



STATE OF INDIANA

MICHAEL R. PENCE, Governor

PUBLIC ACCESS COUNSELOR
LUKE H. BRITT

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Indianapolis, Indiana 46204-2745
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April 14, 2016

Mr. Daniel P. Brewington
[REDACTED]
[REDACTED]

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



DEARBORN SUPERIOR COURT II
JUDGE SALLY A. McLAUGHLIN

215 W. HIGH ST.
2nd FLOOR
LAWRENCEBURG, IN 47025
TELEPHONE 812-537-8800
FAX 812-532-3238

RECEIVED

MAR 17 2016

PUBLIC ACCESS COUNSELOR

facsimile transmittal

To: Mr. Luke Britt
From: Judge Sally McLaughlin
Re: Response to Complaint.
Date: 3-17-16

Fax # 317-233-3091

- Urgent
- For review
- Please comment
- Please reply
- Please recycle

Thank you for the opportunity to respond. I am sending the original in the mail and I have faxed a copy to Judge Hill.

Confidential



DEARBORN SUPERIOR COURT II
Sally A. McLaughlin, Judge

March 17, 2016

Mr. Luke H. Britt
Office of the Indiana Public Access Counselor
Indiana Government Center South
402 W. Washington Street, Room W470
Indianapolis, IN 46204

RECEIVED

MAR 17 2016

PUBLIC ACCESS COUNSELOR

RE: Complaint 16-FC-48 by Mr. Daniel Brewington

Dear Mr. Britt:

This letter is in response to your request for comment on a complaint by Mr. Daniel Brewington. The complaint is related to requests for grand jury proceedings involving the case of State of Indiana vs. Daniel Brewington, Cause No. 15D02-1103-FD-084, that was filed in Dearborn Superior Court No. 2 on March 7, 2011.

Although I am the Judge of Dearborn Superior Court No. 2, I do not have jurisdiction in this matter. A request was made for a special judge to be appointed by the Indiana Supreme Court on March 17, 2011. The Indiana Supreme Court appointed the Honorable John Westhafer as Special Judge in response to that request. The Indiana Supreme Court appointed the Honorable Brian Hill as Special Judge on June 3, 2011 after the Honorable John Westhafer recused himself. Pursuant to Indiana Rules of Trial Procedure, Judge Hill retains jurisdiction in this matter. Indiana Rules of Trial Procedure, Rule 79(K), provides that upon the certification of a request for the appointment of a special judge, the Supreme Court may order the appointment of a special judge and such order vests jurisdiction in that special judge. Thus, in the matter of State of Indiana vs. Daniel Brewington, jurisdiction is vested in the Special Judge, the Honorable Brian Hill. The Indiana Rules of Trial Procedure further provide that a special judge shall retain jurisdiction of the case through judgment and post judgment matters, Rule 79(L). Therefore, pursuant to the Indiana Rules of Trial Procedure, the Honorable Judge Hill retains jurisdiction in this matter which would include post judgment matters and requests for records.

Mr. Brewington and his relatives have made several requests to the Court to obtain records and address other matters on his behalf over the past few years. Each request has been forwarded to Special Judge Hill who has jurisdiction.

A review of the chronological case summary in this matter, which is a public record, provides that this matter proceeded to a jury trial with verdicts filed and judgment of conviction signed on October 6, 2011. A sentencing order was issued by Special Judge Hill on October 24, 2011. On November 1, 2011, pauper counsel was appointed to represent the Defendant on his appeal. On January 18, 2012, private counsel entered an appearance for the Defendant's appeal. The Indiana Court of Appeals issued an opinion for publication in this matter on January 17, 2013, Brewington v. State, 981 N.E.2d 585 (Ind. Ct. App. 2013). The Indiana Supreme Court accepted transfer and issued an opinion on May 1, 2014, Brewington v. State, 981 N.E.2d 585 (2013). Mr. Brewington ultimately had convictions sustained for Count II, Intimidation of a Judge, a Class D Felony; Count IV, Attempted Obstruction of Justice, a Class D Felony; and Count V, Perjury, a Class D Felony.

Disclosure of grand jury proceedings are controlled by Indiana Code 35-34-2-10 which provides that the transcript 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;

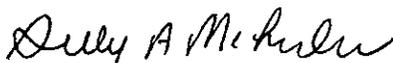
but only after a showing of particularized need for the transcript.

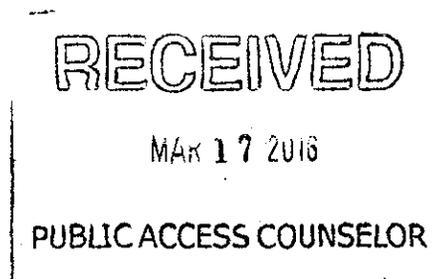
This case has progressed beyond the issuing of indictments by the grand jury and has had verdicts returned at a trial by jury over which the Special Judge presided. The Defendant appealed this matter to the Indiana Court of Appeals and the Indiana Supreme Court which have issued published opinions. The Special Judge has knowledge of whether any Grand Jury testimony has been made public in the course of the matter proceeding to trial and has presided over the matter. The Defendant has been represented by pauper and/or private counsel throughout the proceedings.

Indiana Code 35-34-2-10 also provides that unauthorized disclosure of grand jury testimony is a Class B Misdemeanor. The Code does not state that the transcript "shall" be released but rather states "may be produced only" and provides specific circumstances where they may be released. The Statute does not address the release of audio tapes from grand jury proceedings.

Please advise if I can be of any further assistance. Thank you.

Sincerely,


Judge Sally A. McLaughlin





RUSH SUPERIOR COURT

DATE: March 8, 2016

INCLUDING COVER: 4

TO: Ms. Dale L. Brewer, Office of the Public Access Counselor

FAX: (317) 233-3091

TELEPHONE #

FROM: Brian D. Hill, Rush Superior
Court Judge

TELEPHONE # (765) 932-2829

SUBJECT: Formal Complaint 16-FC-48

COMMENTS:

HARD COPY: Will not follow in mail

NOTICE

This information contained in this facsimile message is legally privileged and confidential and intended only for the use of the individual or entity to whom it is addressed. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone, and return the original message to us at the address below via U.S. Postal Service. Thank you for your cooperation.

Questions or problems in transmission, contact Sender: RUSH SUPERIOR
COURT, 101 East 2nd Street, 3rd Floor Courthouse, Rushville, IN 46173
(765) 932-2829 or (765) 932-3520. FAX # (765) 932-2856

**STATE OF INDIANA****MICHAEL R. PENCE, Governor****PUBLIC ACCESS COUNSELOR
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March 7, 2016

The Honorable Brian Hill, Special Judge
Rush County Superior Court
C/o Dearborn County Superior Court II
215 West High Street, 2nd Floor
Lawrenceburg, Indiana 47025

Re: Formal Complaint 16-FC-48

Dear Judge Hill:

Pursuant to Indiana Code § 5-14-5, a formal complaint has been filed with the Indiana Public Access Counselor concerning an alleged violation(s) of the Access to Public Records Act by the Honorable Brian Hill, Special Judge, Rush County Superior Court, in care of Dearborn County Superior Court II. A copy of the formal complaint is enclosed for your reference.

The Public Access Counselor is required to issue an advisory opinion within thirty (30) business days of receipt of the complaint. His anticipated publication date is April 19, 2016. Pursuant to Indiana Code § 5-14-5-5, a public agency shall cooperate with the counselor in any investigation or proceeding. As such, the response of the Honorable Brian Hill, Special Judge, Rush County Superior Court, in care of the Dearborn County Superior Court II must be received by this office no later than March 22, 2016. Please feel free to fax your response to the number in the letterhead or email it to dabrewer1@opac.in.gov.

Should you have any concerns or inquiries, please feel free to contact our office.

Best regards,

A handwritten signature in cursive script, appearing to read "Dale L. Brewer".

Ms. Dale L. Brewer
Office of the Public Access Counselor

Rush Superior Court

Rush County Courthouse
101 East Second Street
Rushville, Indiana 46173
Phone: (765) 932-2829 / (765) 932-3520
Fax: (765) 932-2856

Brian D. Hill, Judge

Tonya Muckerheide, Court Reporter
Sandra A. Land, Court Administrator

March 8th, 2016

Ms. Dale L. Brewer
Office of the Public Access Counselor
Indiana Government Center South
402 West Washington Street, Rm W470
Indianapolis, IN 46204

Re: Formal Complaint 16-FC-48

Ms. Brewer,

I am in receipt of the above-referenced complaint dated March 7, 2016. Mr. Brewington's request as to the audio recordings of the Grand Jury proceedings of February 28, 2011, March 1, 2011, and March 2, 2011 was denied by me simply because I did not preside over those proceedings. I was appointed special judge over the criminal case that followed. I am aware that the statute allows the judge who presided over the criminal trial to make decisions as to the release of grand jury information related to the criminal charges, however, I did not feel it was appropriate in this case. Mr. Brewington has had full access to the official transcript of these proceedings. I didn't feel that his latest allegation of a conspiracy between the prosecuting attorney and court reporter was sufficient justification to release an audio record that he already has the transcript to. In addition, we are talking about grand jury proceedings which led to an indictment that went to jury trial and was subsequently affirmed by both the Court of Appeals and Indiana Supreme Court.

Mr. Brewington seems to take offense that orders releasing these recordings prohibit the broadcast or publication of the material, however, I believe that admonishment is required by the Code of Judicial Conduct, Rule 2.17. I have not intended to deprive Mr. Brewington to his right of access to his criminal proceedings. As I said earlier, I did not preside over his grand jury proceedings and did not feel comfortable releasing those hearings in yet another format. If you come to a different conclusion, I would be happy to comply immediately.

If I can be of further assistance or answer any questions, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to read "B. Hill", with a large, stylized flourish at the end.

Brian D. Hill
Judge, Rush Superior Court
Special Judge, Dearborn Superior II