

December 22, 2006

Sent Via Facsimile

Dawn Semmler
4170 E. CR 550 South
Lebanon, IN 46052

Re: Formal Complaint 06-FC-208; Alleged Violation of the Access to Public Records Act by the Town of Whitestown

Dear Ms. Semmler:

This is in response to your formal complaint alleging that the Town of Whitestown (“Town”) violated the Access to Public Records Act by denying you a list of names and addresses and parcel numbers. I find that the record you requested is a public record of the Town. I also find that if one of the exemptions to disclosure applies to the record, the Town may properly withhold the record, and it is the Town’s burden to sustain its denial of the record.

BACKGROUND

On October 24, 2006, you e-mailed the Town a request for the list used in mailing the annexation plans including names, addresses and parcel numbers. You were sure that a formal list was requested from Boone County and used by Wabash Scientific to complete the annexation boundaries and then used by whoever mailed the letters notifying owners of an annexation hearing.

You received an October 30 denial letter from the Town, signed by Town Attorney Stephen C. Unger. He stated that the Town does not maintain public records of property owners and their addresses and parcel numbers. He stated that the County would have this information. He stated that any address list of owners and customers prepared by Mr. Unger’s firm is information that is protected from disclosure under IC 5-14-3-4(a)(1), (a)(8), (b)(2), and (b)(20).

You filed your formal complaint, presumably disagreeing with the basis for the denial of the list. I sent a copy of your complaint to the Town. Mr. Unger filed the enclosed response. He maintains that the Town is not statutorily required to maintain the list you seek, and the Town does not, in fact, maintain the list. Rather, the County Auditor is required to create this list. While the Town does not maintain the list, the law firm of Bose, McKinney & Evans has compiled various lists outlining property information in the proposed annexation area in preparation for rebuffing anticipated litigation. In connection with that preparation, the law firm has created an index of that information that will serve as a guideline for the Town's attorneys in properly responding to a remonstrance attempt. This information reflects the firm's mental impressions and legal theories as to anticipated annexation litigation.

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). "Public records" means material that is "created, received, retained, maintained, or filed by or with a public agency." IC 5-14-3-2(m). To effectuate the purposes of the APRA, the public agency that withholds a public record bears the burden of showing that the record is exempt. IC 5-14-3-1; IC 5-14-3-9(f) and (g). Exceptions to disclosure are narrowly construed, to effectuate the policy of openness. IC 5-14-3-1.

The Town has directed you to the County Auditor as the keeper of the record of property owners' names, addresses and parcel numbers. However, the fact that another public agency maintains a record as the official keeper of the record does not preclude a person from seeking and receiving the identical or similar record from a different public agency. In addition, your stated purpose for the record, in part, is to determine to whom the notices were sent.

The Town also contends that the list of names, addresses, and parcel numbers is not maintained by the Town and is hence not a public record. The list of names, addresses and parcel numbers is maintained by the Town's attorneys in connection with the Town's planned annexation. These records appear to have the earmarks of a public record in the same way that the settlement agreement held by the town's attorney constituted a public record of the Town of Knightstown, though no employee of Knightstown ever possessed the settlement agreement. *Knightstown Banner LLC v. Town of Knightstown*, 838 N.E.2d 1127 (Ind. Ct. App. 2006). I do not agree with the narrow construction accorded this holding by Town Attorney Unger. Although the Court of Appeals observed that the settlement agreement was required to be filed with the town clerk as documentation of the expenditure of the town's funds, the holding is not so narrow as to preclude its application to records not required to be filed. It is my understanding that the list was compiled, or at least received from the Auditor, by the Town's attorneys in furtherance of the Town's annexation proposal. The list was used to mail annexation notices via certified mail, on Town of Whitestown letterhead. Therefore, it is my opinion that the list or lists are public records of the Town.

That said, not all public records are disclosable. Public records that are exempt from disclosure may be withheld, if the records are classified as confidential or nondisclosable in the

agency's discretion. *See* IC 5-14-3-4. The main exemption that the Town advances for nondisclosure of the list is for 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).

According to Mr. Unger, his law firm has compiled various lists outlining property information in the proposed annexation area in preparation for rebuffing anticipated litigation. The Town has put forth a colorable argument that the "various lists" could reveal the attorney's opinions, theories, or conclusions. In any case, the Town bears the burden in court to show that the lists are attorney work product. However, if any material maintained by the Town's attorneys includes a list of names and addresses as they were received from the Auditor, this list would not be subject to the attorney work product exemption. Such a list should be disclosed to you unless exempt under a different clause of the APRA.

The Town also denied the records citing IC 5-14-3-4(a)(1) and (8). These exemptions are for records declared confidential by state statute, and those declared confidential by or under rules adopted by the supreme court of Indiana, respectively. If a public agency denies records for these reasons, the denial must include the specific state statute or court rule that applies to the record or records, as required by IC 5-14-3-9(c). If the Town intends to rely on these exemptions to continue to deny you a list that is not attorney work product, the Town must specify the statute or rule authorizing the withholding of the record.

The Town also asserts that the list is exempt under IC 5-14-3-4(b)(20). This exemption is for personal information concerning a customer of a municipally owned utility (as defined in IC 8-1-2-1): (A) telephone number, (B) address; and (C) Social Security number. The Town would argue that the municipally owned utility services are provided to all residents in the geographic boundaries of the annexation area; accordingly, the exemption applies to the list. It is my opinion that the utility customer exemption does not apply in this manner. The list of addresses to which the exemption would apply was not received from the municipal utility, nor is it maintained by a municipal utility. If the exemption was applied to a list of persons that were utility customers, but was not "concerning" those customers as would be a list generated by the municipal utility, then every record containing the addresses and telephone numbers of anyone in a town that received municipal utilities would be exempt. Exemptions are to receive narrow construction; this construction impermissibly expands the exemption.

CONCLUSION

For the foregoing reasons, I find that the Town could not withhold a list of names, addresses, and parcel numbers that constitutes the list received by the Town from the County Auditor; if this list exists, it should be disclosed. The Town has the burden to sustain its denial of any record that it claims is exempt under section 4 of the APRA, including for work product of an attorney.

Sincerely,

Karen Davis
Public Access Counselor

cc: Stephen C. Unger