



STATE OF INDIANA

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October 24, 2014

Mr. George W. Pendygraft
6770 Spirit Lake Drive, Ste. 201
Indianapolis, IN 46220

Re: Formal Complaint 14-FC-221; Alleged Violation of the Access to Public Records Act ("APRA") by the Marion County Clerk

Dear Mr. Pendygraft,

This advisory opinion is in response to your formal complaint alleging the Marion County Clerk ("Clerk") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The Clerk's Chief of Staff, Mr. Scott Hohl has responded on behalf of the Clerk. His 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 23, 2014.

BACKGROUND

Your complaint dated September 22, 2014, alleges the Marion County Clerk violated the Access to Public Records Act by not providing records responsive to your request in violation of Ind. Code § 5-14-3-3(b) and various other authorities.

On or about September 2, 2013, you submitted a request for public access to the Clerk seeking a copy of the case file in a named lawsuit filed in Marion County Superior Court 4. As of the filing of your complaint on September 22, 2014, you had not received a response.

The Clerk responded to your complaint on September 25, 2014 stating the records you sought had been sealed by the Court and the file was not disclosable public record. The Clerk does acknowledge it did not respond to your original request in a timely manner, however, it appears you may have been notified of the conclusive denial by the Court itself.

Much is made in your response about procedural trial rules and the attorney-client privilege; however, these issues are not necessarily germane to your complaint. The

Court indeed entered an order on September 4, 2014 sealing the records in question. The issue as I see it is whether the Court properly sealed the records under the Access to Public Records Act. The procedure for filing confidential public records to the Court and the Court's response under the Trial Rules or Administrative Court Rules is outside the purview of this Office and is under the jurisdiction of the judiciary.

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 Clerk 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 Clerk'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 Access to Public Records Act addresses how and under what circumstances a court may seal a public record. Ind. Code § 5-14-3-5.5 states:

(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.

Clearly the discretion to seal a record lies with the presiding Judge; however, it is also clear the procedures enumerated in subsection 5.5 must be followed. According to the Court's order in 49D04-1312-PL-045851, the parties appeared for a status conference at which time the co-Defendant made an oral motion to the Court to seal the records in the case. It does not appear any notice of the proceeding was given and the public did not have an opportunity to testify or file a brief.

The obligation to hold such a hearing is on the presiding Judge. I spoke with the Honorable Cynthia Ayers, Judge of the Marion County Superior Court 4 and she indicated her decision to not hold a hearing was based on her decision confidential attorney-client communication was scattered amongst the documents. Because that kind of communication is declared confidential by several Indiana authorities, she sealed all the records in the case. Furthermore, she feared a hearing would compromise the integrity of the privilege as attorneys may have to give testimony regarding the communication itself.

You clearly disagree with the Judge's determination; however, that is a matter of law and under the jurisdiction of the court. There are alternative appellate remedies if you take exception with her ruling and choose to intervene, however, none of those remedies may be issued by the Indiana Public Access Counselor.

CONCLUSION

It is the Opinion of the Public Access Counselor the Marion County Clerk did not violate the Access to Public Records Act by not remitting the records; however, they did violate APRA because a court order was in place sealing the records. Regardless of the adherence to the sealing procedure by the Judge, the Clerk is bound by her order at the risk of contempt.

Regards,

A handwritten signature in black ink, appearing to be 'LHB', with a long, sweeping underline that extends to the left.

Luke H. Britt
Public Access Counselor

Cc: Mr. Scott Hohl