



# STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR  
JOSEPH B. HOAGE

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](http://www.IN.gov/pac)

October 11, 2011

Tri-Force, Inc.  
Attention: Shana Penn  
55850 Currant Road  
Mishawaka, Indiana 46545

*Re: Formal Complaint 11-FC-233; Alleged Violation of the Access to Public Records Act by the Elkhart County Prosecuting Attorney*

Dear Ms. Penn:

This advisory opinion is in response to your formal complaint alleging that the Elkhart County Prosecuting Attorney ("Prosecutor") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* My office forwarded a copy of your complaint to the Prosecutor on September 13, 2011, but we have not received a response.

## BACKGROUND

In your formal complaint, you allege that on September 2, 2011, you submitted a written request to the Prosecutor for all records relating to the investigation, trial, conviction, and sentencing of your client, Jose Mendoza, pursuant to Cause No. 20-C01-0406-FA-00083 and Case Number 3:2004-CR-00083. The request would include all investigative reports, witness statements, audio/video records, photographs, depositions, and evidence introduced at Mr. Mendoza's trial that were either admitted or judicially excluded.

On September 7, 2011, the Prosecutor responded to your request and advised that the your request was denied pursuant to I.C. § 5-14-3-4(b)(1) and (b)(2), as all records that were requested were collected in anticipation of litigation and are "comprised, primarily, of law enforcement investigative records.

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

A request for records may be oral or written. See I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. See I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. See I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. See I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, the Prosecutor responded to your request within the seven (7) day time-frame as required by the APRA.

The investigatory records exception to the APRA provides that a law enforcement agency has the discretion to disclose or not disclose its investigatory records. An investigatory record is "information compiled in the course of the investigation of a crime." See I.C. § 5-14-3-2(h). The investigatory records exception does not apply only to records of ongoing or current investigations; rather, it applies regardless of whether a crime was charged or even committed. The exception applies to all records compiled during the course of the investigation, even after an investigation has been completed. The investigatory records exception affords law enforcement agencies broad discretion in withholding such records. See *Opinion of the Public Access Counselor 09-FC-157*. "Generally, a police report or incident report is an investigatory record and as such may be excepted from disclosure pursuant to I.C. § 5-14-3-4(b)(1)." *Id.*

Furthermore, I.C. §5-14-3-4(b)(2) provides that a public agency has discretion to withhold a record that is the work product of an attorney representing, pursuant to state employment or an appointment by a public agency: a public agency; the state; or an individual.

"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 conclusions.

I.C. § 5-14-3-2(p).

Under the APRA, a public agency that withholds a public record bears the burden of proof to show that the record is exempt. *See* I.C. §§ 5-14-3-1, 5-14-3-9(f) and (g). Exceptions to disclosure are narrowly construed. *See* I.C. § 5-14-3-1. Without the benefit of a response from the Prosecutor to your formal complaint, it is unclear to me why your request was denied. Thus, it is my opinion that the Prosecutor has failed to sustain its burden.

If the Prosecutor cannot justify withholding the records under the APRA, I encourage the Prosecutor to release the records to you as soon as possible. To the extent the Prosecutor persists in its denial of access following the issuance of an advisory opinion from this office and you believe the Prosecutor to be in violation of the APRA, I leave you to your remedies before a court pursuant to I.C. § 5-14-3-9(e).

#### CONCLUSION

For the foregoing reasons, it is my opinion that the Prosecutor violated the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

Joseph B. Hoage  
Public Access Counselor

cc: Elkhart County Prosecutor