

December 28, 2005

Sent Via Facsimile

Clifford W. Shepard
2325 West Washington Street
Indianapolis, IN 46222

Re: Formal Complaint 05-FC-242; Alleged Violation of the Access to Public Records Act by the Marion County Prosecutor's Office

Dear Mr. Shepard:

This is in response to your formal complaint alleging that the Marion County Prosecutor's Office ("Prosecutor") violated the Access to Public Records Act when it failed to disclose certain records. I find that the Prosecutor did not produce the records you requested within a reasonable period of time.

BACKGROUND

You sent via First Class Mail a letter requesting the public portion of the personnel file of Daniel Constantino, a staff person in the Prosecutor's Office. In addition, you requested a copy of the Prosecutor's policy regarding how support staff determines the \$50 fee that was charged to your client by Mr. Constantino. You also asked for an accounting for how the money was received and distributed, and the name and title of the person authorizing Mr. Constantino to use the TOPS receipt form.

The Prosecutor, through Chief of Staff Lisa Borges, responded to your request on November 6, having received the request on Friday, November 4, 2005. She acknowledged your request and stated that your request "will be carefully reviewed and considered." You wrote Ms. Borges on November 15 asking that she advise you of an estimated time when the Prosecutor's Office will produce the requested documents. When you had not heard from the Prosecutor by November 28, you sent a letter to Ms. Borges's attention stating that you were

sending a formal complaint to the Public Access Counselor regarding the Prosecutor's failure to produce the records.

Ms. Borges responded to your formal complaint by letter. I enclose a copy of her letter and enclosures for your review. Ms. Borges stated that "the information provided by Mr. Shepard required investigation; Mr. Shepard's request referenced his earlier complaint regarding criminal charges filed against his client. The investigation of that complaint is now complete." Ms. Borges enclosed the December 16 letter she wrote to you containing her substantive response to your request for records. The personnel file information was enclosed. However, Ms. Borges indicated that no records existed with respect to your other requests, but for your information, the TOPS receipt form is provided through the City of Indianapolis Purchasing Division.

ANALYSIS

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the Access to Public Records Act ("APRA"). Ind. Code 5-14-3-3(a). The Prosecutor is a public agency under the APRA. IC 5-14-3-2(1)(6). One of the records excepted from disclosure at the discretion of the public agency are personnel files of public employees. IC 5-14-3-4(b)(8). However, certain information from the personnel files must be disclosed. *See* IC 5-14-3-4(b)(8)(A)-(C). Your request for the public portion of Mr. Constantino's personnel file was required to be disclosed under the APRA.

A public agency that receives a request for a record via U.S. Mail is required to issue a response acknowledging receipt of the request within seven (7) days of receipt of the request, or the request is deemed denied. IC 5-14-3-9(b). The Prosecutor's responsive letter of December 6 was timely under this provision. However, the Prosecutor did not indicate how or when it intended to comply with your request. This office has often recommended that a public agency estimate when the records will be produced, or give some timeframe in which the requester can expect to receive a fuller response.

In fact, you sent letters on November 15 and November 28 in which you sought to learn whether and when the Prosecutor would comply with your request. The Prosecutor's first substantive response was December 16, six weeks after receiving your request. Although there is no set time in the APRA within which a public agency is required to produce a record, I have advised that the records should be produced within a reasonable time under the facts and circumstances.

Ms. Borges told me in her letter that the request required investigation, since your request referenced your earlier complaint regarding criminal charges filed against your client. The rights of any person to inspect and copy a record under the Access to Public Records Act do not hinge on outstanding investigations underway by the public agency, unless the investigation provides the factual basis for an exemption under the APRA. If a record is disclosable under the APRA, it must be disclosed in spite of other ongoing matters before the public agency regarding the requester or the requester's client. In that regard, the public records that you requested are not subject to any exemption that I am aware of, including the exemption for investigatory records of

law enforcement. *See* IC 5-14-3-4(b)(1). The personnel file of Mr. Constantino and the office policies and accountings that you requested were not compiled in the course of a criminal investigation, and are therefore not exempt. The Prosecutor could not delay producing the records you requested. The delay in producing the records was not reasonable under the Access to Public Records Act.

CONCLUSION

For the foregoing reasons, the Marion County Prosecutor's Office did not produce the records that you requested within a reasonable time.

Sincerely,

Karen Davis
Public Access Counselor

cc: Lisa Borges