STATE OF INDIANA

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June 10, 2013

Mr. Aaron Smith
2625 Countryside Drive
Lebanon, Indiana 46052

Re: Informal Inquiry 13-INF-29; I.C. § 5-14-3-4(b)(6)

Dear Mr. Smith:

This is in response to your informal inquiry regarding the denial issued by the City of Lebanon ("City") in response to your request for records pursuant to the Access to Public Records Act ("APRA"), I.C. 5-14-3 *et. seq*. Pursuant to I. C. § 5-14-4-10(5), I issue the following informal opinion in response to your inquiry. Robert V. Clutter, Attorney, responded on behalf of the City. His response is enclosed for your reference

BACKGROUND

In your informal inquiry you provide you submitted a written request for records to the City on April 29, 2013. You requested to inspect and copy any and all documents prepared by H.J. Umbaugh ("Umbaugh") for the proposed Lebanon-Worth Annexation ("Annexation"). You specifically sought any and all rough drafts that had been created for the Annexation Fiscal Plan. On May 2, 2013, your request was denied by City Clerk-Treasurer, Tonya Thayer, pursuant to I.C. § 5-14-3-4(b)(6). You question the City's authority to issue a blanket denial to your request in light of the requirements of section 6 of the APRA. You further advise that on January 28, 2013, a representative from Umbaugh appeared at the Lebanon Common City Council ("Council") meeting and announced that members of the Council had received a draft copy of the Annexation Fiscal Plan. In the March 27, 2013 edition of *The Lebanon Reporter*, Lebanon Mayor Huck Lewis stated that the City can resume the Annexation at any time because "the City has the fiscal plan and other necessary documents in place." You maintain that it is apparent that the City considers the documents prepared by Umbaugh to be factual documents and not deliberative; thus the City may not rely on the deliberative materials exception to deny your request.

In response to your informal inquiry, Mr. Clutter advised in November 2012, the Town of Whitestown ("Whitestown") introduced an annexation ordinance proposing to annex a large section of unincorporated land in Boone County. This proposed annexation included land that was between the existing boundaries of the City and the existing

boundaries of Whitestown. After the introduction of the Whitestown Annexation Ordinance, the City introduced a competing annexation ordinance that included much of the same real estate as the Whitestown Annexation Ordinance. The City's ordinance was introduced to the Council as Ordinance 2012-19 on November 26, 2012.

Subsequent to the ordinance's introduction, discussions occurred between various City officials, Whitestown officials, and certain property owners within the proposed annexation areas. As a result, an amended ordinance was introduced to the Council. The amended ordinance substantially reduced the proposed annexation to approximately two square miles. The amended ordinance was introduced to the Council on January 28, 2013. I.C. § 36-4-3-2.1 provides that a municipality may adopt an annexation ordinance only after the body has conducted a public hearing, which may be held not earlier than sixty days after introduction of the ordinance. Written notice of the public hearing must be sent to the affected property owners. A municipality must adopt a written fiscal plan prior to the mailing of notice of the public hearing pursuant to I.C. § 36-4-3-3.1.

The amended ordinance was introduced to the Council on January 28, 2013 and passed on first reading. An ordinance is not deemed adopted unless and until it is passed on a second reading. Further, the annexation statutes demand other procedural requirements prior to adoption. The Council has never scheduled or conducted a public hearing on the amended ordinance, nor scheduled a second reading, nor taken any other affirmative action towards adoption.

Umbaugh was engaged by the City to provide financial services and expertise relating to the proposed annexation. Part of these services included preparation of the fiscal plan pursuant to I.C. § 36-4-3-3.1. When the ordinance was amended, the City instructed Umbaugh to reduce the scope of the fiscal plan. Umbaugh prepared a draft fiscal plan and provided a copy to the Mayor and Mr. Clutter. While there is no doubt that the fiscal plan is a public record, the record fits within the deliberative materials exception, pursuant to I.C. § 5-14-3-4(b)(6), that would allow the City to exercise its discretion to provide the record in response to a request. The record was developed by a private contractor under contract with the City and contained expressions of opinion by the Umbaugh or statements that were speculative in nature as to the financial impact of the proposed annexation. Lastly, the fiscal plan was communicated for the purpose of a decision making.

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* I.C. § 5-14-3-1. The City is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the City's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

Under the APRA a public agency denying access in response to a written public records request must put the denial in writing and include the following information: (a) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and (b) the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). Counselor O'Connor provided the following analysis regarding section 9:

> Under the APRA, the burden of proof beyond the written response anticipated under Indiana Code section 5-14-3-9(c) is outlined for any *court action* taken against the public agency for denial under Indiana Code sections 5-14-3-9(e) or (f). If the public agency claimed one of the exemptions from disclosure outlined at Indiana Code section 5-14-3-4(a), then the agency would then have to either "establish the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit" *to the court*. Similarly, if the public agency claims an exemption under Indiana Code section 5-14-3-4(b), then the agency must prove to the court that the record falls within any one of the exemptions listed in that provision and establish the content of the record with adequate specificity. There is no authority under the APRA that required the IDEM to provide you with a more detailed explanation of the denials other than a statement of the exemption authorizing nondisclosure, but such an explanation would be required if this matter was ever reviewed by a trial court. *Opinion of the Public Access Counselor 01-FC-47*.

As applicable here, the City cited to I.C. § 5-14-3-4(b)(6) to deny your request and provided the name and title of the individual responsible for the denial. The City's denial complied with the requirements of section 9 in that it was in writing, it cited to a specific statutory citation that would authorize the withholding of the record, and provided the name and title of the person responsible for the denial.

As to the substance of the denial, the General Assembly has provided that records that qualify as deliberative materials may be disclosed at the discretion of the public agency. *See* I.C. § 5-14-3-4(b)(6). The subdivision provides that:

> 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. I.C. § 5-14-3-4(b)(6).

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

When a record contains both discloseable and nondiscloseable information and an agency receives a request for access, the agency shall "separate the material that may be disclosed and make it available for inspection and copying." *See* I.C. § 5-14-3-6(a). The burden of proof for nondisclosure is placed on the agency and not the person making the request. *See* I.C. § 5-14-3-1. The Indiana Court of Appeals provided the following guidance on a similar issue in *Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ.*, 787 N.E.2d 893 (Ind. Ct. App. 2005):

> However, *section 6 of APRA* requires a public agency to separate dislcoseable from non-dislcoseable *information* contained in public records. *I.C. § 5-14-3-6(a)*. By stating that agencies are required to separate "information" contained in public records, the legislature has signaled an intention to allow public access to whatever portions of a public record are not protected from disclosure by an applicable exception. To permit an agency to establish that a given document, or even a portion thereof, is non-dislcoseable simply by proving that some of the documents in a group of similarly requested items are non-discloseable would frustrate this purpose and be contrary to section 6. To the extent that the *Journal Gazette* case suggests otherwise, we respectfully decline to follow it.
>
> Instead, we agree with the reasoning of the United States Supreme Court in *Mink, supra*, i.e., that those factual matters which are not inextricably linked with other non-discloseable materials, should not be protected from public disclosure. See *410 U.S. at 92*. Consistent with the mandate of *APRA section 6*, any factual information which can be

> thus separated from the non-discloseable matters must be made available for public access. *Id*. at 913-14.

From the City's response to your informal inquiry, it is my opinion that its description regarding the reasoning for which the record was created would allow it to cite to the deliberative materials exception to deny your request. The record was material developed by a private contractor under contract with the City and provided analysis and opinion on the financial impact of the proposed annexation. The record was created to assist the City in reaching a decision regarding the proposed ordinance. To the extent information contained in the record would be considered deliberative pursuant to I.C. § 5-14-3-4(b)(6), the City would not violate the APRA in denying your request. The authority of the City to deny your request pursuant to the deliberative materials exception does not turn on whether the decision considered has or was actually made. *See Opinion of the Public Access Counselor 09-INF-25.* The City would be required pursuant to section 6 of the APRA to redact the deliberative material and provide the remaining factual portions of the record that remained. Only if the deliberative and factual material was inextricably linked, could the City deny the request in full. Here, the City has not indicated that the factual material and deliberative material are inextricably linked; thus the City would thus be required to redact the record and provide all remaining factual information contained therein.

Please let me know if I can be of any further assistance.

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: Robert V. Clutter