



STATE OF INDIANA

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March 12, 2013

Mr. Paul K. Ogden
118 N. Delaware St.
Indianapolis, IN 46204

Re: Formal Complaint 13-FC-80; Alleged Violation of the Access to Public Records Act by the Boone County Prosecutor

Dear Mr. Ogden:

This advisory opinion is in response to your formal complaint alleging the Boone County Prosecutor ("Prosecutor") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Todd J. Meyer, Prosecuting Attorney, responded on behalf of the Prosecutor. His response is enclosed for your reference. I have granted your formal complaint priority status pursuant to 62 I.A.C. 1-1-3(3).

BACKGROUND

In your formal complaint you provide that on February 15, 2013, you went to the Boone County Courthouse to attend a plea hearing involving Elizabeth Russell in the case of State of Indiana v. Elizabeth A Russell, Cause No. 06D02-1209-CM-00605. After the plea hearing was rescheduled, you proceeded to the Boone County Superior Court II ("Court") to look at the criminal court file involving Ms. Russell. In the file, you found a document titled "Probable Cause Affidavit" which referenced a police report ("Police Report"). The Police Report was not in the file. You inquired with the Boone County Clerk ("Clerk") regarding the Police Report and were informed that it had been copied on green paper in an attempt to render it confidential under the administrative rules. You provide that the Police Report did not involve minors in any way. Your request for a copy of the Police Report was denied by the Clerk. You believe that the Police Report is a public record and that the Boone County Prosecutor is copying police reports onto green paper in order to deny access by those inquiring with the Clerk. You further provide that the Clerk, as keeper of the courts' records, should have instructed the Prosecutor that this practice is unacceptable and a violation of the APRA.

In response to your formal complaint, Mr. Meyer advised that on September 13, 2012, the Prosecutor filed a criminal case against Elizabeth A. Russell and requested a summons. Pursuant to local rules, the case was filed with the Court and was assigned

cause number 06D02-1209-CM-605. The Prosecutor filed the following paperwork with the Court via the Clerk:

1. Order finding probable cause – issuing a summons, 1 page;
2. Appearance Form, 2 pages;
3. Charging Information, 2 pages;
4. Probable Cause Affidavit, 1 page; and
5. Crash Reconstruction Report (“Crash Report”), 11 pages.

Your formal complaint referenced a belief that a Police Report was filed with the Court based on the language in the Probable Cause Affidavit. The Prosecutor did not file a standard Police Report in this matter and instead submitted the Crash Report. The Crash Report was filed on white paper. Pursuant to Indiana Administrative Code Rule 9(G)(1)(e)(i), the Prosecutor redacted information that provided dates of birth, operator license numbers, and addresses of the victim and witnesses. Original un-redacted copies of the three pages containing such information were submitted to the Court on green paper, which is the Court’s portion of the file that is not accessible to the public. Copies of all filings in Ms. Russell’s case are enclosed for your reference, including a redacted copy of the Crash Report.

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 Clerk and Prosecutor are public agencies for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Clerk’s and Prosecutor’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).

As an initial matter, I would note that your request for records was submitted to the Clerk for records that had been provided to the Clerk by the Prosecutor. You never requested a copy of the Police Report directly from the Prosecutor. You allege that the Prosecutor has violated the APRA not by denying your request, but by improperly submitting records to the Clerk and providing that the records were confidential, when they in fact were not protected under APRA, AR 9, or any other provision in state or federal law. My opinion in response to your formal complaint against the Prosecutor will be limited to the actions of the Prosecutor providing the records to the Clerk; the actions of the Clerk will be addressed in a separate advisory opinion in response to the formal complaint that you have filed against the Clerk.

There is no dispute that any records provided by the Prosecutor to the Clerk pursuant to a criminal prosecution would be considered “public records” under the APRA. A “public record” is defined as any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, retrieved,

retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics. *See* I.C. § 5-14-3-2(n). As it is my opinion that records provided by the Prosecutor to the Clerk would be considered public records, it now must be determined whether the Prosecutor's actions of redacting certain information contained in the records complied with the requirements of the APRA and AR 9.¹

The 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(G) provides a list of court records that are excluded from public access. Pursuant to Indiana's Rules of Criminal Procedure, documents and information excluded from public access pursuant to Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G). Ind. R. Crim. P. 1.1. Indiana Trial Rule 5(G) provides:

“Filing of documents and information excluded from public access pursuant to Administrative Rule 9(G)(1). Every document filed in a case shall separately identify information excluded from public access pursuant to Admin. R. 9(G)(1) as follows:

(1) Whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper or have a light green coversheet attached to the document, marked "Not for Public Access" or "Confidential."

(2) When only a portion of a document contains information excluded from public access pursuant to Administrative Rule 9(G)(1), said information shall be omitted [or redacted] from the filed document, and set forth on a separate accompanying document on light green paper conspicuously marked "Not for Public Access" or "Confidential" and clearly designated [or identifying] the caption and number of the case and the document and location within the document to which the redacted material pertains.

(3) With respect to documents filed in electronic format, the trial court, by local rule, may provide for compliance with this rule in manner that separates and protects access to information excluded from public access.

(4) This rule does not apply to a record sealed by the

¹ For the Clerk, the keeper of the records, a separate determination must be made in whether the Clerk properly denied your request for public records pursuant to section 9 of the APRA and AR 9.

court pursuant to IC 5-14-3-5.5 or otherwise, nor to records, documents, or information filed in cases to which public access is prohibited pursuant to Administrative Rule (9)(G). Ind. R. Trial P. 5.

The Indiana Supreme Court, Division of State Court Administration's *Public Access to Court Records Handbook* ("Handbook") provides the following guidance on filing procedures:

"Administrative Rule 9 does not prescribe a particular method to be used and left implementation for local determination. Courts and Clerks must decide how to implement Administrative Rule 9 in their offices in compliance with the requirements of Trial Rule 5(G).

Decisions must be made about how confidential information will be received, entered, stored and made available for review or protected from review by unauthorized persons. Additionally, decisions are necessary concerning the handling of applications for access to confidential information and to prohibit access to information in a court record as both the applications and the information sought remain confidential pending a court ruling.

Each county must adopt a process for receipt of confidential information. Some of this information will be tendered upon the initial filing of a case, but some will be received during the pendency of the case. For ease of immediate identification, Trial Rule 5 requires the use of a light green form by which a party may tender confidential or identifying information to the Clerk for entry into the case record. Examples of the types of confidential information that will be tendered are: full Social Security Numbers, full account numbers, and full credit card numbers. In certain causes of action, such as protection orders, stalking, domestic violence, and criminal cases, addresses, dates of birth, and telephone numbers of witnesses and victims are also excluded from public access.

In order to secure compliance with the filing requirements of Trial Rule 5(G), Courts may want to adopt a Local Rule requiring certification of compliance by all parties and their counsel. A sample rule is contained in Appendix A, Form A-6.

Once received, confidential information must be secured within the system so that access is restricted to those entitled to view the information. Not only must the information remain confidential but the document containing the information must be secured against inappropriate disclosure.

The storage of information related to a case is often a combination of electronic as well as physical filing as opposed to all electronic or physical storage. Confidentiality often pertains to multi-page documents, e.g. custody reports or evaluations or pre-sentence reports.

There are a variety of acceptable means to preserve confidentiality:

1. Partial account numbers and Social Security Numbers may be used, as well as year of birth, in place of the complete number or date. For example, a Social Security Number can be referenced as “xxx-xx-1234” rather than the complete number. To the extent the full Social Security Number is needed by the court, that one piece of data can be filed on a separate light green sheet and segregated from the rest of the public case file. The same would be true of account numbers (listed as “xxxx-xxxx-xxxx-9876” rather than having the full number) or dates of birth (listed as “1970” rather than month, day, and year).

2. If exhibits are filed with a pleading, e.g. a bank check for a proof of claim in a collections matter; the pleading can shield most of the account number, as demonstrated in #1 above, and the copy of the check can be placed in an envelope or otherwise segregated from the public case file to prevent disclosure of the account number.

3. Attorneys should be encouraged to file as much as possible for public access, and, preferably, have either a redacted duplicate copy of their complete filing so the clerk’s office can have both a copy for the public case file as well as the complete filing. Alternatively, an attorney can file only those elements of non-public data (such as Social Security Number, account numbers, etc.) on a separate light green sheet, and use generic markers in the original pleading. In either of these instances, the clerk’s office must decide whether to keep non-public filings segregated completely from the public case file (essentially having two separate files) or whether to keep the non-public filings in an envelope or sub-folder with the public file.

4. Documents generated by the court, including orders, may contain confidential information. In these circumstances, care should be taken that the original order is placed in the confidential RJO and a redacted version is placed in the case file.” *Public Access to Court Records Handbook, Indiana Supreme Court, Division of State Court Administration, July 2010, 23-24.* (<http://www.in.gov/judiciary/admin/files/pubs-accesshandbook.pdf>).

In addition to records made confidential pursuant to AR 9, specific provisions of the Indiana Code address records that are prohibited from disclosure, including I.C. § 31-39-2-10, which governs access to juvenile court records.

The Prosecutor has provided in response to your formal complaint that contrary to the Probable Cause Affidavit filed in Ms. Russell's case, a Police Report was not filed. Instead, a Crash Report was filed. If a Police Report was never filed by the Prosecutor with the Clerk, then the Prosecutor did not violate the APRA or AR 9 as the Clerk cannot provide a record that was never filed by the Prosecutor. From reviewing your formal complaint, I will assume that you were not permitted by the Clerk to inspect the Crash Report. The Prosecutor has provided that the only information that was redacted from the Crash Report was the dates of birth, operator license numbers, and addresses of the victim and witnesses. The redactions were made pursuant to AR 9 (G)(1)(e)(i), which provides that the following information is excluded from disclosure:

- (e) With the exception of names, information such as addresses, phone numbers, and dates of birth which explicitly identifies:
 - (i) natural persons who are witnesses or victims (not including defendants) in criminal, domestic violence, stalking, sexual assault, juvenile, or civil protection order proceedings, provided that juveniles who are victims of sex crimes shall be identified by initials only.

The Crash Report contained eleven pages. Only pages 3, 5, and 7 contained redacted information. Non-redacted copies of pages 3, 5, and 7 were provided to the Clerk on green paper and marked as confidential; redacted copies of pages 3, 5, 7 were provided to the Clerk for all interested persons to inspect and request copies. Although the Clerk and Prosecutor are prohibited in providing confidential un-redacted copies to the Public Access Counselor in response to the formal complaint, from my review of the redacted copies that were provided, the very limited information that was redacted complies with the requirements of AR 9(G)(1)(e)(i). Beyond the limited redactions in pages 3, 5, and 7, there were no other redactions made by the Prosecutor in the eleven-page Crash Report. Thus, it is my opinion that the Prosecutor complied with the requirements of APRA and AR 9 in redacting only such information in the records that have been provided to the Clerk that is allowable under the law.

CONCLUSION

Based on the foregoing reasons, it is my opinion that if a Police Report was never filed with the Clerk in Ms. Russell's criminal matter, then the Prosecutor did not violate the APRA. Further, it is my opinion that the Prosecutor complied with the requirements of the APRA and AR 9 in redacting only such information in the records provided to the Clerk that was allowable under the law.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a distinct "Hoage" following.

Joseph B. Hoage
Public Access Counselor

cc: Todd J. Meyer