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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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JAMES AND SHARON DAY,  
*Complainant,*

v.

SWITZERLAND CO. BRD. OF COMMISSIONERS,  
*Respondent.*

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Formal Complaint No.  
19-FC-8

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Luke H. Britt  
Public Access Counselor

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BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Switzerland County Board of Commissioners (“Board”) violated the Access to Public Records Act.<sup>1</sup> Attorney Wilmer E. Goering, II filed an answer to the complaint on behalf of the Board. In accordance with Indiana Code

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<sup>1</sup> Ind. Code §§ 5-14-3-1 to -10

§ 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on January 22, 2019.

### **BACKGROUND**

This complaint involves a dispute over the release of an engineering report relating to the Complainant's property.

On several occasions, the Complainants sought an engineering report from the Switzerland County Board of Commissioners ("Board"). The report assessed the County's responsibility for the flood risk associated with the property. The Board denied access to the report when requested.<sup>2</sup>

The bulk of the formal complaint attacks the credibility of the individual commissioned to prepare the engineer's report as she allegedly was not certified as an engineer. That matter will not be addressed as the impeachment of an expert witness is a trial court strategy outside the scope of this Office.

The response by the Board explains that the report was commissioned by the County Attorney in anticipation of litigation, although the parties concede that threatened litigation was never formally memorialized in writing.

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<sup>2</sup> The information provided by either party does not specifically state the initial exemption to disclosure under the Access to Public Records Act.

## ANALYSIS

### 1. The Access to Public Records Act

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.” Ind. Code § 5-14-3-1. The Switzerland County Board of Commissioners (“Board”) is a public agency for the purposes of the APRA; and thus, subject to the Act’s requirements. Ind. Code § 5-14-3-2(n).

As a result, any person has the right to inspect and copy the Board’s disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. *See* Ind. Code § 5-14-3-3(a).

### 2. Trial rules and work product

The Board’s response contains an analysis of the Indiana Trial Rules as it pertains to expert witness and testimony, however, the Indiana Trial Rules cited address the inclusion and admissibility of testimony from expert witness and the discoverability of documentation into evidence. Rarely does this Office address the Rules of Discovery as they are mutually exclusive from the Access to Public Records Act. Although Indiana Code sections 5-14-3-4(a)(1) and (a)(8) make confidential those records declared so by Indiana statute and by the Indiana Supreme Court, the rules and cases cited by the Board are, by nature, holdings and guidelines for admissibility and discoverability in a judicial setting.

What the Board does allude to, but never outright argues, is the notion that the report in question was commissioned at the direction of the county attorney in reasonable anticipation of litigation. As such, the report, although it was prepared by a contractor, can be considered the work product of an attorney.

Under APRA, the “work product of an attorney” is exempted from disclosure at the discretion of a public agency. Ind. Code § 5-14-3-4(b)(2).

“Work product of an attorney” means “information compiled by an attorney in reasonable anticipation of litigation,” which includes the attorney’s:

- (1) notes and statements taken during interviews of prospective witnesses; and
- (2) legal research or records, correspondence, reports, or memoranda to the extent that each contains the attorney's opinions, theories, or conclusions.

Ind. Code § 5-14-3-2(u). This would also include materials prepared at the direction of an attorney by a non-attorney for the purpose of assessing risk.

The work product exemption does not merely apply to litigation that has been threatened in writing. It may apply when an attorney—in their independent legal judgment—reasonably expects litigation to occur.

Both parties cite a prior instance of another member of the community initiating litigation in a similar situation. Therefore, it stands to reason that an attorney would have the

foresight to similarly assess a subsequent matter by commissioning a report. That appears to be the case in the current matter.

Based on the information provided, it appears as if the engineering report, regardless of the particular credentials of the individual preparing the report, was created specifically at the direction of the county attorney in the reasonable anticipation of litigation. For that reason, it may be justifiably withheld.

## **CONCLUSION**

Based on the foregoing, it is the opinion of the Public Access Counselor that the Switzerland County Board of Commissioners did not violate the Access to Public Records Act.

A handwritten signature in black ink, appearing to read 'LH Britt', with a stylized flourish at the end.

Luke H. Britt  
Public Access Counselor