

February 19, 2004

Mr. Jeffrey Bringle
3465 Virginia Street
Columbus, IN 47203

*Re: Formal Complaint 04-FC-10; Alleged Denial of Access to Public Records
by the Bartholomew Superior Court, No. 2*

Dear Mr. Bringle:

This is in response to your formal complaint alleging that the Bartholomew Superior Court, No. 2 (Court) violated the Access to Public Records Act (APRA) (Ind. Code 5-14-3-1 *et seq.*), when it responded to your request for records. For the reasons set forth below, I find that the Court's response violates the APRA inasmuch as it denies you a copy of the record requested and does not, in support of that denial, assert that it does not have reasonable access to a machine capable of reproducing the record. While the Court agrees to provide you with an opportunity to inspect the record, I find that the response in this regard further violates the APRA to the extent that it purports to assess a fee for inspection of the record sought, and to the extent that the fee is not otherwise authorized by law.

BACKGROUND

On December 22, 2003, you signed a letter addressed to the Honorable Roderick D. McGillivray, Judge of the Bartholomew Superior Court, No. 2, requesting a copy of the audio recording of a hearing held on December 10, 2003, in cause number 03D02-0310-FD-01500. That written request was received by the Court on the same day. The Court responded with a pre-printed form letter. The response is not dated.¹ The response is not signed. The response asserts first that the Court is not subject to the APRA. The response further states that the Court will provide you with access to inspect the record but that it will not provide you with a copy of the audiotape. Further, the response asserts that you will be charged a \$20.00 fee to inspect the record, and indicates that the fee is to

¹ You do not allege that the written response was untimely, and your formal complaint alleges that the violation occurred on December 22, 2003. Accordingly, no opinion is now offered regarding the timeliness of the response under the APRA.

compensate for “retrieval” of the tape and for court staff time related to sitting with you while you listen to the tape.

On January 19, 2004, you signed a formal complaint against the Court, and that complaint was filed with this office on the following day. This office thereafter sent a copy of your complaint to the Court and requested a response pursuant to Indiana Code 5-14-5-5 and 5-14-5-8. A copy of the complaint and supporting documentation was sent to the Court by facsimile on February 4, 2004, and this office requested that a response be provided by February 11, 2004. No response has been submitted by the Court.²

ANALYSIS

As a threshold matter, I respond to the Court’s suggestion in its form response to the records request that the APRA does not apply to the Court. With regard to jurisdiction, the APRA applies to public agencies and defines “public agency” as including any entity that exercises any part of the judicial power of the state. IC 5-14-3-2. No court of competent jurisdiction has held the provisions of the APRA unconstitutional or otherwise inapplicable to the judicial branch or to judicial branch agencies. Moreover, I note that the Supreme Court of Indiana, through its rulemaking authority, has acknowledged application of the APRA to court records. *See Ind. Administrative Rule 9* (declaring specific court records confidential “[i]n accordance with IC 5-14-3-4(a)(8)”). On that same point, I note that proposed amendments to Administrative Rule 9 even more explicitly acknowledge application of the APRA to court records. *See Proposed Revision of Indiana Administrative Rule 9* (proposed Ind. Admin. R. 9(A)(1)) (proposed November 13, 2003) (declaring that “[e]xcept as otherwise provided by this rule, access to court records is governed by the Indiana Access to Public Records Act (Indiana Code §5-14-3-1, *et. seq.*)”). Accordingly, I find that the APRA applies to the Court.

Indiana Code 5-14-3-3 provides that any person has the right to inspect and copy the public records of any public agency. As set forth above, the Court is a public agency subject to the provisions of the APRA, and the records of the Court are public records. A public record includes any photograph, tape recording, or other material that is received, maintained, or filed by or with that public agency. IC 5-14-3-2. Accordingly, the audiotape at issue here is a public record subject to inspection and copying under the provisions and limitations of the APRA.

The Court’s response denies you a copy of the audiotape, but asserts that you may inspect the tape by listening to the audio and making notes from the tape. The Court’s response does not indicate that it is not capable of reproducing a copy of the record, but cites instead security concerns with regard to protecting the integrity of the original record.

² The facsimile transmission verification report confirms receipt by the Court on February 4, 2004. Also, on that date, the undersigned contacted court staff by telephone and confirmed submission and receipt of the complaint.

The Court correctly observes that it is responsible for protecting the public record from loss, alteration, mutilation, or destruction, or from any activity that would make the record otherwise unavailable to the public agency for the regular functions or duties of that entity. IC 5-14-3-7. However, I do not understand this provision to permit a public agency to refuse to make a reproduction of a record where it has a reasonable means of doing so and where there are adequate safe guards available to maintain the integrity of the original record. Indeed, the law is to the contrary. IC 5-14-3-7(c); 5-14-3-8(e). The APRA expressly provides that if a person is entitled to a copy of a public record and if the public agency is in possession of the record and has reasonable access to a machine capable of reproducing the record, “the public agency must provide at least one (1) copy of the public record to the person.” IC 5-14-3-8(e). A public agency may only require inspection in lieu of copying where it does not have reasonable access to a machine capable of making the requested copy. IC 5-14-3-8(e). The Court has provided no assertion that it is not capable of reproducing the record or that reproduction (that is to say, making a copy of the tape) will result in the loss or other alteration of the original record. Indeed, public agencies copy audio and video recordings on a regular basis and without incident, and that activity is certainly no more dangerous to the original tape than is the activity of feeding a paper record through the automatic feeder of a copy machine. Based on the information before me, I find that the Court violated the APRA by refusing to provide a copy of the public record.³

To the extent that the Court’s response to the record request indicated that it would permit access through inspection, the response was further in violation of the APRA in that it conditioned inspection on the payment of a \$20.00 fee. Certainly, a public agency may charge a fee for reproduction of a record, and it is entitled to secure payment of that fee in advance. IC 5-14-3-8. However, the APRA makes it quite clear that absent statutory exception or court order, the fee may only be assessed for the actual cost of the copy of the record, and the public agency may not charge a fee to inspect a public record or to search for, examine, or review the record. IC 5-14-3-4(b); 5-14-3-8(d); *see* IC 33-19-6-1 (establishing per page copy fee for court records).⁴ Here, the Court’s response indicates that the fee it requires for inspection of the record is specifically a search fee for staff retrieval of the record and for staff time in sitting with the requesting party while the inspection is occurring. The Court’s goal of providing for security measures to ensure the protection of the original record is appropriate, but the APRA does not permit and expressly precludes it from charging for that purpose absent independent authorization. No such authority is alleged or presented here.

³ The Court may rely on Indiana Code 5-14-3-7 to put in place certain procedural restrictions with respect to accessing public records. The Court may, for example, require that records be inspected in front of court personnel, require that court personnel make the copies rather than the requester, or require that the copies be made on the court’s equipment rather than the requester’s equipment.

⁴ Based on these provisions, it is my opinion that the Court may charge for the actual cost of any copy of the audiotape.

CONCLUSION

For the reasons set forth above, I find that the Court's response to your records request is in violation of the APRA both in that it denied you access to a copy of the public record and because it sought to charge you a search and review fee for any inspection of the record. Should the Court maintain its nondisclosure on the conditions set forth in its response to your request, you may seek further remedies pursuant to Indiana Code 5-14-3-9.⁵ If you prevail in any civil action you bring against the public agency, the APRA requires that the agency pay your attorney fees in that action. *See* IC 5-14-3-9(i).

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: The Honorable Roderick D. McGillivary

⁵ You may be entitled to other remedies under the law.