



STATE OF INDIANA

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October 10, 2013

Mr. Jay M. Young
Evansville Courier & Press
300 East Walnut St.
P.O. Box 268
Evansville, IN 47702-7711

Re: Formal Complaint 13-FC-266; Alleged Violation of the Access to Public Records Act by the Vanderburgh County Board of Commissioners

Dear Mr. Young,

This advisory opinion is in response to your formal complaint alleging the Vanderburgh County Board of Commissioners, ("County") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* Mr. Joseph H. Harrison Jr. Esq., of the Massey Law Offices, responded on behalf of the County. His response is enclosed for your reference. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on September 10, 2013. Although your formal complaint requested priority status, I have declined to treat it as such for not meeting the criteria of 62 IAC 1-1-3.

BACKGROUND

Your complaint alleges the Vanderburgh County Board of Commissioners violated the Access to Public Records Act by denying your request in violation of Ind. Code § 5-14-3-3(b). You allege that on or about September 3, 2012, you made a request for records upon the County for a report prepared by Terracon Consulting Engineers and Scientists of Cincinnati, a third party vendor of the County. You claim you were denied access when the County refused your request on September 4, 2013 citing attorney-client privilege and the confidential status of the records you were seeking.

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 Ind.

Code § 5-14-3-1. The Vanderburgh County Board of Commissioners is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the County's public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14- 3-3(a).

A request for records may be oral or written. See Ind. Code § 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 Ind. Code § 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 Ind. Code § 5-14-3-9(b). A response from the public agency could be an acknowledgement the request has been received and information regarding how or when the agency intends to comply.

It appears from the totality of the records submitted by their response; the County is not the entity that is the custodian of said records. The County, through the Massey Law Offices claims that Massey Law is the sole entity maintaining the records. This is evidenced by the Exhibits produced in their response. Massey Law has provided a copy of their Agreement for Legal Services with the County.

A private entity cannot be expected to produce records if they are not a public agency under § 5-14-3-2(n) et. seq. Massey Law Office, although representing the County, is not a public agency under the APRA. Although records coming into the possession of the County would be captured by the APRA, it is unclear from the complaint and response if that has indeed happened.

Even if the County had been provided a copy of the report, it is obvious from Mr. Harrison's response the report is attorney work product and prepared under the auspices of pending litigation. Massey Law has provided a copy of their Agreement for Legal Services with the County and as such is their legal representative. By their own volition, Massey obtained the report exclusively for their use. Although a proxy of the County, certain records are discretionary under the APRA. The report would fall into this exception.

Work product of an attorney means information compiled by an attorney in reasonable anticipation of litigation. See Ind. Code § 5-14-3-2(r). Although the minutes of the meeting were not provided and I cannot state with certainty the accuracy of the statement, the County alleges they authorized the filing of a lawsuit on September 10, 2013. Even though this was after the filing of your formal complaint, it can be inferred the report was generated for such a purpose. Confidential information is exempt from disclosure under Ind. Code § 5-14-3-4(a). This includes records declared confidential by or under rules adopted by the Supreme Court of Indiana. Id at (a)(8). Rule 1.6 of the Indiana Rules of Professional Conduct holds that a lawyer shall not reveal information relating to representation of a client unless the client gives informed consent or the disclosure is impliedly authorized in order to carry out the representation or the disclosure. The

information you seek falls under this privilege, as it is information gathered in the course of representation.

CONCLUSION

For the foregoing reasons, it is the Opinion of the Office of the Public Access Counselor the Vanderburgh County Board of Commissioners did not violate the Access to Public Records Act.

Regards,

A handwritten signature in black ink, appearing to read 'LHB', with a long horizontal flourish extending to the left.

Luke H. Britt
Public Access Counselor

cc: Joseph H. Harrison, Jr. Esq.