INSPECTOR GENERAL REPORT

2011-03-0103

May 5, 2011

SECRETARY OF STATE

Inspector General David O. Thomas, after an investigation by Special Agent Charles Coffin, reports as follows:

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Summary

Absent a law declaring a document confidential, it is not.
Here, the statute gives this confidentiality decision
to the discretion of the agency (Office of the Secretary of State).

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The focus of this report is an October 20, 2010 report (Report) issued by the Indiana Secretary of State (SOS). The Report was prepared by the former SOS and addressed the voting actions by then SOS candidate, and subsequently elected, SOS Charlie White (White). The allegations in the Report led to White's criminal indictment on March 3, 2011, for the pending offenses of voter fraud and other offenses.

We are asked to do two things: (1) Hamilton County Special Prosecuting Attorneys Dan Sigler and John Dowd request an investigation (*Exhibit A,*

attached) as to whether White's *past* review of the Report prior to the grand jury proceedings violated the Indiana Code of Ethics,[1] and (2) SOS White requests advice as to whether his *future* release of the Report to the public would be in violation of the Code of Ethics.

OIG Special Agent Charles Coffin was assigned.

I

The OIG conducted legal research, the review of documents and the interview of witnesses. It was determined that the Report was prepared by the SOS in response initially to a request for an investigation submitted to the SOS by the Chairman of the Indiana Democratic Party in September of 2010.

In late October 2010, a request for the Report pursuant to the Access to Public Records Act (APRA) was denied by then SOS Todd Rokita pursuant to various provisions of the APRA. IC 5-14-3-4(b)(1), IC 5-14-3-4(b)(2), and IC 5-14-3-4(b)(6).

An appeal of the non-disclosure was made to the Indiana Public Access Counselor who issued a written opinion on November 29, 2010, concluding that the SOS had the authority and discretion under the APRA (IC 5-14-3-4(b)) not to disclose the Report. *See Exhibit B, attached.*

[1] Our first inquiry was whether there had been an illegal accessing of grand jury testimony. Grand jury testimony is confidential in Indiana, and a violation of this law is a crime. IC 35-34-2-10. However, had IC 35-34-2-10 been violated, the Special Prosecutors would have jurisdiction to address the criminal violation. Here, the allegation is not that SOS White reviewed grand jury testimony, but that he reviewed the Report that was prepared by the predecessor SOS in advance of the grand jury.

We also considered the effect of whether the Report was a Prosecuting Attorney investigative report. However, the report was prepared, at least in part, at the initiation of the public disclosure request by another party. Furthermore, the definition of a "public record" for APRA includes any "material that is created, received, retained, maintained, or filed by or with a public agency." At a minimum, the Report was maintained or created by the SOS. IC 5-14-3-2(n).

After SOS White assumed office on January 1, 2011, the contents of the Report were reviewed by, or reported to, him. This was prior to the Grand Jury proceedings where he was indicted on March 3, 2011.

II

The OIG is authorized by statute to receive, investigate and litigate violations of the Indiana Code of Ethics (42 IAC 1-5). IC 4-2-7-3.

The OIG is also authorized to provide advice to state officers and agencies to prevent wrongdoing. IC 4-2-7-3(8).

For a violation of the Code of Ethics to occur (*i.e.* the rule prohibiting divulging or benefitting from confidential information in 42 IAC 1-5-10[2] and 42 IAC 1-5-11[3]), there must be a determination that a disclosure of "information of a confidential nature" occurred.

However, a violation of 42 IAC 1-5-10 or 42 IAC 1-5-11 also requires proof that benefitting from the information is not "permitted or required by law" or that divulging the information is not otherwise permitted by law. Here, an investigatory report (the Report) under APRA is confidential at the "discretion" of the agency (SOS). IC 5-14-3-4(b).[4] The previous SOS made the discretionary

[2] A state officer, employee or special state appointee shall not benefit from, or permit any other person to benefit from, information of a confidential nature *except as permitted or required by law*. 42 IAC 1-5-10 (*emphasis supplied*).

[3] A state officer, employee or special state appointee shall not divulge information of a confidential nature *except as permitted by law*. 42 IAC 1-5-11 (*emphasis supplied*).

[4] IC 5-14-3-4(b) states:

(b) Except as otherwise provided by subsection (a), the following public records shall be excepted from section 3 of this chapter *at the discretion of a public agency*:

(1) Investigatory records of law enforcement agencies. However, certain law enforcement records must be made available for inspection and copying as provided in section 5 of this chapter.

(2) The work product of an attorney representing, pursuant to state employment or an

decision that the Report was exempt from disclosure to the public under APRA, which decision was supported by the opinion issued by the Public Access Counselor. *See Exhibit B, supra, attached*. This same discretion to exempt a record from disclosure to the public now lies within the successor and current SOS. IC 5-14-3-4(b).

Other than the provision in IC 5-14-3-4(b) of APRA, we have found no other statute or authority that addresses whether the Report was confidential. [5]

We also find no law prohibiting a state office holder from viewing reports generated or maintained by his or her predecessor. To the contrary, there are at least two statutes, one of which imposes a class D felony penalty, if records from a predecessor administration are *not* made available to a successor. I.C. 5-15-5.1-15[6]; IC 35-44-1-2(5)(class D felony of Official Misconduct).[7]

III

Based upon the above findings and authorities, we make the following findings.

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appointment by a public agency:

(A) a public agency;

(B) the state; or

(C) an individual….

[5] Other statutes on confidentiality include, for example: IC 5-28-15-7(b) (economic development corporation confidentiality) and IC 4-2-7/6 (whistleblower protection if disclosures are made).

[6] I.C. 5-15-5.1-15 "Delivery of records by public official to successor." Section (a) states, "A public official who has the custody of any records, excluding personal records, shall at the expiration of his term of office or appointment, deliver to his successor, or to the commission if there is no successor, all materials defined as records by this chapter.

[7] IC 35-44-1-2 Official misconduct

Sec. 2. A public servant who:

* * * * *

(5) knowingly or intentionally fails to deliver public records and property in the public servant's custody to the public servant's successor in office when that successor qualifies;. . . commits official misconduct, a Class D felony.

1

Absent a law declaring an investigative report confidential to the successor SOS who views his predecessor's *past* investigative reports, we do not find a violation of the Code of Ethics. This is distinct from whether a disclosure of the Report to *the public* may be made pursuant to APRA.

2

We further find that pursuant to IC 5-14-3-4(b) of the APRA, that a *future* public disclosure of the Report is at the discretion of the current SOS and would not be in violation of the Code of Ethics.

The OIG remains willing to consider additional, credible evidence, but for the above reasons closes the investigation with the above advisory information.

Dated this 5th day of May, 2011.

David O. Thomas, Inspector General

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DAVID V. WHITELEATHER (1864-1942)
BENTON J. BLOOM (1879-1949)
JOHN W. WHITELEATHER, SR. (1904-1984)
BENTON W. BLOOM (1913-1990)
RICHARD W. GATES (1932-1997)
WILLIAM M. BLOOM (1917-2004)

March 3, 2011

The Honorable David Thomas
Indiana Inspector General
c/o State Ethics Commission
315 W. Ohio Street, Room 104
Indianapolis, IN 46205

Re: Potential Ethics Violation

Dear David Thomas:

The purpose of this letter is to request an ethics inquiry into the improper disclosure of confidential investigative material prepared by the former Secretary of State, Todd Rokita, in the matter of Charles P. White, the currently elected Secretary of State and the allegations against him of voter fraud and other criminal activities.

The report as prepared by the Secretary of State was provided to the Special Prosecutors on October 23, 2010. The report was not released to the press or public by Secretary Rokita under the theory that it contained confidential investigative material. In keeping with this classification the Special Prosecutors have not released or disclosed the contents of the report to the press, public or unauthorized persons requesting the report.

In the course of our investigation, we have come to learn that the confidential investigative report was provided to current Secretary of State and a target of the voter fraud investigation, Charles P. White. The report was allegedly released to White based upon the approval of Secretary of State General Counsel, Jerold A. Bonnett, who served both the past and present administration.

We believe the production of this report to the target of the investigation raises serious ethical questions and was highly questionable given the ongoing criminal investigation of White. We would therefore request your office and the State Ethics Commission begin an immediate investigation of this matter.

Thank you.

Sincerely,

John E. Dowd, Special Prosecutor

Daniel J. Sigler, Special Prosecutor

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EXHIBIT A

STATE OF INDIANA

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November 29, 2010

Mr. Gregory A. Purvis
12271 Chiseled Stone Dr.
Fishers, IN 46037

Re: Formal Complaint 10-FC-266; Alleged Violation of the Access to Public Records Act by the Indiana Secretary of State

Dear Mr. Purvis:

This advisory opinion is in response to your formal complaint alleging the Indiana Secretary of State ("SOS") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* SOS General Counsel Jerold Bonnet's response is enclosed for your reference.

BACKGROUND

In your complaint, you allege that the SOS denied your request for access to an investigative report prepared by the SOS. On October 1, 2010, you provided to the SOS certain public records demonstrating that, in your opinion, Charles P. White violated Indiana election law. You asked the SOS to conduct an investigation into the alleged violation(s). The SOS conducted an investigation and created a report consisting of "256 pages of unspecified public documents" (the "Report"). On October 26th, you sent to Mr. Bonnet a request via email seeking access to the Report. The same day, Mr. Bonnet denied your request. He cited to three exceptions to the APRA for the authority to withhold the Report: investigatory records of a law enforcement agency, attorney work product, and intra-agency and interagency advisory/deliberative material. You argue that these exceptions do not apply and the SOS should have disclosed the Report.

In response to your complaint, Mr. Bonnet maintains his position regarding the applicability of the three cited exceptions to the APRA. He notes that in late September of 2010, the SOS learned of allegations that a particular individual committed vote fraud in Hamilton County during the primary election held in May of 2010. On September 30th, the Hamilton County Prosecutor asked the SOS to provide any material or information that would assist with the prosecutors' review of the matter. Under the authority of the SOS as the State's Chief Election Officer, Mr. Bonnet, in his capacity as general counsel for the SOS, was tasked with reviewing the allegations and preparing a

EXHIBIT B

report for use of the SOS, the Hamilton County Prosecutor, and the two special prosecutors appointed by the Hamilton County Prosecutor to review the allegations. On October 22nd, Mr. Bonnet delivered his Report to the SOS, the Hamilton County Prosecutor, and the special prosecutors. The Report consisted of a 27-page legal memorandum and appendix, which included 124 pages of documents obtained from public agencies and public records, 26 pages of statutory materials, and 90 pages of Indiana court case law and court records.

Mr. Bonnet concedes that many of the elements of the Report are not, by themselves, exempt from disclosure under the APRA. However, he argues that the entire Report is exempt from disclosure as attorney work product. He notes that although the exceptions cited by the SOS are discretionary, the SOS has consistently applied its policy of denying access to records created in contemplation of law enforcement proceedings, records consisting of attorney work product, or records prepared for the use of cooperating law enforcement agencies. He adds that the SOS gave no direction to the prosecutors regarding whether or not to release the Report, and that the prosecutors have the discretion to release it upon request or on their own initiative.

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

Here, the SOS cites to the so-called deliberative materials exception to the APRA as its legal basis for refusing to disclose the Report. The deliberative materials exception is found at I.C. § 5-14-3-4(b)(6):

> (b) Except as otherwise provided by subsection (a), the following public records shall be excepted from section 3 of this chapter at the discretion of a public agency:
>
> . . .
>
> (6) 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.

Considering that Mr. Bonnet prepared the Report for the SOS and the prosecutors, it is axiomatic that the Report consisted of intra-agency and interagency materials. The deliberative materials exception also requires, however, that the records be expressions of opinion or speculative in nature and communicated for the purpose of decision making.

Mr. Bonnet states that the Report was prepared in order to provide information and advice to the SOS and the prosecutors regarding the allegations against Mr. White. The Hamilton County Prosecutor specifically requested any material or information that would assist with the prosecutors' review of the matter, which will end when the prosecutors decide whether or not to file charges against Mr. White. Accordingly, the Report qualifies as intra-agency and interagency deliberative material and the SOS did not violate the APRA by withholding it.

Moreover, pursuant to I.C. §5-14-3-4(b)(2) a public agency has the discretion to withhold a record that is the work product of an attorney representing a public agency:

> "Work product of an attorney" means information compiled by an attorney in reasonable anticipation of litigation and 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.

I.C. §5-14-3-2(p) (emphasis added). Mr. Bonnet notes that the Report contains a legal memorandum, documents obtained from public agencies and public records, statutory materials, and Indiana case law and court records. The definition of attorney work product includes documents that are "legal research or records" such as those included in the Report. Mr. Bonnet does not claim that every page of those records contains his original "opinions, theories, or conclusions." However, the context of the work product exception does not appear to limit work product to information *created* by the attorney. Rather, the inclusion of "legal research or records" indicates that the General Assembly intended to except from disclosure those materials that, while not created by the attorney himself or herself, nevertheless reveal the attorney's "opinions, theories, or conclusions" due to their content. For example, the content of the statutory materials in Mr. Bonnet's report could suggest that the prosecutors could pursue a particular violation of Indiana law rather than another, consider multiple charges, or indicate that they should file no charges at all. In that case, revealing the content of the statutory materials would reveal the attorney's opinions, theories, or conclusions even if the attorney was not the original creator of the material. Thus, to the extent that the Report contains documents that are otherwise disclosable, but the disclosure of them in the context of attorney work product would reveal the attorney's opinions, theories, or conclusions, it is my opinion that the public agency has discretion to withhold such material. Because this appears to be the case here, it is my opinion that the SOS had the discretion to withhold the entire Report pursuant to subsection 4(b)(2) of the APRA.[1]

[1] In my opinion, the SOS had the discretion to exempt the entire Report as attorney work product. However, I note that if the deliberative materials exception were the only exception that applied here, section 6 of the APRA would require the SOS to release portions of the Report that did not fall within the exception. Generally, if a public record contains both disclosable and nondisclosable information, the APRA requires public agencies to separate and/or redact the nondisclosable information and make the disclosable information available for inspection and copying. I.C. § 5-14-3-6(a). The public access

Because it is my opinion that the SOS had the discretion to withhold the Report under subsections 4(b)(2) and 4(b)(6) of the APRA, it is unnecessary to analyze the SOS's citation to subsection 4(b)(1).

CONCLUSION

For the foregoing reasons, it is my opinion that the SOS did not violate the APRA.

Best regards,

Andrew J. Kossack

Andrew J. Kossack
Public Access Counselor

cc: Jerold Bonnet

counselor has repeatedly opined that if there is information in deliberative materials which is neither advisory/speculative in nature nor inextricably linked with the nondisclosable materials, that information should be provided. *See, e.g., Op. of the Public Access Counselor 09-FC-53.* In my opinion, factual information is inextricably linked with advisory/speculative materials if the latter cannot be effectively communicated without the inclusion of the former. Exempting factual information that is necessary for providing advice to decision makers is consistent with the exception's purpose of shielding deliberative processes from public disclosure in order to ensure that advisors fully inform decision makers of all relevant facts. Thus, to the extent that the factual material in the Report was necessary for Mr. Bonnet's analysis and advice, the SOS acted within its discretion in withholding it.