

July 22, 2005 Alleged Violation of the Access to Public Records Act by the Indiana Department of Labor

July 22, 2005

Sent Via Facsimile

Ms. Lisa Shidler
Post Tribune
1433 E. 83rd Avenue
Merrillville, IN 46410

Re: Informal Inquiry Response; Alleged Violation of the Access to Public Records Act by the Indiana Department of Labor

Dear Ms. Shidler:

You have requested an informal opinion from the Office of the Public Access Counselor. Pursuant to Ind.Code 5-14-4-10(5), I am issuing this letter in response to your request.

Specifically, you contend that the Department of Labor (“Department”) has denied you records in violation of the Access to Public Records Act (“APRA”), and furthermore, you contend that the Department has failed to meet the requirements imposed by APRA on a public agency that denies a person a record. I find that the Department of Labor may have denied you a record or records in violation of the APRA, and that the Department of Labor has violated the APRA in issuing an insufficient denial letter.

BACKGROUND

You had submitted requests for records to the Department in March 2005 regarding the December 20, 2004 workplace fatality of Karl Richards at U.S. Steel’s Gary Works, and the January 17 incident where three contractors were seriously injured at U.S. Steel’s Gary Works [hereinafter, “Gary Works”]. On June 10, 2005, you received some records from the Department, and a letter stating that other responsive records existed but were being withheld pursuant to several exemptions.

The Department provided you copies of safety orders that were issued to Gary Works and any information filed once safety orders were issued. However, you complain that documents

that were used to determine whether safety orders would be issued, including interviews from employees about the accident and a detailed description of how the accident actually occurred, were omitted. You also did not receive a “brief coroner’s report.” You state that in past requests for records to the Department, you have received these records, so you believe that these exist for this file but are being withheld. A related complaint is that you believe that the denial statement contained in the Department’s June 10 letter was insufficient under the APRA, chiefly because although it states that records are being withheld and cites four exemptions, the letter does not state specifically what records are being withheld and which exemption applies to each record.

The Department has submitted a response to your informal inquiry request. I enclose a copy of the Department’s response authored by Tim Grogg, Deputy Commissioner for Legal Affairs for the Department. In his response, Mr. Grogg makes several points, which I summarize and restate as the following:

- The Department, pursuant to federal regulation, is charged with conducting inspections of workplaces and issuing citations and proposed penalties for alleged violations of the federal Occupational Safety and Health Act;
- The Department does not determine the cause of industrial accident, injuries, or fatalities, only whether violations of the law have occurred;
- When an inspection is initiated, a Department inspector enters the site, makes observations, conducts interviews with employees as needed, and returns to his or her office to write up an investigation report;
- The report is sent to the inspector’s supervisor who reviews the opinion and observations of the inspector and the recommended standards or citations and also determines whether additional standards may apply. The supervisor then forwards the report (as amended) to the director, who makes a determination as to what, if any, safety orders should be issued by the Department. This deliberative process is conducted entirely within the Department of Labor;
- The June 17 correspondence of the Post Tribune did not cite any authority for the proposition that certain autopsy material is disclosable and that the agency’s past practice of providing it may not be changed;
- The procedure and activities of determining safety orders is clearly deliberative;
- The decision whether to release pre-safety order deliberations or analysis of the agency should take into account the rights and livelihood of employees and the rights of employers;
- There is no requirement that documents withheld from public disclosure be specifically described or outlined at the stage where the denial is being considered in a complaint or informal inquiry before the public access counselor.

ANALYSIS

Any person may inspect and copy the public records of any public agency, except as provided under section 4 of the APRA. Ind. Code 5-14-3-3(a). This provision is in furtherance of the public policy stated in the APRA that “all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.” IC 5-14-3-1. The APRA is to be liberally construed in favor of disclosure, with the burden of proof for the nondisclosure of a public record on the public

agency that would deny access to the record and not on the person seeking to inspect and copy the record. IC 5-14-3-1.

The public agency may deny a request made in writing if the denial is in writing and the denial includes 1) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record, and the name and the title or position of the person responsible for the denial. IC 5-14-3-9(c).

The Department in its June 10 denial letter stated:

“Please be advised certain material and/or information has been removed or redacted from the documents and not provided (“excepted document”). This exception is authorized pursuant to Indiana Code 5-14-3-4 (Public Access to Public Records). Such excepted document(s) have not been provided based upon the following authority(ies):

- the requested records contain information protected by the Attorney Client Privilege, IC 5-14-3-4(a)(8)
- the requested records contain patient medical records and/or charts, IC 5-14-3-4(a)(9);
- the records requested contain a photograph, video or audio recording of an autopsy, IC 5-14-3-4(a)(11), and
- the records that are intra-agency documents of a deliberative material that are not disclosable, IC 5-14-3-4(b)(6).”

You complain that the Department has not issued an adequate denial under the APRA because the denial only states that records or parts of records have not been disclosed. You contend that under the APRA, the denial must include at least some information about what record has not been provided and what exemption applies to that record. The Department disagrees, declaring that research has not identified a requirement that documents withheld from public disclosure be specifically described or outlined at the stage at which the public access counselor is asked to determine compliance. By this argument, the Department implies that no burden must be discharged by the public agency unless and until a court is asked to determine a person’s rights under the APRA.

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 "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. *See Opinion of the Public Access Counselor 01-FC-47*. In the foregoing opinion, the complainant believed that the privilege log provided by the Indiana Department of Environmental Management which listed each e-mail communication being denied, by reference to date of the message, author, recipient, and subject, was not adequate.

This office determined that short of the explanation required by IC 5-14-3-9(e) or (f) when an action to compel is filed in court, the privilege log provided to the requester by IDEM was adequate under IC 5-14-3-9(c)(2). The IDEM was not required to explain why the exemption from disclosure was claimed and why it is relevant.

In an Indiana Court of Appeals case, *Journal Gazette v. The Board of Trustees of Purdue University*, 698 N.E.2d 826, 828 (Ind. App. 1998), *The Journal* had challenged the denial of access to certain public records by Purdue University. These denials were based on various statutory exemptions under the APRA. The Court observed that Purdue had provided *The Journal* with a Document Log numbering each of the documents requested and listing the author, recipient, date, type and exception claimed.

In the Department of Labor's response to you, absolutely no information regarding what records were being excepted was supplied to you. This denial contained less information than the unsuccessfully challenged denials in 01-FC-47 and the *Journal Gazette* case. A blanket statement that the Department had responsive records that it was withholding under four discrete exemptions without identifying or describing the records to which each exemption applied was, in my opinion, inadequate under IC 5-14-3-9(c). Implicit in section 9(c) is a requirement that the public agency denying a record state what record it is denying. Otherwise, the required statement of the specific exemption or exemptions authorizing the withholding of "*all or part of the public record*" would have no antecedent and would be bereft of meaning.

The denial for a photograph, video or audio recording of an autopsy is illustrative of this point. One can perhaps infer that the Department has a photograph, video or audio recording of an autopsy of the individual who died at Gary Works, but this is not clear, and you complained that you did not receive a report of the verdict and findings of the coroner. Does the Department maintain such a report, but believes the entire report is subject to this exemption? The Department's response letter leaves one completely in the dark with respect to what records it maintains but is claiming the exemption for.

Because the Department has not issued an adequate denial by stating what records it is withholding, it is difficult for me to issue a comprehensive response to your query regarding whether the records may be denied. However, you specifically question the absence of a "brief coroner's report" that you have received in the past. IC 36-2-14-18 specifically requires that limited information with respect to an autopsy, and a coroner's verdict and written report are required to be disclosed. If the Department has received and maintains a copy of this material, it is a public record of the Department, and the Department must disclose it because the coroner must disclose it under IC 36-2-14-18 (or stated another way, the Department must disclose it because no exemption applies to it by virtue of IC 36-2-14-18 which requires it to be disclosed). The fact that you would be entitled to receive it from the coroner's office is not an adequate denial; an agency that maintains a record cannot deny it on the basis that some other agency created the record or is primarily responsible for it. Sending you to the coroner's office for the record is only proper if the Department does not maintain a copy of this information, and it should say so if true. It is also of no moment that the Department does not make a determination of the cause of a workplace fatality. If the Department maintains a photograph, video or audio

recording of an autopsy, it would have to maintain its confidentiality under IC 5-14-3-4(a)(11), but that exemption applies by its terms to only those three items.

If the Department maintains medical records created by a provider as “provider” is defined by IC 16-18-2-295(a), *see* IC 5-14-3-2(k), then those would not be disclosable to you without a court order. Similarly, attorney-client privileged communications are confidential, but the Department should have provided either a state statute or court rule that is the specific basis for this exemption in addition to the citation to IC 5-14-3-4(a)(8).

Finally, the Department maintains that it may withhold unspecified records that are deliberative material under IC 5-14-3-4(b)(6). The Department appears to be arguing that any records that are part of the deliberative activities undertaken by the Department are deliberative, and are “inextricably linked” with deliberative material. This includes, the Department argues, witness statements and interviews of employees of the employer whose workplace is inspected by the Department’s investigator. Also, the Department has provided me with a Department policy called “Public Disclosure of Documents” that states that “all materials collected or that may be collected prior to a determination by a Deputy Commissioner or Director of the Agency regarding Safety Orders or Compliance Orders are deliberative and do not constitute factual matters or opinions.”

A public agency may except from disclosure “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.” IC 5-14-3-4(b)(6). This “deliberative materials” exception has been the subject of several court cases in Indiana, as well as several informal and formal advisory opinions of this office. In order to except records under the deliberative materials exception, a public agency must show that the record meets each element of the exemption: 1) is intra-agency or interagency advisory or deliberative material; 2) are expressions of opinion or are of a speculative nature, and 3) are communicated for the purpose of decision making. It is generally quite easy for an agency to meet the third prong of this exemption, since many records generated by a public agency contain material that is communicated for purpose of decision making. However, this element alone cannot sustain a denial of a record on the basis that it is deliberative material.

The record must also contain intra-agency or interagency advisory or deliberative material and be expressions of opinion or be of a speculative nature. The records that you contend are omitted that have been provided in the past are interviews of employees and a detailed description of how the accident actually occurred. In *An Unincorporated Operating Division of Indiana Newspapers, Inc. d/b/a The Indianapolis Star v. The Trustees of Indiana University*, 787 N.E.2d 893 (Ind. Ct. App. 2003), involving material from an investigation undertaken by Indiana University into allegations that the basketball coach had engaged in inappropriate behavior, the court distinguished between materials that concerned whether Coach Bobby Knight treated basketball players “unfairly” or “improperly,” which were deemed matters of opinion or speculative, and purely factual materials related to the interviewees’ knowledge of whether the coach had removed the university president from a session of practice. *Id.* at 913.

The court ruled that the merely factual matters that are not “inextricably linked” with other non-discloseable material should not be protected from public disclosure. *Id.* at 914. From this treatment of the deliberative materials exception, it is clear that the Department’s conception that deliberative material includes any material, whatever its nature, that is developed prior to the decision to issue safety orders, is too broad and sweeping to pass muster. Rather, the public agency must look at the nature of each record, and within each record, to determine whether the record or part of the record contains expressions of opinion or is speculative in nature. Hence, employee interviews that merely relate the events of the accident or other factual material about the condition of the workplace, for example, are factual material and must be disclosed. As well, any record that relates how the accident occurred is factual material, not opinion. In any event, the Department bears the burden of showing that the records you seek are nondisclosable under an applicable exemption.

Also, the Department believes that it should be free to reconsider past practices related to release of certain records and change those practices. If your request for these records were based solely on the past practice of the Department on a matter in which the Department has discretion, this contention would have merit. As a general rule, public agencies may change past rulings or policies, but such change must be explained and reasons for the change must be articulated. *Community Care Centers, Inc. v. Indiana Department of Public Welfare*, 523 N.E.2d 448 (Ind. Ct. App. 1988). However, an agency may only change policy where it has the discretion to make policy in the first place. In this case, the Department has not been able, to date, to sustain its burden of showing that it may exercise any discretion to deny you at least some of the records you seek, so it may not argue that because it may change its past practices, it may deny you records you have received in the past.

I hope this informal inquiry response is helpful to you. Please feel free to contact me if you have any questions.

Sincerely,

Karen Davis
Public Access Counselor

cc: Tim Grogg