



STATE OF INDIANA

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March 14, 2011

Mr. Michael J. Shepard
4724 Penfold Street
Evansville, IN 47725

Re: Formal Complaint 11-FC-51; Alleged Violation of the Access to Public Records Act by the Clerk of the Vanderburgh Circuit and Superior Courts

Dear Mr. Shepard:

This advisory opinion is in response to your formal complaint alleging the Clerk of the Vanderburgh Circuit and Superior Courts (the "Clerk") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-3 *et seq.* The Clerk's response to your complaint is enclosed for your reference.

BACKGROUND

Initially, I note that you previously filed two complaints against the Clerk in *Op. of the Public Access Counselor 11-FC-46* and *10-FC-213*. In this latest complaint, you claim that the Clerk violated the APRA by denying you a copy of a court order to appear dated February 12, 2010; a court's clarification of sentencing dated April 22, 2010; an Indiana Department of Correction ("DOC") transition program sheet submitted November 4, 2010; Judge Knights [sic] October 21, 2010, recusal order; and Judge Pigman's October 22, 2010, reassignment order. You submitted your request for these records on January 9, 2011, but had received neither an acknowledgment of your request nor the records as of February 9th.

In response to your complaint, the Clerk copied our office on a February 14, 2011, letter to you. With that letter, the Clerk enclosed copies of your Notice of Appeal from Trial Court dated February 12, 2010, and the Findings and Order Denying Community Transition Program dated November 10, 2010. The Clerk states that her office was not aware that the records had been received because they were originally filed with the relevant courts and the Clerk's office does not receive notice of such filings. The Clerk has no other records responsive to your request.

ANALYSIS

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). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. I.C. § 5-14-3-9(a). 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. Here, the Clerk does not dispute that she did not respond to your request in accordance with these timeframes. 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 must 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. I.C. § 5-14-3-9(c). Consequently, if the Clerk failed to deny your request in accordance with subsection 9(c), the Clerk violated the APRA.

The Clerk claims that she has now provided you with a copy of all requested court records that the Clerk maintains. If the Clerk has no other records responsive to your request, the Clerk did not violate the APRA by failing to provide other documents. “[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....”).

CONCLUSION

For the foregoing reasons, if the Clerk failed to respond to your written request within seven days of receiving it, the Clerk violated the APRA. The Clerk did not otherwise violate the APRA if the Clerk provided you with all responsive records that the Clerk maintains.

Best regards,



Andrew J. Kossack
Public Access Counselor

Cc: Susan K. Kirk