



STATE OF INDIANA

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November 2, 2011

Mr. Jorge Ramirez-Montoya
DOC # 212149
5124 W. Reformatory Road
Pendleton, Indiana 46064

Re: Formal Complaint 11-FC-278; Alleged Violation of the Access to Public Records Act by the Allen County Prosecutor's Office

Dear Mr. Ramirez-Montoya:

This advisory opinion is in response to your formal complaints alleging the Allen County Prosecutor's Office ("Prosecutor") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Deputy Prosecutor, David McClamrock, responded on behalf of the Prosecutor. His response is enclosed for your review.

BACKGROUND

In your formal complaint, you allege that you submitted a written request on October 17, 2011 requesting a copy of the transcript from your guilty plea hearing under Cause No. 02-D04-0912-FA-000077. You further allege that the Prosecutor has denied you access to evidence and discovery in the referenced criminal matter.

On October 19, 2011, Mr. McClamrock responded in writing to your records request. Mr. McClamrock advised that the prosecutor did not have a copy of your guilty plea transcript and believed that a written transcript had never been created of the hearing. Your request for "discovery" and "evidence of the case" failed to identify with reasonable particularity any records that the Prosecutor possessed, as required under the APRA. Mr. McClamrock advised that some of the materials provided to your attorney during the discovery phase of the original proceeding would likely be considered an investigatory records of a law enforcement agency, which would allow the Prosecutor discretion to disclose pursuant to I.C. § 5-14-3-4(b)(1). In addition, certain evidentiary materials the Prosecutor could not legally be returned to you (i.e. narcotics). Mr. McClamrock stated that the attorney that represented you in the matter while it was pending before the trial court should have copies of all records disclosed to you during the discovery process. If the attorney is reluctant to provide them, it is possible for you to file a motion to compel the attorney to produce them.

In response to your formal complaint, Mr. McClamrock reiterated the Prosecutor's reasoning in denying your request that had been provided in its response to your original records request.

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." *See* I.C. § 5-14-3-1. The Prosecutor is a public agency for the purposes of the APRA. *See* 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. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, the Prosecutor responded to your request within the timelines provided by section 9 of the APRA.

Generally, if a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. "[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA." *Opinion of the Public Access Counselor 01-FC-61*; *see also Opinion of the Public Access Counselor 08-FC-113* ("If the records do not exist, certainly the [agency] could not be required to produce a copy..."). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. *See Opinion of the Public Access Counselor 10-FC-56*. The Prosecutor has provided that it does not have a copy of the transcript of the guilty plea hearing, nor does it believe a copy of the transcript has ever been created. As such, it is my opinion that it did not violate the APRA in response to your request for a copy of the transcript of your guilty plea hearing.

The APRA requires that a records request "identify with reasonable particularity the record being requested." I.C. § 5-14-3-3(a)(1). "Reasonable particularity" is not defined in the APRA, but the public access counselor has repeatedly opined that "when a public agency cannot ascertain what records a requester is seeking, the request likely has

not been made with reasonable particularity.” *Ops. of the Public Access Counselor 10-FC-57; 08-FC-176*. However, because the public policy of the APRA favors disclosure and the burden of proof for nondisclosure is placed on the public agency, if an agency needs clarification of a request, the agency should contact the requester for more information rather than simply denying the request. *See generally* IC 5-14-3-1; *Opinion of the Public Access Counselor 02-FC-13*.

Here, you specifically requested “discovery” and “evidence of the case” in your request of the Prosecutor. The Prosecutor denied your request due to it failed to identify the records requested with reasonable particularity. The Prosecutor responded to your request in writing, attempted to clarify the request, identified possible issues that would allow or prevent the Prosecutor from producing certain records in response to a more particularized request, and provided an alternative means of securing records that would possibly be responsive to your request. As such, it is my opinion that the Prosecutor did not violate the APRA.

If or when you submit a more particularized request to the Prosecutor, the investigatory records exception to the APRA provides that a law enforcement agency has the discretion to disclose or not disclose its investigatory records. An investigatory record is “information compiled in the course of the investigation of a crime.” *See* I.C. § 5-14-3-2(h). The investigatory records exception does not apply only to records of ongoing or current investigations; rather, it applies regardless of whether a crime was charged or even committed. The exception applies to all records compiled during the course of the investigation, 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.* To the extent that you make a records request of the Prosecutor that would be considered an investigatory record of a law enforcement agency, the Prosecutor would have discretion to grant or deny your request pursuant to I.C. § 5-14-3-4(b)(1).

CONCLUSION

For the foregoing reasons, it is my opinion that the Prosecutor did not violate the APRA.

Best regards,



Joseph B. Hoage
Public Access Counselor

cc: David McClamrock

