

June 7, 2004

Mr. Aaron Israel, No. 892219
Maximum Control Facility
P.O. Box 557
Westville, Indiana 46391-0557

*Re: 04-FC-78; Alleged Violation of the Access to Public Records Act
by the Clerk of the Madison Superior Court*

Dear Mr. Israel:

This is in response to your formal complaint alleging that the Clerk of the Madison Superior Court (Clerk) violated the Indiana Access to Public Records Act (APRA) (Ind. Code §5-14-3) when that office failed to produce records in response to your record request. A copy of the Clerk's response to your public records complaint is enclosed for your reference. The Clerk responds that her office does not maintain any records that are responsive to your request, and that any records ever held by that office that would have been responsive would have been previously destroyed in accordance with state law and an approved record retention schedule. For the reasons set forth below, I find that the Clerk did not deny you access to public records in violation of the APRA.

BACKGROUND

According to your complaint, on March 29, 2004, you prepared and submitted a request for public records to the Clerk of the Madison Superior Court. Your request, which is not included as an exhibit to your complaint, is alleged to have sought jury questionnaire forms related to the jury selection in your 1992 criminal proceedings in that county. The Clerk is alleged to have responded in writing on April 7, 2004, although that response is also not included with your complaint and supporting materials. Your complaint asserts that the Clerk stated that any responsive materials were no longer retained and maintained by that office due to the passage of time. You subsequently wrote the Clerk challenging the truth of that statement but also seeking information on where else you might obtain the responsive records. You assert that no response was forthcoming, and this complaint followed. Your complaint alleges that you were denied access to records in violation of the APRA when the Clerk failed to produce the responsive records with her April 7, 2004, response to your request.

The Clerk responds to your complaint and again asserts that her office does not retain and maintain any records that are responsive to your request. The Clerk states that any responsive records would have been created in 1992, and subsequently destroyed pursuant to an approved record retention schedule. The Clerk cites to Indiana Administrative Rule 7(II), "Judicial Retention Schedule," section 87-9, providing that the court or the Clerk shall destroy juror questionnaire forms after one year from the date of creation. I am in receipt of your subsequent reply asserting, without citation to authority, that destruction of the responsive records pursuant to the judicial record retention schedule is contrary to law.

ANALYSIS

Indiana Code 5-14-3-3 provides that any person has the right to inspect and copy the public records of any public agency. There is no suggestion here that the Clerk's Office is not a public agency subject to the APRA. The records of that public agency then, are public records, and include any writing, photograph, tape recording, or other material that is created, received, maintained, or filed by or with that public agency. IC 5-14-3-2.

The Clerk contends that you were not denied a public record of a public agency because at the time you made your request the record was no longer in existence. It is true that if a public agency does not maintain a record that is responsive to a request for public records, its failure to tender such a record cannot be considered a denial under the APRA. However, that basic truth cannot be used to circumvent your right to access the public records of public agencies. That is to say, a public agency cannot destroy a record *it is required to maintain*, and then be reasonably heard to assert that its failure to produce a responsive record did not "deny or interfere with the exercise of the right [of access]" set forth in the APRA. *See* IC 5-14-3-3(b). Indeed, the APRA provides that "[a] public agency shall protect public records from loss, alteration, mutilation, or destruction." IC 5-14-3-7(a).

The Clerk asserts that it no longer maintains the juror questionnaire forms from your 1992 trial, and that those records were destroyed in accordance with state law pursuant to an approved record retention schedule. Indiana Supreme Court Administrative Rule 7 is the applicable state law that authorizes courts and clerks of courts to dispose of judicial records. Administrative Rule 7 provides that the court or clerk of court shall dispose of judicial records in accordance with the rule and with judicial record retention schedules set forth therein and that have been approved by the Division of State Court Administration. Ind. Administrative Rule 7(A). Judicial retention schedule 90-9-05, set out in the "general schedules" category (87-9) of Administrative Rule 7, provides that Jury Questionnaire Forms shall be destroyed after one year from the date of creation. Admin. R. 7(II), Schedule 90-9-05. The retention schedules set forth in Administrative Rule 7, including the retention schedule at issue here, were adopted by the Indiana Division of State Court Administration, and are mandatory on all courts for records created after January 1, 1988. Admin. R. 7.

Based on the foregoing, it is my opinion that the Clerk did not destroy any records responsive to your request in violation of Indiana law and approved record retention schedules applicable to those records. Because the Clerk did not destroy the records in violation of the law,

and because the records are no longer retained and maintained by the Clerk, the Clerk cannot be said to have denied you access to the records in violation of the APRA.

CONCLUSION

For the reasons set forth above, I find that the Clerk did not deny you access to public records in violation of the APRA.

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Ms. Kathy Stoops-Wright