



STATE OF INDIANA

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December 19, 2013

Mr. Dave S. McDonald
P.O. Box 384
Daleville, IN 47334

Re: Formal Complaint 13-FC-330; Alleged Violation of the Access to Public Records Act by the Town of Daleville

Dear Mr. McDonald,

This advisory opinion is in response to your formal complaint alleging the Town of Daleville ("Town") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* The Town responded to your complaint via Mr. John Brooke, attorney for the Town. Their responses are enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on November 18, 2013.

BACKGROUND

Your complaint alleges the Town of Daleville violated the Access to Public Records Act by denying producing records responsive to your request.

On or about October 9, 2013 you resubmitted a records request to the Town's Clerk-Treasurer for any and all information regarding a road sidewalk project. It appears some of the records were provided to you from your initial August 17, 2013 request; however, the request in its entirety was not fulfilled to your satisfaction. On October 17, 2013, the Town responded by Mr. Brooke stating several documents were withheld based upon APRA exceptions. Notably, a document signed by the property owners affected by the project and reports from the American United Appraisal company and associated work product.

In its response to your formal complaint, the Town classified certain records pursuant to your request as exempt from disclosure as the road project is still in development. Therefore, the Town argues engineering specifications and related documentation are trade secrets and confidential financial information. Furthermore, the Town asserts the document titled "Permanent Right-of-Way Easement for Construction and Maintenance of Sidewalk" signed by property owners is of a deliberative nature and is also exempt from disclosure under the APRA.

ANALYSIS

The public policy of the APRA states that “a (p)roviding person 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 Ind. Code § 5-14-3-1. The Town of Daleville is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the Town’s public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14- 3-3(a).

A request for records may be oral or written. See Ind. Code § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. See Ind. Code § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. See Ind. Code § 5-14-3-9(b). A response from the public agency could be an acknowledgement the request has been received and information regarding how or when the agency intends to comply.

As to the Right-of-Way Easement Document signed by the property owners, the Town claims they are deliberative. I have addressed the issue of deliberative materials before by way of deferring to a previous Public Access Counselor’s decision. Again, I see no reason to deviate from his sound analysis in 13-INF-32. For the purposes of consistency, I adopt much of Counselor Hoage’s rationale in that particular opinion. In it, he concluded:

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.

In the present case, the Town fails to present a compelling argument as to how a document drawn up by the Town and signed by property owners is “deliberative” as intended by the APRA. The deliberative materials exception is to allow policy makers to exchange pre-decision ideas without the fear having their discussions chilled by potential disclosure. Deliberative material is speculative and decision-based. The document you

seek is fact-based and between members of the public; it is not inter or intra-agency communication; nor is it communication with a third-party vendor. It does appear the document was prepared in anticipation of a decision and may have had a direct impact on the project, but the disclosure of the document would not compromise the decision making process and therefore should be released. It is neither opinion based nor contemplative.

As to the assertion the notarization of the documents was inappropriate, I cannot speculate on such matters as they are outside of the purview of this office.

The appraisal work product from the American United Appraisal Company would, however, fall under the deliberative material exception of the APRA. It is the opinion of a third-party vendor to the Town that would, in fact, communicate expressions of a speculative nature i.e., their opinion of property value. The Town was justified in withholding them at its discretion.

You also seek information relating to competing bids and/or proposals by potential vendors. The information provided has not indicated whether the contract has been awarded to a potential vendor or what the Town means by “development stage”. While the Town correctly asserts that trade secrets are exempt from disclosure under Ind. Code § 5-14-3-4(a)(4), my analysis of the proposal and bid process typically stems from Ind. Code § 5-22-9 et. al. Consider the following language from Section 5 of that Chapter:

- (a) A register of proposals must be:
 - (1) prepared; and
 - (2) open for public inspection after contract award.

...

- (5)... except for proprietary information included with an offer, such as trade secrets, manufacturing processes, and financial information that was not required to be made available for public inspection by the terms of the request for proposals.

It is clear from the plain meaning of this statute certain information may be withheld from public disclosure. If the information you seek is considered to be a trade secret or protected financial information, then the Town is justified in withholding it. All other information not protected by subsection (a)(5) must be disclosed only *after* the contract is awarded.

CONCLUSION

For the foregoing reasons, it is the Opinion of the Public Access Counselor the Town of Daleville did not violate the Access to Public Records Act in withholding information

relating to the appraisals, bids and proposals, but did violate the APRA in withholding the right-of-way easement document signed by the property owners.

Regards,

A handwritten signature in black ink, appearing to be 'L. H. Britt', written in a cursive style.

Luke H. Britt
Public Access Counselor

Cc: Mr. John H. Brooke, Esq.