



# STATE OF INDIANA

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March 18, 2013

Mr. Michael L. Felts  
303 Hendricks Street  
Andrews, Indiana 46702

*Re: Formal Complaint 13-FC-57; Alleged Violation of the Access to Public Records Act by the Andrews Town Clerk*

Dear Mr. Felts:

This advisory opinion is in response to your formal complaint alleging the Andrews Town Clerk ("Clerk") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Our office forwarded a copy of your formal complaint to the Clerk on February 18, 2013. The Clerk's response was due no later than March 13, 2013. As of today's date, we have yet to receive a response from the Clerk.

## BACKGROUND

In your formal complaint, you allege that you have made three attempts to acquire a copy of Town Ordinance 1998-1 ("Ordinance"). You provide that your first request was met with a delay, in response to your second request you were provided with copies of other previously requested ordinances, and upon your third attempt you were informed that the Ordinance could not be found.

## 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 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). 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. 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).

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 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....”). However, the APRA requires public agencies to maintain and preserve public records in accordance with applicable retention schedules. *See* I.C. § 5-14-3-4(h). A public agency shall protect public records from loss, alteration, mutilation, or destruction. *See* I.C. § 5-14-3-7(a). A public agency shall further take precautions that protect the contents of public records from unauthorized access, unauthorized access by electronic device, or alteration. *See* I.C. § 5-14-3-7(b). Pursuant to General County/Local Retention Scheduled adopted by the Indiana Commission on Public Records, GEN 10-6 provides that Ordinances must be permanently retained. A copy of the applicable retention schedule can be found at [http://www.in.gov/icpr/files/county\\_general.pdf](http://www.in.gov/icpr/files/county_general.pdf). Here, you requested a copy of the Ordinance, to which the Clerk ultimately provided that it was unable to locate. Accordingly, it is my opinion that the Clerk acted contrary to sections 4(h) and 7(a) of the APRA by failing to retain the requested Ordinance pursuant to the applicable retention schedule.

#### CONCLUSION

Based on the foregoing reasons, it is my opinion that the Clerk acted contrary to sections 4(h) and 7(a) of the APRA by failing to retain the requested Ordinance pursuant to the applicable retention schedule.

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: Andrews Town Clerk