

March 8, 2006

Sent Via Facsimile

Mr. Alan M. Hux
SOMMER BARNARD
One Indiana Square, Suite 3500
Indianapolis, IN 46204

Re: Informal Inquiry Response; West Central Conservancy District Records Inquiry

Dear Mr. Hux:

By letter dated March 6, 2006, you 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.

Specifically, you have asked on behalf of the West Central Conservancy District (“District”) for an informal opinion regarding whether two types of public records maintained by the District must be made available for inspection and copying. An individual who was an unsuccessful candidate for a position on the Board of Directors of the District has requested 1) “Freeholder list from 2/15/2006 Election;” and 2) “Absentee Ballot Envelopes.”

The freeholder list is compiled by the County Auditor and used by the District in elections of District Board members. You assert that the list is not required to be published or disseminated to the public. The District maintains that the freeholder list is exempt under the Access to Public Records Act under Ind. Code 5-14-3-4(b)(20) because the list contains personal information concerning a customer of a municipally-owned utility. The District provides sewer service to its freeholders. The freeholders list contains the names and addresses of the District’s customers. The personal information on this list would be “personal information concerning a customer” of the District, the District argues. The District wants to deny inspection of the list because the District claims that disclosure of this information would subject the District, its employees, and directors to the sanctions and penalties contained in IC 5-14-3-10. Section 10 provides for criminal sanctions for knowing and intentional disclosure of information that is classified as confidential under state law. IC 5-14-3-10(a).

With respect to the absentee ballot envelopes, the District argues that the envelopes fall under the deliberative material exemption provided by IC 5-14-3-4(b)(6). Under this argument, the District notes that the envelopes are intra agency material that is utilized solely by the election clerks to aid in their decision as to the validity of a ballot by comparing the signatures on the freeholder list and on the envelope containing the ballot. Moreover, the envelopes contain the names and addresses of utility customers. This information is “personal information” about a utility customer that is exempt under IC 5-14-3-4(b)(20), contends the District.

For the reasons set forth below, it is my opinion that neither exemption cited by the District may be applied to the requested records. I am not aware of any exemption that would apply to the records requested. Unless some other exemption applies to the records, they must be made available for inspection (in the case of the list of names and addresses), or inspection and copying (in the case of the absentee ballot envelopes).

General Provisions of the Access to Public Records Act

Any person may inspect and copy the public records of any public agency except as provided in section 4 of the Access to Public Records Act (“APRA”). Ind. Code 5-14-3-3(a). Liberal construction of a statute requires narrow construction of its exceptions. *Robinson v. Indiana University*, 659 N.E.2d 153, 156 (Ind. Ct. App. 1995) [Citations omitted]. The APRA places the burden of proof for the nondisclosure of a public record on the public agency that would deny access. IC 5-14-3-1.

A public agency is not required to create or provide copies of lists of names and addresses, unless the public agency is required to publish such lists and disseminate them to the public under a statute. IC 5-14-3-3(f). Records that are exempt from disclosure in the public agency’s discretion are set forth in IC 5-14-3-4(b). By contrast, records that are classified as confidential, i.e., may not be disclosed by a public agency, are in IC 5-14-3-4(a).

Signed Freeholder List

A public agency may not disclose, in its discretion:
The following personal information concerning a customer of a municipally owned utility (as defined in IC 8-1-2-1):
(A) Telephone number.
(B) Address.
(C) Social Security number.

IC 5-14-3-4(b)(20).

The issue with respect to the operation of IC 5-14-3-4(b)(20) is whether the West Central Conservancy District’s freeholder list contains personal information concerning customers of a municipally owned utility. The District appears to assert that the freeholder list is tantamount to a record containing personal information of the District’s sewer utility customers; hence, the list

is subject to the exemption at IC 5-14-3-4(b)(20). Per force, the District is arguing that it is a municipally owned utility.

A “municipally owned utility” includes every utility owned or operated by a municipality. IC 8-1-2-1(h). “Municipality,” as used in Chapter 2, means any city or town of Indiana. IC 8-1-2-1(c). The Indiana Court of Appeals has held that the legislature did not intend to include conservancy districts which own or operate utilities within the classification of municipal utilities; rather, they are public utilities. *Stucker Fork Conservancy District v. Indiana Utility Regulatory Comm’n.*, 600 N.E.2d 955 (Ind. Ct. App. 1992).

Because the West Central Conservancy District is not a municipally owned utility as that term has been construed by Indiana courts, it is not a municipally-owned utility under IC 5-14-3-4(b)(20), and its list of freeholders, even if deemed to be the District’s utility customers, is not “personal information concerning a customer of a municipally owned utility.” IC 5-14-3-4(b)(20). Accordingly, the list of freeholders is not subject to the exemption cited by the District. Although not necessary to this opinion, it is noted that the names of utility customers of municipally owned utilities are *not* among the three types of information that may be withheld by a public agency. Only a customer’s telephone number, address, and social security number may be withheld.¹

I also note that the District’s concern that its employees and directors would be subject to criminal sanctions if personal information about customers were released is misplaced. Section 10 of the APRA states that a public employee, a public official, or an employee or officer of a contractor or subcontractor of a public agency who knowingly or intentionally discloses information classified as confidential by state statute commits a Class A misdemeanor. IC 5-14-3-10(a). Where a public agency *may* withhold a record, but is not *required* to withhold the record because it is classified as confidential, disclosure would not subject the public agency or its employees to criminal penalties under IC 5-14-3-10(a). Hence, a municipally owned utility customer’s personal information may be disclosed in the discretion of the agency; such disclosure could not result in criminal sanctions.

Finally, if the freeholder list is not required to be published or disseminated to the public by statute, the District must allow inspection, but is not required to provide a copy. *See* IC 5-14-3-3(f).

Absentee Ballot Envelopes

The District mounts a two-fold defense to shield the absentee ballot envelopes from disclosure. The first, that the envelopes contain personal information about utility customers of the District, has been refuted in the foregoing discussion. The second exemption asserted is commonly called the “deliberative materials” exception.

A public agency may not disclose, in its discretion, records that are intra-agency or interagency advisory or deliberative material, including material developed by a private

¹ As of July 1, 2005, a public agency may not disclose a social security number contained in the records of a public agency. IC 5-14-3-4(a)(12).

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. IC 5-14-3-4(b)(6). A record must contain all the elements of the exception in order to be shielded from disclosure under the deliberative materials exception. In order to meet the exception, the record must: 1) be intra-agency or interagency records that are advisory or deliberative; 2) be expression of opinion or be of a speculative nature; and 3) be communicated for purpose of decision making.

The absentee ballot envelopes contain names and addresses of freeholders of the District. The District asserts that the envelopes are intra agency material that is utilized solely by the election clerks to aid in their decision as to the validity of a ballot by comparing the signature on the freeholder list and on the envelope containing the ballot.

Under the District's theory, the absentee ballot envelopes meet the deliberative material exception because they are used within the District (are intra-agency) for the purpose of decision making. However, that is not enough to satisfy the exemption. I see at least two faults with this approach. First, the fact that the envelopes are *used* for the purpose of decision making (deciding whether the ballot is valid) is not sufficient. Rather, the record must be *communicated* for the purpose of the District's decision making. The absentee ballot envelopes are communicated for purposes of casting a vote. Second, and perhaps more importantly, the absentee ballot envelopes, or more precisely, the information contained on them, are not expressions of opinion or of a speculative nature. They merely recite factual information, that is, the name and address of a freeholder of the District.

The absentee ballot envelopes are not exempt under the deliberative materials exemption, IC 5-14-3-4(b)(6), or as personal information of a utility customer, IC 5-14-3-4(b)(20).

To summarize, because the list of names and addresses of freeholders and absentee ballot envelopes are not subject to the exemptions cited by the West Central Conservancy District, the records must be disclosed in accordance with the Access to Public Records Act.

Please feel free to contact me if you have any questions.

Sincerely,

Karen Davis
Public Access Counselor