STATE OF INDIANA

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October 17, 2011

Marvin and Michelle Hershenson
1213 Woodbridge Lane
Indianapolis, Indiana 46260

Re: Formal Complaint 11-FC-246; Alleged Violation of the Access to Public Records Act by the City of Indianapolis Office of Corporation Counsel

Dear Mr. and Mrs. Hershenson:

This advisory opinion is in response to your formal complaint alleging the City of Indianapolis Office of Corporation Counsel ("City") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq*. Andrea Brandes Newsom, Chief Deputy Corporation Counsel for the City, responded on behalf of the City. Her response is enclosed for your reference.

BACKGROUND

In your complaint, you allege that the City in denying access to certain documents as part of your public records request, failed to provide a log identifying each document withheld, including information concerning the date, author, recipient(s), subject matter, a list of any enclosures of attachments, and the grounds claimed for withholding the specific document. The City provided that public agencies are not obligated to create new records in response to public records requests, including privilege logs. The basis for denying certain records in response to your request was that the records represented attorney-work product and advisory or deliberative records of a public agency that were subject to discretionary withholding under the APRA, to which the City provided to you the relevant statutory citations.

In response to your formal complaint, Ms. Newsom advised that you requested a log identifying each document withheld in response to your records request that was received by the Department of Public Works. The City provided to you that it was not required to create new records in response to a public records request and cited *Opinion of the Public Access Counselor 09-FC-285.* Further, the City cited to I.C. § 5-14-3-4(b)(2) and (b)(6) of the APRA that provide a public agency discretion in disclosing documents that are attorney-work product and/or deliberative materials.

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." *See* I.C. § 5-14-3-1. The City is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the City's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, the City responded to your request within the timelines provided by the APRA.

Under the APRA, a public agency denying access in response to a written public records request must put that denial in writing and include the following information: (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 title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). The APRA does not obligate public agencies to create any records in response to a public records request, including a privilege log. *See Opinion of the Public Access Counselor 09-FC-285.* I note the following analysis from Counselor O'Connor in a prior advisory opinion:

> Under the APRA, the burden of proof beyond the written response anticipated under Indiana Code section 5-14-3-9(c) is outlined for any *court action* taken against the public agency for denial under Indiana Code sections 5-14-3-9(e) or (f). If the public agency claimed one of the exemptions from disclosure outlined at Indiana Code section 5-14-3-4(a), then the agency would then have to either "establish the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit" *to the court*. Similarly, if the public agency claims an exemption under Indiana Code section 5-14-3-4(b), then the agency must prove to the court that the record falls within any one of the exemptions listed in that provision and establish the content of the record with adequate specificity. There is no

> authority under the APRA that required the IDEM to provide you with a more detailed explanation of the denials other than a statement of the exemption authorizing nondisclosure, but such an explanation would be required if this matter was ever reviewed by a trial court. (emphasis added). *Opinions of the Public Access Counselor 01-FC-47 and 09-FC-285.*

Because the City has satisfied its obligations under section 9(c) of the APRA, I agree with Counselors O'Connor and Neal's analysis. Thus the City is not required to provide you with any additional information at this point. If, however, this matter proceeded to litigation before a court, the burden of proof would indeed be on City to sustain its denial. *See* I.C. § 5-14-3-9(f). As such, it is my opinion that the City did not violate the APRA by failing to create and disclose a privilege log in response to your public records request.

As to the records that the City denied you access to in response to your request, the APRA excepts from disclosure, among others, the following:

> 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.
> I.C. § 5-14-3-4(b)(6).

When a record contains both disclosable and nondisclosable information and an agency receives a request for access to the record, the agency shall "separate the material that may be disclosed and make it available for inspection and copying." *See* I.C. § 5-14-3-6(a). The burden of proof for nondisclosure is placed on the agency and not the person making the request. *See* I.C. § 5-14-3-1.

The Indiana Court of Appeals addressed a similar issue in *Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ.,* 787 N.E.2d 893 (Ind. Ct. App. 2005):

> However, *section 6 of APRA* requires a public agency to separate discloseable from non-discloseable *information* contained in public records. *I.C. § 5-14-3-6(a)*. By stating that agencies are required to separate "information" contained in public records, the legislature has signaled an intention to allow public access to whatever portions of a public record are not protected from disclosure by an applicable exception. To permit an agency to establish that a given document, or even a portion thereof, is non-discloseable simply by proving that some of the documents

> in a group of similarly requested items are non-discloseable would frustrate this purpose and be contrary to section 6. To the extent that the *Journal Gazette* case suggests otherwise, we respectfully decline to follow it.
>
> Instead, we agree with the reasoning of the United States Supreme Court in *Mink, supra*, i.e., that those factual matters which are not inextricably linked with other non-discloseable materials, should not be protected from public disclosure. See *410 U.S. at 92*. Consistent with the mandate of *APRA section 6*, any factual information which can be thus separated from the non-discloseable matters must be made available for public access. *Id*. at 913-14.

To the extent that the records you requested contains information that is not an expression of opinion or speculative in nature, and is not inextricably linked to non-disclosable information, APRA provides that the information shall be disclosed. Here, the City has provided that the record at issue consists, in its entirety, of advisory material necessary for decision making and the deliberative process of a government agency. The record is an expression of opinion by its author and coauthors, is speculative in nature, and was communicated for the purpose of operational and legal decision making. It is my opinion that the City has met its burden in citing to I.C. § 5-14-3-4(b)(6) and did not act contrary to the APRA in response to your request.

The City has also provided that certain records were deemed to be confidential pursuant to state law an attorney-client communication or were the work product of an attorney pursuant to I.C. § 5-14-3-4(b)(2). One category of nondisclosable public records consists of records declared confidential by a state statute. *See* I.C. § 5-14-3-4(a)(1). I.C. § 34-46-3-1 provides a statutory privilege regarding attorney and client communications. Indiana courts have also recognized the confidentiality of such communications:

> The privilege provides that when an attorney is consulted on business within the scope of his profession, the communications on the subject between him and his client should be treated as confidential. The privilege applies to all communications to an attorney for the purpose of obtaining professional legal advice or aid regarding the client's rights and liabilities.

Hueck v. State, 590 N.E.2d 581, 584 (Ind. Ct. App. 1992) (citations omitted). "Information subject to the attorney client privilege retains its privileged character until the client has consented to its disclosure." *Mayberry v. State*, 670 N.E.2d 1262, 1267 (Ind. 1996), *citing Key v. State*, 132 N.E.2d 143, 145 (Ind. 1956). Moreover, the Indiana Court of Appeals has held that government agencies may rely on the attorney-client privilege when they communicate with their attorneys on business within the scope of the attorney's profession. *Board of Trustees of Public Employees Retirement Fund of Indiana v. Morley*, 580 N.E.2d 371 (Ind. Ct. App. 1991).

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, pursuant to state employment or an appointment by a public agency: a public agency; the state; or an individual.

> "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).

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, pursuant to state employment or an appointment by a public agency: a public agency; the state; or an individual.

> "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).

If the records you sought constitute the work product of an attorney or an attorney-client communication, the City has met its burden pursuant to the APRA in denying your request. The City has provided that the records being sought were related to losses alleged by you in a Notice of Tort Claim filed with the City as 10-TC-1412. As such, it is my opinion that the City did not violate the APRA in denying your request.

CONCLUSION

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

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: Andrea Brandes Newsom