



STATE OF INDIANA

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November 14, 2013

Ms. Cristy Wheeler
C/O Mr. Bart Karwath, Esq.
Barnes & Thornburg, LLC
11 South Meridian
Indianapolis, IN 46204

Re: Formal Complaint 13-FC-301; Alleged Violation of the Access to Public Records Act by the Town of Mooresville and the Mooresville Town Council

Dear Ms. Wheeler,

This advisory opinion is in response to your formal complaint alleging that the Town of Mooresville and the Mooresville Town Council (hereafter referenced as "Town") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The Court has responded to your complaint by way of Mr. Jonathan Hughes, Esq. His response is enclosed for your review¹. 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 October 15, 2013.

BACKGROUND

Your complaint dated October 15, 2013, alleges that the Town of Mooresville and the Mooresville Town Council violated the Access to Public Records Act by withholding records responsive to your APRA request.

During the course of *Indiana-American Water Company, Inc. v. Town of Mooresville* 1:12-CV-1493-TWP-DML in the United States District Court, Southern District of Indiana and Cause No. 55D01-1212-PL-2729, the Indiana-American Water Company ("IAWC") made several discovery requests in the course of the litigation. The Town raised several objections to the discovery and both courts denied Motions to Compel

¹ Only the rebuttal response is enclosed. The exhibits provided with the response are not included due to the length of the submission. It is available for your review at this Office; however, I trust that most, if not all of the exhibits have been provided to you in the course of the court proceeding referenced in this Opinion.

Production of Documents. In an APRA request sent to the Town on September 30, 2013, you sent a request to the Town for the following records:

Documents and communications identified by date, author and recipient which list specific communications and documents exchanged with persons at the Indiana American Water Company, the Indiana Utility Regulatory Commission, members of the media, other members of the public, and outside consultants and other non-legislators.

On October 4, 2013, Counsel for the Town denied your APRA request citing several subsections of the APRA as justification for the denial. A response to your formal complaint was submitted to this Office on October 31, 2013. Counsel for the Town outlined arguments for upholding the denial including timeliness, legislative privilege and reiterated the exceptions under the APRA.

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 Town of Mooresville and the Mooresville Town Council are public agencies 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 Town’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.

The matter at hand has been addressed both in Federal and State Courts. Any difference in opinion from the Court’s ruling is not intended to usurp the judiciary’s ruling, but rather to offer a perspective from the standpoint of the APRA. The APRA defers to the judiciary in regard to several matters and a Court Order generally trumps Public Access Counselor’s Opinions as persuasive, but not binding authority. Certainly, not to be flippant; but this situation is akin to a child asking one parent for permission, being denied, and then turning to the other parent for a more satisfactory result. That being said, the spirited debate and novel issues in the complaint and response merit due consideration, and I do differ from the Courts in my analysis.

1. Timeliness

Ind. Code § 5-14-5-7(a) states a formal complaint must be filed with the Public Access Counselor within thirty (30) days of the denial of a public records request. The Town contends your formal complaint be denied because the denial occurred on October 22, 2012 pursuant to a September 28, 2012 request. The Town argues that because the denial occurred in 2012, you do not have standing to file a complaint with this Office.

The September 28, 2012 request has not been provided, only the denial on October 22, 2012 has been submitted as an exhibit. Because the request has been a subject of protracted litigation and the request was resurrected in 2013, I will accept your complaint as timely. Typically, I do not accept the resurrection of a request as timely; however, because this issue was disputed at bar for several months, clarification of these issues are in order. The argument that these matters have been addressed in several briefings and Court Orders vis-à-vis the litigation, I find it proper to speak to the concerns at hand. I will defer to the Court to decide if I have the discretion to do so, if a complaint is filed pursuant to Ind. Code § 5-14-3-9.5 et. seq. for the purposes of collecting attorney fees and civil penalties.

2. Legislative Privilege

Much is made by both parties arguing whether legislative privilege applies to the records sought. There is no question the Town is a quasi-legislative body and is engaged in legitimate legislative functions. The Town asserts legislative immunity shields the Town from disclosing records. I respectfully disagree with the Courts and the Town that immunity encompasses privilege. I find them mutually exclusive.

Immunity entails protection from civil liability for members of a legislature. It is conceded case law unequivocally holds as such. But that is not the issue at hand. The release of public records does not subject the legislature to civil liability. Access to public records is not under the umbrella of immunity. I am persuaded by your argument citing *Town of Schererville v. Vargas*, 389 N.E.2d 346 (Ind. Ct. App. 1979) and the subsequent cases you refer to dealing with production of documents being distinguished from legislative immunity.

However, privilege is a different animal altogether. The APRA statute clearly captures legislative bodies as subject to public access. See Ind. Code § 5-14-3-2(n)(1) and (2)(c). Liberally construing the APRA (as is the statutory obligation of the Public Access Counselor under Ind. Code § 5-14-3-1), it can be inferred the denial of a request for public records from a legislative body cannot be justified by a universal assertion of immunity or privilege. The communications may not be *admissible* in court, but evidentiary admissibility trial rules do not apply to a public records request.

Legislative privilege would definitely extend to testimony and depositions. Both parties seem to stipulate to that and the case law cited is clear. *Production of documents*; however, is not the same as testimony and depositions. Of course, I would opine certain communications such as deliberative or opinion-based discussions are privileged under Ind. Code § 5-14-3-4(b)(6), but the exception only applies to intra and interagency communication (and contractors). Other exchanges with outside entities and constituents memorialize in writing may be subject to disclosure. Even the Court in *Dyas v. City of Fairhope* cited by the Town alludes to gathering information from “other sources” than testimony. I can infer this could include public records production.

Review of the privilege log indicates the majority of the communication withheld fall into the category of either legislative privilege and immunity or deliberative materials. Deliberative materials typically do make up a majority of public agency documentation. It is likely most of the communication would fall under the exception for materials created in a decision-making process, but those materials that are not deliberative are subject to disclosure. Note again this is only intra or interagency communication. Another exception cited is work product of an attorney. This is clearly excepted from disclosure under Ind. Code § 5-14-3-4(b)(2). However, if a public record contains disclosable and nondisclosable information, the public agency shall, upon receipt of a request under this chapter, separate the material that may be disclosed and make it available for inspection and copying. Ind. Code § 5-14-3-6(a). Furthermore, in a court action a public agency denying a request must establish the content of the record with adequate specificity and not by relying on a conclusory statement. Ind. Code § 5-14-3-9(g)(1)(B). I determine the broad exceptions cited in the privilege log do not meet that standard.

Consider the APRA’s sister statute, the Open Door Law (“ODL”) found at Ind. Code § 5-14-1.5 *et. seq.* It also requires legislative bodies hold discussions and deliberations in open public meetings if a majority of the members are gathered. The ODL is not intended to chill the decision-making process, but rather to allow the public to observe the legislative process and be informed as to official action on public business.

3. Other Discretionary Exceptions

The Town asserts several other exceptions in the APRA to justify withholding the records. These considerations would be applicable if the records fall into these exceptions. Without the benefit of viewing the records, I cannot determine with accuracy if the exceptions would apply. It should be noted; however, the exception in Ind. Code § 5-14-3-4(b)(14) would not apply to the Town of Mooresville. The general assembly is the State legislative branch and does not apply to local legislative bodies.²

It should be noted if the Town raised the “reasonable particularity” argument in its response, I would likely consider the request to be too broad. See Ind. Code § 5-14-3-3(a)(1). *Anderson v. Huntington County Board of Commissioners*, 983 N.E.2d 613 (Ind.

² The statute references “the” general assembly, not “a” general assembly and would not apply even if a local legislative body refers to itself as a general assembly.

App. 2013) held that a request for communication is not reasonably particular if the request does not identify the sender and the recipient of the communication.

CONCLUSION

For the foregoing reasons, it is the Opinion of the Public Access the Town of Mooresville violated the Access to Public Records Act by applying legislative privilege too broadly and not identifying with reasonable specificity the records they intend on withholding.

Regards,

A handwritten signature in black ink, appearing to read 'LHB', with a long, sweeping underline.

Luke H. Britt
Public Access Counselor

Cc: Jonathan W. Hughes, Esq.