
OPINION OF THE PUBLIC ACCESS COUNSELOR

BOB SEGALL (WTHR),

Complainant,

v.

INDIANA ECONOMIC DEVELOPMENT CORP.,

Respondent.

Formal Complaint No.

23-FC-104&120¹

Luke H. Britt

Public Access Counselor

BRITT, opinion of the counselor:

This advisory opinion is in response to the formal complaint alleging the Indiana Economic Development Corporation (IEDC) violated the Access to Public Records Act.² IEDC Deputy General Counsel Andrew Lang, filed an answer on behalf of the agency. In accordance with Indiana Code § 5-

¹ Segall filed a second complaint, which will be incorporated by reference along with IEDC's response

² Ind. Code § 5-14-3-1-10.

14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on October 26, 2023.

BACKGROUND

This case involves a dispute over access to public records associated with the Indiana Economic Development Corporation's (IEDC) the LEAP³ Innovation District water projects (LEAP).

On July 29, 2023, Bob Segall (Complainant), senior investigative reporter for WTHR-TV, submitted a public records request with IEDC for materials created by contractors studying the feasibility of the project:

- Updated Cash Flow report
- Black and Veatch Project Progress Reports for June and July 2023
- Monthly invoices from Black and Veatch for reporting periods through August 1, 2023
- The updated Program Schedule and Decision Log for the LEAP Regional Water Solutions project
- The Internal and External Communications Plans (a previous Black and Veatch progress report states have been submitted)
- The Risk Management Plan
- The Risk Register
- Documents from Workshops 1-8 including presentations, slides, notes and other material presented during the workshops
- The most recent Revised Program Management Plan

³ Limitless Exploration/Advanced Pace

- Engineering schedules
- Preliminary Program Phasing Evaluation
- Reuse & Sustainability Evaluation Summary
- Geotechnical Investigation Work Plan
- Program Delivery Alternatives
- Physical Site Security and Resiliency
- Water Resource Evaluation
- All reports and studies related to Environmental Impacts
- Preliminary System Instrumentation and Controls Summary
- Executive Summary of Program Memoranda
- Technical memoranda and all reports related to the following:
 - Groundwater Sampling and Testing
 - Water Quality and Treatment Goals
 - Pipe Sizing and Alignment
 - Pipe Material Alternatives
 - Wastewater Influent Water Quality and Treatment Goals
 - Raw and Finished Water Storage Evaluation
 - Collector Well Desktop Study
 - Hydraulic and Surge Analysis
 - Pump Station Alternatives
 - Pump Station Siting and Layout
 - Utility Coordination
 - Mapbook(s)

On August 4, 2023, IEDC acknowledged Segall's request and followed up on August 25. After seeking a status update a month later, IEDC told Segall to expect the materials by September 29. Segall did not receive the materials by that time.

As a result, Segall filed a formal complaint with this office on October 5. Segall argues that 68 calendar days exceeded

the reasonable time standard to produce records under the Access to Public Records Act (APRA).

IEDC eventually produced records on October 17, 2023. After the production of some of the records, IEDC responded to Segall's complaint on October 26. The agency argues that several factors—including the size and complexity of Segall's request—contributed to the time required to gather the information.

IEDC also argues the omitted or redacted materials include several exceptions to disclosure including deliberative materials and sensitive infrastructure considerations in addition to confidential financial information.

After receiving the records, Segall took exception to the amount of material provided. He filed an additional complaint on November 16, 2023, claiming the documentation was heavily redacted and not responsive to his request. He contends the matter in which the records were produced provide no indication whether the statutes supporting the redactions apply. Toward that end, the materials provided by IEDC were not separated based on what is disclosable and nondisclosable. Instead, IEDC denied Segall's request wholesale.

IEDC responded to Segall's renewed complaint on November 27, 2023, and deferred to its prior response submitted on October 26, 2023.

ANALYSIS

1. The Access to Public Records Act

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 Economic Development Corporation 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 IEDC’s public records during regular business hours. Ind. Code § 5-14-3-3(a).

Indeed, APRA contains mandatory exemptions and discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a) to -(b).

2. Reasonable timeliness

This case, in part, involves the timeliness of an agency’s response to a substantially large public records request.

Segall’s request, illustrated above, is specific in terms of reasonably particular identification of documents. Nonetheless, it still calls for a significant amount of documentation. It is unclear how Segall curated his list of specific documents—presumably from a bid or contract—but he pinpoints specific materials from the study totaling some 30-plus items. The likelihood of all these materials being in one place is high therefore we do not take exception to his large ask.

Be that as it may, adding to the complexity of the request is the very nature of the project itself. There can be no question that the LEAP project has generated an intense amount of public interest and scrutiny. The situation has continued to evolve even up until the drafting of this opinion. It has been a polemic talking point in the upcoming gubernatorial primary campaign as well as the subject of vehement debate on the local level for the communities affected.

As an aside, this office does not make value judgments on the prudence of any project when evaluating public access disputes. Nevertheless, we recognize that public agencies spearheading certain projects can be extra judicious when handling sensitive information about infrastructure projects, especially when disclosure could potentially derail an initiative. This is the case for everything from solar projects to wind farms to ARPA spending.

Toward that end, the density of Segall's request, coupled with navigating a contentious and ambitious prospect, likely contributed to the delay.

This is not to say that 68 business days is an acceptable standard for fulfilling a public records request for all submissions. But given the context, it is acceptable under the circumstances.

3. Redactions and separation of material

As a secondary matter, once Segall received the documentation, he was dissatisfied with the redactions as well as the amount of material provided. IEDC supplemented its denial with statutory authority for exemptions but did not create

a privilege log or other written explanation for what was withheld.

Under 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.⁴ IEDC met this obligation in its denial.

The burden of proof for justifying a denial is on the public agency claiming an exemption or exception. This, however, is a trial court standard. There is no authority under the APRA that required IEDC to provide Segall with a more detailed explanation of the denials other than a statement of the exemption or exception authorizing nondisclosure. It is true that an explanation would be required if this matter was ever reviewed by a trial court, but not as a preliminary matter.

Even so, this office will apply a similar burden of *persuasion* on an agency when evaluating records disputes. Notably, this office cannot take sworn testimony nor is there an administrative mechanism for accepting authenticated evidence. Some cases will be riper than others for the PAC to make a determinative conclusion on factual disputes, but absent an *in camera* review of documentation, that is not always the case.

So too is the case here. The materials provided to this office were the same as those given to Segall. This office has no

⁴ Ind. Code § 5-14-3-9(c).

way to compel an agency to provide more, nor did the PAC seek to do so.

Nevertheless, we reached out to IEDC offline, and Mr. Lang was forthcoming on why Segall may have found the materials lacking.

He explained that the project was still in its very early stages of research and review. The point of the preliminary study by the contractor was to evaluate the project for feasibility but substantive work on the project has not started in earnest. The study was intended to be an introductory phase to determine the achievability of the prospect if it even came to fruition at all. The project has been affirmatively paused until the results of the study can be analyzed.⁵

Additionally, based on the fluidity of the outcome of the study, there have been no set plans, routes, or even materials decided upon for the pipeline and any determinative outcomes are subject to change.

In sum, the entirety of the project is very much in the deliberative phase between the agency and its contractor.

If this is the case, then most of these materials will likely qualify as deliberative material. While it is true that factual data should be separated from speculative or deliberative material in most cases,⁶ this is not so if the factual materials are inextricably intertwined with exempt material.⁷

⁵ <https://www.ibj.com/articles/holcomb-legislative-leaders-promise-to-hold-off-action-on-pipeline>

⁶ Ind. Code § 5-14-3-6.

⁷ *Unincorporated Operating Div. of Indiana Newspapers, Inc. v. Trustees of Indiana University*, 787 N.E.2d 893 (Ind.Ct.App.2005).

Additionally, the IEDC is sensitive to critical infrastructure vulnerability concerns and is withholding certain details to avoid any public safety issues. APRA contemplates this and allows exemptions to disclosure for these types of projects.⁸

All that stated, this project is matter of great public curiosity including an outlay of expenses to a third party totaling several million dollars. Taxpayers have an interest in knowing the State of Indiana received the benefit of the bargain for those services. IEDC indicated that it will continue to provide information as it becomes available, and we encourage them to do so to the extent possible.

CONCLUSION

Based on the foregoing, without the ability to conduct a fact-finding, it is the opinion of this office the Indiana Economic Development Corporation did not violate timeliness considerations or fail to comply with statutory denial standards.



Luke H. Britt
Public Access Counselor

Issued: December 21, 2023

⁸ Ind. Code § 5-14-3-4(b)(19).