January 2, 2004

Mr. Eric Cox
Publisher and Managing Editor
Knightstown Banner, LLC
24 North Washington Street
PO Box 116
Knightstown, Indiana 46148

Re: Formal Complaint 03-FC-130
Alleged Denial of Access to Public Records by Town of Knightstown, Clerk-Treasurer for Town of Knightstown, Greg Crider and Hayes Copenhaver & Crider, and Governmental Insurance Exchange

Dear Mr. Cox:

This is in response to your formal complaint, dated December 1, 2003, and filed on December 2, 2003, alleging that various entities denied you access to records in violation of the Indiana Access to Public Records Act (APRA) (Ind. Code §5-14-3). Specifically, you assert that you were denied access to a settlement agreement executed in a federal lawsuit brought by a former employee of the Town of Knightstown Police Department against that entity. Your complaint asserts that the Town of Knightstown and the Clerk-Treasurer of the Town of Knightstown (collectively "Town"), and Greg Crider and the law firm Hayes Copenhaver & Crider (collectively "Town's Counsel"), denied you access to this record in violation of the APRA when they failed to produce a copy of the document from their own files and thereafter declined to obtain and produce a copy from the files of its insurance carrier. You further assert that the Town's insurance carrier, Governmental Insurance Exchange (GIE), denied you access to this record in violation of the APRA when it declined to produce a copy of the document pursuant to that entity's policy of withholding comment and information about litigation involving its insureds. The Town and Town's Counsel have responded through counsel David Copenhaver, and GIE has responded through counsel Steven Pearson. I have enclosed copies of each response for your review.

For the reasons set forth below, I find that GIE and the Town's Counsel are not public agencies subject to the APRA. I further find that the Town did not violate the APRA when it failed to produce a record that it did not create, receive or retain, and that the APRA does not require that the Town seek to obtain and produce a record created and maintained by its

insurance carrier.

BACKGROUND

Your complaint relates to three separate requests. On October 29, 2003, you submitted a records request to the Knightstown Town Council and to the Town's Counsel seeking:

> A copy of any settlement agreement executed in former police dispatcher Gigi Steinwachs' litigation against the Town of Knightstown and other defendants that was filed in the U.S. District Court for the Southern District of Indiana under Cause No. 1:02-CV-1832, including all terms and conditions of said settlement.

On November 5, 2003, the Town's Counsel responded stating that no documents were responsive to your request.[1]

On November 10, 2003, you submitted a second request for the settlement agreement.[2] This request was directed to GIE. Your request asked that if the settlement agreement was not reduced to writing, you be provided with any and all documents that reveal the amount paid in settlement and any non-monetary terms and conditions of the settlement agreement. GIE responded on November 20, 2003, stating that pursuant to that entity's policy against commenting or providing information about litigation involving its insureds, it would not provide copies of the documents requested. GIE further responded that it was not a "public agency" subject to the APRA.

Also on November 10, 2003, you separately submitted a request to the Knightstown Clerk-Treasurer, the Knightstown Town Council, and the Town's Counsel. In this, your third attempt toward production of the settlement agreement, you asked that the recipients obtain from GIE a copy of any settlement agreement or related documents as referenced above. The Town's Counsel responded on November 24, 2003.[3] The Town's Counsel noted that the settlement agreement was between the plaintiff and the third party insurance carrier, and that a confidentiality provision within that agreement barred disclosure of the terms and conditions of that agreement. The Town's Counsel further responded that the APRA did not require the recipients to obtain and produce a copy of the responsive documents from the third party insurance carrier.

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[1] I understand this response to be made on behalf of the Town's Counsel as well as the Knightstown Town Council. You do not allege otherwise, and your complaint does not challenge any party's failure to respond to your records request.

[2] The request is dated November 10, 2003, and was sent by facsimile and by certified mail on that date. A copy of the return receipt for the mailed copy appears to contain a scrivener's error in that it indicates a delivery date of November 3, 2003.

[3] Again, I read this response as being made on behalf of the Town's Counsel as well as the Knightstown Town Council and Clerk-Treasurer. *See* Note 1.

On December 1, 2003, you signed and submitted your formal complaint against the Town, the Town's Counsel, and GIE. That complaint was received by this office on December 2, 2003, and together with the documents submitted in support, alleges that you were denied access to public records pursuant to the response letters you received on November 5, 2003, November 20, 2003, and November 24, 2003.[4]

GIE responds that it is not a "public agency" subject to the provisions of the APRA and that a record created and maintained by that entity is not a "public record" under that statute.

The Town's response to your complaint notes that it has produced or will soon produce any documents in its possession that may be responsive to your request, but asserts that it is not in possession of the settlement agreement between the Town's former employee and the Town's third party insurance carrier. The Town argues it had no authority over the settlement and settlement terms, and that the Town's third party insurance carrier had the absolute right pursuant to the terms of the insurance contract to enter into a settlement agreement without the consent or agreement of the Town. The Town further asserts that the APRA does not require it to seek and obtain from third parties copies of documents not in its possession for the purpose of producing those documents in response to a records request. With regard to the confidentiality provision, the Town asserts that disclosure of the terms and the conditions of the settlement would subject the Town to liability and would run contrary to public policy encouraging the settlement of disputes.

ANALYSIS

The APRA provides that any person may inspect and copy the public records of any public agency except for those public records that are otherwise exempt from disclosure as provided in that statute. IC 5-14-3-3. "Public Record" is broadly defined in the APRA as being any writing or other material "that is created, received, retained, maintained or filed by or with a public agency." IC 5-14-3-2. Thus, whether or not a record or part of a record is ultimately exempt from disclosure, every record maintained by a public agency is nonetheless a "public record." That would include a settlement agreement in a lawsuit, including such settlement agreements as may contain a "confidentiality clause." A public agency has no authority to declare or agree to maintain a public record as "confidential," and such record maintained by a public agency may be withheld from disclosure only if it falls within one of the narrow and limited exceptions set forth in Indiana Code 5-14-3-4.[5] Thus, if a settlement agreement -- even one with a "confidentiality clause" -- is "created, received, retained, maintained, or filed by or

[4] You do not challenge any response as untimely, and no opinion on that issue is offered here.
[5] The Town's Counsel asserts that a public agency's disclosure of a settlement agreement in violation of a confidentiality clause would both subject the public agency to liability and discourage settlements. While both consequences might be true, any remedy for those consequences lies with the General Assembly to determine the soundness of public policy that exempts settlement agreements from disclosure.

with a public agency," it is a "public record" under the APRA and subject to disclosure under the provisions of that statute.[6]

In this matter, there appears to be no dispute that a written settlement agreement or other documents responsive to your records requests exist. The issue of their required production under the APRA turns then on whether they are "created, received, retained, maintained, or filed by or with a public agency." I find that they are not.

GIE asserts that it is not a "public agency" subject to the provisions of the APRA. I agree.

The APRA states:

> [I]t is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Providing 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.

IC 5-14-3-1. This preamble to the APRA contemplates that all of the provisions that follow will be interpreted in a manner that opens the affairs of government and the acts of those who serve as public officials and employees of government to public scrutiny. The APRA defines "Public Agency" broadly and in various ways so as to give effect to the intent of the legislature. IC 5-14-3-2.

You assert that GIE is a "public agency" and must produce the settlement agreement both because GIE is subject to regulation by the Indiana Department of Insurance, and because it was acting as an "agent" of the Town when it negotiated the settlement agreement. In making this assertion you do not identify under which of the several definitions of "Public Agency" you believe GIE falls. Certainly, state regulation of a private entity does not transform the private entity into a public agency under the APRA. A regulatory relationship does not fall within the language of any definition offered by the statute, and I think most private entities and legislators would be surprised by an interpretation of the APRA that would open the records of private insurance carriers, health providers, nursing homes, hospitals, barbers, hypnotists or other entities simply because they are subject to state licensure and other regulation. The issue of agency presents a slightly closer question under the language of the definitions, but one too that I think must be answered against application of the APRA. Under the closest definitions of "Public Agency," the entity at issue must be exercising an executive, administrative, judicial, or

[6] This does not mean to suggest that a settlement agreement cannot be sealed and kept confidential by order of a court of competent jurisdiction. There is no suggestion that the settlement agreement at issue here was subject to such a court order.

legislative power of the state or local governmental power. IC 5-14-3-2. There is no evidence that GIE exercised the power of government in theory or in practice pursuant to its insurance contract with the Town. Moreover, while the insurance contract apparently gave GIE the authority to settle the litigation against the Town, under Indiana law GIE cannot be said to have been acting as agent of the Town for that purpose. *See Sprowl v. Eddy*, 547 N.E.2d 865, 867 (Ind. Ct. App. 1989); *Martin v. Levinson*, 409 N.E.2d 1239, 1245 (Ind. Ct. App. 1980). When an insurer has the right to effect settlement of a claim for damages against an insured without authority from insured, the insurer does so as an independent contractor. *Martin*, 409 N.E.2d at 1245.

Moreover, neither the Indiana Code nor our courts' interpretations of the APRA otherwise support your characterization of GIE as a public agency. Certainly at the time the legislature was crafting the APRA it was well aware of the distinction between private and public entities and under what circumstances a private entity doing business with a public body must open its records. For example, while the legislature recognizes "public-private agreements" and provides that the records of a private entity engaged in such an agreement are subject to inspection and copying in the same manner as "if the [private entity] were a public agency under [the APRA]" (*see* IC 5-23-7-1), it limits the kinds of agreements subject to this provision to agreements by a private entity *to construct, operate and maintain a public facility* (see IC 5-23-2-2; IC 5-23-2-7; IC 5-23-2-13). In crafting the APRA the legislature demonstrated evidence of its intent to similarly limit the circumstances under which a private entity should come under the provisions of that statute. For example, a "public agency" under the APRA would include a private entity only where that entity is subject to audit by the state board of accounts. IC 5-14-3-2; *see* 5-11-1-9(a) (requiring audit of all accounts of all financial affairs of every public office and officer, state office, state institution, *and entity*); IC 5-11-1-16(e) (defining "entity" as "any provider of goods, services, or other benefits that is … maintained in whole or in part at public expense[,] or … supported in whole or in part by appropriations or public funds or by taxation"); *State Board of Accounts v. Indiana University Foundation*, 647 N.E.2d 342, 352-53 (Ind. Ct. App. 1995). Thus, pursuant to these provisions, a *private entity* that is supported in whole or in part by public funds at a specified level may be considered to be a public agency and subject to all of the requirements of open government and public access in the same manner as if it were an entity more traditionally understood to be an office of government. However, the legislature recognized further that not every private entity that does business with a public entity can be characterized a "public agency" for purposes of the APRA. A private entity may be supported by public funds at a level that does not make that entity subject to audit by the state board of accounts (*see* 5-11-1-9(b)(2)), and thus not a public agency under the APRA. The legislature also recognized a distinction between public entities and contractors with whom they do business in crafting the exemptions to production under the APRA. *See* IC 5-14-3-4(b)(6) (exempting from disclosure certain deliberative material, including material developed *by a private contractor under a contract with a public agency*). Statutory history on the APRA also suggests that the legislature did not intend to capture private entities in the definition of "Public Agency." Specifically, in the 1999 legislative session, an amendment to House Bill 1002 was

unsuccessfully offered to include within the definition of "Public Agency" "[a]ny entity, public or private, with offices in a State owned or operated building." HB 1002-6, 111th General Assembly (Ind. 1999). Based on the foregoing, it is my opinion that the legislature did not intend for the APRA to apply to a private entity such as an insurance carrier by virtue of the fact that it does business with the public entity.

Indiana cases support this interpretation. *Indianapolis Convention & Visitors Association v. Indianapolis Newspapers, Inc.*, 577 N.E.2d 208 (Ind. 1991) (*ICVA*), is instructive. In that case, the supreme court acknowledged the broad policy behind the APRA, but applied a narrow view of when a private entity receiving public funds can be determined to be an entity subject to audit by the state board of accounts. There, the court found that an entity is not "maintained" and "supported" by public funds as contemplated by Indiana Code 5-11-1-9 merely because public funds make up a certain percentage of its revenue. The court looked at the relationship between the private entity and its public funder, establishing the rule that if the relationship is a fee for services or goods relationship, the entity cannot be said to be maintained or supported; that is, subsidized or kept in existence by public funds. *ICVA*, 577 N.E.2d at 212-13. In that manner, the court limited the scope of the APRA as it applies to private entities. 577 N.E.2d at 212-13. Significantly, the court noted that if it were otherwise, an entity that performed any service for any governmental entity would find its business records available for public inspection, a result not perceived by the court to be the legislature's intent in passing the APRA); *see also Indiana State Board of Accounts v. Consolidated Health Group, Inc.*, 700 N.E.2d 247, 251-52 (Ind. Ct. App. 1998); *Indiana University Foundation*, 647 N.E.2d at 353-54. *Cf. Perry County Development Corporation v. Kempf*, 712 N.E.2d 1020, 1026-27 (Ind. Ct. App. 1999) (rejecting claim that Perry County Development Corporation was a public agency where it was not acting under the control of any governmental entity; "[w]orking closely with the County is not tantamount to being compelled to do the County's bidding or working subject to its control.").[7]

In the end, I think that your claim regarding GIE must fail because it does not serve the public policy of the APRA when reviewed in the context of the entire statute. The definitions of "public agency" cannot be read in a vacuum to avoid or *expand* the policy of the APRA. GIE is a private entity and is not subject to the APRA. As such, its November 20, 2003, response and

[7] Your own authority similarly holds against you on this point. *See Tribune-Review Publishing Co. v. Westmorland County Housing Authority*, 833 A.2d 112, 116 (Pa. 2003) (concluding that reciprocal insurer for public agency insured was not an agency of the Commonwealth pursuant to that state's public records provisions).

failure to tender the settlement agreement or any other documents responsive to your records request cannot be said to violate the APRA.[8]

The Town does not dispute that it is a public agency subject to the provisions of the APRA. Accordingly, if the settlement agreement or other responsive documents were created, received, retained, maintained, or filed by or with that agency, its failure to tender those records in response to your request would violate the APRA. The Town asserts that it did not create and has never maintained or possessed the settlement agreement entered into by GIE and its former employee and thus could not produce responsive documents from its own files. Your complaint does not dispute this averment. Accordingly, I find that the Town's November 5, 2003, response and failure to tender the settlement agreement or any other documents responsive to your request did not violate the APRA.

The remaining issue is whether the Town and the Town's Counsel violated the APRA when, in their November 24, 2003, response, they declined to obtain any responsive documents from GIE and then produce those documents in response to your request. As set forth above, I find that the Town's Counsel is a private entity and not subject to the APRA. Accordingly, to the extent that the APRA could be said to impose an obligation on a public agency to obtain documents from a private third party for purposes of production, that obligation would not apply to the public agency's private counsel.

With regard to the Town, you forcefully argue that the Town should be required to obtain a copy of the settlement agreement its insurance carrier entered into in settlement of litigation brought against the Town. In support of that claim, you cite to *Tribune-Review Publishing Co. v. Westmorland County Housing Authority,* 833 A.2d 112 (Pa. 2003), and *State ex rel. Findlay Publishing Co. v. Hancock County Board of Commissioners*, 684 N.E.2d 1222 (Ohio 1997). In *Tribune-Review Publishing Co.*, the court found that a "writing is within the ambit of the Act if it is subject to the control of the agency." 833 A.2d at 118 (*citing Carbondale Township v. Murray*, 440 A.2d 1273 (Pa. 1982)). The court stated that "[i]f the preparation of a writing, such as a litigation settlement document, by an attorney for an agency or by an attorney-in-fact for the agency's insurer is not viewed as preparation by the agency, any public entity could thwart disclosure required by the [state records statute] by having an attorney or an insurer's attorney prepare every writing that the public entity wishes to keep confidential." *Tribune-Review Publishing Co.*, 833 A.2d at 118; *see also State ex rel. Findlay Publishing Co.*, 684 N.E.2d at 1225. You similarly suggest that an interpretation of the APRA that does not compel the Town to obtain the settlement agreement from GIE would provide the Town and other public agencies with an incentive to hide documents from the public by having them prepared or maintained by third parties.

[8] Your claim alleging that the Town's Counsel violated the APRA when counsel failed to tender any documents from its files and further declined to obtain a copy of any responsive documents from GIE must fail for the same reasons. Attorney Crider and his law firm are private entities for purposes of the APRA.

While compelling on the surface, it is my opinion that Town's failure to obtain the settlement agreement from GIE does not violate the APRA. As to the cases you rely upon, I note that they are premised on the theory that the insurer is acting as agent for the public agency and that the public agency retains control over the insurer and the document in the insurer's possession. *See State ex rel. Findlay Publishing Co.*, 684 N.E.2d at 1225 ("The preparation of the settlement agreement by the attorney for the county's insurer, who is representing the county and its employees in the lawsuit, constitutes a public duty performed by the county's agent"). As set forth above, Indiana does not recognize an agency relationship between an insurance carrier and its insured for purposes of settlement, and the Town cannot be characterized as being in control of the settlement or the settlement documents on that basis. Neither is it clear from the submissions before me that the Town is otherwise in a position to require that GIE provide it with a copy of the settlement agreement. In that regard, the terms of the insurance policy between GIE and the Town may control.

Moreover, while neither case cited rested its conclusions on any particular language in the Pennsylvania and Ohio statutes, the APRA under which I am bound does not otherwise support an extension of those holdings to Indiana. As the Town notes, the plain language of the APRA provides for no such duty by a public agency. I also note that other provisions and recent revisions to the APRA suggest that the legislature did not intend to impose such a duty. Indeed, the legislature clearly recognized the possibility that public agencies could utilize third parties to impair the public's right to inspect and copy records, and specifically provided for a remedy in that event. *See* IC 5-14-3-3(f) (prohibiting a public agency from entering into a contract or other obligation for the storage or copying of records or that requires the public to obtain a license or pay a royalty to inspect or copy records where such obligation would unreasonably impair the public's right to inspect and copy the records). More recently the legislature narrowed the definition of "public record" by deleting from that definition records that are simply "used" by public agencies. HEA 1935, §5, 113th General Assembly (Ind. 2003).

Based on the foregoing, I find that the Town's November 24, 2003, response declining to obtain a copy of the settlement agreement from GIE did not violate the APRA.

CONCLUSION

For the reasons set forth above, I find that GIE and the Town's Counsel are not public agencies subject to the APRA. I further find that the Town did not violate the APRA when it failed to produce a record that it did not create, receive or retain, and that the APRA does not require that the Town seek to obtain and produce a record created and maintained by its insurance carrier.

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Mr. David Copenhaver (w/o enclosures)
Mr. Steven D. Pearson (w/o enclosures)