



STATE OF INDIANA

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October 9, 2014

Mr. Robert Kasarda
1111 Glendale Blvd.
Valparaiso, IN 46383

Re: Formal Complaint 14-FC-201; Alleged Violation of the Access to Public Records Act ("APRA") by the Porter County Board of Commissioners

Dear Mr. Kasarda,

This advisory opinion is in response to your formal complaint alleging the Porter County Board of Commissioners ("Board") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* President of the Board, Mr. John A. Evans' 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 September 8, 2014.

BACKGROUND

Your complaint dated September 8, 2014, alleges the Porter County Board of Commissioners 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 September 3, 2014, you submitted a public records request from the Board seeking a human resource audit ("Audit") completed by an outside consultant commissioned by the Board. The Board denied your request that same day citing the deliberative materials exception found at Ind. Code § 5-14-3-4(b)(6).

In its response, the Board argues the Audit is communication between a contractor and the Board which was expressed for the purposes of decision-making and falls squarely within the definition of deliberative material as intended by the statute.

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 Porter 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 Board'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).

The General Assembly has provided that records which qualify as deliberative materials may be disclosed at the discretion of the public agency. See Ind. Code § 5-14-3-4(b)(6).

The subdivision provides:

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.

Deliberative materials include information which 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 inter-agency or intra-agency records, which are advisory or deliberative and 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 the records may be withheld even after a decision has been made. See *Opinion of the Public Access Counselor 09-INF-25*.

The nature of the Audit falls within the definition of deliberative material under Ind. Code § 5-14-3-4(b)(6). The burden is on the public agency to demonstrate non-disclosure is justified. Based upon its response, I find the Board has done so in this instance. While I caution agencies to use the deliberative material exception judiciously, it appears the Board is justified in exercising its discretion.

CONCLUSION

It is the Opinion of the Public Access Counselor the Porter County Board of Commissioners did not violate the Access to Public Records Act.

Regards,

A handwritten signature in black ink, appearing to be 'LH Britt', written in a cursive style.

Luke H. Britt
Public Access Counselor

Cc: John A. Evans