



# STATE OF INDIANA

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March 26, 2009

Gitte Laasby  
*Post-Tribune*  
1433 East 83<sup>rd</sup> Avenue  
Merrillville, Indiana 46410

*Re: Informal inquiry 09-INF-7 regarding the Indiana Department of  
Environmental Management*

Dear Ms. Laasby:

This advisory opinion is in response to your informal inquiry dated January 30, 2009. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry.

You write regarding records maintained by the Indiana Department of Environmental Management ("IDEM"). Pursuant to the Access to Public Records Act ("APRA") (Ind. Code 5-14-3), IDEM is a public agency. *See* I.C. § 5-14-3-2(m)(2). Your inquiry is whether the APRA requires disclosure of the records you requested and to which IDEM has denied you access.

## BACKGROUND

You submitted to IDEM on September 29, 2008 a request for access to records maintained by IDEM. Specifically, you requested "electronic or hard copy calendar items and meeting requests" for meetings related to BP Whiting's air permit. You requested any such calendar items between IDEM employees, IDEM employees and the Governor's office, IDEM employees and BP, and IDEM employees and United States Environmental Protection Agency employees.

In a November 21, 2008 communication, IDEM denied access to the few calendar items responsive to your request on the basis of deliberative material and attorney-client confidential communication. IDEM cited I.C. § 5-14-3-4(b)(6), I.C. § 5-14-3-4(a)(8), and I.C. § 5-14-3-4(b)(2). You indicate that you challenged that denial on the basis that calendar items are neither deliberative materials nor work product of an attorney. You received a reply to your challenge, wherein IDEM claimed the records are nondisclosable pursuant to I.C. § 5-14-3-4(b)(7).

You contend the calendar materials are not excepted from disclosure on the basis of I.C. § 5-14-3-4(b)(7). You cite two cases from other jurisdictions as well as a good deal of information about the way Microsoft Outlook, which is utilized by IDEM, is marketed. You contend that the calendar items cannot be withheld by IDEM.

IDEM responded to the inquiry by letter dated February 20. IDEM confirms the timeline of events as you have described. IDEM asserts that “all of the documents in question are internal, intra-agency deliberative material, were communicated for the purpose of decision making and are the functional equivalent of a diary or journal.” IDEM contends two previous opinions from this office, *Opinion of the Public Access Counselor 01-FC-42* and *05-FC-152*, support this assertion. Further, IDEM contends the assertion is supported by *Journal Gazette v. The Board of Trustees of Purdue University*, 698 N.E.2d 826 (Ind. Ct. App. 1998).

### 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. IDEM 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 IDEM 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).

The APRA provides that at the discretion of the agency, the following (among others) may be withheld from disclosure:

Diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal.  
I.C. § 5-14-3-4(b)(7).

This office has previously addressed the issue of whether calendars of public officials must be disclosed upon request. In *Opinion of the Public Access Counselor 01-FC-42*, Counselor O’Connor addressed an issue nearly identical to the present issue. IDEM denied access to the professional calendar maintained by an employee of IDEM. There, Counselor O’Connor opined as follows:

. . . 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.

*Id.*, available at <http://www.in.gov/pac/advisory/files/2001fc42.pdf>.

In *Opinion 05-FC-152*, Counselor Davis addressed a similar issue involving a request for the calendar of the President of Purdue University. For the reasons provided by Counselor O'Connor, Counselor Davis found that the University had the discretion to withhold the calendar. Further, Counselor Davis provided the following:

Ms. Anne O'Connor interpreted the exemption in section 4(b)(7) to apply to an entire record that meets the exemption in section 4(b)(7), in spite of the general requirement that an agency separate disclosable information from nondisclosable information. *See* IC 5-14-3-6(a).  
*Opinion 05-FC-152.*

In issuing *Opinion 01-FC-42*, Counselor O'Connor relied upon *Journal Gazette v. The Board of Trustees of Purdue University*, 698 N.E.2d 826 (Ind. Ct. App. 1998). There, the Indiana Court of Appeals held that the compliance log of a Purdue University employee was nondisclosable at the discretion of the agency pursuant to I.C. § 5-14-3-4(b)(7). According to the employee, no one else made any entries into the compliance log, he shared information from it with very few people, and he referred to the journal as a notebook or diary. *See Id.*

The present issue is nearly identical to the issues presented in *Opinions 01-FC-42* and *05-FC-152*. The present issue involves the professional calendars of IDEM employees. You argue that IDEM utilizes Microsoft Outlook for calendaring and among the features of Outlook is the ability to "share" calendars electronically with other staff members. You argue that this set of features means that the calendars at issue can be viewed by other employees within the agency. Through this feature, other employees can see appointments as well as the topic of each meeting, where a topic is provided.

I am not persuaded that the features of Microsoft Outlook make the employee calendars different than the compliance log in the *Journal Gazette* case or the calendars in *Opinions of the Public Access Counselor 01-FC-41* and *05-FC-152*. In the *Journal Gazette* case, the court said,

. . . , just because notes are personal does not require them to be completely private. We do not believe that Blalock's occasional sharing of his log with select individuals diminishes the personal nature of the notes . . .  
*Journal Gazette*, 698 N.E.2d at 829.

Here, the calendars of agency employees may be viewed by other employees of the agency or state government. It is my understanding that each of those employees would need to be authorized to view the calendar (i.e. issued a user identification and password by the State). It is also possible for a user to mark information maintained in the Outlook calendar as private. In other words, the user is able to share certain information and maintain other information as private. In my opinion, this is exactly the type of record contemplated by I.C. § 5-14-3-4(b)(7). And I agree with Counselors O'Connor and Davis that IDEM has the discretion to withhold the entire calendar from

disclosure, notwithstanding I.C. § 5-14-3-6. As such, it is my opinion IDEM has the discretion to withhold the calendars from disclosure.

Regarding IDEM's reliance on the deliberative materials exception (I.C. § 5-14-3-4(b)(6)) and the attorney work product exception (I.C. § 5-14-3-4(b)(2)), I do not have enough information from the agency to agree that either of those exceptions supports the denial of access of calendar items. This point is rendered moot, though, by the agency's reliance on I.C. § 5-14-3-4(b)(7).

Please do not hesitate to contact me if I can provide any further assistance.

Best regards,



Heather Willis Neal  
Public Access Counselor

Cc: Robert B. Keene, Indiana Department of Environmental Management