

February 16, 2007

Dorothy Snyder
236 E. Pendle Street
South Bend, IN 46637

Re: Formal Complaint 07-FC-10; Alleged Violation of the Access to Public Records Act by the St. Joseph County Prosecutor

Dear Ms. Snyder:

This is in response to your formal complaint alleging that St. Joseph County Prosecutor (“Prosecutor”) violated the Access to Public Records Act by denying you a record concerning your husband, David Snyder. I find that the Prosecutor may withhold records that are exempt as investigatory records of law enforcement and that constitute work product of an attorney.

BACKGROUND

You and Mr. Snyder visited the Prosecutor’s office in person around January 12 to ask for all the documents in the file regarding Mr. Snyder’s arrest. You needed this information in order to interview prospective attorneys. The Prosecutor’s office told you that the Prosecutor’s office was still investigating the matter, and accordingly, the Prosecutor was willing to release them to you only through your attorney. This denial included all affidavits of probable cause and the police reports in the case.

I sent a copy of your complaint to the Prosecutor. Mr. Michael Dvorak, St. Joseph County Prosecutor, wrote in response, a copy of which is enclosed for your reference. Mr. Dvorak explained that you were told about the process for Mr. Snyder obtaining the documents in discovery. In fact, it is customary for the Prosecutor to turn over the documents at the initial hearing, which was then planned for January 24. Because the documents you sought are not subject to disclosure under the Access to Public Records Act because they are exempt as investigatory records of law enforcement or as attorney work product, it was not a violation of the Access to Public Records Act for the Prosecutor to deny them to you when you visited the office in person.

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). A denial of disclosure by a public agency occurs when the person making the request is physically present in the office of the agency, makes the request by telephone, or requests enhanced access to a document and:

(1) the person designated by the public agency as being responsible for public records release decisions refuses to permit inspection and copying of a public record when a request has been made; or

(2) twenty-four (24) hours elapse after any employee of the public agency refuses to permit inspection and copying of a public record when a request has been made; whichever occurs first.

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

If a request is made orally, either in person or by telephone, a public agency may deny the request orally. However, if a request initially is made in writing, by facsimile, or through enhanced access, or if an oral request that has been denied is renewed in writing or by facsimile, a public agency may deny the request if:

(1) the denial is in writing or by facsimile; and

(2) the denial includes:

(A) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and

(B) the name and the title or position of the person responsible for the denial.

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

The Prosecutor did deny your request because you were present and the person responsible for records release decisions denied you the records. The Prosecutor does not dispute that you were denied the record, but states that you were denied because the records are exempt from disclosure under the Access to Public Records Act.

The APRA allows a public agency to except certain public records at the agency’s discretion. These include:

“investigatory records of law enforcement agencies. However, certain law enforcement records must be made available for inspection and copying as provided in section 5 of this chapter. 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). The Prosecutor is a law enforcement agency and a public agency under IC 5-14-3-2(1)(6).

Hence, although your husband may be entitled under the rules for discovery to the police reports and probable cause affidavits, he is not entitled to the file as a member of the public, because investigatory records are exempt at the Prosecutor's discretion.

I would note that the Prosecutor's Office should discuss with the requester the availability of the daily log when an individual is seeking police reports or probable cause affidavits. In spite of the exemption at section 4(b)(1), a person is entitled to information in the daily log, including:

- (1) The time, substance, and location of all complaints or requests for assistance received by the agency.
- (2) The time and nature of the agency's response to all complaints or requests for assistance.
- (3) If the incident involves an alleged crime or infraction:
 - (A) the time, date, and location of occurrence;
 - (B) the name and age of any victim, unless the victim is a victim of a crime under IC 35-42-4;
 - (C) the factual circumstances surrounding the incident; and
 - (D) a general description of any injuries, property, or weapons involved

Also exempt at the agency's discretion are records that are the work product of an attorney representing, pursuant to state employment or an (h) 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. The term 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(p).

To the extent that your broad request for the file of the Prosecutor regarding Mr. Snyder's case includes work product of an attorney, the records are exempt at the Prosecutor's discretion.

The APRA states that a public agency may deny orally a request that is made orally. When a request for records is written, or when an oral request that has been denied is renewed in writing, the public agency is required to deny the request in writing. The denial must include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the records, and the name and the title or position of the person responsible for the denial. IC 5-14-3-9(c). I recommend in the future that you renew an oral request in writing; if the public agency continues to deny the record, the public agency would be required to give you a written statement of the exemption or exemptions that allow the public agency to withhold the record.

CONCLUSION

The St. Joseph County Prosecutor's Office was not required to give you the police reports and probable cause affidavits regarding David Snyder's case, but should have offered you the daily log.

Sincerely,

Karen Davis
Public Access Counselor

cc: Prosecutor Michael Dvorak