STATE OF INDIANA

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March 20, 2012

Timothy M. Evans
307 N. Pennsylvania
Indianapolis, Indiana 46205

Re: Formal Complaint 12-FC-48; Alleged Violation of the Access to Public Records Act by the Indiana State Department of Toxicology

Dear Mr. Evans:

This advisory opinion is in response to your formal complaint alleging the Indiana State Department of Toxicology ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq*. Teri Kendrick, General Counsel, responded on behalf of the Department. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that on December 19, 2011, the *Indianapolis Star* submitted a public records request to the Department for results from the retesting of 500 samples originally tested by the Department's laboratory and reported to police and prosecutors as positive for drugs. The testing was conducted by NMS Laboratory to determine the accuracy of the initial test results. The retesting was prompted by an earlier audit that reviewed the confirmatory paperwork associated with the original testing by the Department and was paid for with public funds.

In an earlier public records request, the *Indianapolis Star* had been provided with unredacted results for individual cases that were reviewed as part of the initial "technical" or paper audit. Those records included the names of defendants and court case cause numbers. On February 3, 2012, the Department denied the December 19, 2011 records request for the retesting results despite the Department previously providing the records of the original results.

You provide that most, in not all, of the cases have already been resolved in court, and that the information that is sought is a matter of public record in the individual court cases. You believe that there is a compelling public interest in this information that is sought as these tests were critical evidence in criminal cases, most of which resulted in convictions of residents of the state. The initial "technical" audit revealed serious errors and the public has a right and deserves to know if the resting results were also flawed.

The only way to obtain the information and restore public confidence in the state's legal system and the work of the Department is for the Department to reveal the finding of the retesting of the samples. If there are serious problems, the Department should explain how the errors occurred and what is being done to assure the public that there will not be future miscarriages of justice on the faulty work of the Department.

In response to your formal complaint, Ms. Kendrick advised that the records of the Department that would be responsive to your request had been collected and identified. The records that have been collected are subject to exemption from disclosure pursuant to investigatory records exception provided in I.C. § 5-14-3-4(b)(1) or are intra- or interagency advisory material subject to the deliberative materials exception in I.C. § 5-14-3-4(b)(6).

The laboratory reports of the retest results and the original Department test results are investigatory records, which apply to information compiled in the course of the investigation of a crime. The investigatory records exception to the APRA provides that a law enforcement agency has the discretion to disclose the records in response to a request. The investigatory records exception does not only apply to records of ongoing or current investigations, but applies to all records compiled during the course of the investigation of a crime, even where a crime was not ultimately charged or after the completion of the investigation. *See Opinion of the Public Access Counselor 11-FC-21.*

The Department does not disagree with your assertion that the records are considered "public records" pursuant to the APRA. You are correct in providing that there is a compelling public interest in the information that is sought, but as is the case with all reports of analytical findings of the Department, the appropriate recipients of that information are "official(s) requesting the analyses." *See* I.C. § 10-20-2-4(a)(2). In furtherance of that compelling public interest, the Department has provided the retesting results to local prosecutors, who are entitled to receive the results and who are required by law to reveal the results directly to the *affected* persons (emphasis added).

As to the prior disclosure of testing results by the Department, Ms. Kendrick believes that you are referring to information released when the Department was still a part of the Indiana University Department of Pharmacology and Toxicology. On July 1, 2011, the state assumed control of the Department from Indiana University pursuant to I.C 10-20-2-7. Any previous release of information by Indiana University does not operate as a waiver of the Department's right to exercise its discretion as a department of state government. The correspondence and retest results sent to local prosecutors qualifies as an "investigatory record" within the meaning of I.C. § 5-14-3-2(h). *See Opinion of the Public Access Counselor 11-FC-21.*

As to those records that were responsive to your request that are not considered to be "investigatory, the Department has cited to deliberative materials exception found in I.C. § 5-14-3-4(b)(6) to deny your request. Records that are intra-agency or interagency or deliberative material, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making are excepted from disclosure

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at the discretion of the public agency. *See* I.C. § 5-14-3-4(b)(6). The documents at issue here were prepared in order to make decisions in response to issues presented by the retesting results. Further, the APRA does not require an agency to answer inquiries even if they are directly related to the records that are requested. Accordingly, the Department did not violate the APRA by failing to provide answers to your inquiries in connection with your request for records.

Subsequent to the Department's response to your public records request, Ms. Kendrick has prepared a summary of the retesting results in response to a request for information from the Indiana Supreme Court Task Force that was assembled to evaluate the potential impact of the retesting on court administration throughout the state. A meeting has been scheduled with you on March 21, 2012, at which time a copy of the summary will be provided.

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).

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. (emphasis added). *Opinion of the Public Access Counselor 01-FC-47.*

There is no dispute that the records that have been requested are "public records" pursuant to the APRA and are not considered to be confidential pursuant to state or federal law. *See* I.C. § 5-14-3-2(n). The Department has cited to two exceptions found in I.C. 5-14-3-4(b) that allow the Department discretion to produce the records in response to a public records request. The Department would satisfy its obligation in responding to a formal complaint filed with the Public Access Counselor by complying with section 9(c) of the APRA. If, however, the matter proceeded to litigation before a court, who would be allowed to conduct an in-camera review, the burden of proof would be on the Department to sustain the denial of access to the records that were requested. *See* I.C. § 5-14-3-4(f); *Opinion of the Public Access Counselor 09-FC-285.*

The investigatory records exception to the APRA provides that a law enforcement agency has the discretion to disclose or not disclose its investigatory records. An investigatory record is "information compiled in the course of the investigation of a crime." *See* I.C. § 5-14-3-2(h). The investigatory records exception does not apply only to records of ongoing or current investigations; rather, it applies regardless of whether a crime was charged or even committed. The exception applies to all records compiled during the course of the investigation, even after an investigation has been completed. The investigatory records exception affords law enforcement agencies broad discretion in withholding such records. *See Opinion of the Public Access Counselor 09-FC-157.* I.C. § 10-20-2-4(a) provides that the Department shall conduct analyses for poisons, drugs, and alcohols upon human tissues and fluids submitted by Indiana coroners, prosecuting attorneys, sheriffs, authorized officials of the Indiana State Police and Indiana city police departments. The Department shall report the analytical findings of the Department to the official requesting the analyses. *See* I.C. § 10-20-2-4(b). The Department has provided that the retesting results have been forwarded to the appropriate law enforcement agency as required by statute.

As to your request, the retesting results that you sought were created in connection with a criminal investigation. The retesting results are not confidential, however the Department would have discretion to grant or deny your request pursuant to I.C. § 5-14-3-4(b)(1). In its denial of your public records request, the Department cited to

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I.C. § 5-14-3-4(b)(1) and provided the name and title of the person responsible for the denial. Therefore, it is my opinion that to the extent your request sought investigatory records as defined by I.C. § 5-14-3-2(h), the Department did not violate the APRA by denying your request pursuant to I.C. § 5-14-3-2(b)(1).

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).

Deliberative material includes 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 03-FC-75.* Many documents that a public agency creates, maintains or retains may be part of some decision making process. 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), however, the documents must 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 to the record, 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 in 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 dislcosable from non-dislcosable *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-dislcosable 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.

To the extent that the deliberative records that were sought contain information that is not an expression of opinion or speculative in nature, and is not inextricably linked to non-discloseable information, APRA provides that the information shall be disclosed. In the Department's denial of your request for deliberative materials, it cited to the specific statutory exception and provided the name and title of the person responsible for denying the request. It is my opinion that as long as the Department complied with section 6(a) of the APRA in responding to this part of your request, it did not violate the APRA in denying your request for materials that would qualify as deliberative pursuant to I.C. § 5-14-3-4(b)(6).

Under the ARRA, a request for inspection or copying must identify with reasonable particularity the record being requested. *See* I.C. § 5-14-3-3(a). While the term "reasonable particularity" is not defined in the APRA, it has been addressed a number of times by the public access counselor. *See Opinions of the Public Access Counselor 99-FC-21 and 00-FC-15*. Counselor Hurst addressed a similar issue in *Opinion of the Public Access Counselor 04-FC-38*:

> A request for public records must "identify with reasonable particularity the record being requested." IC 5-14-3-3(a)(1). While a request for *information* may in many circumstances meet this requirement, when the public agency does not organize or maintain its records in a manner that permits it to readily identify records that are responsive to the request, it is under no obligation to search all of its records for any reference to the information being requested. Moreover, unless otherwise required by law, a

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> public agency is under no obligation to maintain its records in any particular manner, and it is under no obligation to *create* a record that complies with the requesting party's request. *Opinion of the Public Access Counselor 04-FC-38.*

Public agencies are not obligated to create records in response to a request or to answer generalized inquiries. *See Opinion of the Public Access Counselor 10-FC-120.* If a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. "[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA." To the extent that you submitted inquiries or questions to the Department, as opposed to a request for records, the Department did not violate the APRA by failing to respond.

As to the issue of waiver, the Court of Appeals has recognized that a public agency may waive an applicable APRA exception if the agency allowed access to its material to one party and denied access to another based on an APRA exception. *The Indianapolis Star v. Trustees of Indiana University*, 787 N.E.2d 893, 919 (Ind. Ct. App. 2003). That decision would be applicable to an agency that released certain records and then subsequently refused another individual's request for access to the exact same records. Here, there is nothing to indicate that the Department has provided the records that were the subject of your December 19, 2011 request to other requestors. The retesting results have been forwarded to the respective local prosecuting attorney so as to comply with I.C. § 10-20-2-4(b). I can find no authority from any previous public access counselor that would conclude that the Department waived its discretion to withhold documents that have not been previously disclosed to another requester. *See Opinion of the Public Access Counselor 11-FC-83.* Accordingly, it is my opinion that the Department did not waive its right to deny your request pursuant to any discretionary exemptions found under I.C. § 5-14-3-4(b), as the records had not been previously provided in response to any prior request submitted to the Department.

CONCLUSION

For the foregoing reasons, it is my opinion that if the Department complied with section 6(a) of the APRA as to those records sought that would be considered deliberative materials pursuant to I.C. § 5-14-3-4(b)(6), it did not act contrary to the APRA. As to all other issues, it is my opinion that the Department complied with the requirements of the APRA in responding to your request.

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: Teri Kendrick