STATE OF INDIANA

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January 30, 2013

Mr. Scott Smith
Kokomo Tribune
300 N. Union Street
Kokomo, Indiana 46901

Re: Informal Inquiry 13-INF-02; Tipton County Auditor

Dear Mr. Smith:

This is in response to your informal inquiry regarding the actions of the Tipton County Auditor ("Auditor") and its compliance with the Access to Public Records Act ("APRA"), I.C. 5-14-3 *et. seq*. Pursuant to I. C. § 5-14-4-10(5), I issue the following informal opinion in response to your inquiry. John H. Brooke, Attorney, responded on behalf of the Auditor. His response is enclosed for your reference.

BACKGROUND

In your informal inquiry you provide you submitted a request to the Auditor for a copy of the report compiled by H.J. Umbaugh ("Umbaugh Report"), an outside consulting firm, regarding the proposed Prairie Breeze Windfarm ("Wind Farm"). Your request was denied pursuant to I.C. § 5-14-3-4(b)(5), (6), and (12). You provide that that the Umbaugh Report was created to aid county officials during negotiations. Thereafter, the Tipton County Council ("Council") voted to grant a tax abatement to the project on December 18, 2012, thereby concluding negotiations. You then made a verbal request for a copy of the Umbaugh Report from the County Attorney and the Auditor. As of January 16, 2013, you have yet to receive a response from either party. You inquire whether the Umbaugh Report is now a public record, due to the conclusion of the negotiations. You provide that the auditor verbally informed you that negotiations had concluded, while the County attorney provided that he would look into the matter.

In response to your informal inquiry, Mr. Brooke advised that your original request was made prior to any vote taken by the Council or an official position was taken by the County Commissioners ("Commissioners") or Council as to the propriety or the amount of any real estate tax abatement. The original request was denied pursuant to I.C. § 5-14-3-4(b)(5) and (6), as the Umbaugh Report was deliberative in nature and part of the entire negotiation process with the wind energy company that was looking to locate certain improvements within the County. The records requested have not been provided

to any party. The negotiations have now concluded, the abatements have been determined, and the final decision as to the benefits afforded the Wind Farm had been provided to the media.

There is no disagreement that the report is a public record. However, the County continues to deny access to the records pursuant to I.C. § 5-14-3-4(b)(5), (6), and (12). The County contends that the documents are not required to be disclosed based on the fact that the records were created at the time the County had entered into negotiations with the Wind Farm. I.C. § 5-14-3-4(b)(5) gives public agencies the ability to determine not to disclose records relating to negotiations between the governing body of the political subdivision and commercial prospects. The County had entered into negotiations with the Wind Farm when the Umbaugh Report was created. The report was created and relied upon by the Council and Commissioners in determining what benefits to extend to the Wind Farm in negotiations to have the commercial entity do business in Tipton County.

Further, the Umbaugh Report qualifies as a deliberative material, as it is a interagency document, created and shared with County officials, regarding the project that was deliberative in nature and used in the County's decision making process. The Umbaugh Report was created by a private contractor hired by the County. No third party, other than the contractor, has had access to the Umbaugh Report. The Umbaugh Report contained ideas, opinions, recommendations, and considerations as to the impact of various options available as to the benefits that could be extended to the Wind Farm. The Council and the Commissioners relied upon and discussed the opinions, recommendations, and considerations in making its decision.

Lastly, the County contends that pursuant to I.C. § 5-14-3-4(b)(12), the records are not required as they were prepared specifically for discussion in an executive session. The Umbaugh Report was prepared for review only at an executive session held by the County.

ANALYSIS

The public policy of the APRA states that "(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." *See* I.C. § 5-14-3-1. The Auditor is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Auditor's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A "public record" is defined as any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine

readable media, electronically stored data, or any other material, regardless of form or characteristics. *See* I.C. § 5-14-3-2(n). As such, the Umbaugh Report would have become a "public record" under the APRA, and subject to disclosure minus any applicable exception, once it was received by the Auditor. The status of the negotiations conducted by the County would not have had an effect on whether the Umbaugh Report was considered to be a "public record."

Under the APRA a public agency denying access in response to a written public records request must put the denial in writing and include the following information: (a) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and (b) the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). Counselor O'Connor provided the following analysis regarding section 9:

> Under the APRA, the burden of proof beyond the written response anticipated under Indiana Code section 5-14-3-9(c) is outlined for any *court action* taken against the public agency for denial under Indiana Code sections 5-14-3-9(e) or (f). If the public agency claimed one of the exemptions from disclosure outlined at Indiana Code section 5-14-3-4(a), then the agency would then have to either "establish the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit" *to the court*. Similarly, if the public agency claims an exemption under Indiana Code section 5-14-3-4(b), then the agency must prove to the court that the record falls within any one of the exemptions listed in that provision and establish the content of the record with adequate specificity. There is no authority under the APRA that required the IDEM to provide you with a more detailed explanation of the denials other than a statement of the exemption authorizing nondisclosure, but such an explanation would be required if this matter was ever reviewed by a trial court. *Opinion of the Public Access Counselor 01-FC-47.*

As applicable here, the Auditor cited to three exceptions, I.C. § 5-14-3-4(b)(5), (6), and (12), to deny your request, each of which will be analyzed separately. The Auditor's denial complied with the requirements of section 9 in that it was in writing, it cited to a specific statutory citation that would authorize the withholding of the record, and provided the name and title of the person responsible for the denial.

I.C. § 5-14-3-4(b)(5) provides that the following records may be disclosed at the agency's discretion:

> (a) Records relating to negotiations between the Indiana economic development corporation, the ports of Indiana, the Indiana state

> department of agriculture, the Indiana finance authority, an economic development commission, a local economic development organization (as defined in IC 5-28-11-2(3)), or a governing body of a political subdivision with industrial, research, or commercial prospects, if the records are created while negotiations are in progress.
> (b) Notwithstanding clause (A), the terms of the final offer of public financial resources communicated by the Indiana economic development corporation, the ports of Indiana, the Indiana finance authority, an economic development commission, or a governing body of a public subdivision to an industrial, a research, or a commercial prospect shall be available for inspection and copying under section 3 of this chapter after negotiations with that prospect have terminated.
> (c) When disclosing a final offer under clause (B), the Indiana economic development corporation shall certify that the information being disclosed accurately and completely represents the terms of the final offer. I.C. § 5-14-3-5.

Thus, while the agency is required to provide the terms of the final offer of public financial resources that has been communicated under (b), the exception does not provide that the agency loses its ability to withhold records under (a) after the negotiations are completed. As such, as long as the Umbaugh Report was created and related to negotiations that occurred with the Wind Farm, the record may be withheld at the Auditor's discretion pursuant to I.C. § 5-14-3-4(b)(5).

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).

Pursuant to I.C. § 5-14-3-4(b)(6), the General Assembly has provided that records that qualify as deliberative materials may be disclosed at the discretion of the public agency. 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.* However, the deliberative materials exception does not provide a pre and post-decision distinction, so that the records may be withheld even after a decision has been made. *See Opinion of the Public Access Counselor 09-INF-25.*

When a record contains both discloseable and nondiscloseable information and an agency receives a request for access, the agency shall "separate the material that may be disclosed and make it available for inspection and copying." *See* I.C. § 5-14-3-6(a). The burden of proof for nondisclosure is placed on the agency and not the person making the request. *See* I.C. § 5-14-3-1. The Indiana Court of Appeals provided the following guidance on a similar issue in *Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ.,* 787 N.E.2d 893 (Ind. Ct. App. 2005):

> However, *section 6 of APRA* requires a public agency to separate dislcoseable from non-dislcoseable *information* contained in public records. *I.C. § 5-14-3-6(a)*. By stating that agencies are required to separate "information" contained in public records, the legislature has signaled an intention to allow public access to whatever portions of a public record are not protected from disclosure by an applicable exception. To permit an agency to establish that a given document, or even a portion thereof, is non-dislcoseable simply by proving that some of the documents in a group of similarly requested items are non-discloseable would frustrate this purpose and be contrary to section 6. To the extent that the *Journal Gazette* case suggests otherwise, we respectfully decline to follow it.
>
> Instead, we agree with the reasoning of the United States Supreme Court in *Mink, supra*, i.e., that 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. *Id*. at 913-14.

To the extent information contained in the Umbaugh Report would be considered deliberative pursuant to I.C. § 5-14-3-4(b)(6), the Auditor would not have violated the APRA in denying your request. The authority of the Auditor to deny your request pursuant to the deliberative materials exception does not turn on whether the decision considered has actually been made. *See Opinion of the Public Access Counselor 09-INF-25.* If the Auditor had solely relied on the deliberative materials exception in denying your request, it would have been required to redact and provide the remaining factual

portions of the record that was sought. However here, Auditor relied on two other exceptions found in APRA to deny your request.

Pursuant to I.C. § 5-14-3-4(b)(12), the Auditor would retain discretion to disclose records specifically prepared for discussion or developed during discussion in an executive session under I.C. § 5-14-1.5-6.1. As noted by Counselor Davis:

> However, it is not sufficient that the record must merely relate to an executive session. It must also have been *specifically prepared for discussion* in an executive session. Hence, if the material excepted from disclosure by the CAB sets out specific agenda items to be discussed in an upcoming executive session, the excepted material would meet the exception. As with the exception for deliberative materials, to the extent that material redacted under this exemption is not exempt or "inextricably linked" to exempt material, it should be disclosed. *See Opinion of the Public Access Counselor 05-FC-256.*

As with the exceptions found under (b)(5) and (6), the ability of the Auditor to cite to the executive materials exception to deny your request would not turn on whether the executive session has already occurred. As such, as long as the Umbaugh Report was specifically prepared for discussion in an executive session, the Auditor would retain the discretion to deny the request pursuant to (b)(12), regardless of the timing of the request.

Please let me know if I can be of any further assistance.

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: John H. Brooke