
OPINION OF THE PUBLIC ACCESS COUNSELOR

JPAY, INC.,
Complainant,

v.

INDIANA DEPARTMENT OF ADMINISTRATION,
Respondent.

Formal Complaint No.
17-FC-259

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Indiana Department of Administration (“IDOA”) violated the Access to Public Records Act¹ (“APRA”). General Counsel John D. Snethen filed a response to the complaint on behalf of IDOA. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on November 10, 2017.

¹ Ind. Code §§ 5-14-3-1 to -10

BACKGROUND

JPay, Incorporated (“Complainant”), by and through its legal counsel, filed a formal complaint alleging IDOA violated APRA by improperly denying the company access to disclosable public records.

The disputed records in this case are related to the award of state contract under Request for Proposal (“RFP”) 17-055, which IDOA issued on behalf of the Department of Correction, soliciting a tablet-based system of delivering digital content and electronic services to offenders in state correctional facilities.

On September 1, 2017, IDOA issued an award recommendation letter under RFP 17-055. JPay Inc. was unsuccessful in its bid for the contract with the state.

In a letter dated September 8, 2017, JPay protested the validity of the IDOA’s award under the RFP, raising several specific challenges under the law.

On September 27, 2017, the IDOA responded to the letter of protest stating that it found “no reason to uphold JPay, Inc’s protest” and affirmed the State’s award. Further, IDOA stated that JPay could appeal the findings in writing within five days. JPay, Inc. did just that.

In addition to its letter of appeal, on October 4, 2017, JPay filed a public records request with IDOA seeking the following:

[T]he evaluation team’s detailed scoring sheets for every vendor bidding on the above-referenced RFP.

In addition, we would like to obtain the complete files of the State relating, referring, or pertaining to RFP 17-055 including all documents and data

relating, referring or pertaining to the State's contact and communications with references listed by GTL and verification thereof by RFP evaluators.

The next day, IDOA sent JPay an email denying disclosure of the evaluator's scoring sheets because the IDOA treats and deems the scoring sheets, evaluator identities, notes, and other associated information as deliberative material and confidential under APRA. Moreover, IDOA stated that such records are intra-agency or interagency advisory or deliberative materials and reflect and contain expressions of opinion that are speculative in nature and communicated with the purpose of decision making.

On October 27, 2017, IDOA issued a letter stating that the agency did not find a justifiable reason to overturn or amend its initial decision or award recommendation. Further, IDOA acknowledged this action constituted a final decision and that it considered JPay's administrative remedies exhausted.

As a result, JPay filed a formal complaint with this office regarding its records request with IDOA.

IDOA denies that an APRA violation has occurred in this case. Specifically, as it pertains to the scorecards, IDOA argues that the scorecards are interagency deliberative material; and thus, excepted from public disclosure under Indiana Code section 5-14-3-4(b)(6).

IDOA acknowledges that it failed to respond to the remainder of JPay's request because the language used was so vague and overbroad that the agency could not reasonably ascertain what records the company is seeking. Stated differently, the IDOA claims the remainder of JPay's request

did not identify with reasonable particularity what public records it was seeking as required under APRA.

ANALYSIS

JPay Inc. contends that IDOA has violated APRA by: (1) Failing to provide any basis for withholding most of the requested records; (2) Improperly withholding the scorecards under APRA's deliberative materials exception; and (3) Failing to identify and separate disclosable and non-disclosable materials in the request.

IDOA argues that the scorecards are interagency deliberative material because they express another agency's evaluation team volunteers' opinions and are used by IDOA to form its discretionary opinions. Further, IDOA contends that the remainder of the request fails APRA's reasonable particularity requirement.

As a preliminary matter, it should be noted that this opinion will address only the public access issues presented. This Office will not interject on the validity of the contract award process or procedures administered under the RFP.

1. The Access to Public Records Act

The public policy underlying 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." Ind. Code § 5-14-3-1. Therefore, unless an exception applies under section 4, any person has the right to inspect and copy a public agency's public records during regular business hours. Ind. Code § 5-14-3-3(a).

IDOA is a public agency for the purposes of the APRA; and therefore, subject to the Act's disclosure requirements. Ind. Code § 5-14-3-2(n). Thus, unless an exception applies, JPay Inc. has the right to inspect and copy IDOA's public records.

Under APRA, *public record* means:

any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

Ind. Code § 5-14-3-2(r). Here the parties do not seem to dispute that the records at issue are public records as defined under APRA. Instead, the dispute turns—at least in part—on whether the requested records may be properly withheld from disclosure under the Act.

1.1 Disclosability of Scorecards

JPay Inc. is seeking the evaluation team's detailed scorecards for every vendor bidding on RFP 17-055. IDOA denied the request, arguing the agency has discretion to withhold the score sheets from disclosure under APRA's deliberative materials exception, codified at Indiana Code section 5-14-3-4(b)(6). JPay argues that the (b)(6) exception to disclosure should not apply to the score sheets because they are the final result of an evaluator's decision-making process.

Under Indiana Code section 5-14-3-4(b)(6), a public agency has discretion to withhold the following public records from disclosure:

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.

Here, in this context, based on the evidence submitted to this office, the scorecards of evaluators can be withheld from disclosure under the (b)(6) exception. The scorecards of individual evaluators are expressions of the evaluator's opinion. Furthermore, the scorecards of individual evaluators are communicated for the purpose of decision making – specifically, the purpose of selecting a vendor.

The Complainant argues that the scorecards are factual and final because they are the result of opinions and deliberations. However, based on the explanation of the scoring process provided by the IDOA's response to the Complaint, these individual scores are averaged and a final score is calculated to assist the IDOA in making an award decision. Although the individual scorecards may be the final opinion of the individual evaluator, the scorecards are still communicated for the purpose of making a decision on awarding a contract. Thus it is my Opinion that the scorecards of individual evaluators constitute deliberative material pursuant to Indiana Code section 5-14-3-4(b)(6). They are a subjective assessment upon which the ultimate decision-making authority relies to make said decision.

1.2 IDOA's Basis for Withholding Other Records

JPay asserts that IDOA also violated APRA by failing to respond or otherwise provide a basis for withholding the remainder of the requested records. IDOA concedes that it did

not respond in writing to the portion of JPay's request seeking the following:

[T]he complete files of the State relating, referring or pertaining to RFP 17-055 including all documents and data relating, referring, or pertaining to the State's contact and communications with references listed by GTL and verification thereof by RFP evaluators.

In its answer to the formal complaint, IDOA argues that this portion of the request is so vaguely worded and overbroad that it does not satisfy APRA's requirement of reasonable particularity.

Indeed, APRA mandates any request for access to public records to identify with *reasonable particularity* the record being requested. Ind. Code § 5-14-3-3(a)(1). APRA does not define reasonable particularity. I have addressed this frequently in prior Opinions.

In 16-FC-01, I opined that a broad request does not necessarily lack reasonable particularity. I noted, however, that "if a public agency cannot ascertain what records a requestor is seeking, the request likely has not been made with reasonable particularity," and that "public records request should not contain language such as 'any and all.'" I stated in 16-FC-60 that "there is nothing wrong with a voluminous request as long it meets common sense standards of specificity." In 17-FC-52, I observed the following in regards to records requests for emails that are reasonable and specific:

[P]articularity must be *reasonable*. The Access to Public Records Act is not a license for universal requests for the *totality* of documents which may be in the custody of a public agency, hence the requirement for reasonable particularity. Elements of specificity must be identified. . . . Inherent in

the concept of reasonableness is an element of *practicality*.

I emphasized in 16-FC-60 that “[a] public agency is not required to fulfill a request which lacks reasonable particularity.” In 16-FC-147 I acknowledged that when “a request lacks reasonable particularity, the public agency is not required to conduct a vast search of all its records to produce each document which may fall within the broadly defined terms of the requestor. Rather, it may deny the initial request and require the requestor to craft a more specific request in which the documents sought are readily identifiable.”

1.3 Disclosable and Non-Disclosable Records

IDOA acknowledges that it did not respond in writing to the remaining portion of JPay’s records request because it was so vague and broadly worded that the agency could not reasonably ascertain what records the company wanted.

At a minimum, the IDOA should have responded in writing to the Complainant to deny the request and inform it that the denial was based on the lack of reasonable particularity pursuant to Indiana Code section 5-14-3-3(a)(1). It is my preference that public agencies also suggest ways that the requestor might narrow an overly broad request.

CONCLUSION

Based on the foregoing it is the opinion of the Public Access Counselor that the Indiana Department of Administration did not violate the Access to Public Records Act with respect to the request for individual evaluator scorecards. However, the Indiana Department of Administration should have affirmatively responded in writing to a request that lacked reasonable particularity.

A handwritten signature in black ink, appearing to read 'LHB', with a long, sweeping underline.

Luke H. Britt
Public Access Counselor