



# STATE OF INDIANA

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September 25, 2013

Mr. Richard Martin - #191676  
Wabash Correctional Facility  
P.O. Box 1111  
Carlisle, IN 47838

*Re: Formal Complaint 13-FC-251; Alleged Violation of the Access to Public Records Act by the Clark County Superior Court 1*

Dear Mr. Martin,

This advisory opinion is in response to your formal complaint alleging the Clark County Superior Court 1, ("Court") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The Court has responded to your complaint through The Hon. Vicki L. Carmichael, Judge, Clark County Superior Court 1. The Honorable Judge Carmichael's response is attached for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on September 16, 2013.

## BACKGROUND

Your complaint alleges the Clark County Superior Court 1 violated the Access to Public Records Act by denying your request in violation of Ind. Code § 5-14-3-3(b).

In your complaint, you allege that you submitted a request to the Court for a copy of the Juror Questionnaire and an electronic copy of the sentencing transcript in two separate cause numbers. Additionally, you requested the copies be free of charge due to your status of indigence.

The Court asserts it did not respond to you directly, but forwarded your request to your counsel of record. The Court claims the juror questionnaires contain confidential information about prospective jurors. Furthermore, the Court states the questionnaires were destroyed and that you have previously received a copy of your trial transcript which would contain the sentencing proceeding. Additionally, the Court is unable to

discern your request of “copy of juror questions” and suggests that those questions would be contained within the transcripts of the proceedings.

## 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 Ind. Code § 5-14-3-1. The Clark County Superior Court 1 is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the Court’s 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).

A request for records may be oral or written. See Ind. Code § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. See Ind. Code § 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 (7) days of receipt, the request is deemed denied. See Ind. Code § 5-14-3-9(b). A response from the public agency could be an acknowledgement the request has been received and information regarding how or when the agency intends to comply.

The Court maintains it did not respond to your request, but rather sent a copy of your request to your attorney of record. The Court concedes it is a *pro se* request. The APRA does not address the issue of sending a response to an attorney of record as an agent of the requestor. Therefore, the Court effectively denied access to your records request by not responding directly to you within seven days. It matters not for the purposes of a public records request that you have retained counsel.

Although there are a number of concerns with the response provided by Judge Carmichael, the issue of juror questionnaires is certainly a novel issue with regard to public access. As to the juror questionnaires you seek, there is no case law of which I am aware that addresses the issue of juror confidentiality. *Jackson v. State, 2009 Ind. App. Unpub.* (from *Jackson v. State, 916 N.E.2d 311, 2009*) is not precedent; however, it does provide persuasive authority for this matter. With regard to the aforementioned case, the Court of Appeals deferred to the discretion of the trial court in having authority to deny a defendant post-trial access to juror questionnaires. The Court cites Jury Rule 10 which was promulgated to maintain the safety of jurors. The Court stated the defendant and counsel were provided the information during the trial for the purposes of the criminal proceeding. Jury Rule 10 provides:

Personal information relating to a juror or prospective juror not disclosed in open court is confidential, other than for the use of the parties and counsel. The court

shall maintain that confidentiality to an extent consistent with the constitutional and statutory rights of the parties.

This administrative rule balances the rights of the defendant with the need for juror privacy and confidentiality. It is a reasonable argument this rule only applies to requests for access *during trial*. Furthermore, Trial Rule 9(G)(1)(b)(xii) excludes from public access “*Personal information relating to jurors or prospective jurors, other than for the use of the parties and counsel, pursuant to Jury Rule 10.*”

Again, the utility of the jury questionnaires to parties and counsel is presumed to apply during the course of the criminal proceeding. Furthermore, the APRA states “*no request may be denied because the person making the request refuses to state the purpose of the request, unless such condition is required by other applicable statute.*” See Ind. Code § 5-14-3-3(a)(2). Even if liberally construed in favor of the requestor, I defer to the need for juror confidentiality and privacy during a proceeding for post-conviction relief. It is not foreseeable you will be prejudiced in any way by not having a copy of the juror questionnaire.

Although the Court has not violated the APRA in regard to this matter, the Court has stated the questionnaires are destroyed after jury selection. Trial Administrative Rule 7(II) sets forth retention schedules for the Courts. It explicitly mandates juror questionnaire forms be kept for no less than two years from the date of creation. The Court should be mindful of this consideration.

In addition, you requested a copy of jury questions. The Court has indicated to this Office there is some confusion regarding your request. The Court has stated it is likely contained in the transcript which was provided to you, to your public defender and to your private attorney of record. The Court has denied your request, however, it is suggested when a public agency is unsure of the nature of the request, as a courtesy the agency should ask the requestor to identify with reasonable particularity the records sought. See Ind. Code § 5-14-3-3(a)(1).

As to your request for an electronic copy of the sentencing proceeding, the Court errs in their assertion the records should be denied, as you and your attorney(s) already have a copy of the transcript. Regardless of the possibility that you may have a copy of the transcript already, nothing in the APRA prevents an individual from requesting duplicate copies of public records. It is recognized that documents get lost or destroyed even after you have taken past custody of them.

Even so, despite your claim you are indigent, your financial status holds no bearing on the ability of the Court to charge copying fees under Ind. Code § 5-14-3-8 *et. seq.*. As with many requests that use the public access laws to obtain documents during pending litigation, I suggest that the discovery process is a more efficient way to request those documents. A court order would mandate the release of public records even if the release of those documents is deemed discretionary under the APRA. That is not to say you may not avail yourself of the public records process, but rather the mechanism of discovery is

a useful tool during litigation. If you are a pro se litigant, a third-party request for documents through the court is likely the preferred mechanism in cases such as these.

### CONCLUSION

For the foregoing reasons, it is the Opinion of the Office of the Public Access Counselor that the Clark County Superior Court 1 has violated the APRA in part by failing to provide you with the sentencing proceeding. They have not violated the APRA in denying access to the jury questionnaires or the other copies of jury questions because the request was not reasonably particular.

Regards,

A handwritten signature in black ink, appearing to read 'LH Britt', with a long, sweeping underline.

Luke H. Britt  
Public Access Counselor

cc: Hon. Vicki L. Carmichael