STATE OF INDIANA

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May 28, 2015

Mr. David M. Lutz, Esq.
4203 W. Jefferson Blvd.
Fort Wayne, IN 46804

Re: Formal Complaint 15-FC-148; Alleged Violation of the Access to Public Records Act by the Indiana Worker's Compensation Board

Dear Mr. Lutz,

This advisory opinion is in response to your formal complaint alleging the Indiana Worker's Compensation Board ("Board") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The Board has responded to your complaint via Ms. Linda Hamilton, Esq., Chairman. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on April 29, 2015.

BACKGROUND

Your complaint dated April 27, 2015 alleges the Indiana Worker's Compensation Board violated the Access to Public Records Act by denying you access to records you requested.

You sent a request for documents on March 19, 2015 seeking records related to an audit of the "Second Injury Fund Beneficiaries." You requested documents prepared which related to the audit; including emails, faxes, notes or any other documents, from January 1, 2013 to the time of requested.

On March 31, 2015, you received a response from the Board. It cited several exemptions in refusing the entirety of your request, including confidentiality under state law, attorney work-product and interagency deliberative materials. However, the Board did note certain records deemed disclosable would be provided by no later than August 1, 2015.

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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 Ind. Code § 5-14-3-1. The Indiana Worker's Compensation Board is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the Board's disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14- 3-3(a).

From the materials provided, it appears as if the Board issued a denial based upon several exemptions without searching for and scrutinizing the records you seek. I discourage a denial based on the blanket pretense some of the materials asked for are potentially non-disclosable. Not every staff communication contained in an email is *de facto* deliberative; the materials must meet the requirements set forth in Ind. Code § 5-14-3-4(b)(6).

You also take exception with the assertion the Chairman has claimed the work product of an attorney exception found at Ind. Code § 5-14-3-4(b)(2), because the Office of the Indiana Attorney General is the Board's lawyer. The Indiana Supreme Court has addressed this issue in *Coleman v. Heidenreich*, 381 N.E2d 866, 869 (Ind. 1978). In the *Coleman* decision, the court stated: "[i]n sum, the rule is 'that when an attorney is consulted on business within the scope of his profession, the communications on the subject between him and his client should be treated as strictly confidential". If the Chairman is designated in a legal advisory role, the Board enjoys the same attorney-client communication and work product as the materials between it and the Office of the Attorney General. Additionally, the work product must be in reasonable anticipation of litigation. See Ind. Code § 5-14-3-4(b)(2).

That being said, just because an attorney is employed by a public agency does not denote all of the attorney's work product and communication is *de facto* privileged. The attorney must be in a representative or advisory capacity. If not, the public agency cannot claim the privilege and the material should be treated like any other similarly situated public employee. It appears in this case as if the Chairman is the designated legal advisor to the Board buttressing the counsel from the Attorney General. However, similar to the deliberative materials exception, the communication should be scrutinized to determine if in fact some of the communication is privileged. The remainder should be separated and disclosed.

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As for the self-imposed August 1, 2015 deadline, the Board should be advised public records must be disclosed upon request within a reasonable time. Ind. Code § 5-14-3-3. Self-imposed deadlines can give the impression the date is arbitrary rather than reasonable. Indeed it appears as if your request is not so complex or historical to necessitate a full four (4) months to compile and produce. While this Office recognizes considerations such as staff limitations and volume of pending requests, public access should be integrated into the course of an agency's duties and not just an ancillary task.

I encourage the Board to revisit whether the materials you seek truly fall into the exceptions to disclosure it has cited. Furthermore, I also implore the Board to begin the steps towards disclosure of the non-confidential records with all deliberate speed and provide a more reasonable timeline rather than a self-imposed deadline of four (4) months in the future. Finally, an agency should disclose materials as they become available. Therefore, if a portion of the records are identified before August 1, 2015, the Board should release those records in a piecemeal manner as opposed to waiting until they are all compiled.

Regards,

Luke H. Britt
Public Access Counselor

Cc: Ms. Linda Hamilton, Esq.