



# STATE OF INDIANA

MICHAEL R. PENCE, Governor

PUBLIC ACCESS COUNSELOR  
LUKE H. BRITT

Indiana Government Center South  
402 West Washington Street, Room W470  
Indianapolis, Indiana 46204-2745  
Telephone: (317)233-9435  
Fax: (317)233-3091  
1-800-228-6013  
www.IN.gov/pac

April 22, 2015

Mr. Steven J. Porter  
217 N. Sixth St.  
Lafayette, IN 47901

*Re: Formal Complaint 15-FC-81; Alleged Violation of the Access to Public Records Act by the Tippecanoe County Clerk's Office and Tippecanoe County Prosecutor's Office*

Dear Mr. Porter,

This advisory opinion is in response to your formal complaint alleging the Tippecanoe County Prosecutor's Office ("Prosecutor") and Clerk's Office ("Clerk") have violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The Clerk's Office responded via counsel, Mr. Douglas J. Masson, Esq. The Prosecutor responded via Mr. Patrick K. Harrington, Esq. Their response(s) 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 6, 2015.

## BACKGROUND

Your complaint dated March 6, 2015 alleges the Tippecanoe County Prosecutor's Office and Clerk's Office violated the Access to Public Records Act by denying you access to requested information.

On March 4, 2015 you allege the Clerk denied you access to three MC filings in Tippecanoe County, despite the fact none of the files had been sealed by a judge. They did contain the notation of "nonpublic investigatory record."

You also viewed a record which was the subject of your previous complaint, *Formal Complaint 15-FC-54*, and found what you contend are impermissible redactions under the spirit of APRA.

Counsel responded on March 12, 2015. Counsel cites Ind. Code § 5-14-13-4(b)(1) as justification for withholding the records as investigatory records of law enforcement agencies. Counsel also cites Ind. Code § 5-14-13-4(a)(8), which exempts records declared

confidential under rules adopted by the Indiana Supreme Court. Specifically, Administrative Rule 9(G)(2)(j) allows the exclusion of warrants which have not been served.

### 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 Tippecanoe County Prosecutor’s Officer and Clerk’s Office are public agencies 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 their 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).

Counsel for both respondent parties cite Ind. Code § 5-14-13-4(b)(1) as justification for withholding the records. The release of investigatory records of law enforcement agencies is at the discretion of the agency. The Prosecutor’s Office is part of the law enforcement process and may exercise their discretion. The Clerk’s Office, however, is not part of law enforcement. Therefore, whenever documentation is filed with the Clerk, it ceases to be law enforcement records and becomes a court record.

It should be noted there is an important difference between a record which has been declared to have discretionary release and one which has been declared by statute to be confidential. Both respondent parties cite to Ind. Code § 5-14-3-6.5 which states an agency which receives a record declared confidential, must keep it confidential as if it were the original custodian of the record. While this is true for confidential records, there is no similar provision for a record with discretionary release status. The ‘privilege’ of discretion does not necessarily follow from agency to agency. And so it is with law enforcement records. Because the Clerk’s Office is not a law enforcement agency, it does not have the authority to exercise discretion over investigatory records in the same manner as the Prosecutor.

Once records are filed with the Clerk’s Office, they become court records. Although all investigatory records are not confidential, certain portions of the case file may be filed with the court as confidential if they have been declared non-disclosable by statute or Administrative Rule. The procedures for doing so are found in Administrative Court Rule 9(G).<sup>1</sup>

Although cited by the Prosecutor, the Indiana Administrative Court Rules apply to Clerks and the Judiciary, but not to the Prosecutor as a non-judicial actor. See Administrative Court Rule 9(A)(3). While the Prosecutor may rely on its discretion as a law enforcement

---

<sup>1</sup> From the Administrative Court Rule Commentary: *Rule 9 starts from the presumption of open public access to court records. To address those limited circumstances where federal statute, state statute, or court rule has declared Court Records to be confidential, this section provides the mechanism by which these confidential Court Records are to be excluded from Public Access.*

agency to exercise discretion over its investigatory records before filed with the Clerk, it may not rely on the Administrative Court Rules after filing. The Clerk, however, may cite to these Rules as guidance. However, there must be statutory authority for a Clerk to withhold a record or an order from the trial judge.

### CONCLUSION

While the Prosecutor has the discretion to withhold investigatory records prior to filing with the Clerk of Courts, the records lose the “discretionary” status once the Clerk becomes the custodian of the records. If a *confidential* document has been filed by the Prosecutor, however, it does not lose its status as a *confidential* record. Portions of the court file which have not been specifically declared as confidential by a court or statute must be disclosed upon request.

Regards,

A handwritten signature in black ink, appearing to read 'L. H. Britt', with a long, sweeping underline.

Luke H. Britt  
Public Access Counselor

Cc:  
Mr. Patrick K. Harrington, Esq.; Mr Douglas J. Masson, Esq.