



STATE OF INDIANA

MICHAEL R. PENCE, Governor

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May 9, 2013

WNDU-TV
c/o Charles D. Tobin
800 17th Street, NW, Suite 1100
Washington, D.C., 20006

Re: Formal Complaint 13-FC-116; Alleged Violation of the Access to Public Records Act by the St. Joseph County Airport Authority

Dear Mr. Tobin:

This advisory opinion is in response to your formal complaint alleging the St. Joseph County Airport Authority (“Authority”) violated the Access to Public Records Act (“APRA”), Ind. Code § 5-14-3-1 *et seq.* Mitchell R. Heppenheimer, Attorney, responded on behalf of the Authority. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you provide that on or about March 20, 2013, a representative from WNDU submitted two public records requests to the Authority for video footage of airplane N26DK’s attempted landing that occurred at the St. Joseph County Airport on March 17, 2013. The first request was made via telephone to Julie Curtis, the Authority’s Director of Marketing and Development. The second request was made in writing to Michael Guljas, the Authority’s Director of Administration and Finance. The written request sought, “[a]ny airport closed circuit, surveillance, or security footage showing N26DK making an attempting landing at [the airport] on the afternoon of March 17, 2013.”

In response, the Authority denied your request on two separate occasions. On March 22, 2013, Michael Daigle, the Authority’s Executive Director, denied the request via telephone citing “public safety and security system requirements.” On March 27, 2013, Mr. Heppenheimer denied the request in writing. Mr. Heppenheimer instructed the Authority to not release the footage as the videos “may have a reasonable likelihood of threatening public safety” and that the Authority’s security system was a “trade secret.”

You initially note that in denying your request, the Authority failed to provide the specific exemptions that it relied on to deny the request as required under the APRA. You assume that the Authority is relying on I.C. § 5-14-3-4(b)(19), authorizing the

withholding of records reasonably likely to threaten public safety by exposing a vulnerability to terrorist attack, and I.C. § 5-14-3-4(a)(4), authorizing the withholding of records construed as trade secrets. You believe that the Authority has failed to meet its burden to demonstrate that the cited exceptions apply to your request. As to I.C. § 5-14-3-4(b)(19), it identifies eleven categories of documents which may be withheld if the records are reasonably likely to expose a vulnerability to terrorist attack. Concerning airport records, the exemption is specific and narrow protecting “detailed drawings or specifications of structural elements, floor plans, and operating, utility, or security systems. . . of any building or facility located on an airport.” I.C. § 5-14-3-4(b)(19)(K). You believe that the footage requested does not fall within any of these specifically enumerated categories as the request does not seek detailed drawings or specifications. As to the Authority’s assertion that the footage depicts camera locations which are integral to providing a comprehensive security system, you believe that this is entirely insufficient to meet the Authority’s burden to sustain a denial. Even if the footage requested contained such material, the Authority would be required to make the disclosable portions of the record available for copying and inspection pursuant to I.C. § 5-14-3-6.

You maintain that the Authority’s assertion that the video footage is protected by trade secret is wholly unsupported by facts or law. The request has not sought any information or records concerning the actual security system, nor any “formula, pattern, compilation, program, method, technique or process” related to the system that can be protected. In addition, the Authority has not demonstrated that it derives independent economic value from the footage it claims as a trade secret or has it shown that it has taken steps to protect said footage.

You also argue that strong public policy favors disclosure in this matter. The APRA requires that the law be liberally construed in favor of disclosure. The footage requested of an airplane’s attempted landing is the last known record of the plane, which crashed into three nearby homes minutes later and resulted in the death of two South Bend residents. You maintain that the public has a significant interest in the circumstances surrounding this matter and the media desires to keep the public fully informed.

In response to your formal complaint, Mr. Heppenheimer stated his March 27, 2013 letter outlined the Authority’s initial position in response to your request. Mr. Heppenheimer provided that the Authority was required to submit your request for sensitive information regarding the release of the videos to the Transportation Security Administration (“TSA”). The TSA has conducted a review of the footage and a copy of its written response has been provided. There are four cameras that recorded video of the March 17, 2013 incident. The TSA review has indicated that the Authority is in the position to release three of the four videos. The position and location of the fourth camera (“covert camera”) is not visible. The TSA has informed the Authority that video from the covert camera should be withheld. In light of the TSA’s findings, the Authority will release all video footage responsive to your request, minus video taken from the covert camera.



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ANALYSIS

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

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply.

Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). Counselor O’Connor provided the following analysis regarding section 9:

Under the APRA, the burden of proof beyond the written response anticipated under Indiana Code section 5-14-3-9(c) is outlined for any *court action* taken against the public agency for denial under Indiana Code sections 5-14-3-9(e) or (f). If the public agency claimed one of the exemptions from disclosure outlined at Indiana Code section 5-14-3-4(a), then the agency would then have to either “establish the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit” *to the court*. Similarly, if the public agency claims an exemption under Indiana Code section 5-14-3-4(b), then the agency must prove to the court that the record falls within any one

of the exemptions listed in that provision and establish the content of the record with adequate specificity. There is no authority under the APRA that required the IDEM to provide you with a more detailed explanation of the denials other than a statement of the exemption authorizing nondisclosure, but such an explanation would be required if this matter was ever reviewed by a trial court. *Opinion of the Public Access Counselor 01-FC-47.*

At the time of this opinion, all video footage maintained by the Authority has been provided, minus the footage retrieved from the covert camera. The Authority acted under the guidance of the TSA, who advised that video footage from the covert camera should not be disclosed and there is no ability to redact the video. The footage withheld from the covert camera was eight seconds in length. The TSA made the determination pursuant to SSI Regulation 49 C.F.R. § 1520. In light of these factors, as to the Authority's initial denial that was submitted on March 27, 2013, it is my opinion that the Authority acted contrary to section 9(c) of the APRA by failing to cite to the specific statutory exemptions that would allow the agency to withhold the records in question. Had such a citation been made, as noted *supra*, the Authority would not have been required to provide a further, detailed explanation regarding its denial; however such a showing would be required in a review by the trial court. Nonetheless, I would agree with your skepticism in the Authority's ability to demonstrate that the video footage would be considered a trade secret under Indiana law. However, previous opinions of the Public Access Counselor would support the position that the Authority would retain the discretion to deny your request for footage from the covert camera pursuant to I.C. § 5-14-3-4(b)(10), which provides that records concerning administrative or technical information that would jeopardize a record keeping or security system may be withheld at the agency's discretion. *See Opinions of the Public Access Counselor 03-FC-126; 08-FC-44; 08-FC-5; 10-FC-267.*

As to what I will refer to as the Authority's updated denial that was issued on April 30, 2013 in response to your formal complaint, again the Authority acted contrary to the requirements of section 9(c) of the APRA by failing to cite to the specific statutory provision that would allow it to withhold footage from the covert camera. I am uncertain if the updated denial is still in reference to the assumed citations I.C. § 5-14-3-4(b)(19), I.C. § 5-14-3-4(b)(10), or as it now makes reference to federal regulation 49 C.F.R. § 1520, if the appropriate citation is I.C. § 5-14-3-4(a)(3) citing 49 U.S.C.S. § 40119. To rectify the confusion, I would encourage the Authority to clarify in writing the specific exemption that it is relying on to support the denial of the footage from the covert camera.



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CONCLUSION

Based on the foregoing, it is my opinion that the Authority acted contrary to the requirements of section 9(c) of the APRA in both its initial written denial that was issued on March 27, 2013 and in its updated denial that was issued on April 30, 2013 in response to the formal complaint that was filed.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage".

Joseph B. Hoage
Public Access Counselor

cc: Mitchell R. Heppenheimer