



STATE OF INDIANA

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April 17, 2014

Mr. Tracy Hertel #174444
Miami Correctional Facility
3038 West 850 South
Bunker Hill, IN 46914

Re: Formal Complaint 14-FC-46; Alleged Violation of the Access to Public Records Act by the St. Joseph County Prosecutor

Dear Mr. Hertel,

This advisory opinion is in response to your formal complaint alleging the St. Joseph County Prosecutor (“Prosecutor”) violated the Access to Public Records Act (“APRA”), Ind. Code § 5-14-3-1 *et. seq.* The Prosecutor has provided a response to your complaint via Ms. Jessica McBrier, Director, Projects and Media Relations, St. Joseph County Prosecutor’s Office. Her response is attached for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on March 4, 2014. I have not granted priority status to your complaint as you have not indicated in the narrative of your complaint any pending hearing which would qualify under 62 IAC 1-1-3.

BACKGROUND

Your complaint dated March 4, 2014 alleges the St. Joseph County Prosecutor’s Office violated the Access to Public Records Act by not timely providing records responsive to your request in violation of Ind. Code § 5-14-3-3(b).

On or about January 21, 2014, you mailed a letter to the St. Joseph County Prosecutor’s Office seeking discovery of information for use in a Federal Case for post-conviction relief (PCR). Upon the receipt of this letter, the Prosecutor’s Office staff filed it along with paperwork related to your PCR proceedings and did not respond according to APRA guidelines.

Your second letter, dated February 19, 2014, was served in the form of a request for public records. You requested “discovery for the cause # 71D02-1304-FD-270, starting with a complete description of each state’s disclosure of discovery with approximate page

numbers”. It was received by the Prosecutor on February 24, 2014 and acknowledged in a timely manner on March 3, 2014. The Prosecutor responded by denying your request stating the records you seek were investigatory in nature and therefore the release of the documents were at the Prosecutor’s discretion pursuant to Ind. Code § 5-14-3-2(h). They contend the “state’s disclosure of discovery” documentation merely does not exist.

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 Ind. Code § 5-14-3-1. The St. Joseph County Prosecutor is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the Prosecutor’s public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14-3-3(a).

A request for records may be oral or written. See Ind. Code § 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 Ind. Code § 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 Ind. Code § 5-14-3-9(b). A response from the public agency could be an acknowledgement the request has been received and information regarding how or when the agency intends to comply.

I have reviewed your first letter and it does not appear on its face to be an access to public records request and could be reasonably construed as a discovery pleading pursuant to your post-conviction relief proceeding. As it would be considered germane to your post-conviction relief proceedings, this is a reasonable conclusion. The Prosecutor did not violate the APRA by presuming your request could be responded to using the Indiana Trial Rules regarding discovery.

The second request was a proper APRA request. The Prosecutor contends the records you seek are investigatory records of a crime as defined by Ind. Code § 5-14-3-2(i) and their release is discretionary under Ind. Code § 5-14-3-2(h). Consider the following from former Public Access Counselor Hoage in *Informal Opinion 12-INF-27*:

The investigatory records exception to the APRA provides that a law enforcement agency has the discretion to disclose or not disclose its investigatory records. See I.C. §5-14-3-4(b)(1). An investigatory record is “information compiled in the course of the investigation of a crime.” I.C. § 5-14-3-2(h) (emphasis added). Because the statutory language is clear that the exception does not only apply to those records created by law enforcement agencies, but also to those records compiled by law enforcement agencies during an investigation, it is my opinion that any records obtained by the Department during the investigation of a crime

can be construed as “investigatory records” within the meaning of section 2(h). Moreover, the investigatory records exception does not apply only to records of ongoing or current investigations. The exception applies regardless of whether a crime was charged or whether a crime was even committed. Instead, the exception applies to all records compiled during the course of the investigation of a crime, even where a crime was not ultimately charged, and even after an investigation has been completed. The investigatory records exception affords law enforcement agencies broad discretion in withholding such records.

This discretionary standard extends to the Prosecutor’s Office as they are an extension of the investigatory and prosecutorial function of law enforcement. I have not seen the documents in question and cannot state conclusively if the records meet the criteria for the exception, however, there is a presumption that discovery documents in a criminal cause number would be investigatory or evidentiary material.

Furthermore, I have stated *ad nauseum* the discovery process during an open proceeding is a much more efficient and effective means for obtaining documents than an access to public records request. An APRA request only serves to add confusion to the process. As a recommendation, if a civil or criminal litigant is seeking records to present during the course of litigation, they should do so according to the Indiana Trial Rules.

CONCLUSION

For the foregoing reasons, it is the Opinion of the Indiana Public Access Counselor the St. Joseph County Prosecutor’s Office has not violated the Access to Public Records Act.

Regards,

A handwritten signature in black ink, appearing to read 'LHB', with a long, sweeping underline that extends to the left and then curves back under the letters.

Luke H. Britt
Public Access Counselor

Cc: Ms. Jessica McBrier