

September 19, 2001

Mr. Brett E. Nelson
1346 N. Delaware Street
Indianapolis, IN 46202

Re: Advisory Opinion 01-FC-47; Alleged Violations of the Indiana Access to Public Records Act by the Indiana Department of Environmental Management.

Dear Mr. Nelson:

This is in response to your formal complaint, which was received on August 23, 2001. You have alleged that the Indiana Department of Environmental Management ("the IDEM,") violated the Indiana Access to Public Records Act, ("APRA,") Indiana Code chapter 5-14-3. Specifically, you claim that the IDEM did not identify or disclose all documents responsive to your May 1, 2001 request and that the IDEM failed to meet its burden of proof for nondisclosure by not providing an adequate description of documents identified as privileged or exempt from disclosure. 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 did not fail to identify or disclose all documents responsive to your requests, except for the possible failure to disclose the two e-mail messages about the Shelly Ditch identified in your complaint. If the IDEM has these two e-mail messages and failed to provide them to you, that failure to produce or to cite to a statutory exemption from disclosure violated the APRA. Finally, it is my opinion that the IDEM did not fail to meet its burden of proof for nondisclosure and complied with the requirements of Indiana Code section 5-14-3-9 by citing to the statutory exemption or exemptions that supported their denials.

BACKGROUND

According to your complaint, you made a public records request dated May 1, 2001 on behalf of your client to the IDEM for copies of e-mail messages for ten (10) specific employees of the IDEM concerning a matter known as the "Shelly Ditch." On July 27th and August 3rd, 2001, you received letters from Ms. Reeves that included three hundred seventy-five (375) pages of documents reflecting approximately two hundred thirty-one (231) e-mail messages. You also received a twenty-seven (27) page document, which you refer to as a "privilege log" outlining three hundred fifteen (315) additional records for which the IDEM denied disclosure. It is your position that the IDEM violated the APRA by failing to disclose records to you that were responsive to your May 1st request for e-mail messages concerning the Shelly Ditch. You have listed several examples of e-mail messages that were not produced or referenced on the privilege log that concerned the Shelly Ditch as evidence of the fact that

the IDEM has not been responsive to you.

Further, you allege that the IDEM violated the APRA with respect to the compilation of the privilege log. Specifically, you claim that the IDEM asserted certain statutory exemptions from disclosure but did not provide sufficient information or justification to allow you to make a determination as to whether any claimed exception to disclosure properly applies to the e-mails withheld. It is your contention that the IDEM should have followed the standards set forth in federal case law, or the Vaughn Index, which provides that an explanation of the exemption claimed must be provided.

In response to your complaint, Ms. Reeves stated that the IDEM did comply with the APRA with respect to your May 1, 2001 request for access to public records. Your request specifically stated that you wanted e-mail messages concerning the "Shelly Ditch." Some of the employees who produced e-mail messages under your request did, on their own initiative, provide e-mail messages that referenced related sites, such as Raybestos and Sugar Creek, but this did not mean that the IDEM had failed to produce all of the e-mail messages you had requested. Ms. Reeves points out that the APRA requires the IDEM to provide access to public records as requested, and does not require the public agency to speculate as to what the requestor wants.

Further, some of the e-mail messages referenced in your complaint as evidence that the IDEM did not produce everything to you relate to a former employee who had deleted many of his e-mail messages prior to his departure. The IDEM did provide any of these messages that still existed on their system, but inadvertently failed to cite the deleted messages on the privilege log. Ms. Reeves' response did not specifically address the non-production those e-mail messages that expressly referred to Shelly Ditch for other employees of the IDEM.

As for the production of the privilege log, Ms. Reeves states that it the IDEM's position that they did in fact meet its burden with regard to the denials made in response to your May 1, 2001 request for access to public records. Under Indiana Code section 5-14-3-9(c), the IDEM was required to deny you access to public records in a writing that included a statement of the specific exemption or exemptions from disclosure and the name and title of the person responsible for the denial. The log provided to you contained all of the categories of information required under Indiana Code section 5-14-3-9(c). Ms. Reeves contends that the only difference between the privilege log provided and a Vaughn Index is the amount of information contained in each category provided and that the IDEM did provide enough specificity in denying access to the public records cited in the privilege log.

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).

Your complaint raises two issues. First, you claim that the IDEM violated the APRA by failing to produce all of the public records responsive to your May 1, 2001 request for access to public records. Second, you claim that the IDEM violated the APRA with respect to the privilege log and failed to meet their burden in proving the basis for nondisclosure. Each of these issues will be reviewed separately in the following paragraphs.

Failure to Identify or Disclose Public Records Responsive to your May 1, 2001 Request

Under the APRA, the burden of proof for the nondisclosure of a public record is on the public agency, not the person seeking to inspect or copy the public record. Ind. Code §5-14-3-1. The APRA, however, also places some responsibility on the requestor to inform the public agency in a manner that will permit the public agency to respond to the request.

A request for inspection and copying must . . . identify with reasonable particularity the record being requested . . .

Ind. Code §5-14-3-3(a).

When a public records request is made, therefore, the requestor must make his or her request with reasonable particularity. Ind. Code §5-14-3-3(a)(1). There is no Indiana case law defining "reasonable particularity," but the Florida courts have held that a public agency has the affirmative duty to notify the requestor if more information is needed in order to respond to the request. *Salvador v. City of Stuart, No. 91-812 CA (Fla. 19th Cir. Ct., December 17, 1991.)*

With respect to your May 1st request, you specifically stated that you wanted copies of e-mail messages that discuss or relate to the "Shelly Ditch." The IDEM understood your request as is obvious from the fact that they were able to produce hundreds of e-mail messages in response to your request and there would have not been a reason to contact you for more details in order to comply with your request. In some instances, the IDEM employees who were asked to produce such e-mails did provide e-mail messages that did not expressly include a mention of the "Shelly Ditch" but that were in any event related to it. The fact that these e-mail messages were produced does not mean that the IDEM failed to adequately respond to your request.

With respect to e-mail messages that you already possess and listed in your complaint, but for which the IDEM did not disclose in response to your May 1st request, Ms. Reeves notes that many of these e-mail

messages do not expressly state that they relate to the Shelly Ditch. These messages, therefore, would not have been produced in response to your specific request and in my opinion the failure to produce them was not a violation of the APRA.

Some of the messages were destroyed by a former employee before his departure from the IDEM and no longer available. Ms. Reeves stated that these messages should have been reflected in the privilege log as not disclosed, but were inadvertently not. Under the APRA, if a requestor makes his request in writing, the public agency does have the obligation to notify him in writing if they are denying her access to a public record. Ind. Code §5-14-3-9(c). The failure to produce public records that do not exist, however, is not a denial under the APRA so it is my opinion that the IDEM was not obligated to include these deleted e-mail messages in the privilege log since they no longer exist. Certainly, the IDEM could have notified you of their destruction, but the failure to produce nonexistent records is not a violation of the APRA.

There are two e-mail messages listed in your complaint that do state that the subject matter was the Shelly Ditch¹ and for which Ms. Reeves did not provide a specific explanation for the non-disclosure of these e-mail messages in response to your May 1st request. It is my opinion that, if these two e-mail messages about the Shelly Ditch still exist, the failure of the IDEM to produce them or cite to them in the privilege log in response to your May 1st request was a violation of the APRA.

Improper Exclusion of Public Records from Production and Failure to Meet the Burden of Proof for Nondisclosure under the APRA & the Vaughn Index

You have also alleged that the IDEM improperly excluded public records by citing to various exemptions from disclosure and failing to provide an adequate explanation or justification for not disclosing these records to you. In particular, the IDEM claimed the deliberative material exemption under Indiana Code section 5-14-3-4(b)(6), the attorney-client privilege and the work product privilege as bases for the denials cited in the privilege log. It is your position that the IDEM failed to provide sufficient explanation as to why these exemptions from disclosure were valid under the circumstances. You claim that the IDEM is bound to do so under federal case law setting forth the Vaughn Index, which is required under the federal Freedom of Information Act. In response, Ms. Reeves pointed to Indiana Code section 5-14-3-9(c) as the standard for communicating the denial of access to a public record. She asserts that the IDEM did in fact satisfy not only that standard, but also the standards set forth by the federal courts in cases interpreting the Vaughn Index. She claims that the only dispute is over how much specificity must be provided to explain a denial.

Under the APRA, a public agency denying access in response to a written public records request must put that denial in writing and include the following information:

- A. a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and
- B. the name and title or position of the person responsible for the denial.

Ind. Code § 5-14-3-9(c). In Ms. Reeves letter to you dated August 3, 2001, she attached the privilege log, which contains a statement of the exemption claimed for each e-mail message listed in the log and the name and title of the person responsible for the denials. It appears, therefore, that the IDEM has complied with the requirements of Indiana Code section 5-14-3-9(c).

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.

In a recent Indiana Court of Appeals case, *Journal Gazette v. The Board of Trustees of Purdue University*, 698 N.E.2d 826, 828 (Ind. App. 1998), the Court reiterated the statutory process set forth at Indiana Code section 5-14-3-9. The Journal had challenged the denial of access to certain public records by Purdue University. These denials were based on various statutory exemptions under the APRA. The Court held that the burden of proof was on the public agency to sustain its denial and that the trial court should do this *de novo*. *Id.* The fact that Purdue University only cited to the statutory exemption was not discussed as problematic in this case, and the court further applied the review process under Indiana Code 5-14-3-9 as the appropriate means of determining whether the public agency had authority to withhold the public records from disclosure.

You also claim that the IDEM was obligated to provide a "Vaughn Index" in response to your request for public records that outlined certain information related to the denials. A "Vaughn Index" is a document that is required to be prepared under the federal Freedom of Information Act by federal agencies that are denying access to public records. These indices are required to include "the title of the document or category of documents, the date of the document, the author and recipient(s), a detailed factual description of the document, and the statutory exemption the agency is claiming to support nondisclosure." *Becker v. IRS*, 34 F.3d 398, 401(7th Cir. 1994). As noted in your complaint, Indiana courts may look to the federal Freedom of Information Act, also known as FOIA, and its interpretation by federal courts in interpreting the APRA. You contend that, based upon this federal authority, the IDEM was required to explain why the exemption from disclosure was claimed and why it is relevant. *Osborn v. IRS*, 754 F.2d 195, 196 (6th Cir. 1985).

Ms. Reeves responded to this by stating that the IDEM privilege log essentially does contain the same criteria required in a Vaughn Index. The only difference between the privilege log that was produced to

you and a Vaughn Index is the amount of information included in the categories, specifically, the amount of description of the withheld material. In any event, Ms. Reeves concluded that since the APRA only requires a statement of the statutory exemption claimed by the IDEM with respect to specific public record, the IDEM did comply with the APRA.

After reviewing Indiana case law² interpreting Indiana Code section 5-14-3-9, it appears that our courts have yet to apply the Vaughn Index standard to denials made by public agencies under the APRA. For this reason, it is my opinion that the IDEM's denial that included a statement of the statutory exemption or exemptions for nondisclosure was sufficient under the APRA.

CONCLUSION

It is my opinion that the Indiana Department of Environmental Management did not fail to identify or disclose all documents responsive to your requests, except for the possible failure to disclose the two e-mail messages about the Shelly Ditch identified in your complaint. If the IDEM has these two e-mail messages and failed to provide them to you, that failure to produce or to cite to a statutory exemption from disclosure violated the APRA. Finally, it is my opinion that the IDEM did not fail to meet its burden of proof for nondisclosure and complied with the requirements of Indiana Code section 5-14-3-9 by citing to the statutory exemption or exemptions that supported their denials.

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: Ms. Michelle Reeves, IDEM

¹E-mails dated 5/24/99 and 5/24/99.

²State or federal courts interpreting the APRA. html>