

July 5, 2005

Lawrence Croan
DOC #106584
Location MH-814
New Castle Correctional Facility
P.O. Box A
New Castle, IN 47362

Re: Formal Complaint 05-FC-114; Alleged Violation of the Access to Public Records Act by the Clerk of the Orange Circuit Court.

Dear Mr. Croan:

This is in response to your formal complaint alleging that the Clerk of the Orange Circuit Court ("Clerk") violated the Access to Public Records Act ("APRA") by failing to provide you with the documents that you requested.

BACKGROUND

On June 3, 2005 you filed a complaint with the Office of the Public Access Counselor alleging that the Clerk violated the APRA. Your complaint was assigned formal complaint number 05-FC-114. You stated that you received a package of documents from the Clerk but that the records were not the information that you requested. You stated that the information you received was regarding the initial trial and that what you sought was documentation regarding the Post-Conviction Relief petition. You stated:

"Enclosed is a copy of the request, the clarity is unmistakable. Due to this clarity it is obvious the clerk is trying to 'undermine the pro se petitioner' in a process of verification in application. I want the correct materials and Ms. Jones fined \$700.00."

Your request for records stated,

“Pursuant to the Indiana Access to Public Records Act (I.C. 5-14-3), Rule 23 of Indiana Court Rules of Proceedings for clerks duty in keeping records, and Rule 44A of Indiana Court Rules, I would like to obtain a copy of the following public records: All motions and evidence submitted by the petitioner Lawrence Edward Croan II to Special Judge Lopp, Prosecutor Kelly Minton, and the above said Clerk in regard to the Post-Conviction Relief Petition filed November 22, 2003 in this Circuit Court. For the Clerk to contact Judge Lopp and Prosecutor Kelly Minton, and for the clerk to check her files for motions filed in this cause; and to make copies of all motions and evidence in this cause that was submitted by the petitioner to Judge Lopp, Prosecutor Minton, and the Clerk.”

Clerk Beth Jones responded to your complaint by letter dated June 16, 2005. A copy of that letter is enclosed for your reference. Ms. Jones stated that in order to make sure that she sent you the right motions she made copies of all motions filed in case #59C01-0004-CF-019 and sent them to you. She said that she was not sure what you wanted concerning evidence. She also stated that several of the items that you requested are not maintained by the Clerk, but rather must be obtained from the court reporter. Those items were copies of the transcripts of the court proceedings, copies of everything filed with the Prosecutor and the Judge, and the chronological case summary.

Neither you nor the Clerk have stated whether she provided you with a letter concerning your request or just mailed you the documents.

ANALYSIS

The public policy of the APRA states that “(p)roviding persons with information is an essential function of a representative government and 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. Furthermore, “[t]his chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record.” IC 5-14-3-1.

The Clerk is a public agency for the purposes of the APRA. IC 5-14-3-2. Accordingly, any person may inspect and copy the public records of the Clerk during the regular business hours, unless the records are excepted from disclosure as confidential or otherwise nondisclosable under IC 5-14-3-4. IC 5-14-3-3(a).

Reasonable Particularity

When any person makes a request for records from a public agency, he must "identify with reasonable particularity the record being requested." IC 5-14-3-3(a). While the phrase "reasonable particularity" appears to be clear, were it necessary to interpret the APRA to determine what the General Assembly intended this phrase to mean, courts would rely upon the common and ordinary meaning. *Crowley v. Crowley*, 588 N.E.2d 576, 578 (Ind. App. 1992).

"Particularity" is defined as "the state of being particular rather than general." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 1981, 956.

Statutory interpretation also requires that one construe the phrase "reasonable particularity" in light of the entire APRA. *Deaton v. City of Greenwood*, 582 N.E.2d 882, 885 (Ind. App. 1991). Since the APRA favors disclosure and the burden of proof for nondisclosure is on the public agency, the agency should contact the requestor for more information if it is necessary to respond to a request.

It is clear that you are interested only in documents concerning the post conviction relief proceeding. In the Clerk's response she says that she provided you with copies of all motions filed in case #59C01-0004-CF-019. It is not clear whether that is the case number for the original trial or for the post conviction relief proceeding or both. If the Clerk did not provide you with documents concerning the post conviction relief proceeding or provide you with an explanation as to why your request was being denied, then she violated the APRA. Additionally, the Clerk stated that she was not sure what you wanted concerning evidence. The Clerk has the duty to request clarification if she is unsure as to any aspect of your request. If the Clerk did not request clarification, she has unreasonably denied you access to records in violation of APRA.

Records Maintained by a Separate Entity.

The APRA governs the public records of public agencies, and provides that any person may inspect and copy the public records of any public agency during the regular business hours of the public agency except as otherwise provided in the APRA. IC 5-14-3-3(a). A "public record" for this purpose is defined as any writing or other material that is "created, received, retained, maintained, or filed by or with a public agency." IC 5-14-3-2. If a public agency does not have a document that is responsive to a record request, it cannot be said to have denied access to a public record of that public agency. IC 5-14-3-2, 5-14-3-3(a). If the public agency denies the request, the denial 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). A public agency is not required to create a responsive record or obtain a responsive record from another agency, and its failure to do so is not a denial of public records in violation of the APRA. However, if the public agency does not have the record requested, it should say so.

I will note that it is unclear whether the court reporter is an employee of the court or is independent from the court. It is also unclear whether you intended to invoke specific court rules or procedures for obtaining records independent of APRA. Your request was not reasonably particular in that you referenced rules that appear to have no bearing upon requesting records from the court.¹ It is therefore unclear whether you intended to also seek records through a separate procedure. In any case, this office will only address whether the Clerk's response to your request was appropriate under the APRA.

¹ You requested records pursuant to the APRA, "Rule 23 of Indiana Court Rules of Proceedings for clerks duty in keeping records and Rule 44A of Indiana Court Rules." The Indiana Rules of Criminal Procedure, Rule 23 specifies the manner in which the Clerk must maintain records. It in no way specifies a procedure for making those records available to the public or criminal defendants. It is unclear as to which rule 44A you are referring to. My office could find no rule 44A that referred to obtaining records from a court.

If the documents you seek are not filed with or maintained by the Clerk, then she does not have the duty to provide you with those records. However, she should inform you that the requested documents are not maintained by her office. From the information provided I cannot ascertain whether the Clerk informed you that she did not maintain the records you seek. In fact, it is unclear from the Clerk's response to this complaint whether she does not maintain the records sought by you or whether she simply feels it is the responsibility of another public entity to provide those records. If the Clerk maintains the records, then she must provide you with a copy of those records under APRA, despite the fact that they may also be available from another source.² If she does not maintain the records then she must inform you of such and indicate the appropriate agency to which you should direct your request.

Additionally, if the court reporter is an employee of the court and therefore a member of the same court for which the Clerk maintains records, she may not deny your request simply because it was filed with the wrong person. If a public agency receives a request addressed to the wrong individual within the public agency, it is still the responsibility of the public agency to respond. Therefore, if the court reporter is a member of the same court the Clerk may not deny a request simply because it is not within her duties to respond, but must forward the request to the appropriate person within the public agency to provide a response.

Request that the Clerk be Fined for Failure to Provide Requested Documents

Finally, you requested that this office impose a fine of \$700.00 on the Clerk for failure to provide the requested documents. This office does not possess the authority to impose any fine on public agencies for the failure to comply with the APRA. The issuance of this formal opinion is the remedy available to you from this office. IC 5-14-4-10. Any further remedies you seek must be obtained by filing a motion to compel production of the documents with the court of local jurisdiction. IC 5-14-3-9(e).

CONCLUSION

For the foregoing reasons, I find that if the Clerk of the Orange Circuit Court maintains the requested records and did not provide them then she violated the Access to Public Records Act.

Sincerely,

Karen Davis
Public Access Counselor

cc: Beth Jones

² Given your unclear references to other court rules, if the Clerk thought you were trying to make a request using a procedure other than the APRA, she may not be held to the requirements of APRA to the extent they differ from the APRA requirements.