



# STATE OF INDIANA

**MICHAEL R. PENCE, Governor**

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March 11, 2013

Mr. Jesse Clements  
P.O. Box 68082  
Indianapolis, Indiana 46268

*Re: Formal Complaint 13-FC-50; Alleged Violation of the Access to Public Records Act by the Marion County Circuit Court*

Dear Mr. Clements:

This advisory opinion is in response to your formal complaint alleging the Marion County Circuit Court ("Court") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Andrea Brandes Newsom, Court Administrator, responded 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 for information regarding Ms. Denise Schwarzkopf's registration as a public notary. You further allege that all requests submitted have been ignored. Further, you provide that you submitted a request to the Court to inspect certain audio recordings of hearings that took place on December 13, 2012. Judge Rosenberg responded to your request in writing and granted your request. You were informed to contact the Court to arrange a mutually convenient time for the inspection to occur. Judge Rosenberg further advised that prior to inspection you would need to sign an acknowledgment that would prohibit you from broadcasting or modifying the recordings; however you would be allowed take notes.

In response to your formal complaint, Ms. Newsom advised that you filed a "Praecipe" with the Court on January 17, 2013. The pleading filed sought the ability to listen to audio recordings of certain hearings that took place on December 13, 2012. You further requested an opportunity to inspect the Court reporter's oath and bond. While the Praecipe filed makes reference to the APRA, the Praecipe took the form of a formal pleading filed in a pending civil matter before the Court. You also appear to have served a copy of each Praecipe upon the other parties of record or their designated counsel, as a certificate of service is contained at the conclusion of each Praecipe. On January 31, 2013, Judge Rosenberg responded in writing to your correspondence, which was served on all parties in the associated civil litigation. Judge Rosenberg granted your

request to inspect the audio recordings and you were directed to contact the Court to arrange a mutually beneficial time. Judge Rosenberg also submitted an acknowledgement that memorialized the terms and conditions upon which you would be permitted to inspect the recordings.

The Court has granted your request for inspection. To date, you have made no attempt to contact the Court to arrange a time to inspect the recordings. Your failure to follow the reasonable instructions of the Court is not a denial under the APRA. In the ordinary course of business for the Court, formal pleadings are processed by Court staff and reviewed in due course. Absent the word “Emergency” in this title of the pleading, there is no guarantee of the timeframe in which the Court will review the pleading. Instead of construing each Praecipe as an individual public records request, the Court considered the pleadings in the manner in which they have been presented to the court, as a formal pleading. However, when you disagreed with the conditions related to inspection of the audio recordings, you attempted to convert the pleading to an APRA request.

As to the acknowledgement that the Court has required you to complete prior to inspection, the acknowledgement is appropriate and reasonable under Administrative Rule 9(D)(4) which provides that the 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 proceedings as outlined in Indiana Judicial Conduct Rule 2.17. The Court’s effort to procure an acknowledgment does not constitute a denial under the APRA. The Court is not in possession of any records responsive to the filings you have made with respect to the bond information for certain court reporters. However, the Court does have one record responsive to your request for the oath of a specific court reporter. A copy of the oath is enclosed for your records and will also be provided to you via first-class mail.

#### 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 denial. *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. However, the APRA is separate



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and distinct from other court proceedings, both civil and criminal. The original record that was filed pursuant to a pending civil matter before the Court; the filing was titled as a Praecipe; service was provided to all other parties in the matter. It is my opinion that it was reasonable for the Court to interpret the filing as a pleading in a pending civil matter before the Court as opposed to a request for records made under the APRA.

Even if the Praecipe had been interpreted as an APRA request, if a public agency has no records responsive to a public records request, the agency generally 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*. The Court has provided that it does not maintain any records with respect to your request for bond information for certain court reporters. The Court has provided you a copy of Ms. Schwarzkopf’s Oath of Office. The Court would not violate the APRA by failing to produce a record it was not otherwise legally obligated to maintain.

As to your request to inspect certain audio recordings of hearings that were held in December 2012, 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:

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. *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-accesshandbook.pdf>).

Administrative Rule 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.*

It is my opinion that the Court did not violate the APRA by requiring you to sign an acknowledgment prior to inspection that would prevent you from rebroadcasting of amending the recordings that were to be inspected.



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## CONCLUSION

For the foregoing reasons, it is my opinion that the Court did not violate the APRA in response to your request.

Best regards,

A handwritten signature in black ink that reads "J. Hoage".

Joseph B. Hoage  
Public Access Counselor

cc: Andrea Brandes Newsom