



# STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR  
JOSEPH B. HOAGE

Indiana Government Center South  
402 West Washington Street, Room W470  
Indianapolis, Indiana 46204-2745  
Telephone: (317)233-9435  
Fax: (317)233-3091  
1-800-228-6013  
www.IN.gov/pac

July 18, 2012

Douglas P. Johnson  
DOC 144315  
One Park Row  
Michigan City, Indiana 46360

*Re: Formal Complaint 12-FC-197; Alleged Violation of the Access to Public Records Act by the Whitely County Prosecutor's Office*

Dear Mr. Johnson:

This advisory opinion is in response to your formal complaint alleging the Whitely County Prosecutor's Office ("Prosecutor") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Matt Rentschler, Whitely County Prosecuting Attorney, responded to your formal complaint. His response is enclosed for your reference.

## BACKGROUND

In your formal complaint, you allege that you submitted a written request to the Prosecutor on June 11, 2012 for copies of certain exhibits used in your jury trial. As of July 12, 2012, the date you filed your formal complaint with the Public Access Counselor's Office, you allege that you have failed to receive a response from the Prosecutor.

In response to your formal complaint, Mr. Rentschler advised that exhibits that you sought are securely held by the Whitely Circuit Court.

## 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 Prosecutor 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 Prosecutor'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 24 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 (7) 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.

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. *See Opinion of the Public Access Counselor 11-FC-314*. To the extent that the Prosecutor failed to respond to your request, it is my opinion that it acted contrary to section 9 of the APRA. However, as to the substance of the Prosecutor's denial, if a public agency has no records responsive to a public records request, the agency generally 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*. Here you requested copies of exhibits used in your jury trial. The Prosecutor has provided that those records are securely held by the Whitley Circuit Court. As such, it is my opinion that the Prosecutor did not violate the APRA by failing to provide a record it no longer maintains.

To the extent that you submit a further request to the Whitley Circuit Court, I provide the following guidance from the Indiana State Court Administration's Public Access to Court Records Handbook (<http://www.in.gov/judiciary/admin/files/pubs-accesshandbook.pdf>)

**Are exhibits offered and/or introduced into evidence in a court proceeding public records? If so, must their review of them be supervised or may copies be created at their cost?**

**A.** Once identified and offered or admitted into evidence all exhibits are part of the public record. If a review of the original is granted, the reporter or staff member should supervise because of their duty to maintain the custody and integrity of the exhibit.

The size, nature and extent of the exhibit will have a significant impact upon the time required by the reporter or staff member to allow their reading or viewing. The constraints of time also impact the reasonable time of and nature of the response. In many instances the



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production of copies of large documents at a reasonable charge will be the most efficient manner of responding to the request.

## Q19. How do you handle exhibits containing inappropriate materials?

A. Administrative Rule 9 does not make any explicit exception for exhibits. However, there is some thought that there is a difference between evidentiary exhibits and exhibits attached to pleadings that may be filed. Although an additional amendment to Administrative Rule 9 is probably necessary to clarify this point, there was a consensus of the Task Force that information contained in exhibits admitted in evidence in an open court proceeding would not require redaction and would be part of the publicly accessible case file. Similarly, there was a consensus of the Task Force that transcripts or audio recordings of proceedings in which exhibits or testimony reveals information that would otherwise be non-public should be part of the public case file and not require redaction. In contrast to evidence introduced in a public proceeding, documentary attachments to pleadings containing confidential information must comply with the requirements of Administrative Rule 9. In the event that an individual or entity wishes to make evidence introduced in a public proceeding non-public, the burden is upon that person or entity whose information will be disclosed to seek entry of an order prohibiting access under Administrative Rule 9(H). Until such time as the rule is modified, it is necessary to follow the requirements of the rule as written.

## CONCLUSION

For the foregoing reasons, it is my opinion that the Prosecutor acted contrary to the requirements of the section 9 of the APRA in failing to respond to your written request within seven (7) days of its receipt. As to all other issues, it is my opinion that the Prosecutor did not violate the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage".

Joseph B. Hoage  
Public Access Counselor

cc: Matt Rentschler