

January 8, 2004

Mr. Aaron Israel, No. 892219
Wabash Valley Correctional Facility
P.O. Box 1111, A-209
Carlisle, Indiana 47838

*Re: Formal Complaint 03-FC-139
Alleged Denial of Access to Public Records by the Disciplinary Commission of the
Supreme Court*

Dear Mr. Israel:

This is in response to your formal complaint alleging that the Disciplinary Commission of the Supreme Court (Commission) violated the Access to Public Records Act (APRA) (Ind. Code 5-14-3-1 *et seq.*), when it allegedly denied your request for records without stating the statutory basis for the exemption relied upon for that denial. A copy of the Commission's response to your complaint is enclosed for your reference. For the reasons set forth below, I find that the Commission did not violate the APRA.

BACKGROUND

On November 11, 2003, you signed a letter addressed to the Disciplinary Commission of the Supreme Court requesting access to records you assert are maintained by that entity. Specifically, your request sought information about the admission and discipline of an attorney identified by you as "John R. Walsh, III." Among the items requested were any records containing information about the number and nature of all complaints filed against that attorney, and how each such complaint was resolved.

The Commission received your records request on November 14, 2003, and responded in writing on November 17, 2003.¹ The Commission responded that it had no record of an Indiana attorney named "John R. Walsh, III." The Commission went on to provide information on an attorney named "John R. Walsh, II," and as to that attorney the Commission provided you with the date counsel was admitted to practice and noted that counsel's license to practice law was active and in good standing. The form response further indicated that "[a]ny grievance that does not result in a formal charge of misconduct is confidential and not disclosed," and no information

¹ The Commission states that it responded on the same day it received your request, but the response is postmarked on November 17, 2003. In either event, the response was within seven days of receipt of the request and is timely.

was included in the field styled “Description of any public record of pending or completed discipline.”

On December 11, 2003, you signed a complaint subsequently filed with this office challenging the Commission’s response to your request. This office forwarded your complaint to the Commission for response on December 12, 2003. The Commission’s response first suggests that the APRA does not apply to the Commission and other judicial branch agencies.² Assuming application, the Commission goes on to assert that it met its response obligation under the statute when it notified you that it had no records responsive to your request for information on an attorney named “John R. Walsh, III.” The Commission further responds that it went on to provide you with information on an attorney named “John R. Walsh, II” on the gratuitous assumption that you intended your request to apply instead to that individual. With regard to the issue raised in your complaint – that the Commission failed to cite to the statutory basis for why it was not providing complaint information – the Commission notes that its response declared that any information not resulting in a formal charge of misconduct was confidential under supreme court rule and Indiana Code 5-14-3-4(a)(8) (permitting nondisclosure of information declared confidential by supreme court rule). The Commission indicates that it left the field for public information on pending or completed discipline blank to indicate that there was none for “John R. Walsh, II.”

ANALYSIS

As a threshold matter, I respond to the Commission’s suggestion that the APRA does not apply to the Commission or mandate the procedures followed by this office. With regard to jurisdiction, the APRA applies to public agencies and defines “public agency” as including any entity that exercises any part of the judicial power of the state. IC 5-14-3-2. No court of competent jurisdiction has held the provisions of the APRA unconstitutional or otherwise inapplicable to judicial branch agencies. Accordingly, I find as I must that the APRA applies to judicial branch agencies. Moreover, I note that the Supreme Court of Indiana, through its rulemaking authority, has acknowledged application of the APRA to court records. *See* Ind. Administrative Rule 9 (declaring specific court records confidential “[i]n accordance with IC 5-14-3-4(a)(8)”). On that same point, I note that proposed amendments to Administrative Rule 9 even more explicitly acknowledge application of the APRA to court records. *See* Proposed Revision of Indiana Administrative Rule 9 (proposed Ind. Admin. R. 9(A)(1)) (proposed November 13, 2003) (declaring that “[e]xcept as otherwise provided by this rule, access to court records is governed by the Indiana Access to Public Records Act (Indiana Code §5-14-3-1, *et. seq.*”). With regard to the procedures followed by this office upon receipt of a timely filed complaint, the APRA clearly sets forth the obligations of this office and the public agency respondent. Upon receipt of a timely filed complaint, this office must forward that complaint to the public agency that is the subject of the complaint. IC 5-14-5-8. The public agency is required to cooperate with this office in any investigation or proceeding on that complaint. IC 5-14-5-5. While cooperation may or may not include a formal written response to the complaint, a

² The Commission also characterizes your complaint as “frivolous” and questions both the procedures for investigating the complaint and its obligation to respond to the complaint.

response is anticipated by these provisions and, I think, always in the best interests of the public agency. In any event, this office is required to issue an advisory opinion on a timely filed complaint not later than thirty (30) days after the complaint is filed. IC 5-14-3-9. While I appreciate the Commission's substantive response notwithstanding its claims challenging the complaint and complaint procedure, I find no impropriety in the manner in which the complaint was processed under the APRA.

On the merits, I find that the Commission met its obligations under the APRA. A public agency that receives a request for records under the APRA has a specified period of time to respond to the request. IC 5-14-3-9. A timely response to the request does not mean that the public agency must expressly deny the existence of responsive records, decline to produce responsive records, or at the time of the response produce the documents that are responsive to the request. Of course, a public agency is free to take any of those actions as appropriate, but may also comply with its response obligation under the statute by acknowledging receipt of the request and indicating the specific actions the agency is taking toward production.

In this matter, the Commission did not deny you records in response to your records request. Rather, the Commission timely responded to your records request with a written statement indicating that "[t]here [was] no one on [the] roll of Indiana attorneys named John R. Walsh, III." This was equivalent to a statement that the Commission did not possess any records that were responsive to your request. At this point, the Commission met its obligations under the APRA regarding your records request. Its further attempt to guess the true subject of your request and any alleged deficiencies in its response as to that person cannot be said to constitute a denial of your records request or other violation of the APRA.

That said, I note for the Commission's behalf regarding future requests that the Commission's form response may be found to be in violation of the APRA if for any nondisclosure of existing records it relies upon its conclusory statement that "[a]ny grievance that does not result in a formal charge of misconduct is confidential and is not disclosed." The APRA requires that a response to a records request that seeks to deny disclosure of any responsive record must include a "statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record." IC 5-14-3-9(c)(2)(A). Thus, if the Commission seeks to rely on Indiana Admission and Discipline Rule 23, §22(a), and Indiana Code 5-14-3-4(a)(8) to support nondisclosure of any document requested, it should amend its form or otherwise respond to the requesting party that such denial is pursuant to those provisions.

CONCLUSION

For the reasons set forth above, I find the complaint without merit.

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Mr. Donald R. Lundberg