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November 1, 2012

Alexander G. Campbell
307 N. Pennsylvania Street
Indianapolis, Indiana 46206

Re: Formal Complaint 12-FC-292; Alleged Violation of the Access to Public Records Act by the Indiana Economic Development Corporation

Dear Mr. Campbell:

This advisory opinion is in response to your formal complaint alleging the Indiana Economic Development Corporation ("IEDC") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq*. Stephen J. Akard, Vice President and General Counsel, responded in writing to your formal complaint. His response is enclosed for your reference.

BACKGROUND

In your formal complaint you provide that on August 9, 2012, you submitted a written request for records to the IEDC asking, in part, for the following: "Any and all documentation, including but not limited to emails, memoranda, reports, or other records, pertaining to an internal IEDC investigation into Shuang Liang between a July 8, 2011 letter and the termination of her contract with the state on September 1, 2012." On September 28, 2012, you provide that the IEDC denied your request pursuant to the deliberative materials exception found under I.C. § 5-14-3-4(b)(6), the attorney-work product exception found under I.C. § 5-14-3-4(b)(2), and the attorney-client privilege pursuant to I.C. § 5-14-3-4(a)(1).

You provide that the deliberative materials exception only allows the redaction of material that are expressions of opinion that are of a speculative nature and that are communicated for the purpose of decision making. You acknowledge that certain portions of the records that have been sought would be exempt pursuant to this exception. However, pursuant to I.C. § 5-14-3-6, the IEDC would be required to separate the material that may be disclosed and make it available for inspection and copying. Thus, the IEDC would be required to disclose any and all statements of fact contained within the deliberative materials exception.

In regard to those records that were disclosed pursuant to I.C. § 5-14-3-4(b)(2), the exception would only apply to matters where there is a reasonable expectation of litigation. You are unaware of any litigation that could result from the investigation and request that the IEDC explain what kind of litigation that is reasonably expected or disclose the relevant portions of the records that were not disclosed.

You also sought records concerning, "The dates, destinations, and travel itineraries and for all foreign trips taken by Secretaries of Commerce Michael Maurer, Nathan Feltman, Mitch Roob, and Daniel Hasler during their tenures." The IEDC denied your request pursuant to I.C. § 5-14-3-4(b)(5). You provide that the IEDC would still be required to segregate and produce those records that were not created while negotiations were in progress.

In response to your formal complaint, Mr. Akard advised that since August 1, 2012, you have submitted six multi-part requests for public records to the IEDC. In response the IEDC has provided more than one thousand pages of records, including copies of contracts, invoices, correspondence, and other various records. Mr. Akard would argue that the IEDC has gone beyond the requirements of the APRA by granting your interview requests for himself and the Indiana Secretary of Commerce. Mr. Akard further provided that you have not availed yourself to the basic tenets of the APRA and as opposed to seeking clarification from the IEDC; you have rushed to file a formal complaint with the Public Access Counselor's Office two days after the IEDC denied your request.

As a way of reference, Mr. Akard provided that Shuang Liang served as an independent professional services contractor for the IEDC from May 16, 2011 to September 1, 2011. Pursuant to the contractual terms and by mutual assent, the contract was terminated before the original expiration date of the contract, June 30, 2012. The IEDC has voluntarily provided to you that the contractual relations with Ms. Liang ended on September 1, 2011 and that the IEDC engaged in an internal deliberative review of Ms. Liang's role related to her professional services contract following the July 8, 2011 complaint. Mr. Akard has provided that the IEDC issued a proper denial pursuant to the APRA and the exceptions that have been cited.

As to the deliberative materials exception, in July 2011, the IEDC sought the counsel of Laurie Morone, an in-house attorney with the IEDC, to evaluate Ms. Liang's contract with the IEDC in light of the July 8, 2011 letter. Ms. Morone conducted her review and provided a report to senior management at the IEDC. The report contained Ms. Morone's legal advice on whether the contractual provisions may have been violated and the report was used by IEDC management to make decisions regarding the contractual relationship with Ms. Liang. As such, the report was an expression of opinion communicated for the purpose of a decision and would qualify as a deliberative material pursuant to I.C. § 5-14-3-4(b)(6).

As to your contention that the statement of facts contained in the materials should be produced, Mr. Akard would argue that the Public Access Counselor has noted that

factual material that is inextricably linked with advisory/speculative materials would not be required to be disclosed. *See Opinion of the Public Access Counselor 10-FC-266.* The statements of fact in the report are inextricably linked with Ms. Morone's legal opinion. As such, the IEDC may exclude the entire report from disclosure pursuant to I.C. § 5-14-3-4(b)(6).

As to the attorney-client privilege, I.C. § 34-46-3-1 provides a statutory privilege for attorney-client communications. The privilege extends to government entities 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). No expectation of litigation is required. *Id*. at 373. As indicated, Ms. Morone is an attorney acting on behalf of her client, the IEDC. She has rendered a legal opinion concerning the contractual status of an independent contractor with the IEDC. The subject matter concerned the then possible early termination of a contract, which Mr. Akard would argue is clearly with the scope of legal representation. As such, the record was properly denied pursuant to I.C. § 36-46-3-1.

As to the attorney work product doctrine, the IEDC does not dispute that the records pursuant to this exception must be compiled in reasonable anticipation of litigation. Mr. Akard maintains based on the description of circumstances regarding Ms. Liang, that it was reasonably anticipated that the early termination of a professional services contract could result in a lawsuit. You have been provided copies of the contract in dispute and the IEDC has discussed at length with you the termination and the circumstances that preceded it. The investigative report and related documentation were created by an in-house attorney to advise management on contractual issues. The disclosure of the report and related documents would reveal the attorney's opinions, theories, and conclusions. As such, the IEDC advises that it did not violate the APRA by denying your request pursuant to the attorney work product doctrine.

Lastly, as to your request for records that was denied pursuant to I.C. § 5-14-3-4.5 and I.C. § 5-14-3-4(b)(5), the IEDC would initially note that you were provided with the dates of destinations of the travel itineraries of the Secretaries of Commerce as requested. In addition, the IEDC noted the extensive amount of access and information has been made available to you and what has previously been supplied to the *Indianapolis Star* regarding previous trips. To the extent that you sought records concerning other individuals, the IEDC objected because the request was not made with reasonable particularity. Further, the request was denied pursuant to I.C. § 5-14-3-4(b)(5) as the records were created while negotiations where in progress. Mr. Akard would argue that you have offered no evidence that the records that were not disclosed were not created while negotiations where in progress. To the contrary, Mr. Akard provided that the referenced trips were taken in order to pursue international economic development opportunities on behalf of the IEDC and as such, the itineraries reflect records created during the course of negotiations. The very purpose of the missions is to meet with economic development prospects and advance the status of negotiations. The meeting

itineraries would reveal which companies the IEDC was in negotiation with. As such, the IEDC denial of this portion of your request was proper under the APRA.

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 IEDC 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 IEDC'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).

Under the APRA, a public agency denying access in response to a written public records request must put that denial in writing and include the following information: (a) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and (b) the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). Counselor O'Connor provided the following analysis regarding section 9:

> Under the APRA, the burden of proof beyond the written response anticipated under Indiana Code section 5-14-3-9(c) is outlined for any *court action* taken against the public agency for denial under Indiana Code sections 5-14-3-9(e) or (f). If the public agency claimed one of the exemptions from disclosure outlined at Indiana Code section 5-14-3-4(a), then the agency would then have to either "establish the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit" *to the court*. Similarly, if the public agency claims an exemption under Indiana Code section 5-14-3-4(b), then the agency must prove to the court that the record falls within any one of the exemptions listed in that provision and establish the content of the record with adequate specificity. There is no authority under the APRA that required the IDEM to provide you with a more detailed explanation of the denials other than a statement of the exemption authorizing nondisclosure, but such an explanation would be required if this matter was ever reviewed by a trial court. *Opinion of the Public Access Counselor 01-FC-47.*

There is no dispute that the records that have been requested are "public records" pursuant to the APRA. *See* I.C. § 5-14-3-2(n). The IEDC has cited to certain specific exemptions under state law that would either mandate or allow the IEDC discretion to produce the records in response to a public records request. The IEDC would satisfy its obligation in responding to a formal complaint filed with the Public Access Counselor's

Office by complying with section 9(c) of the APRA. If, however, the matter proceeded to litigation before a court, who would be allowed to conduct an in-camera review, the burden of proof would be on the IEDC to sustain the denial of access to the records that were requested. *See* I.C. § 5-14-3-4(f), (h); *Opinion of the Public Access Counselor 09-FC-285.*

The APRA excepts from disclosure, at the discretion of the agency, the following:

> 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. I.C. § 5-14-3-4(b)(6).

As to exception itself, deliberative materials include information that reflects, for example, one's ideas, consideration and recommendations on a subject or issue for use in a decision making process. *See Opinion of the Public Access Counselor 98-FC-1.* Many, if not most documents that a public agency creates, maintains or retains may be part of some decision making process. *See Opinion of the Public Access Counselor 98-FC-4; 02-FC-13; and 11-INF-64.* The purpose of protecting such communications is to "prevent injury to the quality of agency decisions." *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002). The frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public, and the decisions and policies formulated might be poorer as a result. *Newman*, 766 N.E.2d at 12. In order to withhold such records from disclosure under Indiana Code 5-14-3-4(b)(6), the documents must also be interagency or interagency records that are advisory or deliberative and that are expressions of opinion or speculative in nature. *See Opinions of the Public Access Counselor 98-INF-8 and 03-FC-17.*

When a record contains both disclosable and nondisclosable information and an agency receives a request for access, the agency shall "separate the material that may be disclosed and make it available for inspection and copying." *See* I.C. § 5-14-3-6(a). The burden of proof for nondisclosure is placed on the agency and not the person making the request. *See* I.C. § 5-14-3-1. The Indiana Court of Appeals provided the following guidance on a similar issue in *Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ.*, 787 N.E.2d 893 (Ind. Ct. App. 2005):

> However, *section 6 of APRA* requires a public agency to separate dislcosable from non-dislcosable *information* contained in public records. *I.C. § 5-14-3-6(a).* By stating that agencies are required to separate "information" contained in public records, the legislature has signaled an intention to allow public access to whatever portions of a public record are not protected from disclosure by an applicable exception. To permit an agency to establish that

> a given document, or even a portion thereof, is non-disclosable simply by proving that some of the documents in a group of similarly requested items are non-disclosable would frustrate this purpose and be contrary to section 6. To the extent that the *Journal Gazette* case suggests otherwise, we respectfully decline to follow it.
>
> Instead, we agree with the reasoning of the United States Supreme Court in *Mink, supra*, i.e., that those factual matters which are not inextricably linked with other non-disclosable materials, should not be protected from public disclosure. See *410 U.S. at 92*. Consistent with the mandate of *APRA section 6*, any factual information which can be thus separated from the non-disclosable matters must be made available for public access. *Id*. at 913-14.

Here, the IEDC has provided that the factual material is inextricably linked to the deliberative material in the records that were withheld pursuant to I.C. § 5-14-3-4(b)(6). As such, it is my opinion that the IEDC would not violate the APRA by failing to disclose factual material contained in the records that were requested if such material was inextricably linked to the deliberative material.

As to the attorney-client privilege, one category of non-disclosable public records consists of records declared confidential by state statute. *See* I.C. § 5-14-3-4(a)(1). I.C. § 34-46-3-1 provides a statutory privilege regarding attorney-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). Specifically:

> "The communications sought are communications between a client (PERF) and its attorney (the Attorney General) discussing potential legal

> problems concerning the way in which PERF was carrying out its duties. These fall within exceptions to disclosure under the public records statute because they are protected by the attorney client privilege which makes them confidential under statute and supreme court rule. See IC 34-1-14-5; IC 34-1-60-4; Prof.Cond.R. 1.6(a)." *Morley*, 580 N.E.2d at 374.

In response to your formal complaint, Mr. Akard has provided that Ms. Morone, an attorney acting on behalf of the IEDC, rendered a legal opinion concerning the contractual status of an independent contractor for the IEDC. The IEDC is correct to note that there is no expectation of litigation requirement in order to cite to the attorney-client privilege to deny a request made under APRA. Accordingly, it is my opinion that the IEDC did not violate the APRA to the extent that the agency denied your request for attorney-client communication.

I.C. §5-14-3-4(b)(2) provides that 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(q).

The APRA does not provide that the public agency must explain the type or kind of litigation that is reasonably expected in denying a record pursuant to I.C. § 5-14-3-4(b)(2). The statute provides that the information must be compiled in "reasonable anticipation of litigation." *Id.* In response to your formal complaint, Mr. Akard has stated that the early termination of the professional services contract in question may result in future litigation. As such, it is my opinion that the IEDC's denial of your request pursuant to I.C. § 5-14-3-4(b)(2) did not violate the APRA.

As to your request that was denied for certain meeting and travel itineraries, the IEDC cited to I.C. § 5-14-3-4.5 and I.C. § 5-14-3-4(b)(5). I.C. § 5-14-3-4.5 provides the following:

> (a) Records relating to negotiations between the Indiana economic development corporation and industrial, research, or commercial prospects are excepted from section 3 [IC 5-14-3-3] of this chapter at the discretion of the corporation if the records are created while negotiations are in progress.
> (b) Notwithstanding subsection (a), the terms of the final offer of public financial resources communicated by the corporation to an industrial, a

> research, or a commercial prospect shall be available for inspection and copying under section 3 of this chapter after negotiations with that prospect have terminated.
> (c) When disclosing a final offer under subsection (b), the corporation shall certify that the information being disclosed accurately and completely represents the terms of the final offer. I.C. § 5-14-3-4.5

I.C. § 5-14-3-4(b)(5) provides that records created while negotiations are in progress between the IEDC and industrial, research, or commercial prospects, are exempt at IEDC's discretion. I.C. § 5-14-3-4(b)(5). The Public Access Counselor is not a finder of fact. *See Opinion of the Public Access Counselor 11-FC-80.* Mr. Akard has stated that the referenced trips were taken in order to pursue economic development opportunities on behalf of the IEDC and advance the status of negotiations. Further, the information that was denied would reveal the companies were negotiating with. As such, as long as the records that were denied were created while negotiations were in progress, the IEDC would not be in violation of the APRA in denying your request pursuant to I.C. § 5-14-3-4.5 and I.C. § 5-14-3-4(b)(5).

CONCLUSION

Based on the foregoing reasons, it is my opinion that the IEDC did not violate the APRA.

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: Stephen J. Akard