



STATE OF INDIANA

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November 29, 2010

Mr. Gregory A. Purvis
12271 Chiseled Stone Dr.
Fishers, IN 46037

*Re: Formal Complaint 10-FC-266; Alleged Violation of the Access to
Public Records Act by the Indiana Secretary of State*

Dear Mr. Purvis:

This advisory opinion is in response to your formal complaint alleging the Indiana Secretary of State ("SOS") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* SOS General Counsel Jerold Bonnet's response is enclosed for your reference.

BACKGROUND

In your complaint, you allege that the SOS denied your request for access to an investigative report prepared by the SOS. On October 1, 2010, you provided to the SOS certain public records demonstrating that, in your opinion, Charles P. White violated Indiana election law. You asked the SOS to conduct an investigation into the alleged violation(s). The SOS conducted an investigation and created a report consisting of "256 pages of unspecified public documents" (the "Report"). On October 26th, you sent to Mr. Bonnet a request via email seeking access to the Report. The same day, Mr. Bonnet denied your request. He cited to three exceptions to the APRA for the authority to withhold the Report: investigatory records of a law enforcement agency, attorney work product, and intra-agency and interagency advisory/deliberative material. You argue that these exceptions do not apply and the SOS should have disclosed the Report.

In response to your complaint, Mr. Bonnet maintains his position regarding the applicability of the three cited exceptions to the APRA. He notes that in late September of 2010, the SOS learned of allegations that a particular individual committed vote fraud in Hamilton County during the primary election held in May of 2010. On September 30th, the Hamilton County Prosecutor asked the SOS to provide any material or information that would assist with the prosecutors' review of the matter. Under the authority of the SOS as the State's Chief Election Officer, Mr. Bonnet, in his capacity as general counsel for the SOS, was tasked with reviewing the allegations and preparing a

report for use of the SOS, the Hamilton County Prosecutor, and the two special prosecutors appointed by the Hamilton County Prosecutor to review the allegations. On October 22nd, Mr. Bonnet delivered his Report to the SOS, the Hamilton County Prosecutor, and the special prosecutors. The Report consisted of a 27-page legal memorandum and appendix, which included 124 pages of documents obtained from public agencies and public records, 26 pages of statutory materials, and 90 pages of Indiana court case law and court records.

Mr. Bonnet concedes that many of the elements of the Report are not, by themselves, exempt from disclosure under the APRA. However, he argues that the entire Report is exempt from disclosure as attorney work product. He notes that although the exceptions cited by the SOS are discretionary, the SOS has consistently applied its policy of denying access to records created in contemplation of law enforcement proceedings, records consisting of attorney work product, or records prepared for the use of cooperating law enforcement agencies. He adds that the SOS gave no direction to the prosecutors regarding whether or not to release the Report, and that the prosecutors have the discretion to release it upon request or on their own initiative.

ANALYSIS

The public policy of the APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” I.C. § 5-14-3-1. The SOS is 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 its public records during regular business hours unless the records are excepted from disclosure as confidential or nondisclosable under the APRA. I.C. § 5-14-3-3(a).

Here, the SOS cites to the so-called deliberative materials exception to the APRA as its legal basis for refusing to disclose the Report. The deliberative materials exception is found at I.C. § 5-14-3-4(b)(6):

(b) Except as otherwise provided by subsection (a), the following public records shall be excepted from section 3 of this chapter at the discretion of a public agency:

...

(6) 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.

Considering that Mr. Bonnet prepared the Report for the SOS and the prosecutors, it is axiomatic that the Report consisted of intra-agency and interagency materials. The deliberative materials exception also requires, however, that the records be expressions of opinion or speculative in nature and communicated for the purpose of decision making.

Mr. Bonnet states that the Report was prepared in order to provide information and advice to the SOS and the prosecutors regarding the allegations against Mr. White. The Hamilton County Prosecutor specifically requested any material or information that would assist with the prosecutors' review of the matter, which will end when the prosecutors decide whether or not to file charges against Mr. White. Accordingly, the Report qualifies as intra-agency and interagency deliberative material and the SOS did not violate the APRA by withholding it.

Moreover, pursuant to I.C. §5-14-3-4(b)(2) a public agency has the discretion to withhold a record that is the work product of an attorney representing a public agency:

“Work product of an attorney” means information compiled by an attorney in reasonable anticipation of litigation and 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.

I.C. §5-14-3-2(p) (emphasis added). Mr. Bonnet notes that the Report contains a legal memorandum, documents obtained from public agencies and public records, statutory materials, and Indiana case law and court records. The definition of attorney work product includes documents that are “legal research or records” such as those included in the Report. Mr. Bonnet does not claim that every page of those records contains his original “opinions, theories, or conclusions.” However, the context of the work product exception does not appear to limit work product to information *created* by the attorney. Rather, the inclusion of “legal research or records” indicates that the General Assembly intended to except from disclosure those materials that, while not created by the attorney himself or herself, nevertheless reveal the attorney’s “opinions, theories, or conclusions” due to their content. For example, the content of the statutory materials in Mr. Bonnet’s report could suggest that the prosecutors could pursue a particular violation of Indiana law rather than another, consider multiple charges, or indicate that they should file no charges at all. In that case, revealing the content of the statutory materials would reveal the attorney’s opinions, theories, or conclusions even if the attorney was not the original creator of the material. Thus, to the extent that the Report contains documents that are otherwise disclosable, but the disclosure of them in the context of attorney work product would reveal the attorney’s opinions, theories, or conclusions, it is my opinion that the public agency has discretion to withhold such material. Because this appears to be the case here, it is my opinion that the SOS had the discretion to withhold the entire Report pursuant to subsection 4(b)(2) of the APRA.¹

¹ In my opinion, the SOS had the discretion to exempt the entire Report as attorney work product. However, I note that if the deliberative materials exception were the only exception that applied here, section 6 of the APRA would require the SOS to release portions of the Report that did not fall within the exception. Generally, if a public record contains both disclosable and nondisclosable information, the APRA requires public agencies to separate and/or redact the nondisclosable information and make the disclosable information available for inspection and copying. I.C. § 5-14-3-6(a). The public access

Because it is my opinion that the SOS had the discretion to withhold the Report under subsections 4(b)(2) and 4(b)(6) of the APRA, it is unnecessary to analyze the SOS's citation to subsection 4(b)(1).

CONCLUSION

For the foregoing reasons, it is my opinion that the SOS did not violate the APRA.

Best regards,



Andrew J. Kossack
Public Access Counselor

cc: Jerold Bonnet

counselor has repeatedly opined that if there is information in deliberative materials which is neither advisory/speculative in nature nor inextricably linked with the nondisclosable materials, that information should be provided. *See, e.g., Op. of the Public Access Counselor 09-FC-53.* In my opinion, factual information is inextricably linked with advisory/speculative materials if the latter cannot be effectively communicated without the inclusion of the former. Exempting factual information that is necessary for providing advice to decision makers is consistent with the exception's purpose of shielding deliberative processes from public disclosure in order to ensure that advisors fully inform decision makers of all relevant facts. Thus, to the extent that the factual material in the Report was necessary for Mr. Bonnet's analysis and advice, the SOS acted within its discretion in withholding it.