



STATE OF INDIANA

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Via email transmission

July 15, 2016

Mr. Thomas E. Wheeler, II, Esq.

Re: Informal Inquiry 16-INF-22; Complaint against the Indiana Department of Insurance

Dear Mr. Wheeler:

This is in response to your informal inquiry regarding whether the Indiana Department of Insurance (“IDOI”) violated the Access to Public Records Act. IDOI has responded via Ms. Tina Korty, Esq. Her response is enclosed for your review.

BACKGROUND

You seek a determination as to whether IDOI violated the APRA. Over the last six (6) months, you made multiple public records requests relating to the retention of outside counsel and legal fees paid to these attorneys.

On December 31, 2015, IDOI responded to your initial request. IDOI declined to produce any records due to the fact they were related to a matter currently being litigated between you and the IDOI. This response provided that if you affirmed the records were not for use in the specific case being litigated, your request would be processed.

In its response dated June 27, 2016, IDOI stated your request would be processed because your June 7, 2016 letter -your request was unrelated to the pending litigation.

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 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 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)*.

The issue here is whether a public agency should process a public record request under the APRA when the parties are involved in litigation of the issue. I have previously addressed the “pending litigation” issue in *14-FC-158*, where I found Trial Rules may, in some instances, preclude the production of otherwise disclosable public records. Regarding the applicability of the APRA to the Trial Rules, I stated:

[T]he Indiana judiciary has the authority to establish Trial Rules to “govern the procedure and practice in all courts of the state of Indiana in all suits of a civil nature whether cognizable as cases at law, in equity, or of statutory origin. They shall be construed to secure the just, speedy and inexpensive determination of every action”. Indiana Trial Rule 1. The courts have exclusive jurisdiction over discovery matters. The APRA and the Public Access Counselor do not. *Opinion of the Public Access Counselor 14-FC-158*.

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. It is my belief the Indiana Department of Insurance acted appropriately by requesting you indicate your request was not related to pending litigation before processing it, so as to avoid violating the Trial Rules.

You have stated in your complaint filed with this office your request is “completely outside the claims in the pending litigation.” However, IDOI’s confusion about this request was reasonable due to the fact you are representing an insurance company in legal matters. You have since clarified your position. As such, IDOI has properly commenced with the processing of your initial request. It is my hope you are soon in receipt of the documents you requested.

Please do not hesitate to contact me with any questions.

Best regards,

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

Luke H. Britt
Public Access Counselor

Cc: Ms. Tina Korty, Esq.