



# STATE OF INDIANA

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August 21, 2009

Maurice King  
2035 McDonald Avenue  
New Albany, Indiana 47150-3744

*Re: Formal Complaint 09-FC-174; Alleged Violation of the Access to Public Records Act by the Indiana Department of Homeland Security*

Dear Mr. King:

This advisory opinion is in response to your formal complaint alleging the Indiana Department of Homeland Security ("Department") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to a tape recording of a hearing conducted by the Department. A copy of the Department's response to the complaint is enclosed for your reference. It is my opinion the Department's response to the request may have been untimely under the statute, but the Department has not violated the APRA by refusing to obtain a copy of the recording of the April 8 hearing.

## BACKGROUND

You allege that on July 9, 2009 you made a written request to the Department. You asked for a copy of an audio recording of a hearing conducted by the Department on April 8, 2009. You contacted the Department ten days later, and at that time the Department denied you access to the tape recording. You filed the present complaint on August 4.

The Department responded to the complaint by letter dated August 19 from Mara Snyder. The Department indicates that the administrative law judge involved in the hearing contracted with a court reporter to attend the proceeding and provide a typewritten transcript of the hearing. The transcript was accompanied by a certification that it is a true record of the proceeding. The Department contends the transcript is the public record maintained by the Department and the Department has provided you with a copy of it. The Department further contends the recording is not part of the contracted services between the Department and the reporter. The Department contends that no matter what medium the reporter used to take notes, only the transcript is required to be maintained by the Department, so only the transcript is public record. Finally, the Department provides a copy of an opinion issued by the National Court Reporters Association on a similar issue.

## ANALYSIS

The public policy of the APRA states, "[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. The Department is clearly a public agency for the purposes of the APRA. I.C. § 5-14-3-2(m). Accordingly, any person has the right to inspect and copy the public records of the Department during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

A request for records may be oral or written. I.C. §§ 5-14-3-3(a), 5-14-3-9(c). If the request is delivered by mail (or, as this office has said, electronic mail) and the agency does not respond to the request within seven days of receipt, the request is deemed denied. I.C. § 5-14-3-9(b).

A response could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. There are no prescribed timeframes when the records must be produced by a public agency. A public agency is required to 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). However, section 7 does not operate to deny to any person the rights secured by section 3 of the Access to Public Records Act. I.C. § 5-14-3-7(c). Former public access counselors and I have stated that records must be produced within a reasonable period of time, based on the facts and circumstances.

Here, the Department does not indicate when it received your request. You indicated you waited ten days after sending the request by electronic mail before contacting the Department. If the Department did not respond to the request within seven days of receipt, the Department's response was untimely. I.C. § 5-14-3-9(b).

The substantive question here is whether the audio recording is a public record. In the past several weeks, I have had a number of telephone conversations and electronic mail message exchanges with both you and Ms. Snyder. I originally indicated my opinion that the recording is a public record and the Department must obtain a copy from the reporter. After further research and consideration, my opinion today, though, is that the recording is not a public record.

A "public record" means any writing, paper, report, study, map, photograph, book, card, tape recording or other material that is created, received, retained, maintained or filed by or with a public agency. I.C. § 5-14-3-2. In *Knightstown Banner v. Town of Knightstown*, 838 N.E.2d 1127 (Ind. Ct. App. 2005), the Indiana Court of Appeals added to the definition records that are created for or on behalf of a public agency. Here, the transcript for which the Department contracts is certainly a public record. But I cannot say that any material used to create that record is also a public record. As the Department contends, regardless of the way the reporter recorded the proceeding, those notes or

recordings belong to the reporter as the reporter's method of capturing the information exchanged at the hearing. But the reporter was only contracted to create a transcript, so that transcript is the public record. The recording is not. For this reason it is my opinion the APRA does not require the Department to retrieve from the reporter a copy of the recording in order to maintain as a public record.

#### CONCLUSION

For the foregoing reasons, it is my opinion the Department's response to the request may have been untimely under the statute, but the Department has not violated the APRA by refusing to obtain a copy of the recording of the April 8 hearing.

Best regards,



Heather Willis Neal  
Public Access Counselor

Cc: Mara Snyder, Indiana Department of Homeland Security