



# STATE OF INDIANA

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August 21, 2009

Jeffrey Bellamy  
1900 Market Square Center  
151 North Delaware Street  
Indianapolis, Indiana 46204

*Re: Formal Complaint 09-FC-172; Alleged Violation of the Access to Public Records Act by the Clay-Owen-Vigo Solid Waste Management District*

Dear Mr. Bellamy:

This advisory opinion is in response to your formal complaint alleging the Clay-Owen-Vigo Solid Waste Management District ("District") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to records. A copy of the District's response to the complaint is enclosed for your reference. It is my opinion District has not violated the APRA in failing to disclose records which do not exist but must provide you with any records it maintains which would reflect the amount paid to the law firm.

## BACKGROUND

You allege that on July 8, 2009 you renewed a request you sent to the District in January 2009. You allege there are outstanding requests for three groups of records. You filed the present complaint on August 3 (postmarked July 31), alleging the District has denied you access to those records.

The District responded to the complaint by letter dated August 20 from attorney Michael Wright. The District contends that it does not maintain any records responsive to your first two requests, or the first two categories of records addressed on the complaint form. The District apologizes that the first response was not clear in indicating no such records exist. Regarding the third category of records, those showing any amounts paid to the law firm and the source of those funds, the District argues the records are nondisclosable pursuant to I.C. § 5-14-3-4(b)(2). Mr. Wright offers to provide you with the amounts billed.

## ANALYSIS

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

Here, you have asked for access to records authorizing a remonstrance and records authorizing the hiring of the law firm for the remonstrance. The District contends it maintains no records responsive to your request. While the APRA requires an agency to provide access to public records which already exist, an agency cannot provide access to records which do not exist. Further, nothing in the APRA requires a public agency to *develop* records or information pursuant to a request. It is my opinion the District has not violated the APRA by failing to disclose records which do not exist.

Regarding the final request, for access to records related to amounts billed by the law firm, the District claims the records are excepted from disclosure pursuant to I.C. § 5-14-3-4(b)(2), which affords an agency the discretion to withhold from disclosure attorney work product. I have addressed the issue of the disclosure of attorney billing records in the past:

I would reiterate, though, my opinion from September 28, 2007, that certain information contained on the invoices may indeed be nondisclosable at the discretion of the agency. For instance, the School describes narrative entries contained in the invoices which are "akin to the defense counsel's daily journal or defense plan for the litigation." Certainly this information may fall under the attorney work product exception to disclosure found in I.C. § 5-14-3-4(b)(2)(A) or the exception for attorney-client confidential communications found at I.C. § 34-36-3-2 (and therefore nondisclosable pursuant to I.C. § 5-14-3-4(a)(1)).

The School cites *Opinion of the Public Access Counselor 06-FC-62* as an opinion from this office which would allow the School to withhold the records on the basis of the attorney-client confidential communication exception. In that opinion, Karen Davis opined as follows:

Indiana Code 34-46-3-1 provides that communications between an attorney and her client are confidential. Hence, if the diary entries on the billing statements contain or reveal communications between an attorney and the client that are within the privilege, those entries may be withheld under IC 5-14-3-4(a)(1). In addition, any diary entries that reveal work product of an attorney

may be withheld in the public agency's discretion. IC 5-14-3-4(b)(2).

As I read this opinion, I believe Counselor Davis expressed an opinion similar to that of Counselor O'Connor and similar to the opinion I provide today, that "the entries" which contain confidential or otherwise nondisclosable information may be withheld.

The APRA requires that when a record contains disclosable and nondisclosable information, the disclosable information must be separated, and access to that portion of the record provided. I.C. § 5-14-3-6. While a majority of the information contained in the records at issue may be information which may or must be withheld from disclosure, it is my opinion that any portion of the invoices which do not constitute attorney work product or attorney-client confidential communication (e.g. invoice dollar amounts, remittance information, and similar information) must be disclosed.

*Opinion of the Public Access Counselor 08-FC-243.*

Similarly, it is my opinion in this matter that the District should separate any nondisclosable information from the billing records and provide you with the disclosable portions. In my opinion, the disclosable portion would include amounts billed.

#### CONCLUSION

For the foregoing reasons, it is my opinion District has not violated the APRA in failing to disclose records which do not exist but must provide you with any records it maintains which would reflect the amount paid to the law firm.

Best regards,



Heather Willis Neal  
Public Access Counselor

Cc: Janet Reed, Clay-Owen-Vigo Solid Waste Management District  
Michael Wright, Wright, Shagley, and Lowery, P.C.