



# STATE OF INDIANA

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April 14, 2016

Mr. Daniel P. Brewington  
2529 Sheridan Drive  
Norwood, Ohio 45212

*Re: Formal Complaint 16-FC-48; Alleged Violation of the Access to Public Records Act by the Dearborn County Superior Court 2*

Dear Mr. Brewington:

This advisory opinion is in response to your formal complaint alleging the Dearborn County Superior Court 2 ("Court") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 et. seq. The Court has responded via Honorable Judge Sally A. McLaughlin and the Honorable Judge Brian D. Hill. The Judges' responses are 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 March 4, 2016.

## BACKGROUND

Your complaint dated March 3, 2016, alleges the Dearborn County Superior Court 2 improperly denied your records request for audio recordings of grand jury proceedings in your criminal case.

On January 29, 2016, you submitted a request for public records to Judge McLaughlin for audio discs of grand jury proceedings associated with your criminal case from 2011. Although Judge McLaughlin presides over Superior Court 2, Judge Hill, from Rush County Superior Court, responded to your request as he was the special judge appointed to preside over your specific case.

On February 4, 2016, the Court via Judge Hill issued an order denying the audio recordings of the grand jury proceedings. Public records associated with grand jury proceedings are governed by Ind. Code § 35-34-2-10 and their release is discretionary at the judgment of the Court. While the statute addresses transcripts of those proceedings, audio recordings are not referenced.

The transcripts of the proceedings were indeed made available to you in 2011. You seek the audio recordings to compare with the transcripts. You also seem to take exception to the Court's language stating that individuals who broadcast or publish the records may be held in contempt of court.

## 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 Dearborn County Superior Court 2 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 disclosable 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).

First, it should be noted that although Dearborn Court Superior Court 2 is the custodian of the records in question, Judge Hill presided over the case as special judge and retains exclusive jurisdiction over release of records pursuant to Indiana Rule of Trial Procedure 79(L) superseding the jurisdiction of any other judge previously assigned to the case (including those records associated with proceedings over which he did not preside). Any decisions under the Administrative Court Rules or the APRA would lie solely with Judge Hill. Judge McLaughlin’s response on behalf of the Court is appreciated, however, and duly taken into consideration.

Ind. Code § 35-34-2-10 states:

(a) Except when required to do so by law, a person who has been present at a grand jury proceeding and who knowingly or intentionally discloses:

- (1) any evidence or testimony given or produced;
- (2) what a grand juror said; or
- (3) the vote of any grand juror;

to any other person, except to a person who was also present or entitled to be present at that proceeding or to the prosecuting attorney or his representative, commits unauthorized disclosure of grand jury information, a Class B misdemeanor.

(b) The transcript of testimony of a witness before a grand jury may be produced only:

- (1) for the official use of the prosecuting attorney; or
- (2) upon order of:
  - (A) the court which impaneled the grand jury;
  - (B) the court trying a case upon an indictment of the grand jury; or
  - (C) a court trying a prosecution for perjury;

but only after a showing of particularized need for the transcript.

On January 12, 2012, Judge Hill issued an order giving instruction to the Court Reporter to prepare an audio recording of the grand jury proceedings to a third-party requestor. This order was amended a month later when the Judge was advised they were not admitted into evidence (as previously thought), and the order to produce the audio recordings was vacated. The transcripts of the proceedings have been released and made available to you.

The heart of this issue is whether audio recordings are any different from paper copies for the purposes of public records release. Although the definition of public record includes both (see Ind. Code § 5-14-3-2(o)), there are instances when electronic records are distinguished from paper records. A public agency that maintains records electronically, such as audio recordings, should make reasonable efforts to provide a duplicate of those records. See Ind. Code § 5-14-3-3(d).

When it comes to the judiciary, the APRA is balanced against several other regulatory considerations. For example, pursuant to Administrative Court Rule 9(D)(4), 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. According to the information provided, Judge Hill previously exercised his discretion under Ind. Code § 35-34-2-10 to allow reproduction of the grand jury transcript during the criminal proceedings. Because the case has been adjudicated and the transcript released, it stands to reason that providing you an audio copy of the proceeding would neither prejudice the operation of the court, nor compromise grand jury proceedings. Consider the commentary to Administrative Rule 9:

*The objective of this rule is to provide maximum public accessibility to Court Records, taking into account public policy interests that are not always fully compatible with unrestricted access. The public policy interests listed above are in no particular order. This rule attempts to balance competing interests and recognizes that unrestricted access to certain information in Court Records could result in an unwarranted invasion of personal privacy or unduly increase the risk of injury to individuals and businesses. This rule recognizes there are strong societal reasons for allowing Public Access to Court Records and denial of access could compromise the judiciary's role in society, inhibit accountability, and endanger public safety.*

*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. This rule recognizes that there are times when access to information may lead to, or increase the risk of, harm to individuals. However, given the societal interests in access to Court Records, this rule also reflects the view that any restriction to access must be implemented in a manner tailored to serve the interests in open access.*

Neither should your reason for wanting the recordings prohibit your access. A requestor of public access should not have to justify the purpose of the request to any public agency, regardless of your intentions or reservations of the agency. With very limited exception, a compelling interest is not required for obtaining access to public records.

Finally, you note the Judge's prohibition on broadcasting or publishing the materials. Under Judicial Code of Conduct Rule 2.17, a judge shall prohibit the broadcasting of information without prior approval of the Supreme Court. A judge may exercise some discretion in certain circumstances, but issuing an Order to prohibit broadcasting generally is appropriate.

## **RECOMMENDATIONS**

Based on the forgoing, it is the Opinion of the Public Access Counselor that because the transcript of the grand jury proceedings have previously been provided to you, a copy of the audio recordings of said proceedings should be released as well. I have spoken with Judge Hill and he has indicated his willingness to amend the February 4, 2016 order and instruct the Dearborn County Court to produce the recordings.

Regards,

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

Luke H. Britt  
Public Access Counselor

Cc: Hon. Judge Sally A. McLaughlin; Hon. Judge Brian D. Hill