

January 27, 2004

Mr. Marc N. Stults, No. 891999
Wabash Valley Correctional Facility
P.O. Box 1111
Carlisle, Indiana 47838

*Re: Formal Complaint 03-FC-144
Alleged Denial of Access to Public Records by the Clerk of the Supreme Court, Court
of Appeals, and Tax Court*

Dear Mr. Stults:

This is in response to your formal complaint alleging that the Clerk of the Supreme Court, Court of Appeals, and Tax Court (Clerk) violated the Access to Public Records Act (APRA) (Ind. Code 5-14-3-1 *et seq.*), when he failed to produce records in response to your December 2, 2003, request for records. The Clerk's response to your complaint is enclosed for your reference. For the reasons set forth below, I find that the Clerk did not violate the APRA.

BACKGROUND

On December 2, 2003, you signed a letter addressed to the Clerk requesting access to records you assert are maintained by the Clerk. Specifically, your request sought copies of slides and video tape exhibits alleged to have been introduced into evidence at your criminal trial, and which you assert are maintained by the Clerk as part of the record on appeal.¹ Your request acknowledged that there would be a cost to produce the copies, and your willingness to pay that cost with advance notice. On December 3, 2003, the Clerk responded in writing stating that your request in your pending judicial proceedings should be in the form of a motion submitted to the court of appeals. This complaint followed.

In your complaint against the Clerk, you note that the court of appeals previously denied your request for copies of the slides and video tape exhibits. You further aver that you are entitled to obtain copies pursuant to your independent request made under the APRA, and that

¹ Documents submitted in support of this matter indicate that an opinion was issued by the court of appeals on October 12, 1999, and you are currently pursuing state post-conviction relief with the assistance of the State Public Defender. The record was recently released to and returned by your counsel, and the matter is pending for further proceedings in support of post-conviction relief. Your submissions to this office indicate that you are seeking copies of the trial exhibits to file as part of the record supporting your petition for post-conviction relief with the trial court.

the Clerk's failure to tender those copies and his direction that you renew your request with the court was in violation of that statute. The Clerk responds that his office does not have the ability to make copies of slides and video tapes, and notes that both his office and the court of appeals offered suggestions on how you might access those records notwithstanding your incarceration. To facilitate your inspection of the slides and video tape exhibits, the Clerk noted that you could file a motion with the court of appeals to release the exhibits to you for review and copying under the supervision of the Department of Corrections. The Clerk also noted that you could file a motion with the court of appeals requesting that it send the trial exhibits to the trial court to be admitted into the record on your post-conviction petition. The Clerk further references a prior order of the court of appeals denying your request for copies of the tapes at public expense wherein the court alternatively suggested that it would entertain a motion from the trial court to release the record to that court to allow you access. You replied to the Clerk's suggestions and answer to your complaint by noting that your requests for assistance from the court on some but not all of these suggestions have been denied.²

ANALYSIS

Indiana Code 5-14-3-3 provides that any person has the right to inspect and copy the public records of any public agency. A public agency means, among other things, any agency or office that exercises any part of the executive, administrative, judicial or legislative power of the state. IC 5-14-3-2. And, the public records of any such public agency include any photograph, tape recording, or other material that is received, maintained, or filed by or with that public agency. IC 5-14-3-2. The Clerk is a public agency and the records filed with that entity are public records subject to inspection and copying under the provisions and limitations of the APRA. In my opinion, this would include the records sought in the instant request.

That said, if the public agency that maintains a record sought under the APRA does not have reasonable access to a machine capable of reproducing the record requested, the person requesting the record is only entitled to inspect and manually transcribe the record. IC 5-14-3-8(e). While this provision is problematic for persons who are unable to inspect the record requested (*e.g.*, such as for persons who are incarcerated and cannot come into the agency), I do not understand this provision to require the agency to enter into a contract with a third-party vendor or to otherwise make arrangements for copying its records outside the agency. Neither do I understand any provision of the APRA to require a public agency to make a record available to a person in any manner that would not protect the public record from loss, alteration, mutilation, or destruction, or that would make the record otherwise unavailable to the public agency for the regular functions or duties of that entity. IC 5-14-3-7.³

In this matter, the Clerk has responded to your complaint indicating that he is unable to furnish you with a copy of any slides and video tapes of records that may be responsive to your request because his office does not have the ability to make those copies. While you are entitled

² I note also that you made a similar request of your counsel, who like the Clerk indicated that the Office of the State Public Defender did not have the resources to make copies of slides and videos.

³ The Clerk's suggestion that with leave of court the records might be available to you for inspection or copying under the supervision of the Department of Corrections goes beyond what in my opinion the APRA requires.

to inspect those records under the APRA, that statute does not confer you with any alternative right of access based on your inability to achieve that inspection. Under the circumstances presented here, the Clerk cannot be held to have violated the APRA in failing to provide you with a copy of the records requested and in referring you to the courts to achieve access.⁴

CONCLUSION

For the reasons set forth above, I find that the Clerk did not violate the APRA in responding to your records request.

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Mr. David C. Lewis

⁴ I note that this disposition does not deprive you of the access you seek, specifically, to have the records submitted as part of your record in support of your post-conviction petition. You have counsel in that proceeding who can, and presumably will, file the entire trial court record and exhibits as an exhibit to your post-conviction petition. Even acting pro-se, the post-conviction rules permit you that procedure. Your remedy for the denial of any such motions is to seek review of those rulings with a court of competent jurisdiction. Of course, you may also file a civil action pursuant to Indiana Code 5-14-3-9 to enforce your rights under the APRA if you continue to believe that the Clerk's response to your records request is in violation of that statute.