

January 19, 2000

Mr. John Bernston
52830 C.R.131
Bristol, Indiana 46507

Re: *Advisory Opinion 99-FC-21*;
Denial of Access to Documents by the Noble County Prosecutor's Office.

Dear Mr. Bernston:

This is in response to your formal complaint, which was received on December 20, 1999. You have alleged that the Noble County Prosecutor's Office ("Prosecutor") violated the Indiana Access to Public Records Act, Indiana Code chapter 5-14-3, on two occasions. Prosecutor Steven Clouse responded in writing to your complaint and a copy of his response is enclosed for your reference.

It is my opinion that the Prosecutor's denial of access was justified with respect to documents filed in Neglect of a Dependent cases, since the Noble County Juvenile Court retains jurisdiction over such cases and absent a court order, these records are not open for inspection and copying under Indiana Code section 5-14-3-4(a). The denial of access to court documents in Title IV-D child support cases, however, was not justified for two reasons: (1) the information in Title IV-D cases is not protected by the attorney-client privilege and is therefore not confidential; and (2) the request for documents did not lack specificity.

BACKGROUND

On December 17, 1999, you requested (1) all appearance forms and motions to intervene filed by the Prosecutor between 1995 and December 1999 in any Title IV-D child support case; and (2) all court documents filed by the Prosecutor in any case involving a charge of Neglect of a Dependent filed under Indiana Code section 35-46-1-5 between 1995 and December 1999. Your request was made in person, and Deputy Prosecutor Violette Wysong denied the request. The following day, you made a similar request in writing to Prosecutor Steven Clouse and he also denied the request.

In his response to your formal complaint, the Prosecutor raised three points with respect to your request for court documents that justified his denial of access:

(1) documents in Neglect of Dependent cases are in the custody of the Juvenile Court and therefore, confidential; (2) any court filings in Title IV-D cases are protected by the attorney-client privilege and are confidential; and (3) the request was not reasonably specific as required by statute.

ANALYSIS

Neglect of Dependent Court Documents

Indiana Code section 5-14-3-3, the basis of the Access to Public Records Act, states that:

Any person may inspect and copy the public records of any agency during the regular business hours of the agency, except as provided in section 4 of this chapter.

Emphasis added. Indiana Code section 5-14-3-4 sets forth the circumstances under which a public agency may deny access to an otherwise public document, with the caveat that the burden of proof for nondisclosure rests with the public agency denying access to the record. Ind. Code §5-14-3-1. The first exception listed in the Code is for documents "declared confidential by state statute." Under Indiana Code section 31-30-1-3(1), the juvenile court retains original jurisdiction in cases involving adults charged with Neglect of a Dependent, a crime under Indiana Code 35-46-1-4. Since the juvenile court has jurisdiction and holds the records for Neglect of a Dependent cases, you would not have access to them unless you show that you qualify as an exception to the rules of general confidentiality of juvenile court records. Ind. Code §§31-39 et. seq. For example, an exception is provided for parties to a juvenile action and the juvenile's attorney or parents. Otherwise, documents of the juvenile court are generally not available to members of the public. Therefore, the documents filed in Neglect of Dependent cases are confidential and the Prosecutor's denial of access was proper.

Title IV-D Child Support Cases

You also requested copies of motions to intervene and attorney appearance forms filed with the court in Title IV-D child support cases. In your complaint, you indicate that you sought these documents as filings by the Prosecutor in his capacity as "an agent for the Child Support Bureau of the Indiana Division of Children, a/k/a the Title IV-D agency." The Prosecutor's denied your request and claims that the documents are privileged material and confidential and, in the alternative, that your stated request was not specific enough.

--Attorney-Client Privilege

As noted above, section 3 of the Access to Public Records Act mandates the disclosure of public records held by a public agency unless specifically excepted by the Act. Ind. Code §5-14-3-3. Under Indiana Code section 5-14-3-4(a)(1), "records declared confidential by state statute" may not be disclosed by a public agency unless the disclosure is pursuant to a court order. The Prosecutor asserts in his response that the communication between his deputy and "clients" in Title IV-D cases is privileged, which would render it confidential under Indiana Code section 34-46-3-1. That statute reads:

(t)he following persons shall not be required to testify regarding the following communications: (1) attorneys, as to the confidential communi-

cations made to them in the course of their professional business, and as to advice given in such cases.

Although the attorney-client privilege might protect any *communication* between a person seeking child support and the deputy prosecutor responsible for the case, it does not extend to communications made to a third party unless the third party is an agent for the attorney or the client. *Lorenz v. Valley Forge Ins. Co.*, 815 F.2d 1095 (7th Cir. 1987); *Brown v. State*, 448 Ne.E.2d 10 (Ind. 1983). You seek documents that are publicly filed with the Circuit Court of Noble County and are, by virtue of their status as court documents, communicated to a third party-namely, the judge, the County Clerk and members of the public. When a deputy prosecutor files a motion with the court, whether to enter an appearance or to intervene in a proceeding, neither she nor her client should have an expectation of privacy in such documents. If information is provided by an attorney or client that is not intended to remain confidential, it is not privileged. *United States v. Winfelder*, 790 F.2d 576 (7th Cir. 1986); *Owens v. Best Beers of Bloomington*, 648 N.E.2d 699 (Ind. App. 1995). Thus, the Prosecutor's denial of access to motions to intervene and attorney appearances in Title IV-D cases was improper based upon the assertion of attorney-client privilege.

--Reasonable Particularity

When any person makes a request for records from a public agency, he must "identify with reasonable particularity the record being requested." Ind. Code §5-14-3-3(a). The documents that you identify as "motions to intervene" and "attorney appearance forms" are specifically designated as such on each filed form. The Prosecutor's response to your complaint states that your request for the named court documents was "not specific enough" and "requires us to go on a paper chase through the office."

While the phrase "reasonable particularity" appears to be clear, were it necessary to interpret the Public Records Act to determine what the General Assembly intended this phrase to mean, courts would rely upon the common and ordinary meaning. *Crowley v. Crowley*, 588 N.E.2d 576, 578 (Ind. App. 1992). "Particularity" is defined as "the state of being particular rather than general," and the request that you made for court documents leaves little or no room for interpretation about which documents are being requested. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 1981, 956.

Statutory interpretation also requires that one construe the phrase "reasonable particularity" in light of the entire Public Records Act. *Deaton v. City of Greenwood*, 582 N.E.2d 882, 885 (Ind. App. 1991). Since the Act favors disclosure and the burden of proof for nondisclosure is on the public agency, the agency should contact the requestor for more information if it is necessary to respond to a request. The Prosecutor did not make an attempt to clarify your request or ask that you make it more specific; his response only implied that the request was too voluminous and too burdensome to fulfill. Your request may have necessitated poring through files and pulling the appropriate documents, but this alone does not qualify it as "non-specific." The request was made appropriately under the Public Records Act and was improperly denied by the Prosecutor.

CONCLUSION

For the reasons stated above, it is my opinion that the Noble County Prosecutor's denial of access to documents filed in Neglect of Dependent cases was proper since the Noble County Juvenile Court retains jurisdiction over such cases, and absent a court order, they are not open for inspection and copying under Indiana Code section 5-14-3-4(a). The denial of access to court documents in Title IV-D child support cases, however, was not justified for the two reasons cited by the Noble County Prosecutor; the information is not protected by the attorney- client privilege and your request for documents did not lack the specificity required under the Access to Public Records Act.

Sincerely,

Anne Mullin O'Connor

cc: Mr. Steven Clouse,
Noble County Prosecutor