

May 8, 2006

*Sent Via Facsimile*

Tracy Warner  
The *Journal Gazette*  
600 W. Main Street  
Fort Wayne, IN 46802

*Re: Formal Complaint 06-FC-64; Alleged Violation of the Access to Public Records Act by the City of Fort Wayne*

Dear Mr. Warner:

This is in response to your formal complaint alleging that the City of Fort Wayne (“City”) violated the Access to Public Records Act by failing to disclose legal bills. I find that the City violated the Access to Public Records Act when it initially failed to disclose any part of the legal bills.

#### BACKGROUND

On April 4, 2006, you sent the City a request for “all invoices or other record of payments for legal fees related to the city’s attempts to acquire the utility known as Aqua Source, Aqua Indiana or other predecessor or successor companies.” On or about April 5, 2006, the City sent you a letter declining to provide you with the information “at this time.” Citing the Rules of Professional Conduct, Rule 1.6(a) providing that a lawyer shall not reveal information relating to representation of a client, and stating that certain portions of the invoices requested may constitute attorney work product, the City denied you any records responsive to your request.

However, at some point after the filing of your formal complaint on April 6, 2006, the City did provide a breakdown of legal expenses incurred by the City for years ended 2003, 2004, and 2005. This document showed the total annual amounts paid to four law firms, relating to the Aqua Indiana matter as well as other matters not so called. You continue to protest that you are entitled to see the legal bills relating to the matters above.

I sent the City a copy of your complaint. The City sent you and me a letter dated April 26, 2006. In the letter, City Attorney Timothy Manges stated that the City intended to comply with the Access to Public Records Act by providing all invoices for legal fees related to the City's attempts to acquire the water utility. The City anticipates redacting the description of actions provided by the attorneys; however, the invoices will reflect the dates of service, the attorney performing the service, the time spent in performing the service, and the amounts due for the service. Some of the records are aged and are stored off-site; production time will be lengthy to account for compilation and redaction. The cost for copying is \$.09 per page.

## ANALYSIS

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the Access to Public Records Act ("APRA"). Ind. Code 5-14-3-3(a). Any material that is created, received retained, maintained, or filed by or with a public agency is a public record. IC 5-14-3-2(m). If a public agency intends to deny a written request for a record, it must deny the record in writing and cite the exemption or exemptions that authorize the withholding of the record. IC 5-14-3-9(c). If a public record contains disclosable and nondisclosable information, the public agency shall, upon receipt of a request under the APRA, separate the material that may be disclosed and make it available for inspection and copying. IC 5-14-3-6(a).

Certain public records are excepted from section 3 of the APRA and may not be disclosed by a public agency, 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. IC 5-14-3-4(a). Records declared confidential by state statute are excepted under IC 5-14-3-4(a)(1). Indiana Code 34-46-3-1 provides that communications between an attorney and a client are confidential.

Public records excepted from disclosure at the discretion of a public agency include the work product of an attorney representing, pursuant to an appointment by a public agency, a public agency or an individual. IC 5-14-3-4(b)(2). "Work product of an attorney" is defined as "information compiled by an attorney in reasonable anticipation of litigation" and includes legal research, reports, or memoranda to the extent that each contains the attorney's opinions, theories, or conclusions. IC 5-14-3-2(p).

Any part of the invoices that do not contain exempt material are required to be disclosed under the APRA. The City was under an obligation to redact the invoices to remove the nondisclosable material and disclose the remainder upon your request. Furthermore, a public agency bears the burden of showing that records meet an exception to disclosure contained in the APRA. IC 5-14-3-1; IC 5-14-3-9(g).

## CONCLUSION

For the foregoing reasons, the City violated the Access to Public Records Act as a result of its April 5 letter to you denying you the disclosable part of the legal invoices. The City has now stated that it will comply by removing only that part of the invoices that meet one or more of the exemptions in section 4 of the APRA.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Timothy Manges