



STATE OF INDIANA
MICHAEL R. PENCE, Governor

PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317) 234-0906
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

July 8, 2013

Mr. Terrence J. Fuqua
DOC 935124
P.O. Box 1111
Carlisle, Indiana 47838-1111

Re: Formal Complaint 13-FC-189; Alleged Violation of the Access to Public Records Act by the Allen County Prosecutor

Dear Mr. Fuqua:

This advisory opinion is in response to your formal complaint alleging the Allen County Prosecutor ("Prosecutor") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* David McClamrock, Deputy Prosecuting Attorney, responded on behalf of the Prosecutor. His response is enclosed for your reference. I have granted your request priority status pursuant to 62 Ind. Admin. Code 1-1-3(3).

BACKGROUND

In your formal complaint, you provide that you submitted a written request for records to the Prosecutor on June 19, 2013. Your request was denied by the Prosecutor on June 24, 2013 pursuant to the investigatory records exception, I.C. § 5-14-3-4(b)(1). You specifically sought a copy of an interview conducted by the Fort Wayne Police Department pursuant to a narcotics investigation. You are preparing a pro-se petition for post-conviction relief and maintain that the requested information is vital in filing your petition. You note that the records requested concern an investigation that was completed on November 30, 2011.

In response to your formal complaint, Mr. McClamrock advised that your request was properly denied pursuant to the requirements of the APRA. As you admit in your formal complaint, the records sought are considered to be investigatory under the APRA. Mr. McClamrock provided that if you are entitled to receive a copy of the records pursuant to post-conviction discovery procedures, you must follow the respective process. Pursuant to the APRA, the Prosecutor has discretion to deny your request pursuant to the investigatory records exception.

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). A response from the public agency could be an acknowledgement that the request has been received and include information regarding how or when the agency intends to comply. Here, the Prosecutor complied with the requirements of section 9(b) of the APRA by responding to your written request, in writing, within seven (7) days of its receipt.

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). Counselor O’Connor provided the following analysis regarding section 9:

Under the APRA, the burden of proof beyond the written response anticipated under Indiana Code section 5-14-3-9(c) is outlined for any *court action* taken against the public agency for denial under Indiana Code sections 5-14-3-9(e) or (f). If the public agency claimed one of the exemptions from disclosure outlined at Indiana Code section 5-14-3-4(a), then the agency would then have to either “establish the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit” *to the court*. Similarly, if the public agency claims an exemption under Indiana Code section 5-14-3-4(b), then the agency must prove to the court that the record falls within any one of the exemptions listed in that provision and establish the content of the record with adequate specificity. There is no authority under the APRA that required the IDEM to provide you with a more detailed explanation of the denials other than a statement of the exemption authorizing nondisclosure, but such an explanation would be required if

this matter was ever reviewed by a trial court. *Opinion of the Public Access Counselor 01-FC-47.*

In denying your request the Prosecutor, in writing, cited to I.C. § 5-14-3-4(b)(1), the investigatory records exception. The investigatory records exception to the APRA provides that a law enforcement agency have the discretion to disclose its investigatory records. This is not to say that all records maintained by the Prosecutor are considered investigatory. 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.* There is no dispute that the records sought pursuant to your request are considered to be investigatory under the APRA. Thus, it is my opinion that the Department did not violate the APRA in denying your request. As noted by Mr. McClamrock, if you are entitled to the records sought pursuant to filing a petition for post-conviction relief, you would need to follow the respective discovery procedures in order to obtain such records. The respective Allen County Superior Court would retain jurisdiction over matters related to your petition for post-conviction relief.

CONCLUSION

For the foregoing reasons, it is my opinion that the Prosecutor did not violate the APRA in response to your request.

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 long, sweeping underline.

Joseph B. Hoage
Public Access Counselor

cc: David McClamrock