STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

October 17, 2011

Kevin G. Fitzgerald
Foley & Lardner LLP
777 E. Wisconsin Avenue
Milwaukee, Wisconsin, 53202

Re: Formal Complaint 11-FC-243; Alleged Violation of the Access to Public Records Act by the Indiana Department of Insurance

Dear Mr. Fitzgerald:

This advisory opinion is in response to your formal complaint alleging the Indiana Department of Insurance ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq*. Bryan Shade, Attorney, responded on behalf of the Department. His response is enclosed for your review.

BACKGROUND

In your complaint, you allege on August 11, 2011, you submitted a written request to the Department for three categories of public records. On August 18, 2011, the Department responded to your inquiry and provided that the settlement agreement between Steward Title and the Department ("Agreement") that you had requested would not be produced as it was deemed confidential pursuant to I.C. § 27-1-3.1-15. On August 22, 2011, the Department provided various other documents in response to your August 11, 2011 request, but again reiterated that all other documents in connection with Stewart Title would be confidential pursuant to I.C. § 27-1-3.1-15.

You have advised that the Agreement is not protected from disclosure pursuant to I.C. § 27-1.3-1-15 due to it is not a working paper, recorded information, or document produced by, obtained by, or disclosed to the commissioner in the course of an examination. Rather, the Agreement was negotiated, drafted, and executed by Stewart Title and the Department as part of the resolution of whatever claims the Department had asserted against the company. You further provide that the Department routinely releases settlement agreements entered into with insurance companies, which would indicate that they are not universally confidential. The Department has already announced many of the terms of the Agreement to the media on June 22, 2011. In support of your argument, you have included case law from other jurisdictions that have held that settlement

agreements with public bodies are subject to disclosure. Lastly, in regards to all other materials that were requested relating to Stewart Title and the Department, the Department was required to comply with your request pursuant to I.C. § 5-14-3-6, which requires segregation of disclosable and non-disclosable material, which it failed to do so.

In response to your formal complaint, the Department provided that it has authority to conduct market conduct examinations of insurance companies pursuant to I.C. 27-1-3.1-1 ("Exam Statute"). These examinations allow the Department to discover whether the company is engaging in unfair market practices or competition. Part of the Exam Statute provides that certain information gathered during the examination confidential. It provides that:

> "All working papers, recorded information, documents, and copies thereof product by, obtained by, or disclosed to the commissioner or any other person in the court of an examination under this chapter are confidential for the purposes of IC 5-14-3-4, are not subject to subpoena, and may not be made public by the commissioner or any other person, except to the extent provided in section 14 of this chapter."

Section 14 of the Exam Statute discusses the only public record that is not confidential under the Exam Statute is the examination report. The report only becomes public thirty days after the commissioner issues an order adopting the examination report.

The Department initiated a market conduct examination of Stewart Title. Prior to the completion of the examination, Stewart Title elected to settle the matter. No examination report was prepared by the examiners. A regulatory agreement (i.e. Agreement) was prepare and signed by both the Department and Stewart Title that was produced by the Department during the course of an examination under Indiana's Exam Statute. Further, the Agreement is not considered an examination report that would be disclosable under the law.

In regards to the Conestoga Title case which also arose out of the Exam Statute, the settlement agreement was not withheld due to Conestoga Title filed a petition for judicial review in the Marion County Superior Court after the examination report was issued. As part of the petition for judicial review, the administrative record in the matter was filed. The administrative record, which is a public record, included all the information that was disclosed to you in response to your request, minus the Agreement. The Conestoga settlement agreement was entered into between the Department, the company, and the Indiana Attorney General, who per internal office policy is not permitted to have a confidential settlement agreement and further said agreement was filed in open court. The Conestoga settlement was a settlement of a petition for judicial review not a settlement of an ongoing market conduct examination.

As to your claims that any other records in connection with the Stewart Title examination should be disclosed because they contain both disclosable and nondisclosable information, the Department provide that you have failed to identify with reasonable particularity the records that are sought.

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* I.C. § 5-14-3-1. The Department is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Department's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, the Department responded to your request within the time period required by the APRA.

One category of nondisclosable public records consists of records declared confidential by a state statute. *See* I.C. § 5-14-3-4(a)(1). I.C. § 27-1-3.1-15 provides that:

> Sec. 15. All working papers, recorded information, documents, and copies thereof produced by, obtained by, or disclosed to the commissioner or any other person in the course of an examination under this chapter (including trade secrets and information obtained from a federal agency, a foreign country, or the National Association of Insurance Commissioners, or under another state law) are confidential for the purposes of IC 5-14-3-4, are not subject to subpoena, and may not be made public by the commissioner or any other person, except to the extent provided in section 14 of this chapter. However, access may also be granted to the National Association of Insurance Commissioners. Those parties must agree in

> writing prior to receiving the information to provide to it the same confidential treatment as required by this section, unless the prior written consent of the company to which it pertains has been obtained.

I.C. § 27-1-3.1-14 provides:

> Sec. 14. (a) Upon the adoption of an examination report under section 11(a)(1) of this chapter, the commissioner shall continue to hold the content of the examination report as confidential information for a period of thirty (30) days except to the extent provided in section 10(b) of this chapter. Thereafter, the report shall be open for public inspection.
>
> (b) This chapter does not prevent or prohibit the commissioner from disclosing the content of an examination report, preliminary examination report, or results, or any matter relating thereto, to the National Association of Insurance Commissioners, the insurance department of any other state or country, or to law enforcement officials of Indiana or any other state or agency of the federal government at any time, if the agency or office receiving the report or matters relating thereto agrees in writing to hold it confidential and in a manner consistent with this chapter.
>
> (c) If the commissioner determines that regulatory action is appropriate as a result of any examination, the commissioner may initiate any proceedings or actions authorized by law.
>
> (d) This chapter does not limit the commissioner's authority to use and, if appropriate, to make public any final or preliminary examination report, any examiner or company work papers or other documents, or any other information discovered or developed during the course of any examination in the furtherance of any legal or regulatory action that the commissioner may, in the commissioner's sole discretion, consider appropriate.

You have advised that the Agreement is not protected from disclosure pursuant to I.C. § 27-1.3-1-15 due to it was negotiated, drafted, and executed by Stewart Title and the Department as part of the resolution of whatever claims the Department had asserted against the company. The Department provides that it initiated a market conduct examination of Stewart Title. Prior to the completion of the examination, Stewart Title elected to settle the matter. A regulatory agreement was prepared and signed by both the Department and Stewart Title that was produced by the Department during the course of

an examination under Indiana's Exam Statute. Further, the Agreement is not considered an examination report that would be disclosable under the law.

The public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80.* Here the facts presented are in direct opposite of one another and hinge of the determination whether the Department produced the Agreement during the course of an examination pursuant to I.C. § 27-1-3.1. If the Agreement was drafted outside or prior to an examination conducted pursuant to the statute, minus any other applicable provision of the APRA, state, or federal law, it would be disclosable in response to your records request. But, if the Agreement was produced during the course of a market examination, it would be considered confidential pursuant to state law and the Department would be prohibited from disclosing it.

Although you have provided a number of cases from other jurisdictions which have held that settlement agreements are generally subject to disclosure, I am unable to find a similar holding from Indiana case law or statute. As to the Conestoga Agreement that the Department has previously disclosed to you, the Department has advised that the Conestoga settlement was a settlement of a petition for judicial review not a settlement of an ongoing market conduct examination. If the Conestoga Agreement had been a settlement of an ongoing market conduct examination, it would have been entitled to protection under I.C. § 27-1-3.1-15. As to your assertions that Stephen W. Robertson has already disclosed many of the terms of the Agreement in a June 22, 2011 announcement thus waiving any confidentiality issues, I note that if this matter were to proceed to judicial review, a Court would be able to conduct an inspection of the Agreement. The APRA allows the Court, not the Public Access Counselor, the right to review the public record in camera to determine whether any part of it may be withheld. *See* I.C. § 5-14-3-9(h). As I have not reviewed the Agreement, I am unable to compare it to your assertions of what Mr. Robertson provided in the June 22, 2011 announcement. Nor has an actual copy of the June 22, 2011 announcement been provided in your formal complaint or the Department's response.

When a record contains both disclosable and nondisclosable information and an agency receives a request for access to the record, the agency shall "separate the material that may be disclosed and make it available for inspection and copying." *See* I.C. § 5-14-3-6(a). The burden of proof for nondisclosure is placed on the agency and not the person making the request. *See* I.C. § 5-14-3-1.

The Indiana Court of Appeals addressed a similar issue in *Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ.,* 787 N.E.2d 893 (Ind. Ct. App. 2005):

> However, *section 6 of APRA* requires a public agency to separate discloseable from non-discloseable *information* contained in public records. *I.C. § 5-14-3-6(a).* By stating

> that agencies are required to separate "information" contained in public records, the legislature has signaled an intention to allow public access to whatever portions of a public record are not protected from disclosure by an applicable exception. To permit an agency to establish that a given document, or even a portion thereof, is non-discloseable simply by proving that some of the documents in a group of similarly requested items are non-discloseable would frustrate this purpose and be contrary to section 6. To the extent that the *Journal Gazette* case suggests otherwise, we respectfully decline to follow it.
>
> Instead, we agree with the reasoning of the United States Supreme Court in *Mink, supra*, i.e., that those factual matters which are not inextricably linked with other non-discloseable materials, should not be protected from public disclosure. See *410 U.S. at 92*. Consistent with the mandate of *APRA section 6*, any factual information which can be thus separated from the non-discloseable matters must be made available for public access. *Id*. at 913-14.

To the extent that the records you requested contains information that is not an expression of opinion or speculative in nature, and is not inextricably linked to non-disclosable information, APRA provides that the information shall be disclosed. However, the APRA requires that a records request "identify with reasonable particularity the record being requested." *See* I.C. § 5-14-3-3(a)(1). "Reasonable particularity" is not defined in the APRA, but the public access counselor has repeatedly opined that "when a public agency cannot ascertain what records a requester is seeking, the request likely has not been made with reasonable particularity." *Opinions of the Public Access Counselor 10-FC-57; 08-FC-176*. Because the public policy of the APRA favors disclosure and the burden of proof for nondisclosure is placed on the public agency, if an agency needs clarification of a request, the agency should contact the requester for more information rather than simply denying the request. *See generally* I.C. 5-14-3-1; *Ops. of the Public Access Counselor 02-FC-13; 11-FC-88*. To the extent the Department is unable to identify what records that you are seeking, it should attempt to further clarify your request. However, if the records for which you are seeking are considered confidential pursuant to I.C. § 27-1-3.1-15, the Department would be prohibited from disclosing them pursuant to I.C. § 5-14-3-4(a)(1).

CONCLUSION

For the foregoing reasons, it is my opinion that if the Agreement was not produced by the Department during the course of a market examination under I.C. § 27-1-1.3, minus any other applicable exceptions, it would be disclosable pursuant to your public records request. However, if the Agreement was produced by the Department

conducive to a market examination, pursuant to I.C. § 5-14-3-4(a)(1) and I.C. § 27-1-1.3-15 it would have been deemed confidential and prohibited from disclosure.

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: Bryan Shade