

March 31, 2005

Brendan O'Shaughnessy
The Times of Northwest Indiana
155 West Washington Street, Suite 200
Indianapolis, IN 46204

*Re: Informal Inquiry Response; Alleged Violation of the Access to Public Records Act
by the Indiana Economic Development Corporation*

Dear Mr. O'Shaughnessy:

You have requested an informal opinion from the Office of the Public Access Counselor. Specifically, you have requested an opinion regarding an electronic mail message sent to you by Wendy Stamm, Manager of Media Relations and Public Affairs for the Indiana Economic Development Corporation ("IEDC"). Ms. Stamm sent you the e-mail message in response to your request for the "Crowe Chizek report investigating the Gary Urban Enterprise Association." Pursuant to Ind.Code 5-14-4-10(5), I am issuing this letter in response to your request.

You sent your request for the Crowe Chizek report on March 21, 2005, to Nathan Feltman, IEDC Executive Vice President. On March 22, Ms. Stamm sent you the e-mail message on behalf of Nathan Feltman, in which she declines to release the report because it is a preliminary draft and not a final report. She further states that several portions of the report are still missing as well as back up documentation that the auditor still needs to obtain, and therefore, the IEDC does not believe it is a document that is appropriate for release "in its current state." Ms. Stamm believed that the final report would be received in 2-3 weeks, at which time the final report would be released, except that any confidential information or information that is subject to nondisclosure at the discretion of the agency would be redacted from the report.

You asked me whether preliminary drafts are subject to any exemption under the Access to Public Records Act.

There is no issue regarding whether the IEDC is subject to the Access to Public Records Act. See H.B. 1003, SECTION 30. "Public record" means any writing, paper, report, study...or other material that is created, received, retained, maintained, or filed by or with a public

agency...” Ind. Code 5-14-3-2. Any person may inspect and copy the public records of a public agency, except as provided in section 4 of the APRA. IC 5-14-3-3(a). A public agency may deny a written request for a record if the denial is in writing and the denial includes: 1) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record, and 2) the name and the title or position of the person responsible for the denial. IC 5-14-3-9(c). The APRA places the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record. IC 5-14-3-1.

In my opinion, the e-mail you received constituted a denial of the record under the APRA, even though disclosure of at least part of a related record (the final report) was promised at some future time. In addition, the denial, although issued in a timely manner, did not comport with the APRA because it failed to cite the specific exemption or exemptions authorizing the withholding of the record. There is no exemption in section 4 of the APRA for preliminary reports. Some preliminary reports may constitute “records that are intra- or inter-agency 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.” IC 5-14-3-4(b)(6). However, the mere fact that a report is preliminary in nature or “draft” does not mean that it falls within the “deliberative materials” exemption.

This office has stated that all the elements of the exemption at IC 5-14-3-4(b)(6) must be met in order for the exception to apply. The deliberative material exception requires that information must be "interagency or intra-agency," which implies documents created and shared within a public agency or between public agencies. IC 5-14-3-4(b)(6) also requires that the communication subject to this exception from disclosure be part of a decision making process. In addition, the content of the information must be advisory or deliberative material and constitute opinion or be speculative in nature. The plain meaning of "deliberative" is "assembled or organized for [or] . . . characterized by or for use in deliberation or debate." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 349 (1981). "Deliberation" means "thoughtful and lengthy consideration . . . [t]houghtfulness in decision or action." *Id.* In the context of the APRA, therefore, deliberative material includes information that reflects, for example, one's ideas, opinions, advice, consideration and recommendations on a subject or issue for use in a decision-making process.

Here, the Crowe Chizek report was created as a result of the IEDC's predecessor agency, the Enterprise Zone Board, requiring that the Gary Urban Enterprise Association (GUEA) engage an independent auditor to examine the GUEA and issue a report for the Board to consider whether the GUEA's designation should continue or be revoked. The IEDC has the burden of proof for nondisclosure of the Crowe Chizek report. To discharge its burden, the IEDC must show that each element of the deliberative materials applies to the preliminary Crowe Chizek report, including whether the report is inter- or intra-agency, and whether it contains opinions, advice, consideration and recommendations on a subject or issue for use in a decision-making process.

Also, to the extent that the preliminary Crowe Chizek report contains factual matters that are not inextricably linked with other non-discloseable materials (such as the deliberative portion

of the report), the IEDC is required to separate those factual matters and make them available for inspection and copying. *The Indianapolis Star v. Trustees of Indiana University*, 787 N.E.2d 893, 914 (Ind. Ct. App. 2003).

Based on the information before me, I do not believe that IEDC has met its burden of showing that the preliminary Crowe Chizek report meets any exception in section 4 of the APRA. A person who has been denied the right to inspect or copy a public record may file an action in circuit or superior court to compel the public agency to permit the person to inspect and copy the public record. IC 5-14-3-9(e). The court may review the public record in camera to determine whether any part of it may be withheld under the APRA. IC 5-14-3-9(h).

Sincerely,

Karen Davis
Public Access Counselor

cc: Nathan Feltman
Sue Beesley