



STATE OF INDIANA

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August 22, 2016

Mr. Thomas E. Wheeler, Esq.
201 North Illinois Street, Suite 1900
Indianapolis, Indiana 46204

Re: Formal Complaint 16-FC-160; Alleged Violation of the Access to Public Records Act by the State of Indiana Department of Insurance

Dear Mr. Wheeler:

This advisory opinion is in response to your formal complaint alleging the State of Indiana Department of Insurance (“Department”) violated the Access to Public Records Act (“APRA”), Indiana Code § 5-14-3-1 et. seq. The Department has responded via Mr. Bryan Babb, Esq. His response was forwarded to you and our office on July 28, 2016. Pursuant to Indiana Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on July 7, 2016.

BACKGROUND

Your complaint dated July 7, 2016 alleges the State of Indiana Department of Insurance violated the Access to Public Records Act by improperly denying your records request. This complaint is part of an ongoing issue between you and the Department. You requested records from the Department. In its response, the Department informed you the records would not be provided until you state the purpose of your request. You contend this condition is improper because the APRA does not require the requestor to state a purpose for the documents.

On July 25, 2016 the Department responded. The Department contends its refusal was proper because you are requesting documents which are related to your client’s appeal. The Department notes you requested information on behalf of your client and contends the records requested were intended to bolster your claims at litigation. Therefore, the Department contends your request should be handled through discovery and therefore your complaint was improper.

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 Indiana Code § 5-14-3-1*. The State of

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

First, I note a procedural failing on your part. This situation is part of an ongoing matter between your firm and the Department. However, this matter was previously discussed in *Informal Opinion 16-INF-22*. In your complaint, you do not raise any new allegations except to contend your latest records request was denied by the Department for the same reasons noted previously. This complaint should not have been filed by your firm. Once a complaint has been filed with this office, additional requests should cease until a determination is made. This prevents both the public agency and this office from being inundated with frivolous complaints. It does not matter you requested an informal opinion rather than filing a formal complaint. A great deal of cost to both parties and a great deal of confusion for both the Department and this office could have been avoided if your firm had waited for a determination, as is proper.

You contend the APRA does not allow a public agency to inquire about the purpose of your request. In general this is true; however, there are exceptions to this rule. For example, public agencies can adopt a policy which prevents disclosure of records to commercial agencies if the records are used for a commercial purpose. *See Indiana Code 5-14-3-3(e)*. Courts may also restrict a requestor's access to records if there is a reasonable belief the requestor would alter the record. *See Indiana Administrative Rule 10*. These determinations cannot be made unless the requestor states the purpose behind the request.

Finally, as I noted in *Informal Opinion 16-INF-22*, requests under the APRA are improper when litigation is pending. I wrote

When a case is currently pending before Indiana's courts, it is the general policy of this office to decline complaints. When a lawsuit has been filed concerning a specific subject matter, the General Assembly has precluded the Office of the Public Access Counselor from addressing the controversy from an APRA perspective. *See Indiana Code § 5-14-4-10(6)*. Indeed, the discovery process would be frustrated if an executive branch official were to preempt the court's authority by issuing an opinion on production of documents.

My interpretation has not changed in the four (4) weeks between the publication of that opinion and the publication of this one. As I stated, it is the general policy of this office to decline complaints concerning records discoverable under the trial rules. Your original request was submitted in December 2015. Based on my understanding of the situation, the Department did not begin compiling records until the submission of *16-INF-22* when you stated the records were for matters unrelated to litigation. Therefore, a period of six (6) months passed where limited-to-no disclosure occurred. This could have been remedied had you informed the Department your request is unrelated to litigation. While the APRA does not require a statement of purpose for records, a showing of good faith in the beginning would have saved your firm and your client a great deal of time and money while you waited and then worked through this office.

Based on the Department's response and court records provided to this office, it appears the Court of Appeals will make a determination regarding whether discovery is proper. I would be willing to address

this issue after that time; however, because litigation is pending regarding whether discovery is appropriate, it would be improper for me to opine on whether the APRA has been violated. *See also Indiana Code § 5-14-10-6 (the counselor may not issue an advisory opinion concerning a specific matter with respect to which a lawsuit has been filed under IC 5-14-1.5 or IC 5-14-3).*

Regards,

A handwritten signature in black ink, appearing to read 'LHB', with a long, sweeping underline that extends to the left and then curves back under the letters.

Luke H. Britt
Public Access Counselor

Cc: Mr. Bryan Babb, Esq.