



STATE OF INDIANA

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April 28, 2014

Bennett H. Haeberle
1950 N. Meridian St.
Indianapolis, IN 46202

Re: Formal Complaint 14-FC-60; Alleged Violation of the Access to Public Records Act by the City of Marion

Dear Mr. Haeberle,

This advisory opinion is in response to your formal complaint alleging the City of Marion ("City") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* The City has provided a response to your complaint via Mr. Don Gallaway, Esq. Corporation Counsel. The City's response is attached for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on March 26, 2014.

BACKGROUND

Your complaint dated March 26, 2014 alleges the City of Marion violated the Access to Public Records Act by not providing records responsive to your request in violation of Ind. Code § 5-14-3-3(a).

According to your complaint, the City of Marion took out a \$2.5 million bond for a development project. I was unable to determine (and the City had not responded by the time of the publication of this Opinion) whether the City was the issuer of a municipal bond, or the capital investment firm issued a corporate bond. It is ultimately inconsequential to the discussion below.

In either case, First Farmer's Bank ("Bank") acted as the trustee after the bond was re-financed in 2011. You requested "all financial records related to the development." The City provided you with the bond transcript/agreement and several other related documents. You then asked the Mayor of the City of Marion for more specific documents such as wire transfers, invoices and disbursements and at that point you were directed to the Bank for the information. The Bank denied releasing the information. The reason for the denial was based on the developer of the project not consenting to the release. Again,

it is unclear if they were the settler or the beneficiary of the trust. You argue the project is being developed using taxpayer funds and therefore should be made available for public scrutiny.

The City argues the records are not those of the City of Marion, but in the custody of the Bank as a trustee, once-removed from the City. They contend that because the records were not created, received, retained, maintained or filed by or with the City, the City is under no obligation to produce them. See Ind. Code § 5-14-3-2(o) for a definition of a public record.

DISCUSSION

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 Ind. Code § 5-14-3-1. The City of Marion is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the City’s public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14- 3-3(a).

It appears as if the City made a good faith effort to instruct the Bank to release any public documents related to the transaction. The Bank itself denied you the records and the City contends it is a matter between you and the Bank.

I disagree in part. When a public agency contracts with a private third party to undertake an initiative, the private entity takes on the role of a public agency bound by the APRA *for the purposes of that transaction*. As a direct agent or proxy of the public agency, the private entity is agreeing to act on the behalf of the public agency.

Although not directly on point, the Court in *Knightstown Banner, LLC v. Town of Knightstown*, 838 N.E.2d 1127 (2005) addressed the idea of shielding public documents from the public via the use of a third party (in that particular case an attorney):

Taxpayers of a community have the right to know how and why their money is spent. Therefore, mindful of the APRA's purpose of openness, we do not allow a public authority to thwart disclosure required by APRA by having an attorney or an insurer's attorney prepare every writing that the public authority wishes to keep confidential...

See also *Findlay Publ'g Co. v. Hancock Co. Bd. of Comm'ns*, 80 Ohio St. 3d 134, 1997 Ohio 353, 684 N.E.2d 1222, 1225 (Ohio 1997) (holding that government entities cannot conceal public records by delegating a public duty to a private entity).

The Bank cannot be held to the standard of being versed in Indiana public access laws, however, *but for* the agreement between the City and the Bank, the records would not exist. The City has not set forth any argument claiming any special privilege or

relationship which would exempt the records from disclosure. They are being created, received, retained, maintained and filed with the Bank at the direction of the agreement between the City and the Bank. It should be noted the status of the bond issuer (or borrower) as a private entity is also not of consequence to the production of public records. This does not expose any other business records of the Bank or the Bond Issuer to release; only those related to the capital improvement project are subject to public scrutiny.

Bonds issued or taken on by a city are debts and obligations borne by taxpayers with the expectation of the completion of an initiative. In my interpretation, it is no different than an agreement directly with a private contractor for a capital project. The public has a direct interest in the stewardship of the funds. This would include disbursements, invoices, etc. Information not available to the public would include any trade secrets or confidential financial information of the bank or developer. The use of funds for the completion of a capital project, however, is subject to public scrutiny.

I decline to state a conclusive determination as to any violation of the APRA because the City did go to lengths to retrieve the records for production. After you were denied by the Bank, it does not appear you contacted the City to press the issue. A bank is not a public agency and therefore cannot by definition violate the APRA. My recommendations are twofold: The City can use this Opinion to convince the Bank and the developer to produce the records you seek (if they exist); or, alternatively, provide legal justification as to why the Bank should not be treated as being similarly situated with the City in regard to the APRA.

Regards,

A handwritten signature in black ink, appearing to read 'LH Britt', written in a cursive style.

Luke H. Britt
Public Access Counselor

Cc: Mr. Don Gallaway, Esq.; Ms. Lisa Dominisse; Mr. Tom Hunt, Esq.