



# STATE OF INDIANA

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March 13, 2013

Mr. Paul K. Ogden  
118 N. Delaware St.  
Indianapolis, IN 46204

*Re: Formal Complaint 13-FC-79; Alleged Violation of the Access to Public Records Act by the Boone County Clerk*

Dear Mr. Ogden:

This advisory opinion is in response to your formal complaint alleging the Boone County Clerk ("Clerk") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Robert V. Clutter, Attorney, responded on behalf of the Clerk. His response is enclosed for your reference. I have granted your formal complaint priority status pursuant to 62 I.A.C. 1-1-3(3).

## BACKGROUND

In your formal complaint you provide that on February 15, 2013, you went to the Boone County Courthouse to attend a plea hearing involving Elizabeth Russell in the case of State of Indiana v. Elizabeth A Russell, Cause No. 06D02-1209-CM-00605. After the plea hearing was rescheduled, you proceeded to the Boone County Superior Court II ("Court") to look at the criminal court file involving Ms. Russell. In the file, you found a document titled "Probable Cause Affidavit" which referenced a police report ("Police Report"). The Police Report was not in the file. You inquired with the Clerk regarding the Police Report and were informed that it had been copied on green paper in an attempt to render the Police Report confidential under the administrative rules. You provide that the Police Report did not involve minors in any way. You asked for a copy of the Police Report and were denied. You believe that the Police Report is a public record and that the Boone County Prosecutor is copying police reports onto green paper in order to deny access. You further provide that the Clerk, as keeper of the courts records, should have instructed the Prosecutor that this practice is unacceptable and a violation of the APRA.

In response to your formal complaint, Mr. Clutter advised that in response to your request for the Police Report, the Clerk provided you a copy of the Accident Reconstruction Report ("Accident Report") that was contained on white paper in Ms. Russell's file. At that point, you noticed that the file also contained filings on green

paper. Apparently imputing a nefarious intent on behalf of the Clerk, you then filed a formal complaint stating that the probable cause affidavit was copied on green paper and kept confidential. Mr. Clutter provides that your allegation was in error. In checking with the Boone County Prosecutor (“Prosecutor”), three pages of the Accident Report were placed on green paper as the pages contained dates of birth and home addresses of three State’s witnesses. The dates of birth and home addresses of those individuals was redacted and then transferred onto the white paper. Mr. Clutter maintains that the Prosecutor acted within its authority pursuant to Administrative Rule 9 by redacting information relating to the victim/witnesses, specifically their dates of birth and addresses.

## 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 and Prosecutor are public agencies 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 and Prosecutor’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).

There is no dispute that any records provided by the Prosecutor to the Clerk pursuant to a criminal prosecution would be considered “public records” under the APRA. A “public record” is defined as any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, retrieved, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics. *See* I.C. § 5-14-3-2(n). As it is my opinion that records provided by the Prosecutor to the Clerk would be considered public records, it now must be determined whether the Clerk’s actions in response to your request complied with the requirements of section 9 of the APRA.

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). Under the APRA, if a request is made orally a public agency may deny the request orally. *See* I.C. § 5-14-3-9(c). If a request is initially made in writing or if an oral request that has been denied is renewed in writing, 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. *Id.* 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. AR 9(G) provides a list of court records that are excluded from public access. In addition to records made confidential pursuant to AR 9, specific provisions of the

Indiana Code address records that are prohibited from disclosure, including I.C. § 31-39-2-10, which governs access to juvenile records.

“[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA.” *Opinion of the Public Access Counselor 01-FC-61*; see also *Opinion of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly the [agency] could not be required to produce a copy....”). In response to your formal complaint filed against the Prosecutor, Mr. Meyer advised that the following paperwork was filed by the Prosecutor with the Court via the Clerk:

1. Order finding probable cause – issuing a summons, 1 page;
2. Appearance Form, 2 pages;
3. Charging Information, 2 pages;
4. Probable Cause Affidavit, 1 page; and
5. Accident Report, 11 pages. See *Opinion of the Public Access Counselor 13-FC-80*.

The Clerk has advised that the only records maintained in Ms. Russell’s file that were made confidential were three pages of the Accident Report that contained dates of birth and addresses for three State’s witnesses. Redacted copies of the three pages of the Accident Report were made available to you. The Probable Cause Affidavit filed by the Prosecutor referenced a Police Report. The Prosecutor has stated that no Police Report was filed in this matter, only the Accident Report. The Clerk has provided that you were given access to all records maintained in the file, minus the three original unredacted pages of the Accident Report. Although it would appear that the Clerk could have communicated this to you more clearly at the time of the original request, it still does not erase the fact that the Clerk did not maintain a copy of the Police Report referenced in the Probable Cause Affidavit and you were given access to all records in Ms. Russell’s file, minus the three original unredacted pages of the Accident Report. As such, it is my opinion that the Clerk did not violate the APRA by failing to produce a record that it never maintained. As provided in advisory opinion 13-FC-80, it is my opinion that the Prosecutor’s redactions contained in the Accident Report complied with AR 9(G)(1)(e)(i). *Id.*

## CONCLUSION

Based on the foregoing reasons, it is my opinion that the Clerk did not violate the APRA by failing to produce a record that it never maintained.

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: Robert V. Clutter, Todd J. Meyer