



STATE OF INDIANA

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March 1, 2013

Mr. Jesse Clements
P.O. Box 68082
Indianapolis, Indiana 46268

Re: Formal Complaint 13-FC-64; Alleged Violation of the Access to Public Records Act by the Marion County Clerk

Dear Mr. Clements:

This advisory opinion is in response to your formal complaint alleging the Marion County Clerk ("Clerk") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Scott Hohl, Chief of Staff, responded on behalf of the Clerk. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you provide that on November 14, 2012, you submitted a written request to the Clerk for records related to Special Judge Assignments made by the Clerk under LR49-TR-79.1-227. On January 24, 2013, after speaking with representatives from the Clerk's office regarding the task of compiling the records that would be responsive to your request, you amended your request in writing. You request now sought a front and back copy of certain 3x5 index cards ("Cards") maintained by the Clerk that contained information regarding each Special Judge in Marion County. You informed the Clerk if such copies were provided and if the Clerk were to confirm the accuracy of the records, you would consider your request for records to be satisfied. On February 9, 2012, you were informed via voicemail that you would be allowed to inspect the Cards, but the Clerk would not provide copies. Mr. Hohl allegedly stated that the Cards were not public record as they were "internal work-product." You allege that Mr. Hohl failed to cite to a statute in denying your request for copies. You believe that the Cards are public record under the APRA and that the Clerk may not deny your request for copies.

In response to your formal complaint, Mr. Hohl advised that the Clerk has been working with you for several months to address your concerns about the process employed for the random reassignment of judges in Marion County as well as other public records requests. Mr. Hohl provided that the process for assigning random judges is very rudimentary. The Clerk uses 3x5 index cards, one for each of the Courts in

Marion County. The top card is removed and placed on the bottom of the pile, and the new 'top' card is where the case is reassigned. The Clerk has allowed you to inspect the Cards and answered all of your questions concerning your request and the Clerk's processes. As the Cards are part of an internal court operation, Mr. Hohl does not believe that they are public record and therefore your request for copies was denied. Mr. Hohl advised that the Clerk has concerns that a copy of the Card could be used improperly if provided outside the agency.

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 is a public agency 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 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).

A request for records may be oral or written. *See* I.C. § 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* I.C. § 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* I.C. § 5-14-3-9(b). A response from the public agency could be an acknowledgement that the request has been received and include information regarding how or when the agency intends to comply.

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). It has not been disputed that the Cards are created by the Clerk and thereafter retained in order to fulfill the process of assigning special judges to cases within the county. In light of the very broad definition of "public records" under the APRA, it is my opinion that the Cards are a public record of the Clerk.

Under the APRA, when a request is made in writing and the agency denies the request, 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. *See* I.C. § 5-14-3-9(c). In denying your request, the Clerk failed to cite to an exemption or exemptions that would allow the agency to withhold all or part of the record that had been requested. As such it is my opinion that the Clerk acted contrary to section 9(c) in denying your request.

Indiana law provides the following regarding copies of public records:

If:

(1) a person is entitled to a copy of a public record under this chapter;

and

(2) the public agency which is in possession of the record has reasonable access to a machine capable of reproducing the public record; the public agency must provide at least one (1) copy of the public record to the person. However, if a public agency does not have reasonable access to a machine capable of reproducing the record or if the person cannot reproduce the record by use of enhanced access under section 3.5 of this chapter, the person is only entitled to inspect and manually transcribe the record. A public agency may require that the payment for copying costs be made in advance.

I.C. § 5-14-3-8(e).

If the Clerk has reasonable access to a machine capable of reproducing the Card and there is no exemption within the law that would allow the Clerk to withhold the record, then it must provide at least one (1) copy of the Card in response to your request. *See also Opinion of the Public Access Counselor 07-FC-231.* I would further note that there instances under the APRA where the agency is not required to provide a copy of the record that is requested; it must only allow the opportunity to inspect (e.g. I.C. § 5-14-3-3(f); I.C. § 5-14-3-8(e)). If the Clerk is unable to cite to any authority that would allow it to withhold the record pursuant to 9(c) of the APRA or that would only require the agency to provide an opportunity to inspect, then it must provide one (1) copy of the record in response to your request.

CONCLUSION

For the foregoing reasons, it is my opinion that the Cards are a public record of the Clerk pursuant to I.C. § 5-14-3-2(n). Further, it is my opinion that the Clerk acted contrary to section 9(c) of the APRA in denying your request by not citing to the specific exemption or exemptions that would allow it to withhold the record in question.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is fluid and cursive, with the first letter of the first name being a large, stylized 'J'.

Joseph B. Hoage
Public Access Counselor

cc: Scott Hohl