

October 18, 2004

Mr. Chester Lee Wilms Jr., #943594
Wabash Valley Correctional Facility
P.O. Box 1111
Carlisle, IN 47838

Re: Formal Complaint 04-FC-168; Alleged Violation of the Access to Public Records Act by the Allen County Prosecutor's Office

Dear Mr. Wilms:

This is in response to your formal complaint alleging that the Allen County Prosecutor's Office ("Prosecutor's Office") violated the Access to Public Records Act ("APRA") by denying you access to public records. I find that the Allen County Prosecutor's Office did not violate the Access to Public Records Act.

BACKGROUND

According to your complaint and the attachments provided, on September 3rd and September 4th you requested a copy of a sworn statement made by Detective Miguel Rivera regarding your arrest. On September 13, Mr. David McClamrock, Deputy Prosecuting Attorney, responded, stating that the record you sought is an investigative record of a law enforcement agency, and therefore is not required to be disclosed to you under the Access to Public Records Act. Mr. McClamrock alleges that you are trying to use the procedures of the APRA to act as a substitute for post-conviction discovery procedures, which, he alleges, you are not entitled to do.

You filed a formal complaint, which was received by this office on September 17th. I forwarded a copy of your complaint to the Prosecutor's Office, and Mr. McClamrock responded. I have enclosed a copy of his response for your reference.

Mr. McClamrock states if the record you requested exists, it falls into the category of "investigatory records of law enforcement agencies," which are excepted from disclosure. He also states that the Fort Wayne Police Department, not the Prosecutor's Office, is the keeper of any such written statement. Finally, Mr. McClamrock states that if such a written statement

exists, then it was available to you in pretrial discovery, and you would not be entitled to a second opportunity to obtain it even if you were legitimately pursuing post-conviction relief.

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." Ind. Code §5-14-3-1. The Prosecutor's Office is a public agency for the purposes of the APRA. IC 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Prosecutor's Office during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under IC 5-14-3-4. IC 5-14-3-3(a).

Mr. McClamrock's letter to you indicates that a written statement by Detective Rivera is an investigatory record, which Mr. McClamrock's agency declines to disclose. One of the exceptions to disclosure, IC 5-14-3-4(b)(1), provides that a law enforcement agency has discretion over whether or not to disclose its investigatory records. Investigatory records are defined as 'information compiled in the course of the investigation of a crime.' IC 5-14-3-2. A crime is defined as a misdemeanor or a felony. IC 35-41-1-6. The Prosecutor's Office, as a law enforcement agency, has discretion over the disclosure of investigatory records, and may either disclose or not disclose these public records in response to a public records request under the APRA.

The burden of proof for non-disclosure of a record is placed on the public agency denying access, and not on the person seeking to inspect and copy the record. IC 5-14-3-1. Therefore, the Prosecutor's Office has the burden of proving that the record requested is an investigatory record. Your request indicates that the records you seek are the statements of a police detective regarding a confidential informant involved in your arrest. It is my opinion that such statements are investigatory records, and can be withheld from you at the discretion of the agency.

I note that Mr. McClamrock's response also indicates that the Fort Wayne Police Department would be the keeper of the record you request. Although the Fort Wayne Police Department may also have the information that you seek, if that record is a public record of the Prosecutor's Office, and is not confidential or otherwise nondisclosable, it is the duty of the Prosecutor's Office to provide access to that record.

Finally, Mr. McClamrock's response to your request and your complaint states that if the written statement exists, it was available to you in pretrial discovery and you are not entitled to a second opportunity to obtain it, even if you were legitimately pursuing post-conviction relief. Mr. McClamrock's response objects to your use of the Access to Public Records Act. This objection is without merit as any person can exercise the rights set out in the APRA.

In *Opinion of the Public Access Counselor 02-FC-38*, the City of Carmel denied a request for access to public records because the City believed the request was an attempt to by-pass the proper discovery procedures set forth in the Trial Rules. This office did not find any language in the Trial Rules that would prohibit a party in litigation from making a public record request

under APRA. In fact, you may use the APRA even if you are using post conviction relief procedures. However, because the Prosecutor's Office has cited to one valid reason for non-disclosure, it did not violate the APRA.

CONCLUSION

For the foregoing reasons, I find that Allen County Prosecutor's Office did not violate the Access to Public Records Act.

Sincerely,

Karen Davis
Public Access Counselor

cc: Mr. David McClamrock