



STATE OF INDIANA

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May 16, 2011

Mr. Michael D. Miller
4490 W. Reformatory Rd.
Pendleton, IN 46064

Re: Formal Complaint 11-FC-104; Alleged Violation of the Access to Public Records Act by the Howard County Prosecutor

Dear Mr. Miller:

This advisory opinion is in response to your formal complaint alleging the Howard County Prosecutor ("Prosecutor") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* The Prosecutor's response to your complaint is enclosed for your reference.

BACKGROUND

In your complaint, you allege that the Prosecutor violated the APRA by denying you access to records and recorded testimony that was "used to create and establish Probable Cause Affidavits for [an unspecified] Arrest [sic]."

In response to your complaint, the Prosecutor states that it never denied your request. Rather, it was denied by Howard Superior Court II (the "Court") as shown in the attachment to your complaint. That said, the Prosecutor states that many of your requested records would likely be investigatory records exempt from disclosure under Ind. Code § 5-14-3-4(b)(1), but that the probable cause affidavit you seek is a public record available upon request from the Howard County Clerk's ("Clerk") office.

ANALYSIS

The public policy of the APRA states that "(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." I.C. § 5-14-3-1. The Prosecutor is 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 Prosecutor's public

records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

Here, it appears that the Court, rather than the Prosecutor, denied your records request. However, you filed your complaint against the Prosecutor and did not list the Court as an agency that denied you access. Complaints alleging violations of the APRA should be filed against the agency that denied the request for access as provided in Ind. Code § 5-14-5-6(1). If the Prosecutor never denied your request, the Prosecutor did not violate the APRA and you had no grounds to file a complaint against that agency.

As to the substance of your request, I trust that the Clerk will provide you with the probable cause affidavit upon request. If you seek other records regarding the criminal investigation related to that affidavit, the investigatory records exception to the APRA provides that a law enforcement agency has the discretion to disclose or not disclose its investigatory records, which are defined as “information compiled in the course of the investigation of a crime.” I.C. § 5-14-3-2(h). The investigatory records exception does not apply only to records of ongoing or current investigations. Moreover, it does not apply only to an investigation where a crime was charged or an investigation where it was adjudicated that a crime was indeed committed. Instead, the exception applies to all records compiled during the course of the investigation of a crime, even where a crime was not ultimately charged, and even after an investigation has been completed. The investigatory records exception affords law enforcement agencies broad discretion in withholding such records. *See Opinion of the Public Access Counselor 09-FC-157*. “Generally, a police report or incident report is an investigatory record and as such may be excepted from disclosure pursuant to I.C. § 5-14-3-4(b)(1).” *Id.*

CONCLUSION

For the foregoing reasons, it is my opinion that Prosecutor did not violate the APRA if it never denied a request from you.

Best regards,



Andrew J. Kossack
Public Access Counselor

cc: Mark A. McCann