

October 18, 2007

Aaron Israel  
DOC #892219  
Wabash Valley Correctional Facility  
PO Box 1111  
Carlisle, Indiana 47838

*Re: Formal Complaint 07-FC-286; Alleged Violation of the Access to Public Records Act by the Disciplinary Commission of the Indiana Supreme Court*

Dear Mr. Israel:

This is in response to your formal complaint alleging the Disciplinary Commission of the Indiana Supreme Court ("Commission") violated the Access to Public Records Act ("APRA") (Ind. Code §5-14-3) by denying you access to a record, namely a copy of an attorney's response to your grievance filed with the Commission. A copy of the Commission's response to your complaint is enclosed for your reference. In my opinion the Commission, if the legislature has the constitutional authority to control judicial branch decisions pertaining to records, did violate the APRA by not responding to the request but did not otherwise violate the APRA by denying the request.

#### BACKGROUND

In your complaint you allege you requested by letter dated September 11, 2007 a copy of an attorney's response to a grievance you filed with the Commission. You further allege the Commission denied your request. You mailed this complaint on September 20, and I received it on September 21.

The Commission responded by letter from Executive Secretary Donald Lundberg dated September 21. Mr. Lundberg first indicates he does not concede that the legislative branch has the constitutional authority to control judicial branch decisions pertaining to the release of records and has previously communicated such with this office after Counselor Hurst's *Opinion of the Public Access Counselor 03-FC-139*. Regarding your request, though, Mr. Lundberg indicates the grievance you submitted dated September 11, 2007 was dismissed, and that dismissal decision was ratified by the Commission on September 20. Mr. Lundberg indicates he overlooked your request for a copy of the attorney's response but provides statutory authority for non-disclosure of

the record. Records declared confidential by or under rules adopted by the supreme court of Indiana may not be disclosed under the APRA. I.C. §5-14-3-4(a)(8). Indiana Admission and Discipline Rule 23(22)(a) provides that “proceedings and papers related to matters that have not resulted in the filing of a verified complaint shall not be open and available to the public.” Finally, Mr. Lundberg contends that because you are incarcerated and unable to inspect and copy the records during normal business hours, the Commission is not required to inspect the records for you.

## ANALYSIS

The public policy of the APRA states, "(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." I.C. §5-14-3-1.

The Indiana Supreme Court is a public agency for the purposes of the APRA. I.C. §5-14-3-2(1)(1). I understand Mr. Lundberg’s argument regarding the question of constitutional authority of the legislative branch as it relates to the judicial branch. For purposes of this opinion, I am operating under the law as it has been passed by the legislature, that the judiciary is subject to the APRA, until or unless the question of constitutional authority is answered. Accordingly, any person has the right to inspect and copy the public records of the Commission during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. §5-14-3-3(a).

A request for records may be oral or written. I.C. §5-14-3-3(a); §5-14-3-9(c). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven days of receipt, the request is deemed denied. I.C. §5-14-3-9(b).

If a person is entitled to a copy of a public record under this chapter and the public agency which is in possession of the record has reasonable access to a machine capable of reproducing the public record; the public agency must provide at least one copy of the public record to the person. I.C. §5-14-3-8(e). A public agency may require that the payment for copying costs (established under I.C. §5-14-3-8(c) or (d)) be made in advance. I.C. §5-14-3-8(e).

Here, the Commission did receive your request for a copy of the response to the grievance but overlooked the request in your letter. Under the APRA, an agency is required to respond to a request for access to records within seven days of receipt of the request submitted by mail. I.C. §5-14-3-9(b). An agency is required to respond to the request even if access is being denied. When the request is being denied, the denial must be submitted to the requester in writing and must include a statement of the exemption(s) authorizing withholding the record and the name and title of the person responsible for the denial. I.C. §5-14-3-9(c).

Although the Commission’s denial of access should have been sent to you in writing within seven days of the Commission’s receipt of the request, the denial itself was appropriate under the APRA. Records declared confidential by or under rules adopted by the supreme court of Indiana may not be disclosed under the APRA. I.C. §5-14-3-4(a)(8). Indiana Admission and Discipline Rule 23(22)(a) provides that “proceedings and papers related to matters that have not

resulted in the filing of a verified complaint shall not be open and available to the public.” It is my understanding the record you requested falls into this category and as such may not be disclosed under I.C. §5-14-3-4(a)(8).

Regarding Mr. Lundberg’s final assertion that if the record were disclosable the Commission was under no obligation to inspect the record on your behalf, I do not agree with that submission. The APRA requires an agency to make a copy of a record when the requester has a right to the record under the APRA and when the agency has reasonable access to a machine capable of reproducing the record. I.C. §5-14-3-8(e).

#### CONCLUSION

For the foregoing reasons, it is my opinion the Commission, if the legislature has the constitutional authority to control judicial branch decisions pertaining to records, did violate the APRA by not responding to the request but did not otherwise violate the APRA by denying the request.

Best regards,



Heather Willis Neal  
Public Access Counselor

cc: Donald Lundberg, Disciplinary Commission of the Supreme Court