

January 21, 2005

Ryan E. Morris
P.O. Box 373
312 N. Spruce Street
Monon, IN 47959

Re: Formal Complaint 04-FC-235; Alleged Violation of the Access to Public Records Act by the State Emergency Management Agency

Dear Mr. Morris:

This is in response to your formal complaint alleging that the State Emergency Management Agency (“SEMA”) violated the Access to Public Records Act (“APRA”) by failing to provide you with certain documents that you believe you are entitled to as a party to litigation, in spite of the agency’s attorney work product claim. I find that the SEMA did not violate the Access to Public Records Act.

BACKGROUND

On December 7 you renewed a request for records from the SEMA that the SEMA had previously denied you as attorney work product. You alleged in your renewed request, and in the complaint that you filed to my office, that those records should be produced because you are a party to a case. Your citation was to “IC Admin rule #9, pursuant to IC 5-14-3-4(b)(2)(d), [T]he parties to a case or their lawyers with respect to their own case.”

I sent a copy of your complaint to the SEMA. In response, I received the enclosed letter from Mr. Brad Gavin, the SEMA’s general counsel. In his letter, he explains that pursuant to the privilege log that he enclosed, all the records that you requested were generated in preparation of and during the administrative action that the SEMA had undertaken against you to revoke your certification as an emergency medical technician in September 2002. He cited IC 5-14-3-4(b)(2) and the Indiana Trial Rule 26(B)(3) to protect from disclosure documents that qualify as attorney work product even after conclusion of the case.

ANALYSIS

Under the Access to Public Records Act, any person may inspect and copy the public records of a public agency during the agency's regular business hours, unless the record is excepted from disclosure under IC 5-14-3-4. IC 5-14-3-3(a). One of the exceptions to disclosure is the work product of an attorney representing, pursuant to state employment or an appointment by a public agency: (A) a public agency; (B) the state; or (C) an individual. IC 5-14-3-4(b)(2).

The SEMA has cited to IC 5-14-3-4(b)(2) as one of the bases for denying you access to the public records listed on its document log. The gist of your renewed request for these documents as well as your complaint is that these records, while subject to the attorney work product exception, must be disclosed pursuant to Administrative Rule 9.

You appear to have blended a part of the APRA with partial text from Administrative Rule 9. As best I can ascertain, you wish to argue that Administrative Rule 9 would require that the SEMA give you records because you are a party to a case that came before SEMA. Under the authority of Ind.Admin.R. 9(B)(2)(d), the parties to a case or their lawyers with respect to their own case may have access to court records that might be greater than that afforded the general public.

I have considered your argument, but find it lacking because Administrative Rule 9 governs the records of a court. Ind.Admin.R. 9(A)(1). Records that the SEMA maintains are not subject to Administrative Rule 9 because the SEMA is not a court.

The SEMA records you seek are governed solely by the APRA. Under APRA, "work product of an attorney" means information compiled by an attorney in reasonable anticipation of litigation and includes the attorney's:

1. notes and statements taken during interviews of prospective witnesses; and
2. legal research or records, correspondence, reports or memoranda to the extent that each contains the attorney's opinions, theories or conclusion.

Indiana Code §5-14-3-2. A public agency has discretion to withhold work product of an attorney who is representing the state, whether as an employee of the state or appointed to serve as counsel for a particular case. Ind. Code §5-14-3-4(b)(2). The records that are listed were prepared by counsel employed by the SEMA, and are therefore covered by the exception to disclosure at IC 5-14-3-4(b)(2).

Mr. Gavin makes an additional argument regarding the applicability of Ind.Trial Rule 26(B)(3), but I do not offer any opinion regarding that court rule because the applicability of a trial rule governing discovery is beyond the scope of the authority of the Office of the Public Access Counselor.

CONCLUSION

For the foregoing reasons, I find that the State Emergency Management Agency did not violate the Access to Public Records Act when it denied you records that were the work product of an attorney.

Sincerely,

Karen Davis
Public Access Counselor

cc: Mr. Brad Gavin