



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

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December 17, 2012

Mr. LaMarr T. Crittenden
DOC 148648
3038 West 850 South
Bunker Hill, Indiana 46914

Re: Formal Complaint 12-FC-355; Alleged Violation of the Access to Public Records Act by the Marion County Public Defender

Dear Mr. Crittenden:

This advisory opinion is in response to your formal complaint alleging the Marion County Public Defender ("Public Defender") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Ann M. Sutton, Chief Counsel, responded on behalf of the Public Defender. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that you submitted a written request for records to the Public Defender on or about June 21, 2012. On July 3, 2012, the Public Defender responded in writing to your request and acknowledged its receipt. As of December 10, 2012, the date you filed your formal complaint with the Public Access Counselor's Office, you further provide that you have yet to receive any records in response to your request. On November 12, 2012, you submitted an identical request to the Public Defender, to which you have yet to receive a response.

In response to your formal complaint, Ms. Sutton advised that the Public Defender received your request for records on June 23, 2012, to which the agency acknowledged the receipt of the request in writing on July 3, 2012. Since the receipt of your request, the Public Defender has conducted a thorough search for your file. The agency has finally located the file, in offsite storage, which is expected to arrive within the next week. Ms. Sutton noted that the information you are seeking is not information typically maintained by the Public Defender, as the agency's contract attorneys are paid by an annual contract and expenses are not typical. The Public Defender did receive your subsequent request on November 7, 2012 but did not respond directly to your request as Ms. Sutton was hoping to have a final answer to your original, identical request.

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 Public Defender 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 Public Defender’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.

Effective July 1, 2012, the APRA provides a public agency shall provide records that are responsive to the request within a reasonable time. *See* I.C. § 5-14-3-3(b). The public access counselor has stated that factors to be considered to be considered in determining if the requirements of section 3(a) under the APRA have been met include, the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. The APRA requires an agency to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. *See* I.C. § 5-14-3-6(a). Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. *See* I.C. § 5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. *See* I.C. § 5-14-3-7(c). The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *See Opinion of the Public Access Counselor 02-FC-45*. This office has often suggested a public agency make portions of a response available from time to time when a large number of documents are being reviewed for disclosure. *See Opinions of the Public Access Counselor 06-FC-184; 08-FC-56; 11-FC-172*. Further nothing in the APRA indicates that a public agency’s failure to provide “instant access” to the requested records constitutes a denial of access. *See Opinions of the Public Access Counselor 09-FC-192 and 10-FC-121*.



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Here, the Public Defender has noted that upon receipt of your request, it undertook an exhaustive search for any and all records that would be responsive. Ultimately, your file was located in offsite storage, to which the Public Defender expects to receive within the next week. The Public Defender advised that the records you seek are not typically maintained by the agency. In addition to responding to your request and all other requests for records submitted to the agency, the Public Defender is required to maintain its normal duties and responsibilities. In light of all of these factors, with special emphasis that the Public Defender expects to receive your file within the next week, it is my opinion that the Public Defender complied with the requirements of section 3(b) of the APRA in response to your request. I would also note that 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.* If the contents of your file do not contain a billing statement of expenses accrued by your attorney, the Public Defender would not violate the APRA by failing to produce a record that it does not maintain nor would the APRA require the agency to create a record in response to your request.

CONCLUSION

For the foregoing reasons, it is my opinion that the Public Defender 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: Ann M. Sutton