



# STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR  
JOSEPH B. HOAGE

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](http://www.IN.gov/pac)

September 12, 2012

Termaine D. Chapman  
DOC 892147  
4490 W. Reformatory Road  
Pendleton, Indiana 46064

*Re: Formal Complaint 12-FC-259; Alleged Violation of the Access to Public Records Act by the Allen County Prosecutor's Office*

Dear Mr. Chapman:

This advisory opinion is in response to your formal complaint alleging the Allen County Prosecutor's Office ("Prosecutor") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* David H. McClamrock, Deputy Prosecuting Attorney, responded on behalf of the Prosecutor. His response is enclosed for your reference.

## BACKGROUND

In your formal complaint, you allege that on August 2, 2012 you submitted a written request to the Prosecutor for a copy of various records relating to your criminal proceeding. The Prosecutor responded in writing to your request and provided that some of the records you had requested had already been provided to you as noted by the submissions that accompanied your request; to the extent you sought investigative records of a law enforcement agency, your request was denied; the Prosecutor did not maintain a "detective disclosure memo"; and certain exhibits that you requested were in the possession of the Records Department of the Clerk of the Indiana Supreme Court. Further, the records the Prosecutor did maintain that were responsive to your request would be provided upon receipt of payment. The Prosecutor advised you may possibly avoid such fees by directing your request to the attorney that represented you in the criminal proceeding. You allege the Prosecutor violated the APRA by failing to cite to a specific statutory code to deny your request and by attempting to collect a fee prior to producing any records that were responsive to your request.

In response to your formal complaint, Mr. McClamrock advised that the Prosecutor declined to provide you with copies of records to which you have already been given a copy. The Prosecutor does not maintain a "detective disclosure memo" in your file. The APRA clearly provides that a public agency may collect a fee, in advance,

prior to producing any records in response to a records request. Lastly, the Prosecutor denied your request pursuant to the investigative records exception found under I.C. § 5-14-3-4(b)(1).

## 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 Prosecutor 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 Prosecutor’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 twenty-four 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 days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA a public agency denying access in response to a written public records request must put the denial in writing and include the following information: (a) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and (b) the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). After reviewing the Prosecutor’s response to your request for records, although it is quite evident that the Prosecutor, in part, was denying your request pursuant to the investigative records exception, the Prosecutor did not provide the corresponding statutory citation, that being I.C. § 5-14-3-4(b)(1). As such, the Prosecutor acted contrary to the requirements of Section 9 of the APRA in denying your request, a technical deficiency that it clearly rectified in the agency’s response to your formal complaint.

As to the substance of your complaint, 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). Our office has issued multiple opinions that have provided that 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; 08-FC-259; 12-FC-208*. As such, it is my opinion that the Prosecutor did not violate the APRA by failing to provide you with multiple copies of a record you had already been given a copy of.

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



# STATE OF INDIANA

**MITCHELL E. DANIELS, JR., Governor**

**PUBLIC ACCESS COUNSELOR  
JOSEPH B. HOAGE**

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](http://www.IN.gov/pac)

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*. In response to your request, the Prosecutor provided that it did not maintain a “detective disclosure memo” and that certain exhibits you sought were maintained by the Records Department of the Clerk of the Indiana Supreme Court. Accordingly, it is my opinion that the Prosecutor did not violate the APRA by failing to produce records that it did not maintain.

The APRA provides that a law enforcement agency retains the discretion to disclose its investigatory records. An investigatory record is defined as “information compiled in the course of the investigation of a crime.” *See* I.C. § 5-14-3-2(h). The investigatory records exception does not apply only to records of ongoing or current investigations; rather, it applies regardless of whether a crime was charged or even committed. The exception applies to all records compiled during the course of the investigation, even after an investigation has been completed. The investigatory records exception affords law enforcement agencies broad discretion in withholding such records. *See Opinion of the Public Access Counselor 09-FC-157*. “Generally, a police report or incident report is an investigatory record and as such may be excepted from disclosure pursuant to I.C. § 5-14-3-4(b)(1).” *Id.* To the extent that you sought investigatory records of the Prosecutor, it is my opinion that it would not have violated the APRA by exercising its discretion and denying your request pursuant to I.C. § 5-14-3-4(b)(1).

The APRA permits a public agency to charge a fee for copies of public records. *See* I.C. § 5-14-3-8. Public agencies may require a person to pay the copying fee in advance. *See* I.C. § 5-14-3-8(e). Nothing in the APRA requires that a public agency waive a copying fee. *See Opinion of the Public Access Counselor 07-FC-124*. As such, it is my opinion that the Prosecutor did not violate the APRA by denying your request for failure to pay the respective copying fees or when it declined your request to waive any applicable fees.

## CONCLUSION

For the foregoing reasons, it is my opinion that the Prosecutor acted contrary to section 9 of the APRA by procedurally failing to cite to the statutory citation in denying your request. As to the substance of your request, it is my opinion that the Prosecutor did not violate the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

Joseph B. Hoage  
Public Access Counselor

cc: David H. McClamrock