



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
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October 5, 2012

Mr. Kenneth Horton
DOC 981407
21390 Old S.R. 37
Branchville, Indiana 47514-9042

Re: Formal Complaint 12-FC-261; Alleged Violation of the Access to Public Records Act by the Clerk of the Vanderburgh County Superior Court

Dear Mr. Horton:

This advisory opinion is in response to your formal complaint alleging the Clerk of the Vanderburgh County Superior Court ("Clerk") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Susan K. Kirk, Clerk of Courts, responded in writing to your formal complaint. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that you submitted a written request for records to the Clerk Prosecutor on or about July 31, 2012. As of September 10, 2012, the date you filed your formal complaint with the Public Access Counselor's Office, you further allege that the Clerk has failed to respond to your request in any fashion.

In response to your formal complaint, Ms. Kirk advised that a copy of the "Policy Manual" has been provided to you. The Clerk does not maintain a record titled "Vanderburgh County Clerk's Office Policy Manual." The records that you seek regarding audio tapes of Judge Bowers and Detective Allison are not maintained by the Clerk. As to your request for the chronological case summaries ("CCS"), the Clerk does not have a record of receiving your request.

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 (emphasis added). *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.

As previous Public Access Counselor's have provided, the Public Access Counselor is not a finder of fact. *See Opinion of the Public Access Counselor 10-FC-15*. Consequently, I express no opinion as to whether the Clerk received your request for CCS records. Under the APRA, if a 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). A public agency may deny a request if: (1) the denial is in writing or by facsimile; and (2) the denial includes: (A) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and (B) the name and the title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). If the Clerk received your request and did not respond to it within these timeframes, the Clerk acted contrary to the APRA. However, if the Clerk did not receive your request, it was not obligated to respond to it.

The APRA permits a public agency to charge a fee for copies of public records. *See* I.C. § 5-14-3-8. Additionally, a public agency may require a person to pay the copying fee in advance. *See* IC 5-14-3-8(e). Nothing in the APRA requires that a public agency waive a copying fee. *See Opinion of the Public Access Counselor 07-FC-124*. As the Clerk is now aware of your request, upon receipt of the respective fees, the Clerk will provide you with copies of the requested CCS records.

Generally, if a public agency has no records responsive to a public records request, the agency generally 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*. The Clerk has provided that it does not have access, nor maintain the audio recordings that are responsive to your request. As such, it is my opinion that the Clerk did not violate. If the Court maintains



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the audio recordings that you are seeking, you would need to submit a request directly to the Court.

CONCLUSION

For the foregoing reasons, it is my opinion that the Clerk did not violate the APRA if it did not receive your request. 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", written in a cursive style.

Joseph B. Hoage
Public Access Counselor

cc: Susan K. Kirk