

March 10, 2000

Mr. John D. Bernston
52830 CR 131
Bristol, IN 46507

Re: Advisory Opinion 00-FC- *Denial of Access to Attorney-Client Communication by the Noble*
7 *County Prosecuting Attorney.*

Dear Mr. Bernston:

This is in response to your formal complaint, which was received on February 24, 2000. You have alleged that the Noble County Prosecuting Attorney, Steven Clouse, has violated the Indiana Access to Public Records Act ("APRA,") Indiana Code chapter 5-14-3, by failing to respond to your request for access to any written correspondence he may have sent to the Indiana Attorney General seeking legal advice. Mr. Clouse responded to your complaint in a letter dated March 10, 2000. A copy of his response is enclosed for your reference. It is my opinion that Mr. Clouse should have responded to your request within the time frames set forth in the APRA and the failure to do so constituted a denial. Any written communications of the prosecuting attorney to the Attorney General seeking legal advice, however, are confidential by state statute and Mr. Clouse would not be required to disclose them to you.

BACKGROUND

According to your complaint, you made three requests between the dates of December 30, 1999 and January 23, 2000 to Mr. Clouse for a copy of any correspondence he had written to the Indiana Attorney General requesting an opinion on an issue.¹ You filed your formal complaint on February 24, 2000 because Mr. Clouse had not responded to your requests. In his response to your complaint, Mr. Clouse stated that he would not share any correspondence between himself and the Attorney General as this type of communication is privileged.

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." Ind. Code § 5-14-3-1. The Office of the Prosecuting Attorney is clearly a public agency for the purposes of the APRA. Ind. Code § 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Office during regular business hours unless the public records are excepted from disclosure as confidential or otherwise

nondisclosable under Indiana Code section 5-14-3-4. Ind. Code § 5-14-3-3(a).

Failure to Respond within Time Period under APRA

It is the responsibility of the public agency to respond to requests for public records within a specified time period. The APRA does not set any time periods for producing public records, merely for responding to the request. While this response has not been defined under the APRA, what is contemplated is a communication to the requestor. For example, a public agency may respond that the request has been received, whether there are any records that will be produced that the records requested are confidential or otherwise nondisclosable, or that the public agency needs more time to compile the records requested. A response may also provide the records requested, or notify the requestor that the public records requested are available for his or her inspection.

A public agency is required to make a response to an oral request or a request made in person within twenty-four (24 hours) after it is received. If a written request was mailed or sent via facsimile, the response must be made within seven (7) days after it is received. The failure to respond within these time periods constitutes a denial under the APRA. Ind. Code § 5-14-3-9(b). Once a denial has occurred under the APRA, a person may file suit in the circuit or superior court in which the denial took place to compel the public agency to disclose the public records requested. Ind. Code § 5-14-3-9(d).

Under the facts presented, you did not state how your request was made, but it is clear that Mr. Clouse did not respond within either twenty-four (24) hours or seven (7) days of your requests. It is my opinion that this was a failure to respond in a timely manner that constituted a denial under the APRA that is actionable under Indiana Code section 5-14-3-9(d).

Attorney-Client Communications

While Mr. Clouse clearly did not respond to your requests in a timely manner under the APRA, the next issue is whether the public record in question is required to be disclosed by the public agency. Under Indiana Code section 5-14-3-4(a), there are a number of exceptions to disclosure for public records that are classified as confidential and these records may only be released when required by some state or federal statute or if ordered by a court under the rules of discovery.

One category of confidential public records is those declared confidential by state statute. Under Indiana Code section 34-46-3-1, a statutory privilege between an attorney and the client is recognized. The Indiana Attorney General is required to "consult with and advise the several prosecuting attorneys of the state in relation to the duties of their office." Ind. Code §4-6-1-6. Also, the Attorney General serves as legal counsel to prosecuting attorneys when they are sued in civil courts. Ind. Code §33-2.1-9-1. There is an attorney-client relationship between Mr. Clouse and the Indiana Attorney General.

Indiana courts have also recognized the confidentiality of such communications:

The privilege provides that when an attorney is consulted on business within the scope of his profession, the communications on the subject between him and his client should be

treated as confidential. The privilege applies to all communications to an attorney for the purpose of obtaining professional legal advice or aid regarding the client's rights and liabilities.

Hueck v. State, 590 N.E.2d 581, 584. (Citations omitted.) "Information subject to the attorney-client privilege retains its privileged character until the client has consented to its disclosure." *Mayberry v. State*, 670 N.E.2d 1262, 1267 (Ind. 1996), citing *Key v. State*, 132 N.E.2d 143, 145 (Ind. 1956). While Mr. Clouse, the client in this matter, should have responded to your requests for access to any written communications he may have had with the Indiana Attorney General seeking advice, he was not required waive the attorney-client privilege making these communications confidential in order to disclose this information to you.

CONCLUSION

For the reasons stated above, it is my opinion that the Noble County Prosecuting Attorney, Steven Clouse, should have responded to your request within the time frames set forth in the APRA and the failure to do so constituted a denial that is actionable under Indiana Code section 5-14-3-9. Any written communications from the prosecuting attorney to the Attorney General seeking legal advice are, however, confidential by state statute and Mr. Clouse would not have been required to disclose them to you.

Sincerely,

Anne Mullin O'Connor

Enclosures

cc: : The Honorable Steven Clouse
Noble County Prosecuting Attorney

1 You were made aware of his request for an opinion from a reference in Mr. Clouse's letter dated December 27, 1999 to Rebecca Browning, Staff Attorney in the Office of Public Access Counselor.