

December 8, 2012

**OFFICIAL OPINION 2012-5**

The Honorable Scott Pelath  
Indiana House of Representatives  
200 West Washington St.  
Indianapolis, IN 46204

**RE: Inclusion or exclusion of Indiana State Prison inmates when calculating population for purposes of city council districts**

Dear Representative Pelath:

You requested an opinion from our office regarding the apportionment of Michigan City common council districts. Specifically, you asked whether Indiana law permits Michigan City to exclude individuals incarcerated in the Indiana State Prison from the city’s population for the purpose of geographic ward reapportionment. We have reviewed the applicable statutes and authorities in this regard and have concluded that such exclusion is not permitted.

**BRIEF ANSWER**

Currently applicable state statutes and federal census rules require prison inmates to be counted in the geographic location where they are incarcerated. Ind. Code § 36-4-6-3 requires that members of the legislative bodies or common councils for second-class cities must be selected from districts that “contain, as nearly as possible, equal population.” Ind. Code § 1-1-3.5-3 provides in this context that for purposes of statutes relating to drawing boundaries for political subdivision districts, population references are determined based on the most recent federal decennial census. The U.S. Census Bureau has adopted a *Residence Rule and Residence Situations for the 2010 Census* to determine where individuals residing or placed in various situations and contexts will be counted for census purposes, and the rule provides that individuals in correctional residential facilities, local jails, and other municipal confinement facilities were counted at those prisons, jails and facilities. Therefore, under current law Michigan City cannot exclude inmates from population totals when determining equally populated common council districts.

**ANALYSIS**

Ind. Code § 1-1-3.5-3 provides, in relevant part:

**IC 1-1-3.5-3**

**Use of census data in Indiana statutes**

Sec. 3.

...

(b) For purposes of statutes relating to drawing boundaries of county districts, county fiscal body districts, municipal legislative body districts, or the districts of any other

political subdivision, a reference to population is a reference to population as determined by the most recent of the following:

- (1) Federal decennial census.
- (2) Federal special census.
- (3) Special tabulation.
- (4) Corrected population count.

...  
...

Michigan City is a second-class city pursuant to Ind. Code § 36-4-1-1. Ind. Code § 36-4-6-3(b) provides that in second-class cities, the city council (the “legislative body” of the city districts) shall:

adopt an ordinance to divide the city into six (6) districts<sup>1</sup> that:

- (1) are composed of contiguous territory, except for territory that is not contiguous to any other part of the city;
- (2) are reasonably compact;
- (3) do not cross precinct boundary lines, except as provided in subsection (c) or (d); and
- (4) contain, as nearly as is possible, *equal population*.

(Emphasis added.)

The most recent federal decennial census was taken in 2010. The United States Census Bureau adopted a rule for purposes of determining where various individuals would be counted for purposes of census figures. Specifically entitled the *Residence Rule and Residence Situations for the 2010 Census*,<sup>2</sup> the rule address various unique or potentially ambiguous or unclear residence or count scenarios for purposes of explaining the methodology utilized in determining how various individuals were counted. For example, the rule addresses how the Census Bureau counted students, military personnel, people in health care facilities, people in shelters, and people in transitory locations such as RV parks, campgrounds, and marinas, among other categories. Specific to this analysis, the rule addresses situations involving adult individuals in correctional facilities. Section 16 of the rule provided the following:

## **16. PEOPLE IN CORRECTIONAL FACILITIES FOR ADULTS**

**People in correctional residential facilities on Thursday, April 1, 2010 (Census Day)**  
– Counted at the facility.

**People in federal detention centers on Thursday, April 1, 2010 (Census Day)** – Counted at the facility.

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<sup>1</sup> Additionally, Ind. Code § 36-4-6-3(h) provides that the “legislative body is composed of six (6) members elected from the districts established under subsection (b) and three (3) at-large members.”, but the boundaries for the 6 districts based on population parameters are the focus of the analysis in this opinion.

<sup>2</sup> Available at [http://www.census.gov/population/www/cen2010/resid\\_rules/resid\\_rules.html](http://www.census.gov/population/www/cen2010/resid_rules/resid_rules.html). (Last visited December 27, 2012.)

**People in federal and state prisons on Thursday, April 1, 2010 (Census Day) – Counted at the facility.**

**People in local jails and other municipal confinement facilities on Thursday, April 1, 2010 (Census Day) – Counted at the facility.**

As noted, individuals in state prisons were counted as part of the population at the facility in which they were incarcerated, so individuals incarcerated at the Michigan City state prison would have been included within the Indiana, LaPorte County, and Michigan City population totals. More particularly, based on the rule they were included within what at the time was common council Ward #3, where the prison is located. Therefore, based on the directive in Ind. Code § 1-1-3.5-3(b), those population totals must be considered when council or ward district boundaries are redrawn and in calculating, as nearly as possible equal population.

We understand that other states have taken different approaches than what Indiana law currently provides and have specifically addressed the prison inmate question to require that inmates be counted in their home communities or at their last known permanent address.<sup>3</sup> Additionally, we are aware of recent legislative efforts<sup>4</sup> to amend Ind. Code § 1-1-3.5-3 to provide a process for adjusting the census bureau's population count by classifying an incarcerated or lawfully detained person as a resident of the person's last known address before incarceration or lawful detention. However, based on currently applicable statutory provisions, incarcerated persons must be counted based on the census totals and as such cannot be excluded from city council district population decisions.

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<sup>3</sup> See, for example, *Perez v. Texas*, 2011 WL 9160142 (W.D. Tex., September 2, 2011) (citing Tex. Elec. Code Ann. § 1.015(e) and Tex. Const. Art. III § 26); *Little v. LATFOR*, New York State Supreme Court, Albany County, Index No. 2310-2011; and *Fletcher v. Lamone*, 133 S.Ct. 29 (U.S. 2012), affirming judgment in *Fletcher v. Lamone*, 831 F.Supp.2d. 887 (D.Md. 2011)

<sup>4</sup> House Bill No. 1459 was introduced by Rep. Charlie Brown in the 2011 session of the Indiana General Assembly. The bill was assigned to the Committee on Elections and Apportionment but did not advance out of committee. The text of HB 1459 is available at <http://www.in.gov/apps/lisa/session/billwatch/billinfo?year=2011&session=1&request=getBill&doctype=HB&docno+1459>.

## CONCLUSION

Federal Census Bureau rules include prisoners in the geographic location where they are incarcerated for purposes of determining applicable population totals. Applicable state statutes require second-class cities to use federal census determinations for purposes of calculating population and drawing city council districts based on equal population considerations. Individuals incarcerated in state prisons within geographic district boundaries cannot be excluded from the population counts.

Sincerely,

Gregory F. Zoeller  
Indiana Attorney General

Misty Mercer  
Deputy Attorney General