STATE OF INDIANA

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November 17, 2011

Andrew Mallon
Securus Technologies, Inc.
736 Hanover Place, Suite 200
Carmel, Indiana 46032
Via email: amallon@dsvlaw.com

Re: Informal Inquiry 11-INF-64; Indiana Department of Administration

Dear Mr. Mallon:

This is in response to your informal inquiry regarding the Indiana Department of Administration ("IDOA"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response to your inquiry. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), I.C. § 5-14-3-1 *et seq.*

BACKGROUND

On November 11, 2010, Securus submitted a written record request to the IDOA for certain documents relating to Request for Proposal 10-55 ("RFP"). Securus specifically requested the following records, in either their hardcopy or electronic format:

(1) Any and all notes taken or made by any individual in connection with the scoring or evaluation or proposals submitted in response to the RFP.
(2) Scoring sheets completed by individual evaluations/scorers, along with any notes, drafts, versions, supporting, back-up material, or other records reflecting scoring, in connection with the RFP.
(3) Any and all records (including but not limited to internal e-mails, memoranda, agendas, and recordings) relating in any way to the RFP, including but not limited to records relating to the solicitation, evaluation, and scoring of bids submitted in response to the RFP.
(4) Any communications, in whatever form, with, from, to, or about Public Communications Services, Inc., whether or not related to the RFP.

On November 16, 2010, Ms. Connie Smith responded to your request in writing on behalf of the IDOA. Ms. Smith provided a link to a website containing numerous documents that were responsive to your request. Mr. Smith further provided that all other

records that were sought were deliberative in nature and would not be disclosed. You allege that Ms. Smith did not provide a log that provided what documents were being withheld and that the IDOA did not produce all records in response to your request.

On November 23, 2010, Securus submitted further correspondence with the IDOA that outlined issues it had with the IDOA's production of records in response to the request. On December 17, 2010, Ms. Smith provided in writing that various categories of documents were protected and were being withheld due to their deliberative nature. Securus submitted additional correspondence on December 21, 2010, further outlining issues it had with the response produced.

On March 24, 2011, pursuant to I.C. § 5-22-19-2, Securus filed a Petition for Judicial Review in the Marion County Superior Court challenging the RFP.[1] During the process of discovery, the IDOA has produced documents that Securus believes should have been disclosed in their original public records request in November 2010. Securus is still of the belief that all records have not been disclosed pursuant to its November 2010 request. Securus disputes IDOA's reliance on I.C. § 5-14-3-4(b)(6), in that it would only apply to intra-agency or interagency records, and would never be applicable to communication between the IDOA and a non-public agency. In addition, the exception would only apply to expressions of opinion or speculative in nature made for the purpose of a decision-making, and would not be applicable to statements expressing or communicating facts or those statements made after a decision was made. As such, the non-deliberative material and post-decision statements should have been disclosed.

On October 27, 2011, Securus filed a Formal Complaint with the Public Access Counselor's Office against the IDOA. I.C. § 5-14-5-7(a) provides that a person who chooses to file a formal complaint with the counselor must do so no later than thirty days after the alleged denial. Noting that the final communication provided by either Securus or the IDOA in regards to Securus's APRA request would have occurred on December 17, 2010, Securus's formal complaint was rejected on October 28, 2011. On October 31, 2011, Securus requested that the issue be considered an informal inquiry. On November 2, 2011, the IDOA was notified on Securus's informal inquiry and allowed a chance to respond. Connie Smith, Communications Manager, responded on behalf of the IDOA. Her response is enclosed for your reference.

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 IDOA 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 IDOA'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).

[1] Securus has not filed an action in any court against the IDOA pursuant to I.C. § 5-14-3.

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 in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). 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 IDOA responded to the request within the timelines provided by the APRA.

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. *See* I.C. § 5-14-3-9(c). The APRA does not obligate public agencies to create any records in response to a public records request, including a privilege log. *See Opinion of the Public Access Counselor 01-FC-47; 09-FC-285; 11-FC-246.* I note the following analysis provided by 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. (emphasis added). *Opinions of the Public Access Counselor 01-FC-47.*

Thus, the IDOA was not required to provide Securus with a privilege log recording what specific records were being withheld from disclosure, unless it maintained

such a log. Further, the IDOA was not required in response to your records request to provide you with a detailed explanation authorizing nondisclosure. As noted above, in an action before a court, the IDOA would have to either "establish the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit. Ms. Smith noted in her denial that certain records were being withheld due to they were deliberative in nature, which you interpreted as the denial was made pursuant to I.C. § 5-14-3-4(b)(6). I would encourage the IDOA in the future to, along with providing the complete language of the statutory cite, to also include the statutory citation itself.

The APRA excepts from disclosure, among others, the following:

> 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.
> I.C. § 5-14-3-4(b)(6).

When a record contains both disclosable and nondisclosable information and an agency receives a request for access to the record, the 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 burden of proof for nondisclosure is placed on the agency and not the person making the request. *See* I.C. § 5-14-3-1.

The Indiana Court of Appeals provided the following guidance on 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 dislcosable from non-dislcosable *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-dislcosable 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 in *Mink, supra*, i.e., that those factual

> matters which are not inextricably linked with other non-discloseable materials, should not be protected from public disclosure. See *410 U.S. at 92*. 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.

To the extent that records contain information that is not an expression of opinion or speculative in nature, and is not inextricably linked to non-disclosable information, APRA provides that the information shall be disclosed.

Securus provides that I.C. § 5-14-3-4(b)(6) would never be applicable to communication between the a public agency and a non-public agency, the exception would only apply to expressions of opinion or speculative in nature made for the purpose of a decision-making and not to those statements expressing or communicating facts or those statements made after a decision was made. Deliberative material includes information that reflects, for example, one's ideas, consideration and recommendations on a subject or issue for use in a decision making process. Many, if not most documents that a public agency creates, maintains or retains may be part of some decision making process. The purpose of protecting such communications is to "prevent injury to the quality of agency decisions." *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002). The frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public, and the decisions and policies formulated might be poorer as a result. *Newman*, 766 N.E.2d at 12. In order to withhold such records from disclosure under Indiana Code 5-14-3-4(b)(6), however, the documents must also be interagency or interagency records that are advisory or deliberative and that are expressions of opinion or speculative in nature. *See Opinions of the Public Access Counselor 98-INF-8 and 03-FC-17.*

I.C. § 5-14-3-4(b)(6) requires that the that information must be "interagency or intra-agency," which implies documents created and shared within a public agency or between public agencies. *See Opinion of the Public Access Counselor 02-FC-69.* Previous guidance of this office has observed that where part of a requested file contained records that were submitted from persons outside of the public agency, the material would not qualify as deliberative material. *See Opinions of the Public Access Counselor 02-FC-13; 04-FC-194; 05-FC-206.* As such, it is my opinion that I.C. § 5-14-3-4(b)(6) would not be applicable to records containing communication between a public agency and a non-public agency, as such records are not "interagency or intra-agency."

Securus is correct in stating that when a record contains both disclosable and nondisclosable information and an agency receives a request for access to the record, the 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 only exception to this rule would be, as noted in *Unincorporated Operating Div. of Indianapolis Newspapers*, if the disclosable material was inextricably linked with the non-discloseable materials. Under I.C. § 5-14-3-4(b)(6), expressions of opinion or speculative in nature made for the

purpose of a decision making would need to be separated and redacted from those statements expressing or communicating facts or those statements made after a decision was made.

The public access counselor is not a finder of fact. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80.* The IDOA maintains that all records have been produced in response to Securus November 11, 2010 request. Pursuant to I.C. § 5-14-3-4(b)(6), the IDOA exercised its discretion provided by the statute to withhold records from disclosure as they are intra-agency, interagency advisory or deliberative. You disagree with the assertion that the IDOA has disclosed all records responsive to your request and that the IDOA properly applied I.C. § 5-14-3-4(b)(6). As such, if the IDOA has not disclosed all records responsive to your November 11, 2010 request and failed to properly apply I.C. § 5-14-3-4(b)(6) to records it withheld, it is my opinion that it acted contrary to the APRA. But, if the IDOA has disclosed all records responsive to your request and withheld records properly pursuant to I.C. § 5-14-3-4(b)(6), it has not violated the APRA.

If I can be of additional assistance, please do not hesitate to contact me.

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: Connie Smith