OPINION OF THE PUBLIC ACCESS COUNSELOR

KAYLA M. SULLIVAN,
Complainant,

v.

TIPPECANOE CIRCUIT COURT,
Respondent.

Formal Complaint No.
17-FC-257

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to the formal complaint alleging the Tippecanoe Circuit Court ("Court") violated the Access to Public Records Act[1] ("APRA"). The Court has responded via Mr. Douglas Masson. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on November 1, 2017.

[1] Ind. Code §§ 5-14-3-1 to -10

BACKGROUND

Kayla Sullivan ("Complainant"), a reporter for WLFI-TV, filed a formal complaint alleging the Court violated the APRA by wrongfully denying her the opportunity to inspect a court recording.

On October 25, 2017, Sullivan made a request to the Court to listen to an audio recording of a court proceeding involving an attorney who had allegedly made a threat to a defendant. Sullivan stated that she wanted to listen the audio because the transcript of the proceeding reads "inaudible" during the portion of the trial where the threat by the attorney allegedly occurred.

On October 26, 2017, Tippecanoe Circuit Court Judge Thomas H. Busch denied Sullivan access to the recording. The Court concluded that it would cause substantial interference with the resources or operation of the court pursuant to Indiana Administrative Court Rule 9 (D)(4). Additionally, the Court cites Indiana Rule of Judicial Conduct 2.17, which prohibits "the broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions."

What is more, the Court argues that the transcript is sufficient to substitute for the audio recording and cites two prior Public Access Counselor opinions. Further, the Court contends the inaudible conversation was an off-the-record confidential discussion extraneous to the record.

ANALYSIS

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." Ind. Code § 5-14-3-1. The Tippecanoe Circuit Court is a public agency for the purposes of the APRA. Ind. Code § 5-14-3-2(n). Therefore, unless an exception applies, any person has the right to inspect and copy the Court's public records during regular business hours. Ind. Code § 5-14-3-3(a). A public agency is required to make a response to a written request that has been mailed within seven (7) days after it is received. Ind. Code § 5-14-3-9(c).

This Office has not been made privy to the transcript via an in camera review or otherwise. It should be noted at the outset that an inadvertent recording is mutually exclusive from an inadvertent utterance. Based on the information provided, it appears that the "threat" in question was an unintended utterance. If the former was true, I would agree with the Court that the Administrative Rules and Judicial Canons would generally authorize the redaction or omission of an inadvertent recording from the inspection or production of an audio recording.

It is also immediately noteworthy that Sullivan is not seeking a copy of the recording. Instead, she has requested mere inspection of the recording. Inspection of audio recordings of court proceedings is a routine matter that is regularly allowed by courts statewide, and rightfully so. The various rules governing court and judicial regulation recognize this

and begin with the presumption that all court records—including recordings—are disclosable. Even the judiciary must have a compelling justification for withholding records per those administrative rules.

A prepared transcript is distinguishable from an audio recording as a transcript is subject to human error and is not a true substitution of an audio recording but can suffice under certain circumstances. To that end, in the Opinion of the Public Access Counselor 12-FC-45, the Court's recording was inaccessible and the Court lacked the equipment to reproduce a copy therefore a transcript was produced free of charge. The recordings in that case were from over two decades prior to the request. Here, there has been no assertion by the Court that the audio recording is inaccessible.

Moreover, the PAC opinion the Court cites—12-FC-206—dealt exclusively with a confidential DCS proceeding. The statement in that opinion held "If you have previously received a written transcript… [a Court] would not be in violation of the APRA by failing to provide you with an audio copy." That statement was an explicitly cited reference to PAC Opinion 07-FC-185 and was predicated on the condition that the audio recordings requested were from several courts and several years prior. That denial was only "after consideration of the time and difficulty related to compliance".

The Court also cites the 2015 version of the Indiana Supreme Court Handbook on Public Access to support this supposition. I have reviewed the 2017 version and could not find language consistent with the position. Alternatively, the Handbook states:

> Recordings of court proceedings made by court reporters are public records regardless of whether they are produced on magnetic recording tape, compact disk, stenotype, shorthand or digitally recorded upon a computer hard drive unless the specific case type is confidential under Administrative Rule 9. See Administrative Rules 9(C)(2) regarding the definition of "Case Record" and 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.

With the technological advances of digital recording, it is doubtful that allowing inspection of an audio recording from a proceeding would, in any way shape or form, interfere with the normal operation of the Court or cause an undue hardship upon the administration of justice. Therefore, it is unlikely a staff member would need to intimately supervise the inspection process other than to provide a pair of headphones and press play on the computer file. Interestingly enough, however, the Handbook goes on to posit:

> Providing a copy of the record is probably the most efficient and least time consuming method to provide public access.

But once again, Sullivan is not seeking a *copy* but rather seeking *inspection*. Therefore, the "broadcast" argument also fails. This Office recognizes that the Indiana Court of Appeals recently upheld certain restrictions of use on recorded copies, including *ex post facto* broadcast.[2] The *WPTA* case does not

[2] *WPTA-TV v. State*, No. 35A02-1705-CR-1060, 2017 WL 4928181, (Ind. Ct. App. Oct. 31, 2017).

restrict inspection in any manner as *usage* and *inspection* are two completely different considerations.

This opinion is conditioned on the premise that the portion of the audio requested was indeed during the course of the proceeding in open court and on the record. The Court has not offered any evidence suggesting otherwise. To that extent, the recording is not confidential, would not impede justice, and is a public record subject to inspection.

RECOMMENDATION

I strongly recommend the Tippecanoe Circuit Court revise its position in this case and grant inspection of the audio recording to the Complainant.

Luke H. Britt
Public Access Counselor