



# STATE OF INDIANA

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June 11, 2012

James J. Hermacinski  
1950 N. Meridian St.  
Indianapolis, Indiana 46202

*Re: Formal Complaint 12-FC-133; Alleged Violation of the Access to Public Records Act by the Indiana Department of Homeland Security*

Dear Mr. Hermacinski:

This advisory opinion is in response to your formal complaint alleging Indiana Department of Homeland Security ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* John Erickson, Senior Public Information Officer, responded on behalf of the Department. His response is enclosed for your reference.

## BACKGROUND

In your formal complaint, you provide that on May 10, 2012, WISH-TV requested in writing from the Department the after action report on the Indiana State Fair Stage Collapse ("Report"). On May 10, 2012, Mr. Erickson provided in an e-mail correspondence to you that your request had been received and he was looking into the Reports availability. You allege that WISH-TV did not receive a denial within seven (7) days of submitting the request from the Department; however on May 17, 2012, the Department responded in writing and provided that "We are reviewing the document." On May 24, 2012, John Erickson, on behalf of the Department, denied your request in writing pursuant to I.C. § 5-14-3-4(b)(6).

You note that the deliberative materials exception provided in I.C. § 5-14-3-4(b)(6) is discretionary, it does not require the Department to withhold the material, nor does it provide that the record is confidential. You provide that a previous advisory opinion issued by Public Access Counselor stated that "It is not sufficient to discharge [the entity's] burden by making a conclusory statement that the report is deliberative, without establishing with adequate specificity what is contained in the report, and how the report meets all of the above elements of the deliberative materials exception." *See Opinion of the Public Access Counselor 05-FC-57.* Furthermore, the counselor "has observed that many, if not most records that a public agency creates or maintains may be

some part of the decision making process.” *See Opinion of the Public Access Counselor 05-FC-206.*

As to the Department’s denial, the one-sentence fails to provide WISH-TV with the information necessary to analyze whether the Department has met its burden to cite to I.C. § 5-14-3-4(b)(6). Further, the denial provided by the Department states that the Report is “non-disclosable”, which is factually incorrect. Lastly, the Department failed to comply with the requirements of I.C. § 5-14-3-6, as it has made no attempt to separate the disclosable and non-disclosable information.

In response to your formal complaint, Mr. Erickson advised that the Report that was requested concerned the August 13, 2011 incident at the Indiana State Fairgrounds and was compiled with the cooperation of responding public safety agencies, both state and local. The document covers the response phase of the incident. The primary purpose of the Report was to focus on operational issues, including performance evaluation and improvement. This internal and deliberative document will assist public safety agencies in preparing more effectively for future large-scale public events. The purpose of the report was to facilitate open and wide ranging, even speculative discussions, in an effort to address public safety issues that have been raised. The report is not subject to disclosure pursuant to I.C. § 5-14-3-4(b)(6) and the Department is confident that the report will improve the overall public safety to future large scale incidents.

#### ANALYSIS

The public policy of the APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” *See* I.C. § 5-14-3-1. The Department is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Department’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). A response from the public agency could be an acknowledgement that the request has been received and include information regarding how or when the agency intends to comply. You submitted your written request to the Department via e-mail on May 10, 2012. The Department would not have been required to provide the records or issue a denial within seven (7) days of receipt of your request. However, the Department would have been required to, at a minimum, acknowledge in writing the receipt of your request within seven (7) days of its receipt. On May 10, 2012, Mr. Erickson responded via e-mail to your request, acknowledged its receipt, and provided that he was looking into the Reports availability.

As such, it is my opinion that the Department did not violate the APRA by failing to issue a denial within seven (7) days of receiving your request.

Under the APRA, a public agency denying access in response to a written public records request must put that denial in writing and include the following information: (a) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and (b) the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). Counselor O'Connor provided the following analysis regarding section 9:

Under the APRA, the burden of proof beyond the written response anticipated under Indiana Code section 5-14-3-9(c) is outlined for any *court action* taken against the public agency for denial under Indiana Code sections 5-14-3-9(e) or (f). If the public agency claimed one of the exemptions from disclosure outlined at Indiana Code section 5-14-3-4(a), then the agency would then have to either “establish the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit” *to the court*. Similarly, if the public agency claims an exemption under Indiana Code section 5-14-3-4(b), then the agency must prove to the court that the record falls within any one of the exemptions listed in that provision and establish the content of the record with adequate specificity. There is no authority under the APRA that required the IDEM to provide you with a more detailed explanation of the denials other than a statement of the exemption authorizing nondisclosure, but such an explanation would be required if this matter was ever reviewed by a trial court. *Opinion of the Public Access Counselor 01-FC-47*.

As applicable here, Mr. Erickson in his written denial of your request cited to I.C. § 5-14-3-4(b)(6) and provided his name and title with the Department. The statutory language provided by Counselor Davis in Advisory Opinion 05-FC-57 that references I.C. § 5-14-3-9(g)(1)(b), cited in your formal complaint, alludes to the requirements of an agency who has issued a denial pursuant to the APRA before a court. As such, it is my opinion that the Department issued a proper denial to your written request pursuant to the requirements of section 9 (c) of the APRA.

The APRA excepts from disclosure, among others, the following:

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. I.C. § 5-14-3-4(b)(6).

There is no dispute amongst the parties that the Report is considered to be a public record. *See* I.C. § 5-14-3-2(n). The Report is not confidential. Rather, under I.C. § 5-14-3-4(b)(6), the General Assembly has provided that records that qualify as deliberative materials may be disclosed at the discretion of the public agency. While it is my opinion that the Department did not violate the APRA by stating that the report was “non-disclosable”, the Department should be aware of the distinct difference between a record that is confidential, which may not be disclosed under any circumstance, and a record that may be disclosed at the discretion of the agency.

As to exception itself, deliberative materials include information that reflects, for example, one's ideas, consideration and recommendations on a subject or issue for use in a decision making process. *See Opinion of the Public Access Counselor 98-FC-1*. Many, if not most documents that a public agency creates, maintains or retains may be part of some decision making process. *See Opinion of the Public Access Counselor 98-FC-4; 02-FC-13; and 11-INF-64*. The purpose of protecting such communications is to "prevent injury to the quality of agency decisions." *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002). The frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public, and the decisions and policies formulated might be poorer as a result. *Newman*, 766 N.E.2d at 12. In order to withhold such records from disclosure under Indiana Code 5-14-3-4(b)(6), the documents must also be interagency or interagency records that are advisory or deliberative and that are expressions of opinion or speculative in nature. *See Opinions of the Public Access Counselor 98-INF-8 and 03-FC-17*.

When a record contains both disclosable and nondisclosable information and an agency receives a request for access, the agency shall “separate the material that may be disclosed and make it available for inspection and copying.” *See* I.C. § 5-14-3-6(a). The burden of proof for nondisclosure is placed on the agency and not the person making the request. *See* I.C. § 5-14-3-1. The Indiana Court of Appeals provided the following guidance on a similar issue in *Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ.*, 787 N.E.2d 893 (Ind. Ct. App. 2005):

However, *section 6 of APRA* requires a public agency to separate disclosable from non-disclosable *information* contained in public records. *I.C. § 5-14-3-6(a)*. By stating that agencies are required to separate "information" contained in public records, the legislature has signaled an intention to allow public access to whatever portions of a public record are not protected from disclosure by an applicable exception. To permit an agency to establish that a given document, or even a portion thereof, is non-disclosable simply by proving that some of the documents

in a group of similarly requested items are non-discloseable would frustrate this purpose and be contrary to section 6. To the extent that the *Journal Gazette* case suggests otherwise, we respectfully decline to follow it.

Instead, we agree with the reasoning of the United States Supreme Court in *Mink, supra*, i.e., that those factual matters which are not inextricably linked with other non-discloseable materials, should not be protected from public disclosure. See *410 U.S. at 92*. Consistent with the mandate of *APRA section 6*, any factual information which can be thus separated from the non-discloseable matters must be made available for public access. *Id.* at 913-14.

The Department denied your request, in its entirety, citing to I.C. § 5-14-3-4(b)(6). The Department is not required to include a statement in its denial that it was aware of and complied with the requirements of I.C. § 5-14-3-6. If the Report contained information that did not meet the requirements of I.C. § 5-14-3-4(b)(6) and said information was not inextricably linked to the non-disclosable information, the APRA provides that the discloseable information shall be produced. If the Department complied with the requirements of I.C. § 5-14-3-6 in issuing its denial of your request, it would not have violated the APRA.

#### CONCLUSION

For the foregoing reasons, it is my opinion that the Department did not violate the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "Joe Hoage". The signature is stylized with a large initial "J" and "H".

Joseph B. Hoage  
Public Access Counselor

cc: John Erickson