

September 16, 2003

Mr. Keith Ware, #5265
Location C-206
P.O. Box 41
Michigan City, IN 46361

Re: *Advisory Opinion 03-FC-79*; Alleged Denial of Access to Public Records by the
Indiana Supreme Court Disciplinary Commission

Dear Mr. Ware:

This is in response to your formal complaint, which was received August 27, 2003. In it, you allege that the Indiana Supreme Court Disciplinary Commission (“Commission”) has violated the Indiana Access to Public Records Act (the “APRA”). Specifically, you allege that the Commission did not respond to your request for access to a public record directed to the Commission and Executive Secretary Donald R. Lundberg. I forwarded your complaint to Mr. Lundberg. He responded on August 28, 2003, and enclosed with his response his letter to you bearing the same date. I am enclosing the August 28 letter addressed to me for your reference.

It is my opinion that the Commission failed to respond to your request within the statutorily required seven (7) days. However, it is also my opinion that you were not improperly denied access to records regarding the investigation of your complaint. Additionally, it should be noted that the Commission has now provided the names of the Commission members who evaluated your complaint.

BACKGROUND

On July 25, 2003, you requested from Mr. Donald Lundberg, Executive Secretary of the Disciplinary Commission of the Supreme Court, the names of Commission members who evaluated your misconduct complaint, a copy of your misconduct complaint, and any information made during the investigation of your complaint. When you did not receive a response to your request you filed your complaint with this Office.

In his response to this Office Mr. Lundberg asserted that he did not concede that this Office has jurisdiction over the Commission, a judicial branch agency. Mr. Lundberg advised in

his response that he understood your letter to be in the nature of a general complaint about the fact that his grievance against several lawyers had been dismissed. On August 28, 2003, Mr. Lundberg replied to you, and provided some of the information you requested. Additionally, Mr. Lundberg withheld certain information declared confidential by rule of the Indiana Supreme Court.

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." Ind. Code § 5-14-3-1. Additionally, any person has the right to inspect and copy the public records of the Department during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under Indiana code section 5-14-3-4. Ind. Code § 5-14-3-3(a). Mr. Lundberg, however, does not concede that this Office has jurisdiction over the Commission, a judicial branch agency. Since there is no case law indicating otherwise I will presume for the purposes of this opinion that the APRA is applicable to the Commission and that this Office has jurisdiction over the Commission.

It is the responsibility of the public agency to respond to requests for access to public records within a specified time period. The APRA does not set any time periods for producing public records, merely for responding to the request. For requests that are delivered by mail, a denial is deemed to have occurred if seven (7) days elapse after the agency receives the request and there has been no response. Ind. Code § 5-14-3-9(b). Once a denial has occurred under the APRA, a person may file suit in the circuit or superior court in the county in which the denial took place to compel the public agency to disclose the public records requested. Ind. Code § 5-14-3-9(e). Here, the Commission failed to respond to your request within the seven (7) day time period as required under the APRA.

Although it does not change my opinion in this matter, the Commission has now responded to your request. With respect to your request for the names of the members of the Commission who evaluated your complaint, the Commission has now provided the information you requested.

Regarding your request for "any information (notes-records) made during investigation" of your complaint the Commission has asserted that the information you requested is confidential and may not be disclosed. Generally, the public has the right to inspect and copy the public records of any public agency during the regular business hours of the agency unless those records are exempt from disclosure pursuant to Indiana Code section 5-14-3-4. Ind. Code § 5-14-3-3. In particular the APRA provides that a public agency may not disclose, unless required by statute or by court order under the rules of discovery, records "declared confidential by or under rules adopted by supreme court of Indiana." The Indiana Supreme Court has declared confidential certain public records concerning attorney discipline. Indiana Admission and Discipline Rule 23, section 22(a) states, "[p]roceedings and papers that relate to matters that have not resulted in the filing of a verified complaint shall not be open and available to the public. Investigative reports and other work product of the Executive Secretary or his or her agents shall be confidential and not open to public inspection." Since the grievance you filed against several

lawyers has been dismissed, it is my opinion that Mr. Lundberg has properly denied you access to any information, including notes and records, made during the investigation of your original grievance. It is my opinion that there has been no violation of the APRA as a result of such nondisclosure.

CONCLUSION

In conclusion, it is my opinion that the Indiana Supreme Court Disciplinary Commission violated the Access to Public Records Act by failing to respond to your mailed request within seven (7) days. Although it does not change my opinion on the matter the Commission has now provided you with the names of the members who evaluated your misconduct complaint. However, it is my opinion that the Commission did not violate the APRA by withholding information created during the course of the investigation into your allegation of attorney misconduct as that information is confidential by Supreme Court Rule.

Sincerely,

Sandra K. Barger
Acting Public Access Counselor

Cc: Mr. Donald Lundberg, Executive Secretary
Indiana Supreme Court Disciplinary Commission