



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

November 15, 2011

Jana Lee Marjenhoff
16 Greer Road
Sandia Park, New Mexico 87047

Re: Formal Complaint 11-FC-284; Alleged Violation of the Access to Public Records Act by the Lawrence County Clerk

Dear Ms. Marjenhoff:

This advisory opinion is in response to your formal complaint alleging the Lawrence County Clerk ("Clerk") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Pam Bolton, Deputy Clerk and Financial Officer, responded on behalf of the Clerk. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that you have submitted two written records requests to the Clerk and have yet to receive any records responsive to your request. On June 25, 2011, you requested the trial transcript for a criminal trial held in 1997. You provided your telephone number and asked that you be informed of the cost prior to the copies being made. On October 12, 2011, you made a second request of the Clerk, which included a request for the above mentioned transcript, along with trial records, docket sheets, and records of all witnesses that testified during the trial. You again provided your telephone number and asked that you could be informed of the cost prior to the copies being made.

In response to your formal complaint, Ms. Bolton advised that in regards to your initial request, she attempted to contact you at the phone number you not only provided, but requested to be contacted at regarding costs associated with the production of the records. After attempting to contact you at this number on multiple occasions, she left a message that she needed to speak to you prior to the request being processed. After a week had passed without hearing back from you, Ms. Bolton again left a message and provided that the Clerk did not have a copy of the records that you requested, but the Lawrence Superior Court would. Mr. Bolton informed you that she was forwarding your request to the Court and provided its phone number so that you could contact them regarding costs associated with the production of the records.

As to your second request, you again asked to be contacted via a telephone number you provided to which Ms. Bolton thereafter attempted to establish contact. Ms. Bolton attempted to leave a message but the voice mail indicated that you were not accepting calls at the current time. Ms. Bolton then sent you a letter regarding your records request and instructed you to contact the Lawrence Superior Court. Ms. Bolton provided that you specifically requested that you be called prior to the production of copies, which she attempted on multiple occasions.

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). 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 Clerk attempted to respond to your request within the timelines proscribed by the APRA, however in lieu of responding to your request in writing as proscribed by section 9, the Clerk attempted to comply with your specific request and on multiple occasions attempted to contact you at the telephone number that was provided. During this time, multiple messages were left on your voicemail, until such time that the voicemail message indicated that you were no longer taking calls. At that time, the Clerk then proceeded to contact you in writing and informed you that it did not have any records responsive to your request; the Lawrence Superior Court had access to said records, and provided to you contact information for the Court. Although I applaud the efforts of the Clerk, which undoubtedly went above and beyond the requirements of the APRA, it technically acted contrary to the APRA by failing to respond to your request in writing within seven (7) days of its receipt.

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 have any records that were responsive to your request and provided the contact information for the public agency that would have said records. As such, it is my opinion that the Clerk did not violate the APRA.

CONCLUSION

Based on the foregoing, it is my opinion that the Clerk acted contrary to the APRA by failing to respond to your request in writing within seven (7) days of its receipt. As to all other issues, it is my opinion that the Clerk did not violate the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive, flowing style.

Joseph B. Hoage
Public Access Counselor

cc: Pam Bolton