



STATE OF INDIANA

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September 16, 2009

Mr. Ernest T. Smith, # 883353
E-103-L
Wabash Valley Correctional Facility
PO Box 1111
Carlisle, IN 47838

*Re: Formal Complaint 09-FC-188; Alleged Violation of the Access to
Public Records Act by Tippecanoe County Superior Court*

Dear Mr. Smith:

This advisory opinion is in response to your formal complaint alleging the Tippecanoe County Superior Court ("Court") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*, by denying you access to public records. For the following reasons, my opinion is that the Court violated the APRA when it denied your public records requests because the Court failed to cite a specific exemption to the APRA in its responses to you. However, the Court did not otherwise violate the APRA by denying your requests because the record you sought -- a search warrant -- does not exist.

BACKGROUND

According to your complaint, you sought access to a search warrant in case number 79D02-9509-CF-00089 via a letter dated July 9, 2009. You allege that the Court denied that request, but you do not specify the date or cited reason for the Court's denial. You further state that on July 15, 2009, the Court denied your second request for access to the search warrant.

The Court's response to your complaint is enclosed for your reference. The Court alleges that you sent two separate requests for records. First, on July 9, 2009, you sent a letter to the Clerk of Tippecanoe County requesting records pertaining to a criminal case against you that was initiated in 1995. The Clerk's office treated that as a pleading in the case and directed it to Superior Court No. 2, where Judge Busch denied it in an order dated July 15, 2009. Second, on August 4, 2009, you directed a similar request to the Clerk of Tippecanoe County, this time as a public records request, asking specifically for a search warrant. On August 5, 2009, Judge Busch entered another order denying your

request. Neither of Judge Busch's orders cited to a specific statutory exemption to support the denials of your requests.

The Court argues that both of your requests were denied because they were excluded from public access pursuant to a specific court order under Ind. Administrative Rule 9(G)(1)(c). The Court also cites to I.C. § 5-14-3-2(h) in arguing that the search warrant is an investigatory record and, therefore, exempt from disclosure under I.C. § 5-14-3-4(b)(1). Finally, the Court states that the Clerk's review of the case file did not reveal the presence of a search warrant. The Clerk did not review documents in the file that were sealed by judicial order.

ANALYSIS

The public policy of the APRA states, "[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." I.C. § 5-14-3-1. The Court meets the definition of a "public agency" under the APRA. IC 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Court during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

As an initial matter, it appears that the Court violated the APRA insofar as it failed to respond to your request by citing the specific authority upon which it was basing its denial. Under the APRA, if an agency denies a written request for public records, the agency must include "a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record" in its denial. I.C. § 5-14-3-9(c)(2)(A). The Court's responses to your requests, which took the form of judicial orders, did not cite to any specific exemption.

However, if, as the Court alleges, no search warrant exists in the case file, the Court did not otherwise violate the APRA by failing to produce it for you. In 2001, Counselor O'Connor opined "that the APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA." *Opinion of the Public Access Counselor 01-FC-61*; see also *Opinion of the Public Access Counselor 08-FC-113* ("If the records do not exist, certainly the [Agency] could not be required to produce a copy....")

I note the Court states that the Clerk did not review the sealed case files for the presence of a search warrant. However, even assuming that the search warrant is included in the sealed materials, it would be exempt from disclosure under Ind. Administrative Rule 9. Under Admin. R. 9, certain types of information or documents contained in court records are confidential or are disclosable only under certain circumstances. Specifically, information that is excluded from public access pursuant to a specific court order is confidential and, therefore, not disclosable by a court. Admin. R.

9(G)(1)(c). In this case, as long as the sealed records were sealed pursuant to a court order that complied with the requirements of Admin. R. 9, those records would be properly withheld by the Court. Therefore, it is my opinion that the Court did not violate the APRA by failing to produce the search warrant (if it exists) from the sealed case files.

CONCLUSION

For the foregoing reasons, it is my opinion that the Court violated the APRA's requirement that its denials of your requests include a statement of the specific exemption(s) authorizing the withholding of all or part of the public record. However, the fact that the search warrant you requested does not exist means that the Court did not otherwise violate the APRA by denying your requests.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive, slightly slanted style.

Andrew J. Kossack
Public Access Counselor

Cc: Douglas Masson, Hoffman, Luhman & Masson PC