

December 12, 2005

Mr. Curtis L. Jackson  
#973802  
Indiana Department of Correction  
Indiana State Prison  
P.O. Box 41  
Michigan City, IN 46361-0041

*Re: Formal Complaint 05-FC-235; Alleged Violation of the Access to Public Records Act by the Vanderburgh County Prosecutor's Office*

Dear Mr. Jackson:

This is in response to your formal complaint alleging that the Vanderburgh County Prosecutor's Office ("Prosecutor") violated the Access to Public Records Act by failing to respond to your request for the discovery in your criminal case. I find that the Prosecutor failed to respond to your request.

#### BACKGROUND

You filed a formal complaint with the Office of the Public Access Counselor on November 14, 2005. You state that you mailed a request for copies of the state's complete discovery in regards to Cause No. 82C01-9811-CF-1122 on October 21, 2005. As of the date of your complaint, you had not received a response.

The Prosecutor responded to your complaint by letter dated November 21, 2005. I have enclosed a copy of the response for your reference. Deputy Prosecuting Attorney Anna DeVoy Clutter informed me that prior to filing your petition for post-conviction relief, you had sent her office a letter dated October 21, requesting "a complete copy of the discovery" in regards to your criminal sentencing matter. All information contained in the Prosecutor's file that is public record has already been sent to you. The discovery documents you are seeking are "arguably not available for public access." However, she states that the issue is moot because your file has

been sent to your public defender. The public defender will “conduct the appropriate discovery to obtain the information he or she will need to proceed with post-conviction relief.”

## ANALYSIS

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the Access to Public Records Act (“APRA”). Ind. Code 5-14-3-3(a). A request for inspection or copying must identify with reasonable particularity the record being requested. IC 5-14-3-3(a)(1). A public agency that receives a written request for records via U.S. Mail must respond to the request within seven days of the request. IC 5-14-3-9(b). If the request is denied, the public agency must deny the request in writing, and cite the specific exemption or exemptions authorizing the withholding of all or part of the public record, and the name and title or position of the person responsible for the denial. IC 5-14-3-9(c). The APRA is an independent means by which even a litigant may receive a public record from a public agency.

The Prosecutor is a public agency and a law enforcement agency. IC 5-14-3-2(1)(6). Investigatory records of law enforcement agencies may be withheld from disclosure, in the public agency’s discretion. IC 5-14-3-4(b)(1).

The Prosecutor’s response to your complaint appears to be that in the course of the proceedings both before and after you filed your petition for post-conviction relief, you or your public defender received all the public records that the Prosecutor had in its file regarding your case. Further, the Prosecutor will conduct discovery going forward on your post-conviction petition. The discovery documents you seek are “arguably” not available for public access, contends the Prosecutor.

The Prosecutor did not respond to your request within seven days, as required by the APRA. The Prosecutor did send the State Public Defender’s Office a November 14 letter in response to your October 21 request, with a copy to you. However, it did not respond by stating any exemption that would apply to your request, nor did it seek clarity with respect to the records that you were seeking. The Prosecutor violated the APRA with respect to the tardy and unresponsive letter regarding your APRA request for a record.

However, I note that your request for “a copy of the state’s discovery that was obtained in regards to” your cause, is not reasonably particular, in my opinion. Because you framed your request for a record in terms of a legal process in which both parties request and receive documents and other items under formal rules, your request was vague. It would be difficult to sort out whether you were seeking records that were compiled by the Prosecutor during the criminal investigation, or whether you sought documents obtained by the Prosecutor following a formal discovery process, or both. It was incumbent on the Prosecutor, as a public agency, to write you within seven days to seek clarification. In any event, the Prosecutor avers that it sent you everything in its file that is a matter of public record. Of course, this declaration is of little assistance to me in determining whether the Prosecutor had sent you all the records to which you are entitled, because all records maintained by a public agency are “public records.” *See* IC 5-14-3-2(m). However, I note that if the Prosecutor contends that some of the records in its file are

investigatory records of law enforcement, those records, if compiled in the course of the criminal investigation, could be withheld under IC 5-14-3-4(b)(1). *See* IC 5-14-3-2(h). Hence, a valid response to your October 21 request would have been a letter to you denying the Prosecutor's investigatory records under IC 5-14-3-4(b)(1), and seeking clarification of your request or more specificity. If the Prosecutor's contention is that the Public Defender's Office will be able to get any records you are requesting via formal discovery in the post-conviction relief proceeding, I write to caution the Prosecutor that you would be entitled to a non-exempt record or records under the APRA, in spite of your representation by counsel.

Finally, it does appear that some records have been sent to your legal representative. To the extent that you have already received some of the records you requested, the Prosecutor is under no obligation to supply you with additional copies of the same records. *See* IC 5-14-3-8(e).

### CONCLUSION

For the foregoing reasons, I find that the Prosecutor did not timely and adequately respond to your request for records, in violation of the Access to Public Records Act.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Anna DeVoy Clutter