

March 28, 2003

Matthew R. Lee
Inner City Press/Fair Finance Watch
1919 Washington Avenue
Bronx, NY 10457

Re: *Advisory Opinion 03-FC-17*; Alleged Denial of Access to Public Records by the Office of the Attorney General.

Dear Mr. Lee:

This is in response to your formal complaint, which was received on March 21, 2003. ¹ You have alleged that the Office of the Attorney General ("Attorney General") violated the Indiana Access to Public Records Act, ("APRA,") Indiana Code chapter 5-14-3. You requested access to public records related to the predatory lending settlement reached by the Attorney General with Household International, Inc. ("Household") and certain information was provided in response to this request. You claim, however, that the Attorney General improperly denied you access to additional information maintained by that office by relying upon trade secrets exception at Indiana Code section 5-14-3-4(a)(4), Indiana Code section 5-14-3-4(b)(6) for deliberative materials and Indiana Code section 5-14-3-4(b)(2) for attorney work-product. Further, you claim that the Attorney General constructively denied you access when copying fees were not waived upon your request for the public records that you have been provided and that the consent judgment between the Attorney General and Household contains a confidentiality provision that violates the APRA. Finally, it is your opinion that the Attorney General cannot rely upon confidentiality laws of other states in denying you access to public records of that office. Mr. Roy Coffey, Deputy Attorney General, responded in writing to your complaint and a copy of his response is enclosed for your reference.

For the reasons set forth below, it is my opinion that the Attorney General's reliance upon the exceptions for work product of an attorney, deliberative material and trade secrets is valid only to the extent that any information contained in the public records you requested qualifies under one of these exceptions. To the extent that any information provided by other states or Household does not qualify under one of these exceptions, the Attorney General may not withhold that information under these exceptions. The burden for showing that all or part of a public record is nondisclosable under the APRA lies with the Attorney General and the Attorney General is obligated to disclose information that is not excepted from disclosure. It is also my opinion that it was not a constructive denial for the Attorney

General to refuse to waive a copying fee that is authorized under the APRA. Further, the confidentiality provision of the consent judgment reached between the Attorney General and Household does not appear to violate the APRA. Finally, if the Attorney General wishes to claim that any public record maintained by that office is confidential pursuant to another state's law, then the Attorney General is required to cite to Indiana Code section 5-14-3-6.5 and the other state's statute in order to justify a nondisclosure on this basis.

BACKGROUND

According to your complaint, on January 10, 2003 you requested public records from the Attorney General related to the predatory lending settlement that office reached with Household Financial, Inc. In a letter dated January 23rd, the Attorney General provided you with a copy of the consent judgment between that office and Household ("consent judgment,") but denied your request for a waiver of the copying fees related to your request. The Attorney General then requested additional time to review other documents you had requested. In a letter dated March 18th, the Attorney General acknowledged its production of a copy of the settlement agreement to you and additional information about Indiana consumers who had filed complaints about Household. The Attorney General, however, denied you access to certain of the public records related to Household, Inc. on the basis of various exceptions under the APRA for trade secrets, deliberative material and attorney work product.

You believe that the Attorney General is improperly relying upon the statutory exceptions provided for deliberative material, attorney work-product and trade secrets. See, Ind. Code 5-14-3-4(b)(2), (a)(4) and (b)(6). You also believe that the confidentiality provision in the Attorney General's consent judgment violates the APRA in that it provides that the Attorney General will notify Household of any public records disclosure requests received and provide Household with the opportunity to assert an exception to disclosure. In addition, you believe that the Attorney General's reference to others states' confidentiality laws is not an appropriate basis for an agency in Indiana to rely upon. Finally, it is your position that the Attorney General's refusal to waive copying fees for you constitutes a constructive denial of access under the APRA. For these reasons, you filed your formal complaint with this Office.

In response to your complaint, Mr. Coffey stated that the public records that were not provided to you consisted of e-mail communications and documents provided by various states and Household subject to an understanding that this information would remain confidential. Mr. Coffey also re-asserted the position of the Attorney General that the statutory bases for denying you access to additional public records were valid 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." Ind. Code § 5-14-3-1. Furthermore, "[t]his

chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record." Ind. Code § 5-14-3-1.

The Attorney General is clearly a public agency for the purposes of the APRA. Ind. Code § 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Attorney General during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under Indiana Code section 5-14-3-4. Ind. Code § 5-14-3-3(a).

Since it is the public policy of the APRA that it is to be construed liberally in favor of disclosure, exceptions to that general rule of disclosure are to be narrowly construed. Ind. Code §5-14-3-1. Liberal construction of a statute requires narrow construction of its exceptions. In the context of public disclosure laws

"[e]xceptions to a statute and its operation should be strictly construed by placing the burden of proving the exception upon the party claiming it. Other states, in examining their respective 'Open Door' or 'Sunshine' laws, follow these same mandates, particularly the principle of strict construction of statutory exceptions."

Robinson v. Indiana University, 659 N.E.2d 153, 156 (Ind. App. 1995) [Citations omitted] quoting *Common Council of City of Peru v. Peru Daily Tribune, Inc.* 440 N.E. 2d 726, 729 (Ind. App. 1982) [Citations omitted]. If a public record contains disclosable and nondisclosable information, then the public agency is obligated to redact or remove the nondisclosable information and provide the disclosable information to the requestor. Ind. Code §5-14-3-6(a).

There is no dispute between the parties that the information you requested is a public record for the purposes of the APRA. Ind. Code 5-14-3-2. The Attorney General has raised a number of bases for its denial of access to these public records and you have claimed that the refusal to waive copying fees for you constitutes a constructive denial of access. You have also challenged the validity of the confidentiality provision set forth in the consent judgment under the APRA and the Attorney General referred to other states' confidentiality laws as a basis for denying you access to public records. All of these issues will be addressed separately in the following paragraphs:

Attorney Work Product

The Attorney General has cited to Indiana Code section 5-14-3-4(b)(2) as one of the bases for denying you access to public records. In particular, this exception was raised in response to your requests for access to public records of the communications between the Attorney General and other states.

For the purposes of the APRA, "work product of an attorney" means Information compiled by an attorney in reasonable anticipation of litigation and includes the attorney's:

1. notes and statements taken during interviews of prospective witnesses; and
2. legal research or records, correspondence, reports or memoranda to the extent that each contains the attorney's opinions, theories or conclusion.

Indiana Code §5-14-3-2. A public agency has discretion to withhold work product of an attorney who is representing the state, whether as an employee of the state or appointed to serve as counsel for a particular case. Ind. Code §5-14-3-4(b)(2).

The Attorney General has indicated that the communications between states qualifies as the work product of an attorney and that is certainly a credible claim given that the action taken against Household was in anticipation of and in the case of actual litigation against Household. The burden under the APRA of showing that particular information or an entire public record is nondisclosable lies with the public agency, not with the person making the request. To the extent that any information contained in communications with others states concerning Household does not qualify as the work product of an attorney under the APRA, however, the Attorney General may not withhold that information under this exception.

Trade Secrets

The Attorney General also cited to Indiana Code section 5-14-3-4(a)(4), for records containing trade secrets as a basis for not disclosing information provided by Household to the Attorney General during negotiations. A "trade secret" for the purposes of the APRA has "the meaning set forth in IC 24-2-3-2," the Indiana Uniform Trade Secrets Act (IUTSA. Ind. Code § 5-14-3-2.

"Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique or process, that:

1. derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
2. is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

A trade secret that may be protected under the IUTSA has four key characteristics:

1. it is information
2. which derives independent economic value
3. that is not generally known, or readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use, and
4. it is the subject of efforts reasonable under the circumstances to maintain its secrecy.

Ackerman v. Kimball International, Inc., 634 N.E.2d 778, 783 (Ind. App. 1994), *vacated in part, adopted in part*, 652 N.E.2d 507 (Ind. 1995).

The public records that you requested certainly qualify as information. The Attorney General did not provide any basis for claiming that this information derives any independent economic value, but since Household is a commercial entity and competes with other commercial entities, it is conceivable that Household would have information that would have independent economic value. This information, at least to date, has not been generally known or readily ascertainable to anyone except the Household and the Attorney General.² It appears that this information has been the subject of reasonable efforts to maintain its secrecy in that apparently there have been no prior requests for this nor has this information been provided as the result of a public records request or otherwise.

It is my opinion that the Attorney General may withhold only that information that conforms to the previously defined "trade secret" definition under Indiana law. The burden lies with the Attorney General to show that each public record in question qualifies under this statutory exception. To the extent that any information provided by Household does not qualify as a "trade secret" then the Attorney General may not withhold that information under this exception.

Deliberative Material Exception

In support of its nondisclosure of public records related to the communications between the states' attorney generals on this matter, the Attorney General cited to Indiana Code 5-14-3-4(b)(6). This exception under the APRA allows public agencies discretion as to whether to disclose the following information:

(r)ecords 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 purposes of decision making*.

Indiana Code §5-14-3-4(b)(6). [Emphasis added.] In order to withhold public records from disclosure under Indiana Code 5-14-3-4(b)(6), therefore, the information must meet all of the requirements of this exception.

There is very little case law interpreting Indiana Code section 5-14-3-4(b)(6). In 1998, the Indiana Court of Appeals rendered a decision in *The Journal-Gazette v. The Board of Trustees of Purdue University*, 698 N.E.2d 826 that provided an interpretation of Indiana Code section 5-14-3-4(b)(6). One of the issues in that case was whether certain documents related to an internal grievance process concerning an alleged NCAA violation were properly withheld from disclosure under Indiana Code 5-14-3-4(b)(6). The Court of Appeals determined that documents gathered during the course of the internal grievance process were interagency documents, statements of opinion and used for a decision making

purpose. As a result, the Court held many of the documents requested concerning the investigation could lawfully be withheld from disclosure under Indiana Code section 5-14-3-4(b)(6).

The Court of Appeals in the Purdue case did not, however, provide an easy to apply standard when considering what information is subject to nondisclosure under the deliberative material exception. To the extent that it does not, we must rely upon the rules of statutory construction used by our courts to interpret statutes. "Generally, when construing a statute, the interpreting body attempts to give words their plain and ordinary meanings." *Indiana Wholesale Wine v. State of Indiana, Alcoholic Beverage Commission*, 695 N.E.2d 99,103 (Ind. 1998), citations omitted. Non-technical, undefined words are to be defined by their ordinary and accepted dictionary meaning. *Bulkomatic Transport v. Department of Revenue*, 629 N.E.2d 955, 957 (Ind. Tax 1994), citations omitted.

Intra-agency or Interagency

The deliberative material exception requires that information must be "interagency or intra-agency," which implies documents created and shared within a public agency or between public agencies. The Attorney General, in response to your formal complaint, has pointed to the fact that the other participants in this matter with Household are other public agencies that enforce consumer protection laws in other states. The plain and ordinary meanings of intra-agency and interagency are clear, the real question is whether this would include the communications between the Attorney General and similar offices in other states that communicated with respect to Household. It is my opinion that Indiana Code section 5-14-3-4(b)(6) covers communications between these public agencies and that this element of Indiana Code section 5-14-3-4(b)(6) has been met.

Communication for the Purpose of Decision Making

Indiana Code section 5-14-3-4(b)(6) also requires that the communication subject to this exception from disclosure be part of a decision making process. Many, if not most documents that a public agency creates, maintains or retains may be part of some decision making process. While the plain and ordinary meaning of decision making is clear, the question is what decision making the General Assembly intended to provide this exception for when they enacted this language. It is clear that only public agencies that are subject to the APRA, state and local public agencies in Indiana, can rely upon the APRA and its exceptions. It is logical to interpret the term "decision making" as used by our General Assembly was intended to relate to the decision making processes of state and local public agencies in Indiana. The Attorney General must demonstrate that information withheld under Indiana Code section 5-14-3-4(b)(6) relates to decision making by that office, which is subject to the APRA. Clearly, there was a decision by the Attorney General to enter into a settlement with Household and for this reason, it is my opinion that this element of Indiana Code section 5-14-3-4(b)(6) has been met.

Advisory or Deliberative Material that is Opinion or Speculative in Nature

The most important substantive element to the exception provided at Indiana Code section 5-14-3-4(b)(6) is that the content of the information must be advisory or deliberative material and constitute opinion or be speculative in nature. The plain meaning of "deliberative" is "assembled or organized for [or] . . . characterized by or for use in deliberation or debate." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 349 (1981). "Deliberation" means "thoughtful and lengthy consideration . . . [t]houghtfulness in decision or action." Id. In the context of the APRA, therefore, deliberative material includes information that reflects, for example, one's ideas, opinions, advice, consideration and recommendations on a subject or issue for use in a decision-making process.

In your complaint, you note that to the extent that information contained in the public records in question is factual, not speculative, advisory, opinion or deliberative, it is not subject to non-disclosure under Indiana Code section 5-14-3-4(b)(6) and I agree with this statement. You submitted with your complaint samples of documents that have been disclosed to you by other states in response to your requests. Since the APRA allows the Attorney General discretion over the disclosure of deliberative materials, then the fact that other states have disclosed similar information is not relevant to this Opinion. It is my opinion, however, that the Attorney General may only withhold information that meets all of the elements of Indiana Code section 5-14-3-4(b)(6) with respect to your request. The burden for showing that all or part of a public record is nondisclosable under Indiana Code section 5-14-3-4(b)(6) lies with the Attorney General.

Copying Fee Waiver

As part of your complaint, you allege that the Attorney General has constructively denied you access to public records by refusing to waive the copying fees related to copies of public records. Under Indiana Code section 5-14-3-8(c), the Attorney General, as a state agency, may collect no more than ten cents (\$0.10) per page for providing a copy of a public record³.

There is no general provision stating that a state agency in Indiana must waive the statutory copying fee for any person. The General Assembly did provide public agencies authority to waive the copying fees associated with electronic maps if the purpose is for public agency program support, nonprofit activities, journalism or academic research. Ind. Code 5-14-3-8(k). This waiver, however, does not extend to other types of public records. For this reason, it is my opinion that it was not a constructive denial for the Attorney General to refuse to waive a fee that is authorized under the APRA.

Validity of Confidentiality Provision of Consent Judgment

You have challenged the validity of the following provision of the consent judgment between the Attorney General and Household as being contrary to the APRA:

If the [Attorney General] receives a request for documents provided by Household relative to the subject matter of the investigations or examinations referred to in Paragraphs 3 and 4 of the Stipulated Recitals of this Consent Judgment, the negotiation of the Agreement in Principle or this Consent Judgment, the Monitor's Reports, or information obtained by the

Administrator or Monitor in connection with this Consent Judgment, the [Attorney General] shall comply with applicable disclosure laws and promptly provide notice of such request that will afford Household the reasonable opportunity to assert that the documents subject to the request are exempt from disclosure.

Consent Judgment, ¶41. This provision does not purport to exempt the Attorney General from the APRA, but does indicate that Household would be notified if and when a request was made for disclosure of information that Household had provided to the Attorney General.

Under Indiana Code section 5-14-3-9(d), when a public agency is sued in court to compel the public agency to permit inspection and copying of a public record, the agency must:

Notify each person who supplied any part of the public record at issue:

1. that a request for release of the public record has been denied; and
2. whether the denial was in compliance with an informal inquiry response or advisory opinion of the Public Access Counselor.

Such persons are entitled to intervene in any litigation that results from the denial.

There is nothing in the APRA that prohibits a public agency from alerting a person who has supplied the information that a request has been made. While it is my recommendation that a public agency ascertain at the time such information is filed with the agency whether or not the record is disclosable under the APRA, it is my opinion that the confidentiality provision of the consent judgment does not attempt to circumvent the APRA. The Attorney General was still obligated to respond to you as the requestor. Further, if the information supplied is confidential as a trade secret, as the Attorney General asserts in its response to you; Household would probably intervene in any action in court concerning this denial. For these reasons, it is my opinion that the confidentiality provision of the consent judgment reached between the Attorney General and Household does not appear to violate the APRA.

Reliance of Attorney General on Other States' Confidentiality Laws

Finally, you claim that the Attorney General may not rely upon other states' confidentiality laws as a basis for denying you access to public records. Under the APRA, a public agency must provide access to public records unless the records are excepted from disclosure under 5-14-3-4. Generally, a public agency in Indiana will cite to one of the exceptions listed under Indiana Code section 5-14-3-4, as the Attorney General has done with respect to your request.

The APRA also states, however, that if a public agency subject to its provisions receives a confidential public record from another public agency, the receiving public agency must maintain that record as confidential. Ind. Code §5-14-3-6.5. In such cases, the receiving public agency must provide the statutory basis for the denial, which would be Indiana Code section 5-14-3-6.5 and the statutory

authority making the public record confidential. Consequently, the Attorney General may not just make a generic reference to other states' statutes-if this was the basis for denial of any particular records, the Attorney General should have provided a specific reference to Indiana Code section 5-14-3-6.5 and the citation of the statute making that information confidential.

Based upon my reading of the Attorney General's response, it appears that this reference to other states' confidentiality laws may have been included to bolster their argument that you are not entitled to access the public records you requested. In all cases, the Attorney General has the burden of showing that a public record is nondisclosable, in whole or in part, and to provide the statutory bases for any denial.

CONCLUSION

It is my opinion that the Attorney General's reliance upon the exceptions for work product of an attorney, deliberative material and trade secrets is valid only to the extent that any information contained in the public records you requested qualifies under one of these exceptions. To the extent that any information provided by other states or Household does not qualify under one of these exceptions, the Attorney General may not withhold that information under these exceptions. The burden for showing that all or part of a public record is nondisclosable under the APRA lies with the Attorney General and the Attorney General is obligated to disclose information that is not excepted from disclosure. It is also my opinion that it was not a constructive denial for the Attorney General to refuse to waive a copying fee that is authorized under the APRA. Further, the confidentiality provision of the consent judgment reached between the Attorney General and Household does not appear to violate the APRA. Finally, if the Attorney General wishes to claim that any public record maintained by that office is confidential pursuant to another state's law, then the Attorney General is required to cite to Indiana Code section 5-14-3-6.5 and the other state's statute in order to justify a nondisclosure on this basis.

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: Mr. Roy Coffey, OAG

¹ You requested an expedited Opinion under 62 IAC 1-1-3 and it appeared that your complaint qualified for expedited consideration. This Opinion, as a result, is being issued within seven (7) days of its receipt.

² Other states were involved in the negotiations, so other states' attorneys general offices were also provided the information.

³ The Indiana Department of Administration set the per-page-copying fee as ten cents (\$0.10) in 1999.

The language of Indiana Code section 5-14-3-8(c) indicates that the fee must be at least ten cents (\$0.10).
