

May 5, 2006

LaDonna Jill Cooper  
3419 W. Myrtle Avenue  
Phoenix, AZ 85051

*Re: Formal Complaint 06-FC-65; Alleged Violation of the Access to Public Records Act by the Elkhart County Prosecuting Attorney's Office*

Dear Ms. Cooper:

This is in response to your formal complaint alleging that the Elkhart County Prosecuting Attorney's Office ("Prosecutor") violated the Access to Public Records Act by refusing to disclose records regarding a IV-D child support case. I find that the Prosecutor is required to disclose any non-exempt records maintained by the Prosecutor.

#### BACKGROUND

On March 9, 2006, you mailed a letter to Bruce Wells, Deputy Prosecuting Attorney, requesting certain documents. You requested all items related to an income withholding order against you in Cause Number 20D01-9904-DR-281, including:

1. A complete payment history of child support payments;
2. The balance due;
3. Arrears due;
4. Any and all orders calculating such;
5. All correspondence in the file to and from all parties and agencies involved in the action;
6. All correspondence initiated by the Prosecutor's office to all parties and agencies involved in the action;
7. The warrant number and copy of such referenced in the Prosecutor's letter dated 2/28/06.

You also requested that the Prosecutor certify all these items. You state in your formal complaint with the Office of the Public Access Counselor that you need these records to show

that you do not owe the child support arrearage. You received a response from the Prosecutor dated March 14, 2006. The Prosecutor's response to your request mirrors the response I received after I sent the Prosecutor your complaint. First, the Prosecutor took your request to be undertaken pursuant to your discovery remedies *and* as a request for records under the Access to Public Records Act. The latter was the basis for the response that I have reviewed and summarize here: For items #1, 2, 3, 4, and 7, the Prosecutor told you that those items "are in the official custody of the Clerk of the Courts of Elkhart County. The Elkhart County Prosecutor's Office is not the custodian of these records." For items #5 and 6, the Prosecutor stated an objection to production on the grounds that the requested items are work product pursuant to Indiana Code 5-14-3-4(b)(2).

## 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. Ind. Code 5-14-3-3(a). The Prosecutor is a public agency under the APRA. *See* IC 5-14-3-2(1)(2)(A); IC 5-14-3-2(1)(6). Any material that is created, received retained, maintained, or filed by or with a public agency is a public record. IC 5-14-3-2(m). If a public agency intends to deny a written request for a record, it must deny the record in writing and cite the exemption or exemptions that authorize the withholding of the record. IC 5-14-3-9(c). A public agency may not deny a record merely because another public agency also maintains the same public record or information. Nothing in the APRA requires that a public agency certify its public records.

A record that is the work product of an attorney representing, pursuant to state employment or an appointment by a public agency, a public agency, the state, or an individual, may be withheld in the public agency's discretion. IC 5-14-3-4(b)(2). Work product of an attorney is specifically defined in the APRA; it means "information compiled by an attorney in reasonable anticipation of litigation and includes the attorney's notes and statements taken during interviews of prospective witnesses, and 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(p). A public agency bears the burden of showing that records meet an exception to disclosure contained in the APRA. IC 5-14-3-1; IC 5-14-3-9(g).

The question left unanswered by the Prosecutor's response to your request for records is whether the Prosecutor maintains any of the records in items #1-4 and 7. If he does, the records are "public records" and must be available for inspection and copying in accordance with IC 5-14-3-3(a). The Prosecutor's response that the records are "in the official custody" of other offices, and "the Prosecutor is not the custodian of the records" hints that the Prosecutor may maintain them but does not have the *official* records. To the extent that your request included a request for the *certified* copy of such records, such a response is understandable. A better response of the Prosecutor would have stated either: "We do not have this record, but you can find it at the Clerk's office" or "We have the records, but if you want them to be certified, only the Clerk's office can give you certified records; please advise whether you want our uncertified records."

It is my opinion that if the Prosecutor maintains these records, the Prosecutor must allow you to inspect and copy them during the Prosecutor's regular hours of business, in spite of their being available as well in the Clerk's office.

The Prosecutor denied you records that are responsive to items 5 and 6, regarding all correspondence initiated by the Prosecutor or received by the Prosecutor from all parties involved in the case. The Prosecutor declined to disclose these records because they are protected by the exemption for work product of an attorney, under IC 5-14-3-4(b)(2). This exemption is certainly appropriate for the Prosecutor to assert for correspondence that constitutes notes and statements taken during interviews of prospective witnesses, and for correspondence or memoranda to the extent that each contains the attorney's opinions, theories, or conclusions. For correspondence that does not fall within the exemption and not subject to any other exemption, the Prosecutor would be obliged to make that correspondence available to you for inspection and copying. I offer no opinion regarding whether or not any file material falls outside the exemption for work product of an attorney, since I am not privy to the contents of the file. The Prosecutor would bear the burden of proof to show that the correspondence falls within the attorney work product exemption, consistent with IC 5-14-3-9(g).

#### CONCLUSION

It is my opinion that the Elkhart County Prosecutor's Office must disclose to you any non-exempt records that it maintains regarding your cause.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Bruce A. Wells