



STATE OF INDIANA

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January 28, 2010

Mr. Fred Peters
DOC # 26498
6908 S. Old. Hwy. 41
P.O. Box 1111
Carlisle, IN 47838

Re: Formal Complaint 10-FC-12; Alleged Violation of the Access to Public Records Act by the Clerk of the Indiana Court of Appeals

Dear Mr. Peters:

This advisory opinion is in response to your formal complaint alleging the Clerk of the Indiana Court of Appeals ("Clerk")¹ violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*, by denying you access to public records.

BACKGROUND

According to your complaint, you sent a request for court records to the Indiana Court of Appeals on December 14, 2009. You state that the court returned your request "without a response except an order to get copies."

My office forwarded a copy of your complaints to the Clerk. Heather Smith, deputy clerk of the Indiana Supreme Court, Court of Appeals, and Tax Court, responded on behalf of the Clerk. First, Ms. Smith claims that the Clerk never received a copy of your request. Second, Ms. Smith notes that a copy fee of one dollar (\$1.00) per page is appropriate for copies of court records and the Clerk may require payment of copy fees in advance pursuant to I.C. § 5-14-3-8 and a 2005 order of the Indiana Supreme Court.

¹ I note that you named "Ind. Court of Appeals" as the relevant public agency in your complaint and identified "Clerk - Kevin A. Smith or Hon. John G. Baker" as the official(s) responsible for denying your records request. My office forwarded your complaint to Mr. Smith for a response, a copy of which is enclosed for your reference.

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.” Ind. Code § 5-14-3-1. The Clerk is clearly a public agency for the purposes of the APRA. 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 public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

Here, the Clerk asserts it did not receive your request. If the Clerk did receive your request, the agency would have a duty under the APRA to respond within seven days of receipt. I.C. § 5-14-3-9(b). While a public agency has a duty to respond to a written request for access to records within seven days of receipt of the request, an agency cannot respond to a request it did not receive. Therefore, if the Clerk did not receive your request, it did not violate the APRA by not responding. *See Opinion of the Public Access Counselor 09-FC-44.*

As to the issue of copy fees, the APRA permits a public agency to charge a fee for copying a record, but sets certain limits on the amount of the copying fee depending upon the type of public agency. *See* I.C. § 5-14-3-8. Normally, a charge of \$1 per page would be excessive for a public agency to charge an individual when the cost of copying cannot exceed the “actual cost of copying.” *Id.* However, the APRA also provides that notwithstanding other provisions within section 8 of the APRA, a public agency shall collect any certification, copying, facsimile machine transmission, or search fee that is specified by statute or is ordered by a court. I.C. § 5-14-3-8(f). Thus, where a specific statute other than the APRA provides a public agency with the authority to charge a fee that exceeds the “actual cost,” the public agency may charge the statutory fee without violating the APRA. Under I.C. § 33-37-5-1, a court clerk shall collect a fee of one dollar (\$1.00) per page for legal size or letter size pages, including a page only partially covered with writing. Moreover, as Ms. Smith notes in her response, the Indiana Supreme Court issued its Order Governing Fees Charged by Clerk of Courts for Miscellaneous Services, which also requires the Clerk of the Court of Appeals to charge one dollar (\$1.00) per page. Thus, it is my opinion that the Clerk has not violated the APRA by charging you the fee of one dollar (\$1.00) per page for copies of the requested records.

I also note that the APRA excepts from disclosure records “declared confidential by or under rules adopted by the supreme court of Indiana.” I.C. § 5-14-3-4(a)(8). Admin. R. 9(G)(1)(h) excludes from public access “[a]ll personal notes and e-mail, and deliberative material, of judges, jurors, court staff and judicial agencies, and information recorded in personal data assistants (PDA’s) or organizers and personal calendars. “ Further, Admin. R. 9 (G)(2)(a) declares “all information excluded in sub-sections (a) through (h) of section (G)(1)” as confidential records.

CONCLUSION

For the foregoing reasons, it is my opinion that the Clerk has not violated the APRA.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive style with a large, sweeping initial 'A'.

Andrew J. Kossack
Public Access Counselor

cc: Heather Smith