



# STATE OF INDIANA

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March 18, 2010

Mr. Tyrone Frazier  
One Park Row  
Michigan City, IN 46360

*Re: Formal Complaint 10-FC-68; Alleged Violation of the Access to Public Records Act by the Marion County Prosecutor's Office*

Dear Mr. Frazier:

This advisory opinion is in response to your formal complaint alleging the Marion County Prosecutor's Office ("Prosecutor") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*, by denying you access to public records. For the following reasons, my opinion is that the Prosecutor did not violate the APRA. I note that I have granted your request for priority status under 62 Ind. Admin. Code 1-1-3(3).

## BACKGROUND

According to your complaint, you allege that the Prosecutor failed to respond to your request for a complete copy of the Prosecutor's file in Cause No. A1587-00822.

The Prosecutor's chief of staff, Jennifer Haley, responded to your complaint on behalf of the Prosecutor. Her response is enclosed for your review. Ms. Haley maintains that the Prosecutor never received your request. In any event, Ms. Haley located the file under the cause number you provided and found no search warrant and affidavit in the file.

## ANALYSIS

The public policy of the APRA states, "[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." I.C. § 5-14-3-1. The Prosecutor is 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 Prosecutor's public records during regular business hours unless the public records are exempt from

disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

A request for records may be oral or written. I.C. §5-14-3-3(a); §5-14-3-9(c). 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. I.C. §5-14-3-9(b). 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.

Thus, if the Prosecutor received your request, it had a duty under the APRA to respond within seven days of receipt. I.C. § 5-14-3-9(b). Here, however, the Prosecutor claims it did not receive your request. 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 Prosecutor did not receive your request, it did not violate the APRA by not responding to you. *See Opinion of the Public Access Counselor 09-FC-44; 10-FC-12.*

Moreover, the Prosecutor did not violate the APRA by failing to produce a record that the Prosecutor does not have. 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....”).

#### CONCLUSION

For the foregoing reasons, it is my opinion that the Prosecutor did not violate the APRA.

Best regards,



Andrew J. Kossack  
Public Access Counselor

Cc: Jennifer Haley, Chief of Staff, Marion County Prosecutor