



STATE OF INDIANA

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April 26, 2010

Ms. Gitte Laasby
Post-Tribune
1433 East 83rd Ave.
Merrillville, IN 46410-6307

Re: Formal Complaint 10-FC-78; Alleged Violation of the Access to Public Records Act by the Indiana Department of Environmental Management

Dear Ms. Laasby:

This advisory opinion is in response to your formal complaint alleging the Indiana Department of Environmental Management ("IDEM") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*, by denying you access to public records. A copy of IDEM's response to your complaint is enclosed.

BACKGROUND

According to your complaint, you allege that on March 8, 2010, you requested a document listed under "Deerfield Storage Facility" in IDEM's virtual file cabinet ("VFC"), an online database where members of the public can access public documents. Documents in VFC are assigned one of two designations: (1) "view," which provides immediate access to the record; and (2) "request," which directs users to a web page where they can make a written request for the record. The record you requested was listed as "request," so you filled out the request.

On March 17th, you received a response from IDEM informing you that the record is exempt from disclosure under Ind. Code § 5-14-3-4(b)(6). The response stated that IDEM denied you access because the record constitutes "intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency that is an expression of opinion or is of a speculative nature, and that is communicated for the purpose of decision making." You state that you were "puzzled by this because the record was listed in IDEM's virtual file cabinet on March 8 as being available for public access by request (hence the VFC document number)." You question whether IDEM may withhold from public disclosure a document that was listed in IDEM's publicly accessible database as being a public

document available for inspection. When you posed that question to IDEM, you received the following reply:

Every document contained in the Virtual File Cabinet (VFC) has a unique document number, and the VFC contains both documents that are available to the public and available to IDEM only. The document you requested, #54300752, contained the notation 'not for public view' which is why you were not able to see the document, copy it, or receive a copy from the agency. It is exempt from public disclosure under Indiana Code 5-14-3-4(b)(6).

[Complaint at 3]. However, you claim that there was no notation to the public that the record was available to IDEM personnel only. You also "wonder why the document would even be listed in a public database as 'request'able [sic] if it's not actually available to the public." You believe that a document that is listed as being available by request in a public database should be considered a public document and released, even if the document was initially listed in the database in error. Further, you claim that IDEM has failed to separate disclosable from nondisclosable information and has not established the content of the record with adequate specificity as required by sections 6 and 9 of the APRA, respectively.

My office forwarded a copy of your complaint to IDEM for a response. Lori Kyle Endris, IDEM's public records advisor, denies that IDEM has violated the APRA. Ms. Endris acknowledges that records are uploaded to the VFC and designated as either "view" or "request," but explains that "request" does not necessarily mean the document is available to the public. She also claims that clicking on the "request" button does not lead users to a web page to make a written request. Rather, pressing the "request" button shows users a message that reads, "Please not search criteria. Your request will be addressed within three business days." The record is then sent into the redaction queue for the appropriate program person to complete a review and redaction process. Following that process, the record will either appear to the public as "view" (i.e., fully accessible), appear partially redacted, or become unavailable due to a "total exemption."

Ms. Endris notes that the record you requested is a public record and, therefore, was properly listed in the VFC. However, she maintains that the record is exempt from disclosure under subsection 4(b)(6) of the APRA. She further states that the record was never listed under "view" and was never released to the public.

Ms. Endris also notes that you requested the record through the "additional information" button on the VFC website. IDEM treated that as a public records request and retrieved the record for review, at which time IDEM determined that the record contained a notation on its face that read, "Not for public view per Indiana Code 5-14-3-4(b)(6)." IDEM programmers then designated the record as confidential, which is why it no longer appears in the document list.

Ms. Endris claims that the record does not contain any disclosable information and that it is excepted from disclosure in its entirety under subsection 4(b)(6) of the APRA. Ms. Endris has informed me that the document is a site review document in

which scientists are expressing their opinions. It involved an analysis from IDEM's Geology Section of the Office of Land Quality to the Section on Solid Waste Permits regarding the review of an entity's responses to requests for additional information. The opinions were expressed for the purpose of informing permit decision makers at IDEM (e.g., an assistant commissioner and/or the commissioner) about the sufficiency or insufficiency of the permit application. Ms. Endris argues that redaction was not required where the record was exempt from disclosure in its entirety. Finally, she claims that the "reasonable specificity" standard applies before a court and not at this stage of review.

ANALYSIS

The public policy of the APRA states, "[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. IDEM is a "public agency" under the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy IDEM's public records during regular business hours unless the public records are excepted from disclosure as nondisclosable under the APRA. I.C. § 5-14-3-3(a).

Here, IDEM claims that it can withhold the record you requested under the "deliberative material" exception to the APRA, which applies to records that are "intra-agency or interagency advisory or deliberative material . . . 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). Based on Ms. Endris' description of the record, it appears that it is an intra-agency communication that contained expressions of the opinions of scientists and other professionals evaluating a permit application for the purpose of enabling IDEM decision makers to make a determination regarding a permit. Consequently, it is my opinion that IDEM has the discretion to withhold the record under subsection 4(b)(6) of the APRA.

With regard to your argument that IDEM should separate disclosable and nondisclosable material and make the former available to you, you are correct that the APRA requires IDEM to do so "[i]f the record contains disclosable and nondisclosable information." See I.C. § 5-14-3-6(a). Here, however, IDEM maintains that the record contains only nondisclosable information. In that case, IDEM has not violated the APRA by withholding the record in its entirety.

As to your allegation that IDEM has not established the content of the relevant record with reasonable specificity, that is a standard that is not applicable at this stage. The APRA provides that any person may file a case in superior court to compel the production of records following the denial of access to such records by a public agency. See generally I.C. § 5-14-3-9. The court reviews the matter *de novo*, and the applicable burden of proof regarding whether the public agency violated the APRA is whether the public agency's decision was arbitrary or capricious. Ind. Code 5-14-3-9(f). In a court case, the burden of proof that the denial was arbitrary or capricious lies with the person

who requested access. *Id.* The public agency, however, must still meet an initial burden of proof by proving that the public record falls within any one of the categories listed under Indiana Code section 5-14-3-4(b) and establishing the contents with adequate specificity. *Id.*; *Opinion of the Public Access Counselor, 00-FC-18.*

At this stage, the relevant standard regarding an agency's denial is found in section 9 of the APRA, which requires that when a public records request is made in writing and the agency denies the request, the agency must deny the request in writing and must include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. I.C. § 5-14-3-9(c). It appears that IDEM has complied with section 9(c).

Finally, the APRA does not prohibit IDEM from publicly listing records in a VFC or similar database even if some of those records are confidential.¹ As Ms. Endris notes, the VFC merely lists the existence of various records; it does not make them all immediately available for public inspection. Moreover, nothing in the APRA prohibits an agency from denying access to a confidential record that is listed on a public database. In other words, an agency's public *acknowledgment* of the existence of a record is distinguishable from an agency's *disclosure* of the record, and nothing in the APRA requires that an agency must produce records merely because the agency has acknowledged their existence.

CONCLUSION

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

Best regards,



Andrew J. Kossack
Public Access Counselor

Cc: Lori Kyle Endris

¹ I note, however, that in some cases the very *existence* of a public record might itself be confidential information (e.g., classified national security information). Here, however, there is nothing to indicate that IDEM's records are subject to such restrictions.