



STATE OF INDIANA

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August 16, 2010

Mr. Tyrone Frazier
Indiana State Prison
One Park Row
Michigan City, IN 46360

Re: Formal Complaint 10-FC-171; Alleged Violation of the Access to Public Records Act by Marion County Criminal Court 18

Dear Mr. Frazier:

This advisory opinion is in response to your formal complaint alleging Marion County Criminal Court 18 (the "Court") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*, by denying you access to public records. I have enclosed a copy of the order Judge Reuben B. Hill entered on August 13, 2010, in response to your request and subsequent complaint. I note that I have granted your request for priority status under 62 Ind. Admin. Code 1-1-3(3).

BACKGROUND

According to your complaint, you sent a request to "Shelia Thompson" in which you requested a copy of an audio recording on a compact disc. Specifically, you sought a recording of a post-conviction relief hearing that was held on December 15, 2009. You allege that you sent your request on July 22, 2010, but had not received a response as of August 2nd.

My office forwarded a copy of your complaints to the City of Indianapolis' Office of the Corporation Counsel. I spoke with the office's Chief Deputy Corporation Counsel Andrea Brandes, who informed me that your request was not received by the Court because it was addressed to Ms. Thompson, who works in another department. As a result, your request was not received by the Court until August 3rd. On August 13th, Judge Hill entered an order denying your request for access to a certified recording of the hearing and informed you that you may file a Praecipe for Transcript of the hearing at a price of \$4.50 per page, payable in advance.

ANALYSIS

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.” Ind. Code § 5-14-3-1. The Court is a public agency for the purposes of the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Court’s public records during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

Here, the Court asserts it did not receive your request prior to the time that you filed your complaint. If the Court did receive your request, the agency would have a duty under the APRA to respond within seven days of receipt. I.C. § 5-14-3-9(b). While a public agency has a duty to respond to a written request for access to records within seven days of receipt of the request, an agency cannot respond to a request it did not receive. *See Opinion of the Public Access Counselor 09-FC-44.*

The Court ultimately denied your request for a certified audio copy of the hearing on compact disc. If the Court does not have reasonable access to a machine capable of reproducing the audio recording for you, it did not violate the APRA by denying your request. Under the APRA, a public agency shall either provide requested copies to the person making the request or allow the person to make copies on the agency’s equipment or on the person’s own equipment. I.C. § 5-14-3-3(b). If (1) a person is entitled to a copy of a public record under this chapter; and (2) the public agency which is in possession of the record has reasonable access to a machine capable of reproducing the record; the public agency must provide at least one copy of the public record to the person. If a public agency does not have reasonable access to a machine capable of reproducing the record, the person is only entitled to inspect and manually transcribe the record. I.C. § 5-14-3-8(e). It is unclear whether or not the Court has the ability to make the requested copy for you. If the Court has reasonable access to a machine capable of creating a copy for you, it should either provide the copy (subject to your paying the appropriate fee) or cite a basis under the APRA for denying your request. *See* I.C. § 5-14-3-9.

As to the issue of the \$4.50 per page fee that the Court intends to charge you for copies of a transcript, it is unclear why the Court is charging you that fee. I note that if the Court does not maintain a paper copy of the transcript, it is under no obligation to produce the record to you at all. *See Opinion of the Public Access Counselor 10-FC-56* (“Where records are not yet created, a public agency does not violate the APRA by refusing to produce them.”) In that case, the Court did not violate the APRA by charging you a fee in excess of the fees permitted by the APRA. If the Court does maintain a paper copy of the hearing transcript, the APRA’s fee provisions apply. The APRA permits a public agency to charge a fee for copying a record, but sets certain limits on the amount of the copying fee depending upon the type of public agency. *See* I.C. § 5-14-3-

8. However, the APRA also provides that notwithstanding other provisions within section 8 of the APRA, a public agency shall collect any certification, copying, facsimile machine transmission, or search fee that is specified by statute or is ordered by a court. I.C. § 5-14-3-8(f). Thus, where a specific statute other than the APRA provides a public agency with the authority to charge a fee that exceeds the “actual cost,” the public agency may charge the statutory fee without violating the APRA. Under I.C. § 33-37-5-1, a court clerk shall collect a fee of one dollar (\$1.00) per page for legal size or letter size pages, including a page only partially covered with writing. If the Court cannot cite a statutory basis for its \$4.50 per page fee, it has charged you an excessive fee under section 8 of the APRA.

Finally, I note that the APRA permits a public agency to require a requester to pay any applicable copy fees prior to releasing the records. I.C. § 5-14-3-8(e).

CONCLUSION

For the foregoing reasons, it is my opinion that if the Court does not have reasonable access to a machine capable of producing a copy of the record you seek, the Court did not violate the APRA. If the Court does have reasonable access to a machine capable of creating a copy for you, the Court should either do so or cite to a basis in the APRA that permits the Court to withhold the record. If the Court maintains paper copies of the transcript you requested, the APRA prohibits the Court from charging you \$4.50 per page for a paper copy of a transcript unless the Court has a statutory basis for assessing that fee.

Best regards,



Andrew J. Kossack
Public Access Counselor

cc: Andrea Brandes