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June 28, 2013

Mr. James A. Hartman
9744 Castle Woods Cove
Indianapolis, Indiana 46280

Re: Formal Complaint 13-FC-158; Alleged Violation of the Access to Public Records Act by the Indiana Horse Racing Commission

Dear Mr. Hartman:

This advisory opinion is in response to your formal complaint alleging the Indiana Horse Racing Commission ("Commission") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq*. Lea Ellingwood, General Counsel, responded on behalf of the Commission. Her response is enclosed for your reference.

BACKGROUND

As applicable to your formal complaint, you provide that on or about February 18, 2013, you submitted a written request for records to the Commission for copies of correspondence between the Commission and the Office of the Attorney General ("OAG") and correspondence between the Commission and Commission staff regarding the arrest and conviction of an administrative law judge ("ALJ") retained by the Commission. On May 8, 2013, the Commission denied your request pursuant to I.C. § 5-14-3-4(a)(1), I.C. § 34-46-3-1, and I.C. § 5-14-3-4(b)(6). While you do not doubt that certain communications requested would be considered privileged, deliberative, or speculative; you argue that simple communications of fact that do not seek legal advice or that speculate, communicated for the purposes of a decision making would not be eligible to be withheld from disclosure pursuant to the provisions cited by the Commission. You further maintain that discussions between the Commission and its staff would not be considered deliberative because the only arena in which the Commissioners may deliberate and make decisions would be in a public meeting.

In response to your formal complaint, Ms. Ellingwood advised that your request was properly denied pursuant to I.C. § 5-14-3-4(a)(1), I.C. § 34-46-3-1, and I.C. § 5-14-3-4(b)(6). Case law from the Indiana Court of Appeals and prior advisory opinions of the Public Access Counselor support the Commission's position regarding attorney-client communications, when such communication are made for the purpose of obtaining legal advice or aid regarding the client's rights and responsibilities. The Commission and its

staff seek legal advice and representation from its internal General Counsel and Deputy General Counsel, as well as from the OAG. Pursuant to I.C. 4-6, the OAG is responsible for representing the legal interests of state agencies and for providing legal advice to state agencies. As applicable here, after receiving information that one of its ALJs had been arrested and subsequently convicted, Commission staff and the Chairman of the Commission began the process of determining the appropriate course of action. The Commission's Executive Director and the Chairman consulted with Ms. Ellingwood, in her capacity as General Counsel, as well as a representative from the OAG's office for advice regarding the Commission's rights and potential liabilities. The documents requested, and subsequently withheld, are those communications between said parties.

While there are undoubtedly a number of different communications between the OAG and the Commission, as well as between the Commissioners and Commission staff, which would not be considered confidential pursuant to the attorney-client privilege, no such records are responsive to your request that specifically sought records related to the ALJ's arrests. All such documents that are responsive to your request fall with the attorney-client privilege and the Commission is prohibited from disclosing confidential records.

Ms. Ellingwood further provided that the fact that the withheld communications were not used for deliberation at a public meeting of the Commission is irrelevant. The deliberative materials exception found under I.C. § 5-14-3-4(b)(6) does not require that the record be used for deliberation at a public meeting. The exception only provides that the record be intra- or inter-agency, that is advisory or deliberative, containing an expression of opinion or speculate, that is communicated for the purposes of a decision making. The communications responsive to your request between Commission staff, the Chairman and the OAG were made for purposes of determining the appropriate course of action regarding the ALJ.

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 Commission 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 School'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 twenty-four 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 days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). 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. 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). Counselor O'Connor provided the following analysis regarding section 9:

> 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. *Opinion of the Public Access Counselor 01-FC-47*.

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).). Specifically:

> "The communications sought are communications between a client (PERF) and its attorney (the Attorney General) discussing potential legal problems concerning the way in which PERF was carrying out its duties. These fall within exceptions to disclosure under the public records statute because they are protected by the attorney client privilege which makes them confidential under statute and supreme court rule. See IC 34-1-14-5; IC 34-1-60-4; Prof.Cond.R. 1.6(a)." *Morley*, 580 N.E.2d at 374.

Here, your initial request sought copies of correspondence between the Commission and the OAG regarding the ALJ's arrest and convictions. There is no dispute that the OAG provides legal representation and advice to all state agencies, including the Commission. *See generally* I.C. § 4-6. It is my opinion that the communications between the Commission staff and the OAG for the purpose of obtaining legal advice or aid regarding the Commission's rights and liabilities as to the ALJ's arrest and subsequent conviction would fall within I.C. § 34-46-3-1. It is important to note that the Commission is not asserting that all communications between the OAG and the Commission would qualify as attorney-client communication; however all communications that are responsive to your specific request would be. As such, it is my opinion that the Commission did not violate the APRA by denying your request for all communication between the agency and the OAG regarding the ALJ's arrest and conviction pursuant to I.C. § 34-46-3-1.

Your remaining request sought all correspondence between the Commission staff and the Commission regarding the ALJ's arrests and convictions. All such communications between members of the Commission and/or the Executive Director and Ms. Ellingwood, in her capacity as General Counsel, made for the purpose of obtaining legal advice or aid would fall with attorney-client communication privilege cited above. As such, the Commission would not violate the APRA for denying said requests pursuant to I.C. § 34-46-3-1. Again, the Commission has provided that all such correspondence that would be responsive to your second request would fall within this privilege. As such, it is my opinion that the Commission did not violate the APRA in denying your secondary request pursuant to I.C. § 34-46-3-1.

The General Assembly has also provided that records that qualify as deliberative materials may be disclosed at the discretion of the public agency. *See* I.C. § 5-14-3-4(b)(6). The subdivision provides that:

> 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).

Deliberative materials include information that reflects, for example, one's ideas, consideration and recommendations on a subject or issue for use in a decision making process. *See Opinion of the Public Access Counselor 98-FC-1.* Many, if not most documents that a public agency creates, maintains or retains may be part of some decision making process. *See Opinion of the Public Access Counselor 98-FC-4; 02-FC-13; and 11-INF-64.* The purpose of protecting such communications is to "prevent injury to the quality of agency decisions." *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002). The frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public, and the decisions and policies formulated might be poorer as a result. *Newman*, 766 N.E.2d at 12. In order to withhold such records from disclosure under Indiana Code 5-14-3-4(b)(6), the documents must also be interagency or interagency records that are advisory or deliberative and that are expressions of opinion or speculative in nature. *See Opinions of the Public Access Counselor 98-INF-8 and 03-FC-17.* However, the deliberative materials exception does not provide a pre- and post-decision distinction, so that the records may be withheld even after a decision has been made. *See Opinion of the Public Access Counselor 09-INF-25.*

When a record contains both discloseable and nondiscloseable information and an agency receives a request for access, 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 provided the following guidance on 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 dislcoseable from non-dislcoseable *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-dislcoseable 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.

Had the Commission solely relied on the deliberative materials exception to deny your request, it would be required to comply with the requirements of section 6 in redacting all speculative and deliberative information and provide the remaining discloseable information. However, the Commission has provided that as to your specific requests, all such information would also qualify as attorney-client communication, made confidential pursuant to I.C. § 34-46-3-1. As such, it is my opinion that the Commission did not violate the APRA by additionally citing to the deliberative materials exception to deny your request.

CONCLUSION

For the foregoing reasons, it is my opinion the Commission did not violate the APRA by denying your request for correspondence pursuant to I.C. § 34-46-3-1 and I.C. § 5-14-3-4(b)(6).

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: Lea Ellingwood