



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

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September 21, 2012

Mr. Randall S. Tison
DOC 127788
P.O. Box 1111
Carlisle, Indiana 47838

Re: Formal Complaint 12-FC-275; Alleged Violation of the Access to Public Records Act by the Vanderburgh County Prosecutor's Office

Dear Mr. Tison:

This advisory opinion is in response to your formal complaint alleging the Vanderburgh County Prosecutor's Office ("Prosecutor") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Nicholas Hermann, Prosecuting Attorney, responded in writing to your formal complaint. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that you submitted a written request for records to the Prosecutor on or about August 23, 2012. As of September 14, 2012, the date you filed your formal complaint with the Public Access Counselor's Office, you further allege that the Prosecutor has failed to respond to your request in any fashion.

In response to your formal complaint, Mr. Hermann advised that if the Prosecutor did receive your original request, it did not knowingly ignore it. Regardless, the Prosecutor does not maintain any records that are responsive to your request and any/all records maintained by the Prosecutor regarding your criminal proceeding have been provided to your counsel pursuant to a standard discovery motion.

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 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.

As previous Public Access Counselor's have provided, the Public Access Counselor is not a finder of fact. *See Opinion of the Public Access Counselor 10-FC-15*. Consequently, I express no opinion as to whether the Prosecutor received your request. Under the APRA, if a 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). A public agency may deny a request if: (1) the denial is in writing or by facsimile; and (2) the denial includes: (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 the title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). If the Prosecutor received your request and did not respond to it within these timeframes, the Prosecutor acted contrary to the APRA. However, if the Prosecutor did not receive your request, it was not obligated to respond to it.

As provided in the Prosecutor's response, it does not maintain any records that are responsive to your request. 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, the Prosecutor would not violate the APRA by failing to produce records that it did not maintain.



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CONCLUSION

For the foregoing reasons, it is my opinion that the Prosecutor did not violate the APRA if it never received your request. Further, it is my opinion that the Prosecutor did not violate the APRA by failing to produce a record that it did not maintain.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage".

Joseph B. Hoage
Public Access Counselor

cc: Nicholas Hermann