April 25, 2005

Mr. Robert Crawford
3398 West 200 North
Danville, IN 46122

Re: Formal Complaint 05-FC-57; Alleged Violation of the Access to Public Records Act by the Indiana Department of Labor

Dear Mr. Crawford:

This is in response to your formal complaint alleging that the Indiana Department of Labor ("Department") violated the Access to Public Records Act by failing to disclose its investigator's final report.

BACKGROUND

In your formal complaint, you have alleged that you were denied access to a copy of the Department investigator Calvin Trautveter's final report in the Mt. Carmel Sand & Gravel, Inc./Crawford Case #03098. Initially, the Department responded to your March 7 request by claiming the attorney client privilege, citing IC 5-14-3-4(a)(8). After you wrote a letter challenging this response, the Department sent another letter, dated March 23, in which it reiterated that it was withholding the records as the work product of an attorney representing the Department, but citing instead section 4(a)(2). The Department also excepted the report under section 4(b)(6) as a record that is intra-agency deliberative material.

You filed your formal complaint with my office on March 24. You allege that the case involving these records has been dismissed, and therefore there are no deliberative qualities in the material. You also state that the denial is unreasonable and against the spirit of the Access to Public Records Act.

I sent a copy of your complaint to the Department, and received a reply from Tom A. Grogg, Deputy Commissioner for Legal Affairs for the Department. I note that you also received a copy of this letter. He claims the same bases for denial of the record as in his March 23 letter to you. He also states that the Department may not exercise any discretion to disclose

the record because it is confidential under the Access to Public Records Act. He states that "the very name of the requested document, 'Final Investigative Report' denotes that the same is clearly a critical portion of the Department's deliberative process and materials."

ANALYSIS

Any person may inspect and copy the public records of a public agency during the agency's regular business hours, except as provided in section 4 of the Access to Public Records Act. Ind. Code 5-14-3-3(a). The final investigative report is clearly a public record, because it is created and maintained by a public agency, the Indiana Department of Labor. IC 5-14-3-2. The Department has cited two main bases for denial of the record--attorney-client material and deliberative materials--albeit the citations used are either incorrect or incomplete, for the following reasons.

In the Department's March 10 letter, which was its first denial, it cited to section 4(a)(8) when claiming the attorney client privilege. Section 4(a)(8) excepts from disclosure records that are declared confidential by or under rules adopted by the supreme court of Indiana. This response is incomplete because it does not cite the specific supreme court rule that applies to the report for which attorney client privilege is claimed. Also, the supreme court rule would have to declare certain records confidential, not just state that there is a statutory attorney client privilege that would be observed in the course of a court proceeding.

The March 23 letter expands on the previous communication to you. It omits the attorney client privilege based on court rule, but cites to section 4(a)(2) for records that are attorney work product. The Department likely meant to cite to section 4*(b)*(2)--the latter exception to disclosure is discretionary, and excepts records that contain the work product of an attorney representing pursuant to state employment or an appointment by a public agency: a public agency, the state, or an individual. This citation was also repeated in the April 4 response to your complaint. Even if the Department meant to cite to section 4(a)(2), for records that are declared confidential by rule adopted by the public agency under specific authority to classify public records as confidential, the Department should have specified the agency rule applicable to the final investigative report. Therefore, the Department's denial to you based on IC 5-14-3-4(a)(2) was an insufficient basis for denial under the Access to Public Records Act.

Also, the Department claimed as exempt the final investigative report under the deliberative materials exception, under IC 5-14-3-4(b)(6).

The public agency that denies a record bears the burden of proof for the nondisclosure of the record. IC 5-14-3-1; IC 5-14-3-9(f) and (g). An agency that receives a record request in writing may deny the request if the denial is in writing, and if the denial includes a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record, and the name and the title or position of the person responsible for the denial. IC 5-14-3-9(c). The public agency is required to separate disclosable matters from nondisclosable matters within a record and make the disclosable matter available for inspection and copying. IC 5-14-3-6(a).

Attorney Work Product and Attorney Client Privilege

The attorney work product and attorney client privilege are two discrete bases on which the Department may wish to claim an exception to disclosure for the final investigative report. The attorney work product exception at IC 5-14-3-4(b)(2) excepts from disclosure any records that were prepared or compiled by an attorney in reasonable anticipation of litigation. IC 5-14-3-2 (defining "attorney work product").

It is not true that the Department is prohibited from disclosing the report on this basis; the work product exception is discretionary. However, the Department must be able to sustain its burden of proof that the record meets the attorney work product exception. The Department has not established the content of the record with adequate specificity that would enable me to determine whether all or part of the record meets the attorney work product exception. IC 5-14-3-9(g)(1)(B).

The Department may also be claiming that the final investigative report falls under the attorney client privilege at IC 34-46-3-1, protecting communications between an attorney and client. If the Department intended to claim this as a basis for denial of the final investigative report, its denial letter should have cited to IC 5-14-3-4(a)(1), which excepts records declared confidential by state statute, and IC 34-46-3-1.

In the case of either the attorney work product exception or attorney client privileged material, the Department would be required to separate any part of the final investigative report that did not contain material covered by either of the exceptions, and disclose the remainder of the report (unless it met some other exception to disclosure).

Deliberative Materials

The Department may except from disclosure "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). This exception is commonly called the "deliberative materials" exception, and it is also discretionary. If the report fits the deliberative materials exception, the Department may disclose it or not disclose it in its discretion. Again, the Department bears the burden of demonstrating that the report, or part of it, is advisory or deliberative material; contains expressions of opinion and is communicated for purpose of decision making. It is not sufficient to discharge its burden by making a conclusory statement that the report is deliberative, without establishing with adequate specificity what is contained in the report, and how the report meets all the above elements of the deliberative materials exception. *See* IC 5-14-3-9(g)(1)(B). If only part of the report fits the deliberative materials exception, the Department is obliged to withhold only that part and disclose the remainder. I also note that the Department's explanation that the very name of the report denotes deliberative material is not sufficient to claim the deliberative materials exception,

since a report's title is inherently not deliberative material in and of itself, and the public agency must demonstrate the nature and contents of the report rather than rely on the title of the record.

It is not relevant with respect to the deliberative materials exception that the case is no longer live; if a record meets the deliberative materials exception, it remains deliberative even after a decision has been made regarding the information in the record.

CONCLUSION

I find that the Indiana Department of Labor has not met the requirements of the Access to Public Records Act in its denial of the final investigative report.

Sincerely,

Karen Davis
Public Access Counselor

cc: Tim A. Grogg