

October 12, 2006

*Sent Via Facsimile*

Scott Cooper  
P.O. Box 22327  
Indianapolis, IN 46222

*Re: Formal Complaint 06-FC-159; Alleged Violation of the Access to Public Records Act by the Marion Superior Court, Civil Division Room 2*

Dear Mr. Cooper:

This is in response to your formal complaint alleging that the Marion Superior Court, Civil Division Room 2 ("Court") violated the Access to Public Records Act by denying your request for personnel file information. I find that the Access to Public Records Act requires the disclosure of the personnel file information that you requested.

#### BACKGROUND

You filed your formal complaint with the Office of the Public Access Counselor on September 12, 2006. The record request that is the subject of this complaint is a September 7 request for court employee Mark Nicholson's compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, and date of first employment. In addition, you asked for information relating to the status of any formal charges against him, and the factual basis for any disciplinary action in which final action has been taken and that resulted in Mr. Nicholson's suspension or demotion.

You requested the personnel file information following a telephone discussion with Mr. Nicholson regarding your request for a copy of a default judgment in a specific matter and being asked for your full name, the attorney you work for, and your telephone number. You allege that you were told you would have to come to the Court to receive records. However, your complaint is confined to the denial of access to the personnel file information of Mr. Nicholson.

On September 12, 2006, you received a letter dated September 8 from Judge Kenneth Johnson enclosing the copy of the default judgment, but denying your request for the personnel file of Mr. Nicholson. You enclosed a copy of the denial letter. The letter recites that your attempt at intimidation in requesting the contents of Mr. Nicholson's personnel file is specifically prohibited under the Indiana Supreme Court's Administrative Rule 9(G)(2)(b)(vi) and Indiana Code Section 5-14-3-4(b)(8).

I sent a copy of your complaint to the Court. Judge Johnson provided me with a written response, a copy of which is enclosed for your reference. Judge Johnson stated that you became belligerent when you refused to identify yourself to Court Bailiff Nicholson. Mr. Nicholson asked for this information so that he would know whether you were to be provided unlimited access to the contents of the file or as a member of the public would have only limited access to the file. Judge Johnson denied that you were told you would have to come to the Court to access copies of the records, but you were invited to come to the Court to inspect the file. Judge Johnson refers to his denial of the Nicholson personnel file as a confidential record, but does not otherwise explain how Administrative Rule 9 and the Access to Public Records Act apply to the specific information you sought from the file.

In further response, Judge Johnson said the fax that you sent requesting the personnel file of Nicholson showed that the fax was sent from a machine belonging to an individual who was suspended from the practice of law. This resulted in the Judge calling you on September 22 to inquire about the possible unauthorized practice of law by the suspended attorney. To date, Judge Johnson's call has not been returned.

#### ANALYSIS

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the Access to Public Records Act ("APRA"). Ind. Code 5-14-3-3(a). If a record is excepted from disclosure as a confidential record under IC 5-14-3-4(a), or if a record may be excepted from disclosure at the discretion of the agency under IC 5-14-3-4(b), then the public agency may withhold the record.

If a public agency receives a request for a record in person, the public agency is required to respond within 24 hours or the record is deemed denied. IC 5-14-3-9(a). If the public agency receives a request for a record via U.S. Mail or facsimile, the public agency is required to respond within seven calendar days, or the request is deemed denied. IC 5-14-3-9(b). Because the Court sent a response to your faxed request within seven days, the response of the Court was timely under the APRA.

Your complaint challenges the Court's denial of the record. If a request is made orally, either in person or by telephone, a public agency may deny the request orally. IC 5-14-3-9(c). However, if a request initially is made in writing, or if an oral request that has been denied is renewed in writing or by facsimile, a public agency may deny the request if the denial is in writing or by facsimile, and the denial includes the exemption or exemptions authorizing the public agency to withhold the record, and the name and title or position of the person responsible for the denial. IC 5-14-3-9(c).

Under section 4(b)(8) of the Access to Public Records Act, a public agency may, at its discretion, except from disclosure:

Personnel files of public employees and files of applicants for public employment... except for:

(A) The name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency;

(B) Information relating to the status of any formal charges against the employee; and

(C) The factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged.

IC 5-14-3-4(b)(8).

A record declared confidential by or under rules adopted by the Supreme Court of Indiana must be withheld. IC 5-14-3-4(a)(8). Administrative Rule 9, a rule adopted by the Indiana Supreme Court, sets out specific provisions regarding disclosure of court records, defined as case records and administrative records. Ind. Administrative Rule 9(C)(1). Records that are maintained by the Court pertaining to the administration of the judicial branch of government and not associated with any particular case are administrative records. Admin. R. 9(C)(3). The files of public employees engaged by the Court would be an administrative record.

In pertinent part, information from an administrative record that is excluded from public access to the extent provided by Indiana statute or other court rule includes personnel files of employees, *except for* the name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, and dates of first and last employment; information relating to the status of any formal charges against the employee, and information concerning disciplinary actions in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged, pursuant to Ind. Code §5-14-3-4(b)(8). Admin. R. 9(G)(2)(b)(vi) (Emphasis added).

This latter provision was cited by the Court in denial of the personnel records. However, according to the Access to Public Records Act and Indiana Administrative Rule 9, you are entitled to receive the information you specified in your request pertaining to Mr. Nicholson, a court employee. Therefore, the denial of that part of the personnel file that you requested does not find support in the Access to Public Records Act.

For this reason, it is my opinion that the Court did deny you access in violation of the APRA and that this denial is actionable under Indiana Code section 5-14-3-9(e).

Although not part of your complaint, I write to address two issues raised by the Court. The Court stated that it needed to inquire whether you were a party or representative of a party to the proceeding pertaining to the default judgment order. With respect to the need for the Court to inquire regarding your name, your association with an attorney and other information when receiving a record request, this would be appropriate only if the request had necessitated your

unfettered access to the Court's file or because access to the specific record was limited by applicable law. However, your request for a copy of the default judgment order does not appear to be one that would require that the Court ascertain that you could access the entire file. Of course, having your contact information in order to mail the record or hold it at the Court's office for your retrieval is completely consistent with the Access to Public Records Act.

In addition, the Court brings to my attention a matter involving an attorney who has been suspended from the practice of law. Quite apart from an obligation to report such unauthorized practice of law which I do not dispute or offer any opinion on, I would observe that because the APRA provides to any person the right to inspect and copy public records, the fact that you may be acting on behalf of an attorney suspended from law practice has no bearing on your right or his right to inspect and copy an otherwise disclosable public record.

#### CONCLUSION

For the foregoing reasons, it is my opinion that the Marion Superior Court Civil Division Room 2 denied a record under the Access to Public Records Act, and that this constituted a denial that is actionable under the APRA.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Honorable Kenneth Johnson