

November 20, 2006

Tom Yingling
1212 Flagstone Drive
Jeffersonville, IN 47130

Re: Formal Complaint 06-FC-182; Alleged Violation of the Access to Public Records Act by the Jeffersonville Common Council

Dear Mr. Yingling:

This is in response to your formal complaint alleging that the Jeffersonville Common Council ("Council") violated the Access to Public Records Act by denying you a copy of a list of subdivisions and number of households, and a list of the specific households and their addresses that were referred to in a draft annexation plan.

BACKGROUND

You made a formal request for records on September 29, 2006. In your multi-part request, you referred to the draft annexation fiscal plan made public by the Council on September 15, 2006. In connection with the proposed area of annexation, you sought a list naming every subdivision in the proposed annexation area and the number of households/parcels in each subdivision. You also asked for the name of each home owner and their personal mailing address and/or street address of the parcels being considered for annexation. You stated that the surveyor, David Blankenbaker, already has this information in an electronic format and this would be the preferred way of acquiring this information from him.

Your request was addressed to Mayor Robert Waiz and the Common Council of the City of Jeffersonville, 500 Quartermaster Court, Jeffersonville. You addressed your letter "Dear Council Members." On October 4, the City Attorney Les Merkley wrote you in response to the request submitted to the Mayor. He stated that the Mayor does not maintain the information, but the information may be obtained from the Council since it was the entity that had initiated the annexation. He recommended that you request the information from the city council, which is represented by Greg Fifer in the annexation proceeding.

You apparently contacted Mr. Fifer, because you enclosed an October 10 letter from Mr. Fifer, acknowledging receipt of "your letter to Mayor Waiz and the Common Council dated September 29, 2006." The portions of Mr. Fifer's response letter pertinent to your complaint are summarized as follows:

Request 2: The list naming every subdivision in the proposed annexation area and the number of households/parcel in each subdivision.

Response: The list will not be filed as a public record until notices of the public hearing required by statute to be given to each and every owner of record in the proposed annexation area are mailed (anticipated to occur in mid-April 2007). Until the proposed annexation ordinance is formally introduced such list is subject to change, and upon my advice and direction no filing of these records will be made with the Clerk-Treasurer until such notices are mailed in order to avoid confusion and resultant errors in the giving of such notices. You will have the opportunity to obtain copies of such notices once they are filed of record and mailed.

Request 3: With regard to the list of 3,660 households in the annexation area, provide the name of each home owner and their personal mailing address and/or street address of the parcels being considered for annexation, in electronic format as provided by the surveyor.

Response: See response to No. 2 above. I have retained Blankenbaker and SouthEastern Indiana Title Company, Inc., to compile this information in order to meet the requirements of Indiana law. Once an annexation ordinance is formally introduced the name of each property owner and their most current tax mailing address will be available from the mailed notices that will be filed in the Clerk-Treasurer's office.

In addition, Mr. Fifer's response to your request states that the records that he has compiled or caused to be compiled are protected as confidential attorney work product. In closing his October 10 letter, Mr. Fifer noted that most, if not all, the information you seek will be available from publicly filed documents once the consideration process formally begins on March 5, 2007. Mr. Fifer further advised you that the letter represented the firm's complete response to your requests of the City Council.

In your formal complaint filed with the Office of the Public Access Counselor, you contend that the draft report indicates that 3,660 households are being considered for annexation and those home owners have a right to know now if they are being considered for annexation or not.

I sent a copy of the complaint to the Council, in care of Mr. Fifer. He responded by letter, a copy of which is attached for your reference. Mr. Fifer acknowledges that the Council is a public agency subject to the disclosure requirements of the Access to Public Records Act. He denies that his firm, Applegate & Fifer, is subject to those disclosure requirements, because the firm is not subject to audit by the state board of accounts and therefore is not a public agency. The Clerk-Treasurer is the custodian of all the public records of the City Council. Mr. Fifer stated that you have not filed with the Clerk-Treasurer a formal request for the documents. Accordingly, Mr. Fifer contends that you do not have a valid and ripe claim for violation of the Access to Public Records Act.

As a courtesy to you and me, Mr. Fifer provides insight into the position of the City Council respecting your request for documents, which I summarize as follows:

The information regarding the ownership and tax records of the individual properties that may be included in the annexation have not been provided to the accounting firm providing assistance in preparing the fiscal plan, but instead is retained solely in Mr. Fifer's file and are protected as confidential attorney work product. When the Council presents a resolution adopting the fiscal plan and introduces the annexation ordinance at its regular meeting on March 5, 2007, as planned, Mr. Fifer will work with the Clerk-Treasurer to issue the required notices of public hearing. A copy of such notices will be filed with the Clerk-Treasurer at that time, and as such will be available for inspection by the public. Until this process formally starts with the taking of such legislative acts, Mr. Fifer will not be filing any such information with the Clerk-Treasurer. Finally, since your sole motivation for seeking the information concerning the households is that the homeowners have a right to know now if they are being considered for annexation or not, he gave you a copy of the map prepared by the surveyor that clearly delineates the seven areas that are presently under consideration for annexation by the Council. It should be apparent from this map whether or not their respective properties are presently being considered for annexation.

ANALYSIS

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the Access to Public Records Act ("APRA"). Ind. Code 5-14-3-3(a). "Public record" means any document or material that is created, received, retained, maintained, or filed by or with a public agency. IC 5-14-3-2(m).

If a request for a record initially is made in writing, or if an oral request that has been denied is renewed in writing or by facsimile, a public agency may deny the request if the denial is in writing or by facsimile, and the denial includes the exemption or exemptions authorizing the public agency to withhold the record, and the name and title or position of the person responsible for the denial. IC 5-14-3-9(c).

As a threshold matter, I do not find your complaint to lack a valid basis, at least not on its face. It is true that you must allege a denial of access by a public agency, without which you would not have standing to file a complaint with the Office of the Public Access Counselor. *See* IC 5-14-5-6. Mr. Fifer states that you have not properly taken your request to the Clerk-Treasurer, who is custodian of the Council's records. However, your request letter was addressed to the Mayor and the Common Council, at the Council's address, 500 Quartermaster Court. This is also the address of the Clerk-Treasurer, Peggy Wilder. Your letter addressed "All Council Members." Although the Mayor's counsel responded suggesting that you address your request to Mr. Fifer directly, I do not think that following this advice negates the clear indicator that you sent your request to the Council (as well as to the Mayor) at the address of the Council's place of business and that of the custodian of its records, the Clerk-Treasurer. Although Mr.

Fifer carefully wrote that the October 10th letter was the firm's response, Mr. Fifer stated that he was counsel to the Council for purposes of the annexation, and indicated that the letter represented the firm's response to your requests of the City Council. Mr. Fifer also claimed an exemption to the Access to Public Records Act, the attorney work product exemption. In my estimation, the October 10th letter, whether intended or not, appeared to be a response to your requests to the Council on the Council's behalf. Given that you addressed your request to the Council, noted the Council and Clerk-Treasurer's correct office address, and received what appeared to be a denial letter on behalf of the Council, it is my opinion that your complaint is ripe and that you have standing to bring the complaint.

Having said that, Mr. Fifer is correct that his firm is not a public agency under the APRA. Although he does not say so directly, Mr. Fifer implies that the information that you seek is retained by him in his files, and therefore is not a public record of the Council because it has not been filed with the Council's custodian, the Clerk-Treasurer.

As stated above, "public record" is any material that is created, received, retained, maintained, or filed by or with a public agency. This definition is very broad. In a recent case decided by the Indiana Court of Appeals, a settlement agreement created by and maintained by the counsel representing the Town of Knightstown was held to be a public record subject to the Access to Public Records Act, despite not being in the actual possession of the town council or clerk-treasurer of the town. *Knightstown Banner, LLC v. Town of Knightstown*, 838 N.E.2d 1127 (Ind. Ct. App., 2005), *transfer denied*, 2006 Ind. LEXIS 668. The Court of Appeals deemed without merit the town's argument that the definition of "public record" does not include documents created by private individuals acting on behalf of a public agency:

"There is no doubt that although Retained Counsel is a private individual, and not itself a public authority under APRA, he created, maintained, and retained custody of the settlement agreement as an attorney for Knightstown, which is a public authority."

Knightstown Banner at 1133.

The facts presented by your complaint are distinguished from those in *Knightstown Banner* in that the court case involved expenditure of public funds in connection with the settlement agreement, and the statutes respecting payment of claims anticipated that the settlement agreement would be required to be filed with the town's clerk-treasurer in order to be a valid legal claim. Nevertheless, I do not read the *Knightstown Banner* case so narrowly as to necessarily preclude its application to the information compiled by the attorney to the Council in furtherance of the planned annexation. Mr. Fifer does not explicitly claim that the records are not public records of the Council, only that the records are not disclosable at this stage because they are work product of an attorney.

A public agency may withhold at its discretion the work product of an attorney representing, pursuant to state employment or an appointment by a public agency, 1) a public agency, 2) the state, or 3) an individual. IC 5-14-3-4(b)(2). "Work product of an attorney" means information compiled by an attorney in reasonable anticipation of litigation and 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. IC 5-14-3-2(p).

Assuming that the information maintained in Mr. Fifer's file is a public record of the Council, the Council is assigned the burden of proof that the material is the work product of an attorney, and as such may be withheld under IC 5-14-3-4(b)(2). See IC 5-14-3-1. It is not apparent to me how lists of householders and parcels fits the definition of work product of an attorney, because those lists have not been compiled by the attorney in reasonable anticipation of litigation, nor do they contain the attorney's opinions, theories, or conclusions. Anticipating that some of the file material may contain opinion, I recommend to the Council consideration of Indiana Code 5-14-3-6(a), which requires that disclosable information be separated from nondisclosable information.

Hence, it is my opinion that the records you seek may be public records of the Council under the holding in *Knightstown Banner v. Town of Knightstown*. In addition, it is my opinion that the Council is required to sustain its burden of showing that the records are work product of an attorney.

On a final note, I observe that the material may contain lists of names and addresses. The APRA recognizes special rules with respect to providing copies of lists of names and addresses. See IC 5-14-3-3(f).¹

¹ (f) Notwithstanding the other provisions of this section, a public agency is not required to create or provide copies of lists of names and addresses (including electronic mail account addresses) unless the public agency is required to publish such lists and disseminate them to the public under a statute. However, if a public agency has created a list of names and addresses (excluding electronic mail account addresses) it must permit a person to inspect and make memoranda abstracts from the list unless access to the list is prohibited by law. The lists of names and addresses (including electronic mail account addresses) described in subdivisions (1) through (3) may not be disclosed by public agencies to any individual or entity for political purposes and may not be used by any individual or entity for political purposes. In addition, the lists of names and addresses (including electronic mail account addresses) described in subdivisions (1) through (3) may not be disclosed by public agencies to commercial entities for commercial purposes and may not be used by commercial entities for commercial purposes. The prohibition in this subsection against the disclosure of lists for political or commercial purposes applies to the following lists of names and addresses (including electronic mail account addresses):

(1) A list of employees of a public agency.

(2) A list of persons attending conferences or meetings at a state institution of higher education or of persons involved in programs or activities conducted or supervised by the state institution of higher education.

(3) A list of students who are enrolled in a public school corporation if the governing body of the public school corporation adopts a policy:

(A) with respect to disclosure related to a commercial purpose, prohibiting the disclosure of the list to commercial entities for commercial purposes;

(B) with respect to disclosure related to a commercial purpose, specifying the classes or categories of commercial entities to which the list may not be disclosed or by which the list may not be used for commercial purposes; or

(C) with respect to disclosure related to a political purpose, prohibiting the disclosure of the list to individuals and entities for political purposes.

A policy adopted under subdivision (3)(A) or (3)(B) must be uniform and may not discriminate among similarly situated commercial entities. For purposes of this subsection, "political purposes" means influencing the election of a candidate for federal, state, legislative, local, or school board office or the outcome of a public question or

CONCLUSION

For the foregoing reasons, I find that the Jeffersonville Common Council must disclose any of its public records that are not exempt under the Access to Public Records Act.

Sincerely,

Karen Davis
Public Access Counselor

cc: Peggy Wilder, Clerk-Treasurer
C. Gregory Fifer

attempting to solicit a contribution to influence the election of a candidate for federal, state, legislative, local, or school board office or the outcome of a public question.