer questions. Here, the Public Defender has advised that much of the information you requested is not readily available. Regardless, the agency has attempted to answer your inquiries and provide the compiled information in order to satisfy your request. As the Public Defender has now provided the relevant records and answered your questions, it is my opinion that the agency has not violated the APRA.

#### CONCLUSION

Based on the foregoing reasons, it is my opinion that the Public Defender acted contrary to the requirements of section 9(b) of the APRA by failing to, at a minimum, acknowledge the receipt of your request in writing within seven (7) days of the receipt of your request. It is my opinion that the Public Defender did not violate the APRA by requiring the payment of all copying fees prior to disclosure. It is my opinion that the Public Defender is not required to create records and/or answer questions in order to satisfy a request for records made pursuant to the APRA.

Best regards,

A handwritten signature in black ink, appearing to read 'J. Hoage', written in a cursive style.

Joseph B. Hoage  
Public Access Counselor

cc: Stephen T. Owens