



STATE OF INDIANA

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November 10, 2011

David R. Snyder
236 E. Pendle Street
South Bend, Indiana 46637

Re: Formal Complaint 11-FC-265; Alleged Violation of the Access to Public Records Act by the Town of Roseland

Dear Mr. Snyder:

This advisory opinion is in response to your formal complaint alleging the Town of Roseland ("Town") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Peter Agostino, Attorney, responded on behalf of the Town. His response is enclosed for your reference.

BACKGROUND

In your complaint, you allege that on September 29, 2011, you submitted a written request to the Town for "...any document that relates in any way to the litigation filed by David Snyder and Dorothy Snyder, Plaintiffs v. Jack D. Tiller, Individually and in his official capacity as Marshal of the Town of Roseland, and Town of Roseland, Defendants in Case No. 3:08-CV-00470." This request included all records and correspondence, whether they be paper, electronic, and or any other recording media.

On October 4, 2011, Mr. Agostino responded in writing on behalf of the Town to your request and acknowledged its receipt. The Town denied your request due to it was not specific and encompassed numerous privileged items. The Town further noted that many of the items requested had already been produced during the course of discovery in the above referenced litigation. The Town provided that it was under no obligation to compile information in response to a request and that if you would further define your request, to forward it to the Mr. Agostino. You allege that the Town's blanket denial violated the APRA.

In response to your formal complaint, Mr. Agostino advised that the request was not made with reasonable particularity. Further, attorney-client communications and attorney work product are excepted from disclosure pursuant to I.C. § 5-14-3-4. I.C. § 5-14-3-4(b) specifically excepts work product of an attorney, diaries, journals, or other

notes, record specifically prepared for discussion in executive session; all of which fall within your request. The requests also are similar to discovery requests that have been filed in the current litigation involving the parties.

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

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, the Town responded to your request within the timelines proscribed by the APRA.

The APRA requires that a records request “identify with reasonable particularity the record being requested.” I.C. § 5-14-3-3(a)(1). “Reasonable particularity” is not defined in the APRA, but the public access counselor has repeatedly opined that “when a public agency cannot ascertain what records a requester is seeking, the request likely has not been made with reasonable particularity.” *See Opinions of the Public Access Counselor 10-FC-57; 08-FC-176*. However, because the public policy of the APRA favors disclosure and the burden of proof for nondisclosure is placed on the public agency, if an agency needs clarification of a request, the agency should contact the requester for more information rather than simply denying the request. *See generally* IC 5-14-3-1; *Opinion of the Public Access Counselor 02-FC-13*. Here, the Town responded to your request and provided that it was not specific and encompassed numerous privileged items. The Town further provided that if you clarified your request, it should be directed to Mr. Agostino. Other than your request that specifically requested “any meeting agendas or meeting minutes” related to the litigation, it is my opinion your request was not made with reasonable particularity and the Town responded within the requirements of the APRA by attempting to clarify the nature of it. If the Town has any meeting agendas or meeting minutes that are responsive to your request, then it should produce such documents to you. If the Town does not have any meeting agendas and/or

minutes responsive to your request, then it has not violated the APRA in response to your request.

If you do resubmit your public records request to the Town, I would note that one category of nondisclosable public records consists of records declared confidential by a state statute. *See* I.C. § 5-14-3-4(a)(1). I.C. § 34-46-3-1 provides a statutory privilege regarding attorney and client communications. Indiana courts have also recognized the confidentiality of such communications:

The privilege provides that when an attorney is consulted on business within the scope of his profession, the communications on the subject between him and his client should be treated as confidential. The 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 (Ind. Ct. App. 1992) (citations omitted). "Information subject to the attorney client privilege retains its privileged character until the client has consented to its disclosure." *Mayberry v. State*, 670 N.E.2d 1262, 1267 (Ind. 1996), *citing Key v. State*, 132 N.E.2d 143, 145 (Ind. 1956). Moreover, the Indiana Court of Appeals has held that government agencies may rely on the attorney-client privilege when they communicate with their attorneys on business within the scope of the attorney's profession. *Board of Trustees of Public Employees Retirement Fund of Indiana v. Morley*, 580 N.E.2d 371 (Ind. Ct. App. 1991).

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, pursuant to state employment or an appointment by a public agency: a public agency; the state; or an individual.

"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).

I would note that both parties have acknowledged that that there exists pending litigation that currently appears to be in the discovery process. In *Opinion of the Public Access Counselor 02-FC-38*, the City of Carmel denied a request for access to public records because the City believed the request was an attempt to by-pass the proper discovery procedures set forth in the Trial Rules. This office did not find any language in the Trial Rules that would prohibit a party in litigation from making a public record request under the APRA. *See also Opinion of the Public Access Counselor 09-FC-94*. Thus, the Town would be required pursuant to the APRA to provide you with one copy

of any record responsive to a reasonably particular records request that it may receive from you.

CONCLUSION

Based on the foregoing, the Town should provide all records responsive to your request for any meeting agendas and/or minutes that refer to the presently filed litigation between the two parties. If the Town does not have any records responsive to this request, then it does not violate the APRA by failing to produce a record that does not exist. Should you resubmit a reasonably particular request to the Town, it is my opinion that the Town is required under the APRA to produce one copy of any record that is responsive to your request.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

Joseph B. Hoage
Public Access Counselor

cc: Peter Agostino