



STATE OF INDIANA

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August 6, 2012

Chalmer M. Harris
2851 Nevada Avenue
Evansville, Indiana 47710

Re: Formal Complaint 12-FC-206; Alleged Violation of the Access to Public Records Act by the Vanderburgh County Superior Court

Dear Mr. Harris:

This advisory opinion is in response to your formal complaint alleging the Vanderburgh County Superior Court ("Court") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Judge Mary Margaret Lloyd responded on behalf of the Court. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that on July 16, 2012, you submitted a written request to the Court for the following records:

- All audio taped portions from Cause No. 83-D2-1220-CF-791/Case No. 82A01-0301-CR-00036 (September 23-25, 2002).
- Standard Supplement Reports, Case No. 01-33624(003)
- Investigation No. 48908028 dates of statements October 30, 2011 and May 3, 2002.
- Records of stenographer Trial Cause No. 82-D2-0110-791/Case No. 82A01-0301-CR-00036. (September 23-25, 2002).

In response to your request, Judge Lloyd issued an order under Cause No. 82-D02-0110-CF-00791. The Order provided that records of transcript, audio tapes, and exhibits are not kept in the Court's file. On March 13, 2003, the transcript for the trial was sent to the Indiana Court of Appeals and the Defendant's Counsel of Record. Further, pursuant to I.C. § 5-14-3-8(a)(8) and Indiana Administrative Rule 9, certain records that were responsive to your request were confidential. The Court further noted that your request was overly broad and failed to provide specific information.

In response to your formal complaint Judge Lloyd advised that your request sought unspecified "audio taped portions" of a three-day child molestation trial that

involved two (2) different underage victims which may have included confidential reports from various counties' Department of Family and Child Services. In support of the confidential nature of the Department of Family and Child Services, a subpoena for said agency was quashed at a later court hearing under this cause number. The transcript for said trial and exhibit volumes and the Post-Conviction Relief Hearing Transcript and Exhibits were sent to the Indiana Court of Appeals Clerk and are not contained in the Court's file. The request for police report, "Standard Supplement Reports", and police statements are also not included in the Court's file. The Court further does not maintain any "stenographer" notes from the Cause Number.

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).

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). A response from the public agency could be an acknowledgement that the request has been received and include information regarding how or when the agency intends to comply. Here, the Court responded in writing to your written requests the day after its receipt. As such, it is my opinion that the Court complied with the requirements of section 9(b) of the APRA in responding to your request.

Generally, 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*. Here, the Court advised that as to your request for Standard Supplement Reports, Investigation Reports, and records of the stenographer (stenographer's notes), said records were not maintained by the Court in the trial court file. Further, as to your request for transcripts, the Court has provided that the records were submitted to the Indiana Court of Appeals Clerk and are no longer contained the trial court file. As such, it is my opinion that the Court did not violate the APRA by failing to produce a record that it did not maintain or no longer maintained.



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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). To the extent the records you sought were declared confidential pursuant to (a)(8) and Administrative Rule 9, the Court would not have violated the APRA in denying your request.

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)*. 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.

I would further note that the APRA provides that if a public agency does not have reasonable access to a machine capable of reproducing the record, the person is only entitled to inspect and manually transcribe the record. *See I.C. § 5-14-3-8(e)*. Thus, if the Court does not have the capability of reproducing the audio recording, the Court would not be in violation of the APRA. *See Opinion of the Public Access Counselor 10-FC-101 and 10-FC-102*. Further, if the Court does not maintain an audio transcript of the hearings that you requested, the APRA would not require the Court to produce or create a record in response to a request. *See Opinions of the Public Access Counselor 06-FC-08 and 12-FC-49*. If you have previously received a written transcript for the hearing for the hearing that you seek, it would not be in violation of the APRA by failing to provide you with an audio copy. *See Opinions of the Public Access Counselor 07-FC-185 and 12-FC-45*. The APRA permits a public agency to charge a fee for copies of public records. *See I.C. § 5-14-3-8*. Additionally, a public agency may require a person to pay the

copying fee in advance. *See* IC 5-14-3-8(e). Nothing in the APRA requires that a public agency waive a copying fee. *See Opinion of the Public Access Counselor 07-FC-124.*

CONCLUSION

For the foregoing reasons, it is my opinion that the Court did not violate the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a distinct "Hoage" following.

Joseph B. Hoage
Public Access Counselor

cc: Judge Mary Margaret Lloyd