



STATE OF INDIANA

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April 11, 2011

Mr. Christopher J. Stephens
1413 ½ Prairie Street
Elkhart, IN 46516

Re: Formal Complaint 11-FC-66; Alleged Violation of the Access to Public Records Act by the Elkhart County Prosecutor's Office

Dear Mr. Stephens:

This advisory opinion is in response to your formal complaint alleging the Elkhart County Prosecutor's Office (the "Prosecutor") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-3 et seq. The Prosecutor's response to your complaint is enclosed for your reference.

BACKGROUND

In your complaint, you allege that on February 28, 2011, the Deputy Prosecuting Attorney Bruce Wells denied your request for access to several forms attached to a civil case in which you are a party. Specifically, you sought access to an application for Title IV-D child support services, which was submitted on State Form 34882; a paternity questionnaire completed and signed by Jessica Sluss, the mother of the relevant child; and a Title IV-D Notice and Waiver, which are also signed by Ms. Sluss. You argue that these are public records and the Prosecutor has no legal basis for withholding them.

In response to your complaint, Mr. Wells states that the forms constitute nondisclosable attorney work product or confidential records under federal and state laws. He states that the records that you requested here are created when the Prosecutor opens a child support case. The records are used by the Prosecutor to determine who the parties are, who the children are, the locations of the parties, paternity, and what type of petition must be filed to enforce child support provisions of federal and state laws. As such, the records are compiled in anticipation of litigation and are attorney work product. Moreover, Mr. Wells cites to Indiana and federal law, which limits the disclosure of documents in a Title IV-D Child Support agency file. Specifically, 456 Ind. Admin. Code 12-13-5-3 provides, "No individually identifiable information secured from an applicant or recipient of parent locator and child support services by the division of family and children shall be disclosed or released, except as permitted under 42 U.S.C. §

651 *et seq.* . . .” The latter code section states that a “state plan for child and spousal support must . . . have in effect safeguards, applicable to all confidential information handled by the State agency, that are designed to protect the privacy rights of all the parties, including – (A) safeguards against unauthorized use or disclosure of information relating to the proceedings or actions to establish paternity, or to establish, modify or enforce support, or to make or enforce a child custody determination. . . .” *Id.*

ANALYSIS

The public policy of the APRA states, “[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.” I.C. § 5-14-3-1. The Prosecutor does not dispute that it is a “public agency” under the APRA. 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 public records are excepted from disclosure as nondisclosable under the APRA. I.C. § 5-14-3-3(a).

State statute does declare some Title IV-D information confidential, as well as providing a statutory requirement to follow federal regulations regarding such information. I.C. § 12-17-2-24 provides that:

- (A) The bureau shall observe all possible safeguards for information obtained by the bureau with the minimum standard for the safeguards to be the federal regulations governing the safeguarding of information under this program.
- (B) The bureau or the prosecuting attorney may not disclose information obtained through the parent locator service, except to the extent necessary to fulfill a duty under this chapter.

I.C. § 12-17-2-24. The Prosecutor cites to 42 USCS § 654, which provides that a state plan for child and spousal support must have in effect safeguards, applicable to all confidential information handled by the State agency, that are designed to protect the privacy rights of the parties. This section requires the plan to include, in part:

- (A) safeguards against unauthorized use or disclosure of information relating to proceedings or actions to establish paternity, or to establish, modify, or enforce support, or to make or enforce a child custody determination;
- (B) prohibitions against the release of information on the whereabouts of 1 party or the child to another party against whom a protective order with respect to the former party or the child has been entered;
- (C) prohibitions against the release of information on the whereabouts of 1 party or the child to another person if the State has reason to believe that the release of the information to that person may result in physical or emotional harm to the party or the child . . .

42 U.S.C. § 654(26). In short, this section provides that information regarding paternity proceedings, support proceedings, or child custody proceedings may only be disclosed in authorized instances. Authorized persons would include the resident parent, legal

guardian, attorney, or agent of a child. 42 U.S.C. § 653(c)(3). The statute does not state whether there are any circumstances under which the information would be provided to persons who are not authorized persons; it merely requires disclosure to authorized persons. I also note that the privacy statement on State Form 34882 reads, "The records in this series are confidential according to Indiana Department of Child Services 42 USC 653, 42 USC 654, and 42 USC 663. Therefore, pursuant to these provisions, it is my opinion that the Prosecutor may not release either the Title IV Child Support application or the Title IV-D Notice and Waiver.

As to the paternity questionnaire, Mr. Wells states that it is attorney work product under I.C. § 5-14-3-4(b)(2), which exempts from disclosure the "work product of an attorney representing, pursuant to state employment or an appointment by a public agency: (A) a public agency; (B) the state; or (C) an individual." "Work product of an attorney" is defined in the APRA as

information compiled by an attorney in reasonable anticipation of litigation. The term 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). Mr. Wells states that the questionnaire is a record that is compiled when the Prosecutor or a deputy prosecuting attorney opens a child support case, and it is prepared in anticipation of child support-related litigation. As such, it is my opinion that the Prosecutor did not violate the APRA by choosing to exercise its discretion to withhold it.

Finally, while I appreciate your statement that you desire access to these records because they are "attached to a civil case in which [you] are a party," that does not change the application of the APRA. If you are a party in a civil case, the rules of discovery would likely afford you greater access to these records than the APRA. However, the application of such discovery rules is within the purview of the court hearing your case rather than this office.

CONCLUSION

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

Best regards,



Andrew J. Kossack
Public Access Counselor

cc: Bruce Wells