

November 14, 2005

*Sent Via Facsimile*

Mr. Robert G. Cress  
President  
Villa North Motors, Inc.  
2200 North Main Street  
Bluffton, IN 46714

*Re: Formal Complaint 05-FC-209; Alleged Violation of the Access to Public Records Act by the Town of North Manchester*

Dear Mr. Cress:

This is in response to your formal complaint alleging that the Town of North Manchester ("Town") and its Clerk-Treasurer violated the Access to Public Records Act by refusing to give you a report maintained by the Town. I find that the Town did not violate the Access to Public Records Act.

#### BACKGROUND

On October 7, you addressed to the Town Clerk-Treasurer Nancy Reed a written request via electronic mail for a record called "Departmental Analysis Report" prepared by Dr. T. Neil Moore. You stated in your request that the Times-Union newspaper had obtained a copy of the report. The record request was forwarded to the Town Attorney Charles R. Tiede, who sent you a letter dated October 12, 2005. In the Town's letter, Mr. Tiede explained that an executive summary of the report you requested was read and discussed in a meeting of the Town Council in January 2003. The Town attorney stated that the executive summary was a disclosable public record, and that it would be provided to you. He also stated that the Town would provide the minutes from the meeting in which the summary was discussed.

The Town denied you a copy of the full report, citing “IC 5-14-3-4(6) and (12).”<sup>1</sup> You filed your formal complaint on October 14 with the Office of the Public Access Counselor. You requested priority status for the complaint without alleging any of the circumstances that would merit priority status under 62 IAC 1-1-3. Therefore, this advisory opinion is issued within 30 days of receipt.

I sent a copy of the complaint to the Town. In response, the Town Attorney sent me a letter countersigned by the Town Clerk-Treasurer Ms. Reed and dated October 26, 2005. I have enclosed a copy of the response for your reference. For background, Mr. Tiede explained that the Town Council voted to engage Dr. T. Neil Moore, Ed.D. to review and assess the police functions and personnel of the Town of North Manchester. The purpose of the review was for the Town to determine whether it would maintain the current organizational structure of the Town’s public safety departments. The result of the engagement of Dr. Moore’s services was the issuance of two discrete reports. One was entitled “North Manchester Police Department: An Organizational Assessment—A Summary Report.” The second report was entitled “North Manchester Police Department: An Organizational Assessment—A Confidential Report.” Both were issued to the Town Council and Town Manager of North Manchester. It is the latter report, hereinafter referred to as the “full report” that is the subject of your complaint.

Mr. Tiede contends that the Town has never released the full report to the media or the public. Rather, it was the summary report that had been disclosed and discussed during the January 9 public meeting of the Town Council. The Town further contends that the analysis was contracted by the Council for deliberative purposes. The Town cites the same provisions of section 4 of the Access to Public Records Act as were cited in your response letter. After receiving the reports, the Town Council voted to enact an ordinance that abolished both of the public safety offices created in 1998. The ordinance established the office of Town Marshal.

## 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). Under section 4(b) of the APRA, a public agency may withhold certain records at the agency’s discretion. If a public agency intends to deny a written request for a record, the public agency is required to deny the record in writing and state the exemption or exemptions that authorize the public agency to withhold the record. IC 5-14-3-9(c). A public agency has the burden of showing that a record falls within one or more of the exceptions to disclosure in section 4. IC 5-14-3-1.

The Town has cited two exceptions under the APRA that it contends pertain to the full report. The first is commonly called the “deliberative materials exception.” Under IC 5-14-3-4(b)(6), a public agency may withhold records “that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.” IC 5-14-3-4(b)(6). If the Town can show

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<sup>1</sup> The correct citation is IC 5-14-3-4(b)(6) and IC 5-14-3-4(b)(12).

that the full report 1) is intra-agency advisory or deliberative material that is developed by a contractor under a contract with the Town; 2) contains expressions of opinion; and 3) is communicated for the purpose of decision making, then the Town did not violate the APRA by not disclosing the full report to you. From my understanding of the facts, the full report was developed under a contract and was communicated for purposes of decision making. It also apparently contained opinions, such as options and recommendations for the possible restructuring of the Town's public safety functions.

However, I have not viewed the full report. It is possible that the report contains information or material that is purely factual. Such factual material that is not inextricably linked to the opinions in the report must be disclosed. *See Indianapolis Star v. Trustees of Indiana University*, 787 N.E.2d 893 (Ind. Ct. App. 2003). A public agency is required to separate parts of a record that contain disclosable and nondisclosable information, and disclose the part that is not subject to any exemption. IC 5-14-3-6(a).

I wish to make two additional points regarding the full report. First, although the full report was labeled "confidential," the Town has not provided any legal authority that would *require* the Town to not disclose the report. The deliberative materials exception allows the agency to withhold the record in the public agency's *discretion*; the public agency may disclose the report if it chooses. Hence, the report is not confidential. Second, a public agency may not withhold a record merely because it has agreed to maintain the confidentiality of the record with a contractor or any other third party. Only where the record is classified as confidential by state or federal statute, is confidential as a trade secret, or is confidential under an agency or court rule may such a confidentiality agreement be honored. *See generally* IC 5-14-3-4(a).

The Town has cited another exception to the report's release, IC 5-14-3-4(b)(12), without offering any argument for its inclusion within the exception. Under IC 5-14-3-4(b)(12), a public agency may exempt records specifically prepared for discussion or developed during discussion in an executive session under Indiana Code 5-14-1.5-6.1. According to the Town, the Town Council voted in a public meeting *that followed an executive session* to commission a review and assessment. Evidently, the report was not prepared *during* discussion in an executive session, nor was the report prepared for discussion *in* an executive session, since the report was prepared after the executive session took place. Therefore, the Town cannot sustain its denial based on IC 5-14-3-4(b)(12). Exceptions to disclosure are to be narrowly construed.

Finally, you may have intended to claim that the Town, by releasing a summary report, waived its right to claim any discretionary exception to disclosure under IC 5-14-3-4(b). There is support in Indiana caselaw for a public agency to waive a statutory exception under the APRA. *See Indianapolis Star v. Trustees of Indiana University*, 787 N.E.2d 893, 919 (Ind. Ct. App. 2003). However, the facts of the *Indianapolis Star* case are fairly close to those presented in this case, where a summary of an investigatory report was released to the media. The Court of Appeals declined to find that Indiana University had waived the deliberative materials exception. I express doubt that the Town waived its right to exempt the full report under these facts as well.

## CONCLUSION

For the foregoing reasons, I decline to find that the Town violated the Access to Public Records Act.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Charles R. Tiede