



STATE OF INDIANA

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December 30, 2009

Ms. Gitte Laasby
Post-Tribune
1433 E. 83rd Ave.
Merrillville, IN 46410

*Re: Formal Complaint 09-FC-285; Alleged Violation of the Access to
Public Records Act by the Indiana Department of Environmental
Management*

Dear Ms. Laasby:

This is in response to your formal complaint alleging the Indiana Department of Environmental Management ("IDEM") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* A copy of IDEM's response to your complaint is enclosed for your reference.

BACKGROUND

In your complaint, you allege that you requested internal communications from IDEM regarding the inspections of ArcelorMittal Burns Harbor on February 5th and 6th and November 5th and 6th in 2008. In your request, you asked IDEM to provide a privilege log of any documents that IDEM believed were not subject to disclosure as well as the dates of those documents, the reason why IDEM believed they were exempt from the APRA, and the sender/receiver of all email communications.

On October 16, 2009, you received a response from IDEM that included 240 pages of records and a one-page privilege log. You believe IDEM's response was deficient in several respects, however. First, IDEM failed to cite a specific statutory basis for withholding two records. Second, you argue that the privilege log contains inadequate information because IDEM "did not provide sufficient information or justification to allow us to make a determination as to whether any claimed exception to disclosure applies to the e-mails withheld and whether the denial is reasonable and justifiable." You cite the federal Freedom of Information Act's ("FOIA") requirement that agencies prepare a "Vaughn Index" regarding withheld records, which 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. Third, you allege that IDEM has

improperly withheld entire documents where only part of that document is nondisclosable under the APRA. You argue that IDEM should separate any disclosable material and make it available to you for inspection and copying.

On behalf of IDEM, Lori Kyle Endris, public records advisor for the Office of External Affairs, responded to your complaint. Ms. Endris claims that all of the records in question are intra-agency advisory or deliberative material that are expressions of opinion or are of a speculative nature and were communicated for the purpose of decision making. Ms. Endris notes that in IDEM's October 16, 2009, response to you, IDEM noted that it was denying you access to all of the records under Ind. Code § 5-14-3-4(b)(6). Ms. Endris claims that IDEM has satisfied the APRA's requirements as to the two withheld documents without specific citations on the privilege log because IDEM cited the basis for withholding those documents as section 4(b)(6) in its October 16th letter to you. Ms. Endris notes that IDEM is not subject to FOIA and, as such, was not required to produce a Vaughn Index -- or a privilege log -- in response to your request. Ms. Endris maintains that IDEM went above and beyond the APRA's requirements when it provided you with a privilege log. Finally, Ms. Endris argues that IDEM did not violate the APRA by failing to produce redacted records because "the documents being withheld are, in their entirety, non-disclosable."

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." I.C. § 5-14-3-1. IDEM is clearly a public agency for the purposes of the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy IDEM's public records during regular business hours unless the records are excepted from disclosure as confidential or nondisclosable under the APRA. I.C. § 5-14-3-3(a).

With regard to the sufficiency of IDEM's response to you, it is my opinion that IDEM's response was sufficient. 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 FOIA. In response, Ms. Endris 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 that standard.

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. I.C. § 5-14-3-9(c). In Ms. Endris' letter to you, she noted that IDEM was withholding all records pursuant to section 4(b)(6) of the APRA. It appears, therefore, that the IDEM October 16th response to you complied with the requirements of Ind. Code

§ 5-14-3-9(c). Because the APRA does not obligate public agencies to create any records in response to a public records request, including a privilege log, any alleged deficiencies in the contents of IDEM's privilege log are moot.

With regard to your argument that IDEM has not met its burden of proof for nondisclosure of the records, I note the following analysis from Counselor O'Connor:

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 (emphasis added). Because IDEM has satisfied its obligations under section 9(c) of the APRA, I agree with Counselor O'Connor's conclusion that IDEM need not provide you with any additional information at this point. If, however, this matter proceeded to litigation before a court, the burden of proof would indeed be on IDEM to sustain its denial. I.C. § 5-14-3-9(f).

As to your allegation that the APRA requires IDEM to separate disclosable material from the nondisclosable material, I agree and incorporate the following analysis from Counselor Neal:

Here, the University has identified 32 records responsive to your request. Nine of those records were released in their entirety and as such are not at issue. The remaining 23 records were provided with the text of the emails redacted. The University contends those materials were redacted at the discretion of the agency pursuant to the so-called deliberative materials exception to disclosure, found at I.C. § 5-14-3-4(b)(6).

To the extent the emails contain information that is not expression of opinion or speculative in nature, and is not inextricably linked to non-disclosable information, that information must be disclosed.

The Indiana Court of Appeals addressed a similar issue in *Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ.*, 787 N.E.2d 893 (Ind. Ct. App. 2005):

However, section 6 of APRA requires a public agency to separate discloseable from non-discloseable information contained in public records. I.C. § 5-14-3-6(a). By stating that agencies are required to separate "information" contained in public records, the legislature has signaled an intention to allow public access to whatever portions of a public record are not protected from disclosure by an applicable exception.

To permit an agency to establish that a given document, or even a portion thereof, is non-discloseable simply by proving that some of the documents in a group of similarly requested items are non-discloseable would frustrate this purpose and be contrary to section 6. To the extent that the Journal Gazette case suggests otherwise, we respectfully decline to follow it.

Instead, we agree with the reasoning of the United States Supreme Court . . . that those factual matters which are not inextricably linked with other non-discloseable materials, should not be protected from public disclosure. . . . Consistent with the mandate of APRA section 6, any factual information which can be thus separated from the non-discloseable matters must be made available for public access.

Id. at 913-14.

If there is information which is not expression of opinion or speculative in nature and is not inextricably linked with the nondisclosable materials, that information should be provided. Here, the University provided the sender, date, time and recipient information for each email. I would agree that information, in this case, is not inextricably linked with the nondisclosable material.

Opinion of the Public Access Counselor 09-FC-53. In accordance with Counselor Neal's opinion, to the extent that IDEM is withholding entire records that contain some disclosable information, IDEM should redact the nondisclosable information and produce the remaining information to you.

CONCLUSION

For the foregoing reasons, it is my opinion that IDEM has satisfied the APRA's requirements regarding the form of IDEM's denial of your request. However, it is also my opinion that section 6(a) requires IDEM to redact nondisclosable information from the responsive records and produce the remaining information to you.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive, slightly slanted style.

Andrew J. Kossack
Public Access Counselor

cc: Lori Kyle Endris, Indiana Department of Environmental Management