



STATE OF INDIANA

MICHAEL R. PENCE, Governor

**PUBLIC ACCESS COUNSELOR
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July 30, 2013

Mr. William A. Boyd
8301 Forward Pass Road
Indianapolis, Indiana 46217

Re: Formal Complaint 13-FC-197; Alleged Violation of the Access to Public Records Act by the Indiana Department of Transportation

Dear Mr. Boyd:

This advisory opinion is in response to your formal complaint alleging the Indiana Department of Transportation ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Lynn M. Butcher, Attorney, responded on behalf of the Department. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint you provide that you submitted a written request for records to the Department on February 23, 2013. You sought copies of any and all meeting notes, memos, emails, inspection reports, or any other communications relating to the performance of contract IB-33044, the I-69 bridges carrying I-69 over the East Form of the White River. You specifically requested that the records include communications to any other agency, federal or state, and consultants in regard to the execution of the contract. The Department acknowledged the receipt of your request on February 25, 2013. As of July 9, 2013, the date you filed your formal complaint with the Public Access Counselor, you still have yet to receive any records responsive to your request. You provide that you have submitted multiple inquiries regarding the status of your request since the date of the request's submission.

In response to your formal complaint, Ms. Butcher advised that the Department received your written request on February 23, 2013. The Department acknowledged the receipt of your request, in writing, on February 25, 2013. On June 24, 2013, the Department advised you in writing regarding the status of your request. Ms. Butcher noted that your request is extraordinarily broad and involves significant resources to locate all records responsive to it. There are boxes and boxes of records related to construction activities, significant amounts of material related to contracts and design, an entire banker's box of materials regarding geo-technical information for one year alone, and all emails records of any Department employee which were sent or received

regarding the topic of your request. Not only must the Department locate all records responsive to it, it further must review said records prior to disclosure. Under the circumstances provided and the breadth of the request, the Department believes that its actions are reasonable under the APRA. The Department further noted that you have four other pending requests that were submitted on May 13, 2013. In response to the May 13, 2013 requests, the Department has requested that you more particularly identify the records sought.

ANALYSIS

The public policy of the 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.” *See* I.C. § 5-14-3-1. The Department is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Department’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within twenty-four hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, the Department properly acknowledged the receipt of your request, in writing, within seven (7) days of its receipt.

The APRA provides a public agency shall provide records that are responsive to the request within a reasonable time. *See* I.C. § 5-14-3-3(b). The public access counselor has stated that among the factors to be considered in determining if the requirements of section 3(b) have been met include, the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and redacted prior to disclosure. The APRA requires an agency to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. *See* I.C. § 5-14-3-6(a). Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. *See* I.C. § 5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. *See* I.C. § 5-14-3-7(c). The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *See Opinion of the Public Access Counselor 02-FC-45*. This office has often suggested a public agency make portions of a response available from time to time when a large number of documents are being reviewed for disclosure. *See Opinions of the Public Access Counselor 06-FC-184; 08-FC-56; 11-FC-172*. Further nothing in the APRA indicates that a public agency’s failure to provide “instant access” to the requested



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records constitutes a denial of access. *See Opinions of the Public Access Counselor 09-FC-192 and 10-FC-121.*

The request that you submitted on February 23, 2013 is quite broad. Not only is the Department required to locate *all* records responsive to your request, but the APRA further requires that all records be reviewed prior to disclosure (emphasis added). Further, the Department has provided you with a status update regarding your request in June 2013. However, at the time of this opinion, approximately one hundred and sixty (160) days have passed since the date the Department received your original request and the agency has yet to produce a single record. Again, although not required under the statute, it has often been suggested that a public agency make portions of a response available from time to time when a large number of documents are being reviewed for disclosure. Periodic disclosures are even more prudent when dealing with the type of broad requests that are the subject of your formal complaint. The ultimate burden lies with the Department to demonstrate that time period for producing documents is reasonable. It is my opinion that the Department has not met this burden and has acted contrary to the requirements of section 3(b) of the APRA in failing to provide records responsive to your request in a reasonable period of time.

CONCLUSION

Based on the foregoing reasons, it is my opinion that the Department properly acknowledged the receipt of your request, in writing, within seven days of its receipt. Further, it is my opinion that the Department has acted contrary to the requirements of section 3(b) in failing to provide records responsive to your request in a reasonable period of time.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage", written in a cursive style.

Joseph B. Hoage
Public Access Counselor

cc: Lynn M. Butcher