



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

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July 20, 2012

Dwayne A. Frost
DOC 922891
5501 S. 1100 West
Westville, Indiana 46391

Re: Formal Complaint 12-FC-173; Alleged Violation of the Access to Public Records Act by the Elkhart Superior Court No. 1.

Dear Mr. Frost:

This advisory opinion is in response to your formal complaint alleging the Elkhart Superior Court No. 1 ("Court") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Judge Evan S. Roberts issued an order under Cause No. 20-D01-1004-FC-11 and 20-D01-0910-FC-66 in response to your formal complaint. A copy of the order is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that you submitted a written request to the Court on June 5, 2012 for a copy of an audio recording for certain hearings held under Cause No. 20-D01-0910-FC-00066 and 20-D01-1004-FC-00011. The Court denied your request due to it did not constitute a proper pleading as there was not certificate of service attached. You further allege that the Court has improperly converted your request to a criminal filing and that it may not deny your request made pursuant to the APRA for failure to provide a proper certificate of service.

In response to your formal complaint Judge Evan S. Roberts issued the following order:

On 6/27/2012, Joseph B. Hoage, Public Access Counselor tenders correspondence to the Court. Filing taken under advisement . . . [LATER] On 7/18/2012, having taken under advisement the aforementioned filing, having considered the multiple filing of Defendant, including Defendant's Affidavit of Indigency (filed 7/11/2011) and having reviewed the record before the Court, the following Order is entered: (1) Defendant's "Request for Access to Public Records (filed 5/12/2012 and 6/1/2012) is hereby reconsidered; (2) Pursuant to I.C. § 33-40-8-5, *Lane V. Brown*, 372

U.S. 477 (1963), *Hurt v. State* 174 Ind. App. 351, 367 N.E.2d 1109 (Ind. Ct. App. 1977) and noting that there is no pending appeal to the Indiana Court of Appeals or Indiana Supreme Court, Defendant has not filed a petition for post-conviction relief and noting a transcript is not necessary for Defendant to adequately present his case, at this time, the Court declines to produce a written transcript and/or permit Defendant to listen to the Court's recording system and (3) Status Conference 8/30/2012 at 3:30 p.m. CONFIRMED.

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." *See* I.C. § 5-14-3-1. The Court is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Court's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

The APRA provides the right to inspect and copy records of a public agency. However, it is separate and distinct from other court proceedings, both civil and criminal. The Court has advised that you have filed a number of pleadings regarding your criminal matter. After reviewing your request and the Court's Order issued under the respective cause numbers, it is my opinion that the Court has interpreted your request as one being made pursuant to your criminal proceeding, not as one made pursuant to the APRA. I believe that the Court's interpretation of your request being made pursuant to your criminal proceedings, not the APRA, was reasonable in light of the conflicting nature of the multiple requests that you have submitted to the Court. As such, your request was made through means outside the scope of the APRA. *See Opinions of the Public Access Counselor 07-FC-314 and 08-FC-324.*

I would note that in the future, should you submit a request for records pursuant to the APRA that is clearly identifiable from the filings you have made in your criminal proceeding; the Court would be required to respond to your request pursuant to the requirements of the APRA, and AR's 9 and 10. A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within twenty-four hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). 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. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply.



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A court is required to withhold a record that is declared confidential by or under rules adopted by the Supreme Court of Indiana. *See* I.C. § 5-14-3-4(a). The Indiana Supreme Court has adopted Administrative Rule 9, which governs disclosure of court records. Administrative Rule 9 does not specifically limit access to tape recordings of court proceedings. However, a court may manage access to audio and video recordings of its proceedings to the extent appropriate to avoid substantial interference with the resources or normal operation of the court and to comply with prohibitions on broadcast of court proceedings outlined in Indiana Judicial Conduct Rule 2.17. *Administrative Rule 9(D)(4)*.

The Indiana Supreme Court's *Public Access to Court Records Handbook* ("Handbook") provides the following regarding requests for audio recordings of a court proceeding:

Recordings of court proceedings made by court reporters are public records regardless of whether they are produced on magnetic recording tape, compact disk, steno type, shorthand or digitally recorded upon a computer hard drive unless the specific case type is confidential under Administrative Rule 9. See AR 9(C)(2) regarding the definition of "case record" and AR 9 (D)(4) regarding access to audio and video recordings of proceedings. The public has the right to obtain the record within a reasonable period of time after making the request.

A specific means of providing this type of record has not been defined but the time or difficulty of compliance is an important consideration. Allowing the requestor to listen to the recording may be too time consuming to be reasonable for the reporter or a court staff member since the custody and integrity of the original must be continuously maintained.

Providing a copy of the record is probably the most efficient and least time consuming method to provide public access. A reasonable charge for the production of the copy may be made and guidance on this issue may be found in I.C. § 5-14-3-8. Under AR 10, each judge is administratively responsible for the integrity of the judicial records of the court and must ensure that measures and procedures are employed to protect such records from mutilation, false entry, theft, alienation, and any unauthorized alteration, addition, deletion, or replacement of items or data elements. Under Indiana Code of Judicial Conduct, Rule 2.17(1), a judge may

authorize the use of electronic or photographic means for the presentation of evidence, the perpetuation of a record or other purposes of judicial administration. Under no circumstances, should the original be provided to the requestor in order for them to create their own copy.

Requiring the purchase of a transcript would be so costly in many cases as to constitute a denial of access to the public record unless the requestor desires to obtain the record in that format. Given the time required to produce a transcript and the other duties of reporters, the reasonable time for producing the record may well lead the requestor to ask for a different format. If the case is on appeal, a copy of the transcript could be obtained from the Clerk upon its completion and filing.

In situations where the requested record results in provision of an audio and/or audiovisual copy of a court proceeding, the judge should issue an order specifically limiting its use and barring the recipient from broadcasting the received record in any manner. *Public Access to Court Records Handbook, Indiana Supreme Court, July 2010, 49-50.* (<http://www.in.gov/judiciary/admin/files/pubs-accesshandbook.pdf>).

I would further note that the APRA provides that if a public agency does not have reasonable access to a machine capable of reproducing the record, the person is only entitled to inspect and manually transcribe the record. *See* I.C. § 5-14-3-8(e). Thus, if the Court does not have the capability of reproducing the audio recording, the Court would not be in violation of the APRA. *See Opinion of the Public Access Counselor 10-FC-101 and 10-FC-102.* Further, if the Court does not maintain an audio transcript of the hearings that you requested, the APRA would not require the Court to produce or create a record in response to a request. *See Opinions of the Public Access Counselor 06-FC-08 and 12-FC-49.* If you have previously received a written transcript for the hearing for the hearing that you seek, it would not be in violation of the APRA by failing to provide you with an audio copy. *See Opinions of the Public Access Counselor 07-FC-185 and 12-FC-45.* The issue of offenders making requests for audio and written transcripts pursuant to the APRA has been the subject of a number of formal complaints filed with the Public Access Counselor's Office. *See Opinions of the Public Access Counselor 04-FC-67; 04-FC-87; 05-FC-204-208; 06-FC-8; 07-FC-185; 08-FC-232; 10-FC-171; 11-FC-155; 12-FC-45.* All opinions of the Public Access Counselor may be found at www.in.gov/pac.

The APRA permits a public agency to charge a fee for copies of public records. *See* I.C. § 5-14-3-8. Additionally, a public agency may require a person to pay the copying fee in advance. *See* IC 5-14-3-8(e). Nothing in the APRA requires that a public agency waive a copying fee. *See Opinion of the Public Access Counselor 07-FC-124.* The Court would be under no obligation pursuant to a request made via the APRA to waive any fee in regards to the reproduction of an audio recording.



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CONCLUSION

For the foregoing reasons, it is my opinion that the Court did not violate the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage".

Joseph B. Hoage
Public Access Counselor

cc: Judge Evan S. Roberts