

March 10, 2005; What Constitutes a “Public Record” When Records Are Maintained by a Consultant; Valparaiso Redevelopment Commission

March 10, 2005

*Sent Via Facsimile*

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*Re: Informal Inquiry Response*

Dear Mr. Lyp:

You have requested an informal opinion from the Office of the Public Access Counselor. Pursuant to Ind.Code 5-14-4-10(5), I am issuing this letter in response to your request.

You represent the Valparaiso Redevelopment Commission (“VRC”). The VRC is a public agency subject to the Access to Public Records Act (“APRA”). You have asked for clarification regarding what specific documents prepared by a consultant but never provided to the public entity must be produced in response to a request for the document. You also asked whether the agency is permitted to charge the requesting party the actual cost for the professional fee that a consultant would charge the public agency to prepare the record.

Your question stemmed from an inquiry that my office received regarding a soil borings test report that allegedly existed but was in the possession of the DLZ engineering firm that performed the soil borings test for the VRC. The information that my office had received indicated that such a report was generated by DLZ as a direct result of work performed specifically for the VRC, but the report itself had not been given to the VRC. My office had opined preliminarily that the soil borings report, although not in the physical custody of the VRC, was nevertheless a “public record” because it appeared that the VRC, having commissioned the soil borings test, would have been entitled to the written report of the findings. Hence, we opined that the soil borings test report would meet the definition of a “public record”

because it was maintained or filed with the public agency when it was created and retained by the VRC's consultant or contractor on the VRC's behalf. My staff attorney Lea Ellingwood had handled the inquiry into this matter. As discussions were ongoing between the VRC and our office, we learned that VRC would voluntarily make the report available.

Your letter of December 21 sets out a different set of facts. In your letter, you stated that DLZ provided the VRC with a report that made suggestions as to feasibility of a road and some possible road designs. This report has been made publicly available. You characterized the soil borings tests as "underlying data and reports" that were compiled by DLZ to reach its ultimate conclusion as to the feasibility of the road. You stated that "a specific request has not been made of DLZ by the VRC to provide its back-up information; however, we would be expected that any additional work would incur an additional fee." You also stated that a municipality is generally more interested in the actual feasibility report than the underlying data.

I am not aware of any Indiana case law that analyzes the definition of "public record" as it applies to records that are in the custody of a contractor of a public agency.

The APRA defines a public record as "any writing, paper, report, study...that is created, received, retained, maintained, or filed by or with a public agency..." Ind. Code 5-14-3-2. Generally, public records meeting this definition will be in the custody of the public agency. Often, however, public agencies contract with outside consultants to perform services for the public agency, and in the course of performing those services, the consultant or contractor will create, receive, or maintain records. Not all records that are created or received by the contractor in furtherance of the contract would be deemed "public records." In my opinion, the issue is whether the contractor is legally obligated to maintain the records on behalf of the public agency. One such legal obligation may be created when a private consultant contracts with a public agency.

Examples of such arrangements abound with state administrative agencies. For example, the Office of Medicaid Policy and Planning contracts with fiscal agents and CPA firms to calculate rates and pay claims of providers in the Medicaid program. The contractors retain copies of cost reports that are filed by providers, and retain claims filed by providers, on behalf of the public agency. These records are subject to the APRA, even though no public employee or public agency has custody of those records. The records are nevertheless considered to be "filed with" or "maintained by" a public agency.

In addition to or in lieu of specific contractual terms, a statute, administrative rule, or ordinance that concerns record-keeping requirements that a public agency must observe may determine whether a record in the custody of a contractor of the public agency is a "public record." Where the public agency delegates part of its statutory duty to a private contractor, any legal obligation to maintain records connected to that duty would flow to the contractor and the records would be "public records."

We believed that the soil borings test was analogous to the situation of the Medicaid contractors. We believed that the soil borings test report was an already existing report to the VRC as to the condition of the road, generated under an agreement with the VRC to perform a

soil borings test and to compile the results in a report. We also understood that the report was not actually given to the VRC, but the ultimate test results were verbally communicated to the VRC. It seemed to us a logical conclusion that if the VRC asked to see the actual report, it would have been already compiled, and would be provided to the VRC, which had paid for the report pursuant to the contract. It was upon these facts that we based our conclusion that in spite of the lack of actual custody of the report, the report was created and compiled for the benefit of VRC, and VRC was entitled to it as part of its contractual arrangement with DLZ.

As I stated, it is *not* my opinion that *any* record generated or created by a contractor or consultant in furtherance of a contract with a public agency is a “public record.” However, a bright line rule that a record is a “public record” *only* if the public agency has custody of the record would be inconsistent with the purposes of the APRA. I base my opinion in part on the concern that a public agency could evade the requirements of the APRA merely by asking the contractor to retain the record.

You have also asked about the cost of providing a record. An agency may charge only the actual cost of copying, which is the cost of the paper and the per-page cost for use of the copying equipment. Ind.Code 5-14-3-8(d). Where a record is not a public record, or a public record does not exist at the time of the request and the public agency has no legal obligation to create the record, any work performed by a contractor to compile a record on a person’s request is outside the requirements of the APRA, and there would be no violation of the APRA to charge a person for additional work.

I hope this guidance is of assistance to you. Please feel free to call me if you have any additional questions.

Sincerely,

Karen Davis  
Public Access Counselor