

August 15, 2001

Ms. Christina Hightower  
2419 East Tenth Street  
Indianapolis, IN 46201

*Re: Advisory Opinion 01-FC-42; Alleged Improper Denial of Access to Public Records by the Indiana Department of Environmental Management.*

Dear Ms. Hightower:

This is in response to your formal complaint, which was received on August 6, 2001. You have alleged that the Indiana Department of Environmental Management ("IDEM,") violated the Indiana Access to Public Records Act, ("APRA,") Indiana Code chapter 5-14-3. Specifically, you claim that you made a request for a copy of the professional calendar of a particular IDEM employee and were denied access to it under Indiana Code section 5-14-3-4(b)(7). It is your position that the IDEM was required to disclose at least the information related to the individual's employment from the calendar and could have redacted any personal information. Ms. Michelle Reeves, Attorney for the IDEM, responded in writing to your complaint and a copy of her response is enclosed for your reference. For the reasons set forth below, it is my opinion that the IDEM's denial of access to an employee's professional calendar was not inappropriate under Indiana Code section 5-14-3-4(b)(7).

## BACKGROUND

According to your complaint, on July 20, 2001 you received a written denial of access to the professional calendar of Mr. Dick Weisfeld, a fellow IDEM employee, from Ms. Reeves. You requested this information in reference to your Equal Employment Opportunity Commission complaint against the IDEM. It is your contention that since the IDEM purchased the calendar it is the property of the State of Indiana. Mr. Weisfeld has allegedly recorded his schedule in the calendar, including field time at numerous training courses and conferences. The IDEM denied you access to the calendar under Indiana Code section 5-14-3-4(b)(7), but it is your position that the IDEM could have redacted personal information in the calendar and disclosed to you the information related to the professional calendar of Mr. Weisfeld. After receiving the written denial, you filed your formal complaint with this Office.

In response to your complaint, Ms. Reeves emphasized that the reason for your request, specifically as it concerns your EEOC complaint, had no bearing on the agency's decision to deny you access to Mr. Weisfeld's calendar. The denial was based upon the authority set forth at Indiana Code section 5-14-3-4(b)(7), which allows the IDEM discretion over the disclosure of "diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal." Ms. Reeves also pointed to the *Journal Gazette v. The Board of Trustees of Purdue University* case, 698 N.E.2d 826 (Ind.App 1998), a Court of Appeals decision applying Indiana Code section 5-14-3-4(b)(7) to Purdue University employee's

compliance log. Ms. Reeves stated that the facts of that case were similar to this in that Mr. Weisfeld had exclusive control over the calendar and it contains his personal notes. As for your position that the personal notes could be redacted, Ms. Reeves points out that since the calendar in its entirety is the functional equivalent of a diary, then it is entirely nondisclosable and it cannot be separated.

## ANALYSIS

The public policy of the APRA states that "(p)roviding persons with information is an essential function of a representative government and 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. Furthermore, "[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." Ind. Code § 5-14-3-1.

The IDEM is clearly a public agency for the purposes of the APRA. Ind. Code § 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the IDEM during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under Indiana Code section 5-14-3-4. Ind. Code § 5-14-3-3(a). Under the APRA, the burden for showing that a public record is nondisclosable lies with the public agency, not on the person who requests access to the record. Ind. Code §5-14-3-1.

Under Indiana Code section 5-14-3-4(b), public agencies are granted discretion over the disclosure of certain categories of public records. In this case, the IDEM has cited to Indiana Code section 5-14-3-4(b)(7) as authority for the nondisclosure of Mr. Weisfeld's calendar. This section provides that

Except as otherwise provided by subsection (a), the following public records shall be excepted from section 3 of this chapter at the discretion of a public agency:

\* \* \*

Diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal.

Under Indiana Code section 5-14-3-4(b)(7), therefore, the IDEM may either disclose or not disclose public records that are covered by this exception.

In her response to your formal complaint, Ms. Reeves cites to the *Journal Gazette v. The Board of Trustees of Purdue University* case as authority for the IDEM's denial of your request for access to Mr. Weisfeld's entire calendar. *Id.* In the *Journal Gazette* case, the newspaper made repeated requests for access to various public records from Purdue University, including a compliance log. The Court of Appeals found that Purdue University met its burden of proof under the APRA that the compliance log in question was exempt as a whole from disclosure under Indiana Code section 5-14-3-4(b)(7). *Id.* at

829. This compliance log contained notes made concerning information provided to the person on activities related to NCAA or Big Ten rules and regulations, ongoing entries on various matters, and personal notes. The Purdue University employee who created the compliance log also testified that no one else made any entries into the compliance log, he shared information from it with very few people and that he referred to it as a notebook or diary. In this case, Ms. Reeves states that the calendar you requested is similar to the compliance log at issue in the *Journal Gazette* case. Mr. Weisfeld's calendar contains personal notes, is shared with a select few and he has exclusive control of it. For these reasons, the IDEM asserts that their denial of access was appropriate under the APRA.

You have also alleged in your complaint that the IDEM should have redacted any personal entries and provided you with professional entries made by Mr. Weisfeld. Under Indiana Code section 5-14-3-6(a), when a public agency receives a request for access to a public record, and that public record contains disclosable and nondisclosable information, the public agency is required to separate the material that may be disclosed and make it available for inspection and copying. If all of the information is subject to an exception to disclosure, the public agency could not separate out nondisclosable information. In fact, in this case, the IDEM asserts that Mr. Weisfeld's professional calendar may be withheld in its entirety because the calendar as a whole constitutes the functional equivalent of a diary or journal as contemplated under Indiana Code section 5-14-3-4(b)(7).

Based upon the information provided to me, it is my opinion that the IDEM has cited to a valid exception to disclosure under the APRA with respect to Mr. Weisfeld's professional calendar. Further, Indiana Code section 5-14-3-7 does provide that so long as the entire calendar functions as a diary or journal, then that calendar may be subject to nondisclosure as a whole. The IDEM's denial of your request for access to Mr. Weisfeld's professional calendar, therefore, was not inappropriate under the APRA.

## CONCLUSION

It is my opinion that, based upon the information provided, the Indiana Department of Environmental Management's denial of access to the professional calendar of an employee was authorized under Indiana Code section 5-14-3-4(b)(7).

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: Ms. Michelle Reeves, IDEM

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