



STATE OF INDIANA

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March 8, 2013

Mr. Jim Brugh
1315 E. Market Street
Logansport, Indiana 46947

Re: Formal Complaint 13-FC-44; Alleged Violation of the Access to Public Records Act by the City of Logansport

Dear Mr. Brugh:

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

BACKGROUND

In your formal complaint you provide that on November 28, 2012, the City, through its Utility Service Board ("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 22, 2013, you requested that Mayor Ted Franklin permit you to inspect records of communications between himself, or his agents, and Don Willis or any other agent of Green USA Recycling during 2012 and year-to-date in 2013. On January 23, 2013, Mayor Franklin denied your request pursuant to I.C. § 5-14-3-4(b)(5)(A), (B). On January 25, 2013, you amended your request by limiting the time period of the request from January 1, 2012 through November 26, 2012. On January 28, 2013, Mayor Franklin denied your request again pursuant to I.C. § 5-14-3-4(b)(5)(A), (B). On January 29, 2013, you submitted a request to Mayor Franklin to permit you to inspect all records of communications between himself or his agents, and Frank Canterbury or any agent of Pyrolyzer, LLC from January 1, 2012 through November 26, 2012. On January 30, 2012, Mayor Franklin denied your request pursuant to I.C. § 5-14-3-4(b)(5)(A), (B).

You maintain that Mayor Franklin may not cite to I.C. § 5-14-3-4(b)(5)(A) to deny your request because he is not part of the Council, the legislative branch of the City. Further, the Council's period of negotiation with either 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 Mayor because the Mayor is not part of the legislative branch of the City and because 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 City.

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 City 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 City’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 City responded to all of your requests within seven days of their receipt. As such, it is my opinion that the City 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 Mayor denied your request in writing pursuant to I.C. § 5-14-3-4(b)(5) and provided that he was the person 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.

Your initial request, which was later amended, sought records of communications between the Mayor, or his agents, and Don Willis, or any agent of Green USA Recycling for a specific period of time. Your subsequent request sought communications between the Mayor and his agents, and Frank Canterbury and any agency of Pyrolyzer for a defined period. Your request was submitted to the Mayor, not the Council. As to any

records maintained by the Mayor that are responsive to your request, you argue that the Mayor is not part of the Council. As a result you argue that while the Council would be able to deny your request pursuant to (b)(5), the Mayor is not one of the entities identified under (b)(5). As such, you maintain that the Mayor may not deny your request pursuant to (b)(5). Further, you note that the City's period of negotiation did not commence until November 28, 2012, when the RFP was issued.

The parties do not dispute that the Mayor is not part of the Council or that the Mayor's Office itself is not a governing body. Your request sought communications between the Mayor and the various entities that intended or did in fact submit a response to the RFP. While I have reviewed the prior advisory opinions cited by the City, said opinions deal almost exclusively with I.C. § 5-14-3-4.5, which applies only to the Indiana Economic Development Commission. *See Opinion of the Public Access Counselor 09-FC-102*. Based on the plain language of the statute, specifically those entities identified by the General Assembly whose records may be withheld, it is my opinion that the Mayor may not deny your request pursuant to I.C. § 5-14-3-4(b)(5). The only exception to this would be in those specific instances, referenced in Mr. Molitor's response, where the Mayor was communicating with the offerors at the specific direction or request of the Council while negotiations were in progress. In such instances, the Mayor would be acting as an agent of the Council and in that limited capacity the Mayor could deny the request that was submitted pursuant to (b)(5).

As to the issue of when negotiations commenced between the City 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 Mayor may deny your request when acting under the specific direction of the City Council (emphasis added).

Although not raised in the City'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 City'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 City 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 Mayor, City,

and the City Council 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 City 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 would meet the requirements of (b)(7), it is my opinion that the City 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 City 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 discloseable and nondiscloseable 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 City, the City 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 as the City complied with the requirements of section 9(b) when it responded in writing to your requests within seven (7) days of their receipt. It is my opinion that the City complied with the requirements of section 9(c) of the APRA in response to your request. Further, it is my opinion that the Mayor may only deny a request pursuant to I.C. § 5-14-3-4(b)(5) when acting on the specific direction or request of the City Council while negotiations with the commercial prospect were in progress.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

Joseph B. Hoage
Public Access Counselor

cc: John R. Molitor