

February 21, 2007

Mr. Amir Sanjari
P.O. Box 789
Andover, MA 01810

Re: Formal Complaint 07-FC-16; Alleged Violation of the Access to Public Records Act by the Elkhart County Prosecutor

Dear Mr. Sanjari:

This is in response to your formal complaint alleging that the Elkhart County Prosecutor (“Prosecutor”) violated the Access to Public Records Act (APRA), the Privacy Act, and the Freedom of Information Act (“FOIA”). I find that the Prosecutor did not violate the APRA, and that the Prosecutor is not subject to the Privacy Act or the FOIA.

BACKGROUND

Your formal complaints are in two parts. First, you filed on January 22, 2007 a complaint that challenged the response of the Prosecutor to your December 12, 2006 and December 21, 2006 records requests. You claim that the Prosecutor’s responses were a denial of your rights under the APRA, the Privacy Act, and the FOIA. I will call this *Part I* of your complaint.

Next, during the pendency of this complaint, you filed another complaint alleging that the Prosecutor failed to respond at all to a new request for records that you faxed to the Prosecutor on February 2, 2007. For that complaint, you sought expedited treatment, and alleged circumstances for which I would be required to issue an opinion within seven days. I have designated that part of your complaint as *Part II* and consolidate the two complaints for purposes of this Advisory Opinion, 07-FC-16. Hence, this Opinion is issued within seven days from the filing of your second complaint.

Your request for *Part I* is available at this link [07-FC-16 Part I](#). The request for *Part II* is available at this link [07-FC-16 Part II](#).

I sent the Prosecutor a copy of both *Parts* of your complaint. The Prosecutor has submitted a response to each complaint, a copy of which is enclosed. For *Part I*, the Prosecutor contends that its response to you was consistent with the Access to Public Records Act. The response indicated that the records concerning its intervention in the named court case were protected by the exemption for work product of an attorney, and gave the citation for the exemption. In addition, the Prosecutor requested that you make your other requests more specific. The Prosecutor's response itemized each request and specified its response to each request.

In response to *Part II* of your complaint, the Prosecutor sent me a copy of his response dated February 3, 2007. The Prosecutor mailed the response to you at your address in Andover, Massachusetts. The Prosecutor contends that *Part II* of your complaint is without merit since you contend that the Prosecutor failed to respond at all. The response to your request is similar to the response to *Part I*, in that it raised the need to make your request more specific.

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). The Prosecutor is a public agency for purposes of the APRA. IC 5-14-3-2(l)(1).¹ "Public record" means any material that is "created, received, retained, maintained, or filed by or with a public agency." IC 5-14-3-2(m). If a public agency receives a request for a record in person or by telephone, the public agency is required to respond within 24 hours or the record is deemed denied. IC 5-14-3-9(a). If the public agency receives a request for a record via U.S. Mail or facsimile, the public agency is required to respond within seven calendar days, or the request is deemed denied. IC 5-14-3-9(b). However, a response is not necessarily production of the records. Rather, records should be produced within a reasonable time. What is reasonable depends on the facts and circumstances. The number of responsive records and the nature of the requests in terms of their scope are relevant to the inquiry of what is a reasonable time.

If a request is made orally, either in person or by telephone, a public agency may deny the request orally. However, if a request initially is made in writing, by facsimile, or through

¹ You claim that other laws provide you the right to the records of the Prosecutor. Specifically, you cite the Freedom of Information Act and the Privacy Act as laws under which the Prosecutor is required to provide the records. However, you cite no legal authority for this bare claim of right. State and local government agencies are not covered by the Privacy Act. Dittman v. California, 191 F.3d 1020, 1026, 1029 (9th Cir. 1999); An exception to this rule, however, is the social security number usage restrictions, contained in section 7 of the Privacy Act, which do apply to federal, state, and local government agencies. (section 7, part of Pub. L. No. 93-579, can be found at 5 U.S.C. § 552a note (Disclosure of Social Security Number)). Your request is not covered by this narrow exception because you do not request social security numbers.

In addition, neither FOIA nor the Privacy Act apply to a state official. McClain v. United States Dep't of Justice, No. 97-C-0385, 1999 WL 759505, at *2 (N.D. Ill. Sept. 1, 1999) (dismissing FOIA claims against state attorney general because "[p]laintiff may assert Privacy Act and Freedom of Information Act claims against . . . federal defendants only"), aff'd, 17 Fed. Appx. 471 (7th Cir. 2001).

enhanced access, or if an oral request that has been denied is renewed in writing or by facsimile, a public agency may deny the request if the denial is in writing or by facsimile, and the denial includes:

(A) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and

(B) the name and the title or position of the person responsible for the denial. IC 5-14-3-9(c).

A request must identify the record with reasonable particularity. IC 5-14-3-3(a)(1). If a person requests a record that does not exist, the public agency has not denied the record merely because it refuses to compile or create the record in response to a request for the information. This is because the APRA requires only that a public agency allow inspection and copying of its "public records" which by definition are those that are "created, received, retained, maintained, or filed by or with" a public agency. See IC 5-14-3-2(m).

Part I

Your complaint stated that the Prosecutor refused to provide the records to you. It is difficult to discern the crux of your complaint because you do not cite anything in particular about the Prosecutor's response that you believe is insufficient under the APRA. Due to such non-specificity, I can surmise only that you believe that your request was sufficiently specific to permit the Prosecutor to copy all responsive records and mail them to you.

I have reviewed your request and the Prosecutor's response, and find nothing lacking in the response to you. For the same reasons cited in the *Opinion of the Public Access Counselor 07-FC-13* I find that the response of the Prosecutor citing the need for more specificity did not violate the Access to Public Records Act.

There is nothing in the APRA that mandates that a public agency provide the copies of its public records via mail to a requester. Public agencies often do provide records in this way, which demonstrates the public agencies' good faith effort to provide records when personal inspection is difficult. However, as with your request, a request that is not reasonably particular would make it difficult, if not impossible, for the Prosecutor to locate, copy, and mail to you all responsive documents.

In addition, the Prosecutor may except in his discretion records that are:

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.

IC 5-14-3-4(b)(2).

"Work product of an attorney" means 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.

IC 5-14-3-2(p).

The Prosecutor bears the burden of showing that the information concerning his intervention in the court case falls within the exception for attorney work product. IC 5-14-3-1. However, I find nothing on the surface to indicate that the Prosecutor has not properly claimed this exemption, and you raise no specific challenge to the Prosecutor's exempting your requests #1 and #2.

You have demonstrated no violation of the Access to Public Records Act in this part of your complaint.

Part II

You allege that the Prosecutor did not respond at all to your February 2 request for records. This part of your complaint was filed on February 15. The Prosecutor provided me with a copy of the response dated February 3. I have attached a copy of the letter from Deputy Prosecutor Bruce Wells, in the event that you have never received the letter. As your complaint asserts non-response as the sole basis, I can state that your complaint is without merit. The Prosecutor did send out a response well within the seven days required to respond. *See* IC 5-14-3-9(b).

I note as well that the response of the Prosecutor requests more specificity. Your request of February 2 to the Prosecutor is identical to that of the Attorney General in *Part II* of the complaint 07-FC-13. I direct you to the discussion under *Part II* of the *Opinion of the Public Access Counselor 07-FC-13* for the rationale for my finding that the Prosecutor correctly requested that you be more specific in your requests.

I recommend that you determine whether you can make your request more specific or particular, or can narrow the scope of the requests in any way. If you do not agree with this Advisory Opinion, I hasten to inform you that no appeal lies from this purely advisory opinion. Rather, your recourse is to seek a ruling from an Indiana court compelling the Prosecutor to disclose the records. *See* IC 5-14-3-9(e). If you are a prevailing plaintiff, the law would allow your attorney fees, court costs, and reasonable expenses of litigation. If the defendant prevails and the court finds the action frivolous or vexatious, the court could award attorney fees, court costs, and reasonable expenses of litigation to the defendant. IC 5-14-3-9(i).

CONCLUSION

For the foregoing reasons, I find that the Elkhart County Prosecutor has not violated the Access to Public Records Act.

Sincerely,

Karen Davis
Public Access Counselor

cc: Bruce Wells