



STATE OF INDIANA

MICHAEL R. PENCE, Governor

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September 8, 2015

Mr. Anthony Baize
P.O. Box 4828
Frankfort, KY 40604

Re: Formal Complaint 15-FC-219; Alleged Violation of the Access to Public Records Act by the Floyd County Prosecutor's Office

Dear Mr. Baize,

This advisory opinion is in response to your formal complaint alleging the Floyd County Prosecutor's Office ("Office") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The Office has responded to your complaint via Mr. Steven L. Owen, Esq. . His response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on July 31, 2015.

BACKGROUND

You submitted a written request for records to the Floyd County Prosecutor's Office on July 24. You requested records regarding the investigation of Charles D. Boney in February and March 2005. On July 31, you received a written denial for access to the records from Steven Owen, Chief Deputy Prosecuting Attorney. Mr. Owen contended the denial was due to the requested items being part of an investigation involving ongoing cases involving the State of Indiana or its employees, and because some of the items requested are work product.

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



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Under § 5-14-3-4(b)(1), APRA requests can be denied if the items requested are part of an investigation involving ongoing criminal investigation. This Office has held on several occasions that Prosecutors are considered part of law enforcement and therefore the investigatory exemption can apply.

Furthermore, under § 5-14-3-4(b)(2), APRA requests can be denied if the requested items are work product. The Chief Deputy Prosecuting Attorney has stated both of these reasons for the APRA denial.

However this Office has held on that records filed with the court lose their protected status.

To the extent information is filed with the Court, it ceases to be investigatory and becomes part of the Court's file. Everything in the Court file, unless inherently confidential or sealed by a judge, is available to be inspected. Any work product or other material compiled in the course of bringing the case to trial is investigatory records as the Prosecutor is germane to the law enforcement process.

See Opinion of the Public Access Counselor 15-FC-65.

Therefore, those records that have been filed with the court are no longer considered protected under the APRA.

Similarly, I encourage all law enforcement agencies to be judicious when withholding investigatory information from the public. If the records would compromise the integrity of an open investigation or harm public safety or an expectation of privacy, the files should be withheld. If the case is closed and there is no danger in jeopardizing any public safety element, it should be disclosed.

I do take exception with two arguments raised by the Prosecutor. The first is the assertion that the records you seek are not "public records". Ind. Code § 5-14-3-2(o) makes it abundantly clear that anything received, maintained or created by a public agency is a public record. It just may not necessarily be a *disclosable* public record.

Secondly, there is no exception for records which may compromise the outcome of a civil lawsuit. Regardless of whether a suit has been brought by a litigant, a public record



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should be disclosed if would not compromise a criminal investigation or an element of public safety.

The investigatory record exemption is extensive and indefinite. Law enforcement has the discretion to withhold a record regardless of its status as an open or closed case. I respectfully request, however, that the discretion be used judiciously and not arbitrarily or over-broadly.

CONCLUSION

Based on the foregoing, it is the Opinion of the Public Access Counselor that the Floyd County Prosecutor's Office has not violated the Access to Public Records Act.

Regards,

A handwritten signature in black ink, appearing to read "LHBRITT".

Luke H. Britt
Public Access Counselor

Cc: Steven L. Owen, Esq.