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) 234-0906
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

October 31, 2012

David A. Garman
1928 Millstream Dr.
Huntertown, Indiana 46748

Re: Formal Complaint 12-FC-293; Alleged Violation of the Access to Public Records Act by the Huntertown Town Council

Dear Mr. Garman:

This advisory opinion is in response to your formal complaint alleging the Huntertown Town Council ("Council") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq*. Jim Fortman, Council President, responded in writing to your formal complaint. His response is enclosed for your reference.

BACKGROUND

In your formal complaint you provide that the Council retained Umbaugh and Associates ("Umbaugh") to prepare and discuss various reports regarding Huntertown's Water and Sewer Utilities. On October 1, 2012, the Council held a meeting to discuss a draft of the report to be submitted by Umbaugh. Mr. Steven Carter with Umbaugh was in attendance at the October 1, 2012 meeting. When it came time for public comment, you allege that you asked both the Council and Mr. Umbaugh for a copy of the draft report. You further allege that Mr. Umbaugh and Mr. Fortman, Council President, denied your request as the report was only in draft form; however you were advised a copy of the final report would be provided to all residents when the report was completed. Since the October 1, 2012 meeting, you provide that the residents of Huntertown still have questions regarding the proposed options and have yet to receive a copy of the report.

In response to your formal complaint, Mr. Fortman denied that any APRA violation occurred. Mr. Fortman provided that at the October 1, 2012 meeting during public comment you made a request of Mr. Carter, and not the Council, for a copy of the draft report. Mr. Carter responded that the report was only in draft form and could not be provided at this time. Mr. Fortman challenges your assertion that you ever directed a request to the Council for a copy of the draft report. In support of the Council's contentions, Mr. Fortman attached a copy of the memoranda of the October 1, 2012 meeting which provide that you only made you a request of Mr. Carter.

Furthermore, Mr. Fortman provides that even if the Council had received your request, the Council would have had discretion to deny the request pursuant to the deliberative materials exception found under I.C. § 5-14-3-4(b)(6). Umbaugh, a private contractor, was contracted for the purpose of conducting rate studies to advise the Town concerning the possible need to adjust its water and sewer rates. The draft study report contains opinions as to potentially necessary rate adjustments. The draft report was communicated to the Council to assist it in making decisions about future sewer rates. The draft report fall within the deliberative materials exception and Mr. Fortman argues that it is within the Town's discretion to disclose the draft report in response to a request made under the APRA.

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 Council 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 Council'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).

The Council maintains that it never received a request from you for a copy of the draft report. As previous Public Access Counselor's have provided, the Public Access Counselor is not a finder of fact. *See Opinion of the Public Access Counselor 10-FC-15*. Consequently, I express no opinion as to whether the Council received your request at the October 1, 2012 meeting or whether the request was directed solely to Mr. Carter and not the Council. Under the APRA, if an oral request is delivered in person and the agency does not respond within twenty-four hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If a request is made orally, either in person or by telephone, a public agency made deny the request orally. *See* I.C. § 5-14-3-9(c). If an oral request that has been denied is renewed in writing, a public agency may deny the request as long as the denial is in writing and includes 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). As applicable here, if the Council received your request and did not respond to it within these timeframes, the Council acted contrary to the APRA. However, if the Council did not receive your request, it was not obligated to respond to it. I would note that even if it could be found that the Council received your oral request at the October 1, 2012 meeting, it would have complied with the APRA had it orally denied the request at that time. However, as noted *supra*, if you thereafter renewed your request in writing, at that point the Council would be required to cite to the specific exemption authorizing the withholding of the record and provide the name and title or position of the person responsible for the denial.

As to the substance of the Council's denial had a written request been received, it should be initially noted the APRA does not contain a "draft" exception applicable to the

definition of a public record or as a basis for denial in response to a request made for the record. "Even a draft public record is a public record subject to the disclosure requirements of the APRA." *See Opinions of the Public Access Counselor 04-FC-49; 05-FC-195; 08-FC-54; 12-INF-22*. The APRA does not require a record to be in its final or complete form before it can be produced pursuant to a request. *See Opinion of the Public Access Counselor 08-FC-54.* While a draft copy of report would still be a "public record" pursuant to I.C. § 5-14-3-2(n), the Council would be authorized to deny a request for the record if it were able to cite to a statute authorizing the records withholding. *See* I.C. § 5-14-3-9(c). Here, the Council provided had it received a request under the APRA, the draft report could be denied pursuant to I.C. § 5-14-3-4(b)(6). The APRA excepts from disclosure, at the discretion of the public agency, the following:

> Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private 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. I.C. § 5-14-3-4(b)(6).

Pursuant to I.C. § 5-14-3-4(b)(6), the General Assembly has provided that records that qualify as deliberative materials may be disclosed at the discretion of the public agency. 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.*

When a record contains both disclosable and nondisclosable information and an agency receives a request for access, 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 provided the following guidance on 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 dislcosable from non-dislcosable *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-dislcosable 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 information contained in the draft report would be considered a deliberative material pursuant to I.C. § 5-14-3-4(b)(6), the Council would not have violated the APRA had it received and denied your written request pursuant to this subsection.

CONCLUSION

For the foregoing reasons, it is my opinion that the Council did not violate the APRA *if* it never received your request (emphasis added). As to all other issues, it is my opinion that the Council did not violate the APRA.

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: Jim Fortman