
OPINION OF THE PUBLIC ACCESS COUNSELOR

PATRICK W. THOMAS,
Complainant,

v.

INDIANA DEPARTMENT OF REVENUE,
Respondent.

Formal Complaint No.
21-FC-45

Luke H. Britt
Public Access Counselor

BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging that the Indiana Department of Revenue violated the Access to Public Records Act.¹ Assistant General Counsel Sarah Kamhi filed an answer on behalf of the agency. 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 April 15, 2021.

¹ Ind. Code § 5-14-3-1-10.

BACKGROUND

This case involves a dispute over the timeliness of which records were produced, and the application of exceptions allowing an agency to redact and withhold said records.

On July 22, 2020, Patrick W. Thomas (Complainant) filed a public records request with the Indiana Department of Revenue (DOR) seeking the following:

1. Standards issued from January 1, 2019 to July 1, 2020 that the Taxpayer Advocate Office issued to its staff for the consideration of Offers in Compromise, as contemplated under Ind. Code § 6-8.1-3-17(a), including but not limited to: published manuals, published decisions, general rules or policy statements other than rules, and internal guidelines and resources, including but not limited to the Taxpayer Advocate Office's "worksheet" that TAO staff used during this period to determine whether to accept or deny a taxpayer's proposed offer in compromise.
2. Standards issued from January 1, 2019 to July 1, 2020 that the Taxpayer Advocate Office issued to its staff for the consideration of Economic Hardship requests, as contemplated under the Department's published Form FS-H and other Department policy, including but not limited to: published manuals, published decisions, internal guidelines and resources, and general rules or policy statements other than rules; and
3. Standards issued from January 1, 2019 to July 1, 2020 that the Taxpayer Advocate Office issued to its staff for the consideration of

Hardship Payment Plans, as contemplated under the Department's published Form FS-H and other Department policy, including but not limited to: published manuals, published decisions, internal guidelines and resources, and general rules or policy statements other than rules.

For all of the above requests, please include the following information relevant to these policies and considerations:

- A. Guidelines and procedures internally distributed and communicated to Taxpayer Advocate Office employees from January 1, 2019 to July 1, 2020 regarding how the Department considers the difference between the amount of a proposed offer with the amount of the outstanding liability in determining whether to accept or deny a taxpayer's proposed offer in compromise; and
- B. Guidelines and procedures internally distributed and communicated to Taxpayer Advocate Office employees from January 1, 2019 to July 1, 2020 regarding the Department's approach and consideration of offers in compromise where the taxpayer's financial condition demonstrates they do not have sufficient assets or income to pay for the proposed offer.

On July 23, 2020, DOR acknowledged receipt the request. Subsequently, on March 12, 2021, DOR responded to Thomas and provided what it considered to be the disclosable records fulfilling the request.

Thomas takes exception to the length of time DOR took to disclose the records that were made available. Allegedly, it took 233 days after the submission of the records request for DOR to provide a response. He argues this constitutes an unreasonable amount of time for record production.

Moreover, Thomas also contends that DOR improperly redacted non-confidential portions of the disclosed documents. DOR cited redactions according to I.C. 5-14-3-4(b)(6), allowing a public agency to redact information deemed to be advisory or deliberative material. Thomas takes exception to DOR's application of the statute, arguing that the general nature of the documentation is factual and not deliberative or discretionary.

Dissatisfied with the production of documents, Thomas filed a formal complaint on April 15, 2021, alleging that DOR violated the Access to Public Records Act (APRA).

DOR filed a response to Thomas's formal complaint arguing that the agency's actions were appropriate and did not violate the APRA. First, DOR explains that when taking into account the complex nature of the request; the size of the agency; the number of employees available to process all of the records requests submitted to DOR; and the time required to gather and review all potentially responsive materials, the timeframe within which DOR responded to the Thomas's request was in fact reasonable.

Additionally, DOR chose to redact certain parts of the requested Taxpayer Advocate Office (TAO) manuals and guidelines on Offers in Compromise (OIC), Economic Hardship requests, and Hardship payment plans, pursuant to Indiana Code 5-14-3-4(b)(6) as deliberative material. Contrary

to the Complainant's claims regarding the perceived instructional nature of the manuals and guidelines, DOR argues states the redacted materials are directly used to contemplate and deliberate a taxpayer's proposed settlement offer to DOR, for agency advice to employees, and are speculative in nature given taxpayers' varying circumstances.

ANALYSIS

1. The Access to Public Records Act

It is the public policy of the State of Indiana that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Ind. Code § 5-14-3-1.

The Access to Public Records Act (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." Ind. Code § 5-14-3-1. The Indiana Department of Revenue is a public agency for purposes of APRA; and therefore, subject to its requirements. *See* Ind. Code § 5-14-3-2(q).

As a result, unless an exception applies, any person has the right to inspect and copy DOR's public records during regular business hours. Ind. Code § 5-14-3-3(a). Indeed, APRA contains exceptions—both mandatory and discretionary—to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a)—(b).

2. Reasonable timeliness

This complaint, in part, questions whether DOR fulfilled Thomas' requests in a timely manner as required by APRA.

It is true that APRA requires a public agency to fulfill (or deny) a public records request within a reasonable time. *See* Ind. Code § 5-14-3-3(a). While factors beyond the control of an agency may affect what is reasonable, this office generally suggests a 30-day timeframe for most routine records requests.

In this case, however, the records requested were not routine in terms of the sheer volume of material requested. The pared down request still involved six distinct categories of records and dozens more subcategories (e.g., decisions, manuals, rules, policies, etc.). Arguably, the July 22 request was still unspecific in nature. In any case, the request at hand is distinguishable from one for meeting minutes or budgets.

Even so, 233 days is a long time to wait.

While DOR has attempted to argue the delay was reasonable with justifiable factors, this office still likes to see piecemeal production of records as they become available. That generally tends to satisfy a requester and avoids complaints. Waiting until all materials are available and delivering them all at once invites the latter.

DOR does state in its response that the agency is taking further steps to streamline the records request process and automate it to an extent. For that, this office will view the current complaint as an outlier.

3. Deliberative materials exception

Under APRA, a public agency has discretion to withhold deliberative material, which includes records that are:

intra-agency or interagency advisory...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.

Ind. Code § 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. The Indiana Court of Appeals observed that 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 *Newman* case is of particular interest in this regard. While this office has often postured that the deliberative materials exception has potential for rife abuse, it certainly has its merits when applied appropriately.

Generally speaking, static operational documents have little opinion contained within them. The *Newman* court considered a similar issue with unchanging policies of a prosecutor's office. It reasoned the following:

In other words, Newman [the sitting Marion County Prosecutor] does not issue a new, final directive for each and every plea negotiation to be mechanically applied by the deputy prosecutor.

Moreover, if every decision in every negotiation were left to Newman, then there would be no need for the policies. It appears, rather, that each deputy prosecutor ascertains the facts of the individual case, tailors the appropriate negotiating strategy, and makes decisions for each plea negotiation based on the policies.

And so is the case here. The documents in question are the types of pre-decisional standards predicated decisions. To the extent they are fluid, while they may not be opinion-based, they are certainly speculative courses of action. These standards are not made readily known outside DOR.

The agency states the materials are used to “contemplate and deliberate a taxpayer’s proposed settlement offer to DOR, for agency advice to employees, and are speculative in nature given taxpayers varying circumstance.”

DOR Response at 4. While this office has no intention of broadening the application of the deliberative materials exception, it appears the documents in question fall rather squarely into the type of records the *Newman* court contemplated.

The burden of an agency when responding to an investigation by this office is to present a persuasive argument giving the public access counselor a foothold to make a determination. Not all agencies succeed, and the conclusions are especially difficult when the PAC does not have subpoena power to compel an *in camera* review.

In this case, DOR's argument is sufficiently well-reasoned to a degree a conclusion can be reached. The materials redacted are the type which would typically fall into the 4(b)(6) exception based upon binding precedent.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Indiana Department of Revenue did not violate the Access to Public Records Act.

A handwritten signature in black ink, appearing to read 'LH Britt', with a stylized flourish at the end.

Luke H. Britt
Public Access Counselor