



STATE OF INDIANA

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November 15, 2010

Ms. Michelle Allen-Gregory
P.O. Box 363
Greenfield, IN 46140

Re: Formal Complaint 10-FC-246; Alleged Violation of the Access to Public Records Act by the Hancock County Clerk

Dear Ms. Allen-Gregory:

This advisory opinion is in response to your formal complaint alleging the Hancock County Clerk ("Clerk") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*, by denying you access to public records. The Clerk did not provide a written response to your complaint.

BACKGROUND

According to your complaint, you requested access to an electronic copy of proposed findings in conjunction with your preparation of an appellant's brief. Specifically, you sought an electronic copy of a proposed order submitted by Janet Manship on November 10, 2009. On August 25, 2010, you renewed your request for access to the record, but the Clerk again denied you access. On August 27th, you returned with your own equipment to view the records electronically to find the information is "missing." On September 3rd, you submitted a written request for the records. In response, you received a voicemail informing you that the work product of a judge would not be released. On September 21st, you submitted a written request for clarification of the telephone message. On September 27th, you received a response informing you that no decision had been made at that time.

My office forwarded a copy of your complaints to the Clerk. The Clerk did not submit a written response, but informed my office via telephone that it maintains the position that the records constitute work product of a judge. I also note that in the materials attached to your complaint, an order from Special Judge Dan Marshall denied your request for a copy of a CD used by Judge Snow in creating an order in your case. Judge Marshall maintained the position that "the work product of Judge Snow is not something that could be released [to you]."

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. The Clerk is clearly a public agency for the purposes of the APRA. 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 public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

Here, the Clerk’s position is that the records you requested are nondisclosable because they constitute the “work product of a judge.” It is unclear, however, what exception to the APRA the Clerk is relying upon to support its position. Under the APRA, when a records request is submitted in writing and the agency denies the request, the agency must deny the request in writing and must 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. I.C. § 5-14-3-9(c). To my knowledge, the Clerk has not cited to a specific provision permitting or requiring it to withhold the records.

I note that the APRA excepts from disclosure records “declared confidential by or under rules adopted by the supreme court of Indiana.” I.C. § 5-14-3-4(a)(8). Admin. R. 9(G)(1)(h) excludes from public access “[a]ll personal notes and e-mail, and deliberative material, of judges, jurors, court staff and judicial agencies, and information recorded in personal data assistants (PDA’s) or organizers and personal calendars. “ Further, Admin. R. 9 (G)(2)(a) declares “all information excluded in sub-sections (a) through (h) of section (G)(1)” as confidential records. The APRA also exempts from disclosure the “work product of an attorney representing, pursuant to state employment or an appointment by a public agency: (A) a public agency; (B) the state; or (C) an individual.” I.C. § 5-14-3-4(b)(2).

Under the APRA, a public agency that withholds a public record bears the burden of showing that the record is exempt. I.C. §§ 5-14-3-1, 5-14-3-9(f) and (g). Exceptions to disclosure are narrowly construed. I.C. § 5-14-3-1. Because the Clerk has not provided a justification for withholding the records at issue here, it is my opinion that the Clerk has failed to carry that burden.

If the Clerk cannot justify withholding the records under the APRA, I encourage the Clerk to release the records to you as soon as possible. To the extent the Clerk persists in its denial of access following the issuance of an advisory opinion from this office and you believe the Clerk to be in violation of the APRA, I leave you to your remedies before a court pursuant to Ind. Code § 5-14-3-9(e).

CONCLUSION

For the foregoing reasons, it is my opinion that the Clerk violated the APRA by failing to comply with the requirement in subsection 9(c) that denials of written requests be made in writing and include a citation to the authority. Moreover, the Clerk has not yet sustained its burden to demonstrate that the records you requested are exempt from disclosure under the APRA and/or Admin. R. 9. I encourage the Clerk to either provide you with the records or cite a legal basis under the APRA or some other statute for withholding them.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive style with a large, sweeping initial "A".

Andrew J. Kossack
Public Access Counselor

cc: Hon. Dan Marshall