



STATE OF INDIANA

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October 15, 2008

Gregory Neibarger
Bingham McHale LLP
Market Tower, Suite 2700
Ten West Market Street
Indianapolis, Indiana 46204

*Re: Informal Inquiry 08-INF-38 regarding the Indiana Wireless Enhanced 911
Advisory Board*

Dear Mr. Neibarger:

This opinion is in response to your informal inquiry dated September 26, 2008. You write to inquire about records you have requested from the Indiana Wireless Enhanced 011 Advisory Board ("Board") pursuant to the Access to Public Records Act ("APRA") (Ind. Code 5-14-3). I have not enclosed a copy of the Board's response to the inquiry because the Board's attorney has sent a copy of the response to you. Pursuant to I.C. § 5-14-4-10(5), I issue the following opinion in response to your inquiry.

BACKGROUND

You allege you submitted to the Board on July 11, 2008 a request for access to records maintained by the Board. Your request listed nine items, or categories of records, to which you sought access. You allege the Board responded by letter from counsel dated July 14, indicating the Board had received the request and had begun the process of gathering records which were described with reasonable particularity and not exempt from disclosure. Eight days later you sent a letter to the Board's counsel, requesting the Board to make available any records it intended to disclose and asking the Board to identify what portion of the request was not described with reasonable particularity and to identify any documents the Board claimed were exempt from disclosure.

You indicate that the Board produced records responsive to four of the nine categories (items 1, 2, 8, and 9) on July 24. You indicate the Board failed to "otherwise respond" to your July 22 letter. You allege the Board has at no point provided records responsive to items 3, 4, 5, 6 or 7. Further, you allege the Board has not identified what portion of the request was not made with reasonable particularity nor identified any documents the Board claimed were exempt from disclosure.

You inquire whether the Board was required to do the following:

1. Disclose the records requested in items 3, 4, 5, 6 and/or 7 of the request,
2. Identify what, if any, portion of the request was not described with reasonable particularity, and
3. Identify any records or category of records the Board claimed were exempt from disclosure.

The Board responded to the inquiry by letter dated October 9 from attorney Clayton Miller. The Board acknowledges receiving a request for records dated July 11 and responding to the request by letter dated July 14. Further, the Board acknowledges providing records in response to items 1, 2, 8, and 9 on July 24. The Board contends it has no records responsive to items 6 and 7 and informed you of that on or before July 31 when the parties conducted a settlement conference related to litigation between them.

The Board contends the parties continued communication through August and September until your client indicated it was not making a settlement proposal. The Board contends you renewed your request on September 26, although the Board does not contend you had previously rescinded the request. The Board further contends that on October 7 it provided you records in response to items 3, 4 and 5. The Board also identified the categories of records exempt from disclosure. The Board indicates that although it has the discretion to withhold from disclosure deliberative materials, it has provided you with copies of electronic mail messages including deliberative material.

After reviewing the Board's response to the inquiry, you telephoned me on October 15 and followed the conversation with a letter of the same date. You contend the Board's October 9 response contains errors. First, you contend that you did not at any time withdraw the request but instead made "repeated requests" which you allege were "ignored by the Board." You further contend there were no settlement discussions regarding the records request. Finally, you contend that the Board never updated, communicated, or otherwise took a position on the public records request until it received your request for an informal opinion from this office.

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. The Board is clearly a public agency for the purposes of the APRA. I.C. § 5-14-3-2(m). Accordingly, any person has the right to inspect and copy the public records of the Board 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).

Here, you submitted a request to the Board on July 11, 2008. The Board responded by letter dated July 14, 2008. You then sent another letter to the Board dated

July 22 asking the Board to make available any documents it intended to disclose, identify any portion of the request not identified with reasonable particularity, and identify any documents the Board claimed were exempt from disclosure. The Board then provided records responsive to items number 1, 2, 8 and 9 of your request on July 24.

Your inquiry centers around items number 3, 4, 5, 6 and 7 of your request. You inquire whether those records are required to be disclosed and whether the Board is required to identify any portion of the request not identified with reasonable particularity and identify any records the Board claims are exempt from disclosure.

Your first question is whether the Board is required under the APRA to disclose the records requested in items 3, 4, 5, 6 and/or 7 of the request. The answer to this question is yes, the Board is required to disclose any records it maintains which are responsive to the request, unless the records are excepted from disclosure. See I.C. § 5-14-3-3 and I.C. § 5-14-3-4.

Your next question is whether the Board must identify what, if any, portion of the request was not described with reasonable particularity. The APRA requires the requester to identify with reasonable particularity the records being requested. I.C. § 5-14-3-3(a). While the APRA does not specifically require an agency to indicate when it believes a request has not identified with reasonable particularity the records being requested, it has long been the advice and opinion of this office that the agency should notify the requester when the agency believes the request has not identified the records with reasonable particularity. *See, among others, Opinions of the Public Access Counselor 07-FC-207, 08-FC-176, 07-FC-235, and 07-FC-199* regarding reasonable particularity.

It is my opinion that if the Board contended your request did not identify the requested records with reasonable particularity, the Board had a duty to notify you of such. I am not sure I understand the nature of this inquiry, though, because I see no evidence that the Board contended you did not identify with reasonable particularity the records being requested.

Finally, you inquire whether the Board was required to identify any records or category of records the Board claimed were exempt from disclosure. The APRA requires that if a request is made in writing, a public agency may deny the request if the denial is made in writing and the denial includes a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record and the name and title of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). So to the extent the Board contends any requested records are exempt from disclosure, the Board is required to indicate the specific exemption(s) in writing.

In your September 26 letter you ask me to provide an opinion as to whether the Board was required to perform the three tasks listed, and I have answered those inquiries, pursuant to I.C. § 5-14-4-10(5). You did not ask me to provide an opinion as to

whether I believe, based on the facts presented, the Board violated the APRA. As such, I have not offered such an opinion.

Please do not hesitate to contact our office if we can be of further assistance.

Best regards,

A handwritten signature in cursive script that reads "Heather Willis Neal".

Heather Willis Neal
Public Access Counselor

Cc: Clayton Miller, Baker & Daniels LLP
Jim Holden, Office of the Indiana Treasurer of State