



# STATE OF INDIANA

**MICHAEL R. PENCE, Governor**

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February 19, 2016

Mr. Jeffrey Zbyrowski - #254714  
New Castle Correctional Facility  
P.O. Box A  
New Castle, Indiana 47362

*Re: Formal Complaint 16-FC-38; (Priority): Alleged Violation of the Open Door Law by the Porter County Prosecutor's Office, Ms. Cheryl Polarek*

Dear Mr. Zbyrowski:

This advisory opinion is in response to your formal complaint alleging the Porter County Prosecutor's Office ("Office") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 et. seq. The Office has responded via Mr. T. Matthew Frost, Esq., Chief Deputy Prosecutor. His response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on February 17, 2016.

## **BACKGROUND**

Your complaint dated December 21, 2015 alleges the Porter County Prosecutor's Office violated the Access to Public Records Act by failing to respond or acknowledge your records request.

On November 9, 2015, you requested a copy of the complete file 61D01-1311-MC-10346. As of the filing of your complaint, you had not received a response.

On February 19, 2016 the Office responded. The Office note it does not possess "MC" cause files. These "Miscellaneous Criminal" files would be maintained by the Porter County Clerk. In his response, Chief Deputy Prosecutor Frost has indicated the Office has provided you with a copy of the Affidavit for Search Warrant under cause number 64D01-1311-MC-10346 on December 28, 2015. Additionally, he mentions that the Affidavit for Search Warrant was contained in their file numbered 64D02-1311-FB-10121 and was provided to you when you requested records related to that particular file. Mr. Frost contends you have been provided with the entirety of their records related to cause number 64D01-1311-MC-10346.

## 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 Ind. Code § 5-14-3-1. The Porter County Prosecutor’s Office is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the Office’s disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14- 3-3(a).

A request for records may be oral or written. See Ind. Code § 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 Ind. Code § 5-14-3-9(b). A response from the public agency could be an acknowledgement the request has been received and information regarding how or when the agency intends to comply.

Under the APRA, an agency is not required to provide records it does not possess. The Office has stated it does not possess Miscellaneous Criminal files. Therefore, the Office is not required to provide the records.

However, there is still a question as to *why* the Office did not respond to your complaint. In this case, it is likely the Office did not receive your request for records. However, this office is not a finder of fact and cannot determine whether your request was in fact received. If the Office did not receive your request, it is not required to respond. If the Office did receive your request, it has violated the APRA by failing to respond.

Regards,

A handwritten signature in black ink, appearing to read 'LH Britt', with a long, sweeping underline.

Luke H. Britt  
Public Access Counselor

Cc: Mr. T. Matthew Frost, Esq.