



# STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

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April 20, 2012

Beverly Perkins  
2546 Bow Court  
South Bend, Indiana 46628

*Re: Formal Complaint 12-FC-82; Alleged Violation of the Access to Public Records Act by the St. Joseph County Superior Court Clerk's Office.*

Dear Ms. Perkins:

This advisory opinion is in response to your formal complaint alleging the St. Joseph County Superior Court Clerk's Office ("Clerk") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Terri J. Rethlake responded to your formal complaint. Her response is enclosed for your reference.

## BACKGROUND

In your formal complaint, you allege on March 16, 2012 you made a personal visit to the Clerk and requested a copy of a probable cause affidavit in support of a search warrant conducted at a residence located in South Bend, Indiana. You further allege that an employee of the Clerk's office denied your request; the employee initially provided that her name was Pat, but thereafter said it was Dawn.

In response to your formal complaint, Ms. Rethlake advised that she has been in communication with Judge Jerome Frese's administrative assistant regarding your request. Judge Frese signed the warrant that was responsive to your request on January 13, 2012. It is the practice of St. Joseph County Courts to keep all search warrants in the Court's offices until filed with the Clerk. The search warrant in question was not filed with the Clerk until January 27, 2012. The Order in the Record of Judgments does not include a probable cause affidavit. Mr. Rethlake provided that you were advised to contact the Chief Judge's Offices on the date of your request, as the employee advised she was not certain if the probable cause affidavit may be released. Ms. Rethlake was informed by Judge Frese's administrative assistant that the Indiana Supreme Court Administration had been contacted in regards to whether the requested record was confidential. Enclosed with Ms. Rethlake response to your formal complaint are copies of the signed and executed warrants and a record detailing all information retained in the Clerk's database. As of April 19, 2012, the Clerk continues to not maintain a probable cause affidavit that is responsive to 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 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. From what has been provided, you made an oral request of the Clerk on March 16, 2012 to which the Clerk orally acknowledged and responded to that same day. As such, it is my opinion that the Clerk responded to your oral request within twenty-four hours of its receipt in compliance with section 9(a) of the APRA.

“[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...”). The Clerk provided it did not maintain a copy of the probable cause affidavit that you requested. Accordingly, it is my opinion that the Clerk did not violate the APRA by failing to produce a record that it did not maintain.

It would appear from the Clerk’s response that the St. Joseph County Superior Court, as opposed to the Clerk, may have a record that is responsive to your request. I would encourage you to file a public records request pursuant to the APRA directly with the Court. The Court would be required to either produce the record, or cite to a specific exception found in state or federal law that either prohibits the Court, or gives it discretion, to produce the record in response to your request.



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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", written in a cursive style.

Joseph B. Hoage  
Public Access Counselor

cc: Terri J. Rethlake