

January 16, 2008

Stuart Showalter
PO Box 374
Lebanon, Indiana 46052

Re: Formal Complaint 08-FC-13; Alleged Violation of the Access to Public Records Act by the Boone Superior Court II

Dear Mr. Showalter:

This is in response to your formal complaint alleging the Boone Superior Court II (“Court”) violated the Access to Public Records Act (“APRA”) (Ind. Code 5-14-3) by denying you access to records. A copy of the Court’s response to your complaint is enclosed for your reference. It is my opinion the Court must provide you access to inspect the recordings or provide you a copy of the recordings.

BACKGROUND

In your complaint you allege that you submitted a request for access to records to the Court on December 11, 2007. Specifically, you requested recordings from a trial held on December 11. The Court denied your request on December 14, citing *Opinion of the Public Access Counselor 04-FC-122*. That opinion referenced the exception to disclosure for records declared confidential by rules of the Indiana Supreme Court (See I.C. §5-14-3-4(a)(8)) and Ind. Crim. Rule 5, declaring confidential certain recordings made of criminal trials involving felony matters. You enclose a copy of an order by the Supreme Court, effective January 1, 2007, amending Crim. R. 5 to remove the word “confidential,” thereby making those recordings non-confidential court records. You allege the Court has violated the APRA by denying you access to the requested recordings. You mailed this complaint on December 17, and I received it on December 18.

The Court responded to your complaint by letter dated December 28 from Judge Rebecca McClure. Judge McClure contends that you have not been denied access to the recordings. Instead, the Court has asked you to pay for a transcript of the recordings, just as any attorney, party, or other citizen seeking production of trial proceedings would be required to do. Judge McClure contends the Court does not have the personnel resources to allow any member of the public to come to the office and listen to trial recordings since the court reporter could not leave

a person unattended. Judge McClure contends that doing so could compromise the integrity of the tape recording. Judge McClure contends that no statute requires the copying of an official court proceeding. Further, Judge McClure contends that Crim. R. 5 provides that the Court may order a transcription of a recording; a request for a transcript is the procedure by which a person may obtain a copy of Court proceedings.

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." I.C. §5-14-3-1. The Court is clearly a public agency for the purposes of the APRA. I.C. §5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Court during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. §5-14-3-3(a).

A "public record" means any writing, paper, report, study, map, photograph, book, card, tape recording or other material that is created, received, retained, maintained or filed by or with a public agency. I.C. §5-14-3-2.

A public agency may not disclose any record declared confidential by rules of the Indiana Supreme Court. I.C. §5-14-3-4(a)(8).

If a person is entitled to a copy of a public record under the APRA and the agency has reasonable access to a machine capable of reproducing the record, the public agency must provide at least one copy of the record to the person. If the agency does not have reasonable access to such a machine, the person is entitled only to inspect and manually transcribe the record. An agency may require that the payment for copying costs be made in advance. I.C. §5-14-3-8(e).

The recordings at issue would likely have been excepted from disclosure under Crim. R. 5 prior to January 1, 2007 since a transcription had not been prepared, certified and filed. Upon receipt of your request in December, the Court called my office to seek advice, and we discussed the exception to disclosure found in Crim. R. 5. However, since the Supreme Court has amended Crim. R. 5 to remove the word "confidential," those records are no longer excepted from disclosure pursuant to I.C. §5-14-3-4(a)(8).

The issue here then is whether the Court may require you to purchase a copy of the transcript when you have requested access to inspect and copy the recordings of a trial held by the Court. The Court contends that providing you with opportunity to listen to the recordings would require staff supervision and would establish an unwieldy and extremely burdensome precedent. The Indiana Supreme Court has addressed this issue in the Frequently Asked Questions section of its *Public Access to Court Records Handbook* (December 2004 Edition), found at <http://www.in.gov/judiciary/admin/pubs/accesshandbook.pdf>. In answer to the question whether court reporter recordings of proceedings are public records, the Handbook indicates the following:

Recordings of court proceedings made by court reporters are public records regardless of whether they are produced on magnetic recording tape, compact disk, stenotype, shorthand or digitally recorded upon a computer hard drive, unless the specific case type is confidential under Administrative Rule 9. The public has the right to obtain the record within a reasonable period of time after making the request.

A specific means of providing this type of record has not been defined but the time or difficulty of compliance is an important consideration. Allowing the requestor to listen to the recording may be too time consuming to be reasonable for the reporter or a court staff member since the custody and integrity of the original must be continuously maintained.

Providing a copy of the record is probably the most efficient and least time consuming method to provide public access. A reasonable charge for the production of the copy may be made and guidance on this issue may be found in IC-5-14-3-8. Under no circumstances should the original be provided to the requestor in order for them to create their own copy.

Requiring the purchase of a transcript would in many cases be so costly as to constitute a denial of access to the public record unless the requestor desires to obtain the record in that format. Given the time required to produce a transcript and the other duties of reporters, the reasonable time for producing the record may well lead the requestor to ask for a different format. If the case is on appeal a copy of the transcript could be obtained from the Clerk upon its completion and filing.

Id. at 48.

Based on this explanation by the Supreme Court of the application of Ind. Administrative Rule 9 to recordings of court proceedings, it is my opinion the Court should either allow you to listen to the recording, or if that is too time consuming for the staff, provide a copy of the recording. The Court may charge you in advance the cost for the copy.

CONCLUSION

For the foregoing reasons, it is my opinion the Court must provide you access to inspect the recordings or provide you a copy of the recordings.

Best regards,



Heather Willis Neal
Public Access Counselor

cc: Judge Rebecca McClure, Boone Superior Court II