



STATE OF INDIANA

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August 18, 2014

Mr. Brian N. Culp
60 S. Jefferson St.
Martinsville, IN 46151

Re: Formal Complaint 14-FC-151; Alleged Violation of the Access to Public Records Act by the Morgan County Superior Court 1 and Circuit Court (Amended)

Dear Mr. Culp,

This advisory opinion is in response to your formal complaint alleging the Morgan County Superior Court 1 and Circuit Court ("Courts") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The Courts have not responded to your complaint despite an invitation to do so on July 23, 2014. 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 July 18, 2014.

BACKGROUND

Your complaint dated July 18, 2014, alleges Morgan County Superior Court 1 and Circuit Court violated the Access to Public Records Act by not providing records responsive to your request.

On July 16, 2014, you requested certain documents regarding two separate cause numbers in each Court. These documents related to causes wherein expungement was requested and pending. The Courts responded on July 17, 2014, stating the expungement hearings were closed due to their classification of civil proceedings as opposed to criminal proceedings. This classification, the Courts argue, gives Judges the discretion to open or close the proceedings. As for the documents in question, the Courts cite Ind. Code § 35-28-9-6 as justification for sealing expungement records and therefore denying their release.

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 Morgan County Superior Court 1 and Circuit Court 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 petition to expunge criminal records is a civil proceeding and not a criminal court filing. As such, it is not governed by the Open Door Law or Ind. Code § 5-14-2 et.al. (Criminal matters are, generally, open to the public). A civil proceeding may only be closed when the denial of access “is essential to preserve higher values and is narrowly tailored to serve that interest.” See *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (1994).

It is not the place of the Public Access Counselor to weigh whether the Courts are justified in making that subjective determination. Any challenge to the Courts’ authority would be made through other legal channels.

As for the records of the Courts, under Ind. Code § 5-14-3-2(n)(1), the APRA contemplates courts of the judiciary as public agencies subject to open access laws. The Indiana Rules of Court also place an emphasis on access to records See Ind. Admin. Court Rule 9, although the commentary to Rule 9 states as follows:

This rule starts from the presumption of open public access to court records. In some circumstances; however, there may be sound reasons for restricting access to these records.

Moreover, the general access rule in subsection 9(D)(1) states:

A court record is accessible to the public except as provided in sections (G) and (H) of this rule, or as otherwise ordered sealed by the trial court.

Subsection 9(G)(1)(g) goes on to state:

All orders of expungement entered in criminal or juvenile proceedings orders to restrict access to criminal history information pursuant to Ind. Code § 35-38-5-5.5 or Ind. Code § 35-38-8-5 and records excluded from public access by such orders, and information related to infractions that is excluded from public access pursuant to Ind. Code § 34-38-5-15 or Ind. Code § 34-38-5-16.

So while the philosophy of open access is embraced by the judiciary, these rules recognize certain public policy reasons for sealing a court record. From the materials provided, it is unclear as to what stage the proceedings are in. Ind. Admin. Court Rule 9(G)(1)(g) and Ind. Code § 35-38-9-6 only speaks to expungement orders *if* conviction records are expunged. These statutes do not address pending cases in which expungement

has not been granted. If the order has been granted, the Court clearly must seal the record under Ind. Code § 35-38-9-6 and limit access to certain individuals.

In cases where expungement has not been granted and the cause is pending, I am not aware of any authority which would allow a Court to declare those records inherently confidential. The *filing* of the petition does not change the nature of the conviction records – only the *granting* of the petition would do so. The Court may very well determine that the release of records in an expungement case may be counterintuitive and should be sealed, but the APRA is the authority under which they may do so.

CORRECTION: On August 20, 2014, respondent Judge Hon. G. Thomas Gray informed the Public Access Counselor of a new statute effective July, 2014. Ind. Code § 35-38-9-10(i) states that petitions and orders for expungement are confidential. This was not raised in the Courts' original denial and therefore was not addressed.

As to all other records:

Ind. Code § 5-14-3-5.5 holds:

- (a) This section applies to a judicial public record.
- (b) As used in this section, "judicial public record" does not include a record submitted to a court for the sole purpose of determining whether the record should be sealed.
- (c) Before a court may seal a public record not declared confidential under section 4(a) of this chapter, it must hold a hearing at a date and time established by the court. Notice of the hearing shall be posted at a place designated for posting notices in the courthouse.
- (d) At the hearing, parties or members of the general public must be permitted to testify and submit written briefs. A decision to seal all or part of a public record must be based on findings of fact and conclusions of law, showing that the remedial benefits to be gained by effectuating the public policy of the state declared in section 1 of this chapter are outweighed by proof by a preponderance of the evidence by the person seeking the sealing of the record that:
 - (1) a public interest will be secured by sealing the record;
 - (2) dissemination of the information contained in the record will create a serious and imminent danger to that public interest;
 - (3) any prejudicial effect created by dissemination of the information cannot be avoided by any reasonable method other

than sealing the record;

(4) there is a substantial probability that sealing the record will be effective in protecting the public interest against the perceived danger; and

(5) it is reasonably necessary for the record to remain sealed for a period of time.

Sealed records shall be unsealed at the earliest possible time after the circumstances necessitating the sealing of the records no longer exist.

If the Courts hold a hearing and the above criteria are met, they may seal the record. Otherwise, the Courts will not have met the burden of denial access to a court record under Ind. Code § 5-14-3-1.

Regards,

A handwritten signature in black ink, appearing to read 'LH Britt', with a long, sweeping underline.

Luke H. Britt
Public Access Counselor