



STATE OF INDIANA

MICHAEL R. PENCE, Governor

PUBLIC ACCESS COUNSELOR
LUKE H. BRITT

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

October 29, 2013

Mr. Jesse Clements
Mr. Gersh Zavodnik
P.O. Box 68082
Indianapolis, IN 46268

Re: Formal Complaint 13-FC-289; Alleged Violation of the Access to Public Records Act by Marion Superior Court 6

Dear Mr. Clements and Mr. Zavodnik,

This advisory opinion is in response to your formal complaint alleging that the Marion Superior Court 6 (“Court”) violated the Access to Public Records Act (“APRA”), Ind. Code § 5-14-3-1 *et. seq.* The Court has responded to your complaint by way of Ms. Andrea Brandes Newsom. Her response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on September 30, 2013. Please note your complaint did not meet the requirements of 410 IAC 1-1-3 and priority status has not been granted.¹

BACKGROUND

Your complaint dated September 30, 2013, alleges that the Marion County Superior Court 6 violated the Access to Public Records Act by denying your request in violation of Ind. Code § 5-14-3-3(b).

¹ Your initial public records request was denied on July 11, 2013 when the Court indicated that it had no records responsive to your request. This is outside the timeframe for filing a complaint under Ind. Code § 5-14-5-7 and your complaint is deemed moot. It matters not that you resurrected your request on September 11, 2013 – the request had already been denied. Therefore, this Opinion is truly advisory in nature and should not be considered persuasive authority in any other venue.

You allege that on June 14, 2013 you served a request upon the Court seeking the following records:

“In Case No. 49D06-1208-MF-030697 there exists a CCS entry on 05/13/2013 which states as follows: **Order Issued**
Order Granted (Order on the Motion for Change of Judge) Carroll, Thomas J.
Transaction ID: 47524252.”

It is unclear if or when the Court acknowledged your request; however, on June 26, 2013 you were advised the Court’s file was available for inspection at your convenience. On July 11, 2013 you inspected the entirety of the Court’s file. The file did not contain the document sought. You subsequently sent a letter to Ms. Newsom on September 11, 2013 giving the Court 48-hours to respond to your request. It does not appear the Court responded to the second request.

In its response, the Court denies a violation of the APRA on the grounds that records responsive to your request do not exist. It is suggested the records you seek were compromised by technical difficulties and the Court is in the process of generating a Chronological Case Summary that mirrors the actual events.

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 Ind. Code § 5-14-3-1. The Marion County Superior Court 6 is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the Court’s public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14-3-3(a).

A request for records may be oral or written. See Ind. Code § 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 Ind. Code § 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 Ind. Code § 5-14-3-9(b). A response from the public agency could be an acknowledgement the request has been received and information regarding how or when the agency intends to comply.

The Court maintains they have no records responsive to your request. Your complaint alleges the records were “tampered” with in order to effectuate a nefarious plot to withhold the records. Although the Public Access Counselor is not a finder of fact, it seems highly unlikely the Court would intentionally hide records from you. Additionally, it is beyond the bounds of reason the Court would alter records in order to subvert transparency and open access in instance at hand. Even when viewing the facts in a light

most favorable to you, I will not accept such accusations suggesting conduct unbecoming of a judge in this particular case.

It is well established by previous Public Access Counselor opinions an agency is not required to create records that do not exist. The Court, if taken at their word (which seems more credible, based on the information provided); it seems the omission of the record from the Court's file was an inadvertent mistake. It appears as if the Court is making best efforts to remedy the issue. The Court met its obligations under the APRA to make the file available to you for inspection. The Court has admitted the document was erroneous and the record will need to be reconstructed to reflect the correct entries.

I hesitate to even speak to the issue, but your request for me to admonish the actions of the Court, the Honorable Judge Carroll, and its staff, will not be addressed here or anywhere else by this Office. In regard to the language in your complaint and your public records request, no matter what dissatisfaction you have with the Marion County court system, communication which disparages the judiciary and its representatives will not be tolerated by this Office. You would be well served to show deference to the judges in all jurisdictions and seek other means of redress in a diplomatic manner if you feel that any of your litigation has been compromised by their rulings.

CONCLUSION

For the foregoing reasons, it is the Opinion of the Office of the Public Access Counselor the Marion County Superior Court 6 did not violate the Access to Public Records Act.

Regards,

A handwritten signature in black ink, appearing to be 'LHB', written in a cursive style.

Luke H. Britt
Public Access Counselor

Cc: Ms. Andrea Brandes Newsom