



# STATE OF INDIANA

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September 25, 2012

Douglas Johnson  
DOC 144315  
One Park Row  
Michigan City, Indiana 46360

*Re: Formal Complaint 12-FC-265; Alleged Violation of the Access to Public Records Act by the Whitley County Clerk's Office*

Dear Mr. Johnson:

This advisory opinion is in response to your formal complaint alleging the Whitley County Clerk's Office ("Clerk") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Debbie Beers, Whitley County Clerk, responded in writing to your formal complaint. A copy of her response is enclosed for your reference.

## BACKGROUND

In your formal complaint, you allege that you submitted a written request to the Clerk on August 13, 2012 for three exhibits used in your criminal jury trial. On August 17, 2012, the Whitley Circuit Court denied your request under Cause No. 92-C01-0904-FA-00039.

In response to your formal complaint, Ms. Beers advised that James Heuer, Whitley County Circuit Court Judge, denied your request.

## 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 Clerk 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 Clerk'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. After reviewing your request and the Court's Order issued under the respective cause number, it is my opinion that the Court 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 nature of the request that was 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, which is clearly identifiable from the filings made in your criminal proceeding; the Court would be required to respond to your request pursuant to the requirements of the APRA, and Administrative Rules 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.

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 exhibits:

Are exhibits offered and/or introduced into evidence in a court proceeding public records? If so, must their review of them be supervised or may copies be created at their cost?

**A.** Once identified and offered or admitted into evidence all exhibits are part of the public record. If a review of the original is granted, the reporter or staff member should



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supervise because of their duty to maintain the custody and integrity of the exhibit.

The size, nature and extent of the exhibit will have a significant impact upon the time required by the reporter or staff member to allow their reading or viewing. The constraints of time also impact the reasonable time of and nature of the response. In many instances the production of copies of large documents at a reasonable charge will be the most efficient manner of responding to the request.

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 Clerk or the Court does not have the capability of reproducing the audio recording, it would not be in violation of the APRA. *See Opinion of the Public Access Counselor 10-FC-101 and 10-FC-102.* The issue of offenders making requests for audio and written transcripts and exhibits 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](http://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. Lastly, the APRA requires a public agency to provide one copy of a disclosable public record but does not require an agency to provide additional copies or to repeatedly provide copies of a particular record. *See* I.C. § 5-14-3-8(e). To the extent that a copy of the records that are sought has already been provided, neither the Clerk nor the Court would be required to provide multiple copies of an identical record.

## CONCLUSION

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

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

Joseph B. Hoage  
Public Access Counselor

cc: Debbie Beers