

May 31, 2001

Mr. Ben Z. Hershberg
The Courier-Journal Bureau
2500 Lincoln Drive
Clarksville, IN 47129

*Re: Advisory Opinion 01-FC-26; Alleged Denial of Access to Public Records by
the City of New Albany.*

Dear Mr. Hershberg:

This is in response to your formal complaint, which was received on May 10, 2001. You have alleged that the City of New Albany ("City") violated the Indiana Access to Public Records Act ("APRA,") Indiana Code chapter 5-14-3. Specifically, on May 8 and 10, 2001, you were denied access to copies of letters of resignation submitted by members of the City Sewer Board. Mr. Keith Henderson, City Attorney responded in writing to your complaint and a copy of his response is enclosed for your reference. For the reasons set forth below, it is my opinion that the City's denial of access to the resignation letters did violate the APRA because no valid statutory basis for denial was provided.

BACKGROUND

According to your complaint, you made a verbal request to Mayor Regina Overton for copies of letters of resignation submitted to her from two members of the City Sewer Board. After consulting with Mr. Henderson, Mayor Overton denied you access to these public records. On that same day, you contacted this Office and described the public records in question. Based on this information, it was my advice that the letters in question were public records as defined under the APRA and that the City could only deny access if there was a valid statutory basis for that denial. You asked me to contact Mayor Overton by telephone that afternoon and I did. In my conversations with Mayor Overton and Mr. Henderson, they stated no statutory basis for denial. I discussed the APRA and its application to your request with both the Mayor and Mr. Henderson at that time.

The next day, May 9, 2001, you made a written request for access to copies of the two resignation letters. On May 10th, you received a written denial from Mr. Henderson and he cited several bases for the denial. First, he stated that since these letters were delivered in envelopes labeled "personal," they were not public records. Second, he stated that since neither the City Sewer Board nor the City Council is required to receive these resignations, the letters are not public records. Also, Mr. Henderson stated that the two persons in question are appointees of the mayor, they serve at the leisure of the mayor and thus, the letters are not public records as defined in the APRA. Finally, Mr. Henderson stated that the mayor has a responsibility to protect the individual privacy of the two persons who resigned so she will not release copies of these letters. He did state, however, that it is their position that the two former City Sewer Board members are free to disseminate copies of their letters to the Mayor to the public if they so

desire.

In response to your complaint, Mr. Henderson reasserted the denial of your requests and added a new basis for denial. He stated that the content of the letters related to litigation that is pending against the City and that such information is protected by the attorney-client privilege. He also added that if the letters were subject to the approval of the City Sewer Board or the City Council, he agreed that they would be public records, notwithstanding his assertion that the attorney-client privilege applied.

ANALYSIS

The public policy of the APRA states that "(p)roviding persons with information is an essential function of a representative government and 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. Furthermore, "[t]his chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record." Ind. Code § 5-14-3-1. Any person may inspect and copy the public records of a public agency unless an exception to disclosure exists under Indiana Code section 5-14-3-4.

The pivotal questions in this matter are whether the Mayor's Office is considered a public agency and whether the letters in question constitute public records under the APRA. The APRA defines public agency to include:

Any . . . county, township, school corporation, city, or town, or any board, commission, department, division, bureau, committee, office, instrumentality, or authority of any county, township, school corporation, city, or town.

Indiana Code §5-14-3-2. A mayor's office is an office of city government. It is my opinion, therefore, that the Mayor's Office is a public agency for the purposes of the APRA.

The second question is whether the two letters in question constitute public records for the purposes of the APRA. A public record is defined as follows:

"Public record" means any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, used, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

Indiana Code §5-14-3-2. A public record includes information that has been received by a public agency, therefore, the two letters of resignation delivered to the Mayor's Office were received by the public agency. It is my opinion, therefore, that the two resignation letters received are public records as

defined under the APRA. This is not to say that these two letters are in fact, disclosable public records. The APRA states that any person has the right to inspect and copy the public records of a public agency during regular business hours *unless* the public records are excepted from disclosure as confidential or otherwise nondisclosable under Indiana Code section 5-14-3-4. Ind. Code § 5-14-3-3(a).

As noted above, Mr. Henderson cited to a number of reasons for the denial of your request by the City. Since it is my opinion that the two letters in question constitute "public records" under the APRA, I have reviewed each of Mr. Henderson's bases for denial as if he were claiming some exception to disclosure, rather than that the records are not subject to the APRA.

Letters marked as "personal" are not disclosable public records.

Under the APRA, there are a number of exceptions to disclosure but the public agency has the burden of showing that there is a valid statutory basis for denial. Ind. Code §5-14-3-4. After reviewing these exceptions to disclosure, it is clear that the General Assembly has excepted information from disclosure in many situations. As you may know, these exceptions are typically based on the content of the document. It is my opinion that if an individual marks a letter or document as "personal" or "confidential" that does not render that letter confidential under the APRA. The contents of the document must also be subject to one of the exceptions listed under Indiana Code sections 5-14-3-4(a) or (b).

Letters that need not be presented to a governing body, such as the City Sewer Board or the City Council are not disclosable public records.

The question of whether a public record must be presented to a governing body is not relevant to the determination of whether that information is considered a public record. *See*, Ind. Code §5-14-3-2. This basis for denial, therefore, is not valid under the APRA.

Letters of resignation submitted by appointees who serve at the leisure of the Mayor are not public records.

Again, the fact that the two public records in question were submitted by mayoral appointees is not relevant to the determination of whether those letters are public records. This basis for denial is not valid under the APRA.

Letters are not disclosable because the Mayor has a responsibility to protect the individual privacy of the two persons involved.

Under the APRA, the General Assembly has made determinations as to what information must not or may not be disclosed, and in some cases, those determinations were made in the interest of protecting individuals' personal privacy. While it is always a compelling argument that a public record may affect the author's personal privacy, there are no general statutory exceptions under the APRA that would

permit the City to deny access to public records on this basis.

Since the content of the letters included information on pending litigation, the letters are protected from disclosure under the attorney-client privilege.

The attorney-client privilege makes confidential the communications between attorneys and their clients. *See*, Ind. Code §§ 5-14-3-4(a)(1) and 34-46-3-1. According to the facts presented, the correspondence was between two Sewer Board members and the Mayor. There is no indication that the Board members serve as the Mayor's attorney or the Mayor serves as their attorney. The fact that the content of the letters concern pending litigation in which the City is a party does not make the letter subject to the attorney-client privilege. For this reason, this basis for denial, in my opinion, is not valid under the APRA.

For the reasons cited above, it is my opinion that the City has failed to provide a valid statutory basis for denial of access to the two resignation letters in question. The burden for nondisclosure is on the public agency, and not on you as the requestor. Ind. Code §5-14-3-1. Consequently, it is my opinion that the City denied you access to these public records in violation of the APRA.

CONCLUSION

It is my opinion that the City of New Albany's denial of access to the two resignation letters in question violated the APRA because no valid statutory basis for denial was provided.

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: Mr. Keith Henderson, Attorney City of New Albany