



# STATE OF INDIANA

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February 2, 2012

Tom Kenneth  
5124 W. Reformatory Road  
Pendleton, Indiana 46064

*Re: Formal Complaint 12-FC-06; Alleged Violation of the Access to Public Records Act by the Marion County Jail*

Dear Mr. Kenneth:

This advisory opinion is in response to your formal complaints alleging the Marion County Jail ("County") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Kevin Murray, Legal Counsel, responded on behalf of the County. His response is enclosed for your reference.

## BACKGROUND

In your formal complaint, you allege that you submitted a written request to the County for a copy of your August 10, 2010 transport order that was cancelled. In response to your request, you further allege that that County did not provide the documents that you were seeking.

In response to your formal complaint, Mr. Murray advised that the County does not maintain a record that refers to the cancellation of your transport order from August 10, 2010. The APRA does not require production or creation of documents that do not exist. Enclosed with the County's response, Mr. Murray has provided the records listing all inmates who had court appearances on August 10, 2010 and August 12, 2010. Your name does not appear on either list. As such, the County did not violate the APRA by failing to produce a record that does not exist or that it does not maintain.

## 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 County 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 County'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 request within the timelines provided by section 9 of the APRA.

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 County has provided that it does not maintain any record that refers to the cancellation of your August 10, 2010 transport order. As such, it is my opinion that the County did not violate the APRA by failing to provide a record that it does not exist.

#### CONCLUSION

For the foregoing reasons, it is my opinion that the County did not violate 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: Kevin Murray