



# STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR  
HEATHER NEAL

Indiana Government Center South  
402 West Washington Street, Room W460  
Indianapolis, Indiana 46204-2745  
Telephone: (317)233-9435  
Fax: (317)233-3091  
1-800-228-6013  
[www.IN.gov/pac](http://www.IN.gov/pac)

October 21, 2008

Susan Craig  
Southeastern Indiana Regional Planning Commission  
PO Box 765  
Versailles, Indiana 47042

*Re: Informal Inquiry 08-INF-40 regarding Southeastern Indiana Regional  
Planning Commission*

Dear Ms. Craig:

This opinion is in response to your informal inquiry dated October 15, 2008. You write on behalf of the Southeastern Indiana Regional Planning Commissioner ("Commission") to inquire about a number of requests for access to records you have received, submitted pursuant to the Access to Public Records Act ("APRA") (Ind. Code 5-14-3). You inquire whether the records are required to be disclosed to the requester. Pursuant to I.C. § 5-14-4-10(5), I issue the following opinion in response to your inquiry.

## BACKGROUND

The Commission has received a number of requests from an individual seeking records related to a determination of federal Hatch Act compliance. You indicate that in the year 2000 a Commission staff person ran for election as Jefferson County Commissioner. The Commission, concerned with compliance with the Hatch Act, consulted the United States Office of Special Counsel on the matter. In addition, the Commission's Board of Directors discussed the issue in great detail. A Commission staff member also obtained a legal opinion regarding the issue. You have received requests for a number of records related to this matter, and those records are listed below:

- "Copies of any records related to the Federal Office of Special Counsel, during calendar year 2000, which document communication including correspondence, conversation, faxes, emails and notes related to the Hatch Act. Including conversations with Ms. Lovell.
- Copies of any records related to the Federal Office of Special Counsel, during calendar year 2008, which document communication including correspondence, conversation, faxes, emails and notes related to the Hatch Act.

- Copies of any records related to attorney Mike Howard's determination that a SIRPC employee can run for election to public office, and copies of any further review the SIRPC did regarding possible Hatch Act issues.
- Copies of any record that directed Ms. Craig to permanently reassign Ms. Berry to projects not funded with federal funds.
- Copies of any record that documents that Ms. Berry was not assigned to any projects that were funded with federal funds.
- Copies of any record that directed Ms. Craig to fund Ms. Berry's position from non federal funds.
- Copies of any record that documents that Ms. Berry's position from non-federal funds.
- Copies of any record that documents that Ms. Berry's position was not funded with federal funds from the year 2000 thru 2008.
- Copies of any records that show that the SIRPC segregated expenditures made from federal funds from the year 2000 to 2008.
- Copies of any records that relates Ms. Berry's recent resignation, including her letter of resignation and any correspondence with SIRPC board members regarding Ms. Berry's resignation.”

You indicate it appears to you the requests would fall under exceptions to disclosure listed in the APRA, specifically "intra agency or interagency advisory or deliberative materials that express opinions and are used for decision making" and "diaries, journals, or other personal notes." You further indicate that “[o]ther issues would appear to be personnel related, which I would assume would be exempt.”

#### ANALYSIS

The public policy of the 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." I.C. § 5-14-3-1. The Commission is clearly a public agency for the purposes of the APRA. I.C. § 5-14-3-2(m). Accordingly, any person has the right to inspect and copy the public records of the Commission during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

Your inquiry relates to three separate exceptions to disclosure found in the APRA. Because I do not know the exact nature of the records the Commission maintains which are responsive to each of the items requested, I will address the three exceptions in

general terms. What is important about invoking the exceptions, though, is to remember that the agency bears the burden of proof to sustain the denial of access; the burden is not placed on the requester who seeks access to inspect and copy the records. See I.C. § 5-14-3-1.

First, you assert that some of the records may fall under the deliberative materials exception to disclosure. The APRA excepts from disclosure, among others, the following:

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).

The Indiana Court of Appeals addressed the issue of deliberative materials 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.

Here, you indicate it appears to you that some of the requests would fall under the deliberative materials exception. To be withheld from disclosure under the deliberative materials exception, the records must be expressions of opinion or speculative in nature *and* communicated for the purpose of decision-making. I.C. § 5-14-3-4(b)(6). To the extent the requested records satisfy both components of the definition of deliberative materials, those portions of the records would be excepted from disclosure at the

discretion of the agency. *Id.* If there is information which is not expression of opinion or speculative in nature and is not inextricably linked with the nondisclosable materials, that information should be provided. The question to ask when reviewing the records is whether each record *consists of* deliberative material or merely *contains* deliberative material. If a record consists of deliberative material, the entire record may be withheld from disclosure. If the record merely contains deliberative material, the remaining portions of the record must be provided.

You further indicate you believe some of the records may be withheld under the diaries, journal and personal notes exception to disclosure found at I.C. § 5-14-3-4(b)(7). This issue has been addressed by the Indiana Court of Appeals in *Journal Gazette v. Board of Trustees of Purdue University*, 698 N.E.2d 826 (Ind. Ct. App. 1998), which involved Purdue University's denial of access to an NCAA compliance log maintained by Mr. Blalock, a Purdue employee. The court said that the APRA allows the exception of

‘diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal’ from the disclosure requirement of the Act. Blalock described the compliance log as notes that he has made concerning information provided to him on activities related to NCAA or Big Ten rules and regulations. He testified that it is an ongoing log with the entries referring to various matters. He also testified that the log is a place for his personal notes and that no one else makes entries in the log. He specifically referred to it as his notebook or diary, and shares it with select others only on occasion. The compliance log kept by Blalock clearly falls under the diary, journal, or personal notes exception in the Act.  
*Id.* at 829.

I do not see in the list you provided any specific records I would identify as similar records to those in the *Journal Gazette* case. Certainly if any records responsive to the request are indeed diaries, journals, or personal notes serving as the equivalent of diaries or journals, those would be excepted from disclosure pursuant to I.C. §5-14-3-4(b)(7). I would caution, though, that this is not a blanket exception for any handwritten or even typed notes a public employee takes. As you will see in the court's analysis of the *Journal Gazette* case, the notes must be the functional equivalent of a diary or journal kept by the employee or official. To the extent Purdue maintains correspondence, electronic mail messages or other records responsive to the request which do not fall under the diary, journal or personal notes exception or another exception found in the APRA, those records should be produced.

Finally, you indicate that other records requested appear to be “personnel related,” and you indicate your assumption those records would be exempt. Indeed the APRA does provide a general exception to disclosure for personnel files of public employees or applicants for employment, but that exception, found at I.C. § 5-14-3-4(b)(8), contains three exceptions within the exception, or three categories of records which *must* be disclosed upon request:

(A) the name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency;

(B) information relating to the status of any formal charges against the employee; and

(C) the factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged.

I.C. § 5-14-3-4(b)(8).

To the extent any of the requested records are personnel file records and fall under one of the listed exceptions to the exceptions, those records must be disclosed. Any other personnel file records may be withheld at the discretion of the agency. *Id.*

Please do not hesitate to contact our office if we can be of further assistance.

Best regards,



Heather Willis Neal  
Public Access Counselor