



STATE OF INDIANA

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August 13, 2012

Cynthia L. Perry
3201 Aspen Grove Drive A5
Franklin, Tennessee 37067

Re: Formal Complaint 12-FC-212; Alleged Violation of the Access to Public Records Act by the Warrick County Superior Court II

Dear Ms. Perry:

This advisory opinion is in response to your formal complaint alleging the Warrick County Superior Court II ("Court") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Judge R.R. Aylsworth responded on behalf of the Court. His response is enclosed for your reference.

BACKGROUND

On June 29, 2012, you inquired with the Court about obtaining an audio copy of hearings that occurred on May 2, 2012 and June 28, 2012. You were informed that the Court does not have the means or equipment to produce an electronic copy of the hearing. The Court informed you that the cost to have the hearings transcribed would be approximately \$1000 for the six hours of hearings. On August 3, 2012, you submitted a request to the Court to arrange an opportunity to listen to the audio recordings. You were informed by the Court that you were not allowed to listen to the hearings. You advise that you do not have the necessary funds to pay the \$1000 fee in order for written transcripts to be prepared and believe that the APRA allows you the right to listen to the audio recordings. You further advise that you filed a similar formal complaint with the Public Access Counselor's Office regarding this issue in 2010.

In response to your formal complaint, Judge Aylsworth advised that if the Court were to receive written authority from the Indiana Supreme Court or the Indiana State Court Administration allowing it to provide audio copies of hearing, copies of the requested hearings would be provided. The Court cited to a 2010 order issued in the civil proceeding that addressed your previous request for audio recordings.

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.” *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 the Court’s public 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 in person and the agency does not respond within twenty-four hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail 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). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply.

The Court in response to your formal complaint advised that if it receives written authority from the Indiana Supreme Court or State Court Administration allowing the Court to provide copies of audio recordings, audio copies of the hearings which you have requested will be provided. 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 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:

Recordings of court proceedings made by court reporters are public records regardless of whether they are produced on magnetic recording tape, compact disk, stenotype, shorthand or digitally recorded upon a computer hard drive unless the specific case type is confidential under Administrative Rule 9. *See* AR 9(C)(2) regarding the definition of “case record” and AR 9 (D)(4) regarding access to audio and video recordings of



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proceedings. The public has the right to obtain the record within a reasonable period of time after making the request.

A specific means of providing this type of record has not been defined but the time or difficulty of compliance is an important consideration. Allowing the requestor to listen to the recording may be too time consuming to be reasonable for the reporter or a court staff member since the custody and integrity of the original must be continuously maintained.

Providing a copy of the record is probably the most efficient and least time consuming method to provide public access. A reasonable charge for the production of the copy may be made and guidance on this issue may be found in I.C. § 5-14-3-8. 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.

Requiring the purchase of a transcript would be so costly in many cases as to constitute a denial of access to the public record unless the requestor desires to obtain the record in that format. Given the time required to produce a transcript and the other duties of reporters, the reasonable time for producing the record may well lead the requestor to ask for a different format. If the case is on appeal, a copy of the transcript could be obtained from the Clerk upon its completion and filing.

In situations where the requested record results in provision of an audio and/or audiovisual copy of a court proceeding, the judge should issue an order specifically limiting its use and barring the recipient from broadcasting the received record in any manner. *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>).

AR 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.

AR 9(D)(4) provides that Court shall 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 comply with prohibitions on broadcast of court proceedings outlined in Indiana Judicial Conduct Rule 2.17. The Handbook provides that creating a copy of the audio record is probably the most efficient and least time consuming method to provide public access. If the Court is able to make a audio recording of the hearing in question, the recording is not declared confidential, and providing the recording complies with the Court's management of its audio recordings pursuant to AR 9(D)(4) and Indiana Judicial Conduct Rule 2.17, a copy of the hearing requested should be provided.¹ I am not aware of, nor does the Handbook cite to, a requirement that the Indiana Supreme Court or State Court Administration must first issue written authority to the respective Court prior to disclosure of an audio recording. As such, it is my opinion that the Court has failed to meet its burden in demonstrating that its denial of your request for records was proper under the APRA.

¹ Although not addressed in the Court's response, you have provided that the Court has informed you on previous occasions that is was unable to make audio copies of the hearings in question. The APRA provides that if a public agency does not have reasonable access to a machine capable of reproducing the record or if the person cannot reproduce the record by use of enhanced access under section 3.5 of this chapter, the person is only entitled to inspect and manually transcribe the record. *See* I.C. § 5-14-3-8(e).



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CONCLUSION

Based on the foregoing, it is my opinion that the Court has failed to meet its burden to demonstrate that its denial of your request for audio recordings was proper under the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage".

Joseph B. Hoage
Public Access Counselor

cc: Judge L.L. Aylsworth