

April 26, 2004

Mr. Farrell Haycraft, No. 105690  
Wabash Valley Correctional Facility  
P.O. Box 1111  
Carlisle, Indiana 47838

*Re: 04-FC-54; Alleged Violation of the Access to Public Records Act by the  
Harrison County Superior Court*

Dear Mr. Haycraft:

This is in response to your formal complaint alleging that the Harrison County Superior Court (Court) violated the Indiana Access to Public Records Act (APRA) (Ind. Code §5-14-3) when it failed to timely respond to your request for records. A copy of the Court's response to your complaint is enclosed for your reference. The Court provides evidence that it did respond to your request, and the response indicates that the Court does not have the records you requested. While the response was untimely, the Court did not otherwise violate the APRA.

#### BACKGROUND

On March 1, 2004, you submitted your record request to the Court. Your request sought Volume IV of your trial transcript in *State of Indiana v. Farrell Haycraft*, No. 31D01-0008-DF-685. Your request noted the statutory requirement that the Court respond in writing within seven days of receipt of the request. On March 22, 2004, having received no response to your request, you prepared and submitted this complaint challenging the Court's failure to respond.

In response to your complaint, the Court provides a copy of a letter it prepared and submitted in response to your request for records. That letter attached a copy of your request, and that copy shows the Court's stamp indicating that it received the request on March 3, 2004. The response letter is dated March 16, 2004, and states that your complete trial transcript was forwarded to the Clerk of the Indiana Supreme Court and Court of Appeals in August 2001 as part of your appeal from your conviction. The Court responded that it no longer had the records that were responsive to your request. The Court reiterates that response here.

#### ANALYSIS

Indiana Code 5-14-3-3(a) provides that any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as otherwise provided in the APRA. IC 5-14-3-3(a). A "public record" means any writing, paper, report, study, map, photograph, tape recording or other material that is created, received,

retained, maintained or filed by or with a public agency. IC 5-14-3-2. A request for records may be oral or written. IC 5-14-3-3(a); 5-14-3-9(c). If the request is made in writing, the agency must respond to the request in writing. IC 5-14-3-9(c). If the request is delivered by mail or facsimile, the agency must respond to the request within seven days of receipt. IC 5-14-3-9(b). A timely response to the request does not mean that the public agency must produce or expressly decline to produce the documents that are responsive to the request within the statutorily prescribed time period. Of course, a public agency is free to take either of those actions, but may also comply with its response obligation under the statute by acknowledging receipt of the request and indicating the specific actions the agency is taking toward production. A public agency is not required to create a record in response to a request, and it is not required to produce a record it does not have. If an agency does not have a responsive record, it should say so, but its failure to produce a record it does not have is not a denial under the APRA.

Your complaint alleges that the Court did not timely respond to your request. I must agree. The Court has presented evidence to show that it received your written request on March 3, 2004. Pursuant to Indiana Code 5-14-3-9(b), it was required to respond to your request in writing within seven days, or the request would be deemed to be denied. The Court's response was due to be tendered on March 10, 2004. It was submitted on March 16, 2004, six days late.

While the Court's response was not timely, it did indeed respond and that response substantively answered your request and was otherwise in compliance with the APRA. The Court's response indicated that your trial transcript, including the specific volume that is at issue in your request, was forwarded to the Clerk of the Indiana Supreme Court and Court of Appeals in August 2001 as part of your appeal from the conviction entered in the trial court. The Court no longer has the record you are requesting. In that manner, the responsive record is not a public record of the public agency to which you directed your request. The Court's failure to produce a copy of a record that it does not maintain is not a denial of public records under the APRA.<sup>1</sup>

#### CONCLUSION

For the reasons set forth above, I find that the Court's response was not timely under the APRA. I further find that the response does not otherwise violate the statute.

Sincerely,

Michael A. Hurst  
Public Access Counselor

cc: Ms. Karen LaHue, Deputy Clerk, Harrison County Superior Court

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<sup>1</sup> The Court's failure to maintain the record at issue is not itself a violation of the APRA or any other law regarding the preservation and maintenance of public records. *See, e.g.*, IC 5-14-3-7(a); 5-15-6. The records at issue were transferred to the reviewing court pursuant to the rules of the Indiana Supreme Court governing post-trial and appellate procedure.