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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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RONALD D. EVANS,  
*Complainant,*

v.

BATTLE GROUND CONSERVANCY DIST.,  
*Respondent.*

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Formal Complaint No.  
20-FC-2

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Luke H. Britt  
Public Access Counselor

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BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Battle Ground Conservancy District (“BGCD”) violated the Access to Public Records Act.<sup>1</sup> The Chair of the BGCD Board, Andrea K. Agree, filed an answer to the complaint with this Office. In accordance with Indiana Code § 5-

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<sup>1</sup> Ind. Code §§ 5-14-3-1 to -10

14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on January 8, 2020.

### **BACKGROUND**

This case involves a dispute about whether a conservancy district may rely on the discretionary disclosure exception available to a municipally owned utility as authority to deny access to certain district records.

On December 6, 2019, Ronald Evans (“Complainant”) filed a public records request with the Battle Ground Conservancy District (“BGCD”) seeking the district’s 2012 lead and copper test site reports.

That same day, Evans received a copy of the 2012 reporting form, but it did not include the addresses of the testing sites like last year’s report. Instead, a number identified each address.

Evans contacted the district to ask for a copy of the form that included the addresses of the test sites. Carol Watson, Board Chair of the BGCD at the time, denied the request for the addresses, claiming that the required retention time for that kind of information had expired.

On December 9, 2019, Evans rejected Watson’s claim by arguing that Title 327 of the Indiana Administrative Code section 8-2-47 required the BGCD to retain lead and copper records for 12 years. Watson agreed with Evans’ argument, stating that the BGCD had the addresses. Regardless, Watson again denied Evans’ request for the addresses. Watson relied on Indiana Code section 5-14-3-4(b)(20), which gives

a public agency discretion to withhold certain personal information of customers of a municipally-owned utility including addresses, telephone numbers, and social security numbers.

As a result, Evans filed a formal complaint on January 8, 2020 alleging the denial violates the Access to Public Records Act.

Essentially, Evans argues that the BGCD is not a “municipally owned utility” as defined under Indiana Code section 8-1-2-1; and thus, the disclosure exception invoked by the BGCD does not apply and the addresses must be released. Evans further supports his argument by citing Title 327 of the Indiana Administrative Code 8-2-46(a)(1)(A)(i), which requires that the location of each site used for lead and copper testing be reported.

On January 24, 2020, the current BGCD Board Chair, Andrea Agree, filed an answer to Evans’ complaint denying the district has improperly withheld disclosable records in violation of APRA.

In sum, the BGCD argues that it consistently meets all of the monitoring requirements mandated by the Indiana Administrative Code and those regulated by the Indiana State Department of Environmental Management. Thus, contrary to Evans’ claims, the 2012 Drinking Water Report is compliant even without the addresses listed.

Chairperson Agree goes on to explain that even though the BGCD maintains the addresses in question, the information was recorded “... in handwriting on notebook paper by the former Water Superintendent as a log for his personal use as a reference for the purpose of submitting a report to

IDEM.” Moreover, Agree explains that “personal notes serving as the functional equivalent of a diary or journal kept by an employee or official can be excepted from disclosure at the discretion of the public agency under Indiana Code 5-14-3-4(b)(7).” The BGCD concludes with a request that this office conclude that internal handwritten notes are not be subject to disclosure under APRA.

## ANALYSIS

### 1. The Access to Public Records Act (“APRA”)

The Access to Public Records Act (“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.” Ind. Code § 5-14-3-1. The Battleground Conservancy District (“BGCD”) is a public agency for purposes of APRA; and therefore, subject to its requirements. *See* Ind. Code § 5-14-3-2(q). As a result, unless an exception applies, any person has the right to inspect and copy the district’s public records during regular business hours. Ind. Code § 5-14-3-3(a).

Indeed, APRA contains exceptions—both mandatory and discretionary—to the general rule of disclosure. In particular, APRA prohibits a public agency from disclosing certain records unless access is specifically required by state or federal statute or is ordered by a court under the rules of discovery. *See* Ind. Code § 5-14-3-4(a). In addition, APRA lists other types of public records that may be excepted from disclosure at the discretion of the public agency. *See* Ind. Code § 5-14-3-4(b).

## **2. Records of municipally owned utilities**

The APRA specifically enumerates the types of information that may be withheld from disclosure by a municipally owned utility under Indiana Code section 5-14-3-4(b)(20). The statute provides a municipally owned utility with discretion to withhold from disclosure a customer's telephone number, home address, and social security number.

Notably, this disclosure exception is only available to a utility that satisfies the definition of a municipally owned utility under Indiana Code section 8-1-2-1(h). The operative factor being ownership by a municipality.

Evans argues the BGCD is not a municipally owned utility as defined by the operative statute even though it is a public utility. The definition of a public utility and the definition of a conservancy district found at Indiana Code section 14-33-1-1 are not necessarily mutually exclusive, especially when a conservancy district elects to supply water and conduct operations similar to what a utility would do. In fact, many of the elements of those definitions are similar. The BGCD, however, is not municipally owned under its structure as a conservancy district.

A conservancy district, by definition, is created by individual freeholders and operated by a board of directors separate and distinct from a municipality.<sup>2</sup> In essence, a conservancy district is its own entity, even if a municipality is included in

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<sup>2</sup> Ind. Code § 14-33 et.al.

its territorial area. “There is no indication that the legislature’s enactments meant to treat conservancy districts as though they were municipal utilities.” *Stucker Fork Conservancy Dist. v. Indiana Utility Regulatory Com’n*, 600 N.E.2d 955, 961 (Ind. Ct. App. 1992).

This position can be read harmoniously with Indiana code section 5-14-3-4(b)(20) as a critical element of the establishment and continuation of a conservancy district is domicile location. It does not stand to reason that the legislature intended freeholder addresses to remain off limits in the same way as a municipally owned utility customer.

Therefore it is the opinion of this office that a conservancy district cannot invoke the disclosure exception found under Indiana Code section 5-14-3-4(b)(20).

### **3. Other Exemptions Cited by BGCD**

After some initial confusion, it was indeed determined the records in question exist and have been retained by BGCD. Title 327 section 8-2-47 of the Indiana Administrative Code sets a 12 year retention schedule for lead and copper testing records. These are the business records of water sampling on the part of the district. There can be little doubt this public health data is an essential public record.

If 327 IAC 8-2-46(a)(1)(A)(i) requires addresses to satisfy reporting requirements,<sup>3</sup> the addresses should be released. This office, however, is not the regulatory agency charged with overseeing or enforcing those requirements.

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<sup>3</sup> 327 IAC 8-2-46(a)(1)(A)(i) mandates “the location of each site” in its language and does not specifically use addresses as satisfaction of that criteria.

Nevertheless, the BGCD argues that the Lead and Copper report and compliance log are the functional equivalent of a diary or journal and can be withheld according to Indiana Code section 5-14-3-4(b)(7), which excludes diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal.

This cannot be.

By the BGCD's logic, any critical government record could be shielded from disclosure merely because they are "*made in handwriting on notebook paper.*" Budgets, invoices, meeting minutes, and even resolutions or ordinances themselves could theoretically be withheld simply because they are scrawled informally and not formalized.

No, the journal and diary exemption is exactly what it purports to be: personal notes and references in the course of the day, annotating the work as an employee goes about the public's business (e.g., personal reference material). But it does not extend to the substantive work product itself, which is what these records appear to be.

## **CONCLUSION**

Based on the foregoing, it is the opinion of the Public Access Counselor that the Battle Ground Conservancy District release the records in question.

A handwritten signature in black ink, appearing to read 'LH Britt', is positioned above the printed name.

Luke H. Britt  
Public Access Counselor