



STATE OF INDIANA

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April 11, 2014

Mr. Michael Hoose
9075 W. Forest Drive
Elwood, IN 46036

Re: Formal Complaint 14-FC-49; Alleged Violation of the Access to Public Records Act by the City of Elwood

Dear Mr. Hoose,

This advisory opinion is in response to your formal complaint alleging the City of Elwood ("City") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The City has provided a response to your complaint via Mr. James Wilson, Esq., attorney for the City. His response is attached 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 March 14, 2014.

BACKGROUND

Your complaint dated March 12, 2014 alleges the City of Elwood 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).

In December of 2013, the City of Elwood announced in a public meeting a potential annexation of certain property. The City was interested in gauging the public's acquiescence or resistance to the annexation. On or about December 5, 2013, you received a poll from the law firm of Bingham, Farrer & Wilson seeking input on whether you would file a remonstrance of the annexation. Although the poll was on firm letterhead, it was signed by the City of Elwood. You expressed that you did not support the initiative.

On February 7, 2014 you submitted a public records request to the City's Clerk-Treasurer for each response to the poll. You received an acknowledgement on the same day by the Clerk-Treasurer indicating she would send the request to the City's law firm for response. On February 13, 2014, an associate of the firm denied your request arguing they are not public records subject to disclosure.

The City responded to your complaint reiterating their belief the responses are not public record because they are maintained by the firm of Bingham, Farrer & Wilson as an independent contractor and the City did not ever receive the data. They also assert attorney-client privilege.

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 City of Elwood 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.

It is unclear from the materials provided whether the poll was at the behest of the City or an independent exercise on the part of the City’s contracted law firm. However, because the poll was signed “City of Elwood”, I can infer the City was instrumental in the decision to conduct the poll. What complicates the public access issue is the fact the City never received the data from the firm. Nonetheless, if the City never received the information, it is not a public record. While the definition of public record under the APRA is comprehensive, it is not meant to include records in the custody of an independent contractor when the records were never received, created or maintained by an agency.

As to the assertion of attorney-client privilege, Rule 1.6 of the Rules of Professional Conduct states a lawyer shall not reveal information relating to representation of a client unless the client gives informed consent. While in the attorney’s sole possession, the results of the poll would be confidential. If the agency did receive the results, I would not find the argument of attorney-client privilege as compelling because the information would be captured by the APRA, which does not specifically declare attorney-client communication privileged unless it is in contemplation of litigation. A more sound argument would be the results are intra-agency deliberative materials provided by a private contractor. See Ind. Code § 5-14-3-4(b)(6). The poll would be an expression of public opinion provided to the City by a private contractor for the purposes of decision making.

CONCLUSION

For the foregoing reasons, it is the Opinion of the Indiana Public Access Counselor the City of Elwood has not violated the Access to Public Records Act.

Regards,

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

Luke H. Britt
Public Access Counselor

Cc: Mr. James Wilson, Esq.