



STATE OF INDIANA

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March 12, 2014

Mr. CaNon Harper #211235
Wabash Correctional Facility
6908 S. Old U.S. Hwy. 41
Carlisle, IN 47838

Re: Formal Complaint 14-FC-30; Alleged Violation of the Access to Public Records Act by the Fourth Judicial Circuit Prosecuting Attorney

Dear Mr. Harper,

This advisory opinion is in response to your formal complaint alleging the Office of the Prosecuting Attorney, Fourth Judicial Circuit ("Prosecutor") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The Prosecutor has responded via Mr. Carl C. Frazier, Esq., Deputy Prosecutor. 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 February 11, 2014.

BACKGROUND

Your complaint dated February 11, 2014, alleges the Office of the Prosecuting Attorney, Fourth Judicial Circuit violated the Access to Public Records Act by not providing records responsive to your request in violation of Ind. Code § 5-14-3-3(b).

On February 11, 2014, the Hon. Daniel E. Moore, Judge, Clark Circuit Court 1, issued an Order denying your request for public records and determining they are not subject to disclosure based upon the investigatory records exception as asserted by the Prosecutor.¹ Specifically, you requested:

A copy of the Clark County Sheriff's Office Consent to Search Form signed by the Bel-Air Motel manager, Mark Arnold in relation to Cause No. 10D02-0811-FA-378. Also a copy of the entire transcript of proceedings taken in the suppression hearing held on May 6, 2009 in

¹ See Order and State's Response, Harper v. State, 10C01-1306-PC-000010.

relation to Cause No. 10D02-0811-FA-378 and 10D02-0811-FA-379 and a copy of the dash cam video of the traffic stop that led to Cause no. 10D02-0811-FA-378

The Prosecutor responded to your request by filing a brief in 10D02-0811-FA-378 stating the records were investigatory in nature and therefore their release is discretionary under Ind. Code § 5-14-3-4(b). It is unclear why the request was taken into consideration by the Judge and similarly why you did not make the request during the criminal discovery process.

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 Office of the Prosecuting Attorney, Fourth Judicial Circuit 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 Prosecutor’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).

A request for records may be oral or written. See Ind. Code § 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 Ind. Code § 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 Ind. Code § 5-14-3-9(b). A response from the public agency could be an acknowledgement the request has been received and information regarding how or when the agency intends to comply.

In Opinion of the Public Access Counselor 14-FC-07, I opined I could not issue an Advisory Opinion based on Ind. Code § 5-14-4-10(6) (the Public Access Counselor may not issue an advisory opinion concerning a specific matter with respect to which a lawsuit has been filed under IC 5-14-1.5 or IC 5-14-3). In that case, however, the litigant had incorporated his request under the civil cause number in the form of a Verified Praecipe and Notice of Lawsuit. In the present case, you simply made a public records request outside the Court’s purview.

Because the Circuit Court Judge has adjudicated the issue, I cannot determine a violation on the part of the Prosecutor. The Prosecutors actions were taken pursuant to a legitimate court order. What troubles me is how the APRA request was incorporated into the litigation. With deference to the Hon. Judge Moore and Deputy Prosecutor Frazier, I respectfully disagree with the decision to make it part of the proceedings.

Substantively, I agree with the Court and the Prosecutor in determining the Consent to Search Form and the dash cam are investigatory records and not subject to a public records request. I cannot, however, come to the same conclusion in regard to the

transcript of the suppression hearing. Unless the court records are sealed under Ind. Code § 5-14-3-5.5, judicial records must be disclosed upon request.

For this reason, with all due courtesy to Judge Moore, I submit the Court erred in its determination your Access to Public Records Act request be incorporated into ongoing criminal litigation and also by denying your request for the transcript of the suppression hearing. Although discovery matters are outside the scope of my purview, I respectfully encourage the Judge to reconsider on the matter of the suppression hearing.

Regards,

A handwritten signature in black ink, appearing to read 'LH Britt', with a long, sweeping underline.

Luke H. Britt
Public Access Counselor

Cc: Mr. Carl C. Frazier, Esq.