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## OPINION OF THE PUBLIC ACCESS COUNSELOR

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DEBRA DURALL,  
*Complainant,*  
v.  
NEW CARLISLE TOWN COUNCIL,  
*Respondent.*

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Formal Complaint No.  
25-FC-00B

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Jennifer G. Ruby  
Public Access Counselor

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RUBY, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the New Carlisle Town Council (Town) violated the Access to Public Records Act<sup>1</sup> (APRA). Attorney Andrea Halpin filed a response to the complaint on behalf of the Town. In accordance with Indiana Code (IC) § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on January 29, 2025.

### BACKGROUND

On December 26, 2024, Debra Durall (Durall) sent an initial APRA request to the Town for the following documents: 1) Nondisclosure Agreement (NDA) and/or such types of restrictive agreements between Amazon and Members of New Carlisle Town Council, Town employees, and contractors, on the water usage and withdrawal by Amazon Data Centers/ Amazon Web Services (AWS) and related properties/facilities, such as the New Carlisle and South Bend Water Treatment Plants and IEC related wells, Niespodzany Ditch, and nearby wetlands between January 1, 2022 and December 26, 2024<sup>2</sup>; 2) Communications of the above parties and their legal consultants on the above matter and dates; 3) Communications of St. Joseph County employees, elected officials, and the South Bend Regional Chamber of Commerce on the above matter and dates;

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

<sup>2</sup> Your original request asked for documents from January 1, 2022, to January 26, 2024, but you later amended your request to change the end date to December 26, 2024.

and 4) Communications and any agreements of GM/Samsung Battery Plant, representatives and contractors, and St. Joseph County employees and elected officials, New Carlisle Town Council, and South Bend Regional Chamber of Commerce on the construction status and dates for completion of the Battery Plant between January 1, 2022, and December 26, 2024.

On January 2, 2025, after an initial acknowledgement of the request by the Town, the Town's attorney provided Durall with several documents in response to her request. The Town Attorney explained that it provided a blank NDA because although the Town Council and Town employees who attended an executive session with AWS signed the NDA, the Town does not have in its possession signed copies of those NDAs.

The Town Attorney also wrote that the Town does not maintain several other documents Durall requested. In response to the request for communications of St. Joseph County employees, elected officials, and the South Bend Regional Chamber of Commerce, the Town Attorney stated that the Town does not maintain records for St. Joseph County elected officials or employees or for the chamber of commerce. Also, in response to another request, the Town Attorney noted that the Town has not entered into agreements with GM, Samsung, or their representatives.

The Town Attorney also provided a copy of a Commercial Application and Agreement for Utility service and noted that the document was redacted pursuant to IC 5-14-3-4(b)(20).

In response to the request for various communications involving members of the Town and its legal consultants, the Town Attorney responded that the Town was withholding certain documents as work product of attorneys representing the Town under IC 5-14-3-4(b)(2). She also explained that the Town was withholding certain documents as records relating to negotiations of a governing body of a political subdivision under IC 5-14-3-4(b)(5) and as trade secrets under IC 5-14-3-4(a)(4). The Town Attorney noted that both AWS and GM identified their water usage as trade secrets. She also included an order from the Indiana Utility Regulatory Commission (IURC) from December 27, 2012, in which the IURC found that GM water usage data was considered confidential and exempt from public access and disclosure under IC 5-14-3-4.

On January 29, 2025, Durall filed a formal complaint with the Office of the Public Access Counselor (OPAC) alleging that the Town violated APRA by failing to provide the following documents: list/copies of signers of an NDA with Amazon; utility service agreement contact information and addresses; water usage records and communications considered trade secrets by Amazon; communications by St. Joseph County employees and elected officials on water usage by Amazon; communications about GM/Samsung battery plant construction and

completion; attorney work products as considered trade secrets; and GM water usage as considered trade secrets.

To be filed timely, a complaint must be filed with this office no later than thirty days after the denial. IC 5-14-5-7(a). This complaint was filed timely.

The OPAC sent formal notice of this complaint to the Town on July 24, 2025. The Town Attorney responded on July 25, 2025, and included a copy of the Town's original response to the APRA request.

## **ANALYSIS**

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

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." IC 5-14-3-1. Towns are public agencies for the purposes of APRA; and therefore, subject to the law's requirements. See IC 5-14-3-2(q). As a result, unless an exception applies, any person has the right to inspect and copy an agency's public records during regular business hours. IC 5-14-3-3(a).

When issuing an advisory opinion on application of APRA, the OPAC may only consider the public access statutes as plainly written and valid Indiana court opinions. IC 5-14-4-10.5.

#### *Requests for Records Not Maintained by the Agency*

APRA does not require a public agency to create a record or conduct research to compile any record to satisfy a request for documentation. If a record does not exist that would be responsive to a particular request, the Town is under no obligation to create a record to satisfy the request for records. Furthermore, APRA does not require a public agency to explain why it has not created a record.

In the Town's response to your APRA request, the Town Attorney stated that the Town does not have signed copies of the NDA in its possession. Furthermore, the Town Attorney wrote that the Town does not maintain records for St. Joseph County elected officials or any employees or any chamber of commerce. If the Town does not have copies of signed NDAs or certain communications involving County or chamber of commerce officials or employees, it did not violate APRA when it failed to provide you with those requested documents.

For correspondence involving County officials, you may wish to make a public records request directly to the County to see if they have documents responsive to your request. For the list of Town officials or employees that signed the NDA, you may wish to make a public records request for the minutes or memorandum

of the executive session meeting at which the NDA was considered. Under IC 5-14-1.5-4<sup>3</sup>, the members of the governing body recorded as either present or absent should be included in the memorandum of the meeting.

#### *Discretionary Exceptions to Disclosure under APRA*

Under IC 5-14-3-4(b), APRA allows certain records to be excepted from the requirements of disclosure at the discretion of the public agency. A public agency does not violate APRA by withholding the items listed in this subsection; however, if a public agency denies a request for a public record, it must include a statement of the specific exemption or exemptions authorizing withholding of all or part of the public record and the name and title or position of the person responsible for the denial. IC 5-14-3-9(d).

IC 5-14-3-4(b)(20) allows a public agency to maintain the confidentiality of personal information concerning a customer of a municipally owned utility, including the telephone number, address, and social security number. The Town Attorney cited this exception in her letter explaining why the Town redacted a copy of a Commercial Application and Agreement for Utility service that the Town provided you. This is a valid exception under APRA. As such, the Town did not violate APRA by redacting this information.

IC 5-14-3-4(b)(2) allows a public agency to maintain the confidentiality of 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. The Town Attorney cited this exception when explaining the Town's decision to withhold from disclosure certain communications involving the work product of the Town's attorney. This is a valid exception to disclosure requirements under APRA; therefore, the Town did not violate APRA by withholding communications that were attorney work product from disclosure.

IC 5-14-3-4(b)(5) allows a public agency to maintain the confidentiality of records relating to negotiations between a governing body of a political subdivision with industrial, research, or commercial prospects, if the records are created while negotiations are in progress. The Town Attorney cited this exception when explaining the Town's decision to withhold from disclosure certain communications. As such, the Town did not violate APRA by withholding communications that were negotiations between the Town's governing body and industrial, research, or commercial prospects.

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<sup>3</sup> IC 5-14-1.5 is the Indiana Open Door Law, which also falls under jurisdiction of the PAC.

### *Mandatory Exceptions to Disclosure under APRA*

Under IC 5-14-3-4(a), APRA prohibits a public agency from disclosing certain records, unless access to the records is specifically required by a state or federal statute or is ordered by a court under the rules of discovery. Records containing trade secrets are included in the statute's list of records that cannot be disclosed by a public agency. IC 5-14-3-4(a)(4).

Indiana statute defines "trade secret" as:

*[I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process that: (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.*

IC 24-2-3-2. Based on this statutory definition, the Indiana Court of Appeals has found that a trade secret generally has the following four characteristics: it is "(1) information, (2) which derives independent economic value, (3) is not generally known, or readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use, and (4) the subject of efforts reasonable under the circumstances to maintain its secrecy." *Indiana Bell Telephone Co., Inc. v. Indiana Utility Regulatory Commission*, 810 N.E.2d 1179 (Ind. Ct. App. 2004). The Indiana Court of Appeals also has found that the IURC has wide discretion on matters that fall within its jurisdiction. *Id.*

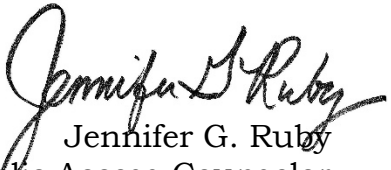
Here, the Town asserted that they are prohibited from disclosing certain records regarding water usage because they are protected trade secrets. The Town Attorney cited IC 5-14-3-4(a)(4) for this exception and included a copy of an IURC order dated December 27, 2012. In the IURC order, the IURC wrote that the IURC has "previously found that customer-service [water] usage data may constitute trade secret information, and thus, be subject to confidential treatment pursuant to Ind. Code § 5-14-3-4 and Ind. Code § 24-2-3-2." The IURC order further reasoned that water usage information can provide important information on a company's business operations. According to the IURC, this information is generally not known and provides value to a company in keeping the information confidential. Although Indiana statute only allows the OPAC to consider public access statutes and case law when issuing advisory opinions, Indiana case law provides that the IURC can be given wide discretion in matters within its jurisdiction; therefore, it seems reasonable for the OPAC to consider an IURC opinion when determining whether water usage information has the characteristics outlined by Indiana case law and qualifies as trade secrets.

Using the Indiana Court of Appeal's definition of trade secret and the IURC's review of records containing water usage, it is reasonable for the Town to withhold from disclosure communications that contain water usage information. First, the water usage data is information. Second, according to the IURC, the information has independent economic value in that it provides important information on a company's business operations. Third and fourth, the Town's Attorney has asserted that both AWS and GM have identified their water usage as trade secrets; therefore, it seems likely that the water usage information is not generally known or readily ascertainable by proper means by others who can derive value from the information's disclosure or use, and the companies have made reasonable efforts under the circumstances to maintain the information's secrecy.

The OPAC does not have the benefit of reviewing the documents that the Town has withheld from disclosure. Nonetheless, we agree with the Town's assertion that it has an obligation to protect records containing trade secrets under APRA. The Town risks a lawsuit by disclosing such records in the absence of a state or federal statute providing that access to the communications is specifically required or unless ordered by a court under the rules of discovery. In that the Town has a reasonable basis to believe that the communications requested contain trade secrets, I find that the Town did not violate APRA by failing to disclose these communications.

### **CONCLUSION**

Based on the foregoing, it is the opinion of this office that the Town did not violate APRA by failing to provide records that it does not maintain and that fall under the discretionary or mandatory exceptions of APRA.

  
Jennifer G. Ruby  
Public Access Counselor

Issued: September 24, 2025