

July 11, 2007

Christopher Stephens  
128 Pinto Way  
Bloomington, Georgia 31302

*Re: Formal Complaint 07-FC-153; Alleged Violation of the Access to Public Records Act by the Elkhart County Prosecuting Attorney's Office*

Dear Mr. Stephens:

This is in response to your formal complaint alleging the Elkhart County Prosecuting Attorney's Office ("Prosecutor") violated the Access to Public Records Act (Ind. Code 5-14-3) (APRA) by denying your request for records. I find that the Prosecutor violated the Access to Public Records Act by denying your request for records.

#### BACKGROUND

On May 14, 2007 you sent to the Prosecutor a request for the following:

- Application for Title IV-D Child Support Service – State form 34882/DFC Form 425A
- Elkhart County Child Support Application
- UIFSA Questionnaire, and
- Title IV-D Notice and Waiver.

The Prosecutor received your request on May 30, 2007. On behalf of the Prosecutor, Mr. Bruce Wells responded to your request by mail on June 5, 2007, indicating the request was denied for two reasons. The Prosecutor cited Ind. Code 5-14-3-3, specifically subsection (a)(1), which requires the request to be made with reasonable particularity, in denying your request for access to the UIFSA Questionnaire. Furthermore, the Prosecutor cited IC 5-14-3-4(b) regarding the remaining three documents, claiming they are attorney work product and excepted from IC 5-14-3-3(a).

You filed a complaint with this office on June 11, 2007 challenging the denial of access. Mr. Wells responded to the complaint and provided a copy of his June 5 response to you.

## 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(l). 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(m).

### *Reasonable particularity*

When any person makes a request for records from a public agency, he must "identify with reasonable particularity the record being requested." IC 5-14-3-3(a). While the phrase "reasonable particularity" appears to be clear, were it necessary to interpret the APRA to determine what the General Assembly intended this phrase to mean, courts would rely upon the common and ordinary meaning. *Crowley v. Crowley*, 588 N.E.2d 576, 578 (Ind. App. 1992). "Particularity" is defined as "the state of being particular rather than general." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 1981, 956.

Statutory interpretation also requires that one construe the phrase "reasonable particularity" in light of the entire APRA. *Deaton v. City of Greenwood*, 582 N.E.2d 882, 885 (Ind. App. 1991). Since the APRA favors disclosure and the burden of proof for nondisclosure is on the public agency, the agency should contact the requestor for more information if it is necessary to respond to a request. In his response to you, Mr. Wells says of this item, "it is not clear what is meant by your request." The Prosecutor should have asked for further clarification to determine whether the document you seek is on maintained by the office.

### *Attorney work product*

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(p).

In my opinion, the definition of “attorney work product” does not include all case records in the possession of the Prosecutor. 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 and not on the person seeking to inspect and copy the record. IC 5-14-3-1.

The Prosecutor, therefore, is required under the law to prove that each of the three records, or the one packet of records as the case may be, you have requested falls within the attorney work product exception IC 5-14-3-9(g). It may be that the records you requested are excepted under the attorney work product provision, but it is the duty of the Prosecutor to explain why they fall under that exception rather than simply indicating they do.

### 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,

Heather Willis Neal  
Public Access Counselor

cc: Bruce Wells