

February 24, 2004

Mr. Bryan L. Cook
1111 East 54th Street, Suite 125
Indianapolis, Indiana 46220

Re: Formal Complaints 04-FC-13, 04-FC-17 consolidated; Alleged Violation of the Access to Public Records Act by the Kosciusko County Prosecutor's Office and the Kosciusko County Sheriff's Department

Dear Mr. Cook:

This is in response to your formal complaints alleging that the Kosciusko County Prosecutor's Office (Prosecutor) (04-FC-13) and the Kosciusko County Sheriff's Department (Sheriff) (04-FC-17) violated the Indiana Access to Public Records Act (APRA) (Ind. Code §5-14-3), when they responded to your requests for records and further failed to produce responsive documents. Each agency has separately responded to your complaint, and copies of those responses are attached for your review. Because the requests seek the same documents from both public agencies of Kosciusko County, I have consolidated these matters for opinion.

BACKGROUND

Formal Complaint 04-FC-13

On September 10, 2003, you signed and mailed a request for records directed to the Kosciusko County Prosecutor's Office seeking access to records you assert are maintained by that public agency. Specifically, you requested the following:

Any and all information in the possession of the Kosciusko County Prosecutor's Office which relates to money seized within the last four years by any law enforcement officers in Kosciusko County where that money was also (1) not fully and timely returned to the person from whom it was seized or to its other rightful owner or custodian, and (2) not subject to a judicial forfeiture action filed within 180 days of seizure; and

Any and all information in the possession of the Kosciusko County Prosecutor's Office which relates to property seized within the last four years by any law enforcement officers in Kosciusko County where that property was also (1) not fully and timely returned to the person from whom it was seized or to its other rightful owner or custodian, and (2) not subject to a judicial forfeiture action filed within 180 days of seizure.

These requests were based on your understanding that in the preceding several years money and property had been seized by Kosciusko County law enforcement officers without being returned and without being subject to a judicial forfeiture action.

You indicate that the Prosecutor received your request on September 13, 2003. The Prosecutor did not respond in writing within seven days of receipt of the request.¹ On January 5, 2004, the Prosecutor orally advised you that he would not be producing any of the requested information. No written response was ever received from the Prosecutor prior to or after the conversation on January 5, 2004. This complaint followed.

In response to your formal complaint, the Prosecutor acknowledges the January 5, 2004, conversation, but states that he misunderstood it to relate to an earlier records request dated November 20, 2002, and for which a written response had already been tendered. The Prosecutor does not reference receipt of your September 10, 2003, request or the lack of written response to that request, but now asserts that his office does not have any records that are responsive to your request. The Prosecutor further notes that he previously tendered to you all records regarding the return of money and pertaining to your client.

Formal Complaint 04-FC-17

On January 22, 2004, you signed and mailed a request for records directed to the Kosciusko County Sheriff's Department seeking access to records you assert are maintained by that public agency. Specifically, you requested the following:

Any and all information in the possession of the Kosciusko County Sheriff's Department which relates to money seized within the last four years by any law enforcement officers in Kosciusko County where that money was also (1) not fully and timely returned to the person from whom it was seized or to its other rightful owner or custodian, and (2) not subject to a judicial forfeiture action filed within 180 days of seizure; and

Any and all information in the possession of the Kosciusko County Sheriff's Department which relates to property seized within the last four years by any law enforcement officers in Kosciusko County where that property was also (1) not fully and timely returned to the person from whom it was seized or to its other

¹ Indiana Code 5-14-3-9(b) provides that a denial of disclosure occurs when seven days elapse from the date the public agency receives the request without a response.

rightful owner or custodian, and (2) not subject to a judicial forfeiture action filed within 180 days of seizure.

As with your identical requests to the Prosecutor, these requests were based on your understanding that in the preceding several years money and property had been seized by Kosciusko County law enforcement officers without being returned and without being subject to a judicial forfeiture action.

On the same day you served that request on the Sheriff by facsimile transmission, you received a written response. The written response was tendered by the Prosecutor, who noted within that response that while he was responding on behalf of the Sheriff, he was not acting as the Sheriff's counsel in that matter. The written response purports to enclose copies of documents showing the return of your client's property back to you. The written response does not state whether the Sheriff was in the possession of any other documents responsive to your request, but does affirmatively deny further production or response. The written response does not cite to any provision of the APRA permitting the Sheriff to withhold production of any responsive documents. This complaint followed.

In response to your complaint, the Sheriff, by counsel Michael Miner, answers that there was some confusion regarding your request and acknowledges that the prior response was inappropriate. The Sheriff cites to his prior response to a November 2002 records request (also referenced by the Prosecutor in 04-FC-13), and characterizing the more recent request as "very similar" to the November 2002 request, offers the Sheriff's earlier response as the appropriate response now.

ANALYSIS²

Indiana Code 5-14-3-3(a) provides that any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as otherwise provided in the APRA. IC 5-14-3-3(a). A request for records may be oral or written. IC 5-14-3-3(a); 5-14-3-9(c). If the request is made in writing, the agency must respond to the request in writing. IC 5-14-3-9(c). Further, if the public agency denies the request, the denial must include "a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record." IC 5-14-3-9(c). In any event, the response must be tendered within seven days from the date the public agency receives the request. IC 5-14-3-9(b).

² Formal Complaint 04-FC-13 was processed as a formal complaint for an advisory opinion pursuant to Indiana Code 5-14-5-7 and 5-14-5-9. However, upon further review, it is my opinion that the denial of disclosure in that matter occurred on September 20, 2003, when seven days elapsed from the date the Prosecutor received the record request without a written response. See IC 5-14-3-9(b). In that regard, the complaint is not timely filed because it is brought more than 30 days after the denial. IC 5-14-5-7. However, that determination does not affect my authority to treat the complaint as an informal inquiry and respond in that manner, and my response to that inquiry is entitled to the same force and effect as would be the case if it were issued as an advisory opinion in response to a timely filed formal complaint. See IC 5-14-3-9(i). As noted above, because this matter involves the identical records request at issue in Formal Complaint 04-FC-17, I have consolidated these matters for a single opinion, and issue that opinion as an Advisory Opinion in response to the latter formal complaint.

Here, both public agencies failed to comply with the APRA in responding to the requests for records. The Prosecutor failed to respond to the written request within seven days of receipt (IC 5-14-3-9(b)), and when he did respond he further failed to respond in writing (IC 5-14-3-9(c)(1)). The Sheriff's response was timely, but nonetheless lacking and contrary to the requirements of the APRA where it denied you production of any responsive records and any further response without citing to the provision of the APRA that permitted the Sheriff to exempt any responsive records from disclosure. IC 5-14-3-9(c)(2).

Both public agencies admit to some confusion in responding to your records request due to an earlier request and response from November 2002. Both parties provide a copy of the response that was made to that earlier request, and the Sheriff even characterizes the requests as being "very similar." The November 2002 request is not included with the materials submitted by the parties, but the Sheriff's response to the earlier request indicates that it sought at least some records different than those now being requested. Indeed, given the context of that response and the exemptions therein asserted, it appears that your 2002 request sought information regarding law enforcement personnel records, and the identities of law enforcement officers. Even assuming that earlier request sought some of the same or similar records now being requested, the APRA required a timely and substantively appropriate written response to your new or renewed request.

While I must find the responses deficient under the APRA for the reasons set forth above, I note that the Prosecutor has now responded further and has affirmatively stated that his office does not have any records that are responsive to your request. Accordingly, I do not find a continuing violation for nondisclosure where that public agency claims not to have any records that are responsive to your request.³ The Sheriff's response to your complaint likewise does not cure the deficiencies in its initial response to your records request, but neither does it answer your current request. Even if the November 2002 and January 2004 requests are similar, and I do not make that finding here, the Sheriff's 2002 response to the prior record request cannot stand as a response to your 2004 request for records for the *last four years*. To meet the requirements of the APRA, the Sheriff's response must be in writing, must be responsive to your pending request, and must either cover production of any responsive records, state a date certain when production will occur, deny the existence of response records, or decline to produce responsive records with citation to the authority supporting the nondisclosure.

³ I note the allegation in your records requests as well as in your complaints that you believe that such records exist in the possession of both public agencies. While I cannot resolve any factual and evidentiary dispute regarding the existence of responsive records, you are, of course, free under the statute to pursue your civil remedies in a court of competent jurisdiction. Indiana Code 5-14-3-9 authorizes you to file a civil action against a public agency alleged to be in violation of the APRA, and if you should prevail in any such action after seeking and obtaining an informal or formal opinion from the Public Access Counselor, the court shall award you attorney fees. IC 5-14-3-9(i).

CONCLUSION

For the foregoing reasons, I find that the Prosecutor's nondisclosure of records does not violate the APRA based on his claim that he does not have any documents that are responsive to the request. That said, I further find that the Prosecutor's initial response to your records request was not timely and was not in writing as required by the APRA, and thus violated those provisions of the statute. With regard to the Sheriff, I find that the Sheriff's response was deficient and in violation of the APRA to the extent that it denied you production of any responsive records and any further response without citing to the provision of the APRA that permitted the Sheriff to exempt any responsive records from disclosure. Absent allegation or evidence that the Sheriff does not have any records that are responsive to your request, I further conclude that any continuing nondisclosure would violate the APRA.

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Mr. Bryan Cook