

STATE OF INDIANA)
) SS:
COUNTY OF MARION) CAUSE NO:

NaTRINA DeBOW, in her official)
capacity as Clerk of the Indianapolis –)
Marion County City-County Council)
)
 Plaintiff)
)
 - vs -)
)
OFFICE OF CORPORATION COUNSEL)
Of the Consolidated City of Indianapolis,)
)
 Defendant)

**COMPLAINT AND MOTION TO COMPEL PRODUCTION
OF DOCUMENTS TO COUNCIL COMMITTEE**

Pursuant to Indiana Code §36-3-4-24(d), NaTrina DeBow, in her official capacity as Clerk of the Indianapolis-Marion County City-County Council (“Clerk”), by counsel, hereby respectfully moves the Court to order the Office of Corporation Counsel of the City of Indianapolis (“OCC”) to produce without further delay certain documents requested by the Council’s Regional Operations Center Investigating Committee, and in support thereof shows the Court as follows:

Parties and Jurisdiction

1. NaTrina DeBow is the duly appointed Clerk of the Indianapolis Marion County City-County Council.
2. The Office of Corporation Counsel provides legal services to the Mayor, the Council (with certain exceptions), all departments and divisions of the city and all county officials and agencies.

3. The Marion County Circuit Court has jurisdiction under Ind. Code §36-3-4-24(d), which provides as follows:

(d) If a person refuses to testify or produce evidence at an investigation conducted under this section, the legislative body may order its clerk to immediately present to the circuit court of the county a written report of the facts relating to the refusal. The court shall hear all questions relating to the refusal to testify or produce evidence and shall also hear any new evidence not included in the clerk's report. If the court finds that the testimony or evidence sought should be given or produced, it shall order the person to testify or produce evidence, or both.

This Court also has jurisdiction under the Access to Public Records Act, Ind. Code §5-14-3-9.

Facts Relating to OCC's refusal to Provide Evidence

4. Ind. Code §36-3-4-24(a) authorizes the Council and its committees to “to investigate the policies and expenditures” of executive branch departments, including the Department of Public Safety (“DPS”).
5. Section 151-33 of the Revised Code of the Consolidated City of Indianapolis authorizes the Council, by resolution, to form special investigating committees “for any lawful purpose.”
6. On October 14, 2013, the Council, by a unanimous vote, adopted a resolution establishing the Regional Operations Center Investigating Committee (“ROC Committee”). A copy of this resolution is attached hereto, marked as Exhibit A. Section 3 of the resolution provides that:

The general nature of the investigation to be conducted by the committee is to examine why DPS entered into an allegedly unfavorable long-term lease and other agreements relating to the ROC; to determine whether the information provided by DPS to the Council committee in April 2011 was complete and accurate; to determine whether the City has entered

into other leases with similar unfavorable terms; and to investigate whether the City made other formal or informal commitments relating to the ROC lease that have not been publicly disclosed.

7. Pursuant to Ind. Code §36-3-4-24(c), the ROC Committee “is entitled to access to all records pertaining to the investigation” and may compel the production of evidence by subpoena.
8. In May 2011, DPS Director Frank Straub signed a 25-year lease obligating the city to pay a total of more than \$18.2 million in rent for 76,000 square feet of space at the former Eastgate Mall. In addition to the rent, the city is also responsible for paying for utilities and maintenance, which brings the expected cost to about \$1 million per year. The property is owned by Alex Carroll (and two others) through a series of LLCs.
9. In June 2011, Carroll—using the city’s favorable credit rating—borrowed more than \$9.6 million from Wells Fargo Bank and assigned the ROC lease to Wells Fargo. As a result, the city’s lease payments, which began in January 2013, are being made to Wells Fargo to repay the loan made to Carroll.
10. The questions the committee has been looking into include the following:
 - Why did DPS choose the Eastgate location? They knew Eastgate was going to need major improvements to make it suitable for an emergency operations center. Why not put the emergency operations center at the old airport, which was the plan before Straub arrived?
 - Who decided the scope and budget of the build-out, and on what basis?
 - Why did they start construction before getting any building permits, and before even seeking council approval of the need for the lease?

- Did the city and/or Carroll properly supervise and monitor the build-out? There were (and still are) defects in the work and unresolved life safety issues.
- Why did DPS agree to such a one-sided lease? What benefit (if any) did the city get in return?
- Who negotiated this deal on behalf of the city? It looks like DPS may have tried to avoid using the Office of Finance and Management, OCC, the bond bank, or anyone else who might have taken an independent look.
- How much of the \$9.6 million loan to Carroll was actually used to pay for the build-out?
- Did Straub and other DPS senior staff mislead the council committee in April 2011?
- What improvements need to be made to the decision-making process on leases in order to prevent this from happening again?

11. On November 15, 2013, the ROC Committee, through the general counsel to the Council, served a set of initial document requests on OCC. A copy of the November 15 document requests is attached hereto, marked as Exhibit B. OCC agreed to receive and respond to the document requests on behalf of all city agencies and departments.

12. OCC still has not provided a written response to the November 15 document requests. OCC has, however, provided some responsive documents.

13. On February 24, 2014, the documents requested by the ROC Committee under IC §36-3-4-24(c) were also made the subject of a public records request under IC 5-14-3-3. OCC has made no substantive response to the public records request.

14. On March 10, 2014 in an effort to move the process forward, the ROC Committee authorized the issuance of a Subpoena to OCC. A copy of the March 10 Subpoena is attached hereto, marked as Exhibit C. The Subpoena identified thirty (30) specific items which were subsets of the November 15 document requests.
15. The Subpoena did not replace the November 15 document requests; the ROC Committee is still seeking, and is entitled to, a complete response to the November 15 document requests, as well as a complete response to the Subpoena.
16. The Subpoena called for production of the identified documents by March 24, 2014, at 10:00 a.m.
17. On March 24, 2014, after 10:00 a.m., OCC produced some responsive documents, but the overall response was incomplete and inadequate.
18. On March 26, 2014, the general counsel to the Council sent by email a detailed description of the gaps in the document production to OCC and requested a complete response to the Subpoena by noon on April 2. A copy of the March 26 email is attached hereto, marked as Exhibit D. OCC provided nothing new by noon on April 2. Since April 2, OCC has produced only a few additional pages of documents in response to the Subpoena.
19. On April 14, 2014, the Council adopted Proposal No. 157, which directed the Clerk to present the matter to this Court in accordance with IC 36-3-4-24(d). A copy of Proposal No. 157 is attached hereto, marked as Exhibit E.
20. As shown in the attachment to Proposal No. 157, nineteen (19) of the thirty (30) items called for by the Subpoena have not yet been produced (in whole or in part).

21. Under state law and the document retention schedules approved by state and local authorities, even public records that have no official or historical value are supposed to be kept for a minimum of three (3) years after filing. IC 5-15-6-8 makes it a Class D felony to recklessly, knowingly or intentionally destroy public records unless the destruction was authorized by an approved retention schedule or approved in writing by the County Public Records Commission.

22. OCC has failed and refused to comply with the Subpoena in at least the following respects:

- (a) Item 3. The only records produced are from February 2013. It seems unlikely that this is the only time the sprinkler and fire systems were tested.
- (b) Item 4. The only records produced are from October 2012. It seems unlikely that this is the only time IFD did an inspection.
- (c) Item 5. The only records produced are from July 2011. Both Mr. Baun and Mr. Zickler have said they created many documents that should be in the City's files.
- (d) Item 9. We know the project budget increased by about \$1 million after the Council approved the need for the ROC lease in May 2011, but the City has not produced any amendments or supplements to the project budget as presented to the council committee on April 26, 2011.
- (e) Item 11. DPS Director Frank Straub spoke about the alternate location's "preferential square footage rate" at the May 16, 2011 Council meeting, but no documents have been produced.

- (f) Items 14 and 15. DPS was a party to both the Development Agreement and the Lease. It is not credible for the City to say it is “unable to locate” any drafts or correspondence, at least unless the documents were illegally destroyed.
- (g) Item 16. The “complete DCE files” should include emails and other internal documents that have not yet been produced.
- (h) Item 17. OCC has been advised that the links provided do not work, but the problem has not been fixed.
- (i) Items 19 and 20. DPS has said it provided these documents to OCC months ago, but OCC still has not produced them.
- (j) Item 21. No emails from Straub for the period from April 14 through April 20 have been produced. Also, a privilege log has been requested, but has not yet been provided.
- (k) Items 22 and 23. Certainly there are emails to or from Mayes and/or Michalak which did not involve Straub and, therefore, would not have been included in the response to Item 21.
- (l) Item 24. It is not credible for the city to say it is “unable to locate” communications between the City and Carroll for the period from March 18, 2011 through June 23, 2011, except for what was produced in response to Item 21, which covered only the period between April 12 and April 26.
- (m) Item 27. The taxpayers are entitled to know how much of their money has actually been spent in connection with the ROC.

- (n) Item 28. Straub discussed several alternative locations at the April 26, 2011 council committee meeting. Records for some locations have been produced, but others have not.
- (o) Item 13. The City has promised to produce documents responsive to item 13, but has not yet done so.

Request for Relief

23. For the reasons set forth above, Clerk DeBow respectfully requests the Court to order OCC to do the following:

- (a) Produce all remaining documents called for by the Subpoena within five (5) days of the date of the Order;
- (b) Produce all remaining documents called for by the November 15 document requests and the February 24 public records requests within fifteen (15) days of the date of the Order;
- (c) If there are legitimate claims of privilege, provide a privilege log as required by Trial Rule 26 within fifteen (15) days of the date of the Order; and
- (d) Reimburse the Council for the costs of this action, including a reasonable attorney's fee.

DREWRY SIMMONS VORNEHM, LLP

Andrew J. Mallon (#23055-49)
*Counsel for NaTrina DeBow, in her official capacity
as Clerk of the Indianapolis-Marion County City-
County Council*

Drewry Simmons Vornehm, LLP
201 N. Illinois Street, Suite 1700
Indianapolis, IN 46204
(317) 580-4848
(317) 580-4855 (fax)
amallon@DSVlaw.com