

**IN THE
INDIANA SUPREME COURT**

No. 33S04-____-CV-____

KNIGHTSTOWN BANNER, LLC,

Appellant/Plaintiff,

v.

TOWN OF KNIGHTSTOWN,
GOVERNMENTAL INSURANCE
MANAGERS, INC., and
GOVERNMENTAL
INTERINSURANCE EXCHANGE,

Appellees/Defendants.

On Petition to Transfer from
Indiana Court of Appeals
No. 33A04-0504-CV-200

Appeal from the Henry Circuit Court
No. 33C01-0405-PL-0013

The Honorable
Mary G. Willis, Judge

**BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLANT'S
OPPOSITION TO TRANSFER**

Bryan H. Babb
Attorney No. 2153549
Bose McKinney & Evans LLP
2700 First Indiana Plaza
135 N. Pennsylvania St.
Indianapolis, IN 46204
(317) 684-5172

Of counsel *Pro Hac Vice* (pending)
Lucy A. Dalglish
The Reporters Committee for Freedom of the Press
1101 Wilson Blvd.
Suite 1100
Arlington, VA 22209
(703) 807-2100
*Counsel for The Reporters Committee for Freedom
of the Press, American Society of Newspaper
Editors, E.W. Scripps Company, Hoosier State
Press Association, National Newspaper
Association, Radio-Television News Directors of
America, and Society of Professional Journalists*

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STATEMENT OF INTEREST

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Reporters Committee staunchly defends the right of citizens — and the news media — to monitor the activities of their government. The public has the right to know what its elected officials are doing on its behalf, and especially how the government is spending taxpayer dollars. The news media serve the public interest in providing this information, allowing the public to hold government accountable for its actions.

State open records laws, such as Indiana's Access to Public Records Act, are intended to make public agencies' records available to interested persons. Allowing a public body to outsource services and declare those records private is an end run around state law, and the Court of Appeals of Indiana properly recognized that. Indiana's law on this matter will directly affect the news media both inside and outside the state, and will have an impact on their ability to report on matters concerning the government in a state with large cities and corporations — matters of interest to citizens across the nation, as well as within Indiana's borders.

The Reporters Committee files this brief *amici curiae* on behalf of several media organizations and in support of the Appellant/Plaintiff, Knightstown Banner, LLC. The Reporters Committee's Executive Director Lucy A. Dalglish has sought permission to appear as counsel for *amici curiae* with this Court in her Motion for Leave to Appear, which is pending.

The American Society of Newspaper Editors is a professional organization of approximately 750 persons who hold positions as directing editors of daily newspapers in the United States and Canada. The purposes of the Society include assisting journalists and providing unfettered and effective press in the service of the American people.

The E.W. Scripps Company is a diverse and growing media enterprise with interests in newspaper publishing, broadcast television stations, national cable networks, electronic commerce, interactive media, and licensing and syndication. The company's portfolio of media properties includes daily and community newspapers in 18 markets, including Evansville, Indiana; 10 broadcast stations, including WCPO-TV, an ABC affiliate whose broadcast signal includes southeast Indiana; Scripps Networks; and United Media.

The Hoosier State Press Association Foundation is a non-profit entity whose members include 176 Indiana newspapers and other parties in the newspaper industry. The primary focus of the HSPA Foundation is to enhance the ability of Indiana newspapers to fully educate and inform the public, and to defend the principles of the First Amendment to the United States Constitution. HSPA Foundation members regularly report on the activities of public agencies throughout the state and have broad experience making requests under Indiana's Access to Public Records Act.

The National Newspaper Association is a 2,500 member organization for community newspapers. Founded in 1885, its members are primarily family-owned and small group newspapers. NNA's mission to protect, promote, and enhance America's community newspapers includes strong advocacy for public access and open records laws.

The Radio-Television News Directors Association is the world's largest and only professional organization devoted exclusively to electronic journalism. RTNDA is made up of news directors, news directors, news associates, educators and students in radio, television, cable and other electronic media in more than 30 countries. RTNDA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

INTRODUCTION

Public bodies dealing with sensitive material cannot avoid public disclosure by simply delegating or assigning away delicate decisions. Public officials employed by the Town of Knightstown (hereinafter "the Town") relied on the Town's attorney (hereinafter "Retained Town Counsel") to act on behalf of the Town and its citizens in creating a Settlement Agreement to end a sexual harassment lawsuit against the Town by a former Town employee. The Town's arguments that it essentially played no role in receiving, retaining or maintaining records related to the Settlement Agreement is an attempt to circumvent the state's Access to Public Records Act (hereinafter "APRA") which is designated to allow the public access to information regarding its representative government.

The State of Indiana enacted the APRA in 1983 to codify a broad grant of access to

information to the public. In Indiana, “all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.” Ind. Code § 5-14-3-1, *et seq.* (2006). A government entity agreeing to provide a legal settlement funded with public monies has acted officially on behalf of the government and of the citizens it represents. That the entity employed a non-governmental third party to aid it in the official act does not exempt the entity — and those acting on its behalf — from disclosure of “full and complete information” regarding the entity’s affairs. The Town cannot hide behind its relationship with its Retained Town Counsel in an attempt to avoid its duty under the law to provide information to the public regarding its official acts.

The Indiana Court of Appeals took notice of the relationship between the Town and its Retained Town Counsel and recognized the method the Town employed to preclude public disclosure of an otherwise clearly public record. Although a matter of first impression in Indiana, this issue was decided by the Court of Appeals in accordance with the other jurisdictions that have addressed it — holding the Settlement Agreement to be a public record, regardless of whether an outside party prepared it. The Supreme Court need not address every issue of first impression and should deny transfer in this case where the Court of Appeals clearly and correctly interpreted the plain meaning and purpose of the open records law in holding the Settlement Agreement to be a public record subject to disclosure under the APRA.

SUMMARY OF ARGUMENT

The news media have a duty to the public to gather and disseminate information in the public's interest. Matters involving elected government officials and taxpayer funds are traditionally of great public interest. Members of the public must have access to public records and information created by their representative government — or parties working on behalf of their representative government — in order to provide the essential check against governmental abuse of discretion. The public is granted access to public records in Indiana through the APRA, which affirms the importance in public oversight of representative government.

The Court of Appeals correctly determined that a settlement agreement created by a government entity through others acting on its behalf is a public record subject to disclosure under the APRA. It recognized the importance of the public's access — through the news media — to these documents, which so clearly concern the public because they are created by representative government and involve the use of public monies. We urge this Court to deny the Petition to Transfer on the basis that this matter has been properly decided in the court below; however, if the Court should grant the Petition, we urge it to affirm the Court of Appeals in its recognition of the Settlement Agreement as a public record that must be disclosed under the APRA.

ARGUMENT

I. The Settlement Agreement is a Public Record Created and Maintained by a Public Agency and Must be Disclosed.

The Town is a public agency under the definition set forth in the APRA. Ind. Code § 5-14-3-2 (2006). Records of public agencies must be open for inspection to “any person.” Ind. Code § 5-14-3-3(a) (2006). The Town’s records are public records and must be made available to the public under the APRA.

In this case, the Town hired an outside third party, Retained Town Counsel, through its attorney-in-fact, Governmental Insurance Managers, Inc. (hereinafter “GIM), to act in its place. The Settlement Agreement created by Retained Town Counsel in resolution of a sexual harassment lawsuit against the Town was created on behalf of and for the benefit of the Town. A public record under the APRA must be “created, received, retained, maintained, or filed by or with a public agency.” Ind. Code § 5-14-3-2(m) (2006). While the Town is the public agency in this case, both the Town’s attorney-in-fact, GIM, and Retained Town Counsel acted as fiduciaries *on the Town’s behalf*. Retained Town Counsel was hired as the attorney for the Town and gave sworn testimony that *he represented the Town*. Knightstown Banner, LLC v. Town of Knightstown, 838 N.E.2d 1127, 1132 (Ind. Ct. App. 2005). Attorneys employed by insurance companies may represent insureds, in this case the Town, without violating any ethical obligations. Cincinnati Ins. Co. v. Wills, 717 N.E.2d 151, 165 (1999). As the Town’s attorney, any documents “retained” or “maintained” by Retained Town Counsel were held *for the Town* and would be “retained” or “maintained” by the Town. As the Court of Appeals pointed out, there is “no doubt” that Retained Town Counsel created and kept the Settlement Agreement “as

attorney for Knightstown.” Knightstown Banner, 838 N.E.2d at 1133.

The Settlement Agreement between the Town and its former employee was created and kept by Retained Town Counsel in Retained Town Counsel’s capacity as the Town’s attorney. The Town cannot argue that simply by avoiding physical possession, the document is not the Town’s document and thus not a public record. This faulty logic would lead to a slippery slope in which public agencies could shuffle off any delicate matters to a third party and so long as the public agency kept an arm’s length away, it would not be required to disclose such records.

The APRA broadly provides for openness and is intended to be liberally construed to further the policy that the public is entitled to information regarding government affairs and official acts. Ind. Code § 5-14-3-1 (2006). It is intended to be construed as a whole, keeping in mind its purpose to promote open government. The Indiana General Assembly previously acted to prevent agencies from frustrating the purpose of the APRA, preventing public agencies from contracting away storage rights for records so as to preclude public access to those records. Ind. Code § 5-14-3-3(g) (2006). To adopt the Town’s assertion that it contracted with Retained Town Counsel to keep the Settlement Agreement would “amount to a tortured interpretation of APRA whereby private attorneys would be permitted to ensconce government contracts within their firm’s file room and completely deny the public access.” Knightstown Banner, 838 N.E.2d at 1133. When the Town is faced with disclosing potentially unflattering information, it must not be allowed to hire an outside attorney to shield it from disclosure of public records.

Jurisdictions that have previously addressed this issue are in line with the Court of Appeals. Courts in Ohio, Pennsylvania, West Virginia, and Wisconsin have all held Settlement Agreements to be public records, recognizing that when an attorney acts on behalf of a public

agency, it is as if the agency had acted on its own accord. See Findley Publ'g Co. v. Hancock Co. Bd. Of Comm'ns, 684 N.E.2d 1222, 1225 (Ohio 1997) (holding that a government entity cannot delegate public duties to private entities so as to avoid public disclosure); Tribune-Review Publ'g Co. v. Westmoreland County Housing Auth., 833 A.2d 112, 120 (Pa. 2003) (ruling that an insurance company that drafted a settlement agreement did so on behalf of a state agency that must disclose the agreement); Daily Gazette Co., Inc. v. Withrow, 350 S.E.2d 738, 745 (W. Va. 1986) (declaring that litigation settlement documents involving a public body constitute public records even when prepared by and in possession of an outside attorney); and Journal/Sentinal, Inc. v. Sch. Bd. of the Sch. Dist. of Shorewood, 521 N.W.2d 165, 171 (Wis. Ct. App. 1994) (holding that although private outside counsel held a document, the relationship between the agency and counsel was as if the agency created and held the document itself, requiring its disclosure). The Attorney General's office in Illinois has also said that a legal settlement prepared by attorneys for a city's insurance company is a public record. See Ames Boykin, City must reveal suit deal, state says, Daily Herald, Dec. 21, 2005 at 1.

Not only must the Settlement Agreement be disclosed under the APRA as a public record kept by the Town, but as the Court of Appeals notes, the Town "was under a statutory duty to keep a copy of the settlement agreement." Knightstown Banner, 838 N.E.2d at 1132. "[O]nce a public authority is actively involved in negotiating a contract through counsel, it has an official duty to demand that these documents are delivered to the town." *Id.* The Town, through Retained Town Counsel, was in possession of the Settlement Agreement as a public record under the APRA, but also was legally required to keep a copy of the agreement under the law.

Public agencies cannot simply contract away their obligations to provide the public with

information regarding their affairs and acts. The APRA is not meant to be interpreted in that way, and the Court of Appeals properly determined that because of the relationship between the Town and Retained Town Counsel, the Settlement Agreement is a public record under the APRA. For those reasons, this Court should deny the Petition to Transfer and allow the Court of Appeals decision to remain the law in Indiana.

II. The Public has the Right to Know How its Government is Operating.

An essential element of representative government is to provide the public with a mechanism to hold elected officials accountable for actions taken on their behalf. The public must be able to monitor government acts in order to evaluate government officials' performance of their job duties and invoke democratic principles to ensure accurate representation when necessary. Open records laws such as Indiana's APRA are not unlike the federal Freedom of Information Act, which exists to let citizens know "what their government is up to." U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989).

The public often relies on the news media as a conduit of information, seeking documents and information from the government and disseminating their contents to the public. The media have a duty to serve the public in this capacity, and act as a "surrogate for the public" Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980), reporting on matters in the public interest and ensuring citizens stay informed of "what their government is up to."

A. Public Agencies Cannot Delegate Authority to Keep
Otherwise Public Documents Secret.

Records created by, or on behalf of, public agencies exist to serve as a record of actions taken by that agency. Public agencies, such as the Town of Knightstown, must be transparent in their acts and allow for public oversight. It is not uncommon for a government agency to require outside assistance at times, especially in this case where it needed to settle a legal matter; however, when that outside assistance results in action taken on behalf of the agency, the outside actor stands in the shoes of the agency and must be treated as the agency would be treated.

Had the Town “created” and “maintained” the Settlement Agreement without the assistance of Retained Town Counsel, there would be no question as to the Agreement’s status as a public record. But because Retained Town Counsel is a private individual, the Town attempts to use its status to shield the Settlement Agreement from disclosure. The Town’s argument disregards both the legal fiduciary relationship between the Town and Retained Town Counsel, as well as the practical notion that Retained Town Counsel was standing in the shoes of the Town when it created, retained, and maintained the Settlement Agreement. As the Court of Appeals pointed out, “delegating the responsibilities of creating, receiving, and retaining the settlement agreement to outside counsel does not thereby remove the document from the statute’s definition of public document.” Knightstown Banner, 838 N.E.2d at 1134. The Court of Appeals would not allow the Town’s attempts to circumvent the purpose and intent of APRA by bringing in an “outside” individual to retain control of a public document, and this Court should agree that such acts are not only inconsistent with APRA, but also undermine its purpose.

B. The Media Cannot Fulfill Their Duties as Surrogates for the Public When Public Information is Kept From Them.

The media has an obligation to the public to report on information concerning government officials and their acts, primarily when it is in the public interest. Here, the Town entered into a legal settlement which resulted in public funds being used to provide a former employee who alleged sexual harassment claims against other government employees. While citizens are often interested in learning what actions a government entity takes and why, when taxpayer dollars are involved, their interest is undoubtedly heightened, and with it, their duty to ensure government accountability. “Taxpayers of a community have the right to know how and why their money is spent.” Knightstown Banner, 838 N.E.2d at 1134. In this case involving public funds and their expenditure, the Settlement Agreement, which would shed light on how those funds are used, must be made available to the public, and to the media who can properly disseminate the information as the surrogate for the public.

Without access to public records, the media cannot properly serve the public and report on matters in the public interest. Many citizens depend on the news media to inform them of issues concerning their elected officials so that they can, in turn, fulfill their own duties to ensure government accountability. The Court of Appeals recognized the importance of the news media’s role in requiring disclosure of the Settlement Agreement in this case to the Knightstown Banner, and this Court should deny transfer of the case allowing that decision to stand.

CONCLUSION

A government entity has a duty to the public to act openly and honestly on the public's behalf. When a public body must address a delicate matter that may shed unflattering light on it, it cannot simply enlist outside third parties to step in and maintain control of its records to avoid public disclosure. The APRA was not created with that purpose in mind, but was clearly enacted to promote openness and complete access to information regarding public officials and their acts. The Town's argument that it did not create or keep records of the Settlement Agreement is an attempt to circumvent the purpose and intent of the APRA. The Town attempts to preclude the public's right of access to information in its interest, and attempts to prevent the media from fulfilling their duty to access that information and disseminate it on the public's behalf. The Court of Appeals correctly saw through this flawed argument to what the Town was really attempting to do — preclude disclosure of sensitive documents it wished to remain confidential. The APRA allows for certain documents to be exempt from release to the public; however, these exemptions do not apply here. The Court of Appeals properly found the Settlement Agreement to be a public record under the APRA and to require its disclosure to the public under that law. We urge this Court to deny the Petition to Transfer as it is unnecessary to review the Court of Appeals which has properly interpreted the law. If this Court should see fit to grant the Petition to Transfer, we urge it to adopt the opinion of the Court of Appeals which has properly interpreted and applied the APRA to require disclosure of this Settlement Agreement as a public record.

Respectfully submitted,

Bryan H. Babb
Attorney No. 2153549
Bose McKinney & Evans LLP
2700 First Indiana Plaza
135 N. Pennsylvania St.
Indianapolis, IN 46204
(317) 684-5172

Of counsel *Pro Hac Vice* (pending)
Lucy A. Dalglish
The Reporters Committee for Freedom of the Press
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209
(703) 807-2100

Counsel for *Amici Curiae*

OF COUNSEL:

Michael A. Wilkins
Ice Miller
One American Square
Box 82001
Indianapolis, IN 46282-0200
Counsel for Hoosier State Press Association Foundation

CERTIFICATE OF WORD COUNT

I verify that this brief contains no more than 4,200 words, as relied on by WordPerfect version 10.0, and as set forth by App. R. 44(e).

Lucy A. Dalglish

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following counsel of record, by first-class United States mail, postage prepaid, this 1st day of May, 2006.

Kurt A. Webber
Kurt A. Webber, P.C.
11805 N. Pennsylvania St., Suite 104
Carmel, IN 46032

Steven D. Pearson
Omar S. Odland
Mecker Bulger & Tilson, LLP
123 N. Wacker Dr., Suite 1800
Chicago, IL 60606

David L. Copenhaver
Gregory L. Crider
Joel E. Harvey
Hayes Copenhaver Crider
214 S. Main St.
New Castle, IN 47362

Thomas E. Wheeler, II
Anthony W. Overholt
Maggie L. Smith
Locke Reynolds LLP
201 N. Illinois St., Suite 1000
P.O. Box 44961
Indianapolis, IN 46244-0961

Steven J. Peters
251 E. Ohio St., Suite 1100
Indianapolis, IN 46204

Lucy A. Dalglish