



STATE OF INDIANA

MICHAEL R. PENCE, Governor

**PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE**

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317) 234-0906
Fax: (317) 233-3091
1-800-228-6013
www.IN.gov/pac

May 29, 2013

Mr. Billy Love
DOC # 891340
One Park Row
Michigan City, Indiana 46360

Re: Formal Complaint 13-FC-153; Alleged Violation of the Access to Public Records Act by the Elkhart County Clerk

Dear Mr. Love:

This advisory opinion is in response to your formal complaint alleging the Elkhart County Clerk ("Clerk") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Wendy Hudson, Clerk of the Circuit Court, responded in writing to your formal complaint. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that you submitted a written request for records to the Clerk on or about April 12, 2013. As of May 23, 2013, the date you filed your formal complaint with the Public Access Counselor's Office, you further allege that the Clerk has failed to respond to your request in any fashion.

In response to your formal complaint, Ms. Hudson advised that the records you had requested are not maintained by the Clerk. From Ms. Hudson's understanding, the records are maintained by the Indiana Secretary of State. Your request was never received by the Clerk as it was filed with the City of Elkhart's Legal Department and never forwarded. Immediately upon being made aware of your request, Ms. Hudson responded in writing.

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 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). 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.

The Clerk maintains that it did not receive a request from you. 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 or not Clerk 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 Clerk received your request and did not respond to it within these timeframes, the Clerk acted contrary to the APRA. However, if the Clerk did not receive your request, it was not obligated to respond to it.

Immediately upon being made aware of your request, the Clerk responded in writing and advised that it did not maintain any records responsive to your request and that it was likely the records would be kept by the Indiana Secretary of State. 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....”). 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 Clerk did not violate the APRA by failing to produce a record that it did not maintain. As you are now aware the records sought are maintained by the Indiana Secretary of State, I would encourage you to file a written request with the Secretary so that the records can be retrieved and provided.



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CONCLUSION

For the foregoing reasons, it is my opinion that the Clerk did not violate the APRA if it never received your request. Further, it is my opinion that the Clerk 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", written in a cursive style.

Joseph B. Hoage
Public Access Counselor

cc: Wendy Hudson