STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
ANDREW J. KOSSACK

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

June 27, 2011

Ms. Jamie A. Maddox, o/b/o Emily S. Kysel
4936 Evanston Avenue
Indianapolis, IN 46205

Re: Consolidated Formal Complaints 11-FC-125, 11-FC-126, 11-FC-127; Alleged Violation of the Access to Public Records Act by the City of Indianapolis Human Resources Department, Office of Disability Affairs, and Department of Code Enforcement

Dear Ms. Maddox:

This advisory opinion is in response to the three formal complaints you submitted on behalf of your client, Emily S. Kysel. Due to the similarity and relatedness of the allegations presented in each of the complaints, I have consolidated my response to them into this single advisory opinion. The complaints allege that the City of Indianapolis ("City") Human Resources Department ("HRD"), Office of Disability Affairs ("ODA") and Department of Code Enforcement ("DCE") (collectively, the "Departments") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq*. Deputy Chief Corporation Counsel Andrea Brandes from the City's Office of Corporation Counsel ("OCC") responded to the complaints for the Departments.

BACKGROUND

Your complaints allege that Ms. Kysel served public records requests on the HRD, ODA, and DCE on July 22, 2010. On September 16, 2010, the OCC began a rolling production of records on behalf of the Departments. The OCC also released responsive records on November 15, 2010, and February 14, 2011. A letter dated February 14, 2011, from Assistant Corporation Counsel Richard McDermott informed your colleague, Kevin Betz, that Ms. Kysel's request was denied insofar as it sought records deemed confidential under Ind. Code § 5-14-3-4(a)(1), (3), and (9). Mr. McDermott also stated that the City was withholding records under Ind. Code § 5-14-3-4(b)(2), (6), and (7). Finally, Mr. McDermott wrote,

> Additionally, the broad nature of you [sic] request makes it impossible for the requested entities to search further for responsive records absent more particular information from you. Pursuant to Ind. Code § 5-14-3-3(1), a request for inspection or copying must identify with reasonable particularity the record being requested. If you are able to identify with reasonable particularity the specific record or records you still with to inspect and/or copy, please contact me at your earliest convenience.

On March 29, 2011, and May 13, 2011, Mr. Betz replied to Mr. McDermott's February 14th letter and argued that Ms. Kysel's request was, in fact, reasonably particular. Specifically, Ms. Kysel sought, for example, "all e-mail, correspondence or communications relating to Emily Kysel from June 2009 to the present from, to and/or involving Elizabeth Terry." Mr. Betz also took issue with the Departments' denials of access in Mr. McDermott's February 14th letter on the basis that the denials failed to cite to state or federal statutes deeming the records confidential under Ind. Code § 5-14-3-4(a)(1) and (3), and because Ms. Kysel "does not believe that her public records request involves work product, deliberative material and/or diaries, journals or other personal notes."

Ms. Brandes responded to the complaints on behalf of the Departments. She states that the records withheld under subsection 4(a) "contain confidential personal health information protected by the Americans With Disabilities Act, the Family Medical Leave Act, and the Health Insurance Portability and Accountability Act." Ms. Brandes explains that a "number of records responsive to the request concern a personal health issue specific to Ms. Kysel and to other employees of the City, and the City has complied with its obligations under the applicable statutes to withhold this information as a mandatory act." Ms. Brandes also maintains the Departments' denials based on the APRA's exception for deliberative materials and dairies, journals, and other personal notes. Finally, Ms. Brandes argues that the requests at issue are not reasonably particular insofar as they seek unspecified "e-mail . . . or communications. . ." and records that "relate" to Ms. Kysel because, according to Ms. Brandes, "that term is open to interpretation" and the City is unable to ascertain what records might or might not be responsive to such a request. Ms. Brandes further explains:

> Ms. Kysel was an employee of the City during the period of time contemplated by the [r]equest, and records in the City's custody may refer to a number of topics. For example, email messages and communications may concern work assignments given to Ms. Kysel specifically, or to Ms. Kysel and her coworkers by the various City employees identified in the request. Email messages and communications may concern personnel or disciplinary issues with respect to Ms. Kysel, her coworkers, and the City employees identified in the [r]equest. . . . [T]he City

> remains concerned that it does not understand what is meant by the requestor when he seeks documents, emails, and electronic documents related to Ms. Kysel, her employment, and other aspects of her relationship with the City and still seeks clarification as to which aspect of her employment and other aspects of her relationship with the City are contemplated in the [r]equest so that it can search for responsive records.

Ms. Brandes denies that the Departments violated the APRA, but states that the City "would be willing to discuss matters of particularity further with counsel for Ms. Kysel."

ANALYSIS

The public policy of the APRA states, "[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. The Departments are public agencies for the purposes of the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Departments' public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

Ms. Brandes is correct that several of my public access counselor predecessors and I have opined that the APRA does not require public agencies to search through records -- electronically or manually -- to determine what records might contain information responsive to a request. *See Ops. of the Public Access Counselor 10-FC-57; 09-FC-124; 04-FC-38*. The APRA requires that a records request "identify with reasonable particularity the record being requested." I.C. § 5-14-3-3(a)(1). "Reasonable particularity" is not defined in the APRA, but the public access counselor has repeatedly opined that "when a public agency cannot ascertain what records a requester is seeking, the request likely has not been made with reasonable particularity." *Ops. of the Public Access Counselor 10-FC-57; 08-FC-176*. Consequently, it is my opinion that the Departments did not violate the APRA when it responded, for example, to your request for "[a]ny and all documents, including e-mails and other electronic documents, *related to* Emily Kysel from June 2009 to the present" (emphasis added) by requesting that you provide additional clarification of your request. Although requests for documents and records "related to" a certain subject matter are often sufficiently particular for purposes of litigation-related discovery, different standards apply in the realm of the APRA. Likewise, a request for "other electronic documents" is, in my opinion, not reasonably particular under the APRA because it is impossible for a public agency to determine what records are contemplated by such a request.

That said, the public access counselor has determined that identifying email communications by sender, receiver, and date range provides sufficient reasonable particularity for the public agency to retrieve any responsive records. *Op. of the Public Access Counselor 09-FC-124*. Thus, your request for emails between various employees

of the DCE from June 2009 to the present was reasonably particular, notwithstanding the fact that the number of records responsive to that request is likely extremely voluminous. Due to the likelihood that the number of records responsive to that request is extremely large, however, I recommend that the parties continue to communicate regarding the subject matter sought in order to limit the expenses incurred by both the City and Ms. Kysel in producing such a voluminous response.

As to the substance of the Departments' denials listed in Mr. McDermott's February 14th letter, Ms. Brandes states that certain confidential information was withheld under "the Americans With Disabilities Act, the Family Medical Leave Act, and the Health Insurance Portability and Accountability Act." Initially, I note that the APRA requires that when a request is made in writing and the agency denies the request, the agency must deny the request in writing and must include a statement of the *specific* exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. I.C. § 5-14-3-9(c). In a 2008 opinion, Counselor Neal opined that citing to "HIPAA" or other laws without providing a specific citation is not sufficient to satisfy the APRA's denial procedures:

> In the Department's response to the complaint, the Department claims HIPAA prohibits disclosure of the medical records absent a signed release. I would advise the Department that this statement is certainly more appropriate than the statement made in the initial response, but it is my opinion it still does not include a statement of the specific exemption; the specific HIPAA provision(s) prohibiting disclosure absent a waiver would be most appropriate.

Op. of the Public Access Counselor 08-FC-169. Thus, while the Departments' mention of the aforementioned federal statutes do provide some insight into the denials, it is still not sufficient for a denial under subsection 9(c) because the Departments have not yet cited a specific provision from any or all of those laws. Moreover, it remains unclear if and how such statutes apply to the records withheld in this matter. For example, if one or more of the Departments is indeed subject to HIPAA and the requested records contain protected health information[1] (as defined by HIPAA), the Departments acted

[1] Under HIPAA, "Protected health information" means individually identifiable health information:

> (1) Except as provided in paragraph (2) of this definition, that is:
> (i) Transmitted by electronic media;
> (ii) Maintained in electronic media; or
> (iii) Transmitted or maintained in any other form or medium.
> (2) Protected health information excludes individually identifiable health information in:
> (i) Education records covered by the Family Educational Rights and Privacy Act, as amended, 20 U.S.C. 1232g;

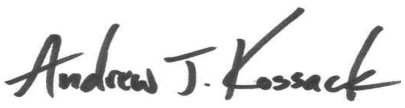
appropriately by refusing to disclose those records. However, it is not evident how HIPAA or the other listed statutes apply generally to the Departments or specifically to the records sought here. Because the APRA places the burden of proof for denial of access on public agencies, it is my opinion that the Departments have not yet sustained their burden of proof to deny access based on Ind. Code § 5-14-3-4(a)(1) and (3).

Finally, based upon Ms. Brandes' description of the records withheld based on the deliberative materials exception and the diaries and journals exception to the APRA, it appears the Departments' denials on those bases were justified under Ind. Code § 5-14-3-4(b)(6) and (7).

CONCLUSION

For the foregoing reasons, it is my opinion that the Departments did not violate the APRA by requesting that you provide clarification regarding your requests for "other electronic documents" and records "related to" your client because such requests are not reasonably particular under the APRA. However, because your requests for emails between various employees of the Departments within a specified date range were reasonably particular, the Department should make them available to you unless they are nondisclosable under section 4. The Departments have not yet sustained their burden of proof regarding their denial of access to records based on various federal statutes. Unless the Departments can specify which provisions of such laws prohibit disclosure of the records, they should make them available to you for inspection and copying within a reasonable period of time. The Departments did not otherwise violate the APRA.

Best regards,



Andrew J. Kossack
Public Access Counselor

cc: Andrea L. Brandes

(ii) Records described at 20 U.S.C. 1232g(a)(4)(B)(iv); and
(iii) Employment records held by a covered entity in its role as employer
45 C.F.R. § 160.103.