

April 28, 2005

Sonny K. Henry  
D.O.C. #935520  
Wabash Valley Correctional Facility  
P.O. Box 1111  
Carlisle, IN 47838-1111

*Re: Formal Complaint 05-FC-60; Alleged Violation of the Access to Public Records Act by the Lake County Prosecuting Attorney*

Dear Mr. Henry:

This is in response to your formal complaint alleging that the Lake County Prosecutor (“Prosecutor”) violated the Access to Public Records Act by failing to respond to your request for records. I find that the Prosecutor violated the Access to Public Records Act by failing to respond to your request for records.

#### BACKGROUND

On or about March 4, 2005, you sent to the Prosecutor a request for the following:

- A five (5) page statement of Marvin Vandewater dated Oct. 25, 1996; and
- The 27 page deposition of Mr. Vandewater from Nov. 20, 1997.

You claim that the Prosecutor failed to reply at all to your request. Bernard Carter, Lake County Prosecutor, sent me a written response to your complaint, which I enclose for your reference. In his response, Mr. Carter states that “the Lake County Prosecutor’s Office does not have any public records for access by the public, being excepted or excluded under I.C. 5-14-3-4(b)(2)(B)”. He calls this a “prosecutorial exclusion,” and he claims that this exclusion is affirmed under Administrative Rule 9. Mr. Carter admits that he did not reply to your request at all, because he believed that when you filed an identical record request to the Lake Superior Court and were denied, it was no longer necessary for him to respond to you because you had been denied by “the proper forum for such requests.”

## ANALYSIS

Any person may inspect and copy the public records of a public agency during the agency's regular business hours, except as provided in section 4 of the Access to Public Records Act ("APRA"). Ind. Code 5-14-3-3(a) "Public agency" includes any entity...exercising in a limited geographical area the executive, administrative, judicial, or legislative power of the state or a delegated local governmental power. IC 5-14-3-2 (defining "public agency"). The office of a prosecutor is a public agency under the APRA. A "public record" is "any writing, paper, report...or other material that is created, received, retained, maintained, or filed by or with a public agency..." IC 5-14-3-2 (defining "public record").

A public agency is permitted to withhold from disclosure, at the agency's discretion, the work product of an attorney representing, pursuant to state employment or an appointment by a public agency:

- (A) a public agency;
- (B) the state; or
- (C) an individual.

IC 5-14-3-4(b)(2). "Work product of an attorney" means information compiled by an attorney in reasonable anticipation of litigation and includes the attorney's:

- (1) notes and statements taken during interviews of prospective witnesses; and
- (2) legal research or records, correspondence, reports, or memoranda to the extent that each contains the attorney's opinions, theories, or conclusions.

IC 5-14-3-2 (defining "work product of an attorney").

A public agency that receives a request for a record by U.S. Mail or by facsimile must respond to the request within seven (7) days of receiving the request. Failure to respond within that timeframe is deemed denial by the public agency. Further, a public agency may deny a written request for a record if the denial is in writing and the denial includes:

- a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record, and
- the name and the title or position of the person responsible for the denial.

IC 5-14-3-9(c).

Mr. Carter concedes that he did not issue a denial in writing, and in fact did not respond to your request. However, he does not concede that this constituted an improper denial under the APRA. From his response, I take it that the prosecutor believes that any records in his office relating to a case are covered under the exception for attorney work product. In my opinion, the definition of "attorney work product" does not include all case records in the possession of the prosecutor. This is because exceptions to disclosure are to be narrowly construed in keeping with the stated policy of the APRA. IC 5-14-3-1. The burden of proof for the nondisclosure of a public record is on the public agency that would deny access, not on the person seeking to inspect and copy the record. IC 5-14-3-1.

Hence, the prosecutor is required under the law to prove that each of the two records you have requested falls within the attorney work product exception, and to establish the content of the records with adequate specificity. IC 5-14-3-9(g).

Mr. Carter also claims that the Lake County Superior Court is the proper forum for you to seek records from, and that the Administrative Rule 9 “affirms” the claimed prosecutorial exception. Ind. Administrative Rule 9 applies by its terms to court records, not to records maintained by the prosecutor. Ind. Administrative Rule 9(A)(3) states: “[t]his rule applies only to court records as defined in this rule and does not authorize or prohibit access to information gathered, maintained, or stored by a non-judicial governmental agency or other entity.” Accordingly, the fact that the Lake County Superior Court denied you a record (and for a reason unrelated to any attorney work product exemption,) is not a valid basis on which the prosecutor may deny you a record or may fail to respond to your request. Also, a public agency may not escape its duty to disclose records under the APRA merely by claiming that another public agency has an equal or greater duty to disclose the records. As this office has stated on many occasions, an individual who is involved in litigation with a public agency is not foreclosed from the rights afforded to persons under the Access to Public Records Act.

The Lake County Prosecutor’s failure to respond to your request for records, and any continuing failure to so respond within the requirements of the Access to Public Records Act, is actionable under IC 5-14-3-9(e).

#### CONCLUSION

For the foregoing reasons, I find that the Lake County Prosecutor’s Office has violated the Access to Public Records Act when it failed to respond to your request for records.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Bernard A. Carter