STATE OF INDIANA

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March 31, 2011

Mr. Joseph A. Cafasso
12559 N. 400 E.
Wheatfield, IN 46392

Re: Formal Complaint 11-FC-80; Alleged Violations of the Access to Public Records Act and Open Door Law by the Kankakee Township Trustee

Dear Mr. Cafasso:

This advisory opinion is in response to your formal complaint alleging the Kankakee Township Trustee ("Trustee") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq*., and the Open Door Law, Ind. Code § 5-14-1.5-1 *et seq*. My office forwarded a copy of your complaint to the Trustee, but we have not yet received a response. I granted your request for priority status under 62 Ind. Admin. Code 1-1-3(3).

BACKGROUND

In your complaint, you allege[1] that you the Trustee violated the ODL by scheduling a meeting that "was canceled at the very last minute with no notification and no rescheduled meeting date, [which is] an open door [sic] violation." Further, you allege that the Trustee violated the APRA by (1) denying you access to records on the basis that they consist of attorney-client privileged information and/or attorney work product; (2) denying a request on the basis that it was not reasonably particular, and requesting that you provide clarification of the same; (3) failing to produce requested records within a reasonable amount of time.

With regard to the records withheld on the basis of the attorney-client privilege and/or the attorney work product exception to the APRA, you claim that there is no official attorney-client relationship between the Trustee and the individual the Trustee claims is acting as his attorney. Moreover, you claim that the Trustee "has caused an

[1] I note that your complaint contains several allegations that are outside the scope of this office's authority, which is to issue advisory opinion regarding alleged violations of the public access laws. *See* I.C. § 5-14-4-10. Consequently, this opinion is based only on those portions of your complaint alleging violations of either the APRA or the ODL.

'inadvertent waiver' and loss of this cited privilege by including Attorney's [sic] Gabrielse in a line item payable of $1,110.00 of taxpayer money in [another record that was disclosed publicly]." There are also other line items to that attorney in other documents that have been publicly released.

As to the Trustee's denial of your request based on his position that it was not reasonably particular, you claim that he responded to other portions of your request that were similar in scope. You also argue that the "file [containing responsive records] is not that extensive, nor exempt from the public access statutes."

Finally, you argue that the Trustee failed to produce records within a reasonable amount of time by informing you that it would take approximately 60 days from the date of the Trustee's response to compile and prepare responsive records. The Trustee cites to the "significant scope of the request and the limited staff of the township." The Trustee's office consists of the Trustee, who works part-time, and a part-time clerk, but the clerk is out of the office for the next two to three weeks. You argue that the timing of the response is a "very critical matter" due to issues related to fire department resources, funding, and staffing, which you outline in detail. You also believe that certain portions of the population served by the fire department are being "discriminated against." You also argue that your request is "not burdensome and does not interfere with Trustee operations at all per the fact that Trustee Allen will not be copying.. [sic] and though the request seems large, the file for Kankakee Township is rather small in nature."

ANALYSIS

Initially, I address your allegation that the Trustee violated the ODL. However, previous public access counselors have opined that the ODL does not apply to individual public officials such as township trustees. In a 2006 advisory opinion, Counselor O'Connor explained:

> [Y]ou have marked "Open Door Law Violation" in the space provided on the complaint form, and the meetings of the Trustee with the fire department, CPA and attorney are the only factual allegations that you make resembling any Open Door Law allegation. Therefore, I would note that the Open Door Law provides that all meetings of governing bodies of public agencies are required to be open at all times for the purpose of permitting members of the public to observe and record them. IC 5-14-1.5-3(a). A "governing body" is *two or more* individuals who are a public agency that is a board or commission, a board or commission of a public agency, or a committee appointed directly by the governing body or its presiding officer. *See* IC 5-14-1.5-2(b). Hence, for a meeting to be subject to the Open Door Law, the meeting must have involved a governing body, not a single individual like a Township Trustee. If you mean to allege that the Trustee must post notice and hold meetings with the fire department, CPA, and attorney in public, your allegation has no merit.

Op. of the Public Access Counselor 06-FC-187. Accordingly, I cannot find that the Trustee violated the ODL.

As to your allegations that the Trustee violated the APRA, the public policy of the APRA states, "[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 Trustee 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 the Trustee's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

Under the APRA, a public agency that withholds a public record bears the burden of proof to show that the record is exempt. I.C. §§ 5-14-3-1, 5-14-3-9(f) and (g). Exceptions to disclosure are narrowly construed. I.C. § 5-14-3-1. I note that, without the benefit of a response from the Trustee, it is difficult for me to fully analyze why your request was denied. Nevertheless, I offer the following analysis based on your complaint and the Trustee's response to you attached thereto.

You argue that the Trustee could not withhold records based on the attorney-client privilege and the attorney work product exception to the APRA because no attorney-client relationship exists between the Trustee and an attorney. Generally, if such a relationship does exist between an attorney and a public official or public agency, such records may be withheld. One category of nondisclosable public records consists of records declared confidential by a state statute. *See* I.C. § 5-14-3-4(a)(1). Indiana Code § 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).

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). Without the benefit of a response from the Trustee, I cannot determine whether or not the Trustee has such an attorney-client relationship. Moreover, the public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. Thus, if the Trustee can demonstrate that an attorney-client relationship exists and show that the withheld records fall within these exceptions, the Trustee may withhold the records on those bases. Because the Trustee has not shown that such a relationship exists, it is my opinion that the Trustee has not yet met that burden. Consequently, such records must be released unless the Trustee can sustain its burden by showing the existence of such relationship.

You also allege that the Trustee violated the APRA when he denied your request for all Township fire and safety related communications since January 1, 2005, to the present, on the basis that it was not a reasonably particular request. The Trustee stated that the Township "will respond if a the [sic] request is clarified with reasonable particularity." Under the ARRA, a request for inspection or copying must identify with reasonable particularity the record being requested. I.C. § 5-14-3-3(a). While the term "reasonable particularity" is not defined in the APRA, it has been addressed a number of times by the public access counselor. *See Opinions of the Public Access Counselor 99-FC-21* and *00-FC-15* for two examples. Counselor Hurst addressed this issue in *Opinion of the Public Access Counselor 04-FC-38*:

> A request for public records must "identify with reasonable particularity the record being requested." IC 5-14-3-3(a)(1). While a request for *information* may in many circumstances meet this requirement, when the public agency does not organize or maintain its records in a manner that permits it to readily identify records that are responsive to the request, it is under no obligation to search all of its records for any reference to the information being requested. Moreover, unless otherwise required by law, a public agency is under no obligation to maintain its records in any particular manner, and it is under no obligation to *create* a record that complies with the requesting party's request.

Opinion of the Public Access Counselor 04-FC-38 (2004), available at http://www.in.gov/pac/advisory/files/04-FC-38.pdf. In requesting "all communication" regarding a certain subject matter from 2005 to the present, it is my opinion that such a request is universal rather than particular. In a 2009 advisory opinion, Counselor Neal noted that email "is a method of communication and not a record," and that requests for records that identify the records by method of communication only are not reasonably

particular. *Opinion of the Public Access Counselor 09-FC-124*. Counselor Neal reasoned:

> If, on the other hand, the request identified the records with particularity enough that the School could determine which records are sought (e.g. all emails from a person to another [person] for a particular date or date range), the School would be obligated to retrieve those records and provide access to them, subject to any exceptions to disclosure.

Informal Opinion of the Public Access Counselor 08-INF-23. Previous public access counselors have not required public agencies to search through records -- electronically or manually -- to determine what records might contain information responsive to a request. *Id.*; *Opinion of the Public Access Counselor 04-FC-38*. Consequently, it is my opinion that the Trustee did not violate the APRA by asking that you provide additional clarification regarding the records you were seeking. *See* I.C. § 5-14-3-3(a)(1). If you could narrow the request based on sender/receiver and date range in accordance with Counselor Neal's opinion above, in my opinion the Trustee should produce all non-confidential records that are responsive to such a request.

Finally, the APRA provides no firm deadlines for the production of public records. The public access counselor has stated repeatedly that records must be produced within a reasonable period of time, based on the facts and circumstances. Considering factors such as the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *Opinion of the Public Access Counselor 02-FC-45*.

In his response to you, the Trustee cites to the breadth of your requests and the fact that only he and a part-time clerk, who will be out of the office for two to three weeks, are employed in the Trustee's office. As a result, the Trustee estimated that it would take approximately 60 days to prepare the records for disclosure. Due to the number and breadth of your requests and the Trustee's limited personnel resources, it is my opinion that the Trustee did not act unreasonably by estimating a 60-day response period. Under the APRA, a public agency shall "regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees." I.C. § 5-14-3-7(a). *See also Op. of the Public Access Counselor 09-FC-115* (two months was not an unreasonable production time where agency director and records request handler recently assumed the duties of another position and needed time to review and redact confidential information); *Op. of the Public Access Counselor 04-FC-81* (not unreasonable for agency to take two months to produce personnel records and policies where other staffing changes occurred at the agency and responding employee was new to the position); *see also Op. of the Public Access Counselor 07-FC-327* (three months was not an unreasonable amount of time to respond to seven requests with approximately 1000 pages of responsive documents; 34 days was not unreasonable

amount of time to produce three-page document considering number of other pending requests).

CONCLUSION

For the foregoing reasons, it is my opinion that the Trustee has not yet met its burden to show that an attorney-client relationship existed that would permit the Trustee to withhold records based on the attorney-client privilege and the attorney work product exception to the APRA. Unless the Trustee can demonstrate such a relationship, he should release such records within a reasonable period of time. The Trustee has not otherwise violated the APRA.

Best regards,

Andrew J. Kossack
Public Access Counselor

cc: Randy L. Allen