

December 29, 2004

Mr. Tyrone Frazier
Indiana State Prison
P.O. Box 41
Michigan City, Indiana 46361-0041

Re: Formal Complaint 04-FC-222; Alleged Violation of the Access to Public Records Act by the Marion County Clerk of Court

Dear Mr. Frazier:

This is in response to your formal complaint alleging that the Marion County Clerk's Office ("Clerk") violated the Access to Public Records Act by denying you records.

BACKGROUND

The subjects of your complaint are records from two matters in the Marion County Courts. You have requested transcripts of a guilty plea hearing in cause number 49A158700822. You also requested "a full and complete copy of all legal documents that were filed under 49G058908CF096817." Both requests were dated November 9, 2004. You filed this complaint, alleging that you were denied these records.

I sent a copy of your complaint to the Clerk of Court. I enclose with this advisory opinion a copy of the Clerk's response, by her Deputy Clerk of Court Administration Chari Burke. With respect to the first request, the court made an entry denying your request, which it had received on November 14. The court stated that you had been informed that the tapes of the hearing had been destroyed, preventing any transcript of the hearing from being produced. The court also noted that all other documents connected with that cause had been provided to you. With respect to the second request, because of your having designated "Dead Files" on the envelope, the court maintaining these records did not receive your request until November 29, 2004. On December 2, 2004, Commissioner Nancy Broyles denied your request explaining that you are represented by counsel and consequently your counsel should obtain your records.

ANALYSIS

Any person may inspect and copy the public records of a public agency during the agency's regular business hours, unless the records are excepted from disclosure under Ind.Code 5-14-3-4. IC 5-14-3-3(a). You do not raise any issues with respect to the timeliness of the Clerk's response to your request for records, and indeed I do not find on the facts presented that the Clerk's responses to your separate requests were tardy. Rather, you note in your complaint that you have not received the transcript in cause number 49A158700822. In its entry, the court noted that the tapes from the hearing have been destroyed. An agency is not required to produce a record that it does not maintain, and is not required to maintain. The issue here is whether the court was required to maintain the recording of the hearing.

Under Indiana Criminal Rule 10 a recording of a guilty plea hearing is required to be maintained by the court for ten years in all misdemeanor and fifty-five years in all felony cases. Because I do not know whether this cause involved a misdemeanor or felony, nor am I apprised as to the time that the recording was created, I cannot opine on whether the recording of the hearing under this cause number was required to be maintained by the court under Indiana Criminal Rule 10. However, if the tape recording of the guilty plea hearing were required to be maintained at the time of your request for it, the destruction or loss of the record would be a violation of the Access to Public Records Act. IC 5-14-3-7.

With respect to the Court's response to your request for all legal documents in cause number 49G058908CF096817, Commissioner Broyles's response that you were not entitled to records except through your attorney was not in accordance with the Access to Public Records Act. There is nothing in the APRA that would allow a public agency to deny a record on the basis that the requester must utilize his retained counsel or use formal court proceedings in order to get records. APRA stands an independent means to obtain records, even where the requester is actively pursuing a court case.

CONCLUSION

For the foregoing reasons, I find that you were denied records in cause number 49G058908CF096817 in violation of the Access to Public Records Act, where you were required to request court records only through your attorney.

Sincerely,

Karen Davis
Public Access Counselor

cc: Ms. Chari Burke