



# STATE OF INDIANA

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November 7, 2005

Donald Averitte  
DOC # 906518  
Putnamville Correctional Facility  
1946 W. US HWY 40  
Greencastle, IN 46135

*Re: Consolidated Formal Complaints 05-FC-204 and 05-FC-208; Alleged Violations of the Access to Public Records Act by the Marion County Court Reporter, Criminal Court #20, and the Marion County Clerk*

Dear Mr. Averitte:

This is in response to your formal complaints alleging that the Marion County Court Reporter, Criminal Court #20, ("Court Reporter") and the Marion County Court Clerk ("Clerk") violated the Access to Public Records Act ("APRA").

### BACKGROUND

On October 7, 2005 you filed a formal complaint with the Office of the Public Access Counselor. Your complaint, alleging violations of the APRA by the Court Reporter, was assigned formal complaint number 05-FC-204. On October 13, 2005 you filed a second formal complaint alleging violations of the APRA by the Clerk; your complaint was assigned formal complaint number 05-FC-208. I have consolidated your complaints for issuance of a single advisory opinion. Your request for priority status in complaint 05-FC-208 was denied because you did not allege sufficient facts to qualify for priority status pursuant to 62 IAC 1-1-3.

In formal complaint 05-FC-204 you allege that the Court Reporter violated the APRA by failing to respond to your request for records. You mailed your request for a record, the audio recording of a specified sentencing hearing, on September 16, 2005. Your request was received by the Marion County Superior Court, Criminal Division #20, ("Court") on September 21, 2005. The Court mailed your request back to you on September 27, 2005. A handwritten note on your request dated September 26, 2005 stated, "denied, copy to D." The note was signed William Young. However, in your complaint you indicate that Judge Young should not have responded to your request. You assert that your request was clearly addressed to and directed to the Court Reporter, not the Court.

The Honorable William Young, Judge of the Marion County Superior Court, Criminal Division #20, responded to your complaint by forwarding a copy of a letter that he sent to you,  
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dated 10/7/05. A copy of the response is enclosed for your reference. He indicated that there is no tape as the hearing was digitally recorded. He requested that you let him know the format in which you would like to receive the audio recording of your sentencing hearing and he will determine the cost and inform you of what the cost will be.

In formal complaint 05-FC-208 you allege that the Clerk violated the APRA by failing to timely respond to your request, by denying your request and by failing to state the reason for the denial. Your request was mailed September 16, 2005. It was received by the Clerk on September 19, 2005. You requested the same audio recording as above. The Clerk responded by returning your original request with a handwritten note dated September 30, 2005 that stated, "denied copy to D" and was signed William Young.

Mr. Tony Schaffer, Chief Deputy, responded to your complaint on behalf of the Clerk by letter dated October 25, 2005. A copy of that response is enclosed for your reference. Mr. Shaffer asserted that the record is confidential pursuant to Rule 5 of the Indiana Rules of Criminal Procedure.

#### ANALYSIS

Any person may inspect and copy the public records of any public agency during the agency's regular business hours, except as provided in section 4 of the Access to Public Records Act. IC 5-14-3-3(a). If a public agency receives a request for records via U.S. mail, facsimile, or e-mail, it has seven days in which to respond. IC 5-14-3-9(b). If a request for a record is made in writing, the public agency may deny the request if the denial is in writing and the denial includes: 1) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record, and 2) the name and the title or position of the person responsible for the denial. IC 5-14-3-9(c).

In 05-FC-204 you specified that your complaint was against the Court Reporter. You contend that the Court Reporter failed to respond to your request and, therefore, violated the APRA. However, the Court Reporter is not a public agency. Rather, the Court Reporter is an employee of the agency. I.C. 5-14-3-9(b) applies to public agencies, not to employees; therefore, the Court Reporter was not required to respond to your request. Therefore, I decline to find that the Court Reporter violated the APRA.

The Clerk received your request on September 19, 2005. The denial was dated September 30, 2005. The Clerk violated the APRA by failing to respond to your request within seven days of receiving it.

The Clerk failed to cite to any exemption authorizing the withholding of the record you seek. The Clerk violated the APRA when she denied your request for records and failed to specify the exemption or exemptions that authorized the withholding of the record.

Although the Clerk failed to cite to a specific exemption authorizing the withholding of the record when denying your request, the Clerk now asserts that the record may not be disclosed pursuant to Rule 5 of the Indiana Rules of Criminal Procedure. Indiana Code Section 5-14-3-4(a)(8) states that the following records shall be excepted from disclosure to the public: “[t]hose declared confidential by or under rules adopted by the supreme court of Indiana.” Indiana Rules of Court, Criminal Procedures, Court Rule 5, requires electronic recording or stenographic reporting, with computer-aided transcription, of all oral evidence and testimony given in all cases and hearings. Court Rule 5 further states, in pertinent part, that "if a transcription of the recorded matters has not been prepared, certified and filed in the criminal proceeding, the electronic recording of all oral matters *shall be maintained as a confidential court record for ten years in all misdemeanors or fifty-five year in all felony cases.*" (Emphasis added). Therefore, the Clerk could properly withhold the requested tape pursuant to Ind. Ct. C.P.R. 5.

The Court has indicated in its reply to 05-FC-204 that it will provide you with a copy of the record if you indicate the format that you would like to obtain the record in. The Court has indicated that it will determine the cost and inform you of that cost. Pursuant to Ind. Ct. C.P.R. 5 the judge of the court, in his discretion, may order transcription of the proceedings. Because the Court is not required by the APRA to create a record, i.e. transcribe an audio tape, the Court may charge you the cost of the transcription.

#### CONCLUSION

For the foregoing reasons, I find that the Clerk of the Marion County Courts violated the Access to Public Records Act by failing to respond to your request for records within seven days of receiving the request. Further, the Clerk of the Marion County Courts violated the Access to Public Records Act when she denied your request and failed to specify the exemption or exemptions authorizing the withholding of the records. The Marion County Court Reporter, Criminal Court #20, is not a public agency; therefore, I decline to find that the Court Reporter violated the Access to Public Records Act.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Judge William Young  
Tony Schaffer