



**STATE OF INDIANA**  
**MICHAEL R. PENCE, Governor**

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July 18, 2013

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

*Re: Formal Complaint 13-FC-178; Alleged Violation of the Access to Public Records Act by the Logansport City Council*

Dear Mr. Brugh:

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

#### BACKGROUND

In your formal complaint, you provide that on May 20, 2013, you submitted a written request for records to the Council, via Council President Joe Buck, for a copy of any documents between the Council and Mayor Ted Franklin, authorizing Franklin to engage in any discussion, on behalf of the City, with any person, corporation, or other entity regarding the City's generation of electricity or regarding any source of electricity for the City from January 1, 2012 through November 26, 2012. You allege that the Council failed to respond to your request within twenty-four (24) hours and thereafter on May 30, 2013 denied your request. The Council denied your request pursuant to I.C. § 5-14-3-4(b)(6), I.C. 5-14-3-4(b)(7), I.C. 5-14-3-4(b)(12), and I.C. 5-14-3-4(b)(19). You believe that the Council has failed to specifically cite to an exception that would allow it to deny your request. Further, you note that it is a question of fact whether the Council authorized the Mayor; thus the deliberative materials and journal exception would not be applicable. You do not believe that every word or sentence in a record can be an expression of an opinion. *See Opinion of the Public Access Counselor 04-FC-53.*

In response to your formal complaint, Mr. Molitor advised that the formal complaint relates to the City's ongoing negotiations that were addressed in recent advisory opinions issued by the Public Access Counselor. *See Opinions of the Public Access Counselor 13-FC-40, 13-FC-43, 13-FC-44.* You note that the Counselor previously opined 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.” However, the gist of your current complaint is that the Council has denied access to records improperly pursuant to the APRA. Mr. Molitor notes that the City Council, not the Mayor, was the recipient of the request; further the City Council denied your request pursuant to I.C. § 5-14-3-4(b)(6), (b)(7), (b)(12), and (b)(19). The Council did not cite to (b)(5) to deny your request. The deliberative materials exception was the essential exemption that your request was denied; the remaining citations were noted in order to demonstrate that there were other exemptions that may or may not apply to certain records that were sought.

## 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 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, you hand-delivered a written request for records to the Council on May 20, 2012. Thus, the Council was required to respond, in writing, within twenty-four hours of receiving your hand-delivered written request, and at a minimum acknowledge the receipt of the request. While I note that the Council ultimately denied your request on May 30, 2013, there has been no showing that the Council acknowledged the receipt of your request within twenty-four hours. As such, it is my opinion that the Council failed to comply with the requirements of section 9 of the APRA in response to your hand-delivered written request. *See Opinions of the Public Access Counselor 05-FC-176; 11-FC-84; 11-FC-308; 12-FC-63; 12-FC-316; 13-FC-10.*

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). 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*.

I do agree with your assertion that the APRA requires a specific citation to the exemption that authorizes an agency to deny a request for records made pursuant to the APRA. Here, the Council provided “and/or” between each citation that was noted in its denial, after initially citing to the deliberative materials exception. It is my opinion, aside from the citation to the deliberative materials exception, the Council acted contrary to the requirements of section 9(c) in failing to make a specific reference to the applicable exemption that would authorize the denial of your request.

As to the substance of the denial, the General Assembly has also provided that records that qualify as deliberative materials may be disclosed at the discretion of the public agency. *See* I.C. § 5-14-3-4(b)(6). The subdivision provides that:

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).

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*.

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 discloseable from non-discloseable *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-discloseable simply by proving that some of the documents in a group of similarly requested items are non-discloseable 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-discloseable 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-discloseable matters must be made available for public access. *Id.* at 913-14.

For those records responsive to your request that the Council denied solely pursuant to the deliberative materials exception, it would have been required to comply with the requirements of section 6 of the APRA in redacting all speculative and deliberative information and provide the remaining factual information, unless the material was inextricably linked. The Council has not noted that the material was inextricably linked. If the Council has complied with said requirements, it has not violated the APRA.

## CONCLUSION

For the foregoing reasons, it is my opinion the Council failed to comply with the requirements of section 9 of the APRA by not acknowledging the receipt of your hand-delivered, written request within twenty-four (24) hours of receipt. Further, it is my opinion, aside from the citation to the deliberative materials exception, the Council acted contrary to the requirements of section 9(c) in failing to make a specific reference to the applicable exemption that would authorize the denial of your request. Lastly, for those records responsive to your request that the Council denied solely pursuant to the deliberative materials exception, it would have been required to comply with the requirements of section 6 of the APRA in redacting all speculative and deliberative information and provide the remaining factual information, unless the material was inextricably linked. If the Council has complied with said requirements, it has not violated the APRA.

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