

May 17, 2006

Jeffrey Gunning, On behalf of Helene C. Uhlman
Pinkerton & Friedman
Attorneys at Law
9245 Calumet Avenue, Suite 201
Munster, IN 46321

Re: Formal Complaint 06-FC-79; Alleged Violation of the Access to Public Records Act by the City of Hammond Health Department

Dear Mr. Gunning:

You filed on behalf of Helene C. Uhlman a formal complaint with the Office of the Public Access Counselor. This is in response to your formal complaint alleging that the City of Hammond Health Department (“Health Department”) violated the Access to Public Records Act (“APRA”) by failing to disclose records. I find that the Health Department is required to disclose its records to Ms. Uhlman irrespective of pending litigation.

BACKGROUND

Ms. Uhlman went to the Health Department on April 12, 2006 to request Department records, including meeting minutes and memoranda for the January 2006 meeting of the Board, the audio tape recordings of the January meeting, and all memoranda, minutes, and notices or agendas for any meetings of the Board that occurred in February and March, 2006. The receptionist asked that Ms. Uhlman put her request in writing; she complied. The receptionist stated that the records would not be available until Monday, April 17. Ms. Uhlman also requested additional records on May 8. As of the date of the complaint on May 9, Ms. Uhlman claims that she has never received the records or a telephone call stating when the records would be available. Ms. Uhlman stated that she needed the records for an executive session of the Hammond City Council, and therefore requested priority status for the complaint. Because she has stated the circumstances for which priority status may be granted, I am issuing this opinion within seven days. *See* IC 5-14-5-10; 62 IAC 1-1-3(3).

I sent a copy of the complaint to the Department. Ms. Kristina Kantar, City Attorney for the City of Hammond Law Department, sent me a letter in response. I have enclosed a copy of the letter for your reference. Ms. Kantar informed me that Ms. Uhlman is a former city employee represented by counsel in a pending legal action against the City of Hammond [hereinafter referred to as “Complaint”]. Her first record request was received by the City on the same day as the request for temporary restraining order was filed and summons and complaint received by the City. Since that date, explained Ms. Kantar, Ms. Uhlman is adverse and represented by counsel. Hence, the City Legal Department has been communicating with Ms.

Uhlman's attorneys. In fact, Ms. Kantar provided me with a copy of Corporation Counsel William O'Connor's letter of May 9, which followed Ms. Uhlman's May 8 request, seeking approval from you to respond to Ms. Uhlman directly. Ms. Kantar stated that the Complaint itself indicates that all public access complaints pending were concluded. The Complaint seeks declaratory, injunctive, and other relief as a result of an alleged violation of the Open Door Law by the Health Department.

Ms. Kantar concluded that it is unethical and inappropriate without Ms. Uhlman's attorney's consent to communicate directly with Ms. Uhlman on issues concerning her lawsuit. Ms. Uhlman's attorney has not provided consent. The City is in the process of mutual discovery in the pending case, and all documents will be tendered in accordance with Ms. Uhlman's counsel's direction, stated Ms. Kantar.

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. Ind. Code 5-14-3-3(a). If a public agency receives a request for a record via hand-delivery, the public agency is required to issue a response within 24 hours of receipt. IC 5-14-3-9(a). A public agency may deny a written request for a record if the denial is in writing and the denial includes a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record, and the name and the title or position of the person responsible for the denial. IC 5-14-3-9(c).

None of the exceptions listed in section 4 of the APRA suggest that pending litigation is a basis for denial of access. *See generally*, IC 5-14-3-4; *Opinion of the Public Access Counselor 02-FC-38*. Hence, the Department through its attorneys could not deny the records based on any exemption under section 4. In fact, the complaint response provided by the Department suggests that there is no intent to deprive Ms. Uhlman of the records she seeks--only that a condition for response to the requests, or for disclosure of the records, is consent of Ms. Uhlman's attorneys to tender a direct response to Ms. Uhlman. The APRA does not contain any requirement that a public agency's attorney refrain from responding directly to a requester who is represented by an attorney.

I believe Ms. Kantar is relying on Ind. Professional Conduct Rule 4.2. Prof. Cond. R. 4.2 states that in representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law or a court order. According to the Comment on the Rule, Prof. Cond. R. 4.2 prohibits a lawyer from communicating with any person who is represented by counsel concerning the matter to which the communication relates. [Comment 2]. The Rule does not prohibit communication of a lawyer with a represented person concerning matters outside the representation. [Comment 4]. Further, the Rule does not prohibit a lawyer from advising a client concerning a communication that the client is legally entitled to make. [Comment 4].

I leave interpretation of the Rules of Professional Conduct to the Indiana Supreme Court. However, whether or not the matter of the public records request is the same matter as the

litigation, it is my opinion that nothing in the Prof. Cond. Rule 4.2 prohibits the Health Department from issuing a response to the request or from providing the records directly to Ms. Uhlman. The obligation under the APRA to respond and to make records available for inspection and copying belongs to the *public agency*, not its attorneys. Of course, the Health Department is free to consult with its counsel prior to making its records available for inspection and copying.

Hence, the denial of the records until Ms. Uhlman's attorneys consented to the communication was not appropriate under the APRA, in my opinion.¹

CONCLUSION

For the foregoing reasons, it is my opinion that the City of Hammond Health Department may not deny the records or impose a condition prior to disclosing the records to Ms. Uhlman. The City of Hammond Health Department is free to seek the advice of the City Legal Department regarding the public access laws or any other matters.

Sincerely,

Karen Davis
Public Access Counselor

cc: Kristina Kantar

¹ Ms. Kantar stated that the lawsuit Complaint recited that all public access complaints pending had been concluded. *The Complaint On An Open Door Law Violation* averred that "Plaintiff filed a complaint with the Indiana Public Access Counselor but it was concluded due to the filing of this action." ¶11. Under IC 5-14-4-10(6), the counselor may not issue an advisory opinion concerning a specific matter with respect to which a lawsuit has been filed under Indiana Code 5-14-1.5 or Indiana Code 5-14-3. Cause No. 45D02-0604-0040 alleges only an Open Door Law violation.