

August 2, 2000

Mr. Scott Smith
Fort Wayne News Sentinel
600 West Main Street
Fort Wayne, Indiana 46802

Re: Advisory Opinion 00-FC-20 *Denial of Access to Public Records by the City of Fort Wayne.*

Dear Mr. Smith:

This is in response to your formal complaint, which was received on July 12, 2000. You have alleged that the City of Fort Wayne ("City") has violated the Access to Public Records Act ("APRA"), Indiana Code chapter 5-14-3. Specifically, on July 7, 2000, you telephoned the Mayor's Office and requested access to proposed site plans for a parking lot to be constructed adjacent to the Fort Wayne Children's Zoo ("Zoo") after these plans were presented to the members of the Fort Wayne Zoological Society ("Society"), a not-for-profit, fundraising arm of the Zoo. In a letter dated July 7, 2000, the City denied your request under Indiana Code section 5-14-3-4(b)(6), otherwise referred to as the "deliberative material" exception.

Mr. Timothy Manges, attorney for the City, responded to your complaint¹ in a letter dated July 21, 2000. A copy of his response is attached for your reference. In addition to the original basis for denial, Mr. Manges raised two additional justifications for withholding the plans. He claims the proposed plans are confidential as documents pertaining to mediation discussions and also protected by the joint defense privilege. While this opinion will focus on the claim under the APRA that the plans are deliberative material under Indiana Code section 5-14-3-4(b)(6), the City's additional arguments are also addressed in this opinion..

It is my opinion that the City violated the APRA when it failed to disclose the site plans to you in response to your request of July 7, 2000.² The fact that the plans had been disclosed to an organization that was not a "public agency" within the scope of the APRA forecloses the City's claim that the documents were "intra-agency" or "interagency" deliberative material under Indiana Code section 5-14-3-4(b)(6).

BACKGROUND

According to information provided in your complaint and by the City, the proposed parking lot, and the site plans that suggested a strategy for its construction, were the subjects of an ongoing

controversy in Fort Wayne. The proposed site plans were generated as part of the City's continual efforts to devise an alternative parking strategy for the Fort Wayne Children's Zoo, a City-owned Zoo, and were to place the parking lot in Franke Park, a City-owned park. There was an adversarial relationship regarding the construction of the parking lot in Franke Park was among the City, the Society, and certain citizens of Fort Wayne.

The proposed site plans were drafted by Mr. Andy Downs, Chief of Staff to Mayor Graham Richard, and presented to the Society for its review. Prior to this presentation, however, a lawsuit to enjoin the construction of any parking lot facility was filed under the cause of *Shoaff, et. al. v. City of Fort Wayne Board of Park Commissioners, et. al.*³ On June 13, 2000, the Fort Wayne Common Council passed a resolution addressing the parking lot dispute that requested, among other things, the Shoaff plaintiffs to dismiss their lawsuit pending the outcome of settlement negotiations among the plaintiffs, the Society, and the City. The plaintiffs complied, the Society agreed to halt any pending construction plans, and the Mayor's office agreed to act as an intermediary between competing interests and parties with the goal of devising an alternative parking strategy.

Mr. Downs drafted the site plans in question, and presented them to the Society for its initial comments outside the presence of the *Shoaff* plaintiffs. According to Mr. Manges, such presentation was done exclusive of the plaintiffs' participation in order to facilitate the mediation process and in the interest of maintaining the confidentiality and confidence of all of the concerned parties. When Mr. Downs completed his sketches of proposed parking lot locations, they were "rough drafts" and "in no way final proposals or adopted positions of the Mayor's office" according to Mr. Manges. Upon receipt of your request for the site plans, then, the City considered them to be deliberative material and thus exempt at their discretion from disclosure under the APRA.

ANALYSIS

The APRA states that " it is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials." Ind. Code §5-14-3-1. In addition, the policy statement reminds public officials and members of public agencies that the burden falls upon them to justify the nondisclosure of a public record. Id. Given the high-profile status of the parking lot controversy, you became interested in the progress of the discussions between the City and the Society and in the plans that were presented, as they may have signaled a break in the deadlocked negotiations. The involvement of the Mayor's office, a "public agency," constituted a clear affair of government and documents generated by the Office were clearly "public records" under the APRA. Ind. Code § 5-14-3-2. Accordingly, any person should have had the right to inspect and copy the site plans, since they were generated and retained by the Mayor's office, unless the plans were excepted from disclosure as confidential or otherwise nondisclosable under the APRA. Ind. Code §5-14-3-4.

Deliberative material exception

The City claims that the exception that permits non-disclosure of the proposed parking lot plans

is the "deliberative material" exception, which gives public agencies the discretion to withhold:

(r)ecords that are *intra-agency* or *interagency* advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

Indiana Code §5-14-3-4-(b)(6). The public records in question, must be, among other things, intra-agency or interagency communications, in order to be considered exempt from disclosure under this provision.

The question is whether the communication between the Society, a private entity, and the Mayor's Office, a public agency, constituted intra-agency or interagency communications as contemplated by the APRA.

In construing a statute, we seek to ascertain and give effect to the intention of the legislature as expressed in the statute. In so doing, the objects and purposes of the statute in question must be considered as well as the effect and consequences of such interpretation. We presume words appearing in the statute were intended to have meaning, and we endeavor to give those words their plain and ordinary meaning absent a clearly manifested purpose to do otherwise.

Johnson v. State, 721 N.E.2d 327, 332 (Ind. App. 1999). [Citations omitted.]

The language of Indiana Code section 5-14-3-4(b)(6) implies that deliberative material will be shared within one public agency or between public agencies, not between public agencies and private entities. This exception clearly states only one instance in which there may be a private entity involved—when a private entity is developing such material for a public agency under contract.

It is the public policy of the APRA that it is to be construed liberally in favor of disclosure and, therefore, exceptions to that general rule of disclosure such as the deliberative material exception are to be narrowly construed. Ind. Code §5-14-3-1. .

Liberal construction of a statute requires narrow construction of its exceptions. In the context of public disclosure laws . . . "[E]xceptions to a statute and its operation should be strictly construed by placing the burden of proving the exception upon the party claiming it. Other states, in examining their respective 'Open Door' or 'Sunshine' laws, follow these same mandates, particularly the principle of strict construction of statutory exceptions."

Robinson v. Indiana University, 659 N.E.2d 153, 156 (Ind. App 1995) [Citations omitted.], quoting, *Common Council of City of Peru v. Peru Daily Tribune, Inc.* 440 N.E. 2d 726, 729 (Ind. App., 1982) [Citations omitted]. Indiana Code section 5-14-3-4(b)(6), therefore, must be construed narrowly as to include only public agencies, except when a private entity develops material contemplated by this exception under a contract with a public agency.

Both you and Mr. Manges have classified the Society as a "not-for-profit" corporation in your correspondence with this Office. A not-for-profit organization is not a "public agency" under the APRA unless it meets one of the definitions of "public agency" under Indiana Code section 5-14-3-2. Such a classification is important because the threshold issue as to whether material exchanged between the City and the Society is "deliberative" depends upon whether it is exchanged between or among public agencies. Just as the burden falls upon a public agency to justify that a document is nondisclosable, so is the public agency required to prove that the agency with which it shared its arguably deliberative information was also a "public" agency. See, *Indianapolis Convention & Visitors Association, Inc. v. Indianapolis Newspapers, Inc.*, 577 N.E.2d 208, 212 (Ind. 1991); *Steinkuehler v. Wempner*, 81 N.E. 482, 484 (Ind. 1907)(party seeking benefit of statute must bring himself within its provisions).

There is nothing in the City's response, however, that supports the notion that the Society is a public agency. In fact, Mr. Manges admitted that "the dissemination (of the plans) to the Zoological Society could have conceivably been seen as a waiver of that privilege because the (Society) might not be viewed as a public agency" under the APRA. The City cites *Indianapolis Convention & Visitors Association*, which discussed the issue of the disclosure of records of a not-for-profit organization, in support of its conclusion that the Society is a public agency. In its holding that the ICVA was a public agency, however, the Indiana Supreme Court in *Indianapolis Convention & Visitors Association* relied primarily upon the high level of maintenance and financial support the ICVA received from the City of Indianapolis and mentioned that merely by virtue of having a contractual relationship with a city, or receiving an influx of public monies, a not-for-profit organization is not necessarily classified as a public agency. 577 N.E. 2d at 214. The City of Fort Wayne has described the Society only as a fundraising entity associated with the Zoo but has not detailed the Society's governance structure, funding sources or financial maintenance agreements it has with the City. It would be difficult to rely upon a mere assertion by the City that the Society is a public agency with which the City exchanged deliberative material without some factual basis supporting the assertion. Therefore, the site plans cannot be classified as deliberative material under the APRA and the City would not have been permitted to withhold the plans based upon this exception.

Joint defense privilege

The *Shoaff* lawsuit was dismissed pursuant to a resolution adopted by the Common Council in order to further the progress of negotiations among all concerned parties. Originally, the City and the Society were named co-defendants in the *Shoaff* litigation and could therefore exercise what has become known as the "common interest rule." *Waller v. Financial Corp. of America*, 828 F.2d 579, 583 (9th Circuit 1987.) This type of "joint defense privilege" extends the attorney-client privilege and protects the communication and strategizing that develops among more than one defendant. Mr. Manges asserts that the joint defense privilege applies to the proposed plans that were reviewed jointly by the City and the Society since they were once co-defendants in a lawsuit that may or may not be re-filed.⁴

First, as a strictly procedural matter, the lawsuit is no longer pending and therefore the City and Society are not co-defendants in the matter. Regardless of whether they were once the targets of the *Shoaff* lawsuit, the City and Society were not co-defendants on the date of the request or on the date that

the site plans were reviewed by the Society. Thus, it would seem that they cannot at the time of your public records request exercise a privilege that is reserved for joint litigants. Second, the two entities were not "pursuing a joint claim" nor were they reviewing the plans "in the course of an ongoing common enterprise, at least one of which seems to be required by courts upon their review of the common interest rule. *See, Olsson v. Indiana University Board of Trustees*, 571 N.E.2d 585, 587 (Ind. App. 1991);, *United States v. Evans*, 113 F.3d 1457, 1467 (7th Cir. 1997). Last, the joint defense privilege should be construed narrowly, both pursuant to the APRA and case law. Ind. Code § 5-14-3-1; see also *United States v. Evans*, 113 F.3d at 1467. It is my opinion, therefore, that the joint defense privilege did not apply to the proposed site plans when they were presented to the Society and the City cannot exercise the privilege as a basis for non-disclosure of the documents.

Mediation proceedings and the APRA

When the Common Council passed its June resolution, the Mayor's office was presumed to take the role of mediator and facilitator among the potential litigants. It is common for parties to engage in mediation as a method of resolving disputes that have been, or are about to be, litigated formally in court, and it is also not uncommon for the parties to expect a degree of confidentiality to encompass this process. Mr. Manges asserts that the site plans are non-disclosable pursuant to the expectation of confidentiality that surrounded the process of mediation, including when the City presented Mr. Downs' proposed plans to the Society.

The APRA contemplates non-disclosure of documents that are confidential pursuant to state statute or rules adopted by the state supreme court. Ind. Code §§5-14-3-4(a)(1), (a)(8). According to the Indiana Rules for Alternative Dispute Resolution, however, the mediation process itself is viewed the same as settlement negotiations in a case, thereby limiting the *admissibility* of information obtained during the mediation process, but *not* limiting the disclosable nature of the information. Ind. R. ADR, Rule 2.11; Ind. Evidence Rule 408. The Rule adds that the *mediator* is subject to some confidentiality provisions, which supports Mr. Manges' position that the Mayor's office would maintain a tight-lipped approach to disclosing the progress of the talks between it the City and the Zoo. Ind. R. ADR, Rule 2.11. Such rules encourage candor among parties during mediation and also inspire the parties' confidences in the mediator. The rule, however, does not protect the documents exchanged during the mediation process as confidential; it merely prohibits the mediator from discussing the actual mediation process. Since the plans in question are public records and were shared with a non-public agency, they are subject to the inspection and copying provisions of the APRA and are not excepted under state statute or rule governing the confidentiality of the mediation process.

CONCLUSION

For the foregoing reasons, it is my opinion that the proposed parking lot site plans are disclosable public records and that the City of Fort Wayne violated the Access to Public Records Act by failing to disclose the documents in response to your July 7, 2000, public records request.

Sincerely,

Anne Mullin O'Connor

cc: Mr. Tim Manges, Attorney
City of Fort Wayne

¹In a letter to the City dated July 12, 2000, this Office requested that the City respond to the formal complaint by July 19, 2000. However, an extension was granted to the City during a phone call between Staff Attorney Becky Browning and Mr. Manges on July 19, giving the City additional time to respond.

²Mr. Manges informed Staff Attorney Becky Browning during their July 19, 2000, telephone conversation that the City planned to disclose the site plans to your organization later that day.

³Allen County Superior Court, Case No. 02D01-9811-CP-2100.

⁴The Shoaff lawsuit was dismissed with prejudice with respect to some counts and without privilege with respect to others; the allegations involving the proposed parking lot site could be re-filed.
