



STATE OF INDIANA

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August 15, 2011

Mr. Edward T. Treacy and Adam Kirsch
Marion County Democratic Party
148 E. Market Street
Indianapolis, Indiana 46204

Re: Formal Complaint 11-FC-172; Alleged Violation of the Access to Public Records Act by the City of Indianapolis

Dear Sirs:

This advisory opinion is in response to your formal complaint alleging the City of Indianapolis ("City") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Chief Deputy Corporation Counsel, Andrea L. Brandes, responded on behalf of the City. Her response is enclosed for your reference.

BACKGROUND

In your complaint you allege that on April 8, 2011, you submitted a written request to the City for the following documents:

- a. The Notice of Grant Award or similar document of award for all grants which provided funds that the City has encumbered or spent, or has budgeted or planned to encumber or spend, with respect to any activities in connection with the NFL Super Bowl XLIV.
- b. The Notice of Grant Award or similar document of award for all grants which provided funds or proceeds that the City has encumbered or spent, or has budgeted or planned to encumber or spend, with respect to any activities in connection with the NFL Super Bowl XLV.
- c. Records that contain lists or that otherwise identify employees of the City of Indianapolis and Marion County whose travel to Texas for activities in connection with Super Bowl XLV was funded or authorized to be funded by federal funds for which the City has received an award or sub-award.

- d. Records that contain lists or that otherwise identify persons other than employees of the City of Indianapolis and Marion County whose travel to Texas for activities in connection with Super Bowl was funded or authorized to be funded by federal funds for which the City has received an award or sub-award.
- e. Records that contain lists or that otherwise identify employees of the City of Indianapolis and Marion County whose travel to Texas for activities in connection with Super Bowl XLV was funded or was authorized to be funded by public funds (other than federal funds). Records that contain lists or that otherwise identify persons other than employees of the City of Indianapolis and Marion County whose travel to Texas for activities in connection with the Super Bowl was funded or was authorized to be funded by public funds (other than federal funds). Records relating to the development, consideration, and approval of all budget revisions to allow to travel to Super Bowl XLV from funds of the Indiana Urban Security Initiative grant, including, but not limited to, records that demonstrate the budgeted activities of the grant before and after the revision.
- f. Records from City employees, including but not limited to Kristin Lion, Jonathan Mack, Marv Smalley, Garry Coons, and Frank Straub, to personnel of the Indiana Department of Homeland Security, including but not limited, Caitlin McKenna (formerly known as Caitlin Intermill), regarding approval, denial, or other consideration of grant allowability and budget revision for travel to Super Bowl XLV.
- g. Records received from personnel of the Indiana Department of Homeland Security, including but not limited to Caitlin McKenna (formerly known as Caitlin Intermill) and Rachel Meyer, to City employees, including but not limited to Kristin Lion, Jon Mack, Marv Smalley, Gary Coons and Frank Straub, that approve, disapprove, or otherwise discuss the City's request for grant allowability and budget revision for travel to Super Bowl XLV.
- h. Records for the executive committee of the Indianapolis Urban Areas Security Initiative grant program related to travel to Super Bowl XLV.
- i. Records received by the City from the 2012 Indianapolis Super Bowl Host Committee regarding all travel arrangements for Mayor Greg Ballard and all other persons traveling to Dallas in connection with Super Bowl XLV.
- j. Records relating to the cost or expense estimates for travel to Super Bowl XLV by City and County employees or other persons funded by City grant funds or other public funds under the control of the City.
- k. Records of the budget for the Indianapolis Urban Areas Security Initiative grant program for grant years 2007, 2008, and 2009. Records that show the total costs from City grant funds and any other public funds under the control of the City associated with travel to Super Bowl XLV.

- l. Records of all receipts and expenses incurred by City employees or any other persons traveling to Super Bowl XLV in connection with that travel that was paid or incurred directly by the City or that has been submitted or anticipated to be submitted for reimbursement.

- m. Records of all emails, calendar appointments, and text messages during the period from Thursday, February 3 through Tuesday, February 8 relating in any way to Super Bowl XLV from or to Mayor Ballard, City employees, and appointed officials who traveled to Super Bowl XLV.

Within seven days of the request, Andrea Brandes responded on behalf of the City. Ms. Brandes provided that the City was working towards gathering the records responsive to your request and that the documents would be forthcoming. On June 3, 2011, Ms. Brandes advised via email that eighty-nine (89) pages of hardcopy documents responsive to your request were available for pickup at her office and that additional records would be forthcoming. Ms. Brandes indicated that certain records have been withheld as authorized by I.C. § 5-14-4(b)(6). You note that her response did not indicate which records were being withheld or otherwise describe a category, type, or number of documents being withheld. Ms. Brandes further provided that a separate records request you made of the City, independent of this complaint, was now available and that three thousand, five hundred and seventy-eight (3,578) pages of records were available for inspection or copying. On June 30, 2011, you collected the documents that are the subject of this complaint from Ms. Brandes' office.

Your complaint alleges that the City's response to your records request constituted an unreasonable delay in producing public records and in violation of the APRA. You further allege that the documents produced by the City were inadequate, records remain outstanding or withheld, and the records were not being provided in electronic format.

In response to your formal complaint, Ms. Brandes provided that the City timely acknowledged your written request for records within seven (7) days of receipt. The City responded to your April 8, 2011 request via email on April 12, 2011, and thereafter on June 3, 2011 notified you that eighty-nine (89) pages or records responsive to your request were available for inspection and/or copying. Ms. Brandes correspondence included that additional records responsive to your request would be provided when they became available. Ms. Brandes advised that you specifically stated in your complaint that you did not challenge the deliberative withholding of email records from the records made available on June 3, 2011.

In regards to the alleged delay, Ms. Brandes provided that the production time involved in the request of the documents was not unreasonable. The request received by the City sought a large volume of records in numerous categories, from various agencies for several calendar years. The request required input from the Office of Corporation Counsel, the Department of Public Safety, the Indianapolis Metropolitan Police

Department, the Department of Code Enforcement, the Indianapolis Division of Homeland Security, and the Office of the Mayor. The request sought records regarding grant funds encumbered or spent, or budgeted or planned to be encumbered or spent, with respect to any activities in connection with Super Bowl XLIV along with travel records during the 2011 calendar year. Ms. Brandes maintained that her office was continuing to work to provide the records responsive to the request and recently informed you that an additional forty-five (45) pages of records were now available. Ms. Brandes concluded that the City's response to your request is anticipated to be completed on or about August 22, 2011.

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

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and 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. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, the City responded to your request within the seven-day time period required by the APRA.

The APRA does not prescribe timeframes for the actual production of records. The public access counselor has stated repeatedly that records must be produced within a reasonable period of time, based on the facts and circumstances of the request. Considering factors such as the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. *See* I.C. § 5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. *See* I.C. § 5-14-3-7(c). The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *See Opinion of the Public Access Counselor 02-FC-45.*

Ms. Brandes cited to the nature of your requests, particularly that the request involved a large volume of records from various calendar years, with multiple data elements that involved various City agencies and personnel. The request required the input of the City Office of Corporation Counsel, the Department of Public Safety, the Indianapolis Metropolitan Police Department, the Indianapolis Fire Department, the Department of Code Enforcement, the Indianapolis Division of Homeland Security, and the Office of the Mayor. In addition, each document had to be reviewed by the Office of Corporation Counsel for items to be withheld as confidential as required by the APRA, state, or federal law and for records whose disclosure was discretionary.

The City made its initial disclosure responsive to your request on or about fifty-two (52) days after the acknowledgement of the receipt of your request. This office has often suggested a public agency make portions of a response available from time to time when a large number of documents are being reviewed for disclosure. *See Opinion of the Public Access Counselor 06-FC-184 and 08-FC-56*. The APRA requires public agencies to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. *See I.C. § 5-14-3-6(a)*. At that time of its initial disclosure, the City indicated that it was still in the process of collecting and reviewing records responsive to your request and another disclosure would be forthcoming. Twenty-seven (27) days after you were made aware the initial documents were available, you collected the documents from the City. The week of August 8, 2011, the City made its second disclosure pursuant to your request and indicated that its final response would occur on or about August 22, 2011.

Under such circumstances, it is my opinion that City has not acted unreasonably. Under the APRA, a public agency shall “regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees.” *See I.C. § 5-14-3-7(a)*. *See also Opinion of the Public Access Counselor 09-FC-115* (two months was not an unreasonable production time where agency director and records request handler recently assumed the duties of another position and needed time to review and redact confidential information); *see also Opinion of the Public Access Counselor 07-FC-327* (three months was not an unreasonable amount of time to respond to seven requests with approximately 1000 pages of responsive documents; 34 days was not unreasonable amount of time to produce three-page document considering number of other pending requests). You made thirteen separate, broad requests of the City to produce records pursuant to the APRA. The City was required to communicate with six agencies that it believed to have records responsive to your requests. Each of those agencies was required to search and review its records, in some cases back to 2007, in an effort to fulfill your request. Upon production of the documents, the records were then reviewed in order to determine whether information was required to be withheld or redacted before making the information available. At the time of the initial disclosure on June 3, 2011, the City notified you that it had completed a separate records request for you that culminated in the disclosure of three thousand, five hundred and seventy-eight pages (3,578). Although it is not clear which, if any, agencies were involved in providing documents in response to both requests; the Office of Corporation Counsel would have been involved in either review before making the disclosable information available for

inspection and copying. This is in addition to the regular duties required of each agency. As such, I do not believe the City took an unreasonable amount of time to collect, review, and reproduce the records in light of the breadth and extensive nature of your requests.

In your formal complaint, you allege that the records requested of the City be provided “in their hardcopy or electronic format whichever applicable.” To date, you have only received records in hardcopy format. The City provided that the email records responsive to your request were stored in an electronic format through the Microsoft Outlook system. However, when the Office of Corporation Counsel received the email records from the various agencies, they were provided in hardcopy format. The City maintains that the efforts necessary in reviewing the documents as required by the APRA required the use of paper printouts rather than compilation of the records electronically through the Microsoft Outlook system.

Except as provided in subsection (e), a public agency that maintains or contracts for the maintenance of public records in an electronic data storage system shall make reasonable efforts to provide to a person making a request a copy of all disclosable data contained in the records on paper, disk, tape, drum, or any other method of electronic retrieval if the medium requested is compatible with the agency’s data storage system. *See* I.C. § 5-14-3-3(d). In your formal complaint you provide that you requested documents from the City in their hardcopy *or* electronic format whichever applicable. From the plain language of your request, I can not interpret that as a specific request that all records be provided in electronic format. In addition, the City has provided that it did not have the technical capability to review and/or redact information, as required by the APRA, from documents maintained in an electronic format. As such, the City did not violate APRA in providing records responsive to your request in hardcopy format.

As to your allegations that the City’s response to your request was inadequate and records still remain outstanding and/or withheld. I would note that the City has provided that its response to your request is not complete and that it anticipates that all records will be provided on or about August 22, 2011. I would note the following for all parties involved regarding the so-called deliberative materials exception to the APRA.

The deliberative materials exception is found at I.C. § 5-14-3-4(b)(6):

(b) Except as otherwise provided by subsection (a), the following public records shall be excepted from section 3 of this chapter at the discretion of a public agency:

...

(6) Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

The exception requires that the records be intra- or inter agency and that the records be expressions of opinion or speculative in nature and communicated for the purpose of decision making. APRA provides that if a public record contains disclosable and nondisclosable information, the public agency shall separate the material that may be disclosed and make it available for inspection and copying. See I.C. § 5-14-3-6(a). The Indiana Court of Appeals has held that I.C. § 5-14-3-6(a) requires an agency to separate disclosable information from the nondisclosable information where the two types of information are not “inextricably linked.” *Indianapolis Star v. Trustees of Indiana University*, 787 N.E.2d 893, 914 (Ind. Ct. App. 2003). Thus, APRA only permits a public agency to withhold the factual material of a deliberative record if it is inextricably linked with the deliberative material.

CONCLUSION

For the foregoing reasons, it is my opinion that the City did not violate the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is fluid and cursive, with a large initial "J" and a distinct "Hoage" following.

Joseph B. Hoage
Public Access Counselor

cc: Andrea L. Brandes