

January 5, 2006 Alleged Violation of the Access to Public Records Act by the Indiana Stadium and Convention Building Authority

January 5, 2006

Sent Via Facsimile

Mr. Michael A. Lough
4531 W. Pitcher Drive
Trafalgar, IN 46181

Re: Informal Inquiry Response; Alleged Violation of the Access to Public Records Act by the Indiana Stadium and Convention Building Authority

Dear Mr. Lough:

You have requested an informal opinion from the Office of the Public Access Counselor. I received your request on December 12, 2005. Pursuant to Ind.Code 5-14-4-10(5), I am issuing this letter in response to your request.

Specifically, you allege that the Indiana Stadium and Convention Building Authority (“Authority”) has denied your request for copies of appraisals of certain parcels that have been acquired by the Authority in connection with the development of the Indiana Stadium. You have also requested that the Authority identify any anticipated future acquisitions for the new stadium.

You received a letter from counsel for the Authority dated December 6, 2005. Mr. Zeff Weiss responded to your request by stating that “the information that you seek is either protected by the attorney/client privilege and/or constitutes deliberative materials.” (Citations omitted).

You believe that this denial was in violation of the Access to Public Records Act. In support, you argue that the records could not be subject to attorney/client privilege, because you requested the records from the Authority, not its counsel. You also believe you are entitled to copies of appraisals because the appraisals are on previously acquired parcels, not on current or pending acquisitions.

Any person may inspect and copy the public records of any public agency during the agency’s regular business hours, except as provided in section 4 of the Access to Public Records Act (“APRA”). Ind. Code 5-14-3-3(a). The Authority is a public agency under the APRA. IC 5-14-3-2(1). Section 4 of the APRA contains exemptions for confidential public records and for

records that may be withheld from disclosure at the discretion of the public agency. Records declared confidential by state statute and by rule of the Indiana Supreme Court are exempt from disclosure. IC 5-14-3-4(a)(1); IC 5-14-3-4(a)(8). Also, 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 may be withheld in the agency's discretion. IC 5-14-3-4(b)(6).

The public agency may deny a written request for a record if the denial is in writing. Further, the denial must include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record, and the name and the title or position of the person responsible for the denial. IC 5-14-3-9(c).

The Authority apparently has records that are responsive to your two-part request. However, in my opinion, the Authority has not adequately stated its denial. Because you have requested two types of records, appraisals and records showing planned future acquisitions, the Authority is required to issue a denial that explains for each record or type of record, which exemption or exemptions apply. For example, it is difficult for me to determine whether the Authority has correctly applied the exemption for interagency deliberative material, because I have no idea to what record the Authority applies that exemption--the appraisals, the records about anticipated future acquisitions, or some other record. Also, the Authority must identify with some specificity what records it possesses that fulfill your request, since you asked for "information" about future acquisitions. It would be helpful to know whether information about planned acquisitions is contained in a letter from bond counsel to the client Authority, for example. In this way, the person seeking a record may determine whether the exemption has been applied appropriately. This is what the legislature intended to occur when it enacted IC 5-14-3-9(c), which requires that a denial include a statement of the specific exemption or exemptions that applies to a record.

Under the APRA, the public agency bears the burden of proving that a record is exempt from disclosure under section 4 of the APRA. IC 5-14-3-1; IC 5-14-3-9(f) and (g). If you believe that the Authority has denied a record in violation of the APRA, you may file a court action to compel disclosure of the record under IC 5-14-3-9(e). In any action filed under section 9, a court shall award reasonable attorney fees, court costs, and other reasonable expenses of litigation to the prevailing party if the plaintiff substantially prevails, and if the plaintiff first sought and received an informal inquiry response from the public access counselor. IC 5-14-3-9(i).

I write also to address your contentions with respect to the two exemptions cited by Mr. Weiss. With respect to the attorney/client privilege, you contend that because you requested records from the Authority, not its counsel, the attorney/client exemption would not apply. Under IC 34-46-3-1, a statutory privilege between an attorney and the client is recognized. This privilege applies to all communications to an attorney for the purpose of obtaining professional legal advice or aid regarding the client's rights and liabilities. *Hueck v. State*, 590 N.E.2d 581, 584. Accordingly, any record that falls within the protected communication is exempt, unless

the client consents to disclosure. It is of no moment that a person requested the record from the client instead of the attorney.

You also state that an appraisal could not be exempt from disclosure where the parcels pertaining to the appraisals have been acquired. I assume for purposes of this guidance that the Authority intended to deny the appraisals on the identified properties under the “deliberative materials” exemption, IC 5-14-3-4(b)(6). In order to sustain its denial, the Authority has the burden of showing that the appraisals meet all the elements of the deliberative materials exemption: 1) the appraisals must be interagency or intra-agency material, or be material developed by a private contractor under a contract with the Authority; 2) the appraisals must be an expression of opinion; and 3) the appraisals must have been communicated for purposes of decision making. If the appraisals meet the exemption, the Authority may withhold the appraisals irrespective of whether or not the property has been acquired. The exemption for interagency deliberative materials survives even after the decision has occurred, although public agencies often, in their discretion, decide to release deliberative records after a decision is made. However, the APRA does not require that an agency exercise its discretion in this manner.

I hope this guidance is of assistance to you. Please feel free to contact me if you have any other questions.

Sincerely,

Karen Davis
Public Access Counselor

cc: Mr. Zeff Weiss