



STATE OF INDIANA

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August 23, 2013

Mr. Clifford W. Shepard
2510 English Avenue
Indianapolis, Indiana 46201-4136

Re: Formal Complaint 13-FC-242; Alleged Violation of the Open Door Law and the Access to Public Records Act by the Hendricks County Superior Court

Dear Mr. Shepard:

This advisory opinion is in response to your formal complaint alleging the Hendricks County Superior Court violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* and the Access to Public Records Act ("APRA"), I.C. § 5-14-3 *et seq.* Judge Robert W. Freese responded in writing to your formal complaint. His response is enclosed for your reference.

BACKGROUND

In your formal complaint you provide that on August 8, 2013, you were present in the courtroom of the Hendricks County Superior Court 1, of which Judge Freese is the elected judge. At approximately 8:15 a.m., a court officer ordered everyone present that was not a defendant to leave the courtroom. You inquired why all non-defendants were being asked to leave and were informed that a video was to be played pertaining to various court processes. You believe that the court officer was acting on Judge Freese's instructions and the Court violated the ODL when it forced all non-defendants to leave the courtroom during the video review.

On the same date, you hand-delivered a written request for records to the Court to access the audio record of the day's proceedings. As of August 19, 2013, the date you filed your formal complaint, you allege that the Court has failed to comply with your request.

In response to your formal complaint, Judge Freese advised that the ODL does not apply to the Court's proceedings. However, I.C. § 5-14-2 provides for public access for criminal proceedings. To avoid having to reply to a subsequent complaint, Judge Freese advised that on August 8, 2013, the Court was conducting criminal proceedings as it does on most Thursday mornings. The Court sometimes will have upwards of 100 cases set. Prior to the commencement of any hearings, all defendants are required to view a DVD

that goes over their Constitutional Rights as to Initial Hearings, Plea Hearings, Probation Violation Hearings, and Rules of Probation. Superior Court 1, the largest of all 7 courtrooms in the Hendricks County Courthouse, only allows for sitting for approximately fifty persons. As such, non-defendants are asked to remain in the rotunda until the roll call is performed and the defendants are given an opportunity to view the DVD. After that process is complete, all parties are permitted in the courtroom. The Judge will then take the bench and the hearings will begin.

Judge Freese provides that you were in the court room prior to his taking the bench. Judge Freese remembers you sitting in the front row, close to the west side of the courtroom. You were in attendance as a witness for the State for one specific hearing. Upon completion of your testimony, you returned to your seat in the courtroom. You then interrupted the hearing and made additional comments, which the Court allowed. You then attempted to speak again, but the Court denied your request as you were no longer a witness. You were in the courtroom for the entire hearing in which you were a witness. At no time were you denied access to the hearing.

As to your request for records, on August 8, 2013, you requested an opportunity to listen to a recording of the hearing in which you were a witness for the State. Judge Freese advised that the Court has relatively new digital equipment so the Court was unable to utilize a tape. At the time of your request, the Court was still conducting hearings, thus it was unable to accommodate your request at that time. Due to a shortage of proper courtroom space, the courtroom utilized that day is shared with other Hendricks County Courts. The Court's office manager has been attempting to set up a time for you to review the audio recording when the courtroom is available.

ANALYSIS

It is the intent of the ODL that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. *See* I.C. § 5-14-1.5-1. Accordingly, except as provided in section 6.1 of the ODL, all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. *See* I.C. § 5-14-1.5-3(a).

You have alleged that the Court violated the ODL by removing all non-defendants from the courtroom during the DVD viewing that instructed defendants on their constitutional rights. By definition, the ODL only applies to the governing bodies of public agencies that are exercising a portion of the executive, administrative, or legislative powers of the state or delegated local governmental power. *See* I.C. § 5-14-1.5-2(a). The Court is exercising judicial authority during its proceedings and thus the ODL would not be applicable. *See also Opinion of the Public Access Counselor 08-INF-6*. Issues you have raised regarding violation of Article 1, Section 12 of the Indiana Constitution would be outside the purview of this office. I would encourage you to contact the Division of State Court Administration regarding the issues you have raised in your formal complaint regarding open access to the Court's proceedings.

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). 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. Here, you allege that you hand-delivered a written request for records to the Court on August 8, 2013. The Court was required to respond, in writing, within twenty-four hours of receiving your hand-delivered written request, and at a minimum acknowledge the receipt of the request. If the Court failed to acknowledge the receipt of your hand-delivered written request for records, in writing, within twenty-four hours of receipt, it acted contrary to the requirements of section 9 of the APRA. *See Opinions of the Public Access Counselor 05-FC-176; 11-FC-84; 11-FC-308; 12-FC-63; 12-FC-316; 13-FC-10.* Beyond section 9 of the APRA, Judge Freese had indicated that the Court’s Office Manager has been attempting to contact you to set up a time to allow you to listen to the Court’s proceedings from the hearing in question. I would encourage you to contact the Court to facilitate this process. Nothing in the APRA indicates that a public agency’s failure to provide “instant access” to the requested records constitutes a denial of access. *See Opinions of the Public Access Counselor 09-FC-192 and 10-FC-121.*

CONCLUSION

Based on the foregoing, it is my opinion that the ODL would not be applicable to the Court’s proceedings. If the Court failed to acknowledge the receipt of your hand-delivered written request for records, in writing, within twenty-four hours of receipt, it acted contrary to the requirements of section 9 of the APRA.

Best regards,



Joseph B. Hoage
Public Access Counselor

cc: Judge Robert W. Freese