

January 2, 2008

Edward Ingram
4422 North Elm Street
Richland, Indiana 47634

Re: Formal Complaint 08-FC-1; Alleged Violation of the Access to Public Records Act by the Luce Township Regional Sewer District Board of Trustees

Dear Mr. Purpus:

This advisory opinion is in response to your formal complaint alleging the Luce Township Regional Sewer District Board of Trustees ("District") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to records. I have enclosed a copy of the District's response to your complaint for your reference. It is my opinion the District may have violated the APRA by denying you access to records which may not be attorney work product unless the District can bear the burden of proving the records qualify as such under the APRA definition of attorney work product. It is my opinion the District has not otherwise violated the Access to Public Records Act.

BACKGROUND

In your complaint you allege that on November 29, 2007 you submitted to the District a request for access to records. You specifically sought certain information related to utility easements in the sewer district as well as information regarding property owners contacted by Mark Davis of the Indiana Rural Community Assistance Program ("IRCAP"). You also sought information related to any commitment from the IRCAP for loans to the District. You allege that approximately thirty minutes after submitting the request, the President of the District, William Rick Garrett, indicated you would need to obtain the records from the Courthouse. Further, you allege Mr. Garrett told you Mr. Davis did not provide a list of contacts to the District. Finally, you allege Mr. Garrett indicated he would provide you with a letter from the IRCAP but has not yet done so. You filed this complaint on December 3.

The District responded to your complaint by letter dated December 19 from attorney Jack Robinson. Mr. Robinson contends the list of all property owners in the sewer district who have or have not signed easements was compiled by his officer. Mr. Robinson contends that he is an independent contractor working for the District but he has not been paid for his work for the

preparation of the 1300 easements. He further indicates that “a majority of the Board does not want to release this list.” Regarding a list of individuals Mr. Davis contacted, Mr. Robinson contends neither Mr. Davis nor IRCAP provided with District with such a list. Finally, regarding a letter from IRCAP regarding any loan to the District, Mr. Robinson has provided a letter of conditions and has indicated the District has provided you a copy of this letter as well.

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. 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 the APRA. I.C. §5-14-3-3(a).

The District is clearly 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 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).

A “public record” means any writing, paper, report, study, map, photograph, book, card, tape recording or other material that is created, received, retained, maintained or filed by or with a public agency. I.C. §5-14-3-2(m).

A request for records may be oral or written. I.C. §5-14-3-3(a); §5-14-3-9(c). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven days of receipt, the request is deemed denied. I.C. §5-14-3-9(b). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. I.C. §5-14-3-9(a).

The District contends the list of easements is work product of an attorney representing a public agency, which is excepted from disclosure at the discretion of the public agency. I.C. §5-14-3-4(b)(2). “‘Work product of an attorney’ means information compiled by an attorney in reasonable anticipation of litigation.” I.C. §5-14-3-2(p). Mr. Robinson contends that his office created the list of easements without assistance from anyone else. Mr. Robinson further contends he has not been paid for the preparation of the list. The question here is whether Mr. Robinson created the list for or on behalf of the District.

While Mr. Robinson’s office is not generally subject to the APRA because it is not a public agency, a public agency cannot deny access to public records by indicating they are maintained by a private entity. The Indiana Court of Appeals addressed this issue in *Knightstown Banner, LLC v. Town of Knightstown*, 838 N.E.2d 1127 (Ind. Ct. App. 2005). There, the Court did not find that the language “created, received, retained, maintained or filed by or with a public agency” in I.C. §5-14-3-2(m) excepted from the definition records created *for* or *on behalf of* a public agency. Furthermore, the Court said it would amount to a tortured interpretation of the statute if private attorneys could ensconce public records in their file room and completely deny

the public access. *Id.* at 1133. Where records are created or maintained for a public agency but kept in the possession of an outside entity, the agency must retrieve the documents pursuant to a request for access to public records.

Here Mr. Robinson indicates that a majority of the Board does not want the list released. The Board must rely on statutory authority, though, to deny access to the records. Mr. Robinson cites the attorney work product exception to disclosure found in I.C. §5-14-3-4(b)(2). For records to be excepted from disclosure under this exception, the records must have been compiled in reasonable anticipation of litigation. I.C. §5-14-3-2(p). Mr. Robinson has not indicated the record was prepared in anticipation of litigation. It is my opinion that if the record was prepared by Mr. Robinson for or on behalf of the District, it is a public record. Further, the District may only withhold the record from disclosure if it can prove the record was compiled in reasonable anticipation of litigation. See I.C. §5-14-3-9(f) (*placing the burden of proof to sustain the denial on the public agency*).

Regarding your request for a list of contacts made by Mr. Davis, the District contends it did not receive any such record from Mr. Davis. Nothing in the APRA requires a public agency to *develop* records or information pursuant to a request. The APRA requires the public agency to *provide access* to records already created. As such, it is my opinion the District has not violated the APRA by denying access to a record that does not exist.

Regarding your request for records related to communications from IRCAP regarding a loan to the District, it is my understanding the District has provided you with a copy of the letter of conditions it received from the IRCAP. As such, it is my opinion the District did not deny you access to this record.

CONCLUSION

For the foregoing reasons, it is my opinion the District may have violated the APRA by denying you access to records which may not be attorney work product unless the District can bear the burden of proving the records qualify as such under the APRA definition of attorney work product. It is my opinion the District has not otherwise violated the Access to Public Records Act.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Jack Robinson, Law Office of Jack R. Robinson
William Rick Garrett, Luce Township Regional Sewer District Board of Trustees