



# STATE OF INDIANA

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December 10, 2013

Kelli M. Stopczynski  
1301 E. Douglas Rd.  
Mishawaka, IN 46535

*Re: Formal Complaint 13-FC-335; Alleged Violation of the Access to Public Records Act by the City of South Bend*

Dear Ms. Stopczynski,

This advisory opinion is in response to your formal complaint alleging the City of South Bend ("City") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The City responded to your complaint via Ms. Cristal Brisco, Corporation Counsel. Her response is enclosed for your review. 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 November 27, 2013. Your request has been granted priority status.

## **BACKGROUND**

Your complaint alleges the City of South Bend violated the Access to Public Records Act by denying producing records responsive to your request.

On November 18, 2013, you submitted to the City a request for any and all documentation relating to the Federal wiretapping case involving the City's police force. On November 25, 2013, the City responded that the records could not be disclosed because they were determined to be work product protected from disclosure under Ind. Code § 5-14-3-4(b)(2).

You filed your complaint with this Office on November 27, 2013. The City responded on December 5, 2013, amended their denial from the attorney work product privilege to include several other exceptions as well.

## **ANALYSIS**

The public policy of the APRA states that "a (p) roviding person 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 City of South Bend 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 City'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.

You requested "any and all documentation" related to the settlement. I do not agree with the City that your request does not identify with reasonable particularity what records you seek pursuant to Ind. Code § 5-14-3-3(a)(1). It is my understanding there is more than one concurrent suit relating to the wiretapping case, however, I do think the City could identify and retrieve the documentation without a significant problem doing so.

The more troubling aspect of your request is that you seek a broad amount of material that would contain information that may not be disclosed under the APRA. Settlement negotiations are particularly sensitive, because they are contemplative back-and-forth dialogues attempting to resolve an issue. While the expenditure of taxpayer funds is critically important to track, a public agency must be given a certain amount of discretion to exercise their judgment when deciding the course of litigation. If settlement negotiations were disclosed before a final offer, it could potentially compromise the integrity of the discussions. The City has indicated that some, but not all of the issues have been settled. Even disclosing the final terms of the settled issues could potentially impact the issues which have not yet been determined.

The APRA contemplates this. See Ind. Code §§5-14-3-4(a)(1), (a)(8). However, I do not find the legal reasoning of the City's argument as compelling. According to the Indiana Rules for Alternative Dispute Resolution, the mediation process itself is viewed the same as settlement negotiations in a case, thereby limiting the admissibility of information obtained during the mediation process, but not limiting the disclosable nature of the information. Ind. R. ADR, Rule 2.11 and Ind. Evidence Rule 408 are both cited by the City. Furthermore, they cite the Indiana Administrative Orders and Procedures Act found in Ind. Code § 4-21.4-3.5-18(e). This would not apply to a Federal proceeding.

The purpose of the APRA is to establish transparency and open access in government, however, the APRA is not meant to create a stumbling block for agency operations. Again, the disclosure of negotiation discussions would definitely have a chilling effect upon the parties attempting to reach a resolution.

I am more compelled by the work product and the deliberative material argument. It is clear work product of an attorney is protected from disclosure under Ind. Code § 5-14-3-4(b)(2). "Work product of an attorney" means information compiled by an attorney in

reasonable anticipation of litigation. Ind. Code § 5-14-3-2(r). The APRA does not give an exhaustive list of what may be considered work product, however, settlement negotiations are often performed by attorneys and those conversations, memos, offers, etc., would conceivably be part of that work product. Moreover, information containing deliberative material would also only have to be released at the discretion of the agency. Deliberative material is defined as expressions of opinion or is of a speculative nature, and is communicated for the purpose of decision making. Ind. Code § 5-14-3-4(b)(6). Any kind of settlement offer received or prepared would be deliberative as it is a contemplation of a final action. It should be noted the final accepted settlement is public record and should be disclosed. See *Knightstown Banner v. Town of Knightstown*, 838 N.E.2d. 1127 (Ind. Ct. App. 2005).

### CONCLUSION

For the foregoing reasons, it is the Opinion of the Public Access Counselor the City of South Bend did not violate the Access to Public Records Act by denying the release of settlement material.

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: Ms. Cristal Brisco