

January 7, 2008

Jamie Barrand
119 North Green Street
Crawfordsville, Indiana 47933

Re: Formal Complaint 08-FC-4; Alleged Violation of the Access to Public Records Act by the Montgomery Circuit Court

Dear Ms. Barrand:

This advisory opinion is in response to your formal complaint alleging the Montgomery Circuit Court ("Court") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to records. I have enclosed a copy of the Court's response to your complaint for your reference. It is my opinion the Court may not deny access to the file prior to the initial hearing as a matter of course but must instead provide the disclosable information after nondisclosable information has been redacted.

BACKGROUND

In your complaint you allege that on December 4, 2007 you were denied access to Court records. Specifically, you requested the file of a person arrested for a number of charges. You allege you were told you could not access the file, including the affidavit of probable cause, until after the initial hearing. You discussed the matter with Judge Thomas Milligan, whom you allege indicated he would not release any information in an attempt to protect the victim of the crime, which was sexual in nature. You allege Judge Milligan cited Indiana Supreme Court Administrative Rule 9(G)(1) in denying access. You further asked Judge Milligan to provide the records with the nondisclosable information redacted, and you allege he indicated this was too much to ask of his staff. You further allege Judge Milligan indicated you could have the file after the initial hearing.

Judge Milligan responded to your complaint by letter dated December 20. Judge Milligan indicated the practice and policy of the Court is to not allow access to the Court file until the initial hearing is held. Judge Milligan contends that after the initial hearing, the case becomes public and most of the information is discussed publicly. Judge Milligan indicates he relied upon Administrative Rule 9(G)(1). Judge Milligan contends that all of the records you requested contained information declared confidential by Administrative Rule 9. Judge Milligan

further contends it would be impractical to try to redact all nondisclosable information from the records. Judge Milligan contends that the information is available after the initial hearing and indicates his belief that public access should be denied prior to the initial hearing to protect the privacy rights of all parties involved.

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. Any person has the right to inspect and copy the public records of a public agency 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).

The Court is clearly a public agency for the purposes of the APRA. I.C. §5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Court 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).

The APRA provides that a public agency may not disclose records declared confidential by or under rules adopted by the supreme court of Indiana. I.C. §5-14-3-4(a)(8).

If a record contains disclosable and nondisclosable information, the public agency shall, upon receipt of a request under the APRA, separate the material that may be disclosed and make it available for inspection and copying. I.C. §5-14-3-6(a).

Here, you requested from the Court a copy of the case file of a particular individual. The file contains the affidavit of probable cause, the arrest warrant, the search warrant affidavit, a search warrant, a subpoena duces tecum to a hospital, a motion and order for the subpoena duces tecum, and a no contact order entered as a condition of bail. In denying access, Judge Milligan relied upon Administrative Rule 9(G)(1), which declares confidential certain information contained in court records. Specifically, Judge Milligan relies on the following provisions:

- (1) Case records. The following information in case records is excluded from public access and is confidential:
 - (b) Information that is excluded from public access pursuant to Indiana statute or other court rule, including without limitation:
 - (xi) All medical, mental health, or tax records unless determined by law or regulation of any governmental custodian not to be confidential . . .
 - (xiii) Information relating to protection from abuse orders, no-contact orders and workplace violence restraining orders not admitted into evidence as a part of a public proceeding as declared confidential by Ind. Code § 5-2-9-6 *et. seq.*
 - (e) Addresses, phone numbers, dates of birth and other information which tends to explicitly identify:

- (i) natural persons who are witnesses or victims (not including defendants) in criminal, domestic violence, stalking, sexual assault, juvenile, or civil protection order proceedings;
- (ii) places of residence of judicial officers, clerks or other employees of courts and clerks of court.

Indiana Supreme Court Administrative Rule 9(G).

Judge Milligan indicates that all of the records in the case file contain information declared confidential by one of the sections of Administrative Rule 9(G)(1) listed above. Judge Milligan further contends that to require court staff to redact the confidential information would be impractical. The APRA provides, though, that if a record contains disclosable and nondisclosable information, the public agency shall, upon receipt of a request under the APRA, separate the material that may be disclosed and make it available for inspection and copying. I.C. §5-14-3-6(a). The APRA does not afford the agency discretion on this matter in instances where the redaction will take a considerable amount of staff time. As such, the court is required by the APRA to provide, pursuant to a request, access to the disclosable information.

Regarding timing for providing the records, the APRA does not provide a time period when records must be produced pursuant to a request. While the APRA sets forth a time for response to a request (See I.C. §5-14-3-9), a response could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. There are no prescribed timeframes when the records must be produced by a public agency.

A public agency is required to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. I.C. §5-14-3-7(a). However, section 7 does not operate to deny to any person the rights secured by section 3 of the Access to Public Records Act. I.C. §5-14-3-7(c). The public access counselor has stated that records must be produced within a reasonable period of time, based on the facts and circumstances. Consideration of the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material are necessary to determine whether the agency has produced records within a reasonable timeframe.

Here, the redaction of the records to separate disclosable from nondisclosable information might take days or weeks, depending on the number of records to be redacted and the amount of time per day a staff member can dedicate to the review of the records. If the entire contents of the file will be available for public inspection after the time of the initial hearing and that initial hearing occurs relatively soon after the request, it may be reasonable to expect the redaction will not be completed before the entire file is disclosable. This is not to say I agree that as a rule the court can deny access to all case files until the time of the initial hearing in each case. Instead, it is my opinion that it is possible the time of an initial hearing might come about before redaction of a file is accomplished.

CONCLUSION

For the foregoing reasons, it is my opinion the Court may not deny access to the file prior to the initial hearing as a matter of course but must instead provide the disclosable information after nondisclosable information has been redacted.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Judge Thomas Milligan, Montgomery Circuit Court