



STATE OF INDIANA

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February 13, 2012

Mr. Scott B. Smith
916 Monon Road
Lowell, Indiana 46356

Re: Formal Complaint 12-FC-16; Alleged Violation of the Access to Public Records Act by the Porter County Superior Court Division 4

Dear Mr. Smith:

This advisory opinion is in response to your formal complaint alleging the Porter County Superior Court Division 4 (Court) violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *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 allege that on December 23, 2011, you submitted a written request to the Court for any audio or visual recordings of a hearing that was held on September 25, 2009. On January 10, 2012, the Court issued an Order that denied your motion for copies of the audio recording. The Order provided that the Court Reporter can transcribe proceedings onto paper, at a cost, for the Defendant. However, the original disc used to record the proceedings cannot be tendered to any party.

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." *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).

As an initial matter I would note that the APRA provides the right to inspect and copy records of a public agency. However, it is separate and distinct from other court proceedings, both civil and criminal. In your August 2011 motion filed with the Court under Cause No. 64-D04-0909-SC-5662, you sought a copy of the audio or video

recordings of the previously held hearing. The Court at that time denied your motion. The August 2011 request was clearly made via motion in a civil judicial proceeding and through means outside the scope of the APRA. *See Opinions of the Public Access Counselor 07-FC-314 and 08-FC-324*. However, on December 23, 2011 you submitted correspondence to the Court, not pursuant to any pending or previously disposed of civil or criminal matter. The correspondence was titled “Requesting Access or Copy of Public Court Record.” You provided in the correspondence that your request was made pursuant to the APRA and Administrative Rule 9 and provided that you sought access to a copy of electronically stored audio or video recordings of a hearing held on September 25, 2009, *Erickson v. Smith*, Cause No. 64-D04-0909-SC-5662. As such, it is my opinion that your December 23, 2011 request was made pursuant to the APRA and distinct from any civil or criminal proceeding before the Court.

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. Here, the Court responded to your request via Order on January 10, 2012. As such, the Court acted contrary to section 9 of the APRA by failing to respond to your written request within seven days of receipt.

As to the denial of your request, a court is required to withhold a record that is declared confidential by or under rules adopted by the Supreme Court of Indiana. *See* I.C. § 5-14-3-4(a). The Indiana Supreme Court has adopted Administrative Rule 9, which governs disclosure of court records. Administrative Rule 9 does not specifically limit access to tape recordings of court proceedings. However, a court may manage access to audio and video recordings of its proceedings to the extent appropriate to avoid substantial interference with the resources or normal operation of the court and to comply with prohibitions on broadcast of court proceedings outlined in Indiana Judicial Conduct Rule 2.17. *Administrative Rule 9(D)(4)*.

The Indiana Supreme Court’s *Public Access to Court Records Handbook* (“Handbook”) provides the following regarding requests for audio recordings of a court proceeding:

Recordings of court proceedings made by court reporters are public records regardless of whether they are produced on magnetic recording tape, compact disk, stenotype, shorthand or digitally recorded upon a computer hard drive unless the specific case type is confidential under

Administrative Rule 9. See AR 9(C)(2) regarding the definition of “case record” and AR 9 (D)(4) regarding access to audio and video recordings of proceedings. The public has the right to obtain the record within a reasonable period of time after making the request.

A specific means of providing this type of record has not been defined but the time or difficulty of compliance is an important consideration. Allowing the requestor to listen to the recording may be too time consuming to be reasonable for the reporter or a court staff member since the custody and integrity of the original must be continuously maintained.

Providing a copy of the record is probably the most efficient and least time consuming method to provide public access. A reasonable charge for the production of the copy may be made and guidance on this issue may be found in I.C. § 5-14-3-8. Under AR 10, each judge is administratively responsible for the integrity of the judicial records of the court and must ensure that measures and procedures are employed to protect such records from mutilation, false entry, theft, alienation, and any unauthorized alteration, addition, deletion, or replacement of items or data elements. Under Indiana Code of Judicial Conduct, Rule 2.17(1), a judge may authorize the use of electronic or photographic means for the presentation of evidence, the perpetuation of a record or other purposes of judicial administration. Under no circumstances, should the original be provided to the requestor in order for them to create their own copy.

Requiring the purchase of a transcript would be so costly in many cases as to constitute a denial of access to the public record unless the requestor desires to obtain the record in that format. Given the time required to produce a transcript and the other duties of reporters, the reasonable time for producing the record may well lead the requestor to ask for a different format. If the case is on appeal, a copy of the transcript could be obtained from the Clerk upon its completion and filing.

In situations where the requested record results in provision of an audio and/or audiovisual copy of a court proceeding, the judge should issue an order specifically limiting its use and barring the recipient from broadcasting the received record in any manner. *Public Access to Court Records Handbook, Indiana Supreme Court, July 2010, 49-50.* (<http://www.in.gov/judiciary/admin/files/pubs-accesshandbook.pdf>).¹

Without the benefit of a response from the Court, I do not have sufficient information to determine whether or not the substance of its denial violated the APRA. Under the APRA, a public agency that withholds a public record bears the burden of

¹ The Handbook provides that should the any court have questions regarding issues arising under AR 9 to contact the Office of State Court Administration at (317) 232-2542.

showing 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 carry that burden.

The Court was correct in its Order that pursuant to Administrative Rule 10, the original disc used to record the proceedings cannot be tendered to any party. If the Court is able to make a copy of the audio recording, the recording is not confidential, and providing the recording complies with the Court's management of its audio recording pursuant to AR 9(D)(4) and Indiana Judicial Conduct Rule 2.17, it may do so. *See* I.C. § 5-14-3-8(e)(2). The Court may also issue in conjunction with providing a copy of the hearing an order specifically limiting its use and barring the recipient from broadcasting the received record in any manner. The Court would further be allowed to charge you a fee for the recording pursuant to I.C. § 5-14-3-8. I would note that the APRA requires public agencies to maintain and preserve public records in accordance with applicable retention schedules. *See* I.C. § 5-14-3-4(e). If the Court's retention schedule provides that it is no longer required to retain a recording of the hearing, the Court would not have violated the APRA by failing to provide a copy of a record that it no longer is required to maintain.

CONCLUSION

For the foregoing reasons, it is my opinion that the Court acted contrary to the APRA by failing to respond to your written APRA request within seven days of its receipt. In addition, it is my opinion that the Court has not sustained its burden of proof pursuant to the APRA to demonstrate that it had a legal basis to deny your request.

Best regards,

A handwritten signature in black ink, appearing to read "Joe Hoage". The signature is stylized with a large initial "J" and "H".

Joseph B. Hoage
Public Access Counselor

cc: Porter County Superior Court, Division 4