STATE OF INDIANA

MICHAEL R. PENCE, Governor

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May 14, 2013

Mr. Edwin Locke
5318 Shadow Wood Court
Indianapolis, IN 46254

Re: Formal Complaint 13-FC-81; Alleged Violation of the Access to Public Records Act by the City of Indianapolis, Department of Parks and Recreation

Dear Mr. Locke:

This is in response to your formal complaint alleging the City of Indianapolis Department of Parks and Recreation violated the Access to Public Records Act ("APRA"). Pursuant to Ind. Code § 5-14-3-9(e), I issue the following opinion in response to your complaint. My opinion is based on applicable provisions of the APRA, I.C. § 5-14-3-1 *et seq.* Ms. Samantha DeWester, Department Prosecutor and Public Access Counselor, responded on behalf of the City of Indianapolis Office of Corporation Counsel and the Department of Parks and Recreation (the "Department"). Her response is enclosed for your reference.

BACKGROUND

Your complaint alleges that the Department violated the APRA by denying you access to public records or by failing to produce records you requested within a reasonable time, or by failing to respond to your request for a status update on your original request within a reasonable time. In an email sent to the Department's Public Access Counselor on December 17, 2012, you requested "[r]ecords, reports, letters, memo's, emails, phone messages, receipts, invoices, and other related documents involving the Department of Parks and Recreation (or any employee/agent thereof) and any or all of the following: Mr. Thomas Geisse, The Community Through Youth Sport Foundations, Pike Youth Soccer Club, Eagle Creek Park Foundation, Michelle Cloud, Carol Walters, Becky Lomax, John Pankhurst, John Ulmer, Tabitha Clem, Mike Eckerle, and Mike Davis." You stated that your request "includes documents during this period involving others acting on behalf of the named organizations," and "any email messages sent through personal accounts accessed on Department computers" from November 1, 2012 through the present.

Ms. Maureen Faul responded to your request via email on January 3, 2013, informing you that the Department had initiated a search for records responsive to your request. Ms. Faul also noted

that responsive records would be examined to determine "whether they contain any material which by statute must or may be withheld from public inspection and copying", and that the Department would notify you when this process has been completed.

You emailed Ms. Faul on Friday, February 1, 2013 requesting an update on the status of your request. You then filed a formal complaint five on March 7, 2013, asserting that you were denied access to public records as of January 18, 2013, and noting that as of the filing of your complaint, you had not yet received any response to your February 1, 2013 email.

Ms. DeWester's submitted a response on behalf of the Department on April 1, 2013. Ms. DeWester acknowledges that the Department did not respond to your request within seven (7) days as required by the APRA. Ms. DeWester states that "the Department's oversight was entirely unintentional" and "at no time did the Department intend to deny access to the Complainant". Further, Ms. DeWester states that "the Department regrets this oversight and apologizes for any inconvenience [this] inadvertent omission may have caused."

Ms. DeWester notes that the APRA only establishes specific timeframes within which a public agency must acknowledge a request for public records. The APRA does not impose a specific time requirement within which public agencies must actually produce records responsive to a request, but only provides that responsive records be disclosed within a reasonable period of time. Ms. DeWester explains that your request is "voluminous and vague" in nature, covering a "multitude of items (not specific to one topic) between twelve (12) individuals or groups and any agents or employees thereof and the City of Indianapolis." She also notes that the Department has a large volume of pending public records requests, and that after responsive records are found, the Office of Corporation Counsel for the City must then work with the Department "to review any responsive records to determine if they contain items which shall or may be withheld by law". Ms. DeWester asserts that given the voluminous nature of the request at issue in your complaint, the time the Department has taken in disclosing responsive records has been reasonable under the APRA.

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. Accordingly, any person has the right to inspect and copy a public agency's 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 by mail, email 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). 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.

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The Department received your request on December 17, 2012. The Department was therefore required, at a minimum, to acknowledge receipt of your request by December 23, 2012. The Department has advised that due to a change in the Public Access Counselor for the City around the time of your request, it did not respond to your request until January 3, 2012. Accordingly, it is my opinion that the Department technically violated the APRA by failing to timely respond to your written request within seven days of its receipt.

The APRA does not require a public agency to provide a requestor with a specific date the search for records will be completed, or to provide a requestor with a status update regarding the search at specific, pre-determined time intervals. Because your February 1, 2013 email was merely a request for an update on the status of your initial request and not a new request for public records, the Department had no obligation under the APRA to issue an additional written response within seven days. However, in keeping with the spirit and intent of the public policy behind the APRA, I would encourage the Department to make every effort to respond to requests for status updates within a reasonable time.

After acknowledgment of a request, the APRA does not prescribe timeframes for the actual production of records. In accordance with section 3(b) of the APRA, the public access counselor has stated repeatedly that records must be produced within a reasonable period of time, based on the facts and circumstances. Considering factors such as the nature of the requests (whether they are broad or narrow), how extensive the process is to gather and redact the records, and whether the records must be reviewed by counsel and redacted to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe.

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. 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 APRA. I.C. §5-14-3-7(c). Thus, under section 7, the Department should not permit employees to neglect their essential duties in order to respond to public records requests, but the Department cannot simply ignore requests either, even when facing the high volume of pending public records requests described by Ms. DeWester. Based on the information provided in the complaint and in the Department's response, I cannot say that the Department has acted contrary to either section 3(b) or section 7 of the APRA.

To apply these standards to the present situation, the Department attributes the delay in producing the records you requested to the fact that your request is "voluminous and vague" in nature, covering a "multitude of items (not specific to one topic) between twelve (12) individuals or groups and any agents or employees thereof and the City of Indianapolis", and that the

Department has a large volume of pending public records requests. Further, the Department states that after responsive records are found, the Office of Corporation Counsel for the City must "review any responsive records to determine if they contain items which shall or may be withheld by law" before such records can be made available for your review. According to Ms. DeWester, the Department is working to accommodate your request and will notify you as soon as records responsive to your request are available.

Given these facts, I cannot say that the Department has violated the APRA by taking an unreasonably long time to produce records responsive to your request, or by denying you access to public records. I would note that the public access counselor 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-260.

As an additional matter, I note that you object to the Department's characterization of your request as "vague" in their April 1, 2013 response to the complaint. You state that you made a very similar request in 2012, and that the City did not object to that request as being too vague. The APRA requires that a records request "identify with reasonable particularity the record being requested." I.C. § 5-14-3-3(a)(1). "Reasonable particularity" is not defined in the APRA, but the public access counselor has repeatedly opined that "when a public agency cannot ascertain what records a requester is seeking, the request likely has not been made with reasonable particularity." *See Opinions of the Public Access Counselor* 10-FC-57; 08-FC-176. Certainly a request cannot always be considered to be made without reasonable particularity solely because it covers a large number of records. As a general guideline, the public access counselor has advised that when a public agency cannot ascertain what records a requester is seeking, the request likely has not been made with reasonable particularity. *See Opinion of the Public Access Counselor* 09-FC-24.

Moreover, the Indiana Court of Appeals recently addressed the issue of reasonable particularity as defined under the APRA in *Jent v. Fort Wayne Police Dept.*, 973 N.E.2d 30 (Ind. Ct. App. 2012), and again in *Anderson v. Huntington County Bd. of Com'rs.*, 983 N.E.2d 613 (Ind. Ct. App. 2013). The Court in *Jent* held that:

> Whether a request identifies with reasonable particularity the record being requested turns, in part, on whether the person making the request provides the agency with information that enables the agency to search for, locate, and retrieve the records. *Jent*, 973 N.E.2d at 33-35.

The Court's opinion in *Anderson* is particularly instructive. In early 2012, Mr. Anderson sought emails to and from four particular employees of Huntington County within a specified date range. When the County denied his request on the grounds that he had not identified records with reasonable particularity, Mr. Anderson filed a formal complaint with Public Access Counselor Joe Hoage. Relying in part on several previous opinions of the public access counselor, Mr. Hoage opined that the County's denial did not violate the APRA, as Mr. Anderson's request did not identify the public records he sought with reasonable particularity within the meaning of the APRA. *See Opinion of the Public Access Counselor* 12-FC-44. Mr. Anderson then filed a complaint in Huntington County Superior Court seeking to compel access to the requested

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records, and to recover attorneys' fees and costs. The Superior Court entered judgment for the County, and Mr. Anderson appealed. Though the County had in fact provided the requested records by the time the appeal was brought, the Court of Appeals chose to address the merits of the appeal under the public interest exception, recognizing that the issue of reasonable particularity under the APRA was one of first impression:

> Initially, we observe that the public policy behind the APRA is to provide the public with full and complete information regarding the affairs of the government. *See* I.C. § 5–14–3–1 (stating that "it is the public policy of the state that all persons are entitled to full and complete information regarding affairs of the government...") However, to request access to a public record, it must be described with "reasonable particularity." I.C. § 5–14–3–3(a)(1). The meaning of this phrase is the crux of the dispute between the Commissioners and Anderson.
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> "Reasonable particularity" is not defined within the APRA; however, Indiana Code section 5–14–3–1 states that "[t]his chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record." Recently, in *Jent v. Fort Wayne Police Department*, 973 N.E.2d 30, 33 (Ind.Ct.App.2012), a case factually similar to the instant one, a panel of this Court likened the reasonable particularity requirement to the discovery rules, stating that "a requested item has been designated with 'reasonable particularity' if the request enables the subpoenaed party to identify what is sought and enables the trial court to determine whether there has been sufficient compliance with the request."
>
> It is noteworthy that while the Commissioners agree with Anderson that the Public Access Counselor's decision is not binding on the trial court or this Court, in the absence of case law or adequate statutory authority, this Court should give considerable deference to the opinions of the Public Access Counselor. The Commissioners point out that in other areas of administrative law, "with respect to an agency's interpretation of statutes and regulations that [it] is charged with enforcing, such interpretation is entitled to great weight...." *Austin v. Ind. Family & Soc. Servs. Admin.*, 947 N.E.2d 979, 982 (Ind.Ct.App.2011). Nevertheless, the Commissioners concur with Anderson that unlike other cases under the Administrative Orders and Procedures Act, the trial court reviews an opinion of the Public Access Counselor de novo. I.C. § 5–14–3–9.

Here, Hoage, the Public Access Counselor, defined "[p]articularity" as "the quality or state of being particular as distinguished from universal." Appellant's App. p. 32. For example, a request for emails sent and received by a person in the last one hundred days lacks the particularity required to satisfy the statute and is a "universal" request. *Id.* at 31–33. Hoage also noted that records broadly involving a method of communication such as email did not rise to the level of "reasonable particularity" so as to compel disclosure. *Id.* at 33.

In reaching his conclusion, Hoage relied on prior opinions, inasmuch as this was not the first time that a Public Access Counselor had addressed this issue. Additionally, Hoage suggested ways in which Anderson could modify his request noting that "a request for all e-mail correspondence from Jane Doe to Jim Smith for a range of dates would be reasonably particular," whereas "a request for all e-mail correspondence to and from Jane Doe for a range of dates is not reasonably particular." *Id.* Instead, Anderson chose to file suit.

The trial court again referenced Hoage's opinion, approving the examples of what would and would not be considered reasonably particular. Additionally, the trial court stated that allowing requests such as Anderson's would permit a "fishing expedition." Appellant's App. p. 4.

Moreover, Anderson's requests required that the Commissioners determine which emails were truly public records and which were not. Consequently, even after the Commissioners compiled the emails, they had to undergo a process to ensure that they did not provide protected health information or other non-disclosable material. Tr. p. 53. This process involved turning over the 9500 emails to Human Resources to be redacted, after an IT employee had already spent ten hours and purchased new software for acquiring the emails. *Id.* at 95, 98.

Nevertheless, Anderson points out that the "reasonably particular" requirement exists so that the government agency knows what is being requested from the agency. Anderson asserts that the strongest evidence that his requests were reasonably particular is that the Commissioners provided the information that Anderson requested without Anderson modifying his initial requests.

Although the Commissioners ultimately spent the time and expense compiling and reviewing 9500 emails, they did not necessarily have a legal obligation to do so, and, as argued above, the Public Access Counselor's opinions state the opposite. To be sure, the fact that the Commissioners provided the information exactly as Anderson requested it does not define the APRA. Indeed, we agree with the Public Access Counselor's opinion that Anderson's requests were not reasonably particular under the APRA, and the Commissioners were under no legal obligation to provide to him the information as he requested. Consequently, this argument fails. *Anderson*, 983 N.E.2d at 617-619.

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Though the facts before me at this time do not indicate that the Department has denied your request for records, I cannot say that your request identifies the records you seek with "reasonable particularity" within the meaning of the APRA as it has been interpreted by the Indiana Court of Appeals in the *Jent* and *Anderson* cases (i.e., communications between any employees or agents of the Department and the individuals you identify). If you would amend or clarify your request to include email communications within a specified date range between specific employees of the Department and the specific individuals or groups you identified in your request, then I believe your request would meet the reasonable particularity requirement of the APRA. Of course, if the Department does not maintain the records you request (such as copies of emails received on or sent from private email accounts accesses on City computers or emails between City contractors or consultants and the parties you identify), the Department is not required to provide such records to you.

Because the public policy of the APRA favors disclosure and thus the burden of proof for nondisclosure is placed on the public agency, if an agency needs clarification of a request the agency should contact the requester for more information rather than simply denying the request. *See generally* IC 5-14-3-1; *Opinions of the Public Access Counselor* 02-FC-13; 05-FC-87; 11-FC-88. In the future, I would encourage the Department to contact requestors as soon as practicable to clarify requests may not be reasonably particular within the meaning of the APRA.

CONCLUSION

For the foregoing reasons, it is my opinion that the Department did violate Section 9(b) of the APRA by failing to respond to your request for public records within seven (7) days. Further, it is my opinion that the Department has not violated Section 3(b) of the APRA by not providing responsive records to you as of January 18, 2013. As your initial request was not reasonably particular within the meaning of the APRA, I suggest that you revise your request as described herein, and I encourage the Department to contact you in the event that additional clarification of your request is needed.

Please contact me if I can be of additional assistance.

Best regards,

Jennifer L. Jansen
Acting Public Access Counselor

Cc: Ms. Samantha DeWester, City Prosecutor and Public Access Counselor