



STATE OF INDIANA

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March 27, 2013

Shahid Iqbal
DOC 135809
1 Park Row
Michigan City, Indiana 46360

Re: Formal Complaint 13-FC-72; Alleged Violation of the Access to Public Records Act by the Morgan County Superior Court

Dear Mr. Iqbal:

This advisory opinion is in response to your formal complaint alleging the Morgan County Superior Court ("Court") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Judge Jane Spencer Craney responded in writing to your formal complaint. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint you provide that on February 6, 2013, you submitted a written request to the Court for copies of the jury questionnaires that were utilized for your trial under Cause No. 55-D03-0208-MR-25. On February 13, 2013, Judge Craney denied your request in writing as the records sought were confidential and not accessible under the APRA.

In response to your formal complaint, Judge Craney advised that the Court received your request on February 13, 2013. After discussing the request with Michael McMahon with the Indiana Judicial Center, who advised that the jury questionnaires are confidential pursuant to Indiana Jury Rule 10 and Administrative Rule 9(G)(1)(b)(xii), Judge Craney denied your request in writing.

By way of background, Judge Craney provided that you were tried by jury on June 2-6, 2013 on charges of Murder, two counts of Criminal Confinement with a Deadly Weapon, Neglect of a Dependent, Carrying a Handgun without a License, and Invasion of Privacy. On June 6, 2013 you were convicted on all counts. An appeal was undertaken and the verdict was upheld on May 6, 2004 by the Indiana Court of Appeals. Two issues were raised on appeal, specifically whether the trial court erred in admitting 404(B) evidence and whether the trial court erred in admitting expert testimony on domestic violation. Thereafter, on December 20, 2004, you filed a pro-se Petition for

Post-Conviction Relief alleging ineffective assistance of counsel, prosecutorial misconduct for allegedly failing to reveal exculpatory evidence, and abuse of discretion by the trial court concerning the presentation of evidence by the State and Defense, issues concerning lesser included offenses, and preliminary instructions. A State Public Defender was appointed to represent you; however the State Defender later filed a Motion to Withdraw. Judge Craney noted that it was the Court's experience that when the State Public Defender requests to withdraw from a Post-Conviction Relief matter, there are no grounds for the Petition. You later filed a Verified Motion to Withdraw the Petition without Prejudice, which was granted by the Court on October 22, 2007. You have never raised any allegation of jury tampering or other possible jury issues.

The Court believes that your request for copies of the jury questionnaires could be denied pursuant to Indiana Jury Rule 10, Administrative Rule 9(G)(1)(b)(xii), and that such records can be destroyed after two years under Administrative Rule 7. Judge Craney has reason to believe that the questionnaires no longer exist and were destroyed in the aftermath of the flood that occurred in June 2008.

The Indiana Supreme Court held in *Matheney* that absent a showing of reasonable belief that the defendant's jury might have been improperly influenced, the jurors interest in privacy outweigh the Defendant's interests. *Matheney v. State*, 688 N.E.2d 883, 894 (Ind. 1997). In a ten-year time period, you have never raised or alluded to any allegation that your jury was improperly influenced. An opposite ruling could lead to juror harassment resulting in "unconscionable burden upon citizens who serve on juries." *Stinson v. State*, 313 N.E.2d 699 (Ind. 1974). In addition, Indiana trial judges routinely inform jurors that their information will be protected. This is reaffirmed by an initial jury instruction video which is shown in Morgan County and the Court Final Jury Instructions.

In Morgan County, attorneys are given the Jury Questionnaires approximately two weeks prior to trial on a case of this significance. They are contained in a blue binder which is collected by the Court's Bailiff immediately after jury selection is complete and shredded. The Jury Commissioner retains the original copy of the questionnaire. Judge Craney has never been asked by any party to provide the questionnaires after retrieval by the Bailiff following jury selection. After receiving your original request, the Court attempted to determine whether the original questionnaires still existed. The Court was able to find an extensive blank questionnaire form that was a modified version created for another high-profile murder case in the county. Based on the CCS entries, it appears that this form was used in addition to the original standard questionnaire. The questionnaires would have been destroyed by the Court's Bailiff immediately after jury selection. The Court attempts to find the original three-page venire questionnaire which the prospective jurors would have filled out was unsuccessful. The boxes containing such records were likely destroyed in a flood that occurred in June 2008.

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 Court 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 Court’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 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 information regarding how or when the agency intends to comply. Here the Court responded in writing to your written request for records within seven (7) days of its receipt. As such, it is my opinion that the Court complied with the requirements of section 9(b) of the APRA in response to your request.

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 the Court’s original written denial of your request it failed to cite to the specific exemption or exemptions that would authorize it to withhold the records that were sought. As such, it is my opinion that the Court acted contrary to section 9(c) in response to your request.

As to the substance of your denial, I.C. § 5-14-3-4(a)(8) provides that records declared confidential by or under rules adopted by the Indiana Supreme Court may not be disclosed in response to a request. Under Administrative Rule 9(G)(b)(xii) personal information relating to jurors or prospective jurors is excluded from public access and declared confidential, other than the use of the parties and counsel pursuant to Jury Rule 10. Indiana Jury Rule 10 provides that 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. *Ind. Jury R. 10*. The courts are instructed to maintain confidentiality to an extent consistent with the constitutional and statutory rights of the parties. *Id.*

The *Public Access to Court Records Handbook* (“Handbook”) published by the Indiana Supreme Court, Division of State Court Administration provides the following guidance as to jury information:

“What information concerning jury lists is open to the public?”

Under Jury Rule 10, 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 is required to maintain that

confidentiality to an extent consistent with the constitutional and statutory rights of the parties. Jury lists were included in Administrative Rule 9 to prevent problems such as the harassment of jurors. Some personal information may be disclosed in the jury selection process, and this information will become part of the public record. However, there is no requirement that addresses, telephone numbers, and other matters of a personal nature be published in the Record of Judgments and Orders. Under IC 33-4-5-9(b) and IC 33-4-5.5-7, the jury lists (names only) will be placed in the Record of Judgments and Orders that are open to the public.

Are juror questionnaires and the responses supplied by prospective jurors public records?

Under Administrative Rule 9(G)(b)(xii) and Jury Rule 10 personal information contained in juror questionnaires is confidential except for the use of the parties and counsel unless the information is disclosed in open court. Otherwise juror questionnaires and the responses of prospective jurors are public records. <http://www.in.gov/judiciary/admin/files/pubs-accesshandbook.pdf>

The APRA requires public agencies to maintain and preserve public records in accordance with applicable retention schedules. *See* I.C. § 5-14-3-4(h). A public agency shall protect public records from loss, alteration, mutilation, or destruction. *See* I.C. § 5-14-3-7(a). A public agency shall further take precautions that protect the contents of public records from unauthorized access, unauthorized access by electronic device, or alteration. *See* I.C. § 5-14-3-7(b). Judicial retention schedule 90-9-05 provides that Jury Questionnaire Forms shall be destroyed after two years from the date of creation. Admin. R. 7, Schedule 90-9-05. *See also Opinions of the Public Access Counselor 04-FC-78; 13-FC-88.* The Court has provided that it no longer retained the jury questionnaires that you had requested. As your trial occurred in June 2003, the Court had the authority to destroy the records in June 2005 pursuant to Admin. R. 7, Schedule 90-9-05. Judge Craney has advised that the Court no longer maintains the records, which were likely destroyed in a flood that occurred in June 2008. As such, it is my opinion that the Court did not violate the APRA by failing to retain records responsive to your request beyond the applicable retention schedule. Regardless of the records availability, I believe that the Court has met its burden to deny your request pursuant to Indiana Jury Rule 10 and Administrative Rule 9(G)(1)(b)(xii) in light of the Indiana Supreme Court's ruling in *Matheney* and the fact that you have never raised any allegation of jury tampering or other jury related issues subsequent to your original conviction.

CONCLUSION

Based on the foregoing reasons, it is my opinion that the Court complied with the requirements of section 9(b) of the APRA in response to your request. It is my opinion that the Court acted contrary to section 9(c) of the APRA by failing to cite in its written

denial to your request the specific exemption or exemptions that would allow it to withhold the records that were responsive to your request. It is my opinion that the Court did not violate the APRA by failing to retain records responsive to your request beyond the applicable retention schedule. Regardless of the records availability, it is my opinion that the Court has met its burden to demonstrate that the denial of your request was proper pursuant to Indiana Jury Rule 10 and Administrative Rule 9(G)(1)(b)(xii) in light of the Indiana Supreme Court's ruling in *Matheney* and that you have never raised any allegation of jury tampering or other jury related issues subsequent to your original conviction.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a distinct "Hoage" at the end.

Joseph B. Hoage
Public Access Counselor

cc: Judge Jane Spencer Craney