

March 11, 2008

Kelly Thomas
DOC #127285
PO Box 30
Pendleton, Indiana 46064

Re: Formal Complaint 08-FC-57; Alleged Violation of the Access to Public Records Act by the Elkhart County Prosecuting Attorney

Dear Mr. Thomas:

This advisory opinion is in response to your formal complaint alleging the Elkhart County Prosecuting Attorney ("Prosecutor") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to records. The Prosecutor's response to the complaint is enclosed for your reference. It is my opinion the Prosecutor did not violate the APRA.

BACKGROUND

You allege you were denied access on February 6, 2008 to a written agreement between the State of Indiana and an individual who is a co-defendant in a case the State has brought against you. You enclosed a copy of a transcript referencing the agreement as evidence of its existence. You mailed this complaint on February 13, and my office received it on February 14. You requested priority status but did not allege any of the reasons for priority status listed in 62 IAC 1-1-3, so priority status was not granted.

The Prosecutor responded to your complaint by letter dated March 7 from Chief Deputy Prosecuting Attorney Vicki Becker. Ms. Becker contends the record you seek is in the public records of the Elkhart Circuit Court. She further contends she has indicated to you a number of times that no written agreement exists beyond the notice to court which she encloses with her response.

ANALYSIS

The public policy of the APRA states, "(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." I.C. § 5-14-3-1. The Prosecutor is clearly a public agency for the purposes of the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Prosecutor during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

A request for records may be oral or written. I.C. §§ 5-14-3-3(a), 5-14-3-9(c). If the request is delivered by mail or facsimile, the agency must respond to the request within seven days of receipt. I.C. § 5-14-3-9(b).

Here the Prosecutor received your request and responded that no written agreement exists between the state and the individual except the notice to court Ms. Becker included with her response. While the APRA requires a public agency to provide access to its records absent an exception to disclosure (*See* I.C. § 5-14-3-3), an agency cannot provide access to records which do not exist. Nothing in the APRA requires a public agency to *develop* records or information pursuant to a request. The APRA requires the public agency to *provide access* to records already created. As such, it is my opinion the Prosecutor has not violated the APRA by not producing a record that does not exist.

Regarding Ms. Becker's "irritation" with the public access counselor complaint process and suggestion that this office should exercise a bit more discretion in determining which claims are valid, I would direct attention to I.C. § 5-14-5-6, which allows any person who has been denied access to a record to file a complaint with this office, and I.C. § 5-14-5-8, which requires my office to forward a copy of the complaint to the public agency. Further, I.C. § 5-14-5-5 requires a public agency to cooperate with the counselor in any investigation or proceeding under the formal complaint chapter. Finally, I.C. § 5-14-5-9 requires me to issue an advisory opinion in response to a complaint. What is not present in I.C. 5-14-5 is a clause allowing my office to dismiss complaints. As such, I have issued this advisory opinion pursuant to I.C. 5-14-5.

CONCLUSION

For the foregoing reasons, it is my opinion the Prosecutor did not violate the Access to Public Records Act.

Best regards,



Heather Willis Neal
Public Access Counselor

cc: Curtis Hill, Elkhart County Prosecuting Attorney
Vicki Becker, Chief Deputy Prosecuting Attorney