

March 2, 2006; Alleged Violation of the Access to Public Records Act by the Lake County Superior Court Clerk

March 2, 2006

*Sent Via Facsimile*

J. Justin Murphy  
Murphy Law Firm  
6949 Kennedy Avenue, Suite E  
Hammond, IN 46323

*Re: Informal Inquiry Response; Alleged Violation of the Access to Public Records Act by the Lake County Superior Court Clerk*

Dear Mr. Murphy:

You have requested an informal opinion from the Office of the Public Access Counselor. Pursuant to Ind.Code 5-14-4-10(5), I am issuing this letter in response to your request.

You have alleged wrongful denial of records pertaining to Joel Rodriguez, a candidate for public office in Lake County. You seek court records showing a felony conviction of Mr. Rodriguez. To that end, you hand delivered a request to the Clerk of the Lake Superior Court ("Clerk") on February 27, 2006. You sought four categories of records:

- Any and all computer printout screens showing search for all docket entries with Joe Rodriguez's name in the caption;
- Corresponding docket sheets;
- The docket sheet and all pleadings filed in cause number 45D07-9304-CF-4565-OA1; and
- Petition and/or complaints to expunge records filed in any of the causes of action.<sup>1</sup>

You received a denial in writing from the employee in the Clerk's office. The form denial stated the reason for denial as "records expunged." I cannot make out the date of this denial, but you have told me that the denial was made on February 28, 2006.

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<sup>1</sup> You also sought records pertaining to 45D09-9906-OV-07356. The denial made by the Clerk also covers this cause.

After the Clerk consulted with his counsel, Mr. David Saks, Mr. Saks issued a letter dated March 1, 2006. That letter specified the denial reasons for each of the above records. For records #1 and #2, Mr. Saks stated that no records existed. For records stated in #3 and #4, the denial was for records that are declared confidential by or under rules adopted by the Supreme Court of Indiana, Indiana Code 5-14-3-4(a)(8). Further, Mr. Saks specified the rule of the Supreme Court that made the records you seek in #3 and #4 confidential, Administrative Rule 9(G)(1)(b)(xvi)(c).

I spoke with Mr. Saks by telephone prior to his issuing the March 1 letter. He stated that orders of expungement are declared confidential under Administrative Rule 9. He also stated that the court order that expunged the court records covered every court record that had been in the Clerk's file. Mr. Sak's position as I understand it is not only is the expungement order confidential and nondisclosable, but the records that *were* expunged by that order are confidential because they are subject to a court order. Hence, I believe that Mr. Saks meant to cite to Administrative Rule 9(G)(1)(c), for information excluded from public access by specific court order.

Any person may inspect and copy the public records of any public agency during the agency's regular business hours, except as provided in section 4 of the Access to Public Records Act ("APRA"). Ind. Code 5-14-3-3(a). The Clerk of Court is a public agency under the APRA. IC 5-14-3-2(1)(2)(C). If a public agency receives a request for a record in person, the public agency must issue a response within 24 hours of receiving the request. If the request is in writing, the public agency may deny the request if the denial is in writing and states the specific exemption or exemptions authorizing the withholding of the record, and the name and title or position of the person responsible for the denial. IC 5-14-3-9(c). A public agency bears the burden of showing that a record is exempt under the APRA. IC 5-14-3-9(f).

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. IC 5-14-3-4(a)(8). Confidentiality of court records is governed chiefly by Administrative Rule 9, which has been 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).

You seek court records pertaining to a particular individual, Mr. Rodriguez, and of a particular cause number. You believe that the Clerk maintained court records of a criminal cause in which Mr. Rodriguez was the subject. Hence, if the Clerk maintains records pertaining to the subject of your request, the Clerk is required to disclose them and allow you to copy them, unless those records are confidential under Administrative Rule 9.

Relevant to this inquiry are two types of records that are classified as confidential: Information excluded from public access by specific court order, Admin. R. 9(G)(1)(c); and All orders of expungement entered in criminal or juvenile proceedings. Admin. R. 9(G)(1)(g). Mr.

Saks has not sent me a copy of the order relating to the expungement of the court records, because such an order is confidential under Administrative Rule 9(G)(1)(g). Mr. Saks has averred to me that the order of expungement covers all the records that you describe in your February 27 request. Hence, he states that the expungement order makes the records you seek confidential under the other part of Administrative Rule 9, Admin. R. 9(G)(1)(c).

In my opinion, the Clerk could withhold the order of expungement itself, under Administrative Rule 9(G)(1)(g). Administrative Rule 9(G)(1)(g) does not appear to cover the records being expunged, only the order of expungement. However, it is not surprising that the order of expungement takes out of the public domain the records affected by the expungement, and hence, the exclusion for “information excluded from public access by specific court order” would appear to be a sound basis for excluding the records affected by the expungement order, in addition to the expungement order itself.

You challenge the authority of the court to enter an order of expungement. Your grounds for this challenge are three-fold. First, you state that only the court maintaining the court records can expunge them. Here, the expungement order was, you believe, entered by a county court, not the Lake County Criminal Division. Second, you believe that the only expungement authority is for arrest records, under IC 35-38-5. IC 35-38-5-3 states that the expungement statute “does not require any change or alteration in any record...made at the time of the arrest or in the record of any court in which the criminal charges were filed.” Third, you believe that in order to effectuate a court order protecting an otherwise public record, a court would have been required to proceed under IC 5-14-3-5.5. This law provides for sealing of a judicial public record. It also provides for a hearing prior to the court sealing a judicial record. IC 5-14-3-5.5(c). You believe that no hearing occurred in this matter.

I do not express any opinion with respect to the authority of any Lake County court to enter an order of expungement that protects all the records respecting Mr. Rodriguez or cause no. 45D07-9304-CF-4565-OA1. It is beyond the scope of my authority to opine regarding the authority of a court to expunge its own or another court’s records. *See* IC 5-14-4-3; IC 5-14-4-10(5).

The Clerk’s denial of February 28, although timely, did not conform to the requirements for specificity in the APRA. The February 28 denial did not set out the specific exemption or exemptions authorizing the withholding of the record. In that respect, the Clerk violated the Access to Public Records Act. In addition, it is my opinion that the Clerk must sustain its burden of showing that it may withhold the records you seek under Administrative Rule 9 and IC 5-14-3-4(a)(8).

I hope this guidance is helpful to you.

Sincerely,

Karen Davis  
Public Access Counselor

cc: David Saks