



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
HEATHER NEAL

Indiana Government Center South
402 West Washington Street, Room W460
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

June 24, 2008

Gitte Laasby
1433 East 83rd Avenue
Merrillville, Indiana 46410-6307

Re: Formal Complaint 08-FC-140; Alleged Violation of the Access to Public Records Act by the Indiana Department of Environmental Management

Dear Ms. Laasby:

This advisory opinion 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) by denying you access to records. I have enclosed a copy of IDEM's response to the complaint for your reference. It is my opinion IDEM did not violate the APRA.

BACKGROUND

You allege that on March 20, 2008 you requested from IDEM a copy of telephone logs of four different individuals employed by IDEM. You asked for telephone logs for office phone numbers as well as cellular telephone numbers. You allege that you received a response to the request on May 12, 2008, but you contend it was incomplete because the cellular telephone records for one individual (Mr. Murray) for a one month period were missing and no cellular telephone records were included for one other individual (Ms. Flum).

In response to your inquiry to IDEM asking why some records were missing, IDEM indicated that Ms. Flum does not have a state-issued cellular telephone. Regarding the missing records for one month of Mr. Murray's calls, IDEM contended it only receives detailed cellular telephone billing if an employee exceeds the number of allotted calling minutes in the billing period. IDEM indicated you did not receive the particular month billing records because the employee did not exceed the allotted minutes.

You allege that you telephoned the cellular telephone carrier to learn about the billing procedures and you were told that a customer either receives itemized billing or does not but that the customer does not just on occasion receive itemized billing. You filed this complaint on May 27 alleging denial of access.

IDEM responded to the complaint by letter dated June 12 from Assistant Commissioner Robert Keene. IDEM asserts that the staff members whose records are at issue here do not routinely keep logs of telephone calls made, so IDEM maintains no records responsive to the request for telephone logs. But IDEM contends that in order to comply with the spirit of the request, it provided you with copies of billing information for the numbers included in your request. IDEM explains that billing records for individual state employees' designated telephone numbers and state-provided cellular telephone records are maintained by the Indiana Office of Technology ("IOT"). IDEM does not receive billing information directly from the cellular provider, nor does it routinely maintain cellular telephone records within the agency. IOT has given a limited number of IDEM's accounting staff permission to access the Computer Installation Management System database ("CIMS") from time to time for accounting purposes. In the ordinary course of business IDEM accesses those records only for accounting purposes and only when a staff member exceeds the allotted minutes. IDEM contends that because of limited experience with CIMS, IDEM accounting staff were unaware of the existence of detailed billing records for all calls made within the allotted calling package. IDEM only learned of the existence of the records when, after receiving a copy of your complaint, IDEM contacted IOT to learn how to access such information.

Regarding the specific requests, IDEM asserts the following: Ms. Flum does not utilize a state-issued cellular telephone, nor does she receive public funding for the use of her personal cellular telephone. You requested records connected to her personal cellular telephone, and those are not public records. IDEM contends it provided you all requested billing information connected to Ms. Flum's office telephone.

Regarding records related to Mr. Murray's telephones, IDEM contends it provided you records for his office number on May 12. IDEM contends it did not provide you with the cellular telephone records for Mr. Murray's state-issued cellular telephone for the reason described above – the agency did not know the records existed because Mr. Murray did not exceed his allotted minutes for the time period. After consultation with IOT, IDEM was able to access the records and provided such to you in a packet of records dated June 12.

Regarding the records of Mr. Stucky, IDEM contends that you made no allegations in your complaint. But IDEM indicates that it provided you further detailed information on June 12. Regarding the records of Commissioner Easterly's telephone calls, IDEM contends you have made no allegations regarding those records. But IDEM did provide you, again on June 12, with further detailed information regarding those calls.

After IDEM submitted the response to this office on June 12, you submitted an addendum to your complaint by letter dated June 16. You indicate you were pleased to receive additional documents from IDEM but maintain your complaint for a number of reasons. First, you contend that you were provided incomplete records for Mr. Murray's cellular calls. You contend the records are missing for the dates March 13 through March 18.

Further, you contend that IDEM improperly redacted parts of several pages of the records provided on June 12. You contend that nothing in the APRA allows the redaction. Further, you contend that if redaction is appropriate, IDEM is required to provide a statement of the specific exemption or exemptions withholding all or part of the public record.

I provided IDEM the opportunity to respond to your additional allegations, and IDEM provided an additional response dated June 23. With respect to your allegation that IDEM provided incomplete information, IDEM contends it made a copying error when preparing the newly discovered records for transmittal to you on June 12. IDEM contends that staff members inadvertently failed to copy page 496 of 1899 but did not catch the oversight because the bottom portion of page 497 (including the page number) was not copied because it contained records not within the date range you requested. IDEM contends the copying error has been corrected and the page has been sent to you under separate cover, dated June 23.

Regarding your allegation that records were redacted without proper legal justification, IDEM contends the redactions require no legal justification because the redacted portions either contained information not requested by you or had already been provided to you. IDEM provides a complete copy of both packets (dated May 12 and June 12) of records mailed to and provides detailed information regarding the redacted information. Finally, IDEM indicates it regrets the copying error that resulted in the omission of one page of the records but contends it has been corrected and IDEM has not denied access to any records.

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. 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 the public records of IDEM during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

You first allege that IDEM improperly denied you access to telephone records by failing to disclose detailed billing information upon your request. IDEM contends its staff was not aware that IDEM had access to detailed billing information because it is maintained by IOT, a separate state agency which acts as a clearinghouse and in many ways a contractor for other state agencies (See IOT's website, www.in.gov/iot, for a description of duties and services). The issue of records maintained by a private contractor was addressed by the Indiana Court of Appeals in *Knightstown Banner v. Town of Knightstown*, 838 N.E.2d 1127 (Ind. Ct. App. 2005). In *Knightstown Banner*, the court held that a record created for or on behalf of a public agency is a public record. Following the *Knightstown Banner* decision, it is my opinion the telephone records

maintained by IOT on behalf of IDEM are public records. Here, though, IDEM contends it was not aware IOT maintained the detailed billing information you requested. I cannot find an agency has violated the APRA by failing to disclose records it did not know existed. It is my opinion that if agency staff members know or should reasonably be expected to know that requested records exist, the agency has a duty to obtain those records maintained by a private contractor. Here, I understand IDEM's staff thought detailed billing records only existed to the extent a person exceeded the allotted minutes. I cannot find that IDEM staff members should have known IOT maintains more detailed information. Certainly once the agency learned that such records do or should exist, and I understand the agency learned that after receiving a copy of your complaint and then contacting IOT, the agency had a duty to obtain and produce a copy of those records. Based on the facts presented, it is my opinion IDEM fulfilled that obligation by working with IOT to obtain the records.

Regarding your complaint based on the records you requested related to Ms. Flum's cellular telephone, it is my opinion IDEM did not violate the APRA. IDEM contends that Ms. Flum does not use a state-issued cellular telephone. Further, her personal cellular telephone charges are not paid by state funds. The APRA does not require IDEM to maintain copies of an employee's personal cellular telephone records. As such, it is my opinion IDEM did not violate the APRA by not maintaining such records.

You further allege that IDEM provided you incomplete records in the June 12 packet by omitting one page from the records of Mr. Murray's calls. IDEM contends this was a copying error and has corrected the mistake by providing you a copy of the missing page. If IDEM intentionally omitted a page of disclosable public records, such omission would constitute a violation of the APRA, since no exception to disclosure exists. *See* I.C. § 5-14-3-3. It is my opinion that if the omission was inadvertent, IDEM did not violate the APRA so long as the mistake was corrected once the omission was discovered. I understand IDEM has now sent you the missing page.

Finally, you allege that IDEM improperly redacted information from the detailed billing records provided on June 12. In the alternative, you contend that even if the records were properly redacted, IDEM failed to cite the statutory authority allowing the redaction, as required by I.C. § 5-14-3-9(c). IDEM contends that the information was properly redacted and no justification was necessary because the information was either information you did not request or was information previously provided to you.

Nothing in the APRA requires an agency to produce information beyond that which was requested. To the extent information redacted from the records you received was redacted because it was not information you requested, IDEM did not violate the APRA. Nothing precludes you from submitting an additional request for further information, but IDEM was not required to produce records or information you did not request.

Regarding IDEM's contention that some of the redacted information had previously been provided to you, the APRA provides the following:

If:

- (1) a person is entitled to a copy of a public record under this chapter; and
- (2) the public agency which is in possession of the record has reasonable access to a machine capable of reproducing the record; the agency must provide *at least one copy* of the public record to the person . . .

I.C. § 5-14-3-8(e), *emphasis added*.

Here, the question is whether IDEM had already provided you a copy of the record it redacted in the June 12 packet. Certainly IDEM provided you (in the May 12 packet) the information about Mr. Murray's calls for the dates at issue. It appears as though two different types of detailed billing records exist – one set listing the units used and one set listing the charge. You did not specify in your request which set of records you requested; you requested “logs of phone calls.” If IDEM had originally provided one set and then later provided a different set and redacted information from that second, newly produced set, it is my opinion the redaction would be inappropriate because IDEM would have redacted information from records you had not yet received. As I review the records IDEM provided to you, I find it appears IDEM at least initially provided both sets of records, those listing units used as well as those listing charges. If this is true, I agree that IDEM was not required to provide justification for redacting the records because those records had already been provided to you. It is my opinion, and the opinion of previous counselors, that I.C. § 5-14-3-8(e) requires an agency to provide only one copy of a record and does not require an agency to provide multiple copies. *See Opinion of the Public Access Counselor 07-FC-83 and 07-FC-349.*

CONCLUSION

For the foregoing reasons, it is my opinion IDEM has not violated the APRA.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Robert Keene, Assistant Commissioner, Office of Legal Counsel and Enforcement, Indiana Department of Environmental Management