



# STATE OF INDIANA

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March 26, 2015

Douglas J. Walker  
The Star Press  
P.O. Box 2408  
Muncie, Indiana 47307

*Re: Formal Complaint 15-FC-57; Alleged Violation of the Access to Public Records Act by the Blackford County Circuit Court*

Dear Mr. Walker,

This advisory opinion is in response to your formal complaint alleging the Blackford County Circuit Court ("Court") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The Honorable Dean A. Young, Judge, responded to your complaint. 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 February 16, 2015.

## BACKGROUND

Your complaint dated February 16, 2015 alleges the Blackford County Circuit Court and Judge Dean Young violated the Access to Public Records Act by failing to provide the requested documentation within a reasonable amount of time.

On February 8, 2015, you attempted to view the probable cause affidavit relating to a recent arrest, but were informed it had not been released yet. The next day, Judge Young issued a gag order prohibiting the disclosure of probable cause affidavits. On February 13, 2015, you submitted a public records request to the Court for the case file of the arrest, which you were unable to obtain. You contend Judge Young improperly prevented the case file from being disclosed.

Judge Young responded to your complaint on February 23, 2015. The Court contends the Probable Cause Affidavit and Search Warrants should remain sealed on the grounds the investigation is still ongoing. With regards to the case file, Judge Young admits the file was accidentally kept from review and has directed the file be viewable, with the above

exceptions. Finally, the Court contends the gag order was properly issued with the principles of Indiana law.

## 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 Blackford 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 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).

Ind. Code § 5-14-3-4(1) exempts from disclosure the investigatory records of law enforcement agencies. Investigatory records are defined as information compiled in the course of investigating a crime. See Ind. Code § 5-14-3-2(i). APRA gives broad discretion to investigatory bodies to withhold disclosure of materials related to ongoing investigations. In his response, Judge Young notes law enforcement is still continuing its investigation and therefore falls under the exemption listed. To the extent investigatory materials have not yet been filed with the Court, this exception would apply. Once it has been received by the Clerk, however, it loses the investigatory records discretionary status.

The Court contends the gag order was properly issued consistent with Indiana law. Ind. Code § 5-14-3-5.5(c) requires “[b]efore a court may seal a public record not declared confidential ... it must hold a hearing at a date and time established by the court.” It continues:

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.

In this instant, the gag order notes “any pre-trial publicity” with a respect to the case may serve to prejudice the jury and endanger the defendant’s right to a fair trial. The imposition of this gag order therefore appears to meet the standard required by Ind. Code § 5-14-3-5.5(d). The order also notes that other methods of preventing prejudice are not available to the court.

Indiana Administrative Rule 9 prescribes the procedure for the withholding of court records. Rule 9(G)(2)(d) allows for court records to be sealed as long as it is in accordance with Ind. Code § 5-14-3-5.5. It appears here Ind. Code § 5-14-3-5.5 has not been satisfied because the “hearing” to seal the records was contemporaneous with the initial hearing, but not properly noticed as a hearing to seal the record.

While the issuance of a gag order is consistent with the holding in *South Bend Tribune, et. al. vs. Elkhart Circuit Court*, 691 N.E.2d 200 (Ind.App. 1998), the procedure by which the public records were withheld was not consistent with the APRA. The Court has considerable latitude and discretion to seal records as long as it is in accordance with Ind. Code § 5-14-3-5.5. The Court should either unseal the records in question or hold a hearing as soon as possible and allow public input on the issue.

Regards,



Luke H. Britt  
Public Access Counselor

Cc: Hon. Dean A. Young