



STATE OF INDIANA

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September 5, 2012

Mark Brooks
Utility Workers Union of America
521 Central Avenue
Nashville, Tennessee 37211

Re: Formal Complaint 12-FC-226; Alleged Violation of the Access to Public Records Act by the City of Westfield

Dear Mr. Brooks:

This advisory opinion is in response to your formal complaint alleging that the City of Westfield ("City") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Brian J. Zaiger, Attorney, responded on behalf of the City. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you provide that on August 6, 2012, you submitted a written request for records to the City for copies of the following:

1. Each response submitted by any entity to the Request for Proposals ("RFP") for the Purchase and/or Management of the Wastewater Utility, Water Utility, and Related Assets, issued by the City on or about April 17, 2012;
2. Any expression of interest or similar document of any kind submitted by any entity to the City in response to the RFP;
3. All exhibits, attachments, or cover letters of any kind submitted by any entity with any such response or expression of interest.

On August 10, 2012, Brian J. Zaiger responded in writing to your request on behalf of the City. Mr. Zaiger advised that the possible responses to the RFP were not in possession of the City and thus would not be subject to the requirements of the APRA. Mr. Zaiger further provided that any documents that have been produced or possibly submitted would have been produced to the attorneys retained to advise the City. On August 13, 2012, Mr. Zaiger advised in writing that the responses were not available for public access pursuant to I.C. § 5-22-9, *et seq.* Mr. Zaiger advised that you would be entitled to view all responses once the contract was awarded.

In light of the definition of “public record” provided in the APRA and the Indiana Court of Appeals holding in *Knightstown Banner, LLC v. Town of Knightstown*, you argue that the City may not deny a request for records by merely stating the records are in possession of the City’s attorney and thus not public records. You further provide that the City may deny your request pursuant to the attorney-client privilege or the attorney work product exception; although you do admit that the City did directly make this claim in writing in response to your request.

In response to your formal complaint, Mr. Zaiger advised that the City received your request for public records related to certain documents regarding an RFP that had been previously issued. Your initial request was followed up by an additional request on August 6, 2012. The RFP that was the topic of your request was issued by the City on or about April 17, 2012 and later amended on or about May 7, 2012. The mechanics of responding to the RFP was designed to omit the handling by any member of the City staff, minimize exposure, and was used to better advise the City on a possible course of action as it related to the information that was gathered. In that regard, all responses to the RFP were made directly to the attorneys retained for the sole purpose of advising the City on a further course of action. No documents were released from those attorney offices. All reasonable efforts were made to avoid the disclosure of the information received.

Mr. Zaiger advised that you received this explanation in writing in response to your request. On August 13, 2012, you received what was explained to be a formal response to your request. That particular correspondence explained that the denial of public access to the records that were sought were authorized and mandated by I.C. § 5-22-9 *et. seq.* All responses and information made public by the City was done pursuant to the highest regards to I.C. § 5-22-9-4. The request that you have submitted is clearly within the exceptions outlines under I.C. § 5-22-9-5. As such, all information and documents received by the City from the RFP and in the possession of the attorneys representing the City, will be made available if and when a contract is awarded.

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



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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 in writing to your written requests for records within seven (7) days of receipt. As such, it is my opinion that the City complied with the requirements of section 9 of the APRA in responding to your request.

The APRA provides that 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. *See* I.C. § 5-14-3-2(n). In 2005 the Indiana Court of Appeals in *Knightstown Banner, LLC v. Town of Knightstown*, 838 N.E.2d 1127 (Ind. Ct. App. 2005) (“*Knightstown*”), held that because a private entity created a settlement agreement for a public agency, the settlement agreement was a public record subject to disclosure under the APRA. *Id.* at 1134. 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 in order to deny the public access. *Id.* at 1133. The Court of Appeals reasoned that “the taxpayers of a community have the right to know how and why their money is spent. Therefore, mindful of the statute's purposes of openness, the court does not allow a public authority to thwart disclosure by having an attorney or an insurer's attorney prepare every writing that the public authority wishes to keep confidential.” *Id.* at 1134; *See also Opinions of the Public Access Counselor 08-FC-223; 10-FC-219; and 12-FC-37.*

As applicable here, the City in its initial written response on August 10, 2012 provided:

“The possible response to the RFP as stated in your letter would not be in possession of the City and thus would not be subject to review and inspection by the public. Any documents that may have been produced or possibly submitted would have been produced to attorney retains to advise the City.”

In a separate correspondence dated August 10, 2012, the City provided:

“None of the responses to the RFP are in possession of the City and therefore not available for inspection, review, and copying.”

Although the City refers to its August 13, 2012 to be its “formal response” to your request, the clear indication from its August 10, 2012 responses is that the RFP records would not be considered “public records” and thus not subject to the APRA because the records had been solely received by the City’s attorneys. In my opinion, the City’s August 10, 2012 responses were improper in light of I.C. § 5-14-3-2(n) and *Knightstown*. The records that you sought would have been considered “public records” upon receipt by the attorney’s retained by the City to handle the RFP process; as such it is my opinion that the City’s August 10, 2012 responses were in violation of the APRA.

However, the City’s “formal response” submitted on August 13, 2012 provided that the records were not available to public access pursuant to I.C. § 5-22-9 *et. seq.* The City advised that you would be entitled to view all responses once the contract was awarded. I.C. § 5-22-9-4 provides that proposals (e.g. RFP’s) must be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation. Further, pursuant to I.C. § 5-22-9-5:

Sec. 5. (a) A register of proposals must be:

- (1) prepared; and
- (2) open for public inspection after contract award.

(b) The register of proposals must contain the following:

- (1) A copy of the request for proposals.
- (2) A list of all persons to whom copies of the request for proposals were given
- (3) A list of all proposals received, which must include all of the following:
 - (A) The names and addresses of all offerors.
 - (B) The dollar amount of each offer
 - (C) The name of the successful offeror and the dollar amount of that offeror’s offer
- (4) The basis on which the award was made
- (5) The entire contents of the contract file except for proprietary information included with an offer, such as trade secrets, manufacturing processes, and financial information that was not required to be made available for public inspection by the terms of the request for proposals.

There is no dispute that a contract has yet to be awarded in response to the City’s RFP or that the process of negotiation has culminated. As such, the City complied with the requirements of I.C. § 5-22-9-4, I.C. § 5-22-9-5, and the APRA in denying your request for access.¹ *See Opinion of the Public Access Counselor 10-FC-260.* As the City

¹ As it is my opinion that the City’s reliance on I.C. § 5-22-9 *et. seq.* was proper, I will not address your claims related to the City’s ability to cite to the attorney-client privilege or the attorney-work product



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outlined in its August 13, 2012 response, all responses will be available for review once a contract is awarded.

CONCLUSION

For the foregoing reasons, it is my opinion that the City violated the APRA by initially denying your request for records by providing that the records were not "public records" pursuant to the APRA because they had only been received by attorneys retained by the City to handle the RFP. However, it is my opinion that the City's subsequent denial pursuant to I.C. § 5-22-9-4 and I.C. § 5-22-9-5 was proper as a contract has yet to be awarded and the process of negotiation is still pending.

Best regards,

A handwritten signature in black ink that reads "J. Hoage".

Joseph B. Hoage
Public Access Counselor

cc: Brian J. Zaiger

exceptions to deny your request. I would note that in my review of all of the City's written responses, I did not find any record where the City cited to either exception to deny your request.