



STATE OF INDIANA

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June 1, 2010

Ms. Lisa A. Moser
304 W. U.S. Hwy. 6
Valparaiso, IN 46385

Re: Formal Complaint 10-FC-103; Alleged Violation of the Access to Public Records Act by the Northwest Indiana Regional Development Authority

Dear Ms. Moser:

This advisory opinion is in response to your formal complaint alleging the Northwest Indiana Regional Development Authority ("Authority") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* A copy of the Authority's response is enclosed for your reference.

BACKGROUND

According to your complaint, you requested a copy of a report prepared by SEH, a consulting firm hired by the Authority, regarding the Gary/Chicago Airport (the "Airport"). You state that after SEH prepared a report and furnished it to the Authority, members of the Airport responded to that report with comments. As a result of the Airport's feedback, SEH completed another report for the Authority. You are now seeking access to the first report (the "Initial Report") and the comments submitted by the Airport. You note that the Authority released the second report (the "Final Report") and argue that if the Final Report was released the Initial Report should be publicly accessible as well.

My office forwarded a copy of your complaints to the Authority. Attorney David L. Hollenbeck responded on its behalf. Mr. Hollenbeck states that the Authority withheld the records under subsection 4(b)(6) of the APRA, which provides public agencies with the discretion to withhold records that are interagency or intra-agency advisory or deliberative materials. Mr. Hollenbeck acknowledges that the Authority released the Final Report, but that it exercised its discretion under subsection 4(b)(6) to withhold the Initial Report. He further claims that the comments of the Airport in response to the Initial Report were, in fact, released to the public along with the Final Report.

ANALYSIS

The public policy of the APRA states, “[p]roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” I.C. § 5-14-3-1. The Authority does not dispute that it is a public agency for the purposes of the APRA. I.C. § 5-14-3-2(m). Accordingly, any person has the right to inspect and copy Authority’s public records during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

Mr. Hollenbeck claims that the only record the Authority will not release is the Initial Report.¹ The Authority cites to the so-called deliberative materials exception to the APRA as its legal basis for refusing to disclose the Initial Report. The deliberative materials exception is found at I.C. § 5-14-3-4(b)(6):

(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:

...

(6) Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

This exception can apply under these circumstances (i.e., where the Authority retained SEH -- a private company -- to develop the report) because the language includes “material developed by a private contractor under contact with a public agency.” *Id.* Moreover, it would apply to the comments of the Airport as they are interagency communications. That said, the deliberative materials exception also requires that the records be expressions of opinion or speculative in nature *and* communicated for the purpose of decision making. To the extent the Initial Report fits both of those criteria, it is deliberative material under the APRA, which means that pursuant to I.C. § 5-14-3-4(b)(6) the Authority has the discretion to withhold it from public disclosure. Moreover, because the deliberative materials exception to the APRA grants public agencies discretionary authority to withhold or release records that fit within the exception, the Authority may release the Initial Report if it chooses to do so.

I do not have sufficient information regarding the content of the Initial Report to determine whether or not the deliberative materials exception applies. If the record consists of speculative/opinionated material communicated for the purpose of decision making, the Authority did not violate the APRA.

¹ I trust that Mr. Hollenbeck’s assurance that the Airport’s comments were released with the Final Report satisfies your complaint with respect to those records.

CONCLUSION

For the foregoing reasons, it is my opinion that if the Initial Report consisted of expressions of opinion or speculative materials that were communicated for the purpose of decision making, the Authority had the discretion under the APRA to withhold it in response to your request.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive style with a large, sweeping initial 'A'.

Andrew J. Kossack
Public Access Counselor

cc: David L. Hollenbeck