



STATE OF INDIANA

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OPINION OF THE PUBLIC ACCESS COUNSELOR

SUE A. BREWINGTON)

Complainant,)

v.)

DEARBORN SUPERIOR COURT II)

Respondent.)

17-FC-121

ADVISORY OPINION

July 10, 2017

This advisory opinion concerns a formal complaint alleging that Dearborn Superior Court II (“Court”) violated the Access to Public Records Act (“APRA”). Ind. Code §§ 5-14-3-1–10. The Court responded by and through Judge Sally A. McLaughlin. In accordance with Indiana Code section 5-14-5-10, I issue the following opinion to the formal complaint filed by the Complainant with the Office of the Public Access Counselor on May 30, 2017.

BACKGROUND

The Complainant, Sue A. Brewington, filed a formal complaint alleging the Court violated APRA by improperly denying her request for audio recordings of the grand jury proceedings in Daniel Brewington’s criminal case. Presumptively the Complainant is related to Daniel Brewington, however, the specific relationship has not been specified in the complaint or supporting documents. At any rate, in a written request, dated April 20, 2017, Ms. Brewington requested the audio recordings of the grand jury proceedings from Daniel Brewington’s 2011 criminal case under case number 15D02-1103-FD-084. The grand jury proceedings at issue occurred over a span of three days from February 28, 2011, to March 2, 2011.

Before turning to the instant complaint, it is worth noting some relevant procedural history on this matter. On January 29, 2016, Daniel Brewington submitted a request to the Court for audio recordings of the grand jury proceedings from his 2011 criminal case. The Court denied the request. Mr. Brewington then



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filed a formal complaint with this office on March 3, 2016. As a result, I issued an advisory opinion¹ on April 14, 2016, where I recommended the audio recordings be released to Mr. Brewington, in part, because a transcript of the proceedings had already been released to Daniel Brewington at the time he requested the audio recordings. On April 20, 2016, the Court—through Special Judge Brian D. Hill—ordered the release of the grand jury audio to Mr. Brewington. The order expressly limited the release of the recordings for personal review by Daniel Brewington. Furthermore, the order specifically barred Brewington from broadcasting or publishing the recordings in any manner.

I turn now to the current complaint. On April 20, 2017, the Complainant, Sue A. Brewington, submitted a written request to the Court requesting the audio of the “entire grand jury proceedings” from Daniel Brewington’s 2011 criminal case. Specifically, Brewington requested “the prosecution’s opening statements and instructions to the grand jury, witness testimony, questions from the grand jury, closing statements, and all other proceedings that occur before the grand jury.”

On May 2, 2017, the Court denied the Complainant’s request for the audio recordings of Daniel Brewington’s grand jury proceedings. In the Court’s view, there was no legal authority in case law, the Indiana Code, or the administrative rules to support the release of grand jury audio recordings to a non-party under APRA. In its denial, the Court declared the recordings to be non-public records. The Court also cited two specific exemptions under section four of APRA as authority for denying the Complainant’s request:

- (1) Those declared confidential by state statute;
- (8) Those declared confidential by or under rules adopted by the Supreme Court of Indiana.

Ind. Code §§ 5-14-3-4(a)(1),(8).

Moreover, the Court cited case law² as additional authority for denying the Complainant’s request for the grand jury audio of Daniel Brewington’s 2011 criminal case.

The Complainant asserts that the Court’s denial violates APRA, in large part, because Judge Hill’s order from April 20, 2016, released the audio publicly. As further support, Ms. Brewington cites a transcript from Daniel Brewington’s preliminary hearing, which was held on September 19, 2011, where Judge Hill referred to the Grand Jury exhibits—released and admitted into evidence—as “public records.” Although the Complainant has acknowledged that the Court’s reasoning for the denial would normally be correct under Indiana Code section 35-34-2-10, she has disputed that conclusion here because the grand jury audio is “already public record.” Ms. Brewington asserts that the Court has failed to distinguish between Grand Jury transcripts and audio, and provided no legal authority for denying the release of the audio. Lastly,

¹ 16-FC-48

² *Pigman v. Evansville Press*, 537 N.E.2d 547 (Ind. Ct. App. 1989); *Hinojosa v. State*, 781 N.E.2d 686 (Ind. 2003); *Blackburn v. State*, 291 N.E.2d 686 (1973).



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the Complainant takes issue with Judge McLaughlin issuing the Court's denial since Judge Hill presided as special judge over Daniel Brewington's criminal case in 2011.

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." Ind. Code § 5-14-3-1. Dearborn Superior Court II is a public agency for the purposes of the APRA. Ind. Code § 5-14-3-2(n). Therefore, any person has the right to inspect and copy Dearborn Superior Court II's disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14-3-3(a).

Under APRA, the term "public record" includes "any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, 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." Ind. Code § 5-14-3-2(r). An audio recording of a court proceeding is a public record subject to disclosure under APRA, unless the recording qualifies under the Act's mandatory or discretionary exemptions. Ind. Code § 5-14-3-3(a),(b). Moreover, a denial must include a statement of the specific statutory reason for the nondisclosure of the information and the name and title—or position—of the individual responsible for the denial. Ind. Code § 5-14-3-9(d)(2).

This case presents a question of whether the Grand Jury audio is *disclosable* to the Complainant, not whether the audio is a public record as contemplated by APRA. The Complainant argues that the Court need only review its own orders for authority on the matter because the audio recordings were already made public. The Complainant, however, misstates the nature of the court order. The court order from Special Judge Brian Hill to the Court Reporter to release the copies of the audio provides that "[t]he release of these audio recordings are hereby specifically limited to the personal review by Daniel Brewington." This does not, by default, deem the audio disclosable to *anyone who requests a copy*.

Similarly, the Complainant argues that the Court "ruled the grand jury transcripts were public record in 2011," but this is also a mischaracterization of the law. Grand jury transcripts are public record as described in Indiana Code section 5-14-3-2(r), but fall under the exemption for disclosure set forth in Indiana Code section 5-14-3-4(a)(1) as "[records] declared confidential by state statute." Indiana Code section 35-34-2-10 provides the following:



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(a) Except when required to do so by law, a person who has been present at a grand jury proceeding and who knowingly or intentionally discloses:

- (1) Any evidence or testimony given or produced;
- (2) What a grand juror said; or
- (3) The vote of any grand juror;

to any other person, except to a person who was also present or entitled to be present at that proceeding or to the prosecuting attorney or his representative, commits unauthorized disclosure of grand jury information, a Class B misdemeanor.

(b) The transcript of testimony of a witness before a grand jury may be produced only:

- (1) For the official use of the prosecuting attorney; or
- (2) Upon order of:
 - (A) The court which impaneled the grand jury;
 - (B) The court trying a case upon an indictment of the grand jury; or
 - (C) A court trying a prosecution for perjury;

but only after a showing of particularized need for the transcript.

Emphasis added.

Furthermore, Administrative Court Rule 9(D)(4) provides that a court has discretion to “manage access to audio and video recordings of its proceeding to the extent appropriate to avoid substantial interference with the resources or normal operation of the court.” The basis of my conclusion in 16-FC-48 was that because the transcript had already been released to Mr. Daniel Brewington, “providing [him] an audio copy of the proceedings would neither prejudice the operation of the court, nor compromise grand jury proceedings.” Again, just because the transcript of the grand jury proceeding was released to one individual does not necessarily render the transcript disclosable to anyone who requests it. The subsequent requester must show a particularized need. It appears the Court has lawfully exercised its discretion to not release the audio recording of the grand jury proceeding to the Complainant.

CONCLUSION

Based on the foregoing, it is the Opinion of the Indiana Public Access Counselor that the Dearborn County Superior Court II has not violated the Access to Public Records Act.

Regards,



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Luke H. Britt

A handwritten signature in black ink, appearing to read "L. H. Britt", written in a cursive style.

Public Access Counselor

Cc: Ms. Sue A. Brewington