

February 20, 2004

Mr. David E. Dearing
3833 North Meridian Street, Suite 245
Indianapolis, Indiana 46208

*Re: 04-FC-24; Alleged Violation of the Access to Public Records Act by the
City of Carmel*

Dear Mr. Dearing:

This is in response to your formal complaint, received on February 13, 2004, alleging that the City of Carmel (City) violated the Indiana Access to Public Records Act (APRA) (Ind. Code §5-14-3), when it responded to your request for records with a broad denial generally referencing all of the exemptions to disclosure set forth in the APRA, and by making a partial production subject to the nondisclosure of material subject to those exemptions. The City submitted a response to your complaint, and a copy is enclosed for your review.

BACKGROUND

On January 15, 2004, you signed and mailed a request for records directed to the City of Carmel, Clerk-Treasurer's Office, seeking access to records you assert are maintained by that public agency. Specifically, you requested the following:

Quantitative results of soil and groundwater sampling performed for City of Carmel by August Mack Environmental, Inc., at 12999 Old North Meridian Street on December 9-10, 2003[,] in connection with project STP/IN-48; quantitative results of any other environmental sampling done by or for the City of Carmel on the same dates and at the same location.¹

On January 28, 2004, the City responded in writing.² The City asserted a general denial stating that the request was not reasonably particular, and asserting every exemption to

¹ This request follows a prior request for the entire preliminary and final reports regarding such sampling and regarding other environmental sampling done at the same location on the same date. The City denied the earlier request stating that information within that request was deliberative in nature. No complaint is now raised regarding that denial.

² Pursuant to Indiana Code 5-14-3-9(b), a public agency must respond to a written records request within seven (7) days of receipt of the request. There is no suggestion of when the written records request was received by the City, and no claims are now asserted that the City's subsequent response was untimely in violation of the APRA.

disclosure of the requested records authorized by the APRA. Notwithstanding that general denial, the City identified a single 81-page document that it asserted was responsive to the request. The document is dated January 6, 2004, and is styled "Remediation Cost Estimates 12999 Old Meridian Road Indianapolis, Indiana August Mack Project Number JD555.10" (Report). The City agreed to provide access to 17 pages of the Report, but asserted that the balance of the Report was exempt from disclosure for the reason that the material withheld was advisory and deliberative material used for decision-making, journal entries or personal notes, trade secrets, and/or contained information prepared for discussion in executive sessions. The response further asserted without specific reference a general denial on the basis that the material withheld was "otherwise exempt from mandatory disclosure under IC 5-14-3-4."

This complaint followed. In your complaint you allege that the City's response was in bad faith and did not meet the requirements of the APRA. You further challenge the partial disclosure and assert that the nondisclosure is not supported by law.

In response to your complaint, the City asserts that its nondisclosure was proper pursuant to Indiana Code 5-14-3-4(b)(6) (allowing exemption of interagency or intra-agency advisory or deliberative material that are expressions of opinion and are of a speculative nature and that are communicated for the purpose of decision making), and Indiana Code 5-14-3-4(b)(12) (allowing exemption of records specifically prepared for discussion or developed during discussion in an executive session).³ With regard to the deliberative privilege exemption, the City asserts first that the entire Report is deliberative because it expresses the author's ideas, opinions, advice, consideration and recommendations on the degree of contamination on the property and the estimated costs of remediation for purposes of assisting the City in evaluating the potential purchase of the property. The City further asserts that each portion of the Report subject to nondisclosure, including the raw data collected by the author and the laboratory results regarding that data, is an opinion or constitutes the speculation of the author. With regard to the executive session material exemption, the City asserts that the Report may be used in future executive sessions of the City's governing body to inform that body's deliberations regarding the purchase of the property at issue. The City further states that the Report was prepared specifically for executive sessions to be held by the City's governing body for that purpose.

ANALYSIS

Initially, I address the City's response to the records request. Indiana Code 5-14-3-9(c) requires that when a public agency denies a written request for public records, the denial must be in writing and must include "a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record." In my opinion the City's response did not comply with this provision. Certainly, the City's response did not cite to the provisions of the APRA and particularly to the specific subsections of Indiana Code 5-14-3-4 supporting each of the exemptions it was relying upon to withhold any specific part of the responsive record. But more significant than whether the formality of citation to chapter and verse of the code is

³ The City does not maintain its claims that the request was not reasonably particular or that the material withheld was subject to any of the other exemptions to production set forth in the APRA.

required by the letter or contemplated by the spirit of the APRA, the City's response collapses under its breadth. The response invokes literally every one of the thirty-one (31) mandatory or discretionary exemptions to disclosure permitted by the APRA. As an example, one exemption asserted not merely by catchall reference but identified specifically in support of nondisclosure was the City's assertion that the responsive records were protected "law enforcement records." Indiana Code 5-14-3-4(b)(1) allows for the exemption of investigatory records of law enforcement agencies; that is, of "information compiled in the course of the investigation of a crime." IC 5-14-3-4(b)(1); *see* IC 5-14-3-2 (Defining "Investigatory Record"). However, there is no suggestion in either the nature of the request, the nature of the responsive document identified in the response, or the nature of the response to support the assertion of this exemption for nondisclosure. Your complaint attributes this response to bad faith, but I do not go so far. In my opinion the City's response was a zealous albeit *pro forma* attempt to protect its rights under the APRA. Still, it was not the narrow and specific response required by the statute, and in that manner the response was contrary to law.

The City fares better on the merits of the two exemptions now claimed to support nondisclosure, but only in part. The public policy of the APRA states:

[I]t is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Providing 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.

IC 5-14-3-1. This preamble to the APRA contemplates that all of the provisions that follow will be interpreted in a manner that opens the affairs of government and the acts of those who serve as public officials and employees of government to public scrutiny. Because the public policy of the APRA requires a liberal construction in favor of disclosure (*see* IC 5-14-3-1), exemptions to disclosure must be construed narrowly. *Robinson v. Indiana University*, 659 N.E.2d 153, 156 (Ind. Ct. App. 1995).

The City first contends that the nondisclosure was proper under the deliberative materials exemption. This exemption provides that "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" are excepted from public disclosure at the discretion of the public agency. IC 5-14-3-4(b)(6). The exemption applies to protect the deliberative material of both staff of the public agency and deliberative material prepared by a private contractor under contract with the public agency. IC 5-14-3-4(b)(6). This purpose of this exemption is to "prevent injury to the quality of agency decisions" by encouraging "frank discussion of legal or policy matters in writing." *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002); *see Unincorporated Operating Division of Indiana Newspapers, Inc. v. Trustees of Indiana University*, 787 N.E.2d 893, 909-10 (Ind. Ct. App. 2003).

In reviewing the City's response to your record request and its response to your complaint, I have no doubt that the Report contains the opinions and speculation of the private party contractor who prepared it, and that those opinions and speculations along with other information in the Report were communicated for the purpose of decision making. The City's response to your complaint characterizes the Report as an "environmental assessment of the remediation costs" of property that was commissioned "solely for purposes of evaluating whether [the City] should acquire the Property for a public purpose." The City further establishes the content of the report with sufficient specificity for me to understand that it contains within it the opinions, advice and recommendations of the contractor regarding the degree of any environmental contamination at that site. In my opinion the City has made an adequate showing that the responsive record falls within the deliberative materials exemption.

That said, the exemption does not protect all matters within the responsive record from disclosure. Rather, the APRA requires a public agency to separate disclosable from non-disclosable information contained in public records. IC 5-14-3-6(a). Thus, the most recent court to address application of this exemption held that factual matters which are not inextricably linked with other non-disclosable materials (specifically, the opinions and speculation of the author) should not be protected from public disclosure. *See Trustees of Indiana University*, 787 N.E.2d at 913-15. *But see Journal Gazette v. Board of Trustees of Purdue University*, 698 N.E.2d 826, 831 (Ind. Ct. App. 1998) (wherein the court applied the exemption to permit disclosure of a group of documents as a whole). In *Trustees of Indiana University*, disclosable factual matters included such information as whether or not an incident happened. In that manner the court distinguished disclosable factual matters from non-disclosable opinions or speculation concerning the incident or about the impact or effect of the incident.

In this matter, your request sought only quantitative results of soil and groundwater sampling. I understand this request to be limited to factual data; that is, the results and measurements or like characteristics of the sampling, not the opinions or recommendations of the contractor about or based upon what the data means. To the extent that the responsive record contains such data, it is factual information that must be disclosed. The City's response suggests that such factual data does exist in the Report. *See* Response at 3 (referencing the contractor's "review of the data" and "the degree of pollution"), & 4 (referencing a "map" and "boring logs" and "soil bearings" and laboratory tests.)⁴ It is my opinion that any factual data or material is disclosable, and its nondisclosure violates the APRA. The City should review the Report consistent with this opinion and disclose any factual data or material previously withheld.

The City next contends that the nondisclosure was proper under the executive session materials exemption. This exemption allows for the nondisclosure of records "specifically prepared for discussion or developed in executive session." IC 5-14-3-4(b)(12). The City correctly observes that its governing body may meet in executive session to discuss strategy with respect to the purchase or lease of real estate. *See* IC 5-14-1.5-6.1(b)(2)(d). The City asserts that the Report qualifies for nondisclosure under these provisions because the Report was

⁴ These references are not intended to be inclusive of all of the sorts of information contained in the Report that should be considered to be disclosable factual data or material.

“specifically prepared” for that purpose. The City does not support this conclusory statement with any detail that permits me to find that the Report properly falls within that exemption. Neither do I think that the exemption, narrowly construed, is intended to be used in the manner the City seeks to use it here. Any document can be discussed or used in an executive session, but that it *can be discussed or used* in a proper executive session does not itself qualify the document for nondisclosure under Indiana Code 5-14-3-4(b)(12). If that were the standard, then a budget or invoice or utility bill or any number of other documents that are otherwise innocuous and clearly subject to disclosure would become subject to nondisclosure by virtue of the fact that they could be used by the governing body to discuss its strategy regarding the purchase of a parcel of land (or, for some other purpose appropriate for an executive session). Here, the Report was prepared at the request of the City’s engineer pursuant to a contract that requested an environmental assessment of the remediation costs of a particular parcel of property. While the Report might have value to the City and the City’s governing body in an executive session that might later be conducted to discuss strategy with regard to the purchase of that property, it cannot, without more, be fairly characterized as having been “specifically prepared for discussion” in any such prospective executive session. In my opinion, the Report is not subject to nondisclosure under the executive session material provision.

CONCLUSION

It is my opinion that the City’s general response to the records request was contrary to the APRA in that it failed to cite to the specific exemptions authorizing its nondisclosure. The City’s reference to every exemption recognized by the APRA does not comply with the statute in this matter where there is no reasonable basis to find or even argue that every exemption applies.

It is my further opinion that the City cannot rely on Indiana Code 5-14-3-4(b)(12) to exempt the Report or portions of the Report from disclosure where the document was not prepared specifically for discussion in an executive session, but rather might only be used in such a meeting of the governing body.

Finally, the City may properly withhold disclosure of portions of the Report pursuant to Indiana Code 5-14-3-4(b)(6). The City may not withhold the entire Report on that basis, and in that regard there is no violation here inasmuch as the City did not seek to withhold the entire document. The City may only withhold disclosure of those portions of the Report that are the author’s *opinions* and *speculation* and that are communicated for the purpose of decision making. There is a suggestion and evidence to indicate that the City’s nondisclosure included factual data and material. To the extent that the City’s response and production seeks to withhold factual data and material, its nondisclosure of such material is in violation of the APRA.

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Mr. P. Jason Stephenson