



STATE OF INDIANA

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October 28, 2013

Ms. Erin Blasko
South Bend Tribune
225 W. Colfax Avenue
South Bend, IN 46626

Re: Informal Inquiry 13-INF-55: Deliberative Materials

Dear Ms. Blasko:

This is in response to your informal inquiry regarding a third-party vendor who has provided a report to the City of South Bend ("City") advising them on a downtown road project. You have previously been advised by the City Attorney, Aladean DeRosen, Esq., that it is the position of the City the materials you have sought are deliberative in nature and; therefore, the release of the records is at the discretion of the City. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response to your inquiry. My opinion is based on applicable provisions of the APRA, Ind. Code § 5-14-3-1 *et seq.*

BACKGROUND

The City, in its response from Ms. DeRosen, claims that on August 21, 2013 you requested a copy of the report referred to as the *Two Way Feasibility Study Michigan and Main Street Corridors SR 933 From Chipewa Avenue to Marion Street South Bend Indiana* ("Report"). This report, prepared by third-party vendor DLZ Indiana, LLC, cost a significant amount of money to prepare.

Your request for the report was determined by the City to fall under the discretionary release standard pursuant to (Ind. Code § 5-14-3-4(6) as interagency advisory or deliberative material. You submitted your request for an informal opinion on September 25, 2013.

ANALYSIS

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 South Bend is a public agency for the purposes of the APRA. *See* Ind. Code § 5-14-3-2. Accordingly, any person has the right to inspect and copy the City's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise non-disclosable under the APRA. *See* I.C. § 5-14-3-3(a).

Counselor Hoage addressed the issue of deliberative materials in 13-INF-32. For the purposes of consistency, I adopt much of his rationale in that opinion. In it, he concluded:

Deliberative materials include information that reflects, for example, one's ideas, consideration and recommendations on a subject or issue for use in a decision making process. *See Opinion of the Public Access Counselor 98-FC-1*. Many, if not most documents that a public agency creates, maintains or retains may be part of some decision making process. *See Opinion of the Public Access Counselor 98-FC-4; 02-FC-13; and 11-INF-64*. The purpose of protecting such communications is to "prevent injury to the quality of agency decisions." *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. 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. *Newman*, 766 N.E.2d at 12. In order to withhold such records from disclosure under Indiana Code 5-14-3-4(b)(6), the documents must also be interagency or interagency records that are advisory or deliberative and that are expressions of opinion or speculative in nature. *See Opinions of the Public Access Counselor 98-INF-8 and 03-FC-17*. The exception does not provide a pre and post-decision distinction, so that the records may be withheld even after a decision has been made. *See Opinion of the Public Access Counselor 09-INF-25; 13-INF-29*. The deliberative materials exception does not provide that the requested materials are confidential; rather the records may be released at the agency's discretion. *See* I.C. § 5-14-3-4(b).

I see no reason to deviate from Counselor Hoage's analysis in the present case. It is clear from both parties the report you have sought is for decision-making purposes. I reiterate the portion of Counselor Hoage's opinion that speaks to the case law in *Newman* which exempts from disclosure any documentation that would place a chilling effect on a public agency when communicating on matters relating to decision making.

It is my understanding a decision has yet to be made on moving forward in the process. It matters not that the report was generated by a third-party vendor, it becomes public record once it is received by the City. The discretionary standard is triggered upon the denial of the request.

There is a caveat to the non-disclosure. If the record contains information that is not for the purpose of decision-making e.g., the cost and invoices of the report, the City is obligated to release those records in part. All of the information used for advisory

purposes is exempt from disclosure. After a final decision is made, regardless of the outcome, the report must be made available upon request.

It should also be noted that deliberations regarding a commercial project such as reviewing the qualifications of a certain vendor for a project is not subject to Indiana's Open Door Law. See Ind. Code § 5-14-1.5-2(c)(5). Any final action, vote or decision; however, must be made in an open meeting for the public to observe and record.

Please do not hesitate to contact me with any further questions.

Best regards,

A handwritten signature in black ink, appearing to read 'L. Britt', with a large, sweeping flourish underneath.

Luke H. Britt
Public Access Counselor

Cc: Ms. Aladean DeRosen, Esq.