



# STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

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May 22, 2012

Dwayne A. Frost  
Westville Correctional Facility  
5501 S. 1100 W.  
Westville, Indiana 46391

*Re: Formal Complaint 12-FC-128; Alleged Violation of the Access to Public Records Act by the Elkhart County Superior Court Clerk*

Dear Mr. Frost:

This advisory opinion is in response to your formal complaint alleging the Elkhart County Superior Court Clerk ("Clerk") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Wendy Hudson, Clerk of the Elkhart County Circuit Court, responded on behalf of the Clerk. Her response is enclosed for your reference.

## BACKGROUND

On May 4, 2012, you submitted a request to the Clerk pursuant to the APRA for a copy of a transcript from a hearing conducted under Cause No. 20-D01-FC-00066 and 20-D01-1004-FC-00011. The Elkhart Superior Court ("Court") denied your request citing a failure to comply with the requirements of Indian Rules of Trial Procedure 5(c) and 10(A).

Ms. Hudson in response to your formal complaint provided that the records that you sought are not maintained by the Clerk, rather the records are created and/or retained by the Court Reporter, who is a member of the Court's staff. The Court and the Clerk are separate and distinct public agencies. The Court, not the Clerk's office, would have a copy of the transcript that was requested, if such a record exists.

## 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 twenty-four 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 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.

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, you made a request of the Clerk for certain transcripts from a criminal proceeding. In response to your formal complaint, the Clerk provided that the Court, not the Clerk, would maintain the records that are responsive to your request, if any such records existed. The Clerk is a separate and distinct public agency from the Court. As such, it is my opinion that the Clerk did not violate the APRA for failing to produce a record that it does not maintain.

I would encourage you to resubmit your request directly to the Court. The Court would be required to respond to your request pursuant to the requirements of the APRA, which is separate and distinct from a criminal or civil judicial proceeding. As noted above however, if the Court does not maintain a transcript of the hearings that you requested, the APRA would not require the Court to produce or create a record in response to a request. *See Opinions of the Public Access Counselor 06-FC-08* and *12-FC-49*. Further, if the Court would have records that are responsive to your request, the Court would be allowed to charge a fee pursuant to I.C. § 5-14-3-8.



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## CONCLUSION

For the foregoing reasons, 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".

Joseph B. Hoage  
Public Access Counselor

cc: Wendy Hudson