



STATE OF INDIANA

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September 11, 2012

Marc G. Lopez
120 E. Market Street, Suite 710
Indianapolis, Indiana 46204

Re: Formal Complaint 12-FC-257; Alleged Violation of the Access to Public Records Act by the Indiana Prosecuting Attorneys Council

Dear Mr. Lopez:

This advisory opinion is in response to your formal complaint alleging the Indiana Prosecuting Attorneys Council ("Council") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* David N. Powell, Executive Director, responded on behalf of the Council. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that on February 7, 2012, you submitted a written request for records to the Council. You requested to inspect, and potentially self-copy, the following records:

1. Any and all written materials, in paper or digital format, of the May 20, 2011 Spring Seminar held at the Indianapolis Marriot North.
2. Any and all written materials, in paper or digital format, of the September 13-15, 2011 Trial Advocacy Course held at the Crown Plaza Hotel.

On February 9, 2012, J.T. Parker responded in writing to your request on behalf of the Council and acknowledged its receipt. On March 7, 2012, Mr. Parker provided the following descriptive list of records that would be responsive to your request and inquired if there were any records that you no longer wished to receive copies of:

1. Spring Seminar Records
 - a. Legislative Update (Language of bill and Power Point)
 - b. Digest of Enactments
 - c. Toxicology Audit (Power Point)
 - d. Recent Decisions in Criminal Law and Procedure (Digest of Cases)
 - e. Recent Decisions in Evidentiary Issues (Power Point)

- f. Legislative Update re: Synthetic Cannabinoids and “Bath Salts (Power Point)
- 2. 2011 Trial Advocacy
 - a. Hypothetical Case file (drunk driving)
 - b. Opening Statements (Power Point)
 - c. Pretrial Preparation (Power Point)
 - d. Effective Courtroom Communication (Power Point)
 - e. Pharmacology and Toxicology of Alcohol and Other Drugs (Power Point)
 - f. Jury Selection (Power Point)
 - g. OWI Legal Update (Power Point)
 - h. Cops in Court (Power Point)
 - i. Paper titled “Direct Exam”
 - j. Presenting Expert Testimony through Direct Examination (Power Point and Appellate Cases)
 - k. Closing Argument (Power Point)
 - l. Cross Examination for Prosecutors (Power Point)
 - m. Common Defenses in OWI Cases (Power Point)
 - n. Closing Argument (Power Point)

In response to Mr. Parker, you indicated that it would not be necessary for the Council to provide items a, b, and f from the Spring Seminar Records. Mr. Parker advised that the Council would thus begin the process of reviewing all records prior to their disclosure. On March 29, 2012, Mr. Parker provided that his review of the records was complete and he would be speaking with the Council’s Executive Director regarding the issue shortly. On April 27, 2012, after not hearing back from Mr. Parker, you inquired as to the status of the request. On the same date, Mr. Parker advised that the Council was in the process of receiving an opinion from the Attorney General on the issue of disclosure in light of new legislation that would allow for civil penalties to be imposed under the APRA. On June 6, 2012, Mr. Parker provided that he intended to have the materials forwarded to the Attorney General by the end of the week, which he thereafter confirmed occurred on June 12, 2012. As of September 5, 2012, the date you filed your formal complaint with the Public Access Counselor’s Office, you provide that the Council has yet to produce any records. You believe that the Council has failed to comply with the requirement that all records be made available within a reasonable period of time and that you have effectively been denied access to the records.

In response to your formal complaint, Mr. Powell advised that the Council has not denied your request in any fashion. The Council has requested an opinion from the Attorney General regarding your request and is awaiting a response. Mr. Powell anticipates that the Attorney General will provide that certain portions of the record may be withheld pursuant to the deliberative materials exception found in I.C. § 5-14-3-4(b)(6). Although the APRA does not require that an agency in exercising its discretionary authority to withhold materials pursuant to the deliberative materials exception to provide any further explanation, Mr. Powell provided that in this instance it is important that the Council do so. You have sought instruction materials produced by



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the Council and others. Some of the materials included instructor commentary that was solely intended for a particular audience. These comments were appropriate for that audience, but if released, would serve to embarrass the instructor and others. If disclosed, such material would have a potentially chilling effect on the instructors and serve to diminish the open discussions that the Council endeavored to foster.

The Council believes that the records are analogous to those examined by the Court of Appeals in *Newman v. Berstein*, 766 N.E.2d 8 (Ind. Ct. App. 2002). In *Newman*, the Court of Appeals addressed the applicability of the deliberative materials exception to policy manuals on plea agreements maintained by the Marion County Prosecutor's Office. The Court held that it would be proper under the deliberative materials exception for the Prosecutor to deny the request, as to require otherwise would likely affect the quality of decisions made by the agency. Mr. Powell further advised that materials similar to what is provided in the conference materials are readily available online via the U.S. Department of Justice. In addition, the records in question were prepared by attorneys based on their insight, experience, and opinions. As such, Mr. Power maintains that disclosure would have a serious impact on those attorneys and others if the materials were to be released beyond the intended audience.

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 Council 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 Council'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 24 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 (7) days of receipt, the request is deemed denied (emphasis added). *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and 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. *See* I.C. § 5-14-3-9(c). 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 Council responded in writing to your written request for records within seven (7) days of receipt. As such, it is my opinion that the Council complied with the requirements of section 9 of the APRA in responding to your request.

Effective July 1, 2012, the APRA provides a public agency shall provide records that are responsive to the request within a reasonable time. *See* I.C. § 5-14-3-3(b). The public access counselor has stated that factors to be considered to be considered in determining if the requirements of section 3(a) under the APRA have been met include, the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. The APRA requires an agency to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. *See* I.C. § 5-14-3-6(a). Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. *See* I.C. § 5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. *See* I.C. § 5-14-3-7(c). The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *See Opinion of the Public Access Counselor 02-FC-45*. This office has often suggested a public agency make portions of a response available from time to time when a large number of documents are being reviewed for disclosure. *See Opinions of the Public Access Counselor 06-FC-184; 08-FC-56; 11-FC-172*. Further nothing in the APRA indicates that a public agency's failure to provide "instant access" to the requested records constitutes a denial of access. *See Opinions of the Public Access Counselor 09-FC-192 and 10-FC-121*.

As applicable to your request, I would note that your request consists of seventeen separate categories of records from two conferences previously held by the Council. Throughout this process, Mr. Parker has maintained a consistent and open written dialogue with you regarding the status of your request, including informing you when certain employees of the Council were delayed in facilitating your request due to family illness and the date on which the request was forwarded to the Attorney General. Further, § I.C. 5-14-3-9.5 provides that civil penalties may be imposed by the Court if an individual continues to deny a request for records that complies with I.C. § 5-14-3-3(b) after the public access counselor has issued an advisory opinion instructing the agency to allow access to the record and the individual denies the request with the specific intent to unlawfully withhold the record. *See* I.C. § 5-14-3-9.5(c). However, it is a defense to the imposition of a civil penalty if the individual relied on the opinion of the Attorney General. *See* I.C. § 5-14-3-9.5(f). In light of I.C. § 5-14-3-9.5(f), the Council sought the opinion of the Attorney General regarding the level of redaction that may be allowed pursuant to I.C. § 5-14-3-4(b)(6). The Council submitted the respective information and records to the Attorney General on June 12, 2012 and is awaiting a response. With all of these factors in mind, it is my opinion that at this time, the Council has complied with the requirements of I.C. § 5-14-3-3(b) in providing all records in a reasonable period of time



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in response to a request made pursuant to the APRA. However, upon receiving guidance from the Attorney General, there should be little delay by the Council in providing any records that are responsive to the request that the Attorney General has determined may not be withheld or redacted pursuant to I.C. § 5-14-3-4(b)(6).

CONCLUSION

For the foregoing reasons, it is my opinion that the Council has not violated the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage".

Joseph B. Hoage
Public Access Counselor

cc: David Powell