



STATE OF INDIANA

MICHAEL R. PENCE, Governor

**PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE**

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317) 234-0906
Fax: (317) 233-3091
1-800-228-6013
www.IN.gov/pac

March 8, 2013

Ms. Mercedes Brugh
1315 E. Market Street
Logansport, Indiana 46947

Re: Formal Complaint 13-FC-43; Alleged Violation of the Access to Public Records Act by the Logansport Utility Services Board

Dear Ms. Brugh:

This advisory opinion is in response to your formal complaint alleging the Logansport Utility Services Board ("Board") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* John R. Molitor, Attorney, responded in writing on behalf of the Board to your formal complaint. His response is enclosed for your reference.

BACKGROUND

In your formal complaint you provide that on November 28, 2012, the Board issued a request for proposals ("RFP") to construct a trash incineration plant. The deadline for submission of proposals was January 11, 2013. You advise that the law of public-private agreements, found under I.C. 5-23, anticipates that the governmental body can negotiate the best and final offer after proposals have been submitted. At the conclusion of the negotiations, the Board recommended that the City Council ("Council") award the public-private agreement to Pyrolyzer, LLC.

On January 28, 2013, you requested that the Board permit you to inspect records of any communication between Board Superintendent Paul Hartman, any Board member, or any agency of Hartman or any Board member, and Don Willis or any agency of Pyrolyzer LLC between January 1, 2012 and November 26, 2012. Mr. Hartman denied your request on January 28, 2013 pursuant to I.C. § 5-14-3-4(b)(5)(A), (B).

You maintain that Mr. Hartman may not rely on the cited exception to deny your request as the Board is a separate entity from the Council. Lastly, the Council's period of negotiation with any commercial prospect did not commence until November 28, 2012, the date when the RFP was issued.

In response to your formal complaint, Mr. Molitor provided that the City is currently engaged in an effort to identify who might be able to make the best offer to the community for the construction of a new power plant. Mayor Franklin and Board Superintendent, Mr. Paul Hartman, along with several other City employees and officials, including members of the Council, have been having discussions for some time with various private vendors under the provisions of the Public-Private Agreement Law, I.C. § 5-23, in the hope that they might eventually be able to negotiate an agreement with one or more of these vendors to build and operate a new plant to serve the City's power customers. Per the Public-Private Agreement Law, "the governmental body may refuse to disclose the contents of proposals during discussions with eligible offerors [and] shall negotiate the best and final offers of responsible offerors who submit proposals. I.C. §§ 5-23-5-6; 5-23-5-7. As of March 1, 2013, six vendors have submitted offers to the City and the Council now has pending before it a proposed ordinance that would authorize the Mayor, with the advice and consent of the Council, to negotiate a "Build-Operate-Transfer" with Pryolyzer LLC. The agreement would ultimately be subject to ratification by the Council. City officials have not kept their constituents in the dark regarding this process. All public records related to the proposed agreement are available online and the City has received and posted online over 100 questions with answers, submitted by the public regarding this issue.

Your complaint provides that I.C. § 5-14-3-4(b)(5)(A) is unavailable to the Board because the Board is not the Council. Further, you allege that that the Council did not commence a "period of negotiation" with any prospect until November 28, 2012, when Mr. Hartman published an RFP on behalf of the Board.

The term "negotiation" is defined plainly as the "process of achieving an agreement through discussion." To the extent that there were any discussions between the Logansport executive branch officials and a would-be power plant vendor which occurred between January 1, 2012 and November 28, 2012, the City would provide that these discussions were and are an essential part of the process of achieving an agreement. Moreover, while the City does not concede that there was no participation by any legislative branch official in any such discussions prior to November 28, 2012, such a lack of participation would not vitiate the fact that the records of any such discussions are clearly related to the ongoing negotiation process and that those records were created since negotiations have been in progress. Regardless, legislative branch officials often authorize executive branch officials to engage in discussions on behalf of the City, so long as the final results of negotiations are ultimately approved by the legislative body. Mr. Molitor argues that it would be illogical for you to claim that the records of preliminary discussions that may have involved only the executive branch officials were somehow unrelated to the City's process of trying to achieve an agreement which is still in progress. Indeed, if the records were truly unrelated to the ongoing negotiation process, you would not have submitted a request.

Further, although not cited in the denial, there may be certain types of records related to the above described negotiation process which are also exempt from disclosure pursuant to I.C. § 5-14-3-4(b)(6); I.C. § 5-14-3-4(b)(7); and I.C. § 5-14-3-4(b)(9). As

noted by a previous counselor, “the IEDC has been granted the Indiana General Assembly broad discretion to withhold from the disclosure records *relating to negotiations* so long as the records were created while negotiations were in progress” (emphasis added). The City firmly believes that this rationale should apply as well to Indiana local governments, including the Board.

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 Board 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 Board’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 twenty-four 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 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 information regarding how or when the agency intends to comply. Here, the Board responded to your request within seven days of its receipt. As such, it is my opinion that the Board complied with section 9(b) of the APRA in response to 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.*

Here, the Board denied your request in writing pursuant to I.C. § 5-14-3-4(b)(5), with Superintendent Hartman being individual responsible for the denial. As such, it is my opinion that the denial of your request complied with the procedural requirements of I.C. § 5-14-3-9(c).

As to the substance of your denial, I.C. § 5-14-3-4(b)(5) provides that the following records may be disclosed at the agency's discretion:

- (a) Records relating to negotiations between the Indiana economic development corporation, the ports of Indiana, the Indiana state department of agriculture, the Indiana finance authority, an economic development commission, a local economic development organization (as defined in IC 5-28-11-2(3)), or a governing body of a political subdivision with industrial, research, or commercial prospects, if the records are created while negotiations are in progress.
- (b) Notwithstanding clause (A), the terms of the final offer of public financial resources communicated by the Indiana economic development corporation, the ports of Indiana, the Indiana finance authority, an economic development commission, or a governing body of a public subdivision to an industrial, a research, or a commercial prospect shall be available for inspection and copying under section 3 of this chapter after negotiations with that prospect have terminated.
- (c) When disclosing a final offer under clause (B), the Indiana economic development corporation shall certify that the information being disclosed accurately and completely represents the terms of the final offer. I.C. § 5-14-3-5.

You provide that the Board may not cite to (b)(5) to deny a request as “the Board is not the City Council.” I would note that the (b)(5) does not provide that the exception is limited to the Council or a legislative body; it would be applicable to a governing body of a political subdivision. There is no dispute that the Board is a governing body. Political subdivision is defined as a municipal corporation or special taxing district. *See* I.C. § 36-1-2-13. Municipal corporation means any unit, school corporation, library district, local housing authority, fire protection district, public transportation corporation, local building authority, local hospital authority or corporation, local airport authority, special service district, or other separate local governmental entity that may sue or be sued. *See* I.C. § 36-1-2-10. A Special taxing district is defined as a geographic area within which a special tax may be levied and collected on an ad valorem basis on property for the

purpose of financing local public improvements that are not political or governmental in nature and of special benefit to the residents and property of the area. *See* I.C. § 36-1-2-18. From the information that has been provided, it is highly likely that the Board would qualify as a political subdivision as either a municipal corporation or a special taxing district. As such, it is my opinion that the Board would not be prohibited from denying a request pursuant to I.C. § 5-14-3-4(b)(5) as it would be considered a governing body of a political subdivision.

As to the issue of when negotiations commenced between the Board and the prospective vendors, you provide that negotiations commenced on November 28, 2012, the date in which the RFP was issued. As a result, you argue that any records created prior to November 28, 2012 may not be denied pursuant to (b)(5), which requires the records have been created while negotiations were in progress. Mr. Molitor has advised that discussions between City officials and prospective vendors were part of the negotiation process that was ongoing prior to the issuance of the RFP. No statute has been cited by either party that would define when negotiations actually commence. The Public Access Counselor is not a finder of fact. Advisory opinions are issued based on the facts presented. If the facts are in dispute, the public access counselor opines on both outcomes. Thus, *if* the records were created while negotiations were in progress, the Board may deny your request pursuant to I.C. § 5-14-3-4(b)(5).

Although not raised in the Board's original denial of your request, Mr. Molitor provided in response to your formal complaint that the records sought would also be disclosed at the Board's discretion pursuant to I.C. § 5-14-3-4(b)(6); I.C. § 5-14-3-4(b)(7); and I.C. § 5-14-3-4(b)(19). As provided *infra*, it is my opinion that to the extent the records you have sought fall into one of three identified exceptions, the Board may deny your request. Further, I would note that a "governmental body may refuse to disclose the contents of proposals during discussion with eligible offerors. *See* I.C. § 5-23-5-6. A "governmental body" means an agency, board, branch, bureau, commission, council, department, institution, office, or any other establishment of the executive, judicial, legislative branches, or a political subdivision. *See* I.C. § 5-22-2-13. The Board would qualify as a "governmental body" pursuant to I.C. § 5-22-2-13.

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).

Pursuant to 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. 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*. However, the deliberative materials exception does not provide a pre and post-decision distinction, so that the records may be withheld even after a decision has been made. See *Opinion of the Public Access Counselor 09-INF-25*. It is my opinion that the Board may deny your request for records to the extent the record meet the requirements of (b)(6).

Pursuant to I.C. § 5-14-3-4(b)(7), an agency at its discretion may deny diaries, journals, or other personal notes serving as the equivalent of a diary or journal. To the extent that any of communications that are responsive to your request meet the qualifications of (b)(7), it is my opinion that the Board would not violate the APRA in denying your request. See also *Opinion of the Public Access Counselor 08-FC-25*.

Lastly, I.C. § 5-14-3-4(b)(19) provides at the agency's discretion, a record or part of a record, the public disclosure of which would have a reasonable likelihood of threatening public safety by exposing a vulnerability to a terrorist attack, may be denied. See I.C. § 5-14-3-4(b)(19)(A)-(K). If an agency receives a request to inspect or copy a record that the agency considers to be excepted from disclosure under (b)(19), the agency may consult with the counterterrorism and security council established by I.C. 10-19-8-1. See I.C. § 5-14-3-9(d). If an agency denies the disclosure of any part of a record pursuant to (b)(19), the agency or the counterterrorism and security council shall provide a general description of the record being withheld and of how the disclosure would have a reasonable likelihood of threatening the public safety. *Id.* To the extent the communications sought are exempt from disclosure pursuant to (b)(19), it is my opinion that the Board would not violate the APRA by denying your request.

As to all of the applicable discretionary exceptions that have been cited, section 6 of the APRA provides that 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-disclosable 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-disclosable 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-disclosable matters must be made available for public access. *Id.* at 913-14.

To the extent information contained in the communications sought would not qualify for an exception cited by the Board, the Board would be required to redact the discretionary information and provide the remaining disclosable portions of the record.

CONCLUSION

Based on the foregoing reasons, it is my opinion that the Board complied with the requirements of section 9(b) and (c) in response to your request. It is my opinion that the Board would qualify as a governing body of a political subdivision and thus would be able to cite to *I.C. § 5-14-3-4(b)(5)* to deny a request for records *if* the records were created while negotiations were in progress.

Best regards,

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

Joseph B. Hoage
Public Access Counselor

cc: John R. Molitor