

June 11, 2007

Charles W. Lancaster
11501 N. CR 100 W.
Muncie, IN 47303

Re: Formal Complaint 07-FC-129; Alleged Violation of the Access to Public Records Act by the Delaware County Assessor

Dear Mr. Lancaster:

This is in response to your formal complaint alleging that the Delaware County Assessor (“Assessor”) violated the Access to Public Records Act by denying copies of two property appraisals. I find that the Assessor has provided at least two appropriate exceptions to disclosure of the appraisals.

BACKGROUND

You are seeking the reports of two appraisers who were retained by the Assessor pursuant to your dispute with the property tax assessment board of review regarding the value of several of your properties. You have been denied the reports in a written denial that cited four bases for denial:

- Records containing information that is related to earnings, income, profits, losses, or expenditures, pursuant to Indiana Code 6-1.1-35-9;
- Records that constitute intra-agency or interagency advisory or deliberative material, pursuant to IC 5-14-3-4(b)(6);
- Records that are part of protected attorney work product, pursuant to IC 5-14-3-4(b)(2); and
- Materials that are consulting expert evidence under Indiana Trial Rule 26(B)(4)(b).

You state that you do not understand how the records can be confidential when, in connection with an earlier dispute with the Delaware County Assessor regarding the assessed value of property, the “appraisal group” discussed the report with you.

I sent a copy of your complaint to the Assessor. The response of Beth Henkel of Schuckit & Associates was sent to you and to this office. Ms. Henkel stated that as a result of your 2005 appeal that you filed to challenge the 2005 assessment of your rental properties, the Assessor engaged appraisers Harold Hindman and Robert Canan as consulting experts to provide an opinion on the value of the parcels. The Assessor advised you that Messrs. Hindman and Canan were consulting experts pursuant to Rule 26 and that neither would testify at the hearing. Neither Hindman nor Canan did testify at the hearing on the 2005 appeal. In addition, Hindman did not prepare a written appraisal or other document regarding the parcels. Canan prepared an appraisal, but the Assessor did not submit it as evidence at the hearing.

Ms. Henkel stated that the Assessor's complaint response would focus on grounds 2, 3, and 4 as the basis for denial; no argumentation that Indiana Code 6-1.1-35-9 applies is submitted in response to your complaint. This is because IC 6-1.1-35-9 applies in the narrow circumstance in which the appraisals contain income information on property that belonged to taxpayers other than you. I take this to mean that the Assessor is not relying on IC 5-1.1-35-9 as a means to deny the appraisal.

Ms. Henkel provides caselaw that supports the denials on the basis of deliberative material, attorney work product, and consulting expert evidence under Trial Rule 26(B)(4)(b).

ANALYSIS

As a threshold matter, the Assessor has questioned whether your complaint was timely filed. A person denied the right to inspect or copy records under Indiana Code 5-14-3 may file a formal complaint with the counselor. IC 5-14-5-6. A person who chooses to file a formal complaint with the counselor must file the complaint not later than thirty (30) days after the denial. IC 5-14-5-7(a)(1). A complaint is considered filed on the date it is received by the counselor or postmarked, if received more than thirty (30) days after the denial that is the subject of the complaint. IC 5-14-5-7(b).

According to the Assessor, the denial occurred on April 9, 2007. Your complaint was received on May 11, but was postmarked May 9. Therefore, the complaint was timely filed because May 9 is 30 days after the denial.

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). If a public agency receives a request for a record in person or by telephone, the public agency is required to respond within 24 hours or the record is deemed denied. IC 5-14-3-9(a). If the public agency receives a request for a record via U.S. Mail or facsimile, the public agency is required to respond within seven calendar days, or the request is deemed denied. IC 5-14-3-9(b).

If a request is made orally, either in person or by telephone, a public agency may deny the request orally. However, if a request initially is made in writing, by facsimile, or through enhanced access, or if an oral request that has been denied is renewed in writing or by facsimile, a public agency may deny the request if:

- (1) the denial is in writing or by facsimile; and
- (2) the denial includes:
 - (A) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and
 - (B) the name and the title or position of the person responsible for the denial.

A public agency bears the burden of proving that a record falls within the exceptions to disclosure under the Access to Public Records Act. IC 5-14-3-1; IC 5-14-3-9(g). If even one exception to disclosure applies to the property appraisal report, then the Assessor may deny the record.

You do not directly take issue with the exemptions that are claimed by the Assessor. Nevertheless, I have reviewed the exceptions to disclosure and find that the Assessor's bases for withholding the record under two exceptions, the deliberative material exception and the attorney work product exception, appear sound.

The APRA allows a public agency to except certain public records at the agency's discretion. One type of record that is exempt at the agency's discretion are 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).

In *Indiana State Bd. Of Public Welfare v. Tioga Pines Living Center, Inc.* 592 N.E.2d 1274 (Ind. Ct. App. 1992), the Indiana Supreme Court found that the point of inquiry under Trial Rule 26 and the attorney work product exception is whether the materials were prepared for trial. It is not necessary that the document be prepared by an attorney in order for the exception to apply in the context of discovery. *Id. at 1276*. So long as the material can fairly be said to have been prepared in anticipation of litigation or for trial, the material can be considered work product. *Id. at 1276*.

The Assessor stated that the appraisers were sent to view your property, and one of them, Mr. Canan, created a report that he prepared for the Assessor specifically as a consulting expert pursuant to Trial Rule 26. The Assessor ordered this report after you filed your appeal for the 2005 assessment. The Assessor claims that none of the exceptions in Trial Rule 26 that would require disclosure to you apply, since the reports were not submitted as evidence in the hearing, and the appraisers did not testify. In addition, you submitted for consideration your own appraisal reports at the hearing. Accordingly, the Assessor was not required to provide the property appraisal reports to you under Trial Rule 26 because you could not show exceptional

circumstances. Given this information, it appears that the Assessor was not required or directed to provide the appraisal report under Trial Rule 26. *See* IC 5-14-3-4(c).

In addition, 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 may be withheld in the agency's discretion. IC 5-14-3-4(b)(6). The appraisal report was developed by the appraiser under a contract to the Assessor, contains an expression of opinion, and was communicated to the Assessor for the purpose of decision making. Therefore, the appraisal report meets the exception for deliberative material.

A third basis for nondisclosure, Trial Rule 26 itself, may not apply as an independent basis for nondisclosure outside of the parameters of the attorney work product privilege. The Assessor cites Indiana Code 5-14-3-4(a)(8), which states that a public agency may not disclose a record that is declared confidential by or under rules adopted by the supreme court of Indiana. It is not clear that Trial Rule 26 declares any record confidential. In any event, because two exceptions apply to the appraisal, the Assessor has some basis to deny you the record.

You have raised in your complaint an issue concerning the disparate treatment of the appraiser's report in your 2002 appeal and the 2005 appeal. You allege that in 2002, the Assessor shared the information concerning the appraisal of your property in 2002. You do not understand the difference between the two situations. In essence, you are alleging that the Assessor has exercised discretion in a way that is arbitrary and capricious with respect to the same reports, but for different years.

The Assessor does not address this allegation. In a court's review of the denial under section 4(b), the public agency meets its burden by proving that the record falls within any one of the categories of exempted records, and by establishing the content of the record with adequate specificity. IC 5-14-3-9(g). Once this burden is met, a person requesting access meets the person's burden of proof by proving that the denial of access is arbitrary or capricious. IC 5-14-3-9(g)(2). Accordingly, I find that if the Assessor's denial of the 2005 appraiser report is arbitrary and capricious, you would be entitled to the 2005 appraisal report.

CONCLUSION

For the foregoing reasons, I find that the Delaware County Assessor did not violate the Access to Public Records Act unless the denial of the appraiser report was arbitrary and capricious.

Sincerely,

Karen Davis
Public Access Counselor

cc: Beth Henkel