

February 2, 2007

Robert Chambers  
#994105  
Wabash Valley Correctional Facility  
P.O. Box 2222  
Carlisle, IN 47838

*Re: Formal Complaint 07-FC-1; Alleged Violation of the Access to Public Records Act by the Marion County Prosecutor's Office*

Dear Mr. Chambers:

This is in response to your formal complaint alleging that the Marion County Prosecutor's Office ("Office") violated the Access to Public Records Act by refusing to allow your representative to inspect the Office's file. I find that the Office should have timely responded to your December 5 request, and should also have provided the exemption that authorized the Office to withhold the record, but otherwise could deny your representative the right to inspect the file.

#### BACKGROUND

You began your attempt to get records from the Office on October 5, 2006. At that time, your representative, an investigator, visited the Office and requested to see the file concerning your criminal case. This visit is not the subject of your complaint, although the investigator was not successful. You followed-up with a written request dated October 16 asking for access to any documents concerning polygraph information, including testing and results, and any documents concerning plea offers, including contacts and actual terms. After an initial response acknowledging receipt of the request, the Office issued a substantive response on December 1, 2006. In its response, the Office informed you that it would exempt as an investigatory record any polygraph information. In addition, the Office informed you that your request for documents concerning plea offers, including contacts and actual terms was denied, as no document concerning a plea offer on your cause number could be located. For purposes of this Opinion, I

will assume that the Office meant that no responsive documents existed in connection with your file.

On December 5, 2006, you responded to the December 1 letter. You stated that you understood the exemption applying to the polygraph information; hence, you were no longer requesting polygraph information. However, you reiterated that your original intention was for your investigator to inspect the records in the case file himself on your behalf. You believe from information in your possession that a plea offer was developed and should be in the case file. You wished to have your investigator look through the file to confirm that no records concerning a plea agreement exist. You have not received any response to your December 5, 2006 letter, so you filed this complaint with the Office of the Public Access Counselor citing the non-response as a denial of access.

The Office responded to your complaint via letter, a copy of which is enclosed for your reference. The Office admitted that it had received your December 5 letter renewing your request for records and clarifying that you wanted your investigator to personally inspect the file on your behalf. In the transition of the new Chief of Staff Ms. Helen Marchal to the Office in late December, the Office discovered that it had not sent the response it had prepared. The response sent to you after this complaint was filed explains that your request for access to the file is denied. Further, no document concerning a plea offer can be located in the Office's file in your cause. In Ms. Marchal's complaint response, she told me that she had personally reviewed your file and confirms that nothing in the files relates to preparation of a plea agreement.

## 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 Office is a public agency under the APRA. IC 5-14-3-2(l)(1). "Inspect" includes the right to manually transcribe and make notes from the record, *see* IC 5-14-3-2(g), but implicitly is the right to view or physically examine records without necessarily receiving a copy.

If a public agency denies a written request for a record, it must do so in a writing that 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). An agency is required to respond to a request received by mail within seven days of the date the agency received the request, or the request is deemed denied. IC 5-14-3-9(b).

A public agency may, at its discretion, except from section 3 of the APRA investigatory records of law enforcement agencies. IC 5-14-3-4(b)(1). "Investigatory record" means information compiled in the course of the investigation of a crime. IC 5-14-3-2(h). Prosecuting attorneys are included in the definition of a law enforcement agency. *See* IC 5-14-3-2(l)(6).

Accordingly, the Office could deny you or your representative the right to inspect all the information compiled by the Office in your criminal matter. Allowing your representative to view the contents of the Office's file would involve inspecting the information that the Office

compiled in the course of its criminal investigation. The records so compiled are exempt; hence, the right secured to you or any member of the public in section 3(a) to inspect the records can be denied under IC 5-14-3-4(b)(1).

However, I note that the Office did not respond to your December 5 request in a timely manner, because no response was issued within seven days of the date that the Office apparently received your request. Although it appears that the Office may have prepared a response in a timely manner, the Office admits that the response was not sent to you. In addition, the response that was prepared failed to cite the specific exemption that applied to the record by reference to the statutory citation for investigatory records of law enforcement. The Office cited Indiana Code 5-14-3 *et seq.* There are over 30 exemptions that are part of IC 5-14-3. Accordingly, the denial of the Office did not conform to the requirement for specificity in IC 5-14-3-9(c), in my opinion. The Office violated the APRA in failing to timely and correctly deny the records.

Nevertheless, the denial of your representative's right to inspect the Office's investigatory records was consistent with the APRA.

#### CONCLUSION

For the foregoing reasons, I find that the Marion County Prosecutor's Office should have timely responded to your December 5 request and cited the specific exemption that applied to the records. However, the Marion County Prosecutor's Office could deny your representative the right to inspect the file concerning your criminal matter.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Helen Marchal