



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
ANDREW J. KOSSACK

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

January 28, 2011

Mr. Curtis McGinnis
DOC # 129893
5124 W. Reformatory Rd.
Pendleton, IN 46064

Re: Formal Complaint 10-FC-329; Alleged Violation of the Access to Public Records Act by the Marion County Superior Court, Criminal Division Six

Dear Mr. McGinnis:

This advisory opinion is in response to your formal complaint alleging the Marion County Superior Court, Criminal Division Six ("Court") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* The Court's response to your complaint is enclosed for your reference.

BACKGROUND

According to your complaint, you requested "access to hear the in Court [sic] Cross-examinations of three witnesses who testified at my Jury Trial [sic] that was held in [the Court]." You requested that you "be permitted to hear and listen to" the recordings in order to prepare for a post-conviction relief hearing. You claim that the written transcripts of the hearing have been "altered, Deleted [sic], and the requested witness testimonies have been omitted in parts." You claim that you have no other way of obtaining the records you requested other than by listening to the original recordings of the testimonies.

My office forwarded a copy of your complaint to the Court. In response, Judge Mark D. Stoner states that the Court does not possess any of the records you seek. He notes that you were tried in Criminal Division Room Five rather than Judge Stoner's Room Six, and that the court reporter in Room Five should have possession and control over such records. He further states that the Court responded to your requests with two separate orders denying them. Finally, he argues that the Court is not obligated to transfer you from a secured facility in the Department of Correction so that you may listen to a record that is not in the Court's possession.

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 Court 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 Court’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, Judge Stoner claims that the records you requested are maintained by another court. 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....”). It is my opinion that the Court did not violate the APRA by denying your request for records that the Court does not have.

I also agree with Judge Stoner’s argument that the APRA does not require a public agency to make special arrangements with the Department of Correction to allow an incarcerated individual to inspect public records in person. Counselor Hurst set a precedent for such a rule in a 2004 opinion issued under similar circumstances:

Circumstances may exist where physical inspection of a record is not practical or even possible, and reasonable access can only be accomplished through production of a copy of the record. Such is the case here. As an incarcerated offender, it is not possible for you to appear at a public agency during its normal business hours and inspect the records of that agency. See I.C. §5-14-3-3(a). Your status is no less significant when seeking to inspect the records of the facility where you are incarcerated.”

Opinion of the Public Access Counselor 04-FC-43. Counselor Hurst added that “it was not unreasonable and not a violation of the APRA for the Department and the [agency] to require that your access to public records of that institution be limited to having the Department provide you with copies of any non-confidential public records responsive to your request.” I trust that upon receipt of a request for copies and payment for applicable copy fees and postage, the appropriate agency will fulfill your request.

CONCLUSION

For the foregoing reasons, it is my opinion that the Court did not violate 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: Hon. Mark D. Stoner