



# STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

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July 18, 2012

Keith Ware  
DOC 5265  
One Park Row  
Michigan City, Indiana 46360

*Re: Formal Complaint 12-FC-196; Alleged Violation of the Access to Public Records Act by the Indiana Commission on Public Records*

Dear Mr. Ware:

This advisory opinion is in response to your formal complaint alleging the Indiana Commission on Public Records ("Commission") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Ted Cotterill, Deputy Director, responded on behalf of the Commission. His response is enclosed for your reference.

## BACKGROUND

In your formal complaint, you allege that you submitted a written request for records to the Commission on June 22, 2012 and June 25, 2012. As of July 12, 2012, the date you filed your formal complaint with the Public Access Counselor's Office, you further allege that the Commission has failed to respond to your request.

In response to your formal complaint, Mr. Cotterill advised that the requests you submitted to the Commission were sent to an incorrect address. The requests were eventually hand-delivered to the Commission, who at that time made immediate contact with the Indiana State Archives Divisions and the Lake County Clerk's Office to determine if there were any records that were responsive to your request. Mr. Cotterill has provided that the State Archives Division does not maintain any records that are responsive to your request. The Commission cannot provide any response as to the availability of records maintained by the Lake County Clerk's Office.

## 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 Commission 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 Commission'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 (emphasis added). *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 Commission has provided the both requests that you submitted were sent to an incorrect address. After the requests were hand-delivered to the Commission, it immediately began the process of searching through its records to determine if it maintained any records that were responsive to it. The seven-day time period for the Commission to respond to your request pursuant to I.C. § 5-14-3-9(b) did not commence until the date the Commission received your request; not the date you placed the request in the mail. As such, if the Commission did not respond in writing to your written request within seven (7) days of its receipt, it is my opinion that it acted contrary to section 9 of the APRA.

As to the substance of your request, the Commission has determined it has no records that are responsive to it. Generally, if a public agency has no records responsive to a public records request, the agency generally 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...."). 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*. As such, it is my opinion that the Commission did not violate the APRA by failing to produce records it was not legally obligated to maintain.



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## CONCLUSION

For the foregoing reasons, it is my opinion that if the Commission failed to respond in writing to your written requests within seven (7) days of its receipt, it acted contrary to the requirements of the APRA. As to all other issues, it is my opinion that the Commission did not violate the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage", written in a cursive style.

Joseph B. Hoage  
Public Access Counselor

cc: Ted Cotterill