



# STATE OF INDIANA

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January 5, 2011

Mr. Donald K. Rothenberger  
7304 Shadow Wood Dr.  
Indianapolis, IN 46254

*Re: Formal Complaint 10-FC-308; Alleged Violation of the Access to  
Public Records Act by the City of Indianapolis*

Dear Mr. Rothenberger:

This advisory opinion is in response to your formal complaint alleging the City of Indianapolis ("City") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* The City's response from Chief Deputy Corporation Counsel and Public Access Counselor Andrea Brandes is enclosed for your reference.

## BACKGROUND

In your complaint, you allege that on November 15, 2010, you submitted a written request for information regarding your status revocation as a volunteer at Eagle Creek Park. On November 19th, you received part of your request. On November 21st, you requested that the City provide you with additional information. On November 30th, you received a denial from Ms. Brandes. You argue that the exception to the APRA cited by Ms. Brandes does not apply because the "withheld memo" pertains only to you, and that "all other information contained in the memo should be released per previous court rulings."

In response to your complaint, Ms. Brandes maintains the City's position that the withheld record is exempt from disclosure under the deliberative materials exception to the APRA. Ms. Brandes explains that the record is an email message consisting of less than one full page of text. Its content is entirely advisory material necessary for the decision making process of a public agency: the City's Department of Parks and Recreation ("DPR"). A DPR employee created the record and transmitted it to another DPR employee. It is an expression of the creator's opinion, speculative in nature, and was communicated for the purpose of DPR employees' decision making.

## 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.” I.C. § 5-14-3-1. The City is a public agency for the purposes of the APRA. 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 nondisclosable under the APRA. I.C. § 5-14-3-3(a).

The City cites to the so-called deliberative materials exception to the APRA as its legal basis for refusing to disclose the Record. 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.

The record at issue here is an intra-agency communication because it was created by an employee of DPR and communicated to another DPR employee. *Id.* The deliberative materials exception also requires, however, that the records be expressions of opinion or speculative in nature and communicated for the purpose of decision making. Ms. Brandes states that the record was prepared in order to provide opinionated information to other employees of DPR in order to facilitate “operational decision making by DPR employees.” Accordingly, the record qualifies as intra-agency deliberative material under I.C. § 5-14-3-4(b)(6). As such, the City did not violate the APRA by withholding it.

As to your argument that the City must disclose other information in the record that is not deliberative material, Ms. Brandes states that the record consists entirely of deliberative material. If that is the case, there is nothing left for the City to disclose. Moreover, I note that in *Indianapolis Star v. Trustees of Indiana University*, 787 N.E.2d 893 (Ind. Ct. App. 2003), the Indiana Court of Appeals held that Ind. Code § 5-14-3-6(a) requires an agency to separate disclosable information from the nondisclosable information where the two types of information are not “inextricably linked.” *Id.* at 914. Thus, even if the record at issue here contains factual information along with the deliberative material, the APRA permits the City to withhold the factual material if it is inextricably linked with the deliberative material.

CONCLUSION

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

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: Andrea L. Brandes