



STATE OF INDIANA

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July 8, 2008

Jason Smathers
511 Prentiss Way
Avon, Indiana 46123

Re: Formal Complaint 08-FC-153; Alleged Violation of the Access to Public Records Act by the Indiana Public Defender Council

Dear Mr. Smathers:

This advisory opinion is in response to your formal complaint alleging the Indiana Public Defender Council ("Council") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to records. I have enclosed a copy of the Council's response to the complaint for your reference. It is my opinion the Council's response was untimely but the Council has not otherwise violated the APRA.

BACKGROUND

You allege you submitted a request on May 19, 2008 to the Council for access to membership website information as well as manuals published by the Council. You include a copy of the Council's response dated June 12. The Council contended the records you request to fall under the work product exception to disclosure.

The Council responded to the complaint by letter dated June 26 from Executive Director Larry Landis. The Council contends that the purpose of the Council is to provide services to its member, which are defined in I.C. § 33-40-4-2(b). The Council contends the publications it creates are prepared by staff attorneys and contract counsel and include legal research, analysis, and opinions by the attorneys and such materials is often based in response to specific litigation questions from members. As such, the Council contends the materials are excepted from disclosure pursuant to I.C. § 5-14-3-4(b)(2).

The Council further contends the publications are prepared for the purpose of assisting members in litigation decision-making and contain advisory opinions about how to handle specific situations and types of cases. As such, the Council contends the materials are excepted from disclosure pursuant to I.C. § 5-14-3-4(b)(6).

ANALYSIS

The public policy of the APRA states, "(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." I.C. § 5-14-3-1. The Council is clearly a public agency for the purposes of the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Council during regular business hours unless the public records are excepted from disclosure under the APRA. I.C. § 5-14-3-3(a).

A request for records may be oral or written. I.C. §§ 5-14-3-3(a), 5-14-3-9(c). If the request is delivered by mail or facsimile (or electronic mail) and the agency does not respond to the request within seven days of receipt, the request is deemed denied. I.C. § 5-14-3-9(b). If the Council received your request on May 19 and first responded on June 12, the response was untimely under the APRA.

Regarding your substantive claims, the APRA excepts from disclosure, among others, the following:

Records 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.

I.C. § 5-14-3-4(b)(6).

The APRA further excepts the following from disclosure:

The work product of an attorney representing, pursuant to state employment or an appointment by a public agency:

- (A) a public agency;
- (B) the state; or
- (C) an individual.

I.C. § 5-14-3-4(b)(2).

"Work product of an attorney" means information compiled by an attorney in reasonable anticipation of litigation. The term includes the attorney's:

- (1) notes and statements taken during interviews of prospective witnesses; and
- (2) legal research or records, correspondence, reports, or memoranda to the extent that each contains the attorney's opinions, theories, or conclusions.

I.C. § 5-14-3-2(p).

Here, the Council contends the publications you requested are the work product of attorneys working for or on behalf of the Council. Those publications include legal

research, analysis, and opinions by the attorneys and are often based in response to specific litigation questions from members. It is my opinion that most of the information contained in the publications and manuals is excepted from disclosure based on the work product exception to disclosure. The purpose of the Council is to provide services to its members, who are all attorneys. It is my understanding those attorneys seek advice and counsel from the Council related to litigation matters. To the extent the publications developed in response to or to assist with those questions, it is my opinion the publications constitute work product of an attorney, as defined in I.C. § 5-14-3-2(p).

Further, the Council contends the publications are deliberative material because they contain expressions of opinion about how to handle specific situations and types of cases. Further, the information is communicated to assist members in making decisions. It is my opinion much of the information contained in the manuals fits the two-pronged definition of deliberative material and as such is excepted from disclosure at the discretion of the agency, pursuant to I.C. § 5-14-3-4(b)(6).

To the extent the publications contain information not covered by one of the two exceptions listed and not inextricably linked to non-disclosable information, that information must be disclosed.

. . . those factual matters which are not inextricably linked with other non-discloseable materials, should not be protected from public disclosure. See *410 U.S. at 92*. Consistent with the mandate of *APRA section 6*, any factual information which can be thus separated from the non-discloseable matters must be made available for public access.
Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ., 787 N.E.2d 893, 914 (Ind. Ct. App. 2005).

I have not reviewed the requested publications and as such cannot say any publication contains information which is not excepted from disclosure. The Council bears the burden of proof to sustain the denial. See I.C. §§ 5-14-3-1, 5-14-3-9(f). It is my opinion the Council can sustain the denial based on the deliberative materials exception and the work product exception.

CONCLUSION

For the foregoing reasons, it is my opinion the Council's response was untimely but the Council has not otherwise violated the APRA.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Larry Landis, Indiana Public Defender Council