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July 31, 2013

Mr. Jacob C. Elder
Clark County Attorney
501 East Court Avenue, Room 406
Jeffersonville, Indiana 47130

Re: Informal Inquiry 13-INF-41; Clark County Commissioners

Dear Mr. Elder:

This informal opinion is in response to your inquiry regarding records maintained by the Clark County Board of Commissioners ("Board") and its compliance with the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq*. Pursuant to I. C. § 5-14-4-10(5), I issue the following informal opinion in response to your inquiry. Elijah D. Baccus, Attorney, issued a response to your informal inquiry. His response is enclosed for your reference. Our office forwarded a copy of your inquiry to Mac Construction ("MAC") on June 28, 2013. A response was due no later than July 30, 2013. Our office failed to receive a response from MAC.

BACKGROUND

The Board has contracted with an engineering firm to design Star Hill Road. Once the design was completed, the Board received bids for construction. The contract was awarded to MAC. This is a joint project between Clark County and the Indiana Department of Transportation ("INDOT") using federal matching dollars. INDOT maintains a provision that allows the construction bid winner to submit a Cost Reduction Incentive ("CRI"), provided the bid winner follows the procedures established by INDOT. The CRI is made up of engineering designs and pecuniary estimates, and is utilized as a mechanism to allow all parties to save money. MAC has prepared and submitted a CRI to the Board for review. As an attorney for the county, you inquire what portion of the CRI is subject to disclosure under the APRA since the CRI has not been accepted by the Board and is merely a proposal at this juncture.

Mr. Baccus represents the Laborers International Union of North America ("LINUA"), who submitted a request for records to the Board for a copy of the CRI submitted by MAC. On or about February 14, 2013, MAC submitted an informal CRI to the Board. At the Board's February 14, 2013 public meeting, a representative from MAC estimated it would cost $175,000 to develop the formal CRI required by INDOT. The

cost of developing the CRI would be split between the Board and MAC, again in compliance with INDOT standards. The Board thereafter approved a proposal to allow MAC to develop the formal CRI.

On March 13, 2013, a representative from LINUA submitted a public records request to the Board for all documents related to MAC's CRI. The Board acknowledged the receipt of the request, in writing, on March 18, 2013. According to Mr. Elder, MAC was instructed to provide an additional copy of the formal CRI in order to allow the Board to satisfy the records request that was submitted. Sometime before June 27, 2013, MAC submitted the formal CRI to the Board and has refused to provide a copy to LINUA, based in part on its belief that the record is not a public record until it is "accepted" by the Board.

Mr. Baccus advises that there is no dispute that MAC has submitted the CRI to the Board; thus there is no question that the CRI qualifies as a public record under the APRA. MAC's argument that a record submitted to a governing body for consideration is not a public record until the record is "accepted" is clearly contrary to the APRA. Nowhere in the definition of "public record" is the word "accepted" mentioned. Regardless, the CRI has already been accepted because formal CRI proposals are only required when the concept underlying the informal CRI has been accepted. The Board has already accepted the concepts proposed by MAC in the informal CRI and has agreed to pay $87,500 to allow MAC to develop the formal CRI.

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 Board 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 Board'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).

A public record is defined as any writing, paper, report, study, map, photograph, book, card, tape recording or other material that is created, <u>received</u>, retained, <u>maintained</u> or filed by or with a public agency (emphasis added). *See* I.C. §5-14-3-2(o). There is no dispute that the Board has received and maintains a copy of the CRI submitted by MAC. Upon the Board's receipt of the CRI, it became a public record of the Board under the APRA. As such, it is my opinion that the Board may not deny access to the CRI based on the theory that the CRI does not become a public record until it has been "approved" or "accepted" by the Board.

Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-

14-3-9(c). No party to the inquiry has made reference to any exemption in state or federal law that would prohibit or allow the Board discretion to withhold the CRI in response to a request made under the APRA. While there is no doubt that the CRI is considered to be a "public record" under the APRA, the burden would be on the Board, not the Public Access Counselor, to demonstrate that the public record may be withheld in response to a request. The Board may have discretion to withhold parts of the record pursuant to the deliberative materials exemption, but again that would be a decision for the Board to make.

As an overview, 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.

If the CRI meets the statutory requirements of a deliberative material, the Board would have discretion to disclose the record in response to LINUA's request. The deliberative materials exception does not deem that the public record is confidential; rather, discretion to provide the public record is left to the agency (emphasis added). Even if the Board exercised its discretion to deny LINUA's request, pursuant to section 6 of the APRA, the Board would only be allowed to withhold speculative and expressions of opinion from the CRI; all remaining factual materials would be required to be disclosed. There may be other discretionary exemptions found within state or federal law that may be applicable to the CRI, but again, the burden is on the Board, not the Public Access Counselor, to demonstrate that the CRI would meet the requirements of any other exception and allow the agency authority to deny the request.

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

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: Elijah D. Baccus, Bryan Wichens