



STATE OF INDIANA

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August 2, 2013

Mr. Jesse Clements
P.O. Box 68082
Indianapolis, IN 46268

Mr. Gersh Zavodnik
4410 Clayburn Drive
Indianapolis, IN 46268

*Re: Formal Complaint 13-FC-145; Alleged Violation of the Access to Public Records Act by
Marion County Superior Court Civil Division, Room 1*

Dear Mr. Clements and Mr. Zavodnik:

This is in response to your formal complaint alleging that the Marion County Superior Court Civil Division, Room 1 (the "Court") violated the Access to Public Records Act ("APRA"). Pursuant to Ind. Code § 5-14-3-9(e), I issue the following opinion in response to your complaint. My opinion is based on applicable provisions of the APRA, I.C. § 5-14-3-1 *et seq.* Ms. Andrea Brandes Newsom, Court Administrator, responded on behalf of the Court. Her response is enclosed for your reference.

BACKGROUND

Your complaint alleges that the Court violated the APRA by failing to respond timely to a request for a record, by failing to produce a record you requested within a reasonable time, and by denying you access to records. In a request sent by facsimile to the Court on April 19, 2013, you requested to review "[t]he audio tape of the April 19, 2013 hearing-scheduled for 10:00am with Zavodnik as one party" (hereinafter referred to as the "Hearing"). You state that the Court Reporter for the Court contacted you on April 23, 2013 to arrange for inspection of the record you requested on April 30, 2013 at 12:00 p.m.

When you appeared to inspect the record on April 30, 2013, you state that you were asked to sign an acknowledgment referencing Indiana Judicial Rule of Conduct 2.17. The acknowledgement states in part:

Accordingly, I hereby acknowledge and agree that I will not copy or broadcast said recording, that I will not add to or delete from said recording, and

that I will not in any way alter said recording. I further understand and acknowledge that I may take notes of the audio recording as I listen to it.

You declined to sign the acknowledgment, and asked the Court reporter to provide a copy of the acknowledgment to you. You state that the Court Reporter refused to provide a copy of the acknowledgment at that time. On May 2, 2013, you state that you “notified Court 1 that it was in violation of the APRA” for failing to respond to your request for a public record (the acknowledgment). On May 6, 2013, you received a copy of the acknowledgement along with a cover letter dated May 2, 2013. You note that this letter was postmarked May 3, 2013. You filed this formal complaint on May 20, 2013.

Ms. Newsom’s response on behalf of the Court asserts that the Court has not committed any violation of the APRA. She states that the Court received your April 19 facsimile request to review the audio recording of the Hearing, but notes that the request contained the salutation “Dear Superior Court 11 Reporter”. This caused the Court staff to transfer the request to Marion Superior Court, Civil Division, Room 11. Ms. Newsom notes that upon further consultation between both courts, it was determined on April 22, 2013 that your request was in fact intended for Court 1. Ms. Newsom notes that this “absence of reasonable particularity in the Request caused confusion for Court staff and created a delay in acknowledgement of the Request.” As such, Ms. Newsom notes that she mailed a written acknowledgement of the request to you on April 29, 2013.

Ms. Newsome confirms that the Court Reporter for the Court contacted you on April 23, 2013 and arranged for you to inspect the audio recording of the Hearing on April 30, 2013 at 12:00 p.m. She states that when you arrived in the Court to inspect the recording, you declined to execute the acknowledgment “governing the terms of the audio inspection pursuant to AR 9(D)(4)”, and that the inspection of the record did not occur. While the Court Reporter did not provide a copy of the acknowledgement to you immediately upon your in-person request on April 30, 2013, Ms. Newsom states that within twenty-four hours of the request, you reduced your request to writing (sent via facsimile to the Court and to the Executive Committee of the Marion County Superior Court on May 1, 2013). Ms. Newsom drafted response letters to you containing a copy of the record you sought (the acknowledgement) on May 2, 2013. Ms. Newsome admits that due to the Court’s mail collection procedures, the responses may have been postmarked the next day.

Ms. Newsom argues that the APRA only establishes specific timeframes within which a public agency must acknowledge a request for public records, and that the Court properly responded to all of your requests within these timeframes. The APRA does not impose a specific time requirement within which public agencies must actually produce records responsive to a request, but only provides that responsive records be disclosed within a reasonable period of time.

Ms. Newsom argues that the Court’s responsiveness to your requests has been reasonable under the circumstances. Ms. Newsome also notes that the Court has “obligations to preserve the integrity of judicial records, including audio recordings of court proceedings”, and as such the Court “has authority to manage access to audio recordings of judicial records as set forth in rules adopted by the Indiana Supreme Court, particularly Administrative Rule 9 and the Indiana



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Judicial Conduct Rules.” Ms. Newsome states that the Court requires an executed acknowledgment to govern inspection of audio records, and that this requirement is “appropriate and reasonable” under Administrative Rule 9(D)(4) and Indiana Judicial Conduct Rule 2.17. Finally, Ms. Newsom notes that “Pursuant to AR 9(D)(4), the provision providing for management of access to video and audio recordings by a court ‘[D]oes not operate to deny any person the right of access to a court record under Rule 9(D)(1)’”.

ANALYSIS

As an initial matter, I note that your complaint appears to raise a number of concerns or issues that are beyond the purview of the Office of the Public Access Counselor. The duties of the public access counselor are defined in I.C. §5-14-4-10, and include issuing “advisory opinions to interpret *the public access laws* upon the request of a person or a public agency”. See I.C. 5-14-4-10(6) (emphasis added). Therefore, in this opinion I address only those issues arising from interpretation of the APRA. Further, the public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. See *Opinions of the Public Access Counselor 11-FC-80, 11-FC-213*.

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 a public agency’s 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 by mail, email 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).

Here, the Court responded to your April 19, 2013 request to review the audio recording of the Hearing with a written acknowledgement sent on April 29, 2013. While this would technically violate the letter of the APRA (which requires a written response to a written request for records within 7 days of receipt), it appears that because of the salutation in your request (referencing Superior Court 11), there was some confusion among court staff as to who should address your request. The Court did not determine that the request was intended for them until April 22, 2013. Ms. Newsom explains that this resulted in the delay in submitting the written response to your request. In light of these circumstances, and considering that the Court Reporter contacted you

on April 23, 2013 to arrange for you to inspect the requested record, I cannot say that the Court's response to your April 19 request was unreasonable or untimely.

With regard to your oral request for a copy of the acknowledgement on April 30, 2013, you state that your request was verbally denied by the Court Reporter, and that the Court Reporter did not provide valid grounds for the denial. If the Court Reporter denied your oral request without providing valid grounds for doing so, this would constitute a violation of the APRA.

However, the Court Reporter's refusal to immediately provide you a copy of a record requested does not necessarily constitute a violation of the APRA. The APRA only requires that an oral request be acknowledged within twenty-four hours. A response from the Court could be an acknowledgement that the request has been received and information regarding how or when the Court intends to comply. After acknowledgment of a request, the APRA does not prescribe timeframes for the actual production of records. The public access counselor has stated repeatedly that records must be produced within a reasonable period of time, based on the facts and circumstances.

While the Court Reporter certainly had the record you sought (the acknowledgement) in her possession at the time of your request, the APRA doesn't require her to give a copy to you immediately upon request. While you express your belief that immediate production of the acknowledgement would have been reasonable in your complaint, I cannot say that a delay of a couple of days is patently unreasonable (particularly if Court staff believed it appropriate to consult with counsel or a supervisor to ensure that the request was addressed in accordance with the APRA). Further, after receipt of your May 1, 2013 letter to the Court (which the Court treated as a renewed request for the acknowledgement), Ms. Newsom sent out a letter containing the record you requested on May 2, 2013 (postmarked the following day). The Court provided the record you requested within two or three days of your original oral request. In light of these circumstances, I cannot say that the Court has violated section 7 of the APRA by failing to disclose the requested record within a reasonable period of time.

Finally, you argue in your complaint that for the Court to require execution of the acknowledgement as a condition of access to records constitutes an illegal denial of access to records. It appears that in this regard the instant complaint is very similar to a complaint you filed with the Office of the Public Access Counselor earlier this year. In *Opinion of the Public Access Counselor 13-FC-50*, the Public Access Counselor found that Court did not violate the APRA by requiring you to sign an acknowledgment prior to inspection that would prevent you from rebroadcasting or amending the recordings that were to be inspected. The Public Access Counselor explained:

...[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. AR 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



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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, Division of State Court Administration's *Public Access to Court Records Handbook* ("Handbook") provides the following guidance regarding requests for audio recordings of a court proceeding:

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. *Public Access to Court Records Handbook, Indiana Supreme Court, Division of State Court Administration, July 2010, 49-50. (<http://www.in.gov/judiciary/admin/files/pubs-accessshandbook.pdf>)*.

Administrative Rule 10 and the accompanying commentary provide the following:

Court Responsibilities. 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.

Commentary

The court is required to preserve the integrity of audio and video recordings of court proceedings. The judge may employ various methods for ensuring the recording is not altered, including but not limited to supervised playback for listening or copying, creating a copy of the recording for use during said playback, serving notice to the parties that the recording is being accessed, and providing a copy, clearly identified as such. As prescribed by Indiana Judicial Conduct Rule 2.17 [former Canon 3(B)(13)], because the court is further required to prohibit broadcasting or televising court proceedings, the court may employ methods to restrict publication of copies of court proceedings made during the pendency of the case.

It is my opinion that the Court did not violate the APRA by requiring you to sign an acknowledgment prior to inspection that would prevent you from rebroadcasting of amending the recordings that were to be inspected.

See Opinion of the Public Access Counselor 13-FC-50. I understand that you believe the language of the acknowledgement to be overbroad, as it doesn't define the word "broadcast" or provide a temporal limitation on the prohibition of "rebroadcasting". However, based on the information presented in your complaint and the Court's response, in light of the restrictions imposed by AR 9(D)(4), AR 10 and Indiana Judicial Conduct Rule 2.17, I cannot say that the Court's requirement that you execute an acknowledgment constitutes a denial of access under the APRA.

CONCLUSION

For the foregoing reasons, it is my opinion that the Court has not violated the APRA by failing to respond timely to your April 19th request for a record, by failing to produce a record you requested within a reasonable time, or by denying you access to records. To the extent that the Court Reporter denied your oral request for a record on April 30, 2013 without providing valid grounds for the denial, the Court may have acted contrary to the APRA.

Please contact me if I can be of additional assistance.

Best regards,



Jennifer L. Jansen
Acting Public Access Counselor

Cc: Ms. Andrea Brandes Newsom, Court Administrator, Marion Superior Court