
OPINION OF THE PUBLIC ACCESS COUNSELOR

MARK ALESIA,
Complainant,

v.

THE INDIANA DEPT. OF TRANSPORTATION,
Respondent.

Formal Complaint No.
17-FC-161

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging that the Indiana Department of Transportation (“INDOT”) violated the Access to Public Records Act (“APRA”). Ind. Code §§ 5-14-3-1 to -10. INDOT responded to the complaint on July 27, 2017, via attorney Marjorie Millman. The response is enclosed for review. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on June 20, 2017.

BACKGROUND

On May 8, 2017, Mark Alesia (“Complainant”), a reporter with *The Indianapolis Star*, submitted a public records request to the INDOT seeking—among other records—“any and all Value for Money (“VfM”) or similar analyses on using a public-private partnership for I-69 Section 5.”

INDOT denied Alesia’s request for the Value for Money analysis, exercising the agency’s discretion to withhold the record as deliberative material under APRA. The Complainant takes exception to the use of the deliberative material exception for a Value for Money Analysis. Specifically, Alesia argues it is the final decision-making tool and not the deliberation, speculation or opinion which went into a final action.

INDOT argues that the Value for Money Analysis is a deliberative document because it is used for internal discussion purposes and decision-making, which falls squarely under Ind. Code § 5-14-3-4(b)(6), and is appropriately withheld at INDOT’s discretion. INDOT did provide this Office with a copy for an *in camera review*.

ANALYSIS

The Access to Public Records Act (“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.” Ind. Code § 5-14-3-1. INDOT is a public agency for the purposes of the APRA. Ind. Code § 5-14-3-2(n). Therefore, any person has the right to inspect and copy INDOT’s public records during regular business hours unless the records are exempt from disclosure as confidential or otherwise under the APRA. *See* Ind. Code § 5-14-3-3(a).

APRA has both mandatory and discretionary exemptions to the disclosure of public records. *See* Ind. Code §§ 5-14-3-4(a) and (b). One category of records that may be withheld from disclosure at the discretion of the agency is *deliberative material*. *See* Ind. Code § 5-14-3-4(b)(6).

Under APRA, *deliberative material* includes records that are:

intra-agency or interagency advisory...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.

Id. 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. *Id.* at 12.

The document in question was created by a contractor, KPMG, for the benefit of INDOT's decision-making process. Its contents contain a cost-benefit analysis for the determination of delivery models for the project. The methodology behind the decision-making process, including financial modeling, formulas, calculations and procedures are generally considered deliberative in nature. They are not merely assessments of current conditions but forecasts based upon the proprietary acumen of KPMG.

The *deliberative materials* exception extends to contractors' speculation, which is essentially what forecasting is—an estimate of future conditions. The materials in the Value for Money report are predictions predicated upon those speculations and presumptions and may be categorized as deliberative material in this instance.

CONCLUSION

Based on the foregoing, it is the opinion of the Public Access Counselor that the Indiana Department of Transportation did not violate the Access to Public Records Act.

A handwritten signature in black ink, appearing to read 'LH Britt', is positioned above the printed name.

Luke H. Britt
Public Access Counselor