

June 21, 2004

Mr. Herbert S. Foust, No. 124101  
Putnamville Correctional Facility  
1946 U.S. Highway 40  
Greencastle, Indiana 46135

*Re: Formal Complaint 04-FC-87  
Alleged Denial of Access to Public Records by the Elkhart City Court*

Dear Mr. Foust:

This is in response to your formal complaint alleging that the Elkhart City Court (Court) violated the Access to Public Records Act (APRA) (Ind. Code 5-14-3), for the reason that its response to your request was not timely, and because it failed to produce the requested records. The Court did not respond in writing, but through court staff and counsel<sup>1</sup> offered an oral response to your request denying that its response was untimely and further denying that it withheld any responsive record in violation of the APRA. For the reasons set forth below, I find that the Court did not violate the APRA.

#### BACKGROUND

On May 9, 2004, you signed a letter addressed to the Court requesting access to records you assert are maintained by the Court. Specifically, your request sought copies of “audio transcripts [in four separate causes of action], in regular speed recording or transcribed by the official court reporter in long-hand type.” Your letter further asked that if the Court had no responsive records that it submit a “signed certificate of no record indicating that a diligent search failed to disclose the record requested.” Your complaint alleges that you received a response to your request. According to your complaint, the response was postmarked May 13, 2004, only four days from the date of your request, and it contained chronological case summaries (docket sheets) for the four cause numbers that were the subject of your request. No audiotapes were produced, and no transcripts of hearings were included. The chronological case summaries indicate that, in fact, no hearings were held in any of these matters save for the initial

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<sup>1</sup> Upon receipt of the complaint, the Court’s staff contacted this office and advised the undersigned that Judge Charles Grodnik was out of the country and would be out through the date this opinion was due. The court staff offered an oral response to the claims. Later that same day, an attorney for the Court contacted the undersigned to confirm the response offered by court staff and set forth herein. It was agreed, based on the response offered, that this office would not require a written answer to the complaint.

appearance in each case. The chronological case summaries reflect the substantive details from those initial hearings. This complaint followed.

In response, the Court states through staff and counsel that no transcripts exist from these hearings, and that the Court does not maintain any audio recordings of the proceedings held in those matters. The Court noted that the Elkhart City Probation Department does record initial hearings in digital format on CD ROM. The hearings in all matters pending before the Court for an entire month may appear on a single CD ROM. The CD ROM is not readable by standard playback technology; that is, you cannot put it into a CD player and listen voice recordings from the proceedings. Further, even assuming that the Court maintained the records being requested in the formats being requested, the Court does not have reasonable access to a machine capable of making a duplicate copy.

### ANALYSIS

Indiana Code 5-14-3-3 provides that any person has the right to inspect and copy the public records of any public agency. A public agency means, among other things, any agency or office that exercises any part of the executive, administrative, judicial or legislative power of the state. IC 5-14-3-2. And, the public records of any such public agency include any photograph, tape recording, or other material that is received, maintained, or filed by or with that public agency. IC 5-14-3-2. Certainly, the Court is a public agency, and any records maintained by that entity are public records subject to inspection and copying under the provisions and limitations of the APRA.

Having received a written request for public records served by United States Mail, the Court was required to respond to the request in writing within seven days of receipt. IC 5-14-3-9(b). The Court's response need not include a denial, or produce responsive records. While a response may be either of those things, it may also be a simple acknowledgment of the request with a date certain for production or further response. You assert that you received a response from the Court that included the production of records. Your allegations are that the response was not timely and that the records were not responsive.

Your claim that the response was untimely is frivolous. Your request is dated May 9, 2004. While you do not provide a copy of the envelope that carried the Court's response, you state that it was postmarked on May 13, 2004. That is only four days after the date of your letter. Clearly, the Court responded in writing within seven days of receipt of your request.

You further claim that the Court's production was not responsive and constitutes a denial of public records. True enough, the Court's production did not include audio records or transcripts of hearings, but given the facts I disagree with your claim that it amounted to a denial of public records in violation of the APRA. A public agency is not required to create a record in response to a request, and it is not required to produce a record it does not have. If an agency does not have a responsive record, it should say so, but its failure to produce a record it does not have is not a denial under the APRA. Here, the Court avers that it does not have records that are responsive to your request. Specifically, your request sought an audio recording of hearings held

in the four matters you cited in your request, in “regular speed recording.” The Court acknowledged that a recording is generally made of initial hearings, but it is not the Court that makes or maintains those recordings. Rather, any recordings are made and maintained by the Elkhart City Probation Department. Further, the recordings are digital, on CD ROM format, and do not exist in regular speed recording capable of playback on a standard CD player. Of course, a public agency is not required to convert a record or, more specifically, the content of a record, to a format that fits your convenience. Neither does the Court maintain a written transcript of those recordings. You do not say, but based on the nature of the actions reflected in the chronological case summaries, it appears that no transcript would have been made from those hearings inasmuch as you did not appeal from the judgments imposed. Notwithstanding the forgoing, the Court did not deny your request with silence or with a letter stating these simple facts. Instead, it produced the closest records it did have, the chronological case summaries. As noted above, while those records do not contain verbatim colloquy from the hearings, they at least contain the general substance of the proceedings that were had on the days in question. The Court’s response in this regard was not a denial of your public records request. Certainly, to the extent that the Court did not have the responsive records, it should have said so. While such a statement accompanying the chronological case summaries tendered in lieu of tendering nothing might have avoided the complaint, I decline to find on this record that the omission of that statement constitutes any violation of law.<sup>2</sup>

Even assuming that the Court maintained the recordings from your initial hearings in these matters and further assuming those recordings were responsive to your request, you would not be entitled to obtain copies under the APRA. That is so because the Court does not have reasonable access to a machine capable of reproducing the record requested. IC 5-14-3-8(e). In that event, the person requesting the record is only entitled to inspect and manually transcribe the record. IC 5-14-3-8(e). While this provision is problematic for persons who are unable to inspect the record requested (*e.g.*, such as for persons who are incarcerated and cannot come into the agency), I do not understand this provision to require the agency to enter into a contract with a third-party vendor or to otherwise make arrangements for copying its records outside the agency. The Court’s failure to produce a copy of the audio recordings is not in violation of the APRA for this additional reason.

#### CONCLUSION

For the reasons set forth above, I find that the Court did not violate the APRA in responding to your records request.

Sincerely,

Michael A. Hurst  
Public Access Counselor

cc: The Honorable Charles Grodnik

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<sup>2</sup> Your request for a “signed certificate of no record indicating that a diligent search failed to disclose the record requested” is not required under the APRA.