



STATE OF INDIANA

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February 13, 2012

Michael J. Shepard
3500 N. Harlan Avenue
Evansville, Indiana 47711

Re: Formal Complaint 12-FC-11; Alleged Violation of the Access to Public Records Act and the Open Door Law by the Vanderburgh County Circuit-Superior Court

Dear Mr. Shepard:

This advisory opinion is in response to your formal complaint alleging the Vanderburgh County Circuit-Superior Court ("Court") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-4 *et seq.*, and the Open Door Law ("ODL"), I.C. § 5-14-1.5-1 *et seq.* A copy of your formal complaint was forwarded to the Court, but we have yet to receive a response.

BACKGROUND

In your formal complaint, you make general allegations that that the Court holds probable cause hearings in closed session in violation of the I.C. § 5-14-2-2. You further allege that the public is not able to obtain transcripts from the probable cause hearings. As to the APRA, you allege that the Court failed to respond to your request for a copy of the "Exclusion Order" or "Notice."

ANALYSIS

It is the intent of the ODL that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. *See* I.C. § 5-14-1.5-1. Accordingly, except as provided in section 6.1 of the ODL, all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. *See* I.C. § 5-14-1.5-3(a).

As to your allegations regarding the ODL, a person denied the right to attend any public meeting of a public agency in violation of I.C. § 5-14-1.5 or denied any other right conferred by I.C. § 5-14-1.5 may file a formal complaint with the public access counselor. *See* I.C. § 5-14-5-6. You make the general allegation that the Court conducts

closed door hearings in violation of I.C. 5-14-2-2 and believe the Court denied you access to the hearing by not responding to your motion filed in your pending criminal matter. You do not provide the date for which you were denied access to any hearing or when you were denied a request for copies of transcripts from the hearings. Because you have not established that you were denied access to any hearing or provide the details thereof, you lack standing to file a complaint with this office. *See Opinions of the Public Access Counselor 00-FC-11, 03-FC-32; 8-FC-168.* However, you are entitled to make an informal inquiry about the state's public access laws. The substance of your complaint as it pertains to the ODL will therefore be addressed by this Office as an informal inquiry. *See I.C. § 5-14-4-10(5).*

All criminal proceedings are presumptively open to attendance by the general public. *See I.C. § 5-14-2-2.* Criminal proceedings is defined as court proceedings in a criminal action after the arrest of an accused and before any appeal is instituted; criminal proceedings do not include the deliberations of juries, omnibus hearings except for those portions at which witnesses are sworn and testimony taken, or any proceeding in which rights of attendance by the general public are otherwise specifically governed by statute or rules of procedure. *See I.C. § 5-14-2-1.* No Court may order the exclusion of the general public from any criminal proceedings, or part of a criminal proceeding, unless it affords the parties and the general public a meaningful opportunity to be heard on the issue of any proposed exclusion. *See I.C. § 5-14-2-3.*

The Criminal Rules of the Vanderburgh Circuit Court provide the following regarding probable cause hearings:

If a defendant is arrested without an arrest warrant having previously been issued, a probable cause hearing will be held. The hearing will be held at the court session immediately following the arrest and booking of the defendant in the Vanderburgh County Jail. At this hearing, the Court will review the affidavit of probable cause filed by the State to decide if there is probable cause for the offense(s) alleged by the State. If the Court finds that there is not probable cause, the defendant will be discharged. If the Court finds that there is probable cause, the Court will advise the defendant of the charges and some preliminary rights and set bond. The Court will also order the defendant to appear in three business days for an initial hearing at which time the defendant should appear with an attorney if he/she intends to hire counsel and the State should file any formal charges. *Vanderburgh Circuit Court Local Rule 82-CR00-C2.06.*

You allege to have presented to the Court an objection to a motion to exclude, which constitute a showing that the duty to act has been presented or brought to the attention of the trial court pursuant to I.C. 5-14-2-8(c). If you believe that the Court has acted contrary to the provisions of I.C. § 5-14-2 *et seq.*, I.C. § 5-14-2-8 provides that any party or member of the general public aggrieved by the ruling of the court on the issue of exclusion of the general public from a criminal proceeding has the right to bring an original action before the Indiana Supreme Court under the Rules of Procedure for Original Actions.



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As to your allegation that the Court violated the APRA, 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 in person and the agency does not respond within twenty-four hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). 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). 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. Thus, if the Court failed to respond to your request within seven days of receiving it, the APRA deems your request denied.

Without the benefit of a response from the Court, it is unclear to me why your request was denied. Under section 4 of the APRA, a public agency may not disclose records declared confidential by or under rules adopted by the supreme court of Indiana. I.C. § 5-14-3-4(a)(8). Confidentiality of court records is governed chiefly by Administrative Rule 9, which was adopted by the Indiana Supreme Court. The rule applies to court records, which is defined as both case records and administrative records. Admin. R. 9(C)(1). "Case record" means any document, information, data, or other item created, collected, received, or maintained by a court, court agency or clerk of court in connection with a particular case. Admin. R. 9(C)(2). All persons have access to court records as provided in Administrative Rule 9. Admin. R. 9(B)(1). However, some case records are confidential, pursuant to Administrative Rule 9(G).

I would also note that if a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. "[T]he 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....”). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. See *Opinion of the Public Access Counselor 10-FC-56*. In your formal complaint you acknowledge that it is possible that the records you requested might not exist. As such, if the Court does not have any records that are responsive to your request, it would not have violated the APRA by failing to provide records that it does not maintain. However, the Court would have been required under section 9 of the APRA to respond to your request and provide that the records did not exist.

Under the APRA, a public agency that withholds a public record bears the burden of proof to show that the record is exempt. See I.C. §§ 5-14-3-1, 5-14-3-9(f) and (g). Exceptions to disclosure are narrowly construed. See I.C. § 5-14-3-1. Because the Court has not provided a justification for withholding the records at issue here, it is my opinion that the Court has failed to sustain its burden.

CONCLUSION

For the foregoing reasons, it is my opinion that if the Court failed to respond to your request within seven days in accordance with section 9 of the APRA, the Court violated the APRA.

Best regards,

A handwritten signature in black ink, appearing to read 'J. Hoage', written in a cursive style.

Joseph B. Hoage
Public Access Counselor

cc: Vanderburgh County Circuit-Superior Court