April 1, 2004

Mr. Eugene Bowers
No. 882244
Indiana State Prison
P.O. Box 41
Michigan City, Indiana 46361-0041

*Re: 04-FC-34; Alleged Violation of the Access to Public Records Act by the Marion County Circuit Court*

Dear Mr. Bowers:

This is in response to your formal complaint alleging that the Marion County Circuit Court (Court) violated the Indiana Access to Public Records Act (APRA) (Ind. Code §5-14-3), when it denied your request for a public record. For the reasons set forth below, I find your complaint without merit.

## BACKGROUND

You were previously convicted of a crime in the Marion County Circuit Court in cause number 49G02-0008-CF-149750. You subsequently filed a petition for post-conviction relief with the Court. It appears from your complaint and supporting documents that your petition was denied and that you were provided with Findings of Fact and Conclusions of Law regarding that denial. I say "appears" because you reference the Court's findings and conclusions, but provide only page 8 of a document that purports to be the findings and conclusions in your case and which does not include the disposition. In any event, the page you provide includes the Court's discussion of what I presume to be your claim of "ineffective assistance of counsel" and specifically the legal standards governing review of such a claim. In setting out the standard of review, the Court cites to the case of *Childers v. State*, 719 N.E.2d 1227 (Ind. 1999), and quotes extensively from that supreme court decision. In *Childers*, the trial lawyer for that defendant objected to an exhibit being tendered to the jury after the *Childers'* jury sent a note to the judge in that case regarding the admissibility of a statement. The passage from the *Childers'* decision quoted in the findings and conclusions in your post-conviction case included a reference to that

note from *Childers*. Apparently misreading the quoted passage from *Childers* to be a reference to the facts of your own case, on February 12, 2004, you submitted a written request for records to the Court seeking a copy of the jury note. Your request seeks "[t]he note written by the juror's [*sic*] during my trial; cause no. 49G02-0008-CF-149750." Notably, you claim that you were not aware of the existence or contents of the note until the Court referenced it in the findings of fact and conclusions of law in your post-conviction matter.

The Court received your written request for records on February 18, 2004, and on that same day the Court entered an order denying the request. The Court's order states that the Court finds no reference in the findings and conclusions regarding any jury note written in your trial, and further states that there was no issue of a jury note in your case. The Court further observes that "if there was a note from the jurors during [your] trial … it would be part of the record of proceedings and/or court file, which was admitted at [the post-conviction] hearing."

This complaint followed.

## ANALYSIS

The Court's response to your record request was not a "denial" of public records maintained by that agency. The APRA governs the public records of public agencies, and provides that any person may inspect and copy the public records of any public agency during the regular business hours of the public agency except as otherwise provided in the APRA. IC 5-14-3-3(a). A "public record" for this purpose is defined as any writing or other material that is "created, received, retained, maintained, or filed by or with a public agency." IC 5-14-3-2. Here, the Court's response indicates not that it has and is withholding a record responsive to your request, but rather that it does not have a record responsive to your request. If a public agency does not have a document that is responsive to a record request, it cannot be said to have denied access to a public record of that public agency. *See* IC 5-14-3-2, 5-14-3-3(a).

Further, what you provide in support of your complaint as evidence that such a responsive record exists does not establish what you think it does. As noted above, the passage that you rely on from the Court's findings and conclusions is on its face not a reference to the facts of *your case*, but rather it is a reference to the facts of another case. The reference to a jury note comes from the *Childers*' case. *See Childers*, 719 N.E.2d at 1231 (wherein the Indiana Supreme Court resolved a claim of ineffective assistance of counsel noting that trial counsel subjected the state's case to adversarial testing by, among other things, "[objecting] to the court's submission of exhibits to the jury during deliberation (after the jury sent a note to the judge regarding the admissibility of a statement)"). This language from *Childers* was quoted by the Court in your findings and conclusions in setting up the standard of review in your case, and you obviously mistook it as a reference to the facts of your own case. There was no note in your case, at least not based on the evidence you provide in support of your complaint with this office.

## CONCLUSION

For the reasons set forth above, it is my opinion that the Court did not deny you access to a public record in violation of the APRA.

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Ms. Amy Barnes
Ms. Doris Anne Sadler