



STATE OF INDIANA

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July 31, 2014

Mr. Jon F. Schmoll
15 N. Washington St.
Valparaiso, IN 46383

Re: Formal Complaint 14-FC-158; Alleged Violation of the Access to Public Records Act by the Indiana Department of Insurance

Dear Mr. Schmoll,

This advisory opinion is in response to your formal complaint alleging the Indiana Department of Insurance ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* 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 July 24, 2014. Your complaint has been granted priority status.

BACKGROUND

Your complaint dated July 23, 2014, alleges Indiana Department of Insurance violated the Access to Public Records Act by not providing records responsive to your request in violation of Ind. Code § 5-14-3-3(b).

On or about June 30, 2014, you submitted to the Department a public records request for a number of documents related to ongoing litigation. Your request specifically referenced the cause number in the Vanderburgh Circuit Court. There seems to be a dispute as to whether the Department is a named party in the lawsuit or an interested third party. The Department is, however, represented by outside counsel in matters associated with the lawsuit.

You received a response from both the Deputy General Counsel for the Department as well as the Department's outside counsel stating their preference for the request would be to produce the documents within the bounds of discovery. The documents you request appear to be part of the controversy addressed by the civil suit. You argue that you are entitled to the public records through an APRA request despite the fact the records are pertinent to the ongoing case in Vanderburgh Circuit Court. You have not been denied

access to any records or the inspection thereof; you have merely been asked to avail yourself of the appropriate discovery device.

DISCUSSION

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 Indiana Department of Insurance 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 Department’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).

It is clear the Department of Insurance, through its Commissioner in his official capacity, has intervened in the case. The Department is inextricably linked to the litigation whether they are a party or not. Furthermore, you have provided a set of pleadings suggesting the discovery process has been initiated and there has been at least one objection filed to a request for production of documents. It is unclear if the same documents you request through APRA are the same as those which have been demanded in discovery.

You cite *Kentner v. Indiana Public Employers’ Plan, Inc.*, 852 N.E.2d 565 (Ind. App. 2006) and prior Public Access Counselor’s opinions as authority for your position. In *Kentner*, a litigant in a Federal lawsuit was unsuccessful in discovery attempts; therefore, he sued the Indiana Public Employers’ Plan (“IPEP”) in state court when an APRA request also failed. *Kentner* argued he was entitled to public records as his status as a citizen with all the rights afforded to him by the APRA. The Court agreed relying heavily on Ind. Code § 5-14-3-3 which states, “No request may be denied because the person making the request refuses to state the purpose of the request, unless such condition is required by other applicable statute.”

The Court in *Kentner* was clear that Federal Rules of Civil Procedure do not trump the APRA therefore changing his status as a litigant. The Court, however, did not address a circumstance where a state court litigant is attempting to file an APRA request at the expense of the state court’s sovereign jurisdiction over discovery matters in a case at bar. Again, the case is distinguishable as *Kentner* was actually denied the records – in fact; part of the factual dispute was whether IPED was even a public agency. A denial has not occurred in the present case, nor has an APRA confidentiality or discretionary exemption been identified.

Prior Public Access Counselors have opined that a person’s status as a litigant is irrelevant to their rights to public access under the APRA. You have cited *Advisory Opinion 06-FC-75 of the Public Access Counselor* as the penultimate Opinion (*A person who is entitled to utilize discovery because of a pending administrative matter or court litigation may request records from a public agency under the APRA, in addition to, or in*

lieu of, formal discovery)¹. With all due respect to Counselor Davis and other PACs who have opined similarly, I disagree with this philosophy.

Article 3, Section 1 of the Indiana Constitution States:

The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative; and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.

Accordingly, the Indiana judiciary has the authority to establish Trial Rules to “govern the procedure and practice in all courts of the state of Indiana in all suits of a civil nature whether cognizable as cases at law, in equity, or of statutory origin. They shall be construed to secure the just, speedy and inexpensive determination of every action”. Indiana Trial Rule 1. The courts have exclusive jurisdiction over discovery matters. The APRA and the Public Access Counselor do not.

Moreover, I stated to you previously:

It is the general policy of [my office] to decline complaints currently under the jurisdiction of the state courts. When a lawsuit has been filed concerning a specific subject matter, the General Assembly has precluded the Office of the Public Access Counselor from addressing the controversy from an APRA perspective. See Ind. Code § 5-14-4-10(6). The *Kentner* case does not address this consideration and appears to be more concerned with actual access to records as opposed to the method by which they are produced and obtained. As of yet, there does not seem to be a question over whether the information you seek is disclosable, only the manner by which the Indiana Department of Insurance must gather, retrieve and produce them.

This is not a matter of semantics; Ind. Code § 5-14-4-10(6) exists to prevent forum shopping and to prevent the muddying of waters between the courts’ exclusive jurisdiction over discovery matters and the executive branch’s involvement in ongoing litigation². Indeed, the discovery process would be frustrated if an executive branch official were to preempt the

¹ Counselor Davis also spent a significant portion of the opinion addressing the confusion created when a discovery request looks like an APRA request and vice-versa. Indeed, you specifically referenced the circuit court cause number on your records request.

² You suggest Ind. Code § 5-14-4-10(6) would only apply to lawsuits filed whose causes of actions arose from APRA denials, however, I interpret the prepositional phrase *under...Ind. Code 5-14-3* to modify the entire statute prohibiting me from issuing an Opinion on whether records sought in *any* lawsuit are disclosable.

court's authority by issuing an opinion on production of documents. Although admissibility and accessibility of public records are mutually exclusive, my involvement in this litigation is inappropriate.

Whether the Indiana Department of Insurance is a party, a relevant non-party or an intervener matters not. The subject matter of the information you seek is germane to the proceedings and inextricably linked to the litigation. I am not aware of a public access exception to disclosure regarding the records you seek and the Indiana Department of Insurance would likely be compelled to produce them pursuant to a subpoena or a third-party request for production. The burden would shift to the Department to assert any confidential or discretionary justification for withholding said records. Disclosability notwithstanding, a discovery device is the appropriate tool for requesting records in the current instance.

To be clear, had you made the request before the commencement of the lawsuit or subsequent to its conclusion, you would have been entitled to an APRA request. Similarly, had you made a request for Department records which were not germane to the litigation, you would have been entitled to those as well. Only those records which directly correlate to the pending litigation would need to be produced through discovery methods.³

For the foregoing reasons, it is the Opinion of the Public Access Counselor that the Indiana Department of Insurance acted appropriately by requesting that you revise your public records request as a request for production of documents through the trial court. Due to Ind. Code § 5-14-4-10(6), I decline to make a conclusive determination under the APRA as to whether the records sought are disclosable. The burden is on the Department

Regards,

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

Luke H. Britt
Public Access Counselor

Cc: Wade E. Fulford; A. Richard M. Blaiklock

³ If the Court were to decline to compel discovery on the basis of relevance to the case, then an APRA request would be acceptable as a Trier of fact has adjudicated the records to immaterial to the case.