



# STATE OF INDIANA

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December 7, 2009

Mr. Valance, N/F/N, N/M/I  
4617 Furge Drive  
Apartment #1  
Fort Wayne, IN 46835

*Re: Formal Complaint 09-FC-278; Alleged Violation of the Access to Public Records Act by the Dekalb County Superior Court II*

Dear Mr. Valance:

This advisory opinion is in response to your formal complaint alleging the Dekalb County Superior Court II ("Court") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* You requested priority status because you need these records for an upcoming hearing. I have granted that request pursuant to 62 Ind. Admin.Code 1-1-3(3).

## BACKGROUND

In your complaint, you allege that on May 7, 2009, you requested transcripts for hearings from the Court. You were told that the transcripts could be provided for a total of \$1,250.00 or in audio form for a total of \$300.00. You state that these costs are beyond your current means.

On November 5, 2009, you wrote to the Court reporter and requested access to the transcripts. The judge responded in writing that you would need to schedule an appointment with the court reporter to come in and inspect the records. You contacted the court reporter, who provided you with several times to inspect the recordings. The times were limited by what the court reporter described as a busy courtroom schedule. You went to the Court on November 20<sup>th</sup>, which was one of the days that the court reporter provided to you. At that time, you asked the court reporter how to make copies on the equipment, but she informed you that you would not be allowed to make copies. You further allege that the court reporter consulted with the judge and then told you that you would not be allowed to make copies of the transcripts. You then say that the court reporter permitted you to listen to records of two of the six hearings for which you requested access, but you could not listen to the remaining hearings because of the "time

constraint placed upon [you] by the Court schedule.” You were then informed by the court reporter that it would “next to impossible” for you to listen to the rest of the hearings before the end of the year because of the court schedule.

## 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.” I.C. § 5-14-3-1. Any person has the right to inspect and copy the public records of a public agency during regular business hours unless the public records are exempt from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a). The Court does not contest that it is a public agency for the purposes of the APRA. I.C. § 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 records fall within one of the APRA’s exceptions to disclosure. I.C. § 5-14-3-3(a).

The APRA includes the following provision regarding copies of public records:

A public agency may not deny or interfere with the exercise of the right stated in subsection (a). The public agency shall either:

- (1) provide the requested copies to the person making the request; or
- (2) allow the person to make copies:
  - (A) on the agency's equipment; or
  - (B) on the person's own equipment.

I.C. § 5-14-3-3(b). “Copy,” for the purposes of the APRA, includes “transcribing by handwriting, photocopying, xerography, duplicating machine, duplicating electronically stored data onto a disk, tape, drum, or any other medium of electronic data storage, and reproducing by any other means. I.C. § 5-14-3-2(b). Certainly this definition includes using audio recording equipment, which would be “reproducing by any other means.”

The APRA also requires, however, that a public agency protect its public records from loss, alteration, mutilation, or destruction, and regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. I.C. § 5-14-3-7(a). Section 7, however, does not operate to deny any person the rights secured by Section 3 of the APRA. I.C. § 5-14-3-7(c).

The issue here is whether the Court had discretion under the APRA to deny your request to make your own copies of the audio files. In *Opinion of the Public Access Counselor 05-FC-70*, Counselor Davis opined that a public agency’s discretion regarding copies of public records is somewhat limited under I.C. § 5-14-3-3(b)(1) and (2), relying

partly upon the APRA's provision that any person may "inspect *and* copy" the public records of a public agency. I.C. § 5-14-3-3(a) (emphasis added). Counselor Davis reasoned as follows:

The APRA does not say that a person may receive a copy of a record, unlike Louisiana's public records law, which states: "any person...may inspect, copy or reproduce *or obtain a reproduction* of any public record." La. R.S. 44:1-44. (Emphasis supplied); *See First Commerce Title Company, Inc. v. Martin*, 887 So.2d 716 (La. App. 2004)(upholding a person's use of a portable scanner in Clerk's office to reproduce records).

IC 5-14-3-3(b) prohibits a public agency from denying or interfering with the exercise of the right stated in subsection (a). The difficulty in interpretation stems from the language stating that a public agency shall either provide the copies or allow the person to make copies on the agency's equipment or on the requester's own equipment. The APRA is silent on whether the options for supplying a copy are solely within the public agency's discretion. In fact, the public agency *could* wish to exercise its discretion to decline to make the copies and instead allow the person to make the copies himself on either the agency's equipment or the person's own equipment. This is a reasonable interpretation of IC 5-14-3-3(b)(2). Also, a public agency is not required to maintain equipment capable of reproducing a record; in that instance, the public agency must permit a person to inspect and manually transcribe the record. IC 5-14-3-8(e). However, to read this clause to not allow a person to use his own equipment to make a copy would nullify the language in IC 5-14-3-3(b)(2)(B), and in any case, the Recorder does maintain equipment to reproduce its records.

A public agency is required to protect records from loss, alteration and destruction, and the Recorder has raised the provision at IC 5-14-3-7(a). However, the Recorder has not explained how your use of a digital camera to take pictures from records displayed on the computer will result in the loss, destruction, or alteration of records, or interfere materially with the functions or duties of the Recorder. If anything, I would suspect that your making copies utilizing your own equipment may actually save staff the time and effort to make copies themselves.

*Opinion of the Public Access Counselor 05-FC-70.*

I agree with Counselor Davis' opinion and agree that a person has a right to make a copy of a record using his own equipment. To the extent the Court can demonstrate how you making your own copies would result in the loss, destruction, mutilation, or alteration of records, the Court may be able to sustain its denial of access. However, if the Court cannot sustain the burden of proof, it is my opinion the Court must allow you to either make your own copies or use your own equipment to make copies of records. Given that the Court must regulate any material interference with the regular discharge of the functions or duties of the agency or employees under Section 7, the Court may set a mutually convenient appointment or series of appointments during business hours to allow you to continue to make the copies you seek.

CONCLUSION

For the foregoing reasons, it is my opinion that if the Court cannot sustain its burden to show why it denied your request to make your own copies of the audio recording, the Court violated the APRA.

Best regards,



Andrew J. Kossack  
Public Access Counselor

cc: Judge Monte L. Brown, Dekalb County Superior Court II