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## NOTES

### **PUBLIC BUSINESS IS THE PUBLIC'S BUSINESS: KOCH'S IMPLICATIONS FOR INDIANA'S ACCESS TO PUBLIC RECORDS ACT**

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#### INTRODUCTION

*“Public business is the public’s business. The people have the right to know. Freedom of information is their just heritage. Without that the citizens of a democracy have but changed their kings.”*

– Harold L. Cross<sup>1</sup>

In 2016, the Indiana Supreme Court faced the question of whether records requested pursuant to the Access to Public Records Act (“APRA”) could be withheld on the basis of the legislative work product exemption in APRA, and the Court held for the first time that APRA applied to the Indiana General Assembly.<sup>2</sup> But the Court declined to review the question of whether the Indiana House Republican Caucus properly denied the requested records out of concern that doing so would violate the distribution of powers provision in the Indiana Constitution.<sup>3</sup> The Court principally relied on two precedent cases involving the Indiana Constitution’s distribution of powers provision, *Masariu v. Marion Superior Court* and *Berry v. Crawford*, to formulate its holding in *Citizens Action Coalition v. Koch*.<sup>4</sup>

Shortly after the Indiana Supreme Court decided *Koch*, the Indiana Court of Appeals heard a case involving nondisclosure of records by the Governor’s

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1. *FOI Quotes*, FREEDOMINFO.ORG, [www.freedominfo.org/resources/freedominfo-org-list-quotes-freedom-information/](http://www.freedominfo.org/resources/freedominfo-org-list-quotes-freedom-information/) [perma.cc/4654-FP5M].

2. *Citizens Action Coal. of Ind. v. Koch*, 51 N.E.3d 236, 243 (Ind. 2016).

3. *Id.* at 242-243.

4. *Id.* at 240.

Office.<sup>5</sup> In response to an APRA request, the Governor's Office redacted invoices from Barnes & Thornburg LLP and refused to disclose a legal memorandum.<sup>6</sup> The Indiana Public Access Counselor determined that the Governor's Office redactions were not a violation of APRA.<sup>7</sup> The requestor filed a suit for judicial review of the denial.<sup>8</sup> In response to the suit, the Governor's Office argued that the request for the redacted and withheld material interfered with core executive functions reserved to the Governor, and thus the court should find the question nonjusticiable.<sup>9</sup> But the Court of Appeals disagreed.<sup>10</sup> The court reasoned that reviewing the refusal of the Governor's Office to release those documents did not challenge a core executive function of the Governor and sustained the Governor's Office's decision to not turn over the legal memorandum.<sup>11</sup> The Court of Appeals held that judicial review would not challenge a core executive function because the attorney-client communications, attorney-client work product, and deliberative material exemptions cited by the Governor's Office in the denial of the request all have definitions in either APRA or Indiana case law, and thus the Court would not have to define those terms on behalf of the executive branch.<sup>12</sup> The *Groth* and *Koch* cases are distinguished by the existence of defined terms or lack thereof in APRA or in Indiana case law.

Part I of this Note provides background on the history of APRA and an overview of its statutory provisions. Part II examines Indiana case law on justiciability and distribution of powers by discussing precedent the Indiana Supreme Court relied upon to decide *Koch*. This Part also includes an overview of the *Koch* decision.

Part III argues that under current law, when the General Assembly denies a records request on the basis of the legislative work product exception, the affected individual is precluded from exercising his or her statutory right to judicial review provided to the individual in APRA. Part III also applies a statutory analysis arguing that the Indiana General Assembly effectively subjected itself to judicial review of denied records requests by adding a provision in APRA for judicial review of denied records requests and not carving out an exception to judicial review of denials made by the General Assembly.

Part IV explores suggestions for how the General Assembly may cure this defect in the interest of public policy, and these suggestions are modeled after how Massachusetts, Delaware, and Connecticut treat the legislative branch in those states' public access laws. These suggestions include the following: exempt the General Assembly from APRA entirely, exempt email communication by General Assembly members and staff from disclosure, or amend APRA to define

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5. *Groth v. Pence*, 67 N.E.3d 1104 (Ind. Ct. App. 2017), *trans. denied*, 2017 Ind. Lexis 320.

6. *Id.* at 1109.

7. *Id.*

8. *Id.* at 1112.

9. *Id.* at 1115.

10. *Id.*

11. *Id.*

12. *Id.* at 1115-16.

legislative work product. Part IV also discusses how *Koch* might have been decided differently with the suggested solutions in place. Finally, Part IV argues that amending APRA to define legislative work product is the solution most consistent with the policy goals of APRA. This Part provides language the General Assembly should use to define legislative work product in APRA.

#### I. HISTORY OF THE ACCESS TO PUBLIC RECORDS ACT

Indiana's APRA provides that "it is the public policy of the state that 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."<sup>13</sup> The Indiana General Assembly passed APRA in 1983 to allow individuals access to public agency records.<sup>14</sup> APRA provides that "[a]ny person may inspect and copy the public records of any public agency during the regular business hours of the agency" unless the desired records fall under a mandatory or discretionary exemption under Indiana Code section 5-14-3-4.<sup>15</sup>

##### *A. Mandatory and Discretionary Exemptions Under APRA*

Not all public records must be disclosed by public agencies.<sup>16</sup> First, disclosure of records deemed confidential by federal<sup>17</sup> or state statute is prohibited.<sup>18</sup> This includes: social security numbers,<sup>19</sup> voting ballots,<sup>20</sup> juvenile law enforcement and court records,<sup>21</sup> educational records pursuant to the Family Educational Rights and Privacy Act,<sup>22</sup> trade secrets,<sup>23</sup> autopsy photos and recordings,<sup>24</sup> records declared confidential by or under rules adopted by the Indiana Supreme Court,<sup>25</sup> and patient medical records.<sup>26</sup>

Second, public agencies may also discretionarily withhold certain records.<sup>27</sup>

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13. IND. CODE § 5-14-3-1 (2018).

14. Office of the Pub. Access Counselor, Handbook on Indiana's Public Access Laws 27 (2017).

15. IND. CODE § 5-14-3-3(a) (2019). APRA defines public agency as, in part, "[a]ny board, commission, department, division, bureau, committee, agency, office, instrumentality, or authority, by whatever name designated, exercising any part of the executive, administrative, judicial, or legislative power of the state." *Id.* § 5-14-3-2(q)(1).

16. *Id.* § 5-14-3-4.

17. *Id.* § 5-14-3-4(a)(3).

18. *Id.* § 5-14-3-4(a)(1).

19. *Id.* § 5-14-3-4(a)(12).

20. *Id.* § 3-10-1-31.1(c).

21. *Id.* § 31-39-3-4(a); § 31-39-2-8(c).

22. 20 U.S.C. § 1232g (2019).

23. IND. CODE § 5-14-3-4(a)(4).

24. *Id.* § 36-2-14-10(b).

25. *Id.* § 5-14-3-4(a)(8).

26. *Id.* § 5-14-3-4(a)(9).

27. *Id.* § 5-14-3-4(b).

This includes: investigatory records of law enforcement agencies and private university police departments;<sup>28</sup> attorney work product;<sup>29</sup> intra- or interagency advisory or deliberative material that are expressions of opinion or speculative and communicated for the purpose of decision making;<sup>30</sup> records prepared for discussion at an executive session of a public agency pursuant to the Open Door Law;<sup>31</sup> gift donor identity;<sup>32</sup> a record that, if disclosed, would have a reasonable likelihood of jeopardizing public safety by exposing a vulnerability to a terrorist attack (like public agency threat assessments and domestic preparedness strategies);<sup>33</sup> municipally owned utility customer contact information;<sup>34</sup> the work product of the Legislative Services Agency (“LSA”);<sup>35</sup> and the work product of individual members and their partisan staff of the Indiana General Assembly.<sup>36</sup> APRA defines some of these terms, including attorney work product<sup>37</sup> and investigatory records.<sup>38</sup> But APRA fails to define legislative work product as it applies to the General Assembly.<sup>39</sup>

*B. Office of the Public Access Counselor and Its Role in Promoting  
the Policy Goals of APRA*

Complaints filed in Indiana courts involving APRA often begin as complaints filed with the Indiana Public Access Counselor.<sup>40</sup> In 1998, then-Governor Frank O’Bannon created the Office of the Public Access Counselor by an executive order.<sup>41</sup> Governor O’Bannon supported freedom of the press and open

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28. *Id.* § 5-14-3-4(b)(1).

29. *Id.* § 5-14-3-4(b)(2).

30. *Id.* § 5-14-3-4(b)(6).

31. *Id.* § 5-14-3-4(b)(12).

32. *Id.* § 5-14-3-4(b)(15).

33. *Id.* § 5-14-3-4(b)(19).

34. *Id.* § 5-14-3-4(b)(20).

35. *Id.* § 5-14-3-4(b)(13).

36. *Id.* § 5-14-3-4(b)(14).

37. *Id.* § 5-14-3-2(u).

38. *Id.* § 5-14-3-2(i).

39. *Id.* § 5-14-3-4(b)(14). Indiana case law does not define legislative work product either. *See generally* Citizens Action Coal. of Ind. v. Koch, 51 N.E.3d 236 (Ind. 2016).

40. *See generally* Koch, 51 N.E.3d at 236; Groth v. Pence, 67 N.E.3d 1104, 1108 (Ind. Ct. App. 2017), *trans. denied*, 2017 Ind. Lexis 320; ESPN, Inc. v. Univ. of Notre Dame Police Dept., 62 N.E.3d 1192 (Ind. 2016); Heber v. Indianapolis Metro. Police Dept., 58 N.E.3d 995 (Ind. Ct. App. 2016); Marion Cty. Election Bd. v. Bowes, 53 N.E.3d 1203 (Ind. Ct. App. 2016); Holleman v. Ind. Dept of Corr., 27 N.E.3d 293 (Ind. Ct. App. 2015); Lane-El v. Spears, 13 N.E.3d 859 (Ind. Ct. App. 2014); Shepherd Props. Co. v. Int’l Union of Painters & Allied Trades, 972 N.E.2d 845 (Ind. 2012). APRA provides for an award of attorney’s fees if the Public Access Counselor issues an informal or formal advisory opinion prior to the filing of the complaint in court, thereby incentivizing such complaints first. *See* IND. CODE § 5-14-3-9(i).

41. *What We Do*, OFFICE IND. PUB. ACCESS COUNSELOR, [www.in.gov/pac/2342.htm](http://www.in.gov/pac/2342.htm) [perma.cc/86SU-F6NK].

government, and he co-sponsored the Indiana Senate bill that created the Access to Public Records Act.<sup>42</sup> He created the office after a coalition of seven newspapers published a series of articles reporting how they encountered obstacles in obtaining information from Indiana government while working on an exposé on open government in Indiana titled “The State of Secrecy: Indiana Flunks the Test on Access.”<sup>43</sup> The editor at the Star-Press of Muncie stated that complaints from members of the public about difficulties they encountered when requesting records inspired the investigation.<sup>44</sup> The newspapers sent reporters across the state to request records, and they did not reveal themselves as reporters in order to determine how a member of the general public might be treated when requesting a public record.<sup>45</sup> They reported that in response to their records requests, agencies lied to them, harassed and repeatedly questioned them, and told them that they needed court orders and subpoenas before the agency would release the records.<sup>46</sup>

The executive order established a task force on public access to conduct public hearings across the state to assess the awareness of public officials on the public access laws, determine how well those public officials follow the public access laws, consider whether the public access laws need updating, and evaluate other substantive or procedural issues with the public access laws.<sup>47</sup> The General Assembly then passed a statute in 1999 to establish the office.<sup>48</sup> The duties of the Public Access Counselor include training public officials and educating members of the public on the public's rights under APRA, as well as issuing advisory opinions interpreting the provisions of APRA after receiving a complaint from an individual denied the right to inspect or copy a public record.<sup>49</sup>

### *C. Judicial Review of Denied Records Requests*

APRA provides a remedy for individuals denied access to public records: if a public agency denies an individual the right to inspect or copy a public record, the individual may file an action to compel production of the requested record.<sup>50</sup> The individual must file the action in the circuit or superior court of the county

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42. H. JOURNAL, 112th Gen. Assemb., 1st Reg. Sess. 1329 (Ind. 2001); *Indiana Governor History: Frank O'Bannon*, IND. ARCHIVES & RECS. ADMIN., [www.in.gov/governorhistory/2333.htm](http://www.in.gov/governorhistory/2333.htm) [perma.cc/8DGQ-QY2D].

43. *What We Do*, *supra* note 41. See also James Derk et al., *The State of Secrecy: Access Effort Finds Records Tough to Obtain*, 86 QUILL 17 (1998).

44. The Associated Press, *Legislators Look at Abuse of Open Records Law*, COURIER & PRESS, June 21, 1998, at A5, 1998 WLNR 8515984.

45. Derk et al., *supra* note 43.

46. Press Release, Brechner Center for Freedom of Information, Indiana Newspapers Win 1999 FOI Award, (Nov. 15, 1999), [www.fs.huntingdon.edu/jlewis/FOIA/Press/BrechnerRptJun04.htm](http://www.fs.huntingdon.edu/jlewis/FOIA/Press/BrechnerRptJun04.htm) [perma.cc/G3WP-MEBA].

47. Ind. Exec. Order No. 98-24, 21 Ind. Reg. 12, 4179 (Sept. 1, 1998).

48. *What We Do*, *supra* note 41.

49. IND. CODE § 5-14-4-10 (2019); *id.* § 5-14-5-9.

50. *Id.* § 5-14-3-9(e).

where the denial occurred.<sup>51</sup> If the issue at hand is whether an agency properly exercised its discretion to withhold a record, APRA places the burden on the public agency to demonstrate that the withheld record falls within the one of the discretionary exceptions under Indiana Code section 5-14-3-4(b).<sup>52</sup> The individual also has the burden of showing that the public agency's decision to exercise discretion was arbitrary and capricious.<sup>53</sup> An agency's decision to withhold a record pursuant to one of the APRA discretionary exemptions is arbitrary or capricious "only where it is willful and unreasonable, without consideration and in disregard of the facts or circumstances in the case, or without some basis which would lead a reasonable and honest person to the same conclusion."<sup>54</sup> Attorney's fees, court costs, and other reasonable expenses may be granted if the plaintiff first received an informal response or an advisory opinion from the Public Access Counselor prior to filing the action.<sup>55</sup> Individuals denied the right to inspect or copy records may file a complaint with the Office of the Public Access Counselor within thirty days of the denial in order to receive an advisory opinion from the Counselor.<sup>56</sup>

## II. DISTRIBUTION OF POWERS: PRECEDENTIAL CASES LEADING TO *KOCH*

Article 3, section 1 of the Indiana Constitution details the distribution of powers doctrine for the State:

The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial; and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.<sup>57</sup>

### A. Roeschlein *Justiciability Test*

The Indiana Supreme Court established a test for justiciability in *Roeschlein v. Thomas*.<sup>58</sup> This case involved a challenge to a constitutional amendment to the judicial article in the Indiana Constitution, enacted by a popular referendum that changed the method of selecting judges in the Court of Appeals and Supreme Court from a popular, partisan election system to an appointment process by the

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51. *Id.*

52. *Id.* § 5-14-3-9(g)(1)(A)(i).

53. *Id.* § 5-14-3-9(g)(2). In Indiana, arbitrary and capricious is narrowly construed and "the reviewing court may not substitute its judgment for the judgment of the [public agency]." *IHSAA v. Carlberg*, 694 N.E.2d 222, 233 (Ind. 1997).

54. *IHSAA*, 694 N.E.2d at 233 (citing *Dep't of Nat. Res. v. Ind. Coal Council, Inc.*, 542 N.E.2d 1000, 1007 (Ind. 1989)).

55. IND. CODE § 5-14-3-9(i).

56. *Id.* §§ 5-14-5-6 to -7.

57. IND. CONST. art. 3, § 1.

58. *Roeschlein v. Thomas*, 280 N.E.2d 581, 591 (Ind. 1972).

Governor.<sup>59</sup> The Court declined to review the journals of the General Assembly to determine if the House or Senate properly followed the constitutional directives found in Article 16, Section 1 of the Indiana Constitution (which governs the process of proposing amendments to the Indiana Constitution) and stated it would rely on the authentication of the process provided by the presiding officers of the House and Senate.<sup>60</sup> The Court said reviewing the journals to determine if the General Assembly properly followed legislative procedure would interfere with an exclusively legislative function.<sup>61</sup>

The *Roeschlein* test states: “legislative actions are non-justiciable if they are taken ‘pursuant to specific constitutional authority and not contrary thereto.’”<sup>62</sup> The Court emphasized that in Indiana, courts will not intervene in the internal matters of the executive or legislative branch when it would upset the balance of the distribution of powers.<sup>63</sup> Thus, a court that has jurisdiction to hear a case may choose to decline the case for prudential reasons.<sup>64</sup>

#### B. Masariu v. Marion Superior Court

*Masariu v. Marion Superior Court* involved votes on controversial amendments to the Indiana state budget by the Indiana House of Representatives.<sup>65</sup> When the members of the House cast their votes on the amendments, the votes quickly flashed across a screen in the House Chamber, but that did not afford the reporters observing the vote enough time to record how representatives voted.<sup>66</sup> Reporters from the Indianapolis Star requested a record of the roll call votes, but the Clerk of the Indiana House of Representatives (“Clerk”) denied the request with no explanation.<sup>67</sup> The Indianapolis Star sued, arguing that the records of the vote were public and therefore subject to APRA.<sup>68</sup> The Indianapolis Star sought declarative relief and attorney’s fees.<sup>69</sup>

In response, the Clerk of the Indiana House of Representatives sought a writ of prohibition to stop the Indianapolis Star’s action.<sup>70</sup> The Indiana Supreme Court may issue a writ of prohibition to “an inferior court to restrain and confine the inferior court to the inferior court’s lawful jurisdiction.”<sup>71</sup> The Indiana Supreme

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59. *Id.* at 584.

60. *Id.* at 589-90.

61. *Id.*

62. *Berry v. Crawford*, 990 N.E.2d 410, 423 (Ind. 2013) (Rush, J., concurring in part and dissenting in part) (citing *Roeschlein*, 280 N.E.2d at 589) (internal emphasis omitted).

63. *Berry*, 990 N.E.2d at 418.

64. *Id.*

65. Laura Schenck, *Freedom of Information Statutes: The Unfulfilled Legacy*, 48 FED. COMM. L.J. 371, 373 (1996).

66. *Id.*

67. *Id.*

68. *Id.* See also *Masariu v. Marion Superior Court No. 1*, 621 N.E.2d 1097, 1098 (Ind. 1993).

69. *Masariu*, 621 N.E.2d at 1098.

70. *Id.*

71. IND. CODE § 34-27-1-3 (2019).

Court held that to the extent that APRA and the Open Door Law empower the judicial branch to examine and interfere with the internal operations of the Indiana House of Representatives, the application requested in the action violated the distribution of powers clause of the Indiana constitution.<sup>72</sup> The Court also reasoned that it had held repeatedly that “courts should not intermeddle with the internal functions of either the Executive or Legislative branches of Government.”<sup>73</sup>

Chief Justice Randall T. Shepard dissented in *Masariu*, stating that the action before the Court presented “several issues of considerable importance about the operation of Indiana government,” including how residents may learn how their representatives voted on amendments to the State’s budget, whether representatives’ votes on budget amendments should be recorded, and whether the distribution of powers provision in the Indiana Constitution prevented the judiciary from taking notice of APRA issues with the General Assembly.<sup>74</sup> Chief Justice Shepard further stated that he did not agree that such issues “are so simple that they should be resolved in a few paragraphs through the supervisory procedure of a writ of prohibition” and that he would have allowed the matter to proceed through litigation.<sup>75</sup>

### C. Berry v. Crawford

In *Berry v. Crawford*, the Indiana Supreme Court added an additional factor to the justiciability test from *Roeschlein*: Whether the legislature was exercising a “core legislative function.”<sup>76</sup>

In 2011, the majority of Indiana House Democrats temporarily moved to Illinois to prevent a quorum and avoid voting on a right-to-work bill that allowed private employees to opt out of joining a union and paying mandatory union dues.<sup>77</sup> The House Republican Caucus moved to fine the absent representatives, and the Speaker of the House directed the clerk to have the Auditor of State withhold the fines from the legislators’ paychecks.<sup>78</sup> The affected representatives sued to recover the withheld salary and sought to enjoin future actions to recover the fines.<sup>79</sup> The Marion County Superior Court found that even though separation of powers concerns rendered it prudent to refuse to address the method of compelling attendance of members of the House Representatives, this did not preclude the trial court “from otherwise interpreting and enforcing applicable

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72. *Masariu*, 621 N.E.2d at 1098.

73. *Id.*

74. *Id.* (Shepard, J., dissenting).

75. *Id.* at 1098-1099.

76. *Berry v. Crawford*, 990 N.E.2d 410, 417 (Ind. 2013) (citing *Comm. on Ethics v. Hardy*, 212 P.3d 1098 (Nev. 2009) and *Brady v. Dean*, 790 A.2d 428 (Vt. 2001)).

77. *Berry*, 990 N.E.2d at 413; Abby Sewell & Michael Muskal, *Indiana Democrats Flee to Illinois in Protest of Union Legislation*, L.A. TIMES (Feb. 23, 2011), [www.articles.latimes.com/2011/feb/23/news/la-pn-0223-indiana-democrats-flee-20110224](http://www.articles.latimes.com/2011/feb/23/news/la-pn-0223-indiana-democrats-flee-20110224) [perma.cc/TM3A-8CZJ].

78. *Berry*, 990 N.E.2d at 413.

79. *Id.*



Indiana statutes” and could thus decide “plaintiffs’ Indiana wage claims and Indiana constitutional claims relating to the collection of the fines.”<sup>80</sup>

Upon appeal, the Indiana Supreme Court disagreed, holding that applying the Indiana Wage Payment Statutes to the Indiana House of Representatives would “undermine the constitutional authority of the House over the imposition and enforcement of legislative discipline and vest it in the courts, in contradiction of the separation of powers doctrine” because a statute cannot limit the House’s authority when there is no constitutional limitation on the authority to compel attendance.<sup>81</sup> The Court emphasized that the distribution of powers doctrine in the Indiana Constitution aims to prevent the separate branches of government from influencing or controlling each other.<sup>82</sup> The Court asserted that by applying the Wage Payment Statutes to the House through judicial action, the Court would undermine the House’s constitutional authority to compel attendance and impose discipline on representatives—both related to the core legislative function of conducting the regular business of the House.<sup>83</sup>

Justice Rucker dissented, arguing that Article 4, section 29 of the Indiana Constitution expressly limited the General Assembly’s constitutional right to compel attendance.<sup>84</sup> Article 4, Section 29 of the Indiana Constitution provides that legislative compensation “shall . . . be fixed by law.”<sup>85</sup> This expressly limits the General Assembly’s method of collecting fines for absence by withholding the fine amount from the absentee legislators’ paychecks.<sup>86</sup> Justice Rucker argued that the question was not whether the General Assembly could impose fines for absence, but rather whether the General Assembly could collect fines in the manner that it did.<sup>87</sup> Because of the constitutional limitation on the General Assembly’s method of determining compensation, Justice Rucker asserted that the question of whether the General Assembly violated the Indiana Wage Payment Statute was justiciable.<sup>88</sup>

Justice Rucker also took issue with the majority opinion discussion of prudential concerns and justiciability, arguing that the Supreme Court had previously stated that “[w]hile this Court respects the separation of powers, we do not permit excessive formalism to prevent necessary judicial involvement.

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80. *Id.* at 414.

81. *Id.* at 420. The Supreme Court granted a petition to transfer pursuant to Indiana Rule of Appellate Procedure 56(A), which allows for bypassing the Court of Appeals even though the appeal would otherwise be within the jurisdiction of the Court of Appeals “upon a showing that the appeal involves a substantial question of law of great public importance and that an emergency exists requiring a speedy determination.” *Id.* at 410; IND. R. APP. P. 56(A).

82. *Berry*, 990 N.E.2d at 415.

83. *Id.* at 420.

84. *Id.* at 424 (Rucker, J., dissenting).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

Where an actual controversy exists we will not shirk our duty to resolve it.”<sup>89</sup>

Justice Rush’s opinion, concurring in part and dissenting in part, agreed that the Supreme Court majority used the proper justiciability test, but joined Justice Rucker’s dissent in every other respect.<sup>90</sup> Namely, Justice Rush agreed that the case was not about whether the House could impose the fines but if the House could collect the fines in the manner it did.<sup>91</sup> Thus Justice Rush concurred that Article 4, Section 29 of the Indiana Constitution expressly limited the House’s options for collecting the fines and would have discussed the Wage Payment Statute on the merits.<sup>92</sup>

#### D. Citizens Action Coalition v. Koch

In January 2015, the Energy and Policy Institute (the “Institute”) submitted a records request under APRA to Representative Eric Koch requesting copies of correspondence between Representative Koch and his staff as well as Duke Energy and Indianapolis Power and Light regarding H.B. 1320.<sup>93</sup> Koch represented Indiana House of Representatives District 65 and served as the Chair of the House Utilities, Energy and Telecommunications Committee.<sup>94</sup> Koch also sponsored H.B. 1320, a bill that would have reduced the amount paid by utility companies when purchasing excess energy from home systems.<sup>95</sup> The Citizens Action Coalition, Common Cause of Indiana, and the Institute all requested emails, texts and any other correspondence with utility companies believing that the correspondence would reveal that the utility industry improperly influenced legislation involving home use of solar energy.<sup>96</sup> The Institute’s request specified that the correspondence requested should include “emails, all draft records, notes, minutes, scheduling records, text messages, other correspondence and all other records” between September 1, 2014, and January 15, 2015.<sup>97</sup>

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89. *Id.* at 423 (quoting *Boehm v. Town of St. John*, 675 N.E.2d 318, 322 (Ind. 1996) (alteration in original)).

90. *Id.* at 422 (Rush, J., concurring in part and dissenting in part).

91. *Id.*

92. *Id.*

93. 15-FC-69 Op. Ind. Pub. Access Counselor (2015), [www.in.gov/pac/advisory/files/15-FC-69.pdf](http://www.in.gov/pac/advisory/files/15-FC-69.pdf) [perma.cc/4PMQ-ENWD].

94. John Russell, *Groups Sue House GOP Over Solar Bill Secrecy*, INDIANAPOLIS STAR (Apr. 15, 2015), [www.indystar.com/story/news/2015/04/15/groups-sue-house-gop-solar-bill-secrecy/25824291/](http://www.indystar.com/story/news/2015/04/15/groups-sue-house-gop-solar-bill-secrecy/25824291/) [perma.cc/4D74-3R6W]; *Rep. Eric Koch Seeking the District 44 Seat Held by Retiring Sen. Brent Steele*, WBIW (Dec. 18, 2015), [www.wbiw.com/local/archive/2015/12/rep-eric-koch-seeking-the-district-44-seat-held-by-retiring-sen-brent-steele.php](http://www.wbiw.com/local/archive/2015/12/rep-eric-koch-seeking-the-district-44-seat-held-by-retiring-sen-brent-steele.php) [perma.cc/ASE7-XMSK]. Eric Koch is now an Indiana State Senator for District 44. *Eric Koch*, IND. SENATE REPUBLICANS, [www.indianasenaterpublicans.com/koch](http://www.indianasenaterpublicans.com/koch) [perma.cc/E4ND-BLUR].

95. Russell, *supra* note 94.

96. *Indiana House Republicans Sued Over Public Records Access*, WFYI (July 20, 2015), [www.wfyi.org/news/articles/indiana-house-republicans-sued-over-public-records-access](http://www.wfyi.org/news/articles/indiana-house-republicans-sued-over-public-records-access) [perma.cc/3J33-WC99].

97. 15-FC-69 Op. Ind. Pub. Access Counselor, *supra* note 93.

On January 20, 2015, Jill S. Carnell, Chief Counsel for the Indiana Republican Caucus, denied the Institute's request based on "House tradition" that treats "all correspondence as confidential."<sup>98</sup> The denial further asserted that the holding in *Masariu v. The Marion Superior Court No. 1* exempted the Indiana General Assembly from APRA.<sup>99</sup> In *Masariu*, the Indiana Supreme Court held that allowing litigation to proceed against the clerk of the Indiana House of Representatives for refusing to produce voting records of representative would be an unconstitutional judicial interference with the internal operations of the legislative branch.<sup>100</sup> The Institute submitted the request a second time, and the Chief Counsel for the Indiana Republican Caucus again denied the request on February 9, 2015, asserting that traditionally, the House treats all correspondence with representatives as confidential and that *Masariu* exempted the House from APRA.<sup>101</sup>

Following these denials, Attorney William Groth on behalf of the Institute filed a formal complaint with the Indiana Public Access Counselor, Luke Britt, alleging that Representative Koch and the Indiana House Republican Caucus violated APRA by denying the records requests.<sup>102</sup> The Public Access Counselor concluded in an advisory opinion that APRA applies to the Indiana General Assembly.<sup>103</sup> The Public Access Counselor also noted that APRA does not contain an exception protecting legislator-constituent privilege.<sup>104</sup> But the Public Access Counselor also concluded that the legislative work product exception would apply to most of what the Institute requested.<sup>105</sup> The Institute submitted a third request, which the Chief Counsel of the Indiana Republican Caucus denied, claiming the legislative work product exemption applied to the requested records.<sup>106</sup> The Chief Counsel of the Indiana Republican Caucus also claimed again that APRA did not apply to the Indiana General Assembly, contradicting the Opinion of the Public Access Counselor.<sup>107</sup>

The Institute, along with the Citizens Action Coalition of Indiana and Common Cause of Indiana, filed for a declaratory judgment requesting that the trial court rule that APRA was applicable to Representative Koch and the Caucus, and that they violated APRA by denying some or all of Plaintiffs' requests.<sup>108</sup> The Defendants filed the motion to dismiss relying on two separate theories: (1) lack

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98. Citizens Action Coal. of Ind. v. Koch, 51 N.E.3d 236, 239 (Ind. 2016).

99. *Id.* at 240.

100. *Masariu v. Marion Superior Court No. 1*, 621 N.E.2d 1097, 1098 (Ind. 1993).

101. *Koch*, 51 N.E.3d at 239.

102. *Id.*; 15-FC-69 Op. Ind. Pub. Access Counselor, *supra* note 93.

103. *Koch*, 51 N.E.3d at 239; 15-FC-69 Op. Ind. Pub. Access Counselor, *supra* note 93; 15-FC-107 Op. Ind. Pub. Access Counselor (2015), [www.in.gov/pac/advisory/files/15-FC-107.pdf](http://www.in.gov/pac/advisory/files/15-FC-107.pdf) [perma.cc/RMQ7-ZDAB].

104. 15-FC-107 Op. Ind. Pub. Access Counselor, *supra* note 103.

105. *Koch*, 51 N.E.3d at 239.

106. *Id.*; 15-FC-69 Op. Ind. Pub. Access Counselor, *supra* note 93.

107. *Koch*, 51 N.E.3d at 239; 15-FC-107 Op. Ind. Pub. Access Counselor, *supra* note 103.

108. *Koch*, 51 N.E.3d at 239.

of justiciability because the Plaintiff's requests interfered with the internal operations of the Indiana House of Representatives and (2) failure to state a claim upon which relief could be granted because two of the Plaintiffs lacked standing, Representative Koch and the Republican Caucus were not public agencies as contemplated by APRA, and because the Caucus should not be a party because the Institute requested records from Representative Koch.<sup>109</sup> The trial court granted the motion on the first theory of non-justiciability.<sup>110</sup>

After the trial court granted Defendants Representative Koch and the Indiana House Republican Caucus's motion to dismiss, Plaintiffs Citizens Action Coalition of Indiana, the Institute, and Common Cause of Indiana, successfully petitioned for transfer to the Indiana Supreme Court.<sup>111</sup> The Court held that APRA applies to the Indiana General Assembly.<sup>112</sup> Two principles guided the Indiana Supreme Court's conclusion that APRA applies to the Indiana General Assembly.<sup>113</sup> First, the General Assembly had the authority to create its rules of proceedings, but the General Assembly did not exercise this authority by excluding itself, by either statute or rule, from the purview of APRA.<sup>114</sup> Secondly, the Supreme Court noted that the General Assembly's creation of an explicit exemption in APRA for the work product of representatives and partisan staff of the General Assembly clearly contemplated that APRA applies to the General Assembly.<sup>115</sup>

But, the Court refused to determine whether the General Assembly properly withheld the requested records pursuant to APRA, holding that "determining whether the documents requested by Plaintiffs are exempt under APRA as legislative work product presents a non-justiciable question."<sup>116</sup> The Court stated that it affirmed the trial court's motion to dismiss for lack of justiciability under Indiana Trial Rule 12(B)(6), failure to state a claim upon which relief may be granted.<sup>117</sup> The Court found the question to be nonjusticiable because defining legislative work product is a core legislative function, and "only the General Assembly can properly define what work product may be produced while engaging in its constitutionally provided duties."<sup>118</sup> The Court further stated that APRA expressly reserves discretion to the General Assembly regarding whether to disclose its work product.<sup>119</sup> The Court said that it was disinclined to make a determination that could interfere with the General Assembly's exercise of

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109. *Id.* at 239-40.

110. *Id.* at 240.

111. *Id.*

112. *Id.* at 242.

113. *Id.* at 241-42.

114. *Id.*

115. *Id.* at 242.

116. *Id.* at 243.

117. *Id.*

118. *Id.* at 242.

119. *Id.*

discretion.<sup>120</sup>

Justice Rucker concurred that the Access to Public Records Act applies to the General Assembly.<sup>121</sup> He dissented, however, because the trial court dismissed the claim for failure to state a claim for which relief may be granted, and a review of a claim for this reason may not be dismissed unless “it appears to a certainty on the face of the complaint that the complaining party is not entitled to any relief.”<sup>122</sup> The question revolves around legal sufficiency—do the allegations establish any scenario where a plaintiff would be entitled to relief?<sup>123</sup> Justice Rucker asserted that it is a glaring problem that the parties did not address the merits of the legislative work product exemption.<sup>124</sup> He further stated that the Defendants did not assert a work product exemption in responding to the Plaintiff’s complaint, and therefore the majority’s ruling is premature and “weighs in on a significant separation of powers issue without an adequate record.”<sup>125</sup>

### III. THE DEFINING DIFFERENCE OF *GROTH* AND THE STATUTORY RIGHT TO JUDICIAL REVIEW

#### A. *Groth v. Pence*

In 2017, the Indiana Court of Appeals faced a similar challenge to a public records request, this time denied in part by the Office of the Governor.<sup>126</sup> William Groth, a private citizen,<sup>127</sup> requested records related to Governor Mike Pence’s decision to join a lawsuit in Texas against then-President Barack Obama that challenged presidential executive orders regarding immigration.<sup>128</sup> The Governor’s Office produced records responsive to the request, but redacted some invoices from Barnes & Thornburg LLP and withheld a legal memorandum.<sup>129</sup> Groth filed a complaint with the Indiana Public Access Counselor, who advised that the redacted records did not facially appear to be over-redacted.<sup>130</sup> He also advised that the redacted materials may contain attorney work product as well as deliberative materials between inter-agency personnel and a contractor.<sup>131</sup> The

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120. *Id.* at 242-43.

121. *Id.* (Rucker, J., concurring in part and dissenting in part).

122. *Id.*

123. *Id.* at 245.

124. *Id.*

125. *Id.*

126. *Groth v. Pence*, 67 N.E.3d 1104, 1108-09 (Ind. Ct. App. 2017), *trans. denied*, 2017 Ind. Lexis 320.

127. *Id.* The Court of Appeals describes William Groth as a private citizen, but it is worth noting that William Groth was also one of the attorneys representing the Energy and Policy Institute in *Koch*. See *Koch*, 51 N.E.3d at 237.

128. *Groth*, 67 N.E.3d at 1108.

129. *Id.* at 1110.

130. *Id.* at 1111-12.

131. *Id.*

Governor's Office argued that Groth's request interfered with core executive functions reserved to the Governor and therefore "[t]he question of whether Groth's specific APRA requests at issue are exempt from disclosure" was not justiciable.<sup>132</sup>

Distinguishing this case from *Koch*, the Indiana Court of Appeals reasoned that judicial review of the denied request for the legal memorandum did not challenge a core executive function of the Governor or his constitutional authority as the chief executive that would allow him, for example, to decide if Indiana should join Texas and other states as plaintiff in a federal suit.<sup>133</sup> The Court of Appeals further noted that the Governor's Office did not assert a particular statutory exemption from APRA that would implicate the separation of powers doctrine, but merely claimed executive privilege from APRA, which the Court of Appeals rejected.<sup>134</sup>

Finally, the Court of Appeals mentioned that *Koch* presented novel legal questions in the application of the legislative work product exception.<sup>135</sup> The Court distinguished the question in *Groth* as a relatively straightforward legal question, as the exemptions cited in the denial of the request related to privileged attorney-client communications, attorney-client work product, and deliberative material.<sup>136</sup> Attorney-client communication, attorney-client work product, and deliberative materials all have established definitions in either Indiana case law or APRA, and the Court held that applying these exceptions to an APRA request would not interfere with a core executive function because the Court would not have to define these terms on behalf of an executive agency.<sup>137</sup> Therefore, the distinguishing factor between *Koch* and *Groth* was the existence of definitions, either in statute or derived from case law, for the basis of the APRA exceptions for attorney-client work product, attorney-client communication, and deliberative materials.<sup>138</sup>

#### *B. The Indiana General Assembly Effectively Agreed to Judicial Review*

The plain meaning of the APRA statutes indicate that the legislative branch is subject to judicial review when exercising its discretion to withhold legislative work product.<sup>139</sup> When evaluating a statute, it is equally important to take note of what a statute does not say as well as what it does say.<sup>140</sup> APRA provides that "[a]ny person may inspect and copy the public records of any public agency

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132. *Id.* at 1115.

133. *Id.*

134. *Id.*

135. *Id.* at 1115-16.

136. *Id.* at 1116.

137. *Id.*

138. *Id.*

139. *See generally* Schenck, *supra* note 65, at 379.

140. *Van Orman v. State*, 416 N.E.2d 1301, 1305 (Ind. Ct. App. 1981) (citing *State ex rel. Schuerman v. Ripley Cty. Council*, 395 N.E.2d 867, 870 (Ind. Ct. App. 1979)); Schenck, *supra* note 65, at 379.

during the regular business hours of the agency” unless the desired records fall under a discretionary or mandatory exemption under Indiana Code section 5-14-3-4.<sup>141</sup> Indiana Code section 5-14-3-2(q)(1) defines public agency as “[a]ny board, commission, department, division, bureau, committee, agency, office, instrumentality, or authority, by whatever name designated, exercising any part of the executive, administrative, judicial, or *legislative* power of the state.”<sup>142</sup> The Indiana Supreme Court has held that APRA applies to the General Assembly. The Supreme Court based that decision on the fact that the General Assembly had not excluded itself from APRA, and the presence of the legislative work product exception contemplated that the General Assembly intended for APRA to apply to itself.<sup>143</sup> Applying that reasoning tends to illustrate that the General Assembly also intended for the judicial review provision of APRA to apply to the General Assembly as well.

Title 2 of the Indiana Code contains one reference to the legislative work product exemption: a legislative work product definition regarding electronic maps.<sup>144</sup> This provision states that electronic Geographic Information System (“GIS”) maps produced using data gathered by the Legislative Services Agency (“LSA”) and developed using proprietary software licensed to the LSA constitute legislative work product.<sup>145</sup> It also provides an option for the public to request paper copies of a map that is printable.<sup>146</sup> The Indiana House of Representatives notably used the holding in *Masariu* to justify withholding records, arguing that the holding exempted the General Assembly from APRA.<sup>147</sup> By amending the Indiana Code to explicitly provide for one definition of legislative work product, it stands to reason that the General Assembly acquiesced to judicial interpretation of the legislative work product exemption for all other assertions of the exception.

#### IV. IMPLICATIONS OF *KOCH* ON APRA AND POSSIBLE MITIGATING SOLUTIONS

The *Koch* decision implicated the judicial review provision of APRA by precluding an individual’s statutorily provided right to judicial review of requests denied by the General Assembly on the basis of the legislative work product exemption.<sup>148</sup> The *Koch* decision has also implicated the Public Access Counselor’s role in providing guidance on possible APRA violations involving legislative work product due to concern over violating the separation of powers provision of the Indiana Constitution.<sup>149</sup> Defining legislative work product in the Indiana Code is the preferred solution for mitigating the implications of *Koch*, as

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141. IND. CODE § 5-14-3-3 (2019).

142. *Id.* § 5-14-3-2(q)(1) (emphasis added).

143. *See generally* Citizens Action Coal. of Ind. v. Koch, 51 N.E.3d 236 (Ind. 2016).

144. IND. CODE § 2-5-1.1-7.5 (2019).

145. *Id.* § 2-5-1.1-7.5(a).

146. *Id.* § 2-5-1.1-7.5(b).

147. *See Koch*, 51 N.E.3d at 240.

148. *See generally id.* at 238.

149. *See* 17-FC-242 (Consolidated) Op. Ind. Pub. Access Counselor (2017), [www.in.gov/pac/advisory/files/17-FC-242\(consolidated\).pdf](http://www.in.gov/pac/advisory/files/17-FC-242(consolidated).pdf) [perma.cc/L72N-SMJF].

it would allow for judicial review of requests denied on that basis. However, two other alternative solutions are provided as options the Indiana General Assembly could explore.

*A. Implications of the Koch Decision on APRA*

*Koch* effectively denied the public an adequate remedy at law for APRA requests denied on the basis of the legislative work product exemption. When the General Assembly exercises its discretion to withhold records as legislative work product, the affected individual will not be able to exercise the statutorily created right to judicial review provided for in APRA, as under current law, a court will grant any motion requesting the court dismiss the complaint for a lack of justiciability.<sup>150</sup>

The Office of the Public Access Counselor received a complaint against both the Indiana House of Representatives and the Indiana Senate approximately 18 months after the *Koch* decision.<sup>151</sup> The individual had requested correspondence between numerous Representatives and Senators regarding himself, his wife, his home address, or his limousine company.<sup>152</sup> The Senate denied his request, stating the reasons for denial as Indiana Supreme Court precedent, the legislative work product exemption, and Senate procedural rules and tradition.<sup>153</sup> This denial is troubling for two reasons—first, the Senate used the holding in *Koch* as a legal basis for denying a records request, effectively asserting that the holding of *Koch* exempted the General Assembly from APRA; and secondly, the Senate references its internal procedural rules as a basis for denial, but the publicly available standing rules for the Senate do not include any reference to disclosing records, and the Public Access Counselor noted that he had not received any information about this procedural rule during the complaint procedure.<sup>154</sup> APRA charges public agencies involved in the formal complaint process to cooperate with the Counselor in formulating an advisory opinion,<sup>155</sup> but the Senate did not provide the Counselor with the procedural rule on which the Senate based the denial.<sup>156</sup>

Furthermore, the Public Access Counselor stated that the legislative work product exemption permitted the denial of the request.<sup>157</sup> But the Counselor declined to discuss the question of whether the Senate properly exercised this exemption further because the Office of the Public Counselor is an executive agency.<sup>158</sup> Because the holding in *Koch* stated that defining legislative work product is a core legislative function, the Counselor said that his office would not interfere out of concern for the distribution of powers provision in the Indiana

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150. *See generally Koch*, 51 N.E.3d at 241.

151. 17-FC-242 (Consolidated) Op. Ind. Pub. Access Counselor, *supra* note 149.

152. *Id.*

153. *Id.*

154. *Id.*

155. IND. CODE § 5-14-5-5 (2019).

156. 17-FC-242 (Consolidated) Op. Ind. Pub. Access Counselor, *supra* note 149.

157. *Id.*

158. *Id.*



Constitution.<sup>159</sup>

*B. The Need for a Statutory Definition of Legislative Work Product*

APRA applies to the Indiana General Assembly, meaning that the Indiana House of Representatives and the Indiana Senate must release records that APRA deems disclosable upon request, unless a mandatory or discretionary exemption applies.<sup>160</sup> As it stands, due to the precedent set by *Koch*, Indiana courts cannot review challenges to records requests denied by the Indiana General Assembly on the basis of the legislative work product exemption, because the Indiana Supreme Court held that to do so would violate the distribution of powers provision of the Indiana Constitution.<sup>161</sup> But if APRA had contained a definition for legislative work product, the Indiana Supreme Court could have evaluated whether or not Representative Koch properly exercised discretion to withhold the requested records.<sup>162</sup>

Currently, not the general public, public agency employees, the media, or possibly even General Assembly staff themselves know what constitutes legislative work product under APRA. APRA fails to define it; the Indiana Supreme Court declined to define it; the Joint House and Senate Rules for the 2017 session did not include any reference to what might be considered work product; the House Standing Rules for the 2017 session did not include any reference to what might be considered work product; and the Senate Standing Rules for the 2017 session did not include any reference to what might be considered work product.<sup>163</sup>

*C. Possible Solutions Mitigating the Implications of Koch on APRA*

The Indiana General Assembly should introduce a bill amending APRA to define legislative work product as it applies to the legislative branch. Then the public is, at the very least, on notice of what the General Assembly considers legislative work product. Furthermore, amending APRA to define legislative work product furthers the policy goals stated in APRA and is consistent with legislative history surrounding APRA. If the General Assembly will not amend APRA to define legislative work product, the General Assembly should, at a minimum, define legislative work product in the House and Senate Standing Rules. The General Assembly could alternatively exempt email correspondence from disclosure, or it could exempt the legislative branch from APRA entirely.

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159. *Id.*

160. IND. CODE § 5-14-3-2(q) (2019).

161. *See generally* Citizens Action Coal. of Ind. v. Koch, 51 N.E.3d 236, 242 (Ind. 2016).

162. *Id.* *See generally* Groth v. Pence, 67 N.E.3d 1104 (Ind. Ct. App. 2017), *trans. denied*, 2017 Ind. Lexis 320.

163. *See* IND. CODE § 5-14-3-4(b)(13-14); *Koch*, 51 N.E.3d at 242; Joint Rules for Conducting Business in the Two Houses of the General Assembly of the State of Indiana, 120th Gen. Assemb. (2017); Rules of the House of Representatives, 120th Gen. Assemb. (Ind. 2017); Standing Rules and Orders of the Senate, 120th Gen. Assemb. (Ind. 2017).

1. *Exempting the General Assembly from APRA Entirely.*—Indiana could exempt the legislative branch from APRA entirely. Indiana would not be alone in carving out an exception to APRA for the legislative branch: The Massachusetts Supreme Court has determined that its public records law does not apply to the Massachusetts legislature because the legislature is not an entity enumerated in the public records statute and is not an “agency, executive office, department, board, commission, bureau, division or authority” within the meaning of the statute.<sup>164</sup> The Georgia Supreme Court has also determined that Georgia’s public records law does not apply to its legislative branch.<sup>165</sup>

Exempting the legislative branch from APRA could save taxpayers money. Litigation is expensive—in *Koch*, the Speaker of the House Brian Bosma elected to hire attorneys from private law firm Taft Stettinius and Hollister rather than using the Indiana Office of the Attorney General, and before oral argument at the Indiana Supreme Court, the cost to the Indiana House of Representatives had risen to \$160,000.<sup>166</sup> Completely exempting the Indiana General Assembly and LSA from APRA might save Indiana taxpayers money in the long run. It would put the public on notice that no right to request records from the General Assembly exists. Finally, a law exempting the Indiana General Assembly and the LSA would also mitigate *Koch’s* effect of precluding an individual’s statutory right to judicial review of a records request denied by the any part of the legislative branch because it would eliminate any right to judicial review of those denied records requests. Had the Indiana General Assembly been exempt from APRA at the beginning of the *Koch* case, the case would have probably been dismissed at the trial court for failure to state a claim on which relief could be granted.<sup>167</sup>

Should the Indiana General Assembly decide to exempt the legislative branch from APRA, it would not be the first time the General Assembly did so.<sup>168</sup> In 2001, Representative Cheney of the Indiana House of Representatives introduced a bill to amend the Open Door Law to exempt school boards engaged in collective bargaining from public meetings.<sup>169</sup> Another Representative moved to

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164. *Westinghouse Broad. Co. v. Sergeant-At-Arms of Gen. Court*, 375 N.E.2d 1205, 1208 (Mass. 1978) (citing MASS. GEN. LAWS ch. 4, § 7 (1978)). There has been some push from the public to apply Massachusetts’s public records law to the legislature, and the legislature created a commission to examine the matter. Isaiah Thompson, *Door is Cracked Open, A Little, On State Public Records Laws*, WGBH NEWS (May 3, 2018), <https://www.wgbh.org/news/local-news/2018/05/03/door-is-cracked-open-a-little-on-state-public-records-laws> [perma.cc/R87D-NZL7].

165. *Coggin v. Davey*, 211 S.E.2d 708, 711 (Ga. 1975).

166. *Cost to Keep Indiana Legislators’ Emails from Public: \$160,000 and Counting*, SOUTH BEND TRIB. (Apr. 5, 2016), [www.southbendtribune.com/news/politics/cost-to-keep-indiana-legislators-emails-from-public-and-counting/article\\_5c612466-fb75-11e5-a493-bb5bf0751d91.html](http://www.southbendtribune.com/news/politics/cost-to-keep-indiana-legislators-emails-from-public-and-counting/article_5c612466-fb75-11e5-a493-bb5bf0751d91.html) [perma.cc/8TB3-8KGX].

167. *See generally* IND. R. TRIAL P. 12(B)(6).

168. S. JOURNAL, 112th Gen. Assemb., Reg. Sess. 577 (Ind. 2001).

169. H.R. 1083, 112th Gen. Assemb., Reg. Sess. (Ind. 2001).

amend the bill to revise APRA by adding a mandatory nondisclosure exception: emails sent or received by an employee of a public agency and records revealing the Internet use by employees of a public agency.<sup>170</sup> The bill as amended passed the House by a vote of 93 to 1.<sup>171</sup> The Senate received the bill, sent the bill to the Governmental and Regulatory Affairs Committee, and then the Senate amended the bill to remove the House's prohibition on disclosure of any email communication of public employees, added to the policy section of APRA a duty to balance the constitutional rights of citizens to contact their representatives and request redress of grievances from the General Assembly, and enshrined in the policy a right of privacy in the public's communications with members of the General Assembly.<sup>172</sup> The Senate also added language that described what correspondence would be protected from disclosure.<sup>173</sup> Additionally, the Senate removed the general application of APRA to the General Assembly and the LSA and instead stated that APRA only applied to the General Assembly "to the extent expressly set out in law" or in the House or Senate Standing Rules, replacing the legislative work product exemption.<sup>174</sup> The engrossed bill passed the Senate by a vote of 45 to 4.<sup>175</sup> The House ultimately concurred in the amendments and passed the engrossed bill with a vote of 71 to 28.<sup>176</sup>

Governor Frank O'Bannon vetoed the bill, and then-Speaker of the House John Gregg did not pass the bill back to the House to vote to override the veto.<sup>177</sup> In Governor O'Bannon's veto notes, the Governor reminded the General Assembly that during the beginning of his service in the General Assembly, public access to the legislature was weak.<sup>178</sup> He stated that committee hearings often were not open to the public, committee votes were not often recorded, and motions to amend bills on the floor were not filed or otherwise made public in advance of the motion.<sup>179</sup> Governor O'Bannon cautioned in the veto notes that should the General Assembly choose to exempt itself from APRA and only address public access in its rules and procedures, it should only be done with careful deliberation and with meaningful opportunity for public input.<sup>180</sup> He also recognized the progress made under APRA that needed to be considered in before

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170. H. JOURNAL, 112th Gen. Assemb., Reg. Sess. 529 (Ind. 2001).

171. *Id.* at 557.

172. S. JOURNAL, 112th Gen. Assemb., Reg. Sess. 577 (Ind. 2001).

173. *Id.*

174. *Id.*

175. *Id.* at 688.

176. H. JOURNAL, 112th Gen. Assemb., Reg. Sess. 1193 (Ind. 2001).

177. Brian Howey, *Government Emails, John Gregg, and Me*, TIMES NORTHWEST IND. (July 28, 2013), [http://www.nwtimes.com/brian-howey-government-emails-john-gregg-and-me/article\\_dc168832-c3ae-5c31-955c-7e630c52d49a.html](http://www.nwtimes.com/brian-howey-government-emails-john-gregg-and-me/article_dc168832-c3ae-5c31-955c-7e630c52d49a.html) [perma.cc/Z63D-LE4L]; Society of Professional Journalists, *Indiana HB 1083 Is An Unprecedented Attack on Open Records*, SPJ NEWS (Nov. 19, 2001), <https://www.spj.org/news.asp?ref=54> [perma.cc/MY5D-QPA4].

178. H. JOURNAL, 112th Gen. Assemb., Reg. Sess. 1328 (Ind. 2001).

179. *Id.* at 1329.

180. *Id.*

passing the legislation exempting the General Assembly from APRA:

Over the last thirty years, the General Assembly has made tremendous strides in opening up the legislative process. Now, through the legislature's web site, citizens can access bills, committee reports, fiscal impact statements, floor amendments, roll call votes, committee and floor calendars, and much more. The legislature passed a bill this session authorizing internet coverage of its proceedings . . . . The main issue presented by House Enrolled Act 1083 is whether the General Assembly should expressly exempt itself from the public records act that [it] has successfully operated under for the last 18 years. Symbolically, and perhaps substantively, this would be a step backwards.<sup>181</sup>

Thus, while this solution may have a mitigating effect on the implications of the *Koch* decision, this possible solution is not the most consistent with the legislative history and policy intent of APRA.

2. *Exempt Email Correspondence Between Representatives and Constituents from Disclosure.*—The Indiana General Assembly could also enact a statute, either in APRA or in Title 2 of the Indiana Code, which designates email communication or other correspondence sent and received by General Assembly members or their staff as legislative work product in order to protect constituent privacy, a concern raised in the past by legislators.<sup>182</sup> Delaware's Freedom of Information Act exempts "[e]mails received or sent by members of the Delaware General Assembly or their staff" from public record.<sup>183</sup> Title 2 of the Indiana Code already contains one reference to the legislative work product exemption: a legislative work product definition regarding electronic maps.<sup>184</sup> It is conceivable that the General Assembly could amend APRA to exempt email and other correspondence as legislative work product, as it attempted to do in 2001.<sup>185</sup> The political climate today may be more hospitable to this exception than it was in 2001. However, when then-Governor Frank O'Bannon vetoed H.B. 1083, he raised the following questions about exempting correspondence by elected officials from APRA:

The debate over this legislation has raised many legitimate and difficult questions. Should a personal letter or email from an individual constituent be treated differently than a letter or email from a lobbyist or corporation? Should there be an exception for those records where disclosure would constitute a clearly unwarranted invasion of personal privacy? . . . . Although there is a constitutional right to petition the legislature, does it follow that there is a right to do so in secret under all circumstances? How should the public records act be updated to take

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181. H. JOURNAL, 112th Gen. Assemb., Reg. Sess. 1329 (Ind. 2001).

182. See H.R. 1083, 112th Gen. Assemb., Reg. Sess. (Ind. 2001).

183. 29 Del. Code § 10002(l)(16) (2019).

184. IND. CODE § 2-5-1.1-7.5(a) (2019).

185. H.R. 1083, 112th Gen. Assemb., Reg. Sess. (Ind. 2001).

account of today's technology?<sup>186</sup>

These are all still relevant questions that the Indiana General Assembly should take into consideration if it pursues this alternative solution. However, this solution would have less of a mitigating effect on the implications of the *Koch* decision, because legislative work product would remain largely undefined. As a result, if an individual requests records other than correspondence involving an elected official, and that request is denied on the basis of the legislative work product exemption, the affected individual would still be precluded from exercising his or her statutory right to judicial review.

3. *Amend APRA to Define Legislative Work Product.*—Colorado's current provision in its open records law defines legislative work product as:

all intra- or inter-agency advisory or deliberative materials assembled for the benefit of elected officials, which materials express an opinion or are deliberative in nature and are communicated for the purpose of assisting such elected officials in reaching a decision within the scope of their authority.<sup>187</sup>

This definition of legislative work product is nearly identical to Indiana's definition for the intra- or inter-agency advisory or deliberative material exemption.<sup>188</sup>

Colorado's open records law exempts from disclosure correspondence with constituents regarding personal private matters or correspondence that the constituent expressly or implicitly expects to remain confidential.<sup>189</sup> The statute also specifies what records do not fall under the work product exception.<sup>190</sup> This includes a final version of a document that expresses a final decision by an elected official, any final accounting report or final financial record, and a final version of a document prepared for an elected official that solely consists of factual information derived from public sources.<sup>191</sup>

An amendment to APRA modeled after the Colorado statute would allow the General Assembly to define what it considers legislative work product based on the theory of deliberative material (which the Indiana Code and Indiana case law have defined),<sup>192</sup> and would designate final records disclosable to the public. This would put the public on notice of what records citizens would have the right to request. Further, if a citizen pursued judicial review of a denied request, the court could review the issue and would not have to decline to exercise judicial review because of justiciability concerns, since the justiciability concern in *Koch* arose out of the Indiana Supreme Court's unwillingness to define a term on behalf of

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186. H. JOURNAL, 112th Gen. Assemb., Reg. Sess. 1329 (Ind. 2001).

187. COLO. REV. STAT. § 24-72-202(6.5)(a) (2019).

188. See IND. CODE § 5-14-3-4(b)(6) (2019).

189. COLO. REV. STAT. § 24-72-202(6)(a)(II)(C) (2019).

190. *Id.* § 24-72-202(6.5)(c)-(d).

191. *Id.*

192. IND. CODE § 5-14-3-4(b)(6) (2019); *Groth v. Pence*, 67 N.E.3d 1104, 1115-16 (Ind. Ct. App. 2017), *trans. denied*, 2017 Ind. Lexis 320.

the Indiana General Assembly.<sup>193</sup>

4. *How Indiana Should Define Legislative Work Product.*—Using the Colorado statute as a model, the Indiana General Assembly should adopt the following amendments to APRA:

**Indiana Code § 5-14-3-2. Definitions.**

...

(u) “Work product of individual members and the partisan staffs of the general assembly” means all intra- or inter- agency advisory or deliberative materials assembled for the benefit of elected officials, which materials express an opinion or are deliberative in nature and are communicated for the purpose of assisting such elected officials in reaching a decision.

**Indiana Code § 5-14-3-4. Exceptions to right to inspect public records.**

...

(b) Except as otherwise provided by subsection (a), the following public records shall be excepted from section 3 of this chapter at the discretion of a public agency:

...

(13) The work product of individual members and the partisan staffs of the general assembly. This work product:

(A) includes records as defined in IC 5-14-3-2;

(B) includes a correspondence from a constituent to an elected official that clearly implies by its nature or content that the constituent expects that it is confidential or that is communicated for the purpose of requesting that the elected official render assistance or information relating to a personal and private matter that is not publicly known affecting the constituent or a correspondence from the elected official in response to such a correspondence from a constituent;

(C) includes correspondence subject to mandatory nondisclosure as provided in IC 5-14-3-4(a);

D) does not include:

(i) any final version of a document that expresses a final decision by an elected official;

(ii) any final version of a fiscal or performance audit report or similar document the purpose of which is to investigate, track, or account for the operation or management of a public entity or the expenditure of public money, together with the final version of any supporting material attached to such final report or document; and

(iii) any final accounting or final financial record or report.

However, elected officials may release, or authorize the release of, all or

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193. See generally *Citizens Action Coal. of Ind. v. Koch*, 51 N.E.3d 236 (Ind. 2016).

any part of work product prepared for them.

Had this definition of legislative work product been in place during the *Koch* decision, the Court likely would have reviewed whether or not the requested records fell under the purview of the legislative work product exception, especially considering that deliberative materials has an established definition in the Indiana Code, and Indiana case law on deliberative materials exists.<sup>194</sup> Seeing as the communication between the utility companies and Representative Koch and his staff allegedly discussed the bill he sponsored, the communication would likely be considered either expressions of opinion or deliberative in nature, and furthermore, “communicated for the purpose of assisting such elected officials in reaching a decision within the scope of their authority.”<sup>195</sup> The burden then would have fallen on the Institute and the Citizens Action Coalition to demonstrate that the decision to withhold the communication was arbitrary and capricious.<sup>196</sup>

#### *D. Public Policy Considerations*

The Center for Public Integrity gave Indiana a grade of “D-” (29th in the United States) in its 2015 assessment of state government accountability and transparency, which evaluates a variety of factors including (but not limited to): public access to information, electoral oversight, legislative accountability, state budget processes, and internal auditing.<sup>197</sup> The Center gave Indiana a grade of “F” in the public access to information category.<sup>198</sup> The Public Access to Information category looks to thirteen factors, such as: whether citizens have a right of access to government information through a mechanism like the Access to Public Records Act; whether public agencies and public officials do not claim to be exempt from access to information laws in practice; and whether records requests are fully answered and/or detailed reasons for denying records are provided in practice.<sup>199</sup> The Center conducted this assessment prior to the *Koch* decision.<sup>200</sup>

The federal equivalent of APRA, the Freedom of Information Act (“FOIA”), expressly exempts the United States Congress.<sup>201</sup> FOIA does not apply to Congress or federal courts because Congress enacted FOIA in 1966 as an amendment to the Administrative Procedure Act, which only applies to federal

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194. *Groth*, 67 N.E.3d at 1115-16.

195. COLO. REV. STAT. § 24-72-202(6.5)(a) (2019).

196. IND. CODE § 5-14-3-9(g)(2) (2019).

197. Barb Berggoetz, *Indiana Gets D- Grade in 2015 State Integrity Investigation*, CTR. FOR PUB. INTEGRITY (Nov. 9, 2015), [www.publicintegrity.org/2015/11/09/18387/indiana-gets-d-grade-2015-state-integrity-investigation](http://www.publicintegrity.org/2015/11/09/18387/indiana-gets-d-grade-2015-state-integrity-investigation) [perma.cc/S7DH-XP6].

198. *Id.*

199. *Id.*

200. The Center conducted the assessment in 2015, and the Indiana Supreme Court issued the *Koch* decision in 2016. See generally *id.*; *Citizens Action Coal. of Ind. v. Koch*, 51 N.E.3d 236 (Ind. 2016).

201. 5 U.S.C. § 551(1)(A) (2019).

agencies.<sup>202</sup> Despite numerous amendments to FOIA, Congress has yet to amend FOIA to include Congress.<sup>203</sup> Voters already experience mistrust in their representatives' motives, and by continuing to exempt Congress from FOIA, Congress has diminished its trustworthiness further.<sup>204</sup>

The Washington State Legislature passed a law exempting itself from most of Washington's public records act during its 2018 session.<sup>205</sup> The legislature passed this law in response to a county Superior Court judge's ruling that the state's public records act applied to the offices of senators and representatives.<sup>206</sup> The law would have also retroactively protected documents the Superior Court Judge ordered to be released.<sup>207</sup> But, Washington's Governor, Jay Inslee, vetoed the bill shortly thereafter at the request of legislators, who faced public and media pressure over the new law.<sup>208</sup> The legislature then created a task force to explore possibilities for a law governing legislative records and to produce a report for the legislature's 2019 session.<sup>209</sup> The Indiana General Assembly would likely face similar public and media frustration should it exempt itself from APRA entirely.

The current state of affairs regarding public access issues in Indiana may not be as dire today as it was in 1998. However, the *Koch* decision on its face will likely further public resentment and frustration felt by the public towards their representatives unless the General Assembly takes action to define what constitutes legislative work product. A 2013 Gallup study indicated that Indiana

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202. Charles S. Clark, *Why FOIA Obligations Don't Apply to Congress*, GOV'T EXECUTIVE (Mar. 25, 2016), [www.govexec.com/management/2016/03/why-foia-obligations-dont-apply-congress/126982/](http://www.govexec.com/management/2016/03/why-foia-obligations-dont-apply-congress/126982/) [perma.cc/BK7R-H58A].

203. *Id.*

204. *Id.*; Schenck, *supra* note 65, at 377-78.

205. Austin Jenkins, *Washington Lawmakers Exempt Themselves from Public Records Act*, NW NEWS NETWORK (Feb. 23, 2018), <http://www.nwnewsnetwork.org/post/washington-lawmakers-exempt-themselves-public-records-act> [perma.cc/P6L5-6GXG].

206. *Id.*; Joseph O'Sullivan, *Judge Says Washington State Lawmakers Must Comply with Public-Records Law*, SEATTLE TIMES (Jan. 19, 2018), <https://www.seattletimes.com/seattle-news/politics/judge-says-state-lawmakers-must-comply-with-public-records-law/> [perma.cc/HD4Z-RS5S]. The author noted that the legislature had spent at least \$56,000 on four private attorneys to represent the legislature in the lawsuit, possibly more because not all billing statements for legal work had been submitted. The legislature also appealed the decision directly to Washington's Supreme Court, which accepted the transfer, but I was unable to locate anything on the progress of that appeal. Rachel LaCorte, *State Supreme Court to Decide Legislative Records Case*, PENINSULA DAILY NEWS (May 31, 2018), <http://www.peninsuladailynews.com/news/state-supreme-court-to-decide-legislative-records-case/> [perma.cc/FJ8A-4E3L].

207. Jim Camden, *Legislature Quickly Passes Bill Exempting Itself from Much of State Public Records Act*, SPOKESMAN-REVIEW (Feb. 23, 2018), <http://www.spokesman.com/stories/2018/feb/23/legislature-quickly-passes-bill-exempting-itself-f/> [perma.cc/8KUE-DMSH].

208. Jim Camden, *State Legislators Not Special When It Comes to the Public Records Act, Lawyers Tell Task Force*, NEWS TRIB. (Oct. 10, 2018), <https://www.thenewtribune.com/news/local/article219788855.html> [perma.cc/6QUD-QLNB].

209. *Id.*



residents had an above average level of trust in Indiana state government compared to other states.<sup>210</sup> By amending APRA to define legislative work product, the Indiana General Assembly could further improve public opinion towards legislators and promote government transparency.

#### CONCLUSION

In *Koch*, the Indiana Supreme Court explicitly ruled for the first time that APRA applied to the Indiana General Assembly. But because the Court found the question of whether requested records fell under the legislative work product exemption nonjusticiable, the Court effectively rendered the Indiana General Assembly exempt from APRA, leaving citizens unable to exercise their statutorily provided legal recourse for denied requests violating APRA.

This Note provided an overview of APRA as well as precedential cases in Indiana on justiciability and the distribution of powers provision in the Indiana Constitution. This Note also includes a detailed discussion of *Koch*, a seminal Indiana Supreme Court case with significant implications for APRA.

This Note argued that the Indiana General Assembly effectively agreed to judicial review of the legislative work product exemption by including a provision for judicial review of records request denials and not carving out an exception to judicial review for the General Assembly or Legislative Services Agency. A statutory analysis and a brief examination of legislative history of the APRA supports this conclusion.

Finally, this Note explored three possible solutions to mitigate the effects of *Koch* modeled after how Colorado, Delaware, and Massachusetts treat the legislative branch under their equivalent public access laws. This Note provided a suggested definition for legislative work product that is most consistent with the codified public policy goals of the Indiana Access to Public Records Act.

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210. John Tierney, *Do You Trust Your State Government?*, ATLANTIC (May 12, 2014), [www.theatlantic.com/politics/archive/2014/05/trust-your-state-government/362044/](http://www.theatlantic.com/politics/archive/2014/05/trust-your-state-government/362044/) [perma.cc/D7KN-B6A7].