



STATE OF INDIANA

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February 14, 2011

Mr. David M. Burks-Bey
5501 S. 1100 W.
Westville, IN 46391

*Re: Formal Complaint 11-FC-25; Alleged Violation of the Access to
Public Records Act by the Tippecanoe County Clerk*

Dear Mr. Burks-Bey:

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

BACKGROUND

In your complaint, you allege that the Clerk violated the APRA by denying your request for a copy of the "Civil Filing Fee (i.e., Motion to Proceed In Forma Pauperis)." In response to your complaint, the Clerk's attorney, Douglas J. Masson, states that the Clerk's office received your request on January 3, 2011. This was during a time of transition from one county clerk to the newly-elected county clerk. Mr. Masson notes that you were not yet due a response when you submitted your formal complaint on January 7th. Nevertheless, due to the transition period, the Clerk's office inadvertently neglected to send you a response. However, Mr. Masson states that the Clerk's office has searched its records for those you requested and confirmed that no responsive documents exist.

ANALYSIS

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). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. I.C. §5-14-3-9(a). 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. Mr. Masson states that the Clerk received your request on January 3rd. Under the APRA, the Clerk had until January 10th to respond. You filed your complaint on January 7th, which was prior to the expiration of the Clerk's statutory response period. In the future, I would encourage you to wait until the expiration of the statutory response period before filing a complaint with this office.

If, however, the Clerk ultimately failed to respond to your request within seven days of receiving it, the APRA deems your request denied. 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 must 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. I.C. § 5-14-3-9(c). Thus, the Clerk's failure to deny your request in accordance with subsection 9(c) violated the APRA. I trust that such error was inadvertent and due to the confusion that is inevitably associated with transitions between elected officials' staff and offices.

Moreover, the substance of the Clerk's denial does not appear to be contrary to the APRA. If the Clerk has no records responsive to your records request, the Clerk did not violate the APRA by denying it. "[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 Clerk should have responded to your written request within seven days. The Clerk did not otherwise violate the APRA.

Best regards,



Andrew J. Kossack
Public Access Counselor

Cc: Douglas J. Masson