

October 31, 2007

James Baker
340 South Foote Street
Cambridge City, Indiana 47327

Re: Formal Complaint 07-FC-311; Alleged Violation of the Access to Public Records Act by the Fayette County Prosecuting Attorney's Office

Dear Mr. Baker:

This is in response to your formal complaint alleging the Fayette County Prosecuting Attorney's Office ("Prosecutor"), violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to records. I have enclosed a copy of the Prosecutor's response to your complaint for your reference. It is my opinion the Prosecutor has a duty under the APRA to provide a response to your request for records and to allow you to inspect and copy those records unless an exception to disclosure applies. Further, it is my opinion that your request to discuss the file with the Prosecutor was outside the APRA. As such, I cannot make a determination regarding the matter; the propriety of the denial would be subject to the Indiana Supreme Court's opinion whether Rule 4.2 precluded the Prosecutor from discussing the file with you.

BACKGROUND

You allege that you submitted a request to the Prosecutor on September 21, 2007 for copies of records related to your arrest. Specifically, you sought a copy of the arrest warrant and a copy of a check showing your bond money was returned to you. You allege you only received a record containing your signature with an indication you received a check and a record with an indication another individual received the check. My office originally received your complaint on October 1 and returned it for further information. I received it again on October 9.

The Prosecutor responded to your complaint by letter dated October 24 by Kenneth Faw, Fayette County Prosecuting Attorney. Mr. Faw indicated that as he recalls the matter, his receptionist advised him you were in the reception area asking to speak to the prosecutor regarding your criminal file. Mr. Faw directed the receptionist to advise you that since you were represented by an attorney, he was unable to speak to you without your attorney present. Mr. Faw indicates he made this decision pursuant to Rule 4.2 of the Rules of Professional Conduct.

ANALYSIS

The public policy of the APRA states, "(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information." Ind. Code §5-14-3-1. The Prosecutor is clearly a public agency for the purposes of the APRA. I.C. §5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Prosecutor during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. §5-14-3-3(a).

A request for records may be oral or written. I.C. §5-14-3-3(a); §5-14-3-9(c). If the request is made in person and the agency does not respond within 24 hours of receipt, the request is deemed denied. I.C. §5-14-3-9(a).

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law or a court order. Ind. Professional Conduct Rule 4.2.

Here the Prosecutor relied on Rule 4.2 of the Rules of Professional Conduct to refuse to discuss your file with you. Former Public Access Counselor Karen Davis addressed a similar issue in *Opinion of the Public Access Counselor 06-FC-79*. There, the City of Hammond Health Department refused an individual access to records, contending it was inappropriate to communicate with the individual regarding matters related to a lawsuit. Counselor Davis opined that nothing in Prof. Cond. R. 4.2 prohibited the public agency from responding to a request for access to records made by an individual to a public agency. She further opined the request was made to the agency and not to the agency's attorneys. *Opinion of the Public Access Counselor 06-FC-79*. The situation is similar here except that the elected official responsible for denying access to records is by law an attorney. It is my opinion, though, that the request is still made to the agency and not to the attorney. Therefore, a public agency may not deny a request for access to records by contending Prof. Cond. R. 4.2 prohibits its response. It is my opinion the agency is still under an obligation to respond to a person's request for access to records and to provide access to records unless disclosure is excepted under the APRA.

Here, though, the Prosecutor indicates you appeared at the office and asked to discuss your criminal file with the Prosecutor. The APRA requires a public agency to provide access to inspect and copy public records (I.C. §5-14-3-3), but it does not require an agency to discuss those records with the requester. If you asked to discuss the file with the Prosecutor, this action is outside the scope of the APRA, and as such Rule 4.2 may well apply. If it is the case you were only requesting access to records, it is my opinion the Prosecutor has a duty under the APRA to respond to that request.

The Prosecutor may, pursuant to I.C. §5-14-3-3(a), require any request for access to records to be in writing in or on a form prescribed by the Prosecutor. Doing so might help a

public official concerned about Rule 4.2 to avoid any communication outside of that required by the APRA.

CONCLUSION

For the foregoing reasons, it is my opinion the Prosecutor has a duty under the APRA to provide a response to your request for records and to allow you to inspect and copy those records unless an exception to disclosure applies. Further, it is my opinion that your request to discuss the file with the Prosecutor was outside the APRA. As such, I cannot make a determination regarding the matter; the propriety of the denial would be subject to the Indiana Supreme Court's opinion whether Rule 4.2 precluded the Prosecutor from discussing the file with you.

Best regards,



Heather Willis Neal
Public Access Counselor

cc: Ken Faw, Fayette County Prosecutor