
OPINION OF THE PUBLIC ACCESS COUNSELOR

THE CENTER FOR WILDLIFE ETHICS,
Complainant,

v.

THE OFFICE OF MANAGEMENT & BUDGET,
Respondent.

Formal Complaint No.
17-FC-270

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Indiana Office of Management and Budget (“OMB”) violated the Access to Public Records Act¹ (“APRA”). The OMB responded to the complaint through general counsel Justin McAdam. In accordance with Indiana Code section 5-14-5-10, I issue the following opinion to the

¹ Ind. Code §§ 5-14-3-1 to -10

formal complaint received by the Office of the Public Access Counselor on December 1, 2017.

BACKGROUND

The Center for Wildlife Ethics, via Laura Nirenberg (“Complainant”), filed a formal complaint alleging the OMB failed to fully satisfy her public records request.

Complainant’s organization, the Center for Wildlife Ethics (“CWE”) submitted a public records request on October 24, 2017, seeking twenty-one categories of records. For the sake of brevity, the entirety of the request will not be restated other than to note the CWE sought information regarding an administrative rule amendment by the Indiana Department of Natural Resources (“DNR”). On November 3 (after a revised request), OMB partially fulfilled the request. The agency cited two statutes as justification for withholding some of the requested records: Indiana Code section 5-14-3-4(b)(6) and Indiana Code section 4-22-2-17.

CWE expresses concern as to the applicability of the withholding authorities. It argues Indiana Code section 4-22-2-17 does not apply as it does not exempt records, but merely clarifies what *is* subject to public access. Secondly, it contends Indiana Code section 5-14-3-4(b)(6) does not apply as the records sought are not deliberative material as contemplated by the statute.

In its response, OMB contends that proposals sent for consideration for rule adoption or amendment are very much deliberative in nature. Pursuant to standing executive orders and statutory guidelines for rule promulgation, the

agency was justified in considering the proposal process deliberative.

ANALYSIS

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.” Ind. Code § 5-14-3-1. The Indiana Office of Management and Budget is a public agency for the purposes of the APRA. Ind. Code § 5-14-3-2(n). Therefore, unless an exception applies, any person has the right to inspect and copy the OMB’s public records during regular business hours. Ind. Code § 5-14-3-3(a). A request for inspection or copying must identify with reasonable particularity the record being requested. Ind. Code § 5-14-3-3(a)(1).

The legislature has provided public agencies with the discretion to withhold from disclosure those records that constitute deliberative materials. *See* Ind. Code § 5-14-3-4(b)(6). The subdivision provides, in relevant part:

Records that are intra-agency or interagency advisory or deliberative material...that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

Deliberative materials include information that reflects, for example, one’s ideas, consideration, and recommendations on a subject or issue for use in a decision making process. The purpose of protecting such communications is to “prevent injury to the quality of agency decisions.” *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002)(quoting

NLRB v. Sears, Roebuck & Co. 421 U.S. 132, 151 (1975)). The frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public, and the decisions and policies formulated might be poorer as a result. *Id.* at 12.

In order to withhold such records from disclosure under Indiana Code section 5-14-3-4(b)(6), the documents must be interagency or intra-agency records of advisory or deliberative material and are also expressions of opinion or speculative in nature.

The deliberative materials exemption is indeed broad and can be subject to abuse. Some have called it the exception that swallows the rule. Potential abuse notwithstanding, as the *Newman* court indicates, it has valuable and sound application and can certainly be exercised consistent with good governance and transparency principals.

The OMB is the financial and auditing arm of the executive branch of state government. It is a set of agencies charged with reviewing state expenditures and ensuring government efficiency and stewardship. In addition to many other duties, the agency evaluates and analyzes proposed rulemaking actions pursuant to Executive Order 13-03 and Executive Order 2-89 for fiscal impact. Agencies submit those proposals (or “packages”) to OMB for review. A proposal submission is not a guarantee of approval. Executive Order 13-03 is known as the “Regulatory Moratorium” and OMB has lone authority to grant exceptions to the moratorium.

While the General Assembly delegates rulemaking authority to administrative agencies, the rule making (or amend-

ment) process does not proceed until OMB grants a variance from the moratorium. An agency with rulemaking authority submits the proposal to OMB as an expression of its opinion—that opinion being that the Indiana Administrative Code should be amended. While that opinion may be buttressed with facts and data, a proposal is ultimately speculative in nature. A proposal is defined as “a plan or suggestion, especially a formal or written one, put forward for consideration or discussion by others.” Merriam-Webster.com, *Proposal*, <https://www.merriam-webster.com> (last visited Feb. 2, 2018).

In this case, the ultimate decision-making authority for executive branch agencies’ proposals is OMB. A speculative proposal is deliberative and communicated by agencies for the purpose of decision-making. While a preliminary decision has indeed been made on DNR’s part to submit, this is very much part of the overall decision-making process of the executive branch of State Government. A decision to go forward with the rule making is not final until OMB’s final approval. At that point, the process becomes public-facing and is transparent. The decision-making deliberations of agencies to develop rules and propose them internally may not be as visible, however, Indiana Code section 4-22 et seq. ensures the public has full notice and knowledge of the promulgation process. The process is not without accountability protections.

First, the agency must publish a notice of intent to adopt a rule in the Indiana Register. Ind. Code § 4-22-2-23(b). The publication notice must include an overview of the intent and scope of the proposed rule, and its statutory authority. *Id.* This notice must be published at least 28 days before the second notice.

Next, the agency must publish notice of a public hearing in one newspaper of general circulation in Marion County, Indiana that includes: (1) the date, time, and location of the hearing; (2) a general description of the subject matter of the proposed rule; (3) an explanation that *the proposed rule and any data, studies, or analysis relied upon may be inspected and copied at the office of the public agency*. See Ind. Code § 4-22-2-24 (emphasis added). In addition, the agency must also publish the notice of the public hearing in the Indiana Register along with the full text of the agency's proposed rule. *Id.* These notices must be published as described at least 21 days before the public hearing is convened.

After the notices and the text of the agency's proposed rule are published, the agency must conduct a public hearing on the proposed rule. Ind. Code § 4-22-2-26(a). The agency must afford any person attending the public hearing an adequate opportunity to comment on the proposed rule through the presentation of oral and written facts or argument. Ind. Code § 4-22-2-26(c).

What is more, the law requires an agency to fully consider comments received at the public hearing and any other information prior to adopting the rule. Ind. Code § 4-22-2-27. After an agency has complied with the above procedure it may formally adopt the rule in accordance with Indiana Code section 4-22-2-29. It should also be noted that the Indiana Attorney General (a separately elected official from that of the Governor's administration) has oversight as to that procedure as well. Ind. Code § 4-22-2-31.

While the ultimate purpose of the Access to Public Records Act is for agencies to provide full and complete information regarding the affairs of the government, there are clear exceptions to the rule. The deliberative materials exception is

one of them. Although overuse of the exception is often a pitfall for agencies, it does not appear as if this is one of those instances. Finally, there are statutory safeguards built into the promulgation process to ensure that the public is fully informed as to the rule before it takes effect.

CONCLUSION

Based on the foregoing, it is the opinion of the Public Access Counselor that the Indiana Office of Management and Budget has not violated the Access to Public Records Act.

A handwritten signature in black ink, appearing to read 'LH Britt', with a stylized flourish at the end.

Luke H. Britt
Public Access Counselor