STATE OF INDIANA

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December 7, 2012

Mr. Randall Tison
DOC 127788
P.O. Box 1111
Carlisle, Indiana 47838

Re: *Formal Complaint 12-FC-347; Alleged Violation of the Access to Public Records Act by the Vanderburgh County Superior Court*

Dear Mr. Tison:

This advisory opinion is in response to your formal complaint alleging the Vanderburgh County Superior Court ("Court") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq*. Chief Judge Mary Margaret Lloyd responded in writing on behalf of the Court. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that you submitted a written request for records to the Court on October 30, 2012. As of December 4, 2012, the date you filed your formal complaint with the Public Access Counselor's Office, you further allege that you have yet to receive any response from the Court.

In response to your formal complaint, Judge Lloyd advised that your request was identical to a request submitted by Chalmer Harris on July 16, 2012 that was the subject of Formal Complaint 12-FC-206. Further, you have previously submitted the same request to the Court on April 30, 2012, May 9, 2012, and June 1, 2012. As with Formal Complaint 12-FC-206, the Court provided that your request sought unspecified audio recordings from a three-day child molestation trial that involved two (2) different underage victims which may have included confidential reports from the Department of Family and Child Services. In support of the confidential nature of the Department of Family and Child Services, a subpoena for the agency was quashed at a later court hearing under the advised cause number. The transcript for the trial, exhibits from the trial, the Post-Conviction Relief Hearing Transcript, and exhibits from the Post-Conviction Relief Hearing were sent to the Indiana Court of Appeals Clerk and are not contained in the Court's file. The request for police reports, "standard supplemental reports", and police statements are not included in the Court's file. The Court does not maintain any "stenographer" notes from the case.

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 24 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 (7) 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.

Generally, if a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. "[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA." *Opinion of the Public Access Counselor 01-FC-61*; *see also Opinion of the Public Access Counselor 08-FC-113* ("If the records do not exist, certainly the [agency] could not be required to produce a copy…."). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. *See Opinion of the Public Access Counselor 10-FC-56*. Here, the Court advised that as to your request for Standard Supplement Reports, Investigation Reports, and records of the stenographer (stenographer's notes), the records were not maintained by the Court in the trial court file. As to your request for transcripts, the Court has provided that the records were submitted to the Indiana Court of Appeals Clerk and are no longer contained in the trial court file. As such, it is my opinion that the Court did not violate the APRA by failing to produce a record that it did not maintain or no longer maintained.

Under section 4 of the APRA, a public agency may not disclose records declared confidential by or under rules adopted by the supreme court of Indiana. I.C. § 5-14-3-4(a)(8). Confidentiality of court records is governed chiefly by Administrative Rule 9, which was adopted by the Indiana Supreme Court. The rule applies to court records, which is defined as both case records and administrative records. Admin. R. 9(C)(1). "Case record" means any document, information, data, or other item created, collected, received, or maintained by a court, court agency or clerk of court in connection with a particular case. Admin. R. 9(C)(2). All persons have access to court records as provided

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in Administrative Rule 9. Admin. R. 9(B)(1). However, some case records are confidential, pursuant to Administrative Rule 9(G). To the extent the records you sought were declared confidential pursuant to (a)(8) and Administrative Rule 9, the Court would not have violated the APRA in denying your request.

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).* 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.

I would further note that the APRA provides that 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. *See* I.C. § 5-14-3-8(e). Thus, if the Court does not have the capability of reproducing the audio recording, the Court would not be in violation of the APRA. *See Opinion of the Public Access Counselor 10-FC-101 and 10-FC-102.* Further, if the Court does not maintain an audio transcript of the hearings that you requested, the APRA would not require the Court to produce or create a record in response to a request. *See Opinions of the Public Access Counselor 06-FC-08* and *12-FC-49.* If you have previously received a written transcript for the hearing for the hearing that you seek, it would not be in violation of the APRA by failing to provide you with an audio copy. *See Opinions of the Public Access Counselor 07-FC-185 and 12-FC-45.* The APRA permits a public agency to charge a fee for copies of public records. *See* I.C. § 5-14-3-8. Additionally, a public agency may require a person to pay the copying fee in advance. *See* IC 5-14-3-8(e). Nothing in the APRA requires that a public agency waive a copying fee. *See Opinion of the Public Access Counselor 07-FC-124.*

CONCLUSION

For the foregoing reasons, it is my opinion that the Court did not violate the APRA.

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: Chief Judge Mary Margaret Lloyd