



STATE OF INDIANA

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August 30, 2012

Randall S. Tison
DOC 127788
PO Box 1111
Carlisle, Indiana 47838

Re: Formal Complaint 12-FC-228; Alleged Violation of the Access to Public Records Act by the Vanderburgh County Prosecutor's Office

Dear Mr. Tison:

This advisory opinion is in response to your formal complaint alleging the Vanderburgh County Prosecutor's Office ("Prosecutor") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Nicholas Hermann, Prosecuting Attorney, provided a written response to your formal complaint. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that you submitted a written request for information to the Prosecutor on July 23, 2012. As of August 13, 2012, the date you filed your formal complaint with the Public Access Counselor's Office, you further allege that the Prosecutor has failed to provide any records in response to your request.

In response to your formal complaint, Mr. Hermann advised that the Prosecutor does not maintain any records that were responsive to your request. Further, any such records that are maintained by the Prosecutor have previously been provided to your counsel when your criminal case was active and/or on appeal. Any further records would be considered attorney-work product that is exempt from disclosure pursuant to I.C. § 5-14-3-4(b)(2).

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 twenty-four 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 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.

Generally, if a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. “[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA.” *Opinion of the Public Access Counselor 01-FC-61*; *see also Opinion of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly the [agency] could not be required to produce a copy...”). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. *See Opinion of the Public Access Counselor 10-FC-56*. Accordingly, it is my opinion that the Prosecutor did not violate the APRA by failing to produce records that were not maintained, nor required to be maintained, by the agency.

Pursuant to I.C. §5-14-3-4(b)(2) a public agency has the 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).

To the extent your request sought records maintained by the Prosecutor that would be considered “work product of an attorney” pursuant to I.C. § 5-14-3-2(p), it is my opinion that the Prosecutor would not have violated the APRA by denying your request pursuant to I.C. § 5-14-3-4(b)(2).

Lastly, the APRA requires a public agency to provide one copy of a disclosable public record but does not require an agency to provide additional copies or to repeatedly provide copies of a particular record. *See* I.C. § 5-14-3-8(e); *See Opinions of the Public Access Counselor 07-FC-19; 08-FC-75; and 08-FC-259.* To the extent that the Prosecutor has previously provided to you copies of the records that you currently seek, it is my opinion that the Prosecutor would not violate the APRA by failing to provide you with multiple copies of an identical record.

CONCLUSION

For the foregoing reasons, it is my opinion that the Prosecutor did not violate the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a distinct "Hoage" following.

Joseph B. Hoage
Public Access Counselor

cc: Gary Schutte