

May 14, 2007

Jeffrey Lynn Bringle
c/o Box 3465 Virginia Street
Columbus, IN 47203

Re: Formal Complaint 07-FC-97; Alleged Violation of the Access to Public Records Act by the Bartholomew County Drainage Board and Surveyor

Dear Mr. Bringle:

This is in response to your formal complaint alleging that the Bartholomew County Drainage Board (“Board”) and Surveyor violated the Access to Public Records Act by denying you a record and by failing to state the name and title or position of the person responsible for the denial. I find that the Surveyor was the person responsible for the denial, and the Surveyor and Board bear the burden of sustaining the denial on the basis of the exception for work product of an attorney.

BACKGROUND

You requested a copy of a letter from acting Board attorney J. Grant Tucker that was sent to the Board in response to a specific request for guidance from the Drainage Board. The letter is referred to in the minutes of the March 12, 2007 meeting of the Board. The minutes recite that the Board discussed procedures during regular meetings and public hearing meetings, and document that “Grant was on hand to review his letter to Bob Nagel regarding questions on rules of procedure.” This discussion followed a letter dated February 7 to Mr. Tucker soliciting his input regarding public comments at public meetings of the Board.

Your request was denied. The denial letter was typewritten on the letterhead of the Bartholomew County Drainage Board, with E.R. Gray III, Surveyor as the sole person noted in the printed heading. The denial, without salutation or signature line, stated: “In response to a written request for public records hand delivered to the Bartholomew County Surveyor’s Office at 2:15 p.m. Tuesday, March 13, 2007 by Jeff Bringle. Your request is denied as the document you asked for is exempt from disclosure pursuant to I.C. 5-14-3-4(b)(2) in that it is the work product of the attorney representing the Drainage Board.”

You allege that the denial violated the Access to Public Records Act because the letter failed to identify “who ever made the legal determination that it was work product.” You allege that previous public access requests were signed by Tom Finke. You also complain that you did not receive the letter you requested since the Board was seeking guidance on how to conduct public meetings, which should not be secret. You stated that the discussion about the rules of procedure was vague and unremarkable.

I sent a copy of your complaint to the Board. The response was submitted on behalf of the Board by J. Grant Tucker. I have previously sent you a copy of his response. Mr. Tucker reiterated that the Board had sought his advice and opinion; hence, the letter constitutes attorney work product and is exempt at the discretion of the Board.

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. Ind. Cod 5-14-3-3(a). The public agency bears the burden of proving that a record is exempt. IC 5-14-3-1. Under IC 5-14-3-9(g), a public agency defending a court challenge to its denial meets its burden by proving that the record falls within any one of the categories of exempted records under section 4(b) and by establishing the content of the record with adequate specificity. One exemption contained in section 4 of the Access to Public Records Act that is relevant to this inquiry is:

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 5-14-3-2(b)(2).

The APRA defines “work product of an attorney” as the following:

"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.

This definition does not restrict the application of any exception under section 4 of this chapter.

IC 5-14-3-2(p).

You do not specify in your complaint why you believe that the specific exemption cited does not apply. Your complaint seems to question whether any advice from counsel about public meetings could be subject to the exemption for work product of an attorney. I do not agree that the attorney work product exemption could not apply to a record that fits that exemption merely because the subject of the advice is the conduct of public board meetings. However, I note that the Board bears the burden of proving that the letter constitutes attorney work product, which is

limited to information compiled by an attorney in reasonable anticipation of litigation. Nothing in the record shows that the letter was prepared by the attorney in reasonable anticipation of litigation. Rather, the letter was prepared at the specific request of the Board in what appears to be a request for advice on the right of the Board to limit public input during meetings, where the Board felt that the public had been granted too much freedom and latitude in the past. I find that the letter may not fit the exemption for work product of an attorney based on the definition contained in the Access to Public Records Act.

If a public agency denies a record, the denial must include a statement of the exemption that authorizes the agency to withhold the record, and the name and title or position of the person responsible for the denial. IC 5-14-3-9(c)(2).

Your second complaint is that the denial letter lacks identification of the person who made the legal determination that the letter was the work product of an attorney. The APRA does not require that the name of legal counsel advising the agency be disclosed in the written denial, only that the public agency identify the person responsible for the denial. Although the letter is not signed, the letter bears the name of the surveyor for the county, E.R. Gray III. This is the only name in the heading. The surveyor is an ex officio member of the county drainage board. *See* IC 36-9-27-5. Mr. Gray is the person responsible for the denial. I find that the Board did comply with IC 5-14-3-9(c) by issuing a denial on letterhead containing only one name, that of the Surveyor, who is a member of the Board.

CONCLUSION

For the foregoing reasons, I find that the denial issued by the Bartholomew County Drainage Board complied with the requirements of the Access to Public Records Act, but the Board bears the burden of proving that the letter prepared by the Board attorney fits within the exception for work product of an attorney.

Sincerely,

Karen Davis
Public Access Counselor

cc: J. Grant Tucker