



# 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](http://www.IN.gov/pac)

April 29, 2011

Mr. Russ McQuaid  
WXIN-TV  
6910 Network Place  
Indianapolis, IN 46278

*Re: Formal Complaint 11-FC-83; Alleged Violation of the Access to Public Records Act by the City of Indianapolis Office of Corporation Counsel and Department of Public Safety*

Dear Mr. McQuaid:

This advisory opinion is in response to your formal complaint alleging the City of Indianapolis Office of Corporation Counsel and Department of Public Safety (the "City") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* The City's response from Chief Deputy Corporation Counsel and Public Access Counselor Andrea Brandes is enclosed for your reference.

## BACKGROUND

Your complaint alleges that the City improperly withheld records "pertaining to the creation of a document later referred to as the 'Bisard Investigation Report'" (the "Bisard Report"). The City released the Bisard Report to the public on November 10, 2010. The City withheld responsive records based on Ind. Code §§ 5-14-3-4(b)(1) and 4(b)(6). You argue that the City waived its right to rely on those exceptions to the APRA, however, because the City expressed that the City intended to release the Bisard Report publicly, because the City released a portion of the withheld records that contains a witness' statement, and because City of Indianapolis Public Safety Director Dr. Frank Straub expressed a "commitment to unprecedented access and transparency." You state that "[i]t is the position of WXIN-TV that these commitments, references and voluntary and public inclusion of confidential information in the final report abrogate and nullify any claim tha[t] the Public Safety Director may make under Indiana Code 5-14-3-4(b)(1) and (6)." You also argue that the release of the supporting documents would not undermine any ongoing investigation or prosecution because the Bisard Report has already been released. Moreover, the supporting records pertain more to internal police administrative matters than to the related criminal matter. Finally, you note that sources

have indicated to WXIN-TV that the Bisard Report “may not be an accurate and full accounting of the findings of the other internal affairs report. . . .”

In response to your complaint, Ms. Brandes claims that the City’s statements regarding releasing the relevant records publicly referred to the 47-page, publicly-released Bisard Report rather than that record’s supporting documents. She also asserts that the City’s representations cited in your complaint could not have resulted in a waiver of the City’s right to withhold the supporting documents because a search for and review of those records was ongoing until the City formally denied your request on March 18, 2011. Finally, she argues that the City did not waive its rights as a matter of law because the City did not release the records to one party and deny them to another.

Ms. Brandes also maintains the City’s denial based on subsections 4(b)(1) and 4(b)(6) of the APRA. She states that the responsive records were compiled and created during the criminal investigation of the automobile crash involving Officer David Bisard of the Indianapolis Metropolitan Police Department (“IMPD”). One individual was killed and two others were injured as a result of that crash. IMPD launched an extensive investigation in response to the incident and created numerous records during the course of its investigation. The Marion County Prosecutor’s Office ultimately filed criminal charges against Officer Bisard. Ms. Brandes claims that other records withheld by the City constitute interagency or intra-agency deliberative materials under subsection 4(b)(6) of the APRA. Specifically, the City maintains investigatory records such as investigator and evidence reports, analyses of witness statements, and internal investigations of personnel involved in the incident and resulting investigation of the incident. Ms. Brandes states that these records consist of advisory material necessary for the decision making process of law enforcement entities within the City.

Finally, Ms. Brandes cites to subsection 4(b)(7) of the APRA in arguing that “many components of [the deliberative records] also fall under the classification of personal notes which may be withheld . . . at the discretion of [the City].”

## 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. The City and its Office of Corporation Counsel and Department of Public Safety 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 these agencies’ 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).

The City cited to three exemptions to the APRA’s presumption of disclosure. The APRA permits public agencies to withhold, at their discretion, “[i]nvestigatory records of law enforcement agencies,” I.C. § 5-14-3-4(b)(1), “[r]ecords 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,” I.C. § 5-14-3-4(b)(6), and “[d]iaries, journals, or other personal notes serving as the functional equivalent of a diary or journal,” I.C. § 5-14-3-4(b)(7). Based on Ms. Brandes’ descriptions of the records at issue, it appears that the first two exceptions apply.

The investigatory records exception to the APRA provides that a law enforcement agency has the discretion to disclose or not disclose its investigatory records. An investigatory record is “information compiled in the course of the investigation of a crime.” I.C. § 5-14-3-2(h). The investigatory records exception does not apply only to records of ongoing or current investigations. Moreover, it does not apply only to an investigation where a crime was charged or an investigation where it was adjudicated that a crime was indeed committed. Instead, the exception applies to all records compiled during the course of the investigation of a crime, even where a crime was not ultimately charged, and even after an investigation has been completed. The investigatory records exception affords law enforcement agencies broad discretion in withholding such records. *See Opinion of the Public Access Counselor 09-FC-157*. “Generally, a police report or incident report is an investigatory record and as such may be excepted from disclosure pursuant to I.C. § 5-14-3-4(b)(1).” *Id.* Based on these standards, it is my opinion that the City did not violate the APRA by withholding records compiled in the course of either the investigation of the Bisard crash or the internal investigation that resulted from the same.

The City also claims that it can withhold the record under the “deliberative material” exception to the APRA, which applies to 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.” I.C. § 5-14-3-4-(b)(6). Again, based on Ms. Brandes’ description of the records at issue, it appears this exception permits the City to exercise its discretion to withhold them. Ms. Brandes seems to indicate that the entire records withheld on this basis are speculative or opinionated in nature, but it is unclear whether the records contain any factual information that is severable from the deliberative material. The APRA requires public agencies to separate and/or redact the nondisclosable information in public records in order to make the disclosable information available for inspection and copying. I.C. § 5-14-3-6(a). In *Indianapolis Star v. Trustees of Indiana University*, 787 N.E.2d 893 (Ind. Ct. App. 2003), the Indiana Court of Appeals held that Ind. Code § 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.” *Id.* at 914. Thus, if any of the records at issue here contain factual information along with the deliberative material, the APRA permits the City to withhold the factual material only if it is inextricably linked with the deliberative material. Otherwise, the City should redact the deliberative material and produce the remainder of the record.

Regarding the City’s citation to the APRA’s exception for diaries, journals, and other personal notes, it is unclear to me how that exception applies to the records at issue here. Under the APRA, a public agency that withholds a public record bears the burden

of proof to show that the record is exempt. I.C. §§ 5-14-3-1, 5-14-3-9(f) and (g). Exceptions to disclosure are narrowly construed. I.C. § 5-14-3-1. While it is possible that some of the requested records could fall under this exception, it is my opinion that the City has not yet sustained its burden of proof to demonstrate that the exception applies here. However, the City may withhold those records if they fall within one or both of the other exceptions cited in its response.

Finally, regarding the allegation that the City waived its rights to withhold records under subsections 4(b)(1) and 4(b)(6) of the APRA, the Court of Appeals has recognized that a public agency may waive an applicable APRA exception if the agency allowed access to its material to one party and denied access to another based on an APRA exception. *The Indianapolis Star v. Trustees of Indiana University*, 787 N.E.2d 893, 919 (Ind. Ct. App. 2003). That decision, however, applied to an agency that released certain records and then subsequently refused another individual's request for access to the *exact same records*. Here, there is nothing to indicate that the City denied you access to records that it released to other media outlets or requesters. As a factual matter, it appears that the City's statements regarding the release of its investigation of the Bisard crash referred not to the supporting documents but to the actual Bisard Report itself, which the City disclosed to the public on November 10th. Regardless, however, I can find no authority from any previous public access counselor that would lead me to believe the City waived its discretion to withhold documents that have not been previously disclosed to another requester. Consequently, it is my opinion that the City did not waive its right to withhold the records at issue here.

#### CONCLUSION

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

Best regards,



Andrew J. Kossack  
Public Access Counselor

cc: Andrea Brandes