



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

October 12, 2011

Tri-Force, Inc.
Attention: Shana Penn
55850 Currant Road
Mishawaka, Indiana 46545

Re: Formal Complaint 11-FC-233; Alleged Violation of the Access to Public Records Act by the Elkhart County Prosecuting Attorney

Dear Ms. Penn:

This amended advisory opinion is in response to your formal complaint alleging that the Elkhart County Prosecuting Attorney (“Prosecutor”) violated the Access to Public Records Act (“APRA”), Ind. Code § 5-14-3-1 *et seq.* Vicki Elaine Becker responded on behalf of the Prosecutor. Her response is enclosed for your reference.¹

BACKGROUND

In your formal complaint, you allege that on September 2, 2011, you submitted a written request to the Prosecutor for all records relating to the investigation, trial, conviction, and sentencing of your client, Jose Mendoza, pursuant to Cause No. 20-C01-0406-FA-00083 and Case Number 3:2004-CR-00083. The request would include all investigative reports, witness statements, audio/video records, photographs, depositions, and evidence introduced at Mr. Mendoza’s trial that were either admitted or judicially excluded.

On September 7, 2011, Ms. Becker responded to your request and advised that the your request was denied pursuant to I.C. § 5-14-3-4(b)(1) and (b)(2), as all records that were requested were collected in anticipation of litigation and are “comprised, primarily, of law enforcement investigative records.”

In response to your formal complaint, Ms. Becker advised that the records you sought are either investigatory records of a law enforcement agency or prosecutor “work

¹ Due to a miscommunication error on my part, we did not receive the Prosecutor’s response to your formal complaint until October 12, 2011.

product”. As such, the Prosecutor has exercised its discretion provided to it under I.C. § 5-14-3-4(b)(1) and (b)(2) and denied your 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 seven (7) day time-frame as required by the APRA.

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.* As such, to the extent that the records you requested were investigatory records of a law enforcement agency, the Prosecutor did not violate the APRA by exercising its discretion and denying your request pursuant to I.C. § 5-14-3-4(b)(1).

Furthermore, I.C. §5-14-3-4(b)(2) provides that a public agency has discretion to withhold a record that is the work product of an attorney representing, pursuant to state employment or an appointment by a public agency: a public agency; the state; or an individual.

“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.

I.C. § 5-14-3-2(q).

Accordingly, in addition to the discretion provided to the Prosecutor pursuant to the investigatory records of a law enforcement agency exception cited in I.C. § 5-14-3-4(b)(1), the Prosecutor acted within the requirements of the APRA by citing to I.C. § 5-14-3-4(b)(2) and I.C. § 5-14-3-2(q) in denying your request for records that would be considered “work product of an attorney.”

CONCLUSION

For the foregoing reasons, it is my opinion that the Prosecutor has not violated the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

Joseph B. Hoage
Public Access Counselor

cc: Vicki Elaine Becker