

August 9, 2007

Kurt A. Webber
On behalf of Knightstown Banner, LLC
11805 North Pennsylvania Street, Suite 104
Carmel, Indiana 46032

Re: Formal Complaint 07-FC-202; Alleged Violation of the Access to Public Records Act by the Town of Knightstown

Dear Mr. Webber:

This is in response to your formal complaint alleging the Town of Knightstown ("Town") violated the Access to Public Records Act ("APRA") (Ind. Code §5-14-3) by denying Knightstown Banner, LLC access to public records. A copy of the Town's response is included for your reference.

BACKGROUND

You filed a complaint on July 6, 2007 (received by this office on July 9, 2007), alleging the Town violated the APRA by denying access to certain records listed in your May 17 request. Your May 17 letter, received by the Town on May 19 and May 21, contained ten specific requests, labeled (a) through (j), regarding public records of communications concerning the lawsuit *Knightstown Banner, LLC v. Town of Knightstown, et al.*, Trial Cause No. 33C01-0405-PL-0013, Appellate Cause No. 33A04-0504-CV-200 ("Lawsuit").

You requested to "inspect and copy all public records (in the original form) of communications concerning the Lawsuit between (a) Town and Governmental Interinsurance Exchange ("GIE"), (b) Town and Governmental Insurance Managers, Inc. ("GIM"), (c) Town and GIE's attorneys, (d) Town and GIM's attorneys, (e) Town's attorneys and GIE, (f) Town's attorneys and GIM, (g) Town's attorneys and GIE's attorneys, (h) Town's attorneys and GIM's attorneys, (i) GIE and its attorneys, and (j) GIM and its attorneys." You then list specific communications which would be included in this request but would not limit the request.

The Town, by Joel E. Harvey, responded to your request on May 24, indicating it was attempting to gather the requested records to determine what, if any, were subject to disclosure. Mr. Harvey further indicated his computer hard drive had crashed in December 2006 and since

some of the communications were stored on his hard drive in electronic mail (email) format, they were unable to be retrieved. He did indicate he was contacting other counsel to request copies.

On June 19, Mr. Harvey again responded to your request. He indicated the Town was not aware of any records responsive to your request in items (a) through (f). He further indicated the Town did not have and has not ever had possession of correspondence between GIE or GIM and its attorneys as requested in (i) and (j). Regarding items (g) and (h), communications between the Town's attorneys and GIM's and GIE's attorneys, Mr. Harvey indicated those records were being withheld from disclosure pursuant to I.C. §5-14-3-4(a)(1); I.C. §5-14-3-4(a)(8); I.C. §5-14-3-4(b)(2); and I.C. §5-14-3-4(b)(6). Mr. Harvey indicated that the claims of privilege had not been waived as Town and GIE/GIM share a common interest in the Lawsuit. Claims of privilege would need to be waived by all parties in order that the records be disclosed, and all parties are not willing to waive the claims.

You filed your complaint on July 9, alleging the Town erroneously denied access. First, you assert the Town was erroneous in its contention that a common interest privilege exists between Town's counsel and GIM/GIE's counsel. You contend a blanket claim of privilege cannot be asserted and a specific reason why each document sought is privileged must be asserted. You further assert the Town stretched the truth in factual representations to the judiciary in the Lawsuit and indicate under these circumstances you are skeptical of the Town's blanket claims of privilege and lost computer files.

The Town, by Mr. Harvey, responded to your complaint on July 26. In its response, the Town indicates it is prepared to provide you with copies of every written communication currently in the possession of the Town or Mr. Harvey that is responsive to your request. Regarding email messages lost in the computer crash, the Town has obtained copies from other counsel in the matter. Regarding items (g) and (h), communications between the Town's attorneys and GIM's and GIE's attorneys, the Town provides rationale why it believes those items are excepted from disclosure under the APRA. The Town contends that providing materials that are exempt from disclosure to a co-defendant in litigation does not effectuate a waiver of the exceptions under the APRA. Further, the Town contends that if disclosure of materials to a defendant is a waiver, the common interest doctrine serves as an exception to such waiver.

The Town further contends that the APRA does not contain the same burden as the Indiana Trial Rules, that the agency must provide specific facts showing a privilege applies. The Town contends the APRA only requires the agency to identify the specific statutory authority for denial of access and name the person responsible for denial.

The Town also addresses in its response the hard drive crash of Mr. Harvey's computer and includes an affidavit by a contractor of Mr. Harvey's firm who attests to the problem and indicates he cannot retrieve the files.

On August 8, you submitted an additional letter to me, contending the finding in Knightstown Banner, LLC, that it would amount to a tortured interpretation of the statute if private attorneys could ensconce public records in their file room and completely deny the public

access, applies here. You ask me to opine that the Town should retrieve the documents from GIM/GIE's attorney and deliver them to the Banner. You further claim the Town has no standing to assert any privilege on behalf of GIM/GIE.

ANALYSIS

Indiana Code §5-14-3-3(a) provides that any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as provided in section 4 of APRA. A "public record" means any writing, paper, report, study, map, photograph, book, card, tape recording or other material that is created, received, retained, maintained or filed by or with a public agency. I.C. §5-14-3-2.

The Town is clearly a public agency for the purposes of the APRA. I.C. §5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Town during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. §5-14-3-3(a).

Records required to be kept confidential by state statute or federal law are excepted from disclosure under I.C. §5-14-3-4(a)(1) and (3). Records declared confidential by rules of the supreme court of Indiana are excepted from disclosure. I.C. §5-14-3-4(a)(8). The agency has the discretion to except from disclosure 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. I.C. §5-14-3-4(b)(2).

Here we are presented with four issues:

1. Whether the requested records in the possession of an outside entity are subject to the APRA;
2. Whether a blanket privilege can be asserted under the APRA;
3. Whether disclosure to a co-defendant is a waiver of privilege; and
4. Whether, if disclosure to a co-defendant is a waiver, the common interest doctrine applies.

First is the question whether the requested records, some of which are in the possession of an entity outside the public agency, are subject to the APRA. The Town is clearly a public agency for purposes of the APRA. Neither GIE nor GIM are public agencies. Notwithstanding that, the Court of Appeals in *Knightstown Banner, LLC* held that because GIE/GIM created the settlement agreement for a public agency, the settlement agreement was a public record. The Court did not find that the language "created, received, retained, maintained or filed by or with a public agency" in I.C. §5-14-3-2 excepted from the definition records created *for* or *on behalf of* a public agency. Furthermore, the Court said it would amount to a tortured interpretation of the statute if private attorneys could ensconce public records in their file room and completely deny the public access. *Knightstown Banner, LLC*, 838 N.E.2d at 1133. Where records are created or maintained for a public agency but kept in the possession of an outside entity, the agency must retrieve the documents pursuant to a request for access to public records.

At issue here are communications between the Town, GIM, GIE, and attorneys representing those entities. Communications between all are public record because they were created and maintained by or for the Town. As such, the records must be made available, regardless of where they are located, for inspection and copying unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. IC §5-14-3-3(a).

Next is the question whether a blanket privilege or exception can be asserted under the APRA. You assert that because the communications at issue between Town's counsel and GIM/GIE's counsel were not between a client and its attorney, they therefore were not privileged under Indiana law. You further assert that claims of privilege must be made on a document-by-document basis.

A public agency may deny a request made in writing if the denial is in writing or by facsimile and 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 title or position of the person responsible for the denial. I.C. §5-14-3-9(c). The burden of proof for the nondisclosure of a public record is on the public agency that would deny access and not on the person seeking to inspect and copy the record. I.C. §5-14-3-1. Exceptions to disclosure are to be narrowly construed to effectuate the purposes of the statute. *Robinson v. Indiana University*, 659 N.E.2d 153, 156 (Ind. Ct. App. 1995) [Citations omitted] quoting *Common Council of City of Peru v. Peru Daily Tribune, Inc.* 440 N.E. 2d 726, 729 (Ind. Ct. App. 1982) [Citations omitted].

It is my opinion that a public agency may not generally assert a blanket privilege or exception to disclosure to cover all records requested. But it is also my opinion an agency may group like records together when asserting an exception or privilege, keeping in mind the burden of proof for nondisclosure is on the agency. See *Opinion of the Public Access Counselor 07-FC-153* (opining the Prosecutor could not claim all documents in his control were attorney work product but had to explain why a group of documents was attorney work product). Here the Town cannot list a number of exceptions from I.C. §5-14-3-4 and assert that all responsive documents fall under one of the exceptions. The Town must show specifically why documents are excepted from disclosure. I do not intend here to indicate the Town may not claim exceptions under section 4; it is my opinion, though, the Town has the burden of proving why each group of responsive documents is excepted from disclosure.

Next is the question whether disclosure to a co-defendant is a waiver of attorney/client privilege. The privilege applies to confidential communications made to attorneys in the course of their professional business and to advice given in such cases. I.C. §36-46-3-2(1). The privilege does not extend to separate attorneys representing separate clients. Furthermore, the Court of Appeals has recognized that a public agency may waive an applicable APRA exception if the agency allowed access to its material to one party and denied access to another based on an APRA exception. *The Indianapolis Star v. Trustees of Indiana University*, 787 N.E.2d 893, 919 (Ind. Ct. App. 2003). I do not find any authority to indicate this disclosure to another party was not a waiver of the privilege for the purposes of the APRA.

Finally is the question whether the "common interest doctrine" applies here. The purpose of this federal doctrine is to "protect the confidentiality of communications passing from

one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel.” U.S. v. Evans, 113 F.3d 1457, 1467 (7th Cir. 1997) [Citations omitted]. However, as you point out in your complaint, privilege is governed by Indiana state law rather than federal law. *Reginald Martin Agency, Inc. v. Conseco Med. Ins. Co.*, 460 F.Supp.2d at 917. I do not locate any Indiana case law acknowledging the federal “common interest doctrine” as applicable to the law of privilege in Indiana.

Regarding the concerns raised by the you and the response from the Town related to the Town’s truthfulness to the judiciary or here as it relates to the lost computer files, that is a factual argument beyond the purview of the Public Access Counselor’s Office. My opinion here is based on the information presented with the assumption the facts presented by both parties are true as it relates to the current request for access to public records.

CONCLUSION

For the foregoing reasons, I find that the Town of Knightstown carries the burden of proving why the requested documents are excepted from disclosure. Further, it is my opinion that the attorney/client privilege does not extend for the purposes of the APRA to communications between attorneys representing two separate parties, and the “common interest doctrine” does not except the communications from disclosure under the APRA.

Best regards,



Heather Willis Neal
Public Access Counselor

cc: Joel Harvey, Attorney for the Town of Knightstown