

July 18, 2007

David Mann  
221 Spring Street  
Jeffersonville, Indiana 47130

*Re: Formal Complaint 07-FC-166; Alleged Violation of the Access to Public Records Act by the Office of the Clark County Prosecuting Attorney*

Dear Mr. Mann:

This is in response to your formal complaint alleging the Office of the Clark County Prosecuting Attorney (“Prosecutor”) violated the Access to Public Records Act (“APRA”) (Ind. Code 5-14-3) by failing to respond to your request for records. A copy of the Prosecutor’s response to your complaint is enclosed for your reference. The Prosecutor provides evidence he did respond to your request. As such, I find the Prosecutor did not violate the APRA.

#### BACKGROUND

Your complaint alleges that on June 13, 2007 you appeared in person and in writing requested from the Prosecutor “any public documents relating to the investigation of Clark County’s 2003 election.” You filed a complaint with this office on June 18, alleging you had received no response from the Prosecutor.

In response to your complaint, the Prosecutor provided a copy of your original request for public records as well as its response to your request, a letter from Steven D. Stewart, Clark County Prosecuting Attorney, indicating that if any such records do exist related to the investigation of Clark County’s 2003 election, they would be exempt from disclosure as investigatory records of a law enforcement agency. In his response to your complaint, the Prosecutor indicates he completed his response within an hour of your appearance in the office and left the response with the office receptionist, assuming you would come back to the office to pick up the response. The Prosecutor indicates he also told another Evening News reporter the response was with the receptionist and ready to be collected. When the Prosecutor was made aware of your complaint by this office, he mailed and faxed a copy of the response to you.

## ANALYSIS

Indiana Code 5-14-3-3(a) provides that any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as provided in section 4 of APRA. A “public record” means any writing, paper, report, study, map, photograph, book, card, tape recording or other material that is created, received, retained, maintained or filed by or with a public agency. IC 5-14-3-2. A request for records may be oral or written. IC 5-14-3-3(a); 5-14-3-9(c). A request for inspection and copying must identify with reasonable particularity the record being requested. IC 5-14-3-3(a).

If the requester appears in person, denial of access occurs when the person responsible for providing access to records denies the request or twenty-four hours elapse after an employee of the agency refuses inspection and copying. IC 5-14-3-9(a). This office has long held the opinion that twenty-four hours means twenty-four business hours.

If a request is initially 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 title or position of the person responsible for the denial.

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

Your complaint alleges the Prosecutor did not respond to your request. The Prosecutor provided evidence it did on June 13 respond to your request. The denial did indicate the specific exemption authorizing the withholding of the records. While the Prosecutor did not indicate the specific citation for the exemption, I do not believe the law requires the citation so long as the specific exemption is referenced. In this instance, the Prosecutor relies on IC 5-14-3-4(b)(1) in denying access to “investigatory records of law enforcement agencies.” “Investigatory record” means information compiled in the course of the investigation of a crime. IC 5-14-3-2(h).

Certain records are not exempt under the investigatory records exemption. Certain information related to arrest or summons for an offense, certain jail or lock-up information, and certain information maintained by a law enforcement agency in a daily log or record that lists suspected crimes, accidents, or complaints shall be made available for inspection and copying. IC 5-14-3-5. I do not understand it to be the case you are requesting any of these particular records from the Prosecutor. If you do intend to request access to those specific records, you should request with “reasonable particularity” access to those records. As to other records related to the investigation of Clark County’s 2003 election, the Prosecutor may withhold records compiled in the course of investigation of a crime, which he claims to be the case here.

The Prosecutor’s denial did not specifically state the name and title or position of the person responsible for the denial. However, because the response letter was signed by the elected official who has authority over the public agency, I believe it is reasonable to assume the

denial came from the Prosecuting Attorney himself. If the denial had been signed by an employee of the agency with no indication who was responsible for denying the record, I would find this denial to violate section 9(c) of the APRA.

The APRA does not dictate the way by which the public agency must deliver the denial of access to records. While the denial is required to be in writing when the request is made in writing, there is not requirement the denial must be mailed or sent by facsimile. IC 5-14-3-9(c). Since you appeared in person to make the request and asked for a response within twenty-four hours, I find it reasonable for the Prosecutor to assume you would appear again in the office to collect the response. If you had mailed your request, it would be reasonable to expect the response to be returned to you by mail.

### CONCLUSION

For the foregoing reasons, I find the Clark County Prosecuting Attorney did not violate the Access to Public Records Act.

Best regards,

Heather Willis Neal  
Public Access Counselor

cc: Steven D.Stewart, Clark County Prosecuting Attorney