



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
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June 3, 2010

Mr. Peter L. Morgan
Wruble & Morgan
315 N. Main St.
South Bend, IN 46601

Re: Informal Inquiry 10-INF-25; Unanswered Public Records Requests

Dear Mr. Morgan:

This is in response to your informal inquiry regarding public records requests that you sent to the Wabash Valley Correctional Facility (the "Facility"), the Indiana State Police (the "Police"), and the Prosecuting Attorney for the 14th Judicial Circuit (the "Prosecutor"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response to your inquiry. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), Ind. Code § 5-14-1.5-1 *et seq.* For purposes of this opinion, I accept the factual allegations in your inquiry as true. However, I note that the public access counselor is not a finder of fact and, as such, I express no opinion regarding the substance of the factual allegations themselves.

In your inquiry, you allege that you submitted requests for access to public records to the Prosecutor on April 30, 2010, and to the Facility and the Police on May 4, 2010. As of the date of your inquiry -- May 20, 2010 -- you received no response from any of the agencies. Under the APRA, a request for records may be oral or written. 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. 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. Thus, if the aforementioned agencies failed to respond to your written request within the required seven (7) days, they violated the APRA.

As to the substance of your request, I cannot opine regarding whether or not the agencies must provide you with access to the records you requested because I have no information regarding whether the agencies maintain responsive records and, if so, whether any exceptions to the APRA apply to permit or require the agencies to withhold them. I note that under the APRA, a "request for inspection or copying must: (1) identify

with reasonable particularity the record being requested; and (2) be, at the discretion of the agency, in writing on or in a form provided by the agency.” I.C. § 5-14-3-3(a). If the agencies cannot identify what records you are seeking in your request, they act in accordance with the APRA by requesting clarification. Even an ambiguous request, however, would not relieve an agency of its duty to respond to your request within seven (7) days. I also note that 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....”).

Assuming the agencies maintain responsive records, I encourage them to either produce the requested records to you or to cite an applicable exception to the APRA that provides them with the legal authority to withhold the requested records. If any or all of the agencies persist in denying you access following the issuance of an advisory opinion from this office, I leave you to your remedies before a court pursuant to Ind. Code § 5-14-3-9(e).

If I can be of any additional assistance, please do not hesitate to contact me.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive style with a large, stylized initial "A".

Andrew J. Kossack
Public Access Counselor