September 3, 2004 Denial of Proposed Designs of Convention Center by Capital Improvement Board as Deliberative Materials

September 3, 2004

Mr. Kevin Corcoran
The Indianapolis Star
307 North Pennsylvania Street
P.O. Box 145
Indianapolis, IN 46206-0145

Re: Informal Inquiry Response Regarding Request of Records of the Indiana Convention Center & RCA Dome, Capital Improvement Board by The Indianapolis Star Newspaper

Dear Mr. Corcoran:

This is in response to your informal inquiry of August 10, 2004 regarding the response of the Indiana Convention Center and RCA Dome's Capital Improvement Board of Managers ("CIB") denying you records. You made your request under IC 5-14-3, the Access to Public Records Act ("APRA"). I find that the CIB may exercise its discretion to deny you access to the records you request under IC 5-14-3-4(b)(6), the deliberative materials exception.

BACKGROUND

On March 25, 2004, Barney Levengood, the Executive Director of the Indiana Convention Center & RCA Dome sent a letter on behalf of the CIB to four architectural design firms. The letter to these "national industry leaders in public venue design" solicits a work product to include artist renderings and an actual 3-D model of an expanded convention center, utilizing the existing RCA Dome as one assumption among several. Mr. Levengood also requests construction cost estimates for the design. The letter expressly states that it is merely a solicitation for concepts to determine whether any of the submissions might be of interest to Mr. Levengood and ultimately the CIB. The letter further states that the "submittal will remain deliberative unless and until it is considered by the Board for final decision-making purposes."

In early April, three of the four design firms responded to the invitation letter and expressed their interest in submitting a design. Apparently, all three in fact submitted designs to the CIB.

On July 22, 2004, John Fritze, reporter for The Indianapolis Star newspaper sent by facsimile a written request to Barney Levengood for various records. Among those records, Mr. Fritze requested "all material, including but not limited to design drawings, renderings, 3D models and cost estimates, produced by the following firms in regards to stadium design: Ellerbe Becket, HKS and HOK Sport." I will refer to this material collectively as "designs."

On July 28, 2004, Mr. Levengood responded on behalf of CIB, acknowledging the request and suggesting a meeting to review the requests. On August 5, 2004, a letter from Barney Levengood was sent to Mr. Fritze enclosing some of the documents that were responsive to his request, and informing Mr. Fritze that the designs "must be denied as deliberative material excepted from disclosure pursuant to IC 5-14-3-4(b)(6)." Mr. Levengood offered Mr. Fritze and his counsel an opportunity to discuss the basis for the CIB's determination regarding the designs. I do not know whether this offer was accepted or whether any discussions between counsels took place. You then sent the Office of Public Access Counselor a request for an advisory opinion regarding whether the CIB is obligated to provide the designs to The Indianapolis Star. You have not filed a complaint with this office regarding the denial; rather, you have sought a response to your informal inquiry. Ind.Code 5-14-4-10(5), (6).

ANALYSIS

It is the public policy of the state of Indiana that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them. IC 5-14-3-1. Furthermore, the APRA 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. IC 5-14-3-1. Hence, any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as provided in section 4 of [chapter 3]. IC 5-14-3-3(a). There appears to be no issue that the CIB is a public agency and subject to the APRA.

IC 5-14-3-4 sets out various exceptions to disclosure. IC 5-14-3-4(b)(6) is claimed by the CIB as the exception pertaining to the designs maintained by the CIB. IC 5-14-3-4(b)(6) excepts from disclosure at the discretion of the public agency:

> (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 purpose of decision making.

As this Office has observed many times, there is little caselaw interpreting this statutory provision. In particular, what constitutes deliberative material has not been the subject of much caselaw analysis. "Generally, when construing a statute, the interpreting body attempts to give

words their plain and ordinary meaning." *Indiana Wholesale Wine v. State of Indiana, Alcoholic Beverage Commission*, 695 N.E.2d 99, 103 (Ind. 1998).

In the context of APRA, deliberative material reflects, for example, the public agency's ideas, consideration and recommendations on a subject or issue for use in a decision making process. This latter factor, "for use in a decision making process" is not a difficult element to establish, since many if not most agency records are used or developed for use in a decision making process. Too much reliance on this element would make many agency records nondisclosable and may thwart the legislature's intent in enacting APRA. To deny access to a record under the deliberative materials exception, a public agency must also establish that the record is an interagency or intraagency record that is advisory or deliberative and that is an expression of opinion or speculative in nature.

As a threshold matter in this inquiry, I considered whether the designs submitted by three design firms were interagency or intraagency. This factor was a concern for this Office in a complaint filed against Ball State University seeking records held by the Dean of Students and denied by Ball State under the deliberative materials exception. *Office of the Public Access Counselor 02-FC-13*. In that opinion, the public access counselor opined that any materials submitted from persons outside of Ball State would not be deemed "interagency or intraagency" because they would not have been documents created and shared within a public agency or between public agencies.

Here, the designs appear to have been submitted following the execution of letter agreements, copies of which were submitted to me by the CIB. I have enclosed copies of these agreements with this opinion for your reference. Although not so clearly stated in the letter from HOK, the letters of HKS and Ellerbe Becket recite consideration of $37,500 for services of the design firms which include submission of designs. The letters are countersigned by Barney Levengood. To the extent that these letter agreements evidence a contract for which consideration is provided for submission of these designs, I find that the CIB has met the "intraagency" element of the exception, which includes "material developed by a private contractor under a contract with a public agency." IC 5-14-3-4(b)(6).

Also, it is quite evident that the material was to be communicated for the purpose of decision making. Mr. Levengood's March 25 letter states as much. The decision to be made included not only whether any of the designs would be used in whole or in part, but also whether the concept of expanding the convention center via use of the existing RCA Dome would be a viable option.

Therefore, the central issue is whether these designs are "expressions of opinion or are of a speculative nature." It was difficult to analyze this element of the exception because there is so little caselaw that guides me or public agencies in determining whether a document contains "expressions of opinion" as that term is contemplated in IC 5-14-3-4(b)(6). Moreover, I found no caselaw that applied that element to pictorial representations. I believe the analysis requires consideration of the factual circumstances surrounding the decision making process of the agency and how the designs serve that process. After careful consideration, I believe that the

designs submitted for consideration by the CIB are probably "expressions of opinion" and "speculative."

It was somewhat helpful to review the Indiana cases that have considered whether materials were deliberative. In two Indiana cases involving state universities, the court of appeals has protected materials developed for internal investigations of the universities.

In *The Journal Gazette v. Board of Trustees of Purdue University*, 698 N.E.2d 826 (Ind.App. 1998), the court held that two documents submitted by Purdue employees to present claims of perceived unfair or improper treatment for administrative resolution were properly claimed as deliberative because grievances by their very nature are expressions of opinion or are of a speculative nature. *Id. a*t 830. Similarly, in *The Indianapolis Star v. The Trustees of Indiana University*, 787 N.E.2d 893 (Ind.App. 2003), the court of appeals held that some materials submitted for purposes of determining whether IU basketball coach Bob Knight should be sanctioned were expressions of opinion or speculative because they contained witness statements that expressed whether Knight was treating basketball players unfairly or improperly. However, the court noted that the log of documents submitted to the court contained materials that appeared to be factual matter rather than expression of opinion or speculation. For example, documents relating to the interviewees' knowledge of whether Knight removed IU President Myles Brand from a session of basketball practice were not, in the court's view, an expression of opinion or speculation. The court noted that APRA requires a public agency to separate disclosable from nondisclosable information contained in public records. The court expressly adopted the holding in *Envtl. Prot. Agency v. Mink*, 410 U.S. 73, 93 S.Ct. 827 (1973) that those factual matters that are not inextricably linked with other non-disclosable materials should not be protected from public disclosure. *The Indianapolis Star*, 787 N.E.2d at 914.

These cases are instructive not with respect to any similarity to the content of the record or the purpose of the submissions involved in this inquiry. Clearly, the designs are not submitted with respect to any internal grievance or internal investigation of CIB. Rather, from these cases I glean the meaning of "expressions of opinion" and "speculative" to be roughly equivalent terms. However, these authorities provided little guidance in discerning the answer to the question posed in this matter: whether the designs sought can be considered "expressions of opinion" or "speculative."

I also considered the various statements of the purpose of the deliberative materials exception. The purpose of protecting materials under the deliberative materials exception is to "prevent injury to the quality of agency decisions." *Newman v. Bernstein*, 766 N.E.2d 8,12 (Ind.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. *The Indianapolis Star*, 787 N.E.2d at 910.

The purpose of the deliberative materials exemption also has been articulated in a case involving this same exception used as a privilege to exempt materials sought in litigation during discovery. Recognizing that the "deliberative materials privilege" has been codified to some degree in both the federal Freedom of Information Act and Indiana's Access to Public Records Act, the federal court states that the privilege extends to protect "advisory opinions,

recommendations, and deliberations *comprising part of a process by which governmental decisions and policies are formulated.*" *Government Suppliers Consolidating Services, Inc., v. Bayh*, 133 F.R.D. 531, 534, emphasis added. The scope of the privilege includes "thoughts, ideas, opinions, and analyses *that encompass the process by which a decision was reached.*" *Id.*, emphasis added.

In considering whether the designs are expressions of opinion, I was not skeptical that non-textual modes of expression could be expressions of opinion. The only issue was under what circumstances they would be. Although the designs would not be expressions of "how" the CIB reached (or will reach) a decision about the development of an expanded convention center, it seems clear to me that the designs represent but three options under consideration. There is no debate that the expression of why or how certain options are adopted or rejected by an agency would be covered under IC 5-14-3-6(b). These are what we typically think of as the agency's opinions and analysis leading to the ultimate decision. What is more difficult to see is the nature of the options under consideration, or the "things" about which the decision is made. I believe that the deliberative materials exception also protects the options under consideration, and that these designs are the embodiment or expression of those options.

The designs as "expressions of opinion" are analogous to the CIB or its staff gathered at a conference table proposing various ideas or options for how to handle extra convention business in the city. A memorandum reciting all the options raised would clearly be deliberative (assuming it was communicated for purposes of decision making), and just as surely, the designs at issue represent the options under development by the CIB (as developed by its contractor design firms).

I am mindful of the policy of the state to liberally construe the law in favor of access to public records, and to construe exceptions narrowly. I am also aware that the public agency has the burden to show that a record comes under one of the exceptions. However, in my opinion, the CIB has discharged that burden.

One consideration that did not enter into my analysis of whether the designs should be disclosed was the assurances of confidentiality or nondisclosure expressed in the Levengood letter to the design firms. These assurances alone would not render otherwise disclosable documents nondisclosable. *See The Indianapolis Star,* 787 N.E.2d at 914.

As you know, my opinion is advisory only. You may consider filing an action in superior court if you believe that you are entitled to inspect and copy the designs. *See* IC 5-14-3-9(e).

CONCLUSION

For the foregoing reasons, I find that the CIB has the discretion to not disclose the designs under IC 5-14-3-4(b)(6).

Sincerely,

Karen Davis
Public Access Counselor

cc: Mary Solada, Bingham McHale