



STATE OF INDIANA

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April 26, 2012

Cary L. Malchow
1800 N. Wheeling Avenue
Muncie, Indiana 47303

Re: Formal Complaint 12-FC-109; Alleged Violation of the Access to Public Records Act by the Delaware County Clerk's Office

Dear Mr. Malchow:

This advisory opinion is in response to your formal complaint alleging the Delaware County Clerk's Office ("Clerk") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Steven Craycraft, Clerk of the Circuit Court for Delaware County, responded to your formal complaint. His response is enclosed for your reference. I have granted your request priority status pursuant to 62 Indiana Administrative Code 1-1-3.

BACKGROUND

In your formal complaint, you allege that you submitted a request to the Clerk on April 12, 2012 for the list of absentee ballot applications. The Clerk provided all records responsive to your request on April 13, 2012. Thereafter on April 19, 2012, you submitted an identical request to the Clerk; you allege that your request was denied by Steve Craycraft as you had already been provided with that information and that his staff did not have time to handle the request.

In response to your formal complaint, Mr. Craycraft advised that the Clerk received your written request on April 12, 2012 for voter records that specifically cited I.C. § 3-7-27-6. The Clerk cannot provide you with the requested voter information because the Clerk does not oversee the Voter Registration Office in Delaware County. Delaware County is one of the few counties in the State that the Clerk of the Circuit Court does not oversee the County Voter Registration Office. In light of this factor, it is improper for someone to request voter records from the Clerk or for the Clerk to distribute voter records, as the Voter Registration Office is a separate agency. Even after being advised by the Clerk and Public Access Counselor's Office in the past regarding the proper office in Delaware County to submit your request for voter information, you still continue to file your requests with the Clerk.

Upon receiving your initial request, the Clerk's election room staff went beyond the requirements of the APRA and attempted to assist you. It has been a practice in the election room that each Deputy Inspection Clerk handwrites the name of each voter whose absentee application is received and worked by them. The reason for this was due to accountability concerns if an issue ever arose. Upon receiving your initial request, the Clerk allowed the election room employees to make a copy of the names that they had handwritten and provided the information to you.

After you were given this information, the Clerk informed the Election Room staff that its only duty was to process absentee ballots and to allow voters to vote early. You informed the staff that all voter information should be obtained from the County Voter Registration Office. There is no state law that requires a handwritten list to be created regarding absentee ballots.

Upon receiving your second request, you were directed to the Voter Registration Office, who maintained the records that were responsive to your request. You were also informed that there was no legal requirement for the Clerk to create a list of absentee voters.

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

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). 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. *See* I.C. § 5-14-3-9(b). 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 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. *See* I.C. § 5-14-3-9(c). 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. Here, the Clerk responded to your request within the requirements of section 9 of the APRA.

Generally, 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



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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....”). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. See *Opinion of the Public Access Counselor 10-FC-56*. The Clerk has provided that it did not have any records that were responsive to your request, other than what was already provided. Further, the Clerk advised you that the Voter Registration Board would be the appropriate agency to submit your request. The APRA requires a public agency to provide one copy of a disclosable public record but does not require an agency to provide additional copies or to repeatedly provide copies of a particular record. See I.C. § 5-14-3-8(e). A public agency is not required to provide duplicative copies of the same record. See *Opinions of the Public Access Counselor 07-FC-19*; *08-FC-75*; and *08-FC-259*. As the Clerk had already provided you with an identical copy of the absentee voter list on April 13, 2012 and that the Voter Registration Board was the appropriate agency to submit your request, it is my opinion that the Clerk did not violate the APRA. I encourage you to submit your request to the Delaware County Voter Registration Board who would be required to respond pursuant to the requirements of the APRA.

CONCLUSION

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

Best regards,

A handwritten signature in black ink that reads "J. Hoage".

Joseph B. Hoage
Public Access Counselor

cc: Steven G. Craycraft