

December 13, 2007

Dorothy Knight
c/o R. Mark Keaton
PO Box 11208
Fort Wayne, Indiana 46856

Re: Your informal inquiry regarding the Fort Wayne Metropolitan Human Relations Commission

Dear Mr. Keaton:

This informal opinion is in response to your informal inquiry dated June 30, 2006. I apologize for the delay in the response. I was appointed to this office effective July 1 of this year and am currently endeavoring to address the backlog of informal inquiries I found when I arrived. Your inquiry concerns the alleged violation of the Access to Public Records Act ("APRA")(Indiana Code 5-14-3) by the Fort Wayne Metropolitan Human Relations Commission ("Commission").

BACKGROUND

You filed a formal complaint with this office dated June 30, 2006. Because your complaint was untimely filed under Indiana Code §5-14-5-7(a), the previous counselor converted it to an informal inquiry to be answered pursuant to I.C. §5-14-4-10(5). In your complaint, you allege that you requested a copy of an audio tape recording from the Commission. The audio tape contained a recording of a fact-finding conference conducted by the Commission on April 19, 2006. You attended the conference with your client, and as I understand it both of you spoke at the conference. You submitted your request to the Commission on April 19, 2006.

You received from the Commission a letter dated April 25, 2006. The Commission denied your request for a copy of the tape. The Commission claimed the denial was pursuant to I.C. §5-14-3-4(a)(2), which requires nondisclosure of records declared confidential by a rule adopted by a public agency under specific authority to classify public records as confidential. The Commission pointed to the ordinance that created the Commission as the authority allowing the Commission to adopt a rule declaring records as confidential. City of Fort Wayne Ordinance G-21-78 §93.054(A)(11). The Commission indicated you could come to the office to review the tape but could not obtain a copy of the tape.

You sent a letter dated May 2, 2006 to the Commission challenging the authority of the Commission to declare records confidential. The Commission responded by letter dated May 2, 2006. The Commission did not address the confidentiality issue but claimed the tape was deliberative material, which may be excepted from disclosure at the discretion of the agency under I.C. §5-14-3-4(b)(6). You sent a letter dated May 15, 2006 to the Commission challenging the Commission's assertion of the deliberative materials exception. I see no further communication, so I assume you received nothing further from the Commission.

The Commission did not respond to this complaint at my invitation, dated October 25, 2007, to do so.

ANALYSIS

The public policy of the APRA states, "(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." I.C. §5-14-3-1.

Ind. Code §5-14-3-3(a) provides that 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 APRA. A "public record" means any writing, paper, report, study, map, photograph, book, card, tape recording or other material that is created, received, retained, maintained or filed by or with a public agency. I.C. §5-14-3-2.

Among the records that are confidential under section 4 of the APRA and may not be disclosed by a public agency are records declared confidential by rule adopted by a public agency under specific authority to classify records as confidential granted to the public agency by statute. I.C. §5-14-3-4(a)(2). Among records that may be excepted from disclosure at the discretion of the public agency are records which are intra-agency or interagency deliberative material, that are expressions of opinion or are of a speculative nature and that are communicated for the purposes of decision making. I.C. §5-14-3-4(b)(6).

Here, you have requested a copy of an audio tape recording of a fact finding conference conducted by the Commission. You were in attendance at the conference, along with your client. Two lawyers and several witnesses spoke at the conference and were recorded. The Commission refers to the record as the "fact finding tape." The Commission has claimed two different exceptions to disclosure in denying you access to the tape.

First, the Commission claimed the tape was declared confidential by rule adopted by a public agency as allowed by I.C. §5-14-3-4(a)(2). The Commission then points to the ordinance adopted by the City of Fort Wayne to create the Commission, which ordinance states,

- (A) The Commission shall have all powers that may lawfully be conferred upon it pursuant to the applicable provisions of Indiana law, including the power to:
 - (11) Adopt rules and regulations.

City of Fort Wayne Ordinance G-21-78 §93.954.

The Commission does not, however, cite the statute allowing the Commission to adopt a rule declaring records confidential. The APRA is very clear on this issue. An agency must be granted specific authority by state statute in order to adopt a rule declaring records confidential. I.C. §5-14-3-4(a)(2). I find no statute granting such authority to the Commission. As such, it is my opinion the Commission violated the APRA by denying you access to the tape for this reason.

At the time of denial, the Commission indicated that while it was denying your request for a copy of the tape, you could come to the office to review the tape. If a person is entitled to a copy of a public record under the APRA and the agency has reasonable access to a machine capable of reproducing the record, the agency must provide at least one copy of the record to the person. I.C. §5-14-3-8(e). I find no authority for the Commission to deny you a copy of the record unless it does not have reasonable access to a machine capable of creating a copy. If it does not have reasonable access to such a machine, the Commission could allow you to bring in your own machine to copy the tape. I.C. §5-14-3-3(b).

When you challenged the Commission's denial under I.C. §5-14-3-4(a)(2), the Commission then claimed the tape was excepted from disclosure pursuant to the deliberative material exception in I.C. §5-14-3-4(b)(6). To use this exception, the record must be an expression of opinion or speculative in nature *and* communicated for the purposes of decision making. *Id.* While I understand the purpose of this conference was to ultimately assist the investigator in making a decision, that assertion alone is not enough to invoke the deliberative materials exception. The record must be expression of opinion or speculative in nature. Here, the Commission called this a fact finding conference, indicating the Commission was seeking facts related to the issue. You have indicated that the information given by the witnesses was factual in nature, and the comments from the lawyers were procedural in nature. It is my opinion the tape contains factual information and not expressions of opinion or speculation. As such, the Commission could not bear the burden of proof to sustain the denial. See I.C. §5-14-3-9(f).

For the foregoing reasons, it is my opinion the Commission has not provided sufficient evidence to sustain denial of access to the tape of the fact finding conference of April 19, 2006.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Raymond Sandoval, Fort Wayne Metropolitan Human Relations Commission